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.

_____/

DEFENDANT AVELLINO'S RESPONSE TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER AND AVELLINO'S MOTION TO COMPEL PLAINTIFFS TO PRODUCE ALL DOCUMENTS RECEIVED FROM MICHAEL SULLIVAN

Defendant Frank Avellino ("Avellino"), files this Response to Plaintiff's Motion for Protective Order as to the Deposition of Michael Sullivan and simultaneously moves this Court for an order compelling Plaintiff, Philip J. Von Kahle, as Conservator of P&S Associates and of S&P Associates (hereinafter "Partnerships" and, collectively, "Plaintiffs"), to produce documents, including transcribed answers to questions and any statements ("the Statement"), taken of Michael Sullivan, and in support therefore states as follows:

I. INTRODUCTION

This action centers around the control of the Partnerships and payments made to various parties including defendant, Avellino. Michael Sullivan, as the general partner of the Partnerships throughout the relevant time period, is central to the operation and control of the Partnerships and payments made. Avellino has noticed Sullivan for deposition for October 28, 2015, and requested he produce all Partnership documents as well as documents he provided Plaintiffs in connection with the settlement agreement he entered into with Plaintiffs. On

October 13, 2015 Plaintiffs filed a motion for protective order to prevent the production of the requested documents. By this motion Avellino seeks a court order compelling Plaintiffs to produce the requested documents to be utilized at Sullivan's deposition, which will have to be continued due to Plaintiff's motion. This is not the first time that Plaintiffs have hidden behind a claim of work-product to avoid the production of this relevant discovery.

1. On April 29, 2014, Avellino propounded upon Plaintiffs his Second Request for Production ("the Request"), paragraph 1 of which requested "all settlement agreements or other documents evidencing the settlement or other resolution Plaintiffs have entered into with any defendants in this action."

2. Plaintiffs served a response to the Request on June 3, 2014, and objected to this particular request as being irrelevant and protected by the work product doctrine and the attorney client privilege

3. On June 25, 2014, Avellino filed a motion to compel production of the documents relating to the settlement. On June 25th and 26th, Sullivan and the Plaintiffs, among other parties, entered into a Confidential Settlement Agreement ("Settlement Agreement").

4. On September 15, 2014, the Court granted Avellino's motion to compel in part and required the production of the Settlement Agreement itself, excluding the dollar amount. The order did not address the remainder of the documents requested. As of the time of the hearing, Avellino had obviously not yet obtained the actual Settlement Agreement, and therefore could not have argued about the need for documents referenced within the agreement.

5. Thereafter, Avellino obtained a copy of the redacted Settlement Agreement, which provides, in pertinent part, that Sullivan would meet with the Plaintiffs and provide them

with "any and all documents relevant to [their] questions" and "answers to questions that are transcribed under oath." (A copy of the Settlement Agreement is attached hereto as Exhibit "A").

6. Avellino filed a motion for reconsideration of the September 15th order based upon the newly acquired information that Sullivan had produced documents to Plaintiffs. In opposition to that motion, Plaintiffs argued that " [f]irst, Defendant should be required to obtain the information he seeks through discovery directed at Sullivan;" and [s]econd, this Court should not permit the Defendant to . . . compel the production of documents which were not in the Plaintiff's possession, or in certain cases, in existence at the time of the requests . . . ." The court denied the motion for Reconsideration.

7. On October 5, 2015, Avellino served a notice of taking Sullivan's deposition *duces tecum*, and requested, *inter alia*, all documents provided to Plaintiffs' counsel in connection with the Settlement Agreement. Unbelievably, after arguing that Avellino should get the documents from Sullivan, the Plaintiffs filed a motion for protective order to prevent such production[1]. Such motion requires Avellino to reschedule Sullivan's deposition scheduled for October 28, 2015, pending resolution of these motions.

8. Furthermore, on October 5, 2015, Plaintiffs filed a motion to compel him to turn over his computer and a motion to strike Avellino's pleadings, attaching some of the ostensibly privileged documents to the motion to strike.

