

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
MICHAEL BIENES' MOTION TO COMPEL PLAINTIFFS TO PRODUCE
DOCUMENTS RESPONSIVE TO HIS THIRD 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 Michael Bienes' Motion to Compel Plaintiff to Produce Documents Responsive to His Third Request for Production* (the "Motion"). In support thereof, Plaintiffs state as follows:

INTRODUCTION

Like a motion filed by Defendant Avellino, Defendant Bienes' Motion concerns document requests that would require Plaintiffs to produce every document in their possession, and Defendant Bienes ("Bienes") has refused to narrow those requests. Specifically, Requests A and B of Bienes' Third Request for Production purportedly require the Plaintiffs to turn over all "[a]ll documents produced by the Conservator in any litigation in which the Conservator is

involved” and all documents received by document request, subpoena, or “informally” in the above-styled action AND “in any other litigation in which the Conservator is involved, or otherwise.” Bienes has refused to clarify what “informally” and “otherwise” means and, as the Conservator is a product of a lawsuit, Bienes’ Requests A and B require Plaintiffs to produce all documents in their possession without any limitation as to time and scope. 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 17, 2015, Bienes served Plaintiffs with his Third Request to Produce (the “3rd RFP”). The 3rd RFP consists of only two requests:

- a. All documents You obtained via document request, subpoena, or informally in this litigation, in any other litigation in which the Conservator is involved, or otherwise.
- b. All documents produced by the Conservator in any litigation in which the Conservator is involved.

4. Counsel for Plaintiffs and Bienes met and conferred before and after the Motion was filed. As a result of the meet and confers, Plaintiffs agreed to produce or make available for inspection documents produced or obtained in response to a subpoena, in response to requests for production, or in response to interrogatories in the Lawsuits. Despite this agreement, Bienes refuses to clarify or narrow the scope of Requests A and B and is insisting in proceeding with overly broad requests which arguably encompass every document in Plaintiffs' possession.

ARGUMENT

i. REQUESTS A AND B IMPROPERLY SEEK EVERY DOCUMENT IN PLAINTIFFS' POSSESSION.

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).

Read together, Requests A and B 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 their scope, which seeks all documents related to any litigation the Conservator is involved in. Further, Bienes has refused to clarify what the terms “informally” or “otherwise” mean in their request for “All documents You obtained via document request, subpoena, or informally in this litigation, in any other litigation in which the Conservator is involved, or otherwise.” Requesting

the whole universe of documents in Plaintiffs' possession is not reasonably calculated because following Defendants' motion to dismiss, the scope of the instant lawsuit relates to the unlawful kickbacks paid to Bienes and others. Requests A and B 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 produce and identify every non-privileged document in their possession, Bienes should be required bear the cost of such a search and production.

ii. REQUEST A IS AN IMPROPER ATTEMPT TO OBTAIN VOLUMINOUS RECORDS WITHOUT SHARING THE COSTS.

Among the documents Bienes is seeking appears to be documents produced in the instant matter or in any other context to Plaintiffs by third parties. Requests A and B 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. Plaintiffs previously offered to provide those documents to Bienes if he paid costs associated with producing the documents. Bienes has not paid any costs. Through his Motion, Bienes is attempting to evade paying the reasonable costs 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 A and B. 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 A and B 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.,

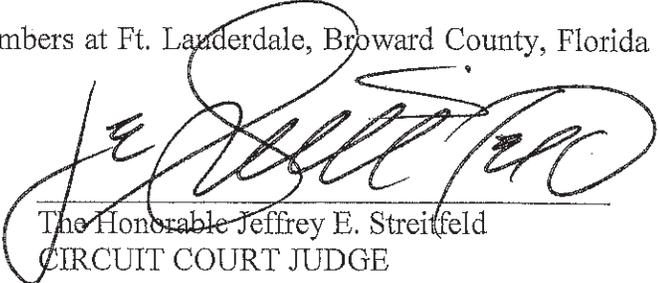
Defendants.

**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.

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

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