

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BROWARD COUNTY

CASE NO.: 12-034123 (07)

P&S ASSOCIATES, GENERAL
PARTNERSHIP, etc., et al.,

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**DEFENDANT'S FRANK AVELLINO MOTION TO COMPEL
PLAINTIFFS TO PRODUCE THE SWORN STATEMENT OF MICHAEL SULLIVAN**

Defendant, Frank Avellino, by and through his undersigned counsel, hereby files his Motion to Compel Plaintiffs to Produce the Sworn Statement of Michael Sullivan and as grounds therefore state as follows:

1. Defendants have previously sought all documents relating to the settlement between Michael Sullivan and Plaintiffs, inclusive of Mr. Sullivan's sworn statement, since they learned of the settlement in October 2015. Plaintiffs have been filing motions, claiming privilege and thwarting efforts to obtain the sworn statement.

2. An Order on November 25 2015 was entered finding that the sworn statement provided by Sullivan is non-discoverable work product and may not be used at trial unless produced by Plaintiffs to Defendants before Sullivan is deposed. A copy of the Order is attached as Exhibit A. Sullivan was initially deposed on December 1, 2015 and Plaintiffs did not provide a copy of the sworn statement.

3. However, during the continuation of the deposition of Michael Sullivan on March 8, 2016, Plaintiffs read to Michael Sullivan portions of his sworn statement to attempt to jog his memory and prompt testimony allegedly consistent with his sworn statement. When Defendant's counsel objected to the use of the sworn statement, and demanded a copy of same, Plaintiffs' counsel provided two pages of the sworn statement. The two pages provided to Defendant's counsel indicate that the sworn statement is at least 139 pages. A copy of the two pages is attached hereto as Exhibit B.

4. Plaintiffs' use of the sworn statement at the deposition of Michael Sullivan compels the production of the statement to Defendant.

5. Section 90.613, Florida Statute provides:

When a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto.

6. Pursuant to this statute, Defendant is entitled to see and examine the written statement by Michael Sullivan so that he can be in a position to cross-examine Michael Sullivan in regarding to his testimony. *See Soler v. Kukula*, 297 So.2d 600 (Fla. 3rd DCA 1974) (fundamental that the opposite party has a right to see and examine the memoranda used by a witness so as to be in a position to cross-examine the witness in regard to the testimony on direct examination).

7. In addition, based on Plaintiffs' use of the sworn statement during Michael Sullivan's deposition, it is reasonably expected that Plaintiffs expect or intend to use the sworn statement at trial to make sure Michael Sullivan testifies in a manner consistent with the

statement. Under these circumstances, any work product privilege Plaintiffs may have claimed over this sworn statement ceases to exist, and the entire sworn statement must be produced. See *Northup v. Acken*, 865 So.2d 1267 (Fla. 2004) (all materials reasonably expected or intended to be used at trial, including documents intended solely for witness impeachment, are subject to proper discovery requests and are not protected by the work product privilege); *American Motors Corporation v. Ellis*, 403 so.2d 459 (Fla. 5th DCA 1981) (where a portion of a previous statement by a witness is used for impeachment purposes, the entire statement is admissible).

8. Furthermore, Plaintiffs are prevented from using the work product privilege as both a sword and shield regarding the sworn statement by Michael Sullivan. See, *Smith v. TIB Bank of the Keys*, 687 So.2d 895, 896 (Fla. 3rd DCA 1997). Now that Plaintiffs have used the sworn statement in the deposition, they have waived any privilege claims to the statement, and should be compelled to produce the entire statement to Defendant.

WHEREFORE Defendant Frank Avellino respectfully requests this Court to enter an Order compelling the Plaintiffs to produce the entire sworn statement of Michael Sullivan to Defendant immediately, and to award attorney's fees and costs for bringing this motion and for such other relief as this Court deems just and equitable.

HAILE, SHAW & PFAFFENBERGER, P.A.

Attorneys for Defendant Frank Avellino

660 U.S. Highway One, Third Floor

North Palm Beach, FL 33408

Phone: (561) 627-8100

Fax: (561) 622-7603

gwoodfield@haileshaw.com

bpetroni@haileshaw.com

By: /s/ Gary A. Woodfield

Gary A. Woodfield, Esq.

Florida Bar No. 563102

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2016, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin Order No. 13-49.

/s/ Gary A. Woodfield
Gary A. Woodfield, Esq.
Florida Bar No. 563102

SERVICE LIST

THOMAS M. MESSANA, ESQ.
MESSANA, P.A.
SUITE 1400, 401 EAST LAS OLAS BOULEVARD
FORT LAUDERDALE, FL 33301
tmessana@messana-law.com
Attorneys for P & S Associates General Partnership

LEONARD K. SAMUELS, ESQ.
ETHAN MARK, ESQ.
MICHAEL O. WEISZ, ESQ.
ZACHARY P. HYMAN, ESQ.
BERGER SINGERMAN
350 EAST LAS OLAS BOULEVARD, STE 1000
FORT LAUDERDALE, FL 33301
emark@bergersingerman.com
lsamuels@bergersingerman.com
mweisz@bergersingerman.com
zhyman@bergersingerman.com
DRT@bergersingerman.com
mvega@bergersingerman.com
Attorneys for Plaintiff

PETER G. HERMAN, ESQ.
THE HERMAN LAW GROUP, P. A.
1401 E. BROWARD BLVD., STE 206
FORT LAUDERDALE, FL 33301
pgh@thglaw.com
*Attorneys for Defendants Steven F. Jacob
and Steven F. Jacob CPA & Associates, Inc.*

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 12-034123 (7)

S&P ASSOCIATES, GENERAL PARTNERSHIP,
ET AL.