II. SULLIVAN'S BUSINESS DOCUMENTS WERE NOT PREPARED BY PLAINTIFFS IN ANTICIPATION OF LITIGATION

By definition, documents are only work product if they were prepared in anticipation of litigation. Florida Rules of Civil Procedure only require a showing of need to obtain discoverable documents when those documents were "prepared in anticipation of litigation or for

[1] Sullivan's counsel has advised that Sullivan does not have documents responsive to Avellino's deposition notice, having provided them all to Plaintiffs without keeping copies.

trial by or for another party or by or for that party's representative . . ." Fla. R. Civ. P. 1.280. The work product doctrine "was never meant to apply to ordinary, routine, business-as-usual communications," so . . . "obviously . . . was not intended to protect the general foreseeability of being sued in the course of business." *Neighborhood Health P'ship, Inc. v. Peter F. Merkle M.D., P.A.,* 8 So. 3d 1180, 1185 (Fla. 4th DCA 2009). Without evidence that the documents were prepared in anticipation of litigation, the motion for protective order must be denied. *See e.g., DeBartolo-Aventura, Inc. v. Hernandez*, 638 So. 2d 988, 990, n.2 (Fla. 3d DCA 1994) (even incident reports are not always work product as the "'privilege only applies to materials obtained or developed in anticipation of litigation or for trial;' (citing Charles W. Ehrhardt, *Florida Evidence* § 502.9, at 270); [i]f incident reports are compiled for a different purpose, not in anticipation of litigation, then the work product doctrine by definition does not apply.'"

Therefore, documents created or maintained by Sullivan do not even constitute Plaintiffs' work product as they were not created by them in anticipation of litigation (in fact, nor were they created by Sullivan in anticipation of this litigation).[2] See e.g. *Neighborhood Health.*, 8 So. 3d at 1185 ("at a minimum, a claim of work product protection requires that *a specific* litigation matter can be reasonably anticipated as a result of an occurrence or circumstance"). Since the documents did not constitute work product when created, they did not become work product when turned over to Plaintiffs. *E. Air Lines, Inc. v. Gellert*, 431 So. 2d 329, 331 (Fla. 3d DCA 1983) (documents which were not prepared in anticipation of litigation "are not documents which come within the definition of work product; . . . [s]ince these documents are not *ab initio* within the work product privilege, no showing to overcome the privilege" is even required.) (citations omitted). If Sullivan still had the documents, Avellino would be entitled to them. The

[2] Since Plaintiffs have never provided a privilege log identifying these documents, Avellino does not know what all of the documents produced by Sullivan are, but does know that the few which were attached to Plaintiffs' motion to strike were not privileged.

Plaintiffs cannot thwart this ability by taking the documents, then claiming "work product" just because they obtained them. "Rule 1.280(b)(2) does not completely immunize from discovery the information contained in the subject statements . . ." *Landrum v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 525 So. 2d 994, 996 (Fla. 1st DCA 1988).

The documents which are attached to Plaintiffs' pending motion to strike provide additional, compelling reason for the production of the documents. Until they wanted to use the emails in support of a motion to strike, Plaintiffs refused to provide them to Avellino, claiming that they were privileged.[3] One glance at the documents is all that is required to realize that the argument of privilege had no basis. There is not one document which contains the confidential mental impressions of Plaintiffs or their counsel or which would constitute work product. Plaintiffs cannot obtain Sullivan's documents, thus preventing Avelino from obtaining them, then claim that they are protected by the work product privilege.

III. EVEN WORK PRODUCT CAN BE OBTAINED WHEN THERE IS A NEED AND A HARDSHIP

Assuming, *arguendo*, that the subject documents were transformed into the Plaintiffs' work product by virtue of their acquisition of same, they would clearly constitute fact, rather than opinion, work product.[4] They must therefore be produced because the two criteria that must exist to overcome employment of the work product doctrine - a need for the document sought and an inability to obtain equivalent information without undue hardship – both exist in this case

[3] Plaintiff also recently produced thousands of documents to Avellino without any indication of their source.

[4] Fact work product is traditionally gathered in anticipation of litigation, while opinion work product consists primarily of the attorney's mental impressions, conclusions, opinions and theories concerning litigation. *Southern Bell*, 632 So.2d at 1384 (Fla. 1994); F.R.Civ.P. 1.280(b)(3). Fact work product is susceptible to disclosure based on considerations of need and relevance. *Acevedo v. Doctors Hospital, Inc.*, 68 So.3d 949, 952-953. Plaintiffs have not attempted to argue that Sullivan's documents constitute opinion work product.

