

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

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

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

Plaintiffs,

vs.

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 FIFTH REQUEST FOR PRODUCTION**

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 Motion to Compel Plaintiff to Produce Documents in Response to His Fifth Request for Production* (the "Motion"). In support thereof, Plaintiffs state as follows:

INTRODUCTION

Like a motion filed by Defendant Bienes, Defendant Avellino's Motion concerns document requests that would require Plaintiffs to produce every document in their possession, and Defendant Avellino ("Avellino") has refused to narrow those requests. Specifically, Request

2 of Avellino’s Fifth Request for Production requires Plaintiffs to turn over all documents received through discovery or “otherwise” in connection with the above-styled action or “any other action or proceeding in which the Conservator is involved”, without further guidance as to the scope or what “otherwise” means. Request 3 of Avellino’s Fifth Request to Produce requires Plaintiffs to produce all “documents produced by the Conservator in any litigation in which the Conservator is involved.” As the Conservator is a product of a lawsuit, and received any and all documents as part of that lawsuit, such requests would require production of all documents in the Plaintiffs’ possession without any time limitation or limitation as to scope. Avellino has refused to narrow Request 2 and 3 despite requests for clarification from Plaintiffs. The Motion should be denied.

RELEVANT FACTUAL BACKGROUND

1. On January 17, 2013, the Court entered an order appointing Philip von Kahle as conservator of the Partnerships (the “Conservator Order”) in the case styled *Matthew Carone, as Trustee, etc., et al v. Michael D. Sullivan*, Case No. 12-24051 (07) (the “Administrative Suit”).

2. Among other things, the Conservator Order directed the Conservator to take possession of all property of the Partnerships (the “Conservatorship Property”), to advance three lawsuits:

- i. *P&S Associates, General Partnership, et al v. Roberta P. Alves, et al*, Case No.: 12-028324 (07) (the “Interpleader Suit”);
- ii. *P&S Associates, General Partnership and S&P Associates, General Partnership, Plaintiffs v. Janet A. Hooker Charitable Trust, e. al.*, Case No. 12-034121 (07) (the “Net Winner Suit”); and
- iii. *P&S Associates, General Partnership and S&P Associates, General Partnership, Plaintiffs v. Michael D. Sullivan, et al.*, Case No. 12-034123 (07) (the “Insider Suit” and collectively with the above-styled action, Interpleader Suit, and Net Winner Suit, the “Lawsuits”).

3. On March 23, 2015, Avellino served Plaintiffs with his Fifth Request to Produce (the “5th RFP”). The 5th RFP includes four requests:

- i. Request 1 - Partnership’s Tax returns, with schedules, for the years 2000 to the present.
- ii. Request 2 - All documents You obtained through discovery or otherwise in connection with this action or any other action or proceeding in which the Conservator is involved.
- iii. Request 3 - All documents produced by the Conservator in any litigation in which the Conservator is involved.
- iv. Request 4 - All documents utilized by or referred to by Conservator’s expert, Barry Mukamal, in the preparation of his report dated November 11, 2013, including all worksheets and work papers.

4. Plaintiffs and Avellino met and conferred before the Motion was filed. During the meet and confer, Avellino agreed to narrow Requests 1 and 4, and Plaintiffs produced the agreed upon documents. Accordingly, the Motion’s issues related to Requests 1 and 4 are moot.

5. Although the parties were to continue meeting and conferring regarding Requests 2 and 3, Avellino instead filed the Motion. Then, after meeting and conferring, and in an effort to reasonable limit on the scope of Requests 2 and 3, Plaintiffs agreed to produce or provide for inspection documents produced or obtained in response to requests for production, interrogatories, and/or subpoenas in the Lawsuits. Despite this agreement, and Plaintiffs’ efforts to clarify that Avellino is not seeking more, Avellino appears to be still pursuing the all-encompassing aspects of Requests 2 and 3, which would require Plaintiffs to produce all documents in their possession.

ARGUMENT

i. REQUESTS 2 AND 3 ARE IMPROPERLY BROAD FISHING EXPEDITIONS.

The Florida Rules of Civil Procedure are designed to allow parties to prove or disprove claims or defenses. The rules for production are not boundless or “designed to afford [an] avenue to pry into adversary’s business or to go on a fishing expedition . . .” *See McDonald’s Rests. Of Fla., Inc. v. Doe.*, 87 So. 3d 791, 794 (Fla. 2d DCA 2012) (citing *Inrecon v. Vill. Homes at Country Walk*, 644 So. 2d 103, 105 (Fla. 2d DCA 1994). Further, “litigants are not entitled to carte blanche discovery of irrelevant material.” *Life Care Ctrs. of Am. v. Reese*, 948 So. 2d 830, 832 (Fla. 4th DCA 2007) (quoting *Residence Inn by Marriott v. Cecile Resort, Ltd.*, 822 So. 2d 548, 550 (Fla. 5th DCA 2002).