Plaintiffs,

v.

STEVEN F. JACOB, an individual, ET AL.,

Defendants.

**ORDER ON PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER IN RESPONSE
TO THE DEPOSITION OF MICHAEL D. SULLIVAN**

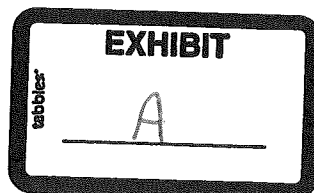
AND

**AVELLINO'S MOTION TO COMPEL PLAINTIFFS TO PRODUCE ALL
DOCUMENTS RECEIVED FROM MICHAEL SULLIVAN**

THIS MATTER came before the Court on October 26, 2015, upon Plaintiffs' Motion for a Protective Order in Response to the Deposition of Michael D. Sullivan (the "Motion for Protective Order") and Defendant Avellino's Motion to Compel Plaintiffs to Produce All Documents Received from Michael Sullivan (the "Motion to Compel"). The Court, having reviewed the Motion for Protective Order and Motion to Compel and the responses and replies thereto, heard argument from counsel for the parties, and being otherwise duly advised in the premises, it is, hereby

ORDERED and **ADJUDGED** that:

1. The Motion for Protective Order and Motion to Compel are **GRANTED**, in part, and **DENIED**, in part, as follows:

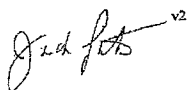


- a. Prior to the deposition of Michael Sullivan ("Sullivan") any documents responsive to the Re-Notice Taking Deposition Duces Tecum of Michael Sullivan filed in this action on October 5, 2015, or subsequent deposition notice of Sullivan, (the "Notice"), that Sullivan has in his possession, custody, or control, or that Defendants received from Sullivan, shall be produced to Plaintiffs. Upon receipt of the above documents from Sullivan or Defendants, Plaintiffs shall produce such documents to Defendants within seven business days of receipt and provide a privilege log as to any such documents withheld or that Plaintiffs believe are privileged and were inadvertently produced to Defendants.
- b. Any sworn statement provided by Sullivan to Plaintiffs is non-discoverable work product and shall not be produced to Defendants. Such statement may not be used at trial unless produced by Plaintiffs to Defendants before Sullivan is deposed. The Court shall address whether to produce other documents exchanged between Plaintiffs and Sullivan in connection with the Settlement Agreement they entered into upon Defendants filing a motion compelling their production.
- c. Plaintiffs shall make available all non-privileged documents produced by Sullivan to the Conservator for inspection and copying by Defendant Avellino, at cost to Defendant Avellino, at a time mutually convenient for Plaintiffs and Defendant Avellino. Plaintiffs shall provide a privilege log of all documents withheld.

DONE AND ORDERED in Chambers this ___ day of November, 2015.

HONORABLE JACK TUTER
Circuit Court Judge

Copies furnished to:
All counsel of record



1 Q Who prepared these S&P Management Fee
2 Calculations typically?

3 A Probably Susan.

4 Q Who calculated the management fee due to you or
5 Michael D. Sullivan & Associate?

6 A Susan as well.

7 Q Do you know how she calculated those?

8 A Just 20 percent profit.

9 Q Did she ever advance pay you management fees?

10 A Yes.

11 Q How would that get reconciled?

12 A Well, if it showed up negative, which it never
13 did in that given year, I would have taken money out of
14 my capital account, which I had with my parents and my
15 investment about \$750,000 in there. So if it ever came
16 out to that number, we would have reconciled it with a
17 payment.

18 Q Do you recall if it did?

19 A To I knowledge we never had to do that at the
20 end of the year. Could it have happened? Yes, but I
21 don't remember that it did. We always kept money in
22 there to make sure all the money was covered.

23 Q So where it says on this document, for example,
24 A and B fees accrued, \$12,493.27, do see that?

25 A Where is that? No, I don't.

EXHIBIT

tabbles

B

1 Q Who prepared these S&P Management Fee
2 Calculations typically?

3 A Probably Susan.

4 Q Who calculated the management fee due to you or
5 Michael D. Sullivan & Associate?

6 A Susan as well.

7 Q Do you know how she calculated those?

8 A Just 20 percent profit.

9 Q Did she ever advance pay you management fees?

10 A Yes.

11 Q How would that get reconciled?

12 A Well, if it showed up negative, which it never
13 did in that given year, I would have taken money out of
14 my capital account, which I had with my parents and my
15 investment about \$750,000 in there. So if it ever came
16 out to that number, we would have reconciled it with a
17 payment.

18 Q Do you recall if it did?

19 A To I knowledge we never had to do that at the
20 end of the year. Could it have happened? Yes, but I
21 don't remember that it did. We always kept money in
22 there to make sure all the money was covered.

23 Q So where it says on this document, for example,
24 A and B fees accrued, \$12,493.27, do see that?

25 A Where is that? No, I don't.