(See Affidavit of Gary Woodfield attached as Exhibit B). *Paradise Pines Health Care Associates, LLC v. Bruce*, 27 So. 3d 83, 83-84 (Fla. 1st DCA 2009); *Florida Power Corp. v. Dunn*, 850 So. 2d 655, 656 (Fla. 2d DCA 2003).

The requisite need may be established by a showing of any one of the following: (1) that the underlying evidence is inaccessible; (2) that the withholding of the documents sought would "defeat the interest of justice" or (3) that the information is not as readily available to respondent as it was to petitioner. *Travelers Indem. Co. v. Fields*, 262 So. 2d 222, 223-24 (Fla. 1st DCA 1972). Only one of these criteria is required to show necessity; all three exist in this case.

The operation of the Partnerships is at the very core of this proceeding. The control of the Partnerships and Avellino's relationship with Sullivan is the basis for the allegations against Avellino. The very existence of documents, regardless of whether they mention Avellino, would bear upon his control – or lack thereof. Without having the records of the Partnerships, Avellino cannot show how he was not involved in its management. Furthermore, a threshold issue in this case is the statute of limitations. The Partnerships' books and records, which individual partners had the legal right to review and actually did review, may reflect what information was provided to them; the Partnerships' documents may reveal who saw those records and when they saw them. Emails produced to date are either about Avellino or with Avellino, and also provide evidence that the documents Plaintiffs obtained are necessary for his informed defense and the fair adjudication of this matter.

Not only are the documents critical to the merits of the entire case, but they form the basis of Plaintiffs' pending motion to strike. Plaintiffs are trying to create the proverbial "shield versus sword" situation by using a few documents they have chosen while simultaneously

refusing to produce the rest. Such a use of the doctrine would certainly "defeat the interest of justice."

Not only can Avellino not obtain the same documents without undue hardship, but he cannot get them at all. They are inaccessible from another source. It was such an attempt to obtain the documents, through a subpoena *ducus tecum* to Sullivan that resulted in Plaintiffs' motion for protective order and in the motion *sub judice.* The audacity of the Plaintiffs, while already in possession of Sullivan's documents, to argue to the Court that they should not have to produce these documents because Avellino should get them from Sullivan, then to object to Sullivan's production, is, unfortunately, representative of the entire course of this litigation. Furthermore, since Sullivan advised the undersigned that he kept no copies of any of the documents provided to Plaintiffs' counsel, the only way for Avellino to obtain the documents is from the Plaintiffs.

In order to determine hardship, the Court is to balance Avellino's burden in obtaining the documents elsewhere with the Plaintiffs' burden in producing them. *Paradise Pines,* 27 So. 3d 83. The scale of this balancing procedure is tipped totally in favor of the production – the documents are otherwise impossible for Avellino to obtain yet the Plaintiffs have not even attempted to argue that they would be burdened by the production – only that they don't want to provide them due to an alleged privilege. It was easy for Plaintiffs to access these documents and find the few they wanted to use for their own benefit; they should access the remainder for production to Avellino.

Not only do the underlying documents created and maintained by Sullivan and the Partnerships in the ordinary course of their business constitute fact work product, but so does the Statement of Sullivan. Since Sullivan was the general partner of the Partnerships, and the person

who paid the subject monies to Avellino, his knowledge of the facts and circumstances are clearly relevant. His actions and those of the other defendants are inextricably intertwined within the operative complaint.

Plaintiffs' motion for protective order seeks to prevent Sullivan from revealing any information during his deposition that they consider to be privileged. To the extent that Plaintiffs take the position that they can prevent Sullivan from testifying for any reason, they would be magnifying the need for the Statement.[5]

Even if Sullivan is allowed to answer questions in the deposition regarding the facts in his Statement, Avellino will not be able to ask all the relevant questions because Sullivan has provided all the documents in his possession to the Plaintiffs, and Plaintiffs have refused to provide those documents to Avellino. An analysis of the documents would undoubtedly reveal pertinent questions that need to be asked. Plaintiffs had the benefit of those documents but have prevented Avellino from getting them, so Plaintiffs should have to produce the Statement.

