

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 REPLY MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO STRIKE/COMPEL**

Defendant Frank Avellino ("Avellino"), files this Reply Memorandum in Support of his Amended 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"). Plaintiffs have had three opportunities to meet their discovery obligations and have failed to do so, necessitating this Motion.

Background

On November 26, 2013, Avellino served Interrogatories and Request for Production on Plaintiffs. On January 31, 2014, Plaintiffs filed their responses. Finding such responses inadequate, Avellino provided Plaintiffs with a draft motion to strike/compel. On February 13, 2014, the parties met and conferred resulting in Plaintiffs serving supplemental discovery responses on March 28, 2014. These responses did not meaningfully address or resolve the inadequacies in Plaintiffs' discovery responses, requiring Avellino to file this Motion on April 7,

2014.¹ In response to the Motion, on April 28, 2014, Plaintiffs filed their second supplemental interrogatory responses and request for production responses, copies of which are attached hereto as, respectively, Exhibits A and B.

Plaintiffs' second supplemental responses continue to be inadequate. Due to the expedited trial schedule in this matter, an impending discovery cutoff and Plaintiffs continued noncompliance with their discovery obligations, Avellino is compelled to proceed with his Motion. This reply memorandum addresses the inadequacies of Plaintiffs' recently served second supplemental responses.

It should be noted that Avellino's discovery, served over five months ago, was directed at Plaintiffs' initial complaint. Since then Plaintiffs have twice filed amended complaints, the latest of which raised for the first time new and significant allegations against Avellino, requiring additional discovery as to such claims. See, Second Amended Complaint, ¶¶ 93-96.

On April 28, 2014, this Court heard defendants' motions to dismiss the Second Amended Complaint, granting in part and denying in part such motions with leave for Plaintiffs to file an amended pleading. To date, no order as to the Court's oral ruling at the hearing has been entered or submitted.

Argument

Although Plaintiff's second supplemental responses omitted some of the egregiously inappropriate, generic objections, he continues to raise meritless objections. Plaintiff's response to the Motion filed May 12, 2014, does not remedy his discovery responses' shortcomings.

¹ As filed, the Motion was directed toward Plaintiffs' first supplemental responses but inadvertently attached the initial discovery responses. Consequently, Avellino served an amended motion attaching the supplemental discovery responses as Exhibits A and B, as well as Plaintiffs' subsequently served second supplemental responses as Exhibits C and D.

Interrogatory Answers

The Plaintiff continues to object “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,” and “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.” Ex. A. at 2.

Such unintelligible qualifications constitute a waiver of the objection, render the response meaningless, “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,” “preserves nothing and serves only to waste the time and resources of both the Parties and the Court.” *Estridge v. Target Corp.*, 11-61490-CIV, 2012 WL 527051 at *1, 2 (S.D. Fla. 2012). *See also, 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).

The Plaintiff has therefore waived these objections. Considering them on their merits does not help the Plaintiff. Since his counsel was furnished a courtesy copy of Avellino’s initial motion to compel, he knew that Defendant expected a privilege log. In fact, Plaintiff knew that a privilege log was required before Avellino’s motion. Two supplemental responses later, and Plaintiff still has not provided a privilege log.

On April 29, 2014, five months after the discovery was propounded, Plaintiff’s counsel inquired if the parties could agree that correspondence between “counsel and client is entitled to privilege and does not need to be logged on a privilege log.” When the undersigned asked Plaintiff’s counsel “other than the conservator, do you consider anyone else to be a client,” he

was met with the totally unresponsive reply of “anyone with an attorney-client relationship.” When advised that, without an identification of “those clients with whom you are withholding production on a claim of privilege,” the matter would have to be presented to the Court, Plaintiff’s counsel did not respond. (Copies of the e mails are attached as Exhibit C).

