

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

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

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

Plaintiffs,

vs.

STEVEN JACOB, et al.,

Defendants.

**PLAINTIFFS' OBJECTION TO FRANK AVELLINO'S NOTICE
OF PRODUCTION TO NON-PARTY BERGER SINGERMAN UNDER RULE 1.351**

Philip J. Von Kahle (the "Conservator"), as Conservator for P&S Associates, General Partnership ("P&S") and S&P Associates, General Partnership ("S&P") (the "Partnerships", and together with the Conservator, the "Plaintiffs"), pursuant to Fla. R. Civ. P. 1.351, hereby file this Objection to Defendant Frank Avellino's ("Avellino") Notice of Production to Non-Party Under Rule 1.351, and in support thereof states as follows:

1. On September 14, 2015, Avellino filed his Notice of Production to Non-Party Under Rule 1.351 to Records Custodian, Berger Singerman, P.A. (the "Notice"). A true and correct copy of the Notice is attached hereto as **Exhibit A**.

2. Berger Singerman LLP ("Berger Singerman") is Plaintiffs' attorney in this action and previously represented the Partnerships and certain partners of the Partnerships in litigation before this Court.

3. The subpoena attached to the Notice (the "Subpoena") contains two requests that – without any time limitation – seek from Berger Singerman: "1) All Partnership documents provided

to you by any partner, person or entity and 2) All documents evidencing when you received any Partnership documents.”

4. Plaintiffs object to Requests 1 and 2 because the Notice and the Subpoena may require Berger Singerman to produce documents that it received from Plaintiffs, its former client partners, or other persons or entities with a common interest that are protected by the attorney-client privilege, work product privilege, accountant-client privilege, or other privilege. Plaintiffs and have not and do not agree to waive those privileges, and Berger Singerman is not aware that its former client partners have waived those privileges. *Nova S.E. U., Inc. v. Jacobson*, 25 So. 3d 82, 86 (Fla. 4th DCA 2009)(“The privilege belongs to the client, *see Neu v. Miami Herald Pub. Co.*, 462 So.2d 821, 825 (Fla.1985), and may be claimed by the client or the lawyer on behalf of the client”).

5. Subpoenas to litigation counsel are inherently frowned upon due to the presumption that the documents possessed by litigation counsel are privileged.

6. Plaintiffs further object to Requests 1 and 2 as vague and ambiguous because Requests 1 and 2 are subject to more than one interpretation. The Subpoena defines “Partnership” to mean “P&S Associates General Partnership., its officers, directors, employees, agents and representatives; and S&P Associates, General Partnership, its officers, directors, employees, agents and representatives.” Using that definition of Partnership, Request 1 and 2 could be read to seek 1) all documents received by Berger Singerman from the Partnerships’, their officers, directors, employees, agents and representatives, and documents showing when Berger Singerman received them; 2) all documents of the Partnerships and documents showing when Berger Singerman received them; or 3) all documents related to the Partnerships and documents showing when Berger Singerman received them.

7. Finally, Plaintiffs object to Requests 1 and 2 as overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Depending on how Requests 1 and 2 are interpreted, the Subpoena may seek documents that have no bearing on this action, including but not

limited to documents such as payments for fees and expenses and correspondence and documents related to issues, claims, and/or defenses in other litigation that are not relevant to this action.

8. Accordingly, this Court ought to sustain Plaintiffs' objection to the Notice.

WHEREFORE the Conservator respectfully requests the entry of an Order: (i) sustaining Plaintiffs' objections to the Notice; (ii) denying Avellino's request to issue the Subpoena on Berger Singerman; and (iii) such other and further relief as this Court deems necessary and proper.

Dated: September 29, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of September, 2015, a true and correct copy of the foregoing document was served on the following parties:

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EXHIBIT A

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

CASE NO. 12-034123(07)

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

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.

Defendants.

NOTICE OF PRODUCTION TO NON-PARTY UNDER RULE 1.351

YOU ARE NOTIFIED that after ten (10) days from the date of service of this notice, if service is by delivery, or fifteen (15) days from the date of service, if service is by mail, and if no objection is received from any party, the undersigned will issue or apply to the clerk of this court for issuance of the attached subpoena directed to:

Records Custodian, Berger Singerman, P.A., who is not a party and whose address is 350 E. Las Olas Blvd., Suite 1000, Fort Lauderdale, FL 33301, to produce the items listed at the time and place specified in the subpoena.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being sent by electronic service via the Florida Courts E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 to all parties on the attached service this 14th day of September, 2015.

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Attorneys for Defendant

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By: /s/ Gary A. Woodfield, Esq.

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P & S ASSOCIATES GENERAL
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Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.

Defendants.

SUBPOENA DUCES TECUM WITHOUT DEPOSITION
(Records May Be Mailed in Lieu of Deposition)

To: Records Custodian, Berger Singerman, P.A.,
c/o Mitchell W. Berger, Registered Agent
350 E. Las Olas Blv.d, Suite 1000
Fort Lauderdale, FL 33301

YOU ARE COMMANDED to appear at Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33418, on _____, 2015 at 10:00 AM., and to have with you at that time and place the following:

See Attached Exhibit A.

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.

If you fail to:

- (1) appear as specified; or

- (2) furnish the records instead of appearing as provided above; or
- (3) object to this subpoena,

you may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

Dated this _____ day of September, 2015.

FOR THE COURT

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By: _____

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EXHIBIT A

Definitions

1. “Partnership” shall mean “Partnership” shall mean P&S Associates General Partnership., its officers, directors, employees, agents and representatives; and S&P Associates, General Partnership, its officers, directors, employees, agents and representatives.
2. “You” shall mean Berger Singerman, P.A., its agents and/or representatives.

Documents

1. All Partnership documents provided to you by any partner, person or entity.
2. All documents evidencing when you received any Partnership documents.