Together Requests 2 and 3 seek production of every document in the possession of Plaintiffs. The Conservator is among the Plaintiffs and, as addressed above, the Conservator was appointed in the Administrative Suit and therefore every document ever given to or sent by the Conservator, including the two decades of Partnerships’ documents, would potentially fall within the scope of Requests 2 and 3, which seeks all documents related to any litigation or proceedings the Conservator is involved in. Requesting the whole universe of documents in Plaintiffs’ possession is not reasonably calculated to lead to the discovery of admissible evidence because following Avellino’s motion to dismiss, the scope of the instant lawsuit relates to the unlawful kickbacks paid to Avellino and others. Requests 2 and 3 improperly go far beyond that scope. *See Publix Supermarkets, Inc. v. Santos*, 118 So. 3d 317, 318 (Fla. 3d DCA 2013) (“We grant Publix's petition for writ of certiorari because the trial court's discovery order gives the respondent carte blanche to irrelevant discovery, thus it departs from the essential requirements

of the law and causes irreparable injury to Publix, for which there is no adequate remedy on appeal”). Such requests are unduly burdensome in terms of costs and time, including the preparation of a privilege log, and the Motion should be denied. To the extent this Court requires Plaintiffs to identify and produce every non-privileged document in their possession, Avellino should be required bear the cost of such a search and production.

ii. REQUESTS 2 AND 3 ARE IMPROPER ATTEMPTS TO OBTAIN VOLUMINOUS RECORDS WITHOUT SHARING THE COSTS.

Among the documents Avellino is seeking appears to be documents produced in the instant matter or in any other context to Plaintiffs by third parties. Requests 2 and 3 are an attempt to avoid sharing the cost of any such documents obtained. For example, Picard, the Trustee of the Bernard L. Madoff Investment Securities (“BLMIS”) liquidation produced certain documents in response to the Plaintiffs’ subpoena. On August 28, 2014, Avellino filed a request for copies under FRCP 1.351. The Plaintiffs offered to provide copies to Avellino if reasonable costs were paid under FRCP 1.351, and Avellino received documents in December 2014. Through his Motion, Avellino is seeking production of those same documents again and attempting to evade paying the reasonable costs associated with such documents that is required under FRCP 1.351.

iii. THE MOTION IS AN IMPROPER SECOND BITE ON PRIOR MOTIONS TO COMPEL WHICH WERE DENIED OR LIMITED.

Settlement agreements, settlement communications, and other privileged documents would arguably fall within the scope of the overly broad Requests 2 and 3. The Court should deny the Motion because such documents are irrelevant to this action (*Wal-Mart Stores, Inc. v. Strachan*, 82 So.3d 1052 (Fla. 4th DCA 2011)) and issues related to some such documents were already resolved by the Court’s Order dated September 15, 2014. Attached hereto as Exhibit A

is a copy of the Court's September 15, 2014 Order. The Motion and Requests 2 and 3 are a second attempt to obtain documents that this Court already denied by its September 15, 2014 Order.

Accordingly, Plaintiffs request that the Court deny the Motion.

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.

Dated: August 14, 2015

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EXHIBIT A

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

CASE NO.: 12-034123 (07)
COMPLEX LITIGATION UNIT

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

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

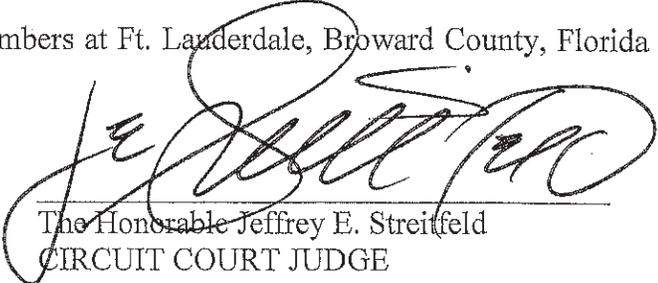
Defendants.

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

THIS CAUSE came before the Court upon Defendant Frank Avellino's Motion to Compel Plaintiff to Produce Documents in Response to His Second Request for Production dated April 29, 2014, and the Court having heard argument of counsel and being fully advised in the premises, hereby

ORDERED and **ADJUDGED** that Defendant's motion to compel is granted, in part. Plaintiff shall produce *KELLY, KELCO FOUNDATION, AND SULLIVAN* the settlement agreements and related documents entered into with any of *UNITY (30)* the defendants in this action within ten (10) days from the date of this order. Plaintiff may redact such documents to exclude the financial consideration for such settlements: *SEE BELOW ** *following*

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida this *15th* day of September, 2014.


The Honorable Jeffrey E. Streitfeld
CIRCUIT COURT JUDGE

Conformed copies to:

Counsel of record
** AS TO KELLY & KELCO - REDACT ALL OF #2 AFTER THE WORD "PAYMENT"*
AS TO SULLIVAN - REDACT THE DOLLAR AMOUNT OF THE JUDGMENT IN Q. 3.

CASE NO.: 12-034123 (07)
Order Granting Defendant Frank Avellino's
Motion to Compel

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