

PHILIP J. VON KAHLE, as Conservator of
P&S Associates, General Partnership and
S&P Associates, General Partnership

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

Plaintiffs,
vs.

Case No. 12-034123 (07)
Complex Litigation Unit

MICHAEL D. SULLIVAN, et al.,
Defendants.

**PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO
DEFENDANT FRANK AVELLINO'S MOTION TO COMPEL PLAINTIFF TO
PRODUCE DOCUMENTS IN RESPONSE TO HIS SECOND REQUEST FOR
PRODUCTION DATED APRIL 29, 2014**

Plaintiffs, Philip J. Von Kahle as Conservator (the "Conservator") of P&S Associates, General Partnership ("P&S") and S&P Associates, General Partnership ("S&P", together with P&S, the "Partnerships", with the Conservator, the "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to *Defendant Frank Avellino's ("Defendant") Motion to Compel Plaintiff to Produce Documents in Response to His Second Request for Production Dated April 29, 2014* (the "Motion"). In support thereof, Plaintiffs state as follows:

INTRODUCTION

The Motion's request that Plaintiffs produce documents related to settlements with co-defendants in this action should be denied because those documents are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

The Motion's request related to requests 2 through 7 are moot based on the parties meet and confer regarding the Motion.

STATEMENT OF FACTS

Request number 1 of Defendant's Requests seeks production of "[a]ll settlement agreements or other documents evidencing the settlement or other resolution Plaintiffs have entered into with any defendants in this action."

In response, Plaintiffs objected to production of the settlement information requested because, *inter alia*, those documents are not reasonably calculated to lead to the discovery of

admissible evidence and because it may seek documents protected by privilege, including privilege attaching to settlement communications.

By Defendant's Motion, he claims he is entitled to such documents because "As alleged joint tortfeasors, settlements with co-defendants can impact the determination and amount of any award."

ARGUMENT

1. DOCUMENTS RELATED TO SETTLEMENTS WITH OTHER DEFENDANTS IN THIS ACTION ARE IRRELEVANT AND NOT SUBJECT TO DISCOVERY.

Courts find that information related to settlements may not be discoverable information. In *Wal-Mart Stores, Inc. v. Strachan*, 82 So.3d 1052 (Fla. 4th DCA 2011), the Fourth District Court of Appeals dismissed an appeal of a trial court order denying a defendant's motion to compel production of settlement information because the settlement information requested was not admissible or likely to lead to the discovery of admissible information. Specifically, the *Wal-Mart* court rejected the party's argument that the settlement information was necessary for its defense of set-off because it "cannot show that discovery of the settlement amounts is necessary to determine entitlement to set-off", "it has not shown that the denial of this discovery will eviscerate its defense", and at trial, the party could "ask the fact-finder to determine its percentage of fault." *Id.* at 1054.

In this case, Defendant's claim that the documents are necessary because they "can impact the determination and amount of any award" is undermined by the *Wal-Mart* decision. In this case, like the *Walmart* case, Defendant can ask the fact-finder to determine its percentage of fault, regardless of the information in the settlement agreements. Additionally, the damages alleged against any defendants who have settled in this action are separate from those alleged against Defendant. Accordingly, the settlement agreements entered into between the Settling Defendants and the Plaintiffs in this matter are irrelevant and have no bearing on the claims, defenses, or damages related to Defendant. Further, such communications are not admissible under Fla. Stat. 90.408. Rather, than being calculated to seek discovery of admissible evidence, Request 1 appears to be calculated to discourage other defendants from settling.

Accordingly, Avellino's Motion should be denied.

**2. DEFENDANT'S ARGUMENTS REGARDING
PLAINTIFFS' OBJECTIONS TO REQUESTS 2
THROUGH 7 ARE MOOT.**

The Motion contends that Plaintiffs' objections made in responses to Requests 2 through 7 are improper as they are similar to those made in response to Avellino's first request for production. This argument is moot as the Plaintiffs have agreed that the objections to Requests 2 through 7 are resolved by the parties' meet and confer.

CONCLUSION

WHEREFORE the Plaintiffs request that this Court enter an order denying the Motion, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

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