

IN THE CIRCUIT COURT OF THE 17TH
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.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**DEFENDANT'S FRANK AVELLINO MOTION TO COMPEL
PLAINTIFFS TO PRODUCE ALL COMMUNICATIONS WITH MICHAEL
SULLIVAN AND HIS COUNSEL RELATED TO THE SETTLEMENT AGREEMENT**

Defendant, Frank Avellino ("Avellino"), by and through his undersigned counsel, files this Motion to Compel Plaintiffs to Produce all Communications with Michael Sullivan ("Sullivan") and his counsel related to the Settlement Agreement and as grounds therefore states as follows:

1. On October 5, 2015 Avellino served a Re-Notice of Taking Deposition of Sullivan *duces tecum*, which requested, *inter alia*, documents relating to the Settlement Agreement entered into between Sullivan and Plaintiffs on June 25/26 2014 ("Settlement Agreement").

2. Plaintiffs filed a Motion for Protective Order in response to the Notice of Taking Deposition *duces tecum* of Sullivan, alleging the documents sought are privileged under the work-product doctrine or the settlement communications privilege or both.

3. Avellino filed a Response to the Motion for Protective Order and a Motion to Compel Plaintiffs to produce all documents received from Sullivan.

4. At the October 26, 2015 hearing on these motions, this Court ordered Plaintiffs to make all corporate records received from Sullivan available for inspection and copying. To date, Plaintiffs have not responded to inquiries to make them available. The Court denied on grounds of work product Avellino's request to produce the written statement Plaintiffs obtained from Sullivan and requested a motion be filed by Avellino to specifically address the production of the communications between Plaintiffs and Sullivan and their counsel prior to, during and resulting in the Settlement Agreement.

5. The communications between Plaintiffs and Sullivan and his counsel are not protected by any privileges and Plaintiffs should be compelled to produce these documents. Since the documents were exchanged between Plaintiffs and Sullivan and his counsel, by definition, they cannot be work product,¹ and even if such communications were work product, the privilege was waived by the exchange of the documents between Plaintiffs and Sullivan and his counsel. See Section 90.507, Florida Statutes (waiver of privilege by voluntary disclosure).

6. Plaintiffs' claim that these communications are protected by settlement communications privilege also fails. Section 90.408, Florida Statutes, does not bar the production of all communications relating to settlements or compromise. As stated by the Court in *Wolowitz v. Thoroughbred Motors, Inc.*, 765 So.2d 920, 925 (Fla. 2d DCA 2000):

Section 90.408 excludes evidence of settlement negotiations only when the evidence is offered to prove liability, the absence of liability, or value. Thus, evidence of settlement negotiations is admissible to establish other relevant facts.

¹ 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 Telephone & Telegraph Company v. Deason*, 632So.2d 1377, 1384 (Fla. 1994).

See also Bankers Trust Company v. Basciano, 960 So.2d 773, 779-780 (Fla. 5th DCA 2007).

7. Here, the settlement communications between Plaintiffs and Sullivan and their counsel are not being sought to prove liability, absence of liability or its value. Sullivan was the managing general partner of the Partnerships, and according to Plaintiffs' allegations a co-conspirator with Avellino and the other Defendants. The communications between his counsel/him and the Plaintiffs and their counsel would be relevant to a number of issues in the litigation, including his knowledge of Madoff's Ponzi scheme², the partners' knowledge of Avellino; the alleged "kickbacks"; Avellino's alleged control of the Partnerships and other issues raised in the litigation.

WHEREFORE Defendant Frank Avellino respectfully requests this Court to enter an Order compelling Plaintiffs to provide all communications between themselves and their counsel and Michael Sullivan and his counsel in connection with the Settlement Agreement, including the communications prior to, during and resulting in the Settlement Agreement.

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By: /s/ Gary A. Woodfield
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² The Settlement Agreement expressly states that Plaintiffs do not believe Sullivan was aware that BLMIS was operating a ponzi scheme.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 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.

By: /s/ Gary A. Woodfield
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