Finally, based on Plaintiffs' recent reliance upon some of Sullivan's documents which were previously claimed as work product (i.e. emails), it is clear that Plaintiffs strategically hide behind the privilege when it benefits them, but then, without any explanation, ambush Defendants with the same information, through document "dumps," attachments to motions, or use at depositions, at their whim. Plaintiffs should at a minimum have to declare now whether or

[5] To the extent that a Court Order is required to allow Sullivan to answer questions in a deposition, Avellino is giving notice of intention to ask about the Settlement Agreement, the Statement and all documents provided by Sullivan to Plaintiffs, and requesting the entry of an order requiring Sullivan to answer the questions. Clearly, documents and facts did not become privileged because they were discussed or provided in the course of settlement negotiations. *Agan v. Katzman & Korr, P.A.*, 328 F. Supp. 2d 1363, 1370 (S.D. Fla. 2004).

not they reasonably expect or intend to use the Statement at trial, for impeachment or other purposes. If they do intend to do so, Plaintiffs should be compelled to provide a copy of the Statement immediately. *See Northup v. Acken,* 865 So.2d 1267, 1270 (Fla. 2004) (when a party reasonably expects or intends to utilize an item before the court at trial, for impeachment or otherwise, it is fully discoverable and is not privileged work product). If they claim they are not going to use the Statement at trial for any purposes, they should be barred from using it. Regardless of such use, however, the Statement constitutes fact work product which Avellino requires and cannot otherwise obtain.

IV. THE WORK PRODUCT ARGUMENT HAS BEEN WAIVED BY RELIANCE ON DOCUMENTS

As set forth above, Plaintiffs have already produced several emails which they otherwise contended were privileged, which they obtained in conjunction with their settlement with Sullivan. Such a purposeful decision to use "privileged" documents constitutes a waiver of any privilege which did exist. "If [for example] a party-client introduces part of his correspondence with his attorney, the production of all of the correspondence could be demanded." *Int'l Tel. & Tel. Corp. v. United Tel. Co. of Florida*, 60 F.R.D. 177, 185-86 (M.D. Fla. 1973) (internal citations omitted).

Plaintiffs are attempting to hide behind the privilege argument in order to evade the obligation which they would otherwise have to produce these documents. Books and records of an operating business, whether still with the existing business or in a successor such as the Conservator, are not "work product" just because they are given to the business' or its successor's attorney. *Gibson v. Florida Legislative Investigation Comm.,* 108 So. 2d 729, 746 (Fla. 1958).

> a party 'may not use the [attorney-client] privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.' The privilege may be "implicitly ... waived when defendant asserts a claim that in fairness requires examination of protected communications.

Lender Processing Services, Inc. v. Arch Ins. Co., 40 Fla. L. Weekly D953 at *10 (Fla. 1st DCA Apr. 22, 2015) (not yet released for publication) (internal citations omitted). Yet that is exactly what Plaintiffs are attempting to do – they are disclosing selected communications for purposes of their motion but refusing to relinquish the remaining documents either for purposes of the motion or for use at trial. Fairness mandates that all of the documents obtained from the Partnerships and Sullivan be provided to Avellino.

CONCLUSION

The documents of Sullivan and the Partnerships do not constitute Plaintiffs' attorneys' mental impressions or work done by Plaintiffs in anticipation of litigation. Avellino has demonstrated both a need for the documents and the Statement and a hardship (impossibility) in getting them elsewhere. Plaintiffs' bad faith is reflected by the fact that they had argued that, instead of their having to produce the documents, Avellino should get them from Sullivan, then objected to the exact means of discovery upon which they had earlier insisted. It would be blatantly unfair for Plaintiffs to continue to trial without revealing these records except for those few documents they choose to reveal to their own benefit within their own timetable.

WHEREFORE, AVELLINO requests that Plaintiffs' motion for protective order be denied and that they be required to provide the Statement, any questions and answers, and all documents obtained by Sullivan in conjunction with the Settlement Agreement and any meetings immediately to Avellino. Avellino alternatively requests that, if any documents are permitted to be withheld from him, that the Plaintiffs be required to immediately provide a privilege log and to produce the documents in camera.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 2015, 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.