It is axiomatic that failure to produce a privilege log results in a waiver of the privilege. To fail to produce such a log after a period of successive motions to compel and strike and two supplemental discovery responses makes the waiver virtually deliberate. This is not an insignificant matter nor does Avellino seek to cause Plaintiff to undertake a meaningless exercise. Communication between the Conservator and his counsel is concededly privileged and Avellino is not seeking to have Plaintiff identify such communication in a privilege log. However, Plaintiff contends that Avellino introduced a number of investors to the Partnerships for which he received a fee. Ex. A. at 3. Plaintiff’s communication with these potential witnesses may reveal relevant evidence. Plaintiff’s gamesmanship in failing to identify with whom he contends he has an attorney/client relationship while at the same time failing to produce any documents relevant to such investors leaves Avellino in the dark as to whether such information exists and is being shielded from production by a questionable claim of privilege.

Nor is the objection to answering questions “to the extent that information is more easily obtained from others” a valid objection. Ex. A. at 2, no. 2 The Plaintiff brought this suit, under many theories, demanding substantial damages. He cannot avoid discovery obligations which relate to the viability of his claims by requiring the other parties to look elsewhere for information which he could produce. Plaintiff’s obligation to provide requested information exists regardless of the ability to obtain it from nonparties, particularly since, if it were obtained

elsewhere, the Plaintiff would undoubtedly then argue that he does not agree with it or that it is not authentic.

The objection to providing information that is “not in the Plaintiff’s current possession or control” is also evasive. Ex. A. at 2, no. 2 There is no need to object to answering something you cannot answer – you simply don’t have the necessary information. An interrogatory is not objectionable merely because an answer “involves information not within the personal knowledge of the party.” *Dickinson v. Wells*, 454 So.2d 758, 759 (Fla. 1st DCA 1984).

These objections should, therefore, be overruled and Plaintiff should be required to answer the questions completely, without relying on these objections as the basis for withholding information. Furthermore, Plaintiff should also be required to answer particular questions more completely. The following questions still remained unanswered in Plaintiff’s second supplemental responses despite such inadequacies being fully identified in Avellino’s Memorandum in Support of Motion relating to Plaintiff’s initial supplemental responses.

In his second supplemental response to the first interrogatory, Plaintiff merely listed the names of general partners who were introduced “through” Avellino, but did not provide any dates or other requested information as to when each partner was introduced, “by” whom he was introduced, or who else was present during the introductions. Ex. A. at 3 Avellino disputes Plaintiff’s allegation regarding such introductions. Information regarding such alleged introductions is critical. If Plaintiff has such information it should be provided. If he lacks such information he should so state.

Plaintiff’s second supplemental response to interrogatory number two continues to include only total amounts by year, but no specific dates and no identification of the person by whom the funds were “funneled.” Ex. A. at 4 This information can be derived from the

Partnership records which are in Plaintiff's possession. There is no apparent reason for Plaintiff's failure to provide the information requested.

In answer to interrogatory number three, requesting evidence that Avellino was a co-conspirator, Plaintiff identified in its last bullet point that "correspondence reflects" without specifically identifying what correspondence. The answer also includes reference to spreadsheets and to certain Bates numbered documents, though it is unclear whether the bates numbers referenced constitute all of the spreadsheets upon which Plaintiff relied. Ex. A., pp. 4-5. These inadequacies were previously raised with Plaintiff who continues to ignore them.

Plaintiff's second supplemental response to interrogatory number four provides totals paid by year rather than individual dates fees were allegedly paid; not all amounts designated include a method of payment despite being asked that specific question. Ex. A., pp. 5-6. Again, this information should be readily available from the Partnership records. The failure to provide the requested detail makes it difficult, if not impossible for Avellino to attempt to locate documents concerning such transactions.

In response to interrogatory number eleven, which requires the identification and calculations for all damages, Plaintiffs stated, *inter alia*, that "this calculation was based upon the Net Investment method approved by the BLMIS liquidation Court," but does not actually provide any calculations. The Plaintiff is required to explain exactly how it derived the amount of his damages. Instead, the totally ambiguous answer identifies damages exceeding \$10 million for one partnership and exceeding \$2 million for the other partnership, then mentions damages for breach of fiduciary duty, then damages as a result of kickbacks. No calculations are included for any category, and it is impossible to tell if the damages claimed in any category overlap or are otherwise properly recoverable.

Request for Production

Plaintiff continues to object to every document requested “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.” See, for example, Ex. B., p. 2. As set forth above, Avellino’s efforts to obtain the required privilege log was met with the patