

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

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

Plaintiffs,  
vs.

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

MICHAEL D. SULLIVAN, et al.,  
Defendants.

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**PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO  
DEFENDANT FRANK AVELLINO'S  
MOTION FOR RECONSIDERATION AND/OR TO COMPEL PLAINTIFF**

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 Frank Avellino's* ("Defendant") *Motion for Reconsideration and/or to Compel* (the "Motion"). In support thereof, Plaintiffs state as follows:

1. By motion to compel dated April 29, 2014, Defendant sought production of all settlement agreements, and related documents, entered into between Plaintiffs and any of the Defendants in this action ("First Motion to Compel").

2. In response, the Court limited the relief granted to only certain settlement agreements by its order dated September 15, 2014 (the "Order").

3. The Order specifically denied the First Motion to Compel's request for *all* "settlement agreements and related documents entered into with any of the defendants in this action" – ostensibly because such documents were confidential and/or work product.

4. Now, the Defendant attempts to take a second bite at compelling production of those documents related to settlement agreements, specifically statements and documents allegedly provided them by Sullivan as part of the settlement agreement, certain of which were not in Plaintiffs' possession at the time Defendant filed the First Motion to Compel and made his requests that were the subject of that motion.

5. This Court ought to deny the relief requested because the Defendant has not put forth good cause for modifying the Order, for allowing him to invade materials protected by the work product doctrine, or for allowing him to shortcut the discovery process by obtaining documents through his instant motion for reconsideration that were not previously in Plaintiffs' possession at the time they were requested and for which there is no outstanding request.

6. First, Defendant should be required to obtain the information he seeks through discovery directed at Sullivan, by deposition or otherwise, because the information he seeks through the instant motion is protected by work product doctrine. "[T]here are two types of work product, fact work product which is information gathered in anticipation of litigation, and opinion work product which consists of counsel's opinions, conclusions and theories. Fact work product is subject to discovery upon a showing of need and undue hardship, while opinion work product is protected from disclosure." *Leventhal v. Lohmann*, 721 So. 2d 1249, 1250 (Fla. 4<sup>th</sup> Dist. Ct. App. 1998) (internal citations omitted).

7. "The rationale supporting the work product doctrine is that 'one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.'" *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994) quoting *Dodson v. Persell*, 390 So.2d 704, 708 (Fla.1980).

8. In this case, the Defendant cannot demonstrate undue hardship if the work product he seeks is not provided by Plaintiffs because Defendant through the rules of discovery may seek depositions and documents of Sullivan. Plaintiffs have agreed to cooperate in coordinating a deposition of Sullivan, and Defendant should not reap the benefits of Plaintiffs own investigative work when the information that Defendant is seeking is available through Sullivan.

9. Second, this Court should not permit the Defendant to bypass the rules of discovery by permitting Defendant to compel the production of documents which were not in the Plaintiffs possession, or in certain cases, in existence at the time the of the requests that were the subject of the First Motion to Compel – and for which there is no outstanding request.

### **CONCLUSION**

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.

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