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CONFIDENTIAL SETTLEMENT AGREEMENT

This Confidential Settlement Agreement and Release (the "Agreement") is made and entered into by and between MICHAEL D. SULLIVAN ("Sullivan") and MICHAEL D SULLIVAN & ASSOCIATES, INC ("MDS"), on one hand (collectively "Defendants"), and PHILIP VON KAHLE, AS CONSERVATOR OF P&S ASSOCIATES, GENERAL PARTNERSHIP AND S&P ASSOCIATES, GENERAL PARTNERSHIP ("Conservator"), P&S ASSOCIATES, GENERAL PARTNERSHIP ("P&S"), and S&P ASSOCIATES, GENERAL PARTNERSHIP ("S&P"), on the other (collectively "Plaintiffs"). Plaintiffs and Defendants are together referred to as the "Parties."

RECITALS

A. On or about December 10, 2012, a civil action was commenced against Sullivan and MDS, among others, relating to payments made by P&S and S&P, in that certain case styled *P&S Associates, General Partnership and S&P Associates, General Partnership, Plaintiffs v. Michael D. Sullivan, et al.*, Case No. 12-034123 (07) (the "Action").

B. The Parties have agreed to fully and finally resolve all disputes between them, including the claims set forth in the Action, without an admission of liability on the part of Defendants.

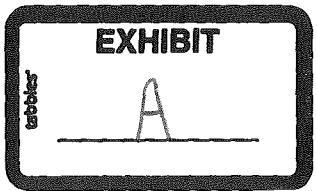
NOW, THEREFORE, for good and valuable consideration as well as the mutual covenants and agreements described herein, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, hereby agree as follows:

1. Recitals. The foregoing recitations are true and correct and are incorporated herein by reference.

2. Prior Disclosures. Prior to entering into this Agreement, the Conservator received and reviewed certain financial statements and disclosures provided by Sullivan. The Conservator's review of those financial statements and disclosures and Sullivan's representation that such financial statements and disclosures are true and accurate was a material factor in the Conservator's decision to enter into this Agreement, and the Conservator justifiably relied on the financial statements and disclosures provided by Sullivan prior to entering into this Agreement.

3. Judgment. Sullivan agrees to entry of a consent judgment against him in the amount of [redacted] (the "Judgment") within 45 days from execution of this Agreement. The Plaintiffs agree to forebear from collection activities related to the Judgment through and until April 1, 2015 (the "Forbearance Period"). The Plaintiffs will not record the Judgment during the Forbearance Period.

4. Satisfaction of Judgment. On March 1, 2015, Sullivan will provide a financial affidavit setting forth his complete financial condition as of that date (the "Affidavit"). The Conservator will review the Affidavit. Within 30 days from the receipt of the Affidavit, the Conservator will advise Sullivan if he will seek to collect on the Judgment after the expiration of



the Forbearance Period. If, after reviewing the Affidavit, the Conservator determines in his good faith, reasonable, business judgment that Sullivan does not have the financial ability to pay the Judgment, the Conservator will enter a satisfaction of Judgment (the "Satisfaction").

5. Court Approval. The Parties agree to seek Court approval of the terms of this Agreement. This Agreement is subject to approval by the Court. In the event that this Agreement is not approved by the Court, the Parties shall be returned to the *status quo ante* prior to their entry into this Agreement, and this Agreement shall be deemed null and void.

6. Release. The "Plaintiff Releasors" under this Agreement shall mean the Conservator, P&S, and S&P. The "Defendant Releasees" under this Agreement shall mean Sullivan and MDS, including its past and present officers and directors. Upon the entry of the Satisfaction, without further action by anyone, for good and valuable consideration, including that set forth above, the receipt of which is hereby acknowledged, Plaintiff Releasors, on behalf of themselves, shall be deemed to have, and by operation of law shall have, fully, finally and forever released, relinquished, settled and discharged as to each and every one of the Defendant Releasees all claims, demands, causes of action (whether direct, indirect or otherwise in nature), damages whenever and however incurred, liability of any nature whatsoever (including costs, expenses, penalties and attorneys' fees) whether asserted or otherwise, known or unknown, suspected or unsuspected, accrued or unaccrued, derivative or direct, whether in law, equity or otherwise from the beginning of the world to the date the Agreement is executed. Notwithstanding the foregoing, this Release shall not release Defendants' obligations under this Agreement. Upon the entry of the Satisfaction, without further action by anyone, for good and valuable consideration, including that set forth above, the receipt of which is hereby acknowledged, Defendants, on behalf of themselves, shall be deemed to have, and by operation of law shall have, fully, finally and forever released, relinquished, settled and discharged as to each and every one of the Plaintiff Releasors all claims, demands, causes of action (whether direct, indirect or otherwise in nature), damages whenever and however incurred, liability of any nature whatsoever (including costs, expenses, penalties and attorneys' fees) whether asserted or otherwise, known or unknown, suspected or unsuspected, accrued or unaccrued, derivative or direct, whether in law, equity or otherwise from the beginning of the world to the date the Agreement is executed. Notwithstanding the foregoing, this Release shall not release Plaintiffs' obligations under this Agreement

