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 MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' SUPPLEMENTAL RESPONSE TO AVELLINO'S FIRST REQUEST FOR PRODUCTION AND SUPPLEMENTAL OBJECTIONS TO INTERROGATORIES AND MOTION TO COMPEL PLAINTIFFS TO PRODUCE DOCUMENTS AND TO ANSWER INTERROGATORIES

Defendant Frank Avellino ("Avellino"), files this Memorandum in Support of his Motion to Strike Plaintiffs' Supplemental Response to Avellino's First Request for Production and Supplemental Objections to Interrogatories and Motion to Compel Plaintiffs to Produce Documents and to Answer Interrogatories (the "Motion").

BACKGROUND

Plaintiffs, S & P Associates, General Partnership ("S & P"), P & S Associates, General Partnership ("P & S") (together "the Partnerships"), and Philip Von Kahle as Conservator of the Partnerships ("Plaintiff") have sued multiple defendants, including Avellino. The second amended complaint alleges ten causes of action, seven of them against Avellino (aiding and abetting a breach of fiduciary duty; avoidance of fraudulent transfers pursuant to Section 726.105(1)(A); unjust enrichment; money had and received; civil conspiracy; and two negligence counts).

As set forth in the Motion, the boilerplate conclusory objections raised to the discovery propounded by Avellino upon Plaintiffs render them meaningless, and they should be stricken. Even if considered on their merits, they should be overruled and Plaintiffs should be compelled to produce the documents and to provide more complete answers to interrogatories. *See, e.g. Christie v. Hixson*, 358 So. 2d 859 (Fla. 4th DCA 1978) ("we determine the trial court erred in sustaining objections to interrogatories and in entering a protective order as the objections were non-specific and insufficient."); *Carson v. City of Fort Lauderdale*, 173 So. 2d 743, 745 (Fla. 2d DCA 1965) (opining that the then-applicable Florida Rules of Civil Procedure "contemplate the same burden being imposed on an objecting party" as do the federal rules, and holding that, "[c]learly, the 'blanket' objections filed by the City did not sustain that burden.").

GENERAL OBJECTIONS

Plaintiffs' Responses to the Request and to the Interrogatories include "General Objections" which, despite their obvious inapplicability to many of the requests, are incorporated into every single response and answer. As held, *inter alia*, in *Christie* and *Carson, supra*, such all-inclusive, unsubstantiated objections are patently improper. Furthermore, in this case, they are without merit when considered individually:

1. **Plaintiffs' review of documents is still in its initial phases and documents still need to be produced by Avellino** (Objection 1 to Request). This case has been pending over a year and the Plaintiffs' obligation to produce documents is independent of Avellino's production. In fact, Avellino propounded discovery upon Plaintiff two months before Plaintiff propounded any upon Avellino, so Plaintiff cannot use any desire it may have for documents from Avellino as an excuse for its own delay – particularly since Plaintiff didn't even propound discovery until

January 24, 2014. Plaintiffs would have the same duty of production even if he had not propounded any request upon Avellino.

2. **Plaintiffs objected to every request and interrogatory to the extent that they seek information protected by the work product or attorney client privilege, and indicated that, to the extent documents are being withheld based upon privilege, he will produce a log upon request and as soon as practicable** (Objection 3 to Request and Objection 3 to Interrogatories). This objection – without further elaboration or applicability – was made without any filing of, or motion directed to, a privilege log. Such a log is made mandatory by Florida Rules of Civil Procedure 1.280(b) (5). *See, e.g. TIG Insurance Corporation of America vs. Johnson*, 799 So.2d 339 (Fla. 4th DCA 2001) which recognized the mandatory language contained within the rule, relied upon federal cases which had found waiver of the privilege where the mandatory rule had been violated, and therefore concluded that the judge's finding of a waiver of the privilege was not a departure from the essential requirement of law.[1] Avellino was not obligated to request a privilege log; Plaintiffs were required to furnish one, and their failure to do so constitutes a waiver of the privilege.

3. **Plaintiffs objected to every request and question to the extent that they require "the production of documents which are in the possession of third parties" or "call[s] for information "more easily obtained through other parties or sources."** (Objection 8 to Request and Objection 4 to Interrogatories). The ability to obtain documents from third

[1] Although a privilege log is not required unless the information is "otherwise discoverable," in this case the other objections are merely boilerplate generic objections which are, on their face, improper. Since the other objections were invalid, the privilege log should have been filed.

parties does not negate Plaintiff's ability to produce documents over which he has custody or control. Nor does the ease with which documents and information could be obtained from other sources. It is not the obligation of this Court to surmise, then to weigh, the relative burden of plaintiffs' production of documents against the burden which may be placed upon others who did not file this suit. *See, e.g., Carson v. City of Fort Lauderdale* at 744 ("Equally well recognized, however, is that the burden of proving the validity of objections is upon the objecting party.").

4. **Plaintiffs objected to all requests and interrogatories insofar as they purport to require information and documents that are irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, or otherwise beyond the scope of permissible discovery** (Objection 10 to the Request; Objections 1 and 2 to the Interrogatories). This objection exemplifies the bad faith with which Plaintiffs' entire response was made – the Request and Interrogatories were focused directly upon allegations made by Plaintiffs, who then made a boilerplate objection of irrelevancy. The relevance is apparent on the basis of each request, though to be discoverable such an obvious relationship between the requests and the relevance is not necessary; it is only necessary that the request be "reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Civ. P. 1.280 (b)(1).

5. **Plaintiffs objected to each interrogatory and request to the extent that it is harassing, unduly burdensome, oppressive, or overly broad, as well as vague and ambiguous.** (Objections 8 and 11 to the Request; Objection 2 to the Interrogatories). Again, the indiscriminate reliance upon this objection obviates Avellino's need to respond. What requests do the Plaintiffs consider to be harassing? Which ones are burdensome or oppressive? What makes them burdensome?

The Fourth District Court of Appeal has specifically recognized that words such as "overlybroad" and "burdensome" "have little meaning without substantive support." *First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Association, Inc.*, 545 So.2d 502, 503 (Fla. 4th DCA 1989) (disapproved of to the extent that it may have provided certiorari relief on the basis of overbreadth). As explained in *First City,* parties asserting the objections must "show the volume of documents, or the number of man hours requiring the production, or some other quantitative factor that would make it so." *Id.* at 503. *See, also, Board of Trustees of the Internal Improvement Trust Fund vs. American Educational Enterprises, LLC*, 99 So.3rd 450 (Fla. 2012).

"[G]eneral objections . . . that they are unreasonably burdensome, oppressive and vexatious, or that they seek information which is easily available to the interrogating party as to the objecting party, or that they would cause annoyance, expense, and oppression to the objecting party . . . are insufficient." *Carson v. City of Fort Lauderdale* at 744-45. Such an objection, "stated baldly and without particulars, is patently without merit. . . . Such 'stonewalling tactics,' designed to delay making a timely response to valid discovery requests, constitute discovery abuse and should not be condoned." *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189, 1193 (Fla. 4th DCA 1999) *disapproved on other grounds by Florida Convalescent Centers v. Somberg*, 840 So.2d 998 (Fla. 2003).

6. **Plaintiffs objected to each interrogatory and request to the extent that it calls for proprietary, confidential or financial information "of the Partnerships and/or a non-party" until a protective order is entered** (Objection 13 to the Request; Objection 5 to the Interrogatories). This supplemental objection was asserted on March 28. 2014 despite the fact

that on February 28, 2014, Plaintiff submitted to the court an Agreed Confidentiality Order which was entered in this case on March 7, 2014.

