

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

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

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

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO
DEFENDANT FRANK AVELLINO'S MOTION TO STRIKE PLAINTIFFS'
SUPPLEMENTAL RESPONSES AND OBJECTIONS TO AVELLINO'S REQUEST FOR
PRODUCTION AND SUPPLEMENTAL OBJECTIONS TO INTERROGATORIES
AND MOTION TO COMPEL PLAINTIFF TO PRODUCE DOCUMENTS AND
ANSWER INTERROGATORIES, AND
PLAINTIFFS' CROSS-MOTION FOR PROTECTIVE ORDER**

Plaintiffs P & S Associates, General Partnership ("P&S"), S & P Associates, General Partnership ("S&P") (collectively, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Frank Avellino's ("Defendant") Motion to Strike Plaintiffs' Supplemental Responses and Objections to Avellino's Request for Production and Supplemental Objection to Interrogatories and Motion to Compel Plaintiff to Produce Documents and Answer Interrogatories and Memorandum in Support (collectively the "Motion"), and Plaintiff's Cross-Motion for Protective Order. In support thereof, Plaintiffs state as follows:

I. INTRODUCTION

The Motion should be denied. First, many of the issues raised by the Motion are moot given Plaintiffs' supplementary discovery responses. Those issues include Defendant's

objections to Plaintiffs' general objections and certain specific objections. Second, Plaintiffs' responses, as provided by Second Supplement (Attached hereto as Exhibit A), are complete and the Plaintiffs should not be compelled to provide additional responses. Finally, certain of Defendant's discovery requests are overly broad and lack the clarity that would enable Plaintiff to prepare a privilege log, and therefore an order of protection should be entered.

II. ARGUMENT

1. Defendant's Arguments Regarding Plaintiffs' General Objections Are Moot.

The Motion contends that Plaintiffs' general objections, which were incorporated into each response, are improper. Defendant claims that this practice evidences bad faith; however, *Defendant's* interrogatory responses to Plaintiffs' discovery requests contain the same alleged impropriety. See Exhibit B at p. 5 ¶5.

Regardless, the Plaintiffs Second Supplement removed the language that Defendant objects to. See Exhibit A at pp. 3, 11. Accordingly, the perceived issues regarding Plaintiffs' general objections are moot.

2. Defendant's Arguments Regarding the "Common Objections" Are Illusory.

The Motion purports to identify five "common objections" in Plaintiffs' Responses whereby Plaintiffs '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."

First, Plaintiffs' Second Supplement does not rely upon "common objections" numbers 2, 3, 4, and 5 therefore those issues are moot. See Exhibit A at p 2-9.

Next, Defendant is not entitled to any privileged documents. To the extent that Defendant's Request for Production are so broad as to include privileged documents such as attorney's memorandums or correspondence with a client – and Plaintiffs' have objected on those grounds – a protective order is appropriate and should be entered for the reasons set forth below.

3. Defendant's Arguments Regarding "Subject to Objection" Are Moot Or Irrelevant.

The Motion contends that the Plaintiffs objections ought to be overruled or stricken in that each response is provided either "subject to" or "without waiver" of the objections.

In the Second Supplement, Plaintiffs have omitted the "subject to" language from their responses, therefore this issue is moot. See Exhibit A.

Next, Plaintiffs' have removed the "without waiver" or similar language from most of their responses. However, the language remains in response to Interrogatories 2 and 11:

Response to Interrogatory No. 2: "Plaintiff reserves the right to provide supplemental responses as additional information becomes available or is made know to Plaintiff. The Plaintiff responds, without waiving its objection:"

Response to Interrogatory No. 11: "The Plaintiff objects to this Interrogatory to the extent it seeks an expert opinion and reserves the right to supplement this answer as necessary. Without waiving the above objection, the Plaintiff responds:"

In both instances, the response provided was complete as of that date. Additionally, with respect to Interrogatory 11, the Plaintiffs merely reserved their right to supplement or rely upon an expert opinion when one is available – as they were not required to designate such an expert at the time of their response. Accordingly, Plaintiffs' objections for Interrogatories 2 and 11 should not be stricken or overruled.

4. The Issues Raised by Pages 8-10 of the Motion Are Moot.

On pages 8 – 10 of the Motion, Defendant makes arguments regarding “objection to producing documents and providing information already in Avellino’s possession”, “production of documents not already produced”, and “particular requests.” These issues are moot because Plaintiffs have already corrected Defendants’ perceived issues with Plaintiffs’ discovery requests. *See* Exhibit A at 2-9.

5. Defendants’ Arguments Regarding Plaintiffs’ Responses Interrogatories 1, 2, 3, 4, 6, And 11 Are Without Merit.

Defendants’ Motion raises arguments with respect to Plaintiffs’ responses to Interrogatories 1, 2, 3, 4, and 6. All of these arguments lack merit.

First, Defendant argues that objections raised in response to Interrogatories 2, 6, and 11 are inappropriate. He is wrong and/or these issues are moot.

Plaintiff’s Second Supplement omits the objections previously utilized in Interrogatories 2 and 6 that are cited by the Motion. Such issues are moot. Additionally, for Interrogatory 11, Plaintiffs provided a complete answer regarding damages, while reserving the right to seek an expert opinion – as no expert designation was due at the time. Plaintiffs are entitled to rely upon an expert’s opinion at the appropriate time. Therefore, Plaintiff’s objection to Interrogatory 11 should not be struck.

Second, the Motion argues that Plaintiff responses to Interrogatories 1, 2, 3, 4, and 11 are incomplete. Plaintiffs’ Second Supplement has already addressed each of the perceived issues with these interrogatory responses.

For Interrogatories 1, 2, and 4, the Second Supplement identifies by bates number which documents contain the responsive information. Rule 1.340(c) of the Florida Rules of Civil Procedure authorizes the production of documents in response to an interrogatory. Accordingly,

the Plaintiffs' responses to Interrogatories 1, 2, and 4 are complete. To the extent Defendant contends the Plaintiffs are required to provide information which is not presently known to the Plaintiffs, such Interrogatory is improper and requests an answer not required by the Florida Rules of Civil Procedure. For example, Defendant contends that a complete answer to Interrogatory 1 would include the identity of any other person present when Defendant made an introduction to the Partnerships. However, the Plaintiff, a Court-appointed professional fiduciary, should not be expected to be in possession of such first-hand knowledge.

For Interrogatory 3, Defendant contends that Plaintiff should be required to identify which documents support their contentions. The Second Supplement uses specific descriptions of the documents which provide responsive information. Therefore, Defendant's argument regarding this interrogatory is moot.

For Interrogatory 11, which states **"Please identify the damages you contend you incurred as a result of any actions or statements by Avellino, and provide the calculation for same"** Defendant contends that Plaintiffs' answer is incomplete because, among other things, it does not specify how the "fiduciary" damages were calculated. However, Interrogatory 11 does not ask the Plaintiffs to provide a calculation of damages for each cause of action asserted by the Complaint. Moreover, the Second Supplement provides how and why the damages were calculated. Plaintiffs' have delineated between the damages for advising the Partnerships to invest with BLMIS and the damages due to receiving the improper commissions, and set forth how those damages were calculated. Accordingly, Plaintiffs' have provided a complete response to Interrogatory 11.

III. PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

Defendant's contention that his discovery requests may seek privileged information necessitates the entry of a protective order.

Here, Plaintiffs have met their discovery obligations by producing non-privileged documents and objecting to the broadness of the requests as they would appear to also encompass privileged information. To date, Defendant has not clarified which documents he is requesting. Therefore, Plaintiffs are unable to determine whether a privilege log is appropriate. *Gosman v. Luzinski*, 937 So. 2d 293, 296 (Fla. 4th DCA 2006) (“A party is required to file a log only if the information is ‘otherwise discoverable.’”)

To the extent that Defendant is arguing that his Requests are broad enough to implicate documents protected by work product and attorney client privilege, a protective order ought to be entered limiting Defendant’s discovery request to non-privileged information and documents. *Alvarez v. Cooper Tire & Rubber Co.*, 75 So. 3d 789, 793 (Fla. 4th DCA 2011) (“A trial court is given wide discretion in dealing with discovery matters, and unless there is a clear abuse of that discretion, the appellate court will not disturb the trial court’s order”).

Finally, Defendant’s argument that Plaintiffs have waived privilege by failing to provide a privilege log is not supported by Florida law. Plaintiffs are not obligated to prepare a privilege log where the Court has not ruled upon its objections and determined the scope of discovery. *Gosman v. Luzinski*, 937 So. 2d 293, 296 (Fla. 4th DCA 2006) (“Before a written objection to a request for production of documents is ruled upon, the documents are not ‘otherwise discoverable’ and thus the obligation to file a privilege log does not arise.”). Plaintiffs have so objected, and the Court has not ruled upon whether Defendant’s requests are vague and ambiguous and/or not reasonably calculated to lead to the discovery of admissible evidence. Once the requests are clarified by the Court, Plaintiffs will prepare a privilege log, if appropriate.

CONCLUSION

WHEREFORE the Plaintiffs request that this Court enter an order denying the Motion, granting Plaintiffs' Motion for Protective Order, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated: May 11, 2014

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Exhibit "A"

IN THE CIRCUIT COURT FOR THE
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PHILIP J. VON KAHLE, as Conservator of
P&S Associates, General Partnership and
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Plaintiffs,

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Defendants.

**PLAINTIFFS' SECOND SUPPLEMENTAL RESPONSES AND OBJECTIONS TO
DEFENDANT FRANK AVELLINO'S REQUEST TO PRODUCE TO PLAINTIFF**

Plaintiffs, by and through the undersigned counsel, hereby provides supplemental responses and objections to Defendant, Frank Avellino's ("Avellino") Request for Production of Documents to Plaintiff, pursuant to Rule 1.350 of the Florida Rules of Civil Procedure.

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GENERAL OBJECTIONS

General Objection 1: Plaintiffs will respond to Defendants' request for production while reserving the right to supplement their responses at a later time.

General Objection 2: To the extent that documents are protected by the Work Product or Attorney-Client Privilege, or any other applicable privilege law or rule, Plaintiffs object to their production.

General Objection 3: Plaintiffs' production of any document is not an acknowledgement that such document is relevant to any issue in the litigation between them and Defendants and/or acknowledgement that such document is responsive to any request.

General Objection 4: It is possible that Plaintiffs will inadvertently produce a document that is otherwise privileged. Such inadvertent production is not intended to waive, alter or otherwise impact the privilege with respect to the particular document, with respect to the subject matter(s) reflected in the document and/or otherwise.

General Objection 5: The Plaintiff objects to the extent the Requests impose a duty to supplement not required by the Florida Rules of Civil Procedure.

General Objection 6: The Plaintiff reserves the right to raise any other objections to these Requests as they become available and/or known to the Plaintiff.

RESPONSES AND SPECIFIC OBJECTIONS TO REQUESTS TO PRODUCE DOCUMENTS

1. All documents evidencing and/or referencing any introductions to any of the general partners of the Partnerships by Avellino.

Response: Plaintiffs object to this request to the extent that it seeks documents protected by the attorney-client privilege, work product privilege, and/or other privilege because this request seeks documents from, *inter alia*, Plaintiffs' attorneys and is vague is

ambiguous as to what is meant by “referencing any introductions to any of the general partners of the Partnerships by Avellino.”

Pursuant to our meet and confer, Plaintiffs will produce non-privileged documents responsive to this Request which are responsive to the allegation that Avellino introduced individuals and/or entities to be investors in the Partnerships and those documents are bearing Bates numbers: AVE00002RTP - AVE00005RTP; AVE00012RTP - AVE00019RTP; AVE00008RTP - AVE00010RTP; and AVE00025RTP - AVE00089RTP.

2. All documents evidencing and/or referencing any assets of the Partnerships which were funneled to Avellino in the form of commissions or referral fees.

Response: Plaintiffs object to Request for Production Number 2 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs’ attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which are in Plaintiffs possession. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; Ave00337RTP to Ave00401RTP.

3. All documents evidencing and/or referencing that Sullivan’s management fees came directly from capital contributions of the other partners rather than from the Partnerships’ profits.

Response: Plaintiffs object to Request for Production Number 3 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs’ attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which

are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; Ave00337RTP to Ave00401RTP.

4. All documents evidencing and/or referencing that Avellino knew or should have known that Sullivan's management fees came directly from capital contributions of the other partners rather than from the Partnerships' profits.

Response: Plaintiffs object to Request for Production Number 4 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; Ave00337RTP to Ave00401RTP.

5. All documents evidencing and/or referencing that Avellino was a co-conspirator with Sullivan and others.

Response: Plaintiffs object to Request for Production Number 5 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; AVE00245RTP - AVE00257RTP; Ave00337RTP to Ave00401RTP.

6. All documents evidencing and/or referencing all management fees or other compensation, distributions or other payments made to Avellino.

Response: Plaintiffs object to Request for Production Number 6 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing documents responsive to this Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; Ave00337RTP to Ave00401RTP.

7. All documents evidencing and/or referencing any controls Avellino had over the Partnerships.

Response: Plaintiffs object to Request for Production Number 7 because "controls" is an undefined term, so the Plaintiff will respond utilizing the meaning of the term as used in the Second Amended Complaint filed in the above-styled action. Plaintiffs object to Request for Production Number 7 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00245RTP to Ave00257RTP.

8. All documents evidencing and/or referencing that Avellino was active in the management of the Partnerships.

Response: Plaintiffs object to Request for Production Number 8 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; AVE00245RTP - AVE00257RTP; Ave00337RTP to Ave00401RTP.

9. All documents evidencing and/or referencing the allegation that Avellino knew or should have known of the millions of dollars of Partnership assets were being misappropriated.

Response: Plaintiffs object to Request for Production Number 9 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; AVE00245RTP - AVE00257RTP; Ave00337RTP to Ave00401RTP.

10. All documents evidencing and/or referencing the allegation that Avellino knew that distributions were improperly being made to Partners and other third parties, but did nothing to prevent it.

Response: Plaintiffs object to Request for Production Number 10 because it seeks the production of documents which are otherwise protected by the attorney-client and/or

work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; AVE00245RTP - AVE00257RTP; Ave00337RTP to Ave00401RTP.

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.

Response: Plaintiffs object to Request for Production Number 11 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; AVE00245RTP - AVE00257RTP; Ave00337RTP to Ave00401RTP.

12. All documents evidencing and/or referencing any damages you allege you incurred as a result of any actions or statements by Avellino.

Response: Plaintiffs object to Request for Production Number 12 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this

Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers Ave00001RTP to Ave00223RTP; AVE00245RTP - AVE00257RTP; Ave00337RTP to Ave00401RTP.

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

Response:

Plaintiffs object to Request for Production Number 13 because it seeks the production of documents which are otherwise protected by the attorney-client and/or work product privilege and it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents from Plaintiffs' attorneys. Pursuant to our meet and confer, Plaintiffs are producing non-privileged documents responsive to this Request which are in Plaintiffs possession and control. Responsive documents include, without limitation, bates numbers: Ave00402RTP to Ave 02007RTP.

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Defendants.

**PLAINTIFF, CONSERVATOR PHILIP J. VON KAHLE'S SECOND
SUPPLEMENTAL RESPONSES TO FRANK AVELLINO'S NOTICE OF
SERVING FIRST SET OF INTERROGATORIES TO PLAINTIFF**

Plaintiff, Philip J. Von Kahle as Conservator of P&S Associates, General Partnership ("P&S") and S&P Associates, General Partnership ("S&P", together with P&S, the "Partnerships") ("Conservator") by and through undersigned counsel, hereby submits his supplemental responses to the Defendant Frank Avellino's First Set of Interrogatories to Plaintiff.

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OBJECTIONS

1. The Plaintiff objects to each and every interrogatory to the extent that it seeks information that is privileged by statute or common law, including attorney work product and privileged communications between attorney and client.

2. The Plaintiff objects to each and every interrogatory to the extent that it calls for information that is not in the Plaintiff's current possession or control or could be more easily obtained through other parties or sources.

3. The Plaintiff objects to the extent the Interrogatories impose a duty to supplement not required by the Florida Rules of Civil Procedure.

4. The Plaintiff reserves the right to raise any other objections to these Interrogatories as they become available and/or known to the Plaintiff.

5. Plaintiff reserves the right to provide supplemental responses as additional information becomes available or is made known to Plaintiff.

INTERROGATORIES

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

ANSWER:

The Plaintiff responds:

The following general partners were introduced to P&S through Avellino:

- **Andrea Acker**
- **Carone Family Trust**
- **Carone Gallery Inc., Pension Trust**
- **Carone Marital Trust #1 UTD 1/26/00**
- **Carone Marital Trust #2 UTD 1/26/00**
- **Carone, Matthew D. Revocable Trust**
- **Elaine Ziffer**
- **Paragon Ventures Ltd.**
- **James A. Jordan Living Trust**
- **Sandra W. Dydo**

The following general partners were introduced to S&P through Avellino:

- **Roberta P. Alves & Vania P. Duarte**
- **Janet A. Hooker Charitable Trust**
- **James and Valerie Judd**
- **Vincent T. Kelly**
- **Kelco Foundation**

Partners in SPJ Investments, Ltd. a general partner in S&P were introduced through Avellino, including:

- **Esteban, Fernando**
- **Esteban, Margaret**
- **Seperson, Marvin**
- **Jordan, James**

In further response to this Interrogatory, Plaintiffs are willing to produce documents whose bates numbers include:

- **Journals - AVE00002RTP - AVE00005RTP; AVE00012RTP - AVE00019RTP.**
- **Management Fee Records – AVE00008RTP - AVE00010RTP; AVE00025RTP - AVE00089RTP.**

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 were they funneled.

ANSWER Plaintiff reserves the right to provide supplemental responses as additional information becomes available or is made know to Plaintiff. The Plaintiff responds, without waiving its objection:

Avellino or an entity controlled by him received a 50% share of the following distributions by year:

- 2000 – \$1,395.36 (P&S); \$1,990.98 (S&P)
- 2001 – \$ 39,12.11 (P&S); \$41,47.57 (S&P)
- 2002 – \$ 54,650.25 (P&S); \$48,614.39 (S&P)
- 2003 – \$ 58,428.61(P&S); \$42,411.17 (S&P)
- 2004 – \$ 59,257.3(P&S); \$52,954.53 (S&P)
- 2005 – \$ 57,812.85 (P&S); \$41,164.36 (S&P)
- 2006 – \$ 107,398.94 (P&S); \$55,834.78 (S&P)
- 2007 – \$ 73,351.06 (P&S); \$52,257.42 (S&P)

Of these funds, Avellino directed approximately \$50,000.00 to Richard Wills during this period. It is also likely that Avellino received additional funds from Michael D. Sullivan and Associates, but Plaintiffs lack sufficient information to affirmatively state that Avellino received his last distribution in 2007 as the Partnerships' books and records indicate that Avellino was to receive management fees in 2008.

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.

ANSWER:

Plaintiff reserves the right to provide supplemental responses as additional information becomes available or is made know to Plaintiff. The Plaintiff responds the following actions and/or statements made by Avellino demonstrate or evidence that Avellino was a co-conspirator with Sullivan and others with respect to the improprieties alleged in the complaint in this action:

- **Spreadsheets reflect that Avellino directed Sullivan to make payments to others on his behalf. Such documents are being provided in response to Avellino's request for production, see Bate number AVE00011RTP**
- **Spreadsheets reflect that Avellino directed Sullivan to pay fees to Richard J. Wills of approximately \$50,000.00. Such documents are being provided in response to Avellino's request for production, see Bates number AVE00011RTP**
- **Before the formation of the Partnerships, Avellino and Michael Bienes operated an entity known as Avellino & Bienes ("A&B"). A&B served as what is commonly known as a "feeder fund" for investors to invest money with Bernard L. Madoff Investment Securities ("BLMIS").**

- After A&B was directed to cease operations by the SEC, Avellino convinced certain investors of A&B to invest with the Partnerships, see Response to Interrogatory No.1. The prior action by the SEC put Avellino on notice that his actions were not authorized by law.
- The Partnership records, including Ahearn Jasco time sheets Bates numbered AVE00256RTP – AVE00257RTP, reflect that Avellino was involved in the Partnerships formation.
- The Partnerships were formed pursuant to written partnership agreements dated December 11, 1992. In 1994, the partnership agreements were amended (the “Partnerships Agreements”).
- Frank Avellino recommended that several individuals and/or entities invest in the Partnerships.
- Frank Avellino advised Sullivan on whether to obtain a legal opinion in Partnership matters. AVE00245RTP - AVE00252RTP
- Correspondence reflects that Avellino worked as an intermediary between Sullivan and investors in the Partnerships. Among this correspondence, Avellino sent over \$500,000 in investor funds via Fed-Ex to the Partnerships.