7. Meeting. Within 3 business days of the execution of this Agreement, and as requested by Plaintiffs thereafter, Defendants agree to meet with Plaintiffs. At these meetings, Defendants agree, as they are able, to cooperate with and assist Plaintiffs in Plaintiffs' evaluation, advancement, and prosecution of claims and causes of action that Plaintiffs have or may have against the non-settling defendants in the Action or which the Conservator may pursue in the future on behalf of P&S and S&P. Such assistance and cooperation shall include, without limitation, (i) meeting with Plaintiffs to answer Plaintiffs' questions, if answers are known, and (ii) providing Plaintiffs with any and all documents relevant to Plaintiffs' questions. During the Parties' meeting on June 25, 2014, the Parties will identify dates no later than 30 days from the date of that meeting whereby Defendants shall provide answers to questions that are transcribed under oath.

8. Confidentiality. The Parties agree that, while they may disclose the fact that they have settled, they will keep the terms and conditions of this Agreement and all related negotiations strictly confidential; provided however, that the Parties shall be able to make disclosures regarding this Agreement to the extent that any such disclosures are required (i) to obtain *in camera* Court approval of this Agreement; (ii) by a binding court order or other compulsory process, providing that the disclosing Party uses reasonable efforts to notify the other Party of a formal request made by any person or entity for such an order or other compulsory process as soon as practical after the request has been made, and the disclosing Party makes all reasonable efforts to object to the disclosure and to quash any efforts to have the Agreement disclosed, (iii) in the normal course of business of one or more of the Parties to their respective insurers, auditors, accountants, tax representatives, attorneys, financial advisors, financial institutions or lending institutions; (iv) by any Party to enforce any term or condition of this Agreement; or (v) as otherwise required by law.

9. Non-Disparagement. Plaintiffs agree that they do not believe that Sullivan was aware that BLMIS was operating a ponzi scheme prior to Madoff's arrest on December 11, 2008. Plaintiffs agree not to represent that Sullivan knew that BLMIS was a ponzi scheme prior to Madoff's arrest on December 11, 2008.

10. No Admission. The Parties agree and acknowledge that nothing contained herein shall be deemed an admission or concession of liability or wrongdoing or any other form of admission with respect to any matter, thing or dispute whatsoever.

11. Miscellaneous. Each individual executing this Agreement below represents and warrants that he or she is fully authorized to (i) execute and deliver this Agreement to the other party on behalf of the party for which he or she is signing and (ii) legally bind the party for which he or she is signing. Each party to this Agreement has consulted with legal counsel regarding the scope and meaning of the terms and conditions set forth herein. This Agreement shall be deemed to have been jointly drafted by the Parties and no ambiguity or claimed ambiguity shall be resolved against any other party on the basis that such party drafted the language claimed to be ambiguous. This Agreement may be signed in two or more duplicate originals, which, taken together, shall constitute but one agreement and any fully executed original of which shall be deemed to be an original. The Parties agree that neither has assigned, pledged, sold or transferred or otherwise conveyed any right, claim, or interest that they have or may have in any matters released herein.

12. Governing Law. This Agreement shall be interpreted and enforced in accordance with the laws of the State of Florida.

13. Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes any other agreement or understanding of the Parties with respect to the matters contained herein. This Agreement may not be changed, altered or modified except in writing signed by the party against whom enforcement of such change would be sought.

14. Further Assurances. The Parties shall execute such further documents and do any and all such further things as may be necessary to implement and carry out the intent of this Agreement.