COMMON OBJECTIONS

In addition to the "General Objections" which Plaintiffs incorporated into every single one of its responses, there are other objections which are common to virtually all of their responses and answers ("Common Objections"). These Common Objections, like the General Objections, render the responses meaningless as, *inter alia*, the qualifications imposed make it impossible to tell whether any documents are being withheld. Specifically, Plaintiffs have agreed to produce only documents which are otherwise (1) non-privileged, (2) have not already been produced in response to "another Request above," (3) are not in Avellino's possession and (4) cannot be "more easily obtained through other parties or sources;" and even (5) what Plaintiff has agreed to produce or answer is only being produced "subject to" the objections.

Production of Documents and Answering Interrogatories "Subject to Objection"

Included within every single response for specific documents is an assertion that certain documents will be produced "[s]ubject to the Specific and General Objections above." Every question was answered, "[w]ithout waiving the general objections," "within the limits of these objections," "[w]ithout waiver of the foregoing [individual objections], and "subject to the specific and general objections above." Such unintelligible qualifications render the response meaningless. As explained in *Estridge v. Target Corp.*, 11-61490-CIV, 2012 WL 527051 (S.D. Fla. 2012):

> Defendant has asserted various objections and then proceeded to answer the interrogatories and responded to the requests for production 'subject to and without waiving' its objections. Plaintiff argues that such responses are insufficient and the Court, therefore, should overrule the objections. This Court agrees. Although this practice has become commonplace, courts in the Eleventh Circuit have found that "whenever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands . . . . As one court in this District has noted, such objections and answer "*preserve[ ] nothing and serve[ ] only to waste the time and resources of both the Parties and the Court.* Further, such practice leaves the requesting Party uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered." . . .

Id. at *1, 2 (emphasis added, internal citations omitted).[2]

> [A]nswering subject to an objection lacks any rational basis. There is either a sustainable objection to a question or request or there is not. . . . Other courts have remarked that all a mixed response really says is the counsel does not know for sure whether the objection is sustainable, that it probably is not, but thinks it is wise to cover all bets anyway, just in case.

Chemoil Corp. v. MSA V, 2:12-CV-472-FTM-99, 2013 WL 944949 (M.D. Fla. 2013) *aff'd*, 2:12-CV-472-FTM-38, 2013 WL 3070853 (M.D. Fla. 2013).

For this reason alone, every General and Common Objection should either be stricken or overruled. Considering each objection individually leads to the same conclusion.

[2] "Because the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of the [Florida] rules." *Royal Caribbean Cruises, Ltd. v. Cox*, 974 So. 2d 462, 466, n. 1 (Fla. 3d DCA 2008).

Objection to Producing Documents and Providing Information Already in Avellino's Possession

Every interrogatory answer, as well as the responses to paragraphs 2 through 12 of the Request, objects to the extent that "information sought is within Avellino's possession." Plaintiffs cannot merely object to producing entire categories of documents or to answering questions for this reason. *See, e.g., Cook v. Rockwell Intern. Corp.,* 161 F.R.D. 103, 105 (D. Colo. 1995), *citing Weiner v. Bache Halsey Stuart, Inc.,* 76 F.R.D. 624, 625 (S.D.Fla.1977). Furthermore, if Plaintiffs were willing to accept the facts as Defendant knows them to be true, he would not have filed this case. Avellino is entitled to know what the *Plaintiff* believes the facts to be, and the information upon which they base their allegations.

Production of Documents Not Already Produced

Plaintiffs responded to every single request by indicating that he would produce documents which have not already been produced in response to "another Request above." Avellino has not propounded another Request for Production in this case. This boilerplate limitation bears no relationship to the instant case and should be stricken. Plaintiffs relied upon this objection in responding to the first item requested, so cannot be referring only to earlier requests within this particular Request for Production.