Additionally, Plaintiff is producing documents which are responsive to this Interrogatory. Specifically, Plaintiffs are producing documents whose bates numbers include:

- Journals - AVE00002RTP - AVE00005RTP; AVE00012RTP - AVE00019RTP.
- Management Fee Records – AVE00008RTP - AVE00010RTP; AVE00025RTP - AVE00089RTP.
- Checks - AVE00006RTP - AVE00009RTP

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

ANSWER:

Plaintiff objects that Management Fees is an undefined term, so the Plaintiff will respond utilizing the meaning of the term as used in the Second Amended Complaint filed in the above-styled action. The Plaintiff responds:

Avellino or an entity controlled by him received a 50% share of the following distributions by year:

Date Accrued	Amount	Method of Payment
2000	\$1,395.36 (P&S); \$1,990.98 (S&P)	Check
2001	\$39,12.11 (P&S); \$41,47.57	Check

	(S&P)	
2002	\$54,650.25 (P&S); \$48,614.39 (S&P)	Check
2003	\$58,428.61(P&S); \$42,411.17 (S&P)	Check
2004 (calculation)	\$59,257.3(P&S); \$52,954.53 (S&P)	
2005(calculation)	\$57,812.85 (P&S); \$41,164.36 (S&P)	
2006	\$107,398.94 (P&S); \$55,834.78 (S&P)	Check
2007	\$73,351.06 (P&S); \$52,257.42 (S&P)	Check

Additionally, the Plaintiff is producing documents which are responsive to this Interrogatory. Specifically, Plaintiff is producing documents whose bates numbers include:

- Journals - AVE00001RTP - AVE00005RTP; AVE00012RTP - AVE00019RTP.
- Management Fee Records – AVE00008RTP - AVE00010RTP; AVE00025RTP - AVE00089RTP.
- Checks - AVE00006RTP - AVE00009RTP

5. Please set forth the facts which support your allegation that Avellino was given a significant, inappropriate and unlawful control over the Partnerships and/or was active in the management of the Partnerships itself.

ANSWER:

The Plaintiff responds:

See response to Interrogatory No. 3.

Additionally, the Plaintiff is producing documents which are responsive to this Interrogatory. Specifically, Plaintiff is producing documents whose bates numbers include: AVE00245RTP - AVE00252RTP

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

ANSWER:

Plaintiff responds:

Witnesses who are believed to have knowledge responsive to this request include;

1. **Michael D. Sullivan.** It is believed that Mr. Sullivan has knowledge related to Mr. Avellino's receipt of commissions and how such commissions were calculated. Additionally, it is believed that Mr. Sullivan has knowledge as to why certain

accounts were attributed to Avellino & Bienes.

2. **Richard Wills.** The Conservator also believes that certain former investors in Avellino & Bienes or general partners in the Partnerships were approached by Richard Wills on Avellino and/or Bienes behalf to solicit investments in P&S and/or S&P.
3. **Michael Bienes.** It is believed that Michael Bienes worked with Frank Avellino in procuring investors for P&S and S&P.
4. **Vincent T. Kelly.** It is believed that Vincent T. Kelly knew of or worked with Mr. Bienes and Avellino in procuring investors, because he was formerly an investor with Mr. Avellino's former company Avellino & Bienes, and worked to solicit substantial investors in the Partnerships. Vincent T. Kelly also acted as Mr. Bienes' pastor.
5. **Lisa Glatt.** It is believed that Lisa Glatt may have information in relation to the transfer of accounts between Avellino and Bienes and the Partnerships.
6. **Erisca Gianna.** Ms. Gianna, was a former partner of Avellino and Bienes whose account was transferred from S&P to P&S without her knowledge of such fact.
7. **Lola Kurland.** Ms. Kurland worked closely with Avellino and Bienes, and their former partners. It is possible that she had knowledge of the involvement of Michael Sullivan and his relationship with Mr. Avellino as well as Mr. Avellino's advice to partners of P&S and S&P to invest.
8. **Susan Moss.** Ms. Moss worked for S&P and P&S and may have knowledge of Mr. Avellino's involvement in the instant cause of action.
9. **Avellino & Bienes.** Avellino & Bienes, was a general partnership formerly operated by Mr. Bienes, and was liquidated as a result of an enforcement action brought by the SEC in 1993. Many of the former partners in Avellino & Bienes became members of S&P and P&S.
10. **Grosvenor Partners, Ltd.** Plaintiffs believe that Grosvenor Partners, Ltd received substantial transfers from the Partnerships on Mr. Bienes' behalf.
11. **Mayfair Ventures, General Partnership.** Plaintiffs believe that Mayfair Ventures General Partnership received substantial distributions on Mr. Bienes behalf.

7. Please set forth the facts which support your allegation that Avellino knew or should have known that millions of dollars of Partnership assets were being misappropriated.

ANSWER:

The Plaintiff responds:

See response to Interrogatory No. 3.

8. Please identify the witnesses who have knowledge of the facts set forth in your answer to Interrogatory 7 above.

ANSWER:

Plaintiff responds:

See response to Interrogatory No. 6.

9. Please set forth the facts which support your allegation that Avellino knew that distributions were improperly being made to Partners and other third parties, but did nothing to prevent it.

ANSWER:

The Plaintiff responds:

See response to Interrogatory No. 3.

Additionally, documents are being provided in response to this interrogatory. Specifically, Plaintiffs are willing to produce documents whose bates numbers include:

- **Journals - AVE00002RTP - AVE00005RTP; AVE00012RTP - AVE00019RTP.**
- **Management Fee Records – AVE00008RTP - AVE00010RTP; AVE00025RTP - AVE00089RTP.**

Additional documents that may reflect Avellino's knowledge of fees paid to others include, but are not limited to: AVE00337RTP - AVE02007RTP.

10. Please set forth the facts which support your allegation that Avellino aided and abetted Sullivan's breaches of fiduciary duty of loyalty and care to the Partnerships.

ANSWER:

The Plaintiff responds:

See response to Interrogatory No. 3.

Additionally, documents are being provided in response to this Interrogatory. Specifically, Plaintiffs are willing to produce documents whose bates numbers include, but are not limited to:

- **Journals - AVE00002RTP - AVE00005RTP; AVE00012RTP - AVE00019RTP.**
- **Management Fee Records – AVE00008RTP - AVE00010RTP; AVE00025RTP - AVE00089RTP.**

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.

ANSWER:

The Plaintiff objects to this Interrogatory to the extent it seeks an expert opinion and reserves the right to supplement this answer as necessary. Without waiving the above objection, the Plaintiff responds:

First, the damages to the Partnerships as a result of Avellino's advice to invest in BLMIS are the amount of the Partnerships' net losses to its investment with BLMIS:

- **S&P's damages of \$10,131,036; and**
- **P&S' damages of \$2,406,624.65.**

This calculation was based upon the Net Investment method approved by the BLMIS liquidation Court.

Second, the damages caused by Defendant Michael Sullivan's breaches of fiduciary duties is \$7,343,947.35. This amount was calculated by adding all known kickbacks paid.

Third, the damages to the Partnerships as a result of kickbacks that Avellino improperly received:

\$ 307,790.84, plus an additional \$50,000 or more directed to Richard Wills. See Response to Interrogatory No. 3 which addresses how this number was calculated.

Exhibit "B"

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.

**DEFENDANT FRANK AVELLINO'S NOTICE OF FILING OBJECTIONS AND
ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**

Defendant, Frank Avellino, by and through his undersigned counsel, hereby gives notice of filing his objections and answers to Plaintiff's First Set of Interrogatories propounded upon him on January 29, 2014.

I HEREBY CERTIFY that original answers were served by U.S. Mail upon Thomas M. Messina, Esq., and a true and correct copy of the foregoing was served via e-mail upon the all counsel of record on the attached service list this 4th day of April, 2014.

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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.

DEFENDANT FRANK AVELLINO'S ANSWERS TO PLAINTIFFS'
FIRST SET OF INTERROGATORIES

Defendant, Frank Avellino ("Defendant"), responds to Plaintiffs' First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Defendant objects to Plaintiffs' Interrogatories insofar as they seek information subject to the attorney/client privilege and the work product doctrine.
2. Defendant objects to Plaintiffs' Interrogatories and to the "definitions" set forth therein insofar as they seek information beyond the scope of any claim or defense asserted herein.
3. By responding to these Interrogatories, Defendant does not concede that any of the information requested is relevant to this action and expressly reserve the right to object to further discovery of any matter raised by their response, or any portion thereof.

4. Defendant reserves the right to provide supplemental responses as additional information becomes available or is made known to Defendants.

5. Defendant incorporates by reference the foregoing Objections in response to each Interrogatory whether or not set forth at length below.

ANSWERS TO INTERROGATORIES

Interrogatory No. 1: Please identify the name and address of each person assisting in the drafting of answers to these interrogatories, and for each person, state his/her position and relationship to Defendant.

Response: Frank Avellino, Defendant
Gary Woodfield, Attorney for Defendant

Interrogatory No. 2: Please identify the names and addresses of all persons who are believed or known by Defendant or his attorneys to possess any knowledge of any facts described in the Amended Complaint and/or in any pleadings related to this action filed with the Court, including the specific matters of which each such person has knowledge.

Response: Frank Avellino
c/o Gary A. Woodfield, Esq.
Haile, Shaw & Pfaffenberger, P.A.
660 US Highway One, Third Floor
North Palm Beach, FL 33408

Knowledge of his non-participation in the formation, management or any other involvement of S&P/P&S and knowledge of referral fees received from Michael Sullivan.

**Michael Sullivan
2590 NE 41st Street
Fort Lauderdale, FL 33308**

Knowledge of S&P/P&S and the payment of referral fees.

**Michael Bienes
3200 Port Royale Dr. N., Apt., 100**

Fort Lauderdale, FL 33308

May have knowledge regarding S&P/P&S and receipt of referral fees.

Interrogatory No. 3: Please describe the nature of Your relationship with Sullivan, including but not limited to all business and personal undertakings prior to 1992.

Response: Object to the term “undertakings” as vague and ambiguous. I have known Michael Sullivan as a co-parishioner of our church for many years. I had no business dealings with Sullivan prior to approximately 1992. My only dealing with Michael Sullivan was limited discussions regarding his decision to form his partnerships and to provide his contact information to several potential investors. Michael Sullivan provided me with a referral fee for some of these investors which I either accepted or directed to be paid to others, including charitable foundations.

Interrogatory No. 4: Please describe the nature of Your relationship with S&P and/or P&S including but not limited to circumstances prior to 1992 leading up to the creating of S&P and P&S; management of S&P and P&S; and the frequency You interacted with the operations of S&P and P&S.

Response: I have had no relationship with or involvement in these entities other than initial discussions with Michael Sullivan on his decision to form his partnerships and providing potential investors with Michael Sullivan’s contact information.

Interrogatory No. 5: Please describe the relationship between You and Avellino Family Foundation, Inc., including any relationship by and through Avellino & Bienes.

Response: I assisted in the formation and was a member of the board of the Avellino Family Foundation, a charitable organization. I do not know what is meant by “including any relationship by and through Avellino & Bienes”. I object to that portion of the interrogatory as vague and unintelligible.

Interrogatory No. 6: Please describe the relationship between You and Grosvenor Partners, Ltd. including any relationship by and through Avellino & Bienes.

Response: I assisted in the formation of and for a period of time was involved in the operation and management of Grosvenor Partners, Ltd. I do not know what is meant by “including any relationship by and through Avellino & Bienes”. I object to that portion of the interrogatory as vague and unintelligible.

Interrogatory No. 7: Please describe the relationship between You and Mayfair Ventures, including any relationship by and through Avellino & Bienes.

Response: I assisted in the formation of and was involved in the operation and management of Mayfair Ventures. I do not know what is meant by “including any relationship by and through Avellino & Bienes”. I object to that portion of the interrogatory as vague and unintelligible.

Interrogatory No. 8: Please describe the relationship between You, and Paragon Ventures, and/or Donald Kahan including any relationship by and through Avellino & Bienes.

Response: To my recollection Donald Kahn was a friend or acquaintance of Michael Bienes who may have been an investor in one of Michael Sullivan’s partnerships. Aside from the foregoing, I had no relationship with Paragon Ventures or Donald Kahn.

Interrogatory No. 9: Please describe the relationship between You and the Kenn Jordan Foundation, Inc., including any relationship by and through Avellino & Bienes.

Response: I assisted in the formation of Kenn Jordan Foundation, Inc. I do not know what is meant by “including any relationship by and through Avellino & Bienes”. I object to that portion of the interrogatory as vague and unintelligible.

Interrogatory No. 10: Please describe the relationship between You and Elaine Ziffer, including any relationship by and through Avellino & Bienes.

Response: To my knowledge Elaine Ziffer was a friend or acquaintance of Michael Bienes who at one time invested with Grosvenor Partners. I do not know what is meant by “including any relationship by and through Avellino & Bienes. I object to that portion of the interrogatory as vague and unintelligible.

Interrogatory No. 11: State all facts and/or circumstances under which Defendant received any transfers of funds, payments, and/or distributions from P&S and/or S&P.

Response: I do not believe that I received any transfer of funds, payments and/or distributions from P&S and/or S&P. Referral fees that I received came from Sullivan or a related entity and not from P&S or S&P.

Interrogatory No. 12: State all facts and/or circumstances under this Defendant received any transfers of funds, payments, and/or distributions from Sullivan.

Response: I received referral fees for some potential investors to whom I provided contact information for Michael Sullivan who ultimately invested with him. I believe all such payments were made by Michael Sullivan through MDS & Associates.

Interrogatory No. 13: Please identify all persons and/or entities to whom assets of P&S and/or S&P were given and/or transferred for any purpose including, but not limited to, custodian possession and/or payment.

Response: It is my understanding that the partnerships invested their funds with Bernard L. Madoff Investment Securities. Other than that, I am not aware of any other transfers.

Interrogatory No. 14: Describe the relationship between and among Defendant and P&S and/or S&P; Michael D. Sullivan; Steven Jacob; Sullivan & Powell Solutions in Tax; Guardian Angel Trust, LLC; Michael D. Sullivan & Associates, Inc., Steven F. Jacob, CPA & Associates, Inc.; Michael Bienes; Kelco Foundation, Inc.; and/or Vincent T. Kelly.

Response: I had no relationship with P&S and/or S&P. As previously stated I have known Michael Sullivan from the church that we attended for many years. I have had no relationship with Steve Jacob, Sullivan & Powell Solutions in Tax, Guardian Angel Trust, LLC, Steven F. Jacob, or CPA & Associates, Inc. I believe the referral payments made by Michael Sullivan were made through MDS & Associates, which I assume is the same as Michael D. Sullivan & Associates, Inc. Michael Bienes and I were partners in an accounting practice and in Avellino & Bienes. Vincent T. Kelly was a priest

at St. John the Baptist Roman Catholic Church and was known to me through Michael Bienes.

Interrogatory No. 15: Please state the nature of your relationship with Reverend Richard Wills, the Christ Church United Methodist in Ft. Lauderdale and any parishioners of that Church, including any relationship by and through Avellino & Bienes.

Response: I object to the term “any relationship by and through Avellino & Bienes” as vague and unintelligible. Additionally, I object to this request that it inquires of my relationship with “any parishioners of that church”, in that such request is overly burdensome, seeks information not relevant to this litigation or is likely to lead to admissible evidence and constitutes an improper invasion of my privacy.

Subject to and without waiving such objections, I had a social relationship with Bishop Wills who was my minister at Christ Church United Methodist Church as well as a friend. I also had social relationships with some of the other parishioners of the church.

Interrogatory No. 16: Identify all communications between and among Defendant and P&S and/or S&P; Michael D. Sullivan; Steven Jacob; Sullivan & Powell Solutions in Tax; Guardian Angel Trust, LLC; Michael D. Sullivan & Associates, Inc., Steven F. Jacob, CPA & Associates, Inc.; Michael Bienes; Kelco Foundation, Inc.; and/or Vincent T. Kelly. For each communication identified, state all facts and/or circumstances surrounding the communication.

Response: I object to this interrogatory as overly broad and burdensome and not likely to lead to admissible evidence. Some of these relationships go back more than twenty years. For example, Michael Bienes and I were partners in our accounting practice and in Avellino & Bienes for many years during which time we may have spoken multiple times a day. This business relationship terminated more than twenty years ago. This request seeks all conversations between us going back more than twenty years which would include thousands of conversations, most of which having nothing to do with anything at issue in this action.