[signature page follows]

P&S ASSOCIATES, GENERAL PARTNERSHIP

By: _____

Name: Philip VonKahle

Its: Conservator

Dated: June 25, 2014

S&P ASSOCIATES, GENERAL PARTNERSHIP

By: _____

Name: Philip VonKahle

Its: Conservator

Dated: June 25, 2014

_____

PHILIP VON KAHLE, as Conservator of P&S ASSOCIATES, GENERAL PARTNERSHIP and S&P ASSOCIATES, GENERAL PARTNERSHIP

DATED: June 25 2014

_____

MICHAEL D. SULLIVAN

DATED: 6/25/14

MICHAEL D. SULLIVAN & ASSOC., INC.,

By: _____

Name: Michael D. Sullivan

Its: Principle

Dated: 6/26/14

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.
_____/

AFFIDAVIT OF GARY WOODFIELD

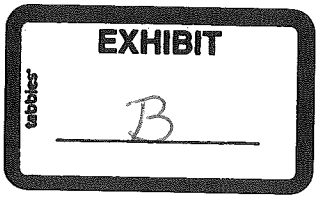
COUNTY OF PALM BEACH)
) ss:
STATE OF FLORIDA)

Before me, personally appeared Gary Woodfield who, being duly sworn, deposes and states:

1. I am counsel for Frank Avellino, a named defendant in the above captioned action.

2. In conjunction with such representation, I have attempted by subpoena to obtain documents of Michael Sullivan, P&S Associates and S&P Associates (collectively, the "Partnerships") from Michael Sullivan. These documents include the documents provided by Sullivan to the Plaintiffs pursuant to the confidential settlement agreement which was approved by this Court on July 28, 2014, and are included within the subpoena *ducus tecum* I caused to be served upon Sullivan in this case.

3. I have communicated with Harry Winderman, Sullivan's counsel in this action, in connection with the subpoena seeking copies of the documents which were provided to the



Plaintiffs. One such communication, received from Mr. Winderman, is attached hereto as Exhibit A. It states that Sullivan "has turned over [off] of his documents to Lenny Samuel and therefor does not have those documents in his custody, control or possession." Mr. Winderman, also advised me that Plaintiff's counsel had access to Sullivan's service provider, and got all emails that exist and that neither he nor his clients retained copies of any documents given to Plaintiffs' counsel.

3. On behalf of Avellino, I need the documents of Sullivan and the Partnerships which were given to Plaintiffs' counsel. Although Plaintiffs have maintained that they do not have to produce them because they constitute work product, Plaintiffs have provided several documents which appear to have been obtained from Sullivan in support of arguments Plaintiffs have used against Avellino, including their motion for access to Avellino's computer and their motion to strike pleadings (using, among other documents, e-mails between Avellino and Sullivan which Avellino did not produce.).

4. Plaintiffs have alleged that Avellino controlled Sullivan and the Partnerships, and that alleged control is central to the causes of action against him in this case. Documents of Sullivan and the Partnerships are critical to this issue as, even if they do not mention Avellino, they may reflect business transactions and decisions which were undertaken without his involvement – and thus be relevant to the issue of control. Others, as we have seen from the limited documents which have been produced, either mention Avellino or are to or from him (emails attached to Plaintiffs' motion to strike). The documents of the Partnerships may also be critical to the statute of limitations defense as they may reflect which partners saw what information on what date.

5. It is impossible for Affiant to know all ways in which the Partnerships'

documents are necessary until he sees them. Even the underlying fact that Plaintiffs' counsel uses portions of the documents periodically without providing all of them to Affiant makes the remaining documents necessary for a more complete understanding and knowledge of the facts relevant to the case and to prepare for trial, depositions and hearings.

6. Affiant cannot obtain the documents from Sullivan, as he no longer has them. Affiant knows of no other way to obtain the documents, and should not have to find a way since Plaintiffs have them.

GARY WOODFIELD

STATE OF FLORIDA

COUNTY OF PALM BEACH

Subscribed and sworn to before me this 22nd day of October, 2054 by Gary Woodfield, who is personally known to me or who produced _____ as identification.

BRENDA C. PETRONI
MY COMMISSION # FF 142087
EXPIRES: July 15, 2018
Bonded Thru Notary Public Underwriters

[SEAL]

Notary Public
Print Name: Brenda C. Petroni

Gary Woodfield

From: harry winderman <harry4334@hotmail.com>
Sent: Tuesday, October 06, 2015 2:45 PM
To: Gary Woodfield
Subject: RE: Michael Sullivan

Gary

Michael has turned over off of his documents to Lenny Samuel and therefore does not have those documents in his custody, control or possession.