PARTICULAR REQUESTS

The only requests to which the Plaintiffs asserted any other objections in addition to the generic objections set forth above are paragraphs 5, 11 and 13. Plaintiffs contend that 5 and 11 call "for a legal conclusion." More specifically, the requests that met with this objection are as follows:

> **5. All documents evidencing and/or referencing that Avellino was a co-conspirator with Sullivan and others.**
>
> **11. All documents evidencing and/or referencing any aiding and abetting by Avellino of Sullivan's breach of fiduciary duty of loyalty and care to the Partnerships.**

Such an objection is inapplicable when raised in reference to a document request. Furthermore, it should be noted that "calling for a legal conclusion" is not alone grounds for objecting to discovery. *See, e.g., Travelers Ins. Co. v. Wilson*, 371 So. 2d 145, 148 (Fla. 3d DCA 1979) (an interrogatory may properly seek an opinion concerning legal fault). *See, also, Dickinson v. Wells*, 454 So.2d 758, 759 (Fla. 1st DCA 1984) ("An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or calls for a conclusion or asks for information not within the personal knowledge of the party.").

Furthermore, the documents requested go to the heart of the allegations against Avellino. If there are documents which reflect that Avellino joined with others to pay management fees improperly rather than to invest Plaintiff's funds (i.e. "conspired"), or aided others in improperly paying management fees rather than investing funds, the requested documents, if they exist, would reflect facts. In fact, they would reflect facts which Plaintiffs must prove at trial. There is no valid reason not to produce these documents.

Finally, paragraph 13 requests the following:

> **13. All documents evidencing and/or referencing all management or referral fees, made by or on behalf of the Partnerships.**

Plaintiffs elaborated upon their generic overly-broad objection in response to this paragraph by stating that:

> **producing all documents that relate to the management or referral fees made by or on behalf of the partnerships, regardless of whether they were made for, or on behalf of Avellino, is not likely to lead to the production of admissible evidence.**

To the contrary, to the extent that the Plaintiffs allege that any fees paid to Avellino were inappropriate, then the fees paid to other persons or entities are relevant to the issue of the reasonableness of the fees paid to Avellino.

PARTICULAR INTERROGATORIES

In addition to the general and common objections subject to which each interrogatory was qualifiedly answered, Plaintiffs raised specific objections to interrogatories 2, 4, 6 and 11 as set forth below:

> **2. Please specify the specific assets of the partnerships that you contend were funneled to Avellino, the date they were funneled to him, the amounts, and by whom they were funneled.**

In addition to the generic objection, Plaintiffs indicated that "the interrogatories do not define the word "funnel" or "funneled" and therefore it is overly broad."

However, paragraph 23 of the complaint alleged that "the assets of the partnerships were *funneled* to Sullivan and other defendants in the form of 'commissions' or 'referral fees'". It is disingenuous for Plaintiffs to use that word in their complaint yet object when Avellino uses that word to obtain documents evidencing the allegations within the complaint. Regardless of the fact that Plaintiffs' second amended complaint does not use this particular word, Plaintiffs should

ascribe the same definitions in responding to discovery as used in drafting the complaint. Avellino should not be required to propound additional discovery for each word Plaintiffs change in their multiple attempts to state a cause of action.

6. Please identify the witnesses who have knowledge of the facts set forth in your answer to interrogatory number 5 above.

Plaintiffs objected to this interrogatory to the extent that it "discovery has recently begun and additional witnesses may be identified. Plaintiffs preserves their right to identify and utilize such witnesses." It is ironic that Plaintiffs' objections included an objection to having to supplement its responses and answers (Objection 6 to Interrogatories; Objection 14 to Request), yet it purports to reserve the right to supplement them and to use witnesses found later. Plaintiffs have no such automatic "right," and whether they are entitled to do so will depend upon, *inter alia*, the good faith with which they seek to provide additional information and the prejudice incurred by Avellino should the plaintiffs come up with last minute evidence or witnesses. Since this case has been pending since 2012, it is disingenuous for Plaintiffs to assert that it is too early for them to identify witnesses. Furthermore, the interrogatory does not ask who the Plaintiffs will be calling as trial witnesses, but who have knowledge of the facts. Such information is specifically made discoverable, without any time constraints applicable here. Fla. R. Civ. P. 1.280 (b) (1).

11. Please identify the damages you intend you incurred as a result of any actions or statements by Avellino, and provide the calculation for same.