Additionally, it is not possible to identify conversations that I had with Michael Sullivan or Monsignor Kelley which conversations cover many years

and occurred many years ago. I do not recall having conversations with the other individuals or entities identified in this interrogatory.

Interrogatory No. 17: Please identify practices concerning communications of any kind made to partners of S&P and/or P&S regarding partnership distributions at any time prior to the filing of the Amended Complaint.

Response: **Objection. This interrogatory is vague and unintelligible, in that it seeks the identification of “practices concerning communications of any kind . . .” which I do not understand and therefore am unable to respond. Subject to and without waiving such objection and interpreting the interrogatory to be seeking the identification of communications, I am not aware of any such communications.**

Interrogatory No. 18: Please identify all persons who maintained, or were in possession of, books and records, accounting records, ledgers, disbursement records or other business records of P&S and/or S&P, and your basis for such knowledge.

Response: **I am not aware of who maintained or possessed such books and records. I assume that while he was alive Greg Powell or Michael Sullivan had such records since I understood that they were the general partners of the partnerships.**

Interrogatory No. 19: Please identify all management fees paid to Avellino & Bienes, You, or any entities You control, or to be paid on your behalf to any unrelated entities including the applicable rates, work performed and accounting thereof.

Response: **Objection. To the extent that this interrogatory seeks details of management fees unrelated to Plaintiffs, it is overly broad, burdensome, seeks irrelevant information and is not likely to lead to admissible evidence. To the extent that such interrogatory seeks management fees paid by Plaintiffs to me, there were none.**

Interrogatory No. 20: Identify any accounting and/or investment advice given and/or received by You concerning investment in P&S and/or P&S.

Response: None to my knowledge.

Interrogatory No. 21: Identify the names and addresses of all entities in which you or one of your relatives hold a controlling interest. For each entity listed, please list the relationship you have with such entities and any transfers those entities received from P&S and/or S&P.

Response: **Objection.** This request is overly broad and burdensome. I have a large family with many relatives. I have no idea what entities my relatives may have a controlling interest in or how that could have any relevance to this litigation. Additionally, over the past twenty-two years I have been involved in a number of entities which have nothing to do with any issues in this litigation. Such a request is overly board, seeks irrelevant information that would not lead to admissible evidence. Subject to and without waiving such objections I am not aware of any entity that received transfers (I assume this refers to money) from P&S and/or S&P.

Interrogatory No. 22: Please identify all factors which led to and were considered as part of your decision to move and locate your business in South Florida, and in the office next to S&P and P&S's offices.

Response: **Objection as irrelevant and not likely to lead to admissible evidence.** My decision to open an office in Florida made many years ago was a personal life-style and health related decision that is irrelevant to this litigation and constitutes an improper invasion of my privacy. I took space in the office building located in Ft. Lauderdale which decision had nothing to do with its proximity to S&P and P&S offices.

Interrogatory No. 23: Identify the date and nature of any inquiries or investigations concerning P&S and/or S&P, and their financial stability.

Response: **Objection.** This interrogatory is vague and unintelligible. I do not know what is meant by "inquiries" or "investigations" or who may have made any. Subject to and without waiving this objection and subject to my interpretation of this interrogatory, I am not aware of any.

Interrogatory No. 24: Why do you believe that you or any entities you controlled received the payments described in the Amended Complaint as “Kickbacks.”

Response: **Objection. I do not know what is meant by “Kickbacks.” As previously stated, I received referral fees from Michael Sullivan for some of the potential investors to whom I provided Michael Sullivan’s contact information who ultimately invested with him.**

Interrogatory No. 25: Please state the names of all persons who had knowledge of the payments that you received from Plaintiffs, and the facts and circumstances which led to their knowledge of such payments.

Response: **I didn’t receive any payments from Plaintiffs.**

Interrogatory No. 26: Please state the names and contact information of all partners of P&S and S&P which you communicated with.

Response: **Objection. I do not know who are the partners of P & S and S & P and therefore am unable to identify partners of such entities with whom I have communicated. Subject to and without waiving such objection, as previously stated I have had communication with Michael Sullivan and his deceased partner, Greg Powell.**

Interrogatory No. 27: Please state the date and nature of all transfers of money to you or any entities that you control from P&S and/or S&P.

Response: **I am not aware of any such transfers of money.**

Interrogatory No. 28: Please describe the relationship between You and James and Valerie Judd, including any relationship by and through Avellino & Bienes.

Response: **I object to the term “any relationship by and through Avellino & Bienes” as vague and unintelligible. Subject to and without waiving such objections I believe that James and Valerie Judd were friends with Michael Bienes.**

ACKNOWLEDGEMENT

By: Frank Avellino
Frank Avellino

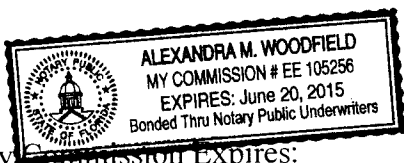
STATE OF FLORIDA)

) SS:

COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, personally appeared Defendant Frank Avellino who, being first duly sworn, deposes and states that the answers to the foregoing Interrogatories are true and correct.

SWORN AND SUBSCRIBED before me, this 1st day of April, 2014, by Frank Avellino who is X personally known to me or _____ has provided _____ as identification.



My Commission Expires:

Alexandra M. Woodfield
Notary Public, State of
Commission No.