

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

COMPLEX LITIGATION UNIT

CASE NO.: 12-034123 (07)

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

Plaintiffs,

v.

STEVEN JACOB, et al.,

Defendants.

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

Plaintiffs, by and through their undersigned counsel, hereby file this Response and Opposition to Defendant Frank Avellino's Motion to Compel Plaintiffs to Produce All Communications with Michael Sullivan and His Counsel Related to the Settlement Agreement (the "Motion"), and in support thereof state:

1. Florida has a public policy of encouraging settlement and Defendant Avellino is once again impermissibly seeking to use that against Plaintiffs by seeking documents related to Plaintiffs and former defendant Michael Sullivan entering into a Settlement Agreement in this action (the "Settlement Agreement").

2. The Motion requests 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.” (Motion at p. 3).

3. The Motion should be denied because (1) such communications are inadmissible and should not be produced under Fla. Stat. § 90.408; (2) Defendant Avellino can obtain the information on the issues he seeks to gain through the Motion by deposing Michael Sullivan (“Sullivan”); and (3) this Court has already denied Defendant Avellino’s requests for documents related to the Settlement Agreement.

4. Fla. Stat. § 90.408 promotes “Florida’s public policy favoring settlement by excluding such prejudicial evidence at trial.” *Saleeby v. Rocky Elson Const., Inc.*, 3 So. 3d 1078, 1083 (Fla. 2009). Specifically, Fla. Stat. § 90.408 provides:

Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.

5. The purpose of the Motion is to obtain information as to issues of liability or absence of liability, which is prohibited by Fla. Stat. § 90.408. The Motion states that the settlement communications sought may be relevant “to a number of issues in the litigation, including his knowledge of Madoff’s Ponzi scheme, the partners’ knowledge of Avellino; the alleged “kickbacks”; Avellino’s alleged control of the Partnerships and other issues raised in the litigation.” (Motion at p. 3). Such issues may relate to Avellino’s liability, absence of liability, and the defenses in this action. Accordingly, such communications addressing those issues are inadmissible under Fla. Stat. § 90.408 and should not be subject to discovery.

6. Avellino's request to obtain the Settlement Communications should be denied because he is able to obtain information about Sullivan's "knowledge of Madoff's Ponzi scheme, the partners' knowledge of Avellino; the alleged "kickbacks"; Avellino's alleged control of the Partnerships and other issues raised in the litigation" by deposing Sullivan. In fact, Defendant Avellino has already noticed Sullivan for deposition at least once, and his request for documents related to that deposition was the subject of a separate hearing before this Court.

7. Further, this is an improper attempt to have this Court reconsider an issue already decided by this Court. This Court previously rejected Defendant Avellino's attempts to obtain the documents and communications he seeks through the Motion. This Court rejected those attempts by its 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, dated September 15, 2014 and Order Denying Defendant Frank Avellino's Motion for Reconsideration and/or to Compel, dated December 15, 2014. A copy of the Court's orders are attached hereto as **Exhibit A** and **Exhibit B**. In its September 15, 2014 Order, the Court specifically struck Defendant Avellino's request for "related documents" in connection with settlement agreements that Plaintiffs entered into with Sullivan and other former defendants (*see Exhibit A*), and Defendant Avellino should not be allowed another bite at the apple through this Motion.

8. Accordingly Plaintiffs respectfully request that the Court enter an Order denying Defendant Avellino's Motion to compel production of privileged settlement communications.

WHEREFORE Plaintiffs respectfully request the Court enter an Order denying the Motion; and granting such further relief as the Court deems just and proper.

Dated: November 16, 2015

BERGER SINGERMAN LLP
Attorneys for Plaintiffs
350 East Las Olas Blvd, Suite 1000
Fort Lauderdale, FL 33301
Telephone: (954) 525-9900
Direct: (954) 712-5138
Facsimile: (954) 523-2872

By: s/ LEONARD K. SAMUELS
Leonard K. Samuels
Florida Bar No. 501610
lsamuels@bergersingerman.com
Steven D. Weber
Florida Bar No. 47543
sweber@bergersingerman.com
Zachary P. Hyman
Florida Bar No. 98581
zhyman@bergersingerman.com

and

MESSANA, P.A.
Attorneys for Plaintiffs
401 East Las Olas Boulevard, Suite 1400
Ft. Lauderdale, FL 33301
Telephone: (954) 712-7400
Facsimile: (954) 712-7401

By: /s/ Thomas M. Messana
Thomas M. Messana, Esq.
Florida Bar No. 991422
tmessana@messana-law.com
Brett D. Lieberman, Esq.
Florida Bar No. 69583
blieberman@messana-law.com
Thomas G. Zeichman, Esq.
Florida Bar No. 99239
tzeichman@messana-law.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this November 16, 2015, the foregoing was filed using the Florida Courts E-Filing Portal, which sent notification to the following parties:

Peter G. Herman, Esq.
Tripp Scott
110 SE 6th Street
15th Floor
Fort Lauderdale, FL 33301
Tel.: 954-525-7500
Fax.: 954-761-8475
pgh@trippscott.com
*Attorneys for Steven Jacob; Steven F. Jacob
CPA & Associates, Inc.*

Thomas M. Messana, Esq.
Messana, P.A.
401 East Las Olas Boulevard, Suite 1400
Fort Lauderdale, FL 33301
Tel.: 954-712-7400
Fax: 954-712-7401
tmessana@messana-law.com
Attorneys for Plaintiffs

Gary A. Woodfield, Esq.
Haile, Shaw & Pfaffenberger, P.A.
660 U.S. Highway One, Third Floor
North Palm Beach, FL 33408
Tel.: 561-627-8100
Fax.: 561-622-7603
gwoodfiled@haileshaw.com
bpetroni@haileshaw.com
eservices@haileshaw.com
Attorneys for Frank Avellino

Mark F. Raymond, Esq.
mraymond@broadandcassel.com
Jonathan Etra, Esq.
jetra@broadandcassel.com
Christopher Cavallo, Esq.
ccavallo@broadandcassel.com
Broad and Cassel
One Biscayne Boulevard, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Tel.: 305-373-9400
Fax.: 305-373-9443
Attorneys for Michael Bienes

By: s/Leonard K. Samuels
Leonard K. Samuels

Exhibit A

PHILIP J. VON KAHLE ET AL. V. STEVEN JACOB, ET AL.

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

Jes
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.

JE Streitfeld
The Honorable Jeffrey E. Streitfeld
CIRCUIT COURT JUDGE

Conformed copies to:

Jes
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

Gary A. Woodfield, Esq., Haile, Shaw & Pfaffenberger, P.A., 660 US Highway One, Third Floor, North Palm Beach, FL 33408 gwoodfield@haileshaw.com; bpetroni@haileshaw.com; syoffee@haileshaw.com; cmarino@haileshaw.com

Thomas M. Messana, Esq., Messana, P.A., 401 East Las Olas Blvd., Suite 1400, Fort Lauderdale, FL 33301 tmessana@messana-law.com; tmessana@bellsouth.net; mwslawfirm@gmail.com; tzeichman@messana-law.com

Leonard Samuels, Esq., Etan Mark, Esq., Steven D. Weber, Esq., Berger Singerman LLP, 350 East Las Olas Blvd, Suite 1000, Fort Lauderdale, FL 33301 lsamuels@bergersingerman.com; emark@bergersingerman.com; sweber@bergersingerman.com

Peter G. Herman, Esq, Tripp Scott, 110 Se 6th Street, 15th Floor, Fort Lauderdale, FL 33301 pgh@trippscott.com; rep@trippscott.com; ele@trippscott.com

Mark F. Raymond, Esq., Jonathan Etra, Esq., Christopher Cavallo, Esq., Shane P. Martin, Esq., Broad and Cassel, One Biscayne Blvd., 21st Floor, 2 S. Biscayne Blvd., Miami, FL 33131 mraymond@broadandcassel.com; jetra@broadandcassel.com; msoza@broadandcassel.com; ccavallo@broadandcassel.com; msanchez@broadandcassel.com

Exhibit B

PHILIP J. VON KAHLE ET AL. V. STEVEN JACOB, ET AL.

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

**Case No: 12-034123(07)
Complex Litigation Unit**

P&S ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership; and S&P
ASSOCIATES, GENERAL PARTNERSHIP, a
Florida limited partnership, PHILIP VON KAHLE
as Conservator of P&S ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited partnership, and
S&P ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership

Plaintiffs,

v.

MICHAEL D. SULLIVAN, an individual, *ET AL.*,

Defendants.

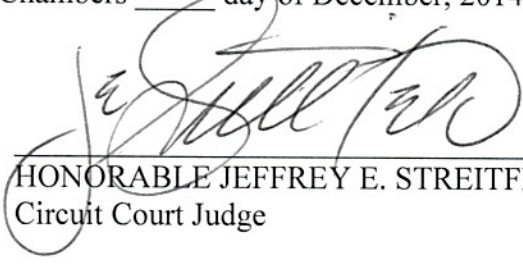
**ORDER DENYING DEFENDANT FRANK AVELLINO'S MOTION
FOR RECONSIDERATION AND/OR TO COMPEL**

THIS MATTER came before the Court on Defendant Frank Avellino's Motion for Reconsideration and/or to Compel (the "Motion"). The Court, having reviewed the Motion, having heard argument from counsel for parties, and being otherwise duly advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Motion is denied.

DONE AND ORDERED in Chambers ^{tu} 15 day of December, 2014.


HONORABLE JEFFREY E. STREITFELD
Circuit Court Judge

Copies furnished to:

Leonard K. Samuels, Esq. who is directed to serve same upon all interested parties.