Plaintiffs objected to the extent that this question seeks an expert opinion, while at the same time purporting to answer the question. Either Plaintiffs can answer they or cannot. If an

expert is required, they should indicate the type of damages about which the expert is expected to testify.

INCOMPLETE ANSWERS

In addition to improperly objecting to each of the interrogatories, the qualified answers which Plaintiffs did provide were also insufficient and should be supplemented:

> **1. Identify each general partner who was introduced to the partnerships through Avellino, and for each one, identify when he was introduced, by who he was introduced and identify any other persons who were present when the introductions were made.**

In answering this question, Plaintiffs merely listed the names of general partners who were introduced "through" Avellino, but did not provide any dates or other information as to when each partner was introduced, or "by" whom he was introduced. Nor did the answer include the identity of any other person present when the introductions were made.

> 2. **Please specify the specific assets of the partnerships that you contend were funneled to Avellino, the date they were funneled to him, the amounts, and by whom they were funneled.**

The answer provides only dollar amounts by year, but no specific dates and no identification of the person by whom they were funneled.

> **3. Please specify all actions and/or statements made by Avellino which you contend demonstrates or evidences that he was a co-conspirator with Sullivan and others.**

The answer provides that

- "certain" records reflect that Avellino directed Sullivan to make payments on his behalf;

- "certain" records reflect that Avellino directed Sullivan to pay fees to Richard J. Wills;
- "certain" records reflect that Avellino was involved in the partnership's formation;
- "certain" correspondence reflects that Avellino worked as an intermediary between Sullivan and investors in the partnerships.

Plaintiffs should be required to specifically identify which records and correspondence support which of their various contentions.

> **4. Please identify all management fees which you contend were paid to Avellino, including the amount, the date paid, and the method of payment.**

The answer provides totals paid by year rather than individual dates fees were allegedly paid.

> 11. **Please identify the damages you contend you incurred as a result of any actions or statements by Avellino, and provide the calculation for same.**

In response to this question, Plaintiffs stated that "Avellino encouraged Sullivan to invest the Partnerships' assets with BLMIS. Avellino encouraged certain partners to invest in the Partnerships and received kickbacks related to same." Plaintiffs do not mention the amount of the "kickbacks" but does continue, "the damages to the Partnerships are the amount of their net losses invested with BLMIS" then just concludes "S & P's damages of $10,131,036; and "P & S' damages of $2,406,624.65." Other dollar amounts were provided for Sullivan's breaches of fiduciary duty ($7,343,947.35) and for commissions received by Avellino ($307,790.84). The answer includes no calculations as required by the question. How, for example, were the fiduciary damages calculated?

CONCLUSION

Avellino's counsel provided Plaintiffs with the Motion prior to filing it, and conducted a conference call with Plaintiffs' counsel to discuss the objections at which time Plaintiffs agreed to amend their discovery responses. However, Plaintiffs supplemental responses and answers do not correct the deficiencies of the discovery responses. Plaintiffs' intentional obfuscation of the issues was made apparent when Plaintiffs continued to provide useless answers and responses "subject to" meritless, boilerplate objections.

Wherefore, Avellino requests this court to strike Plaintiffs' Supplemental Responses and Objections to Defendant's First Request for Production and to require Plaintiffs to produce all requested documents. Alternatively, Avellino requests this Court to overrule Plaintiffs' objections to the Request and to order Plaintiffs to produce all requested documents. Avellino also requests that Plaintiffs be required to amend their written response to verify that all documents have been produced or to specify what has not been produced, if the Court allows Plaintiffs to withhold any documents. Avellino also requests this Court to overrule all Supplemental Objections to the Interrogatories and to require Plaintiffs to supplement their answers. Avellino further requests a finding that the Plaintiffs have waived all privileges for failure to file a log of documents and information withheld based upon privilege, or, alternatively, to provide a privilege log. Finally, Avellino requests the assessment of expenses and attorney fees against Plaintiffs pursuant to Florida Rule of Civil Procedure 1.380 (d).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of 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 this 7th day of April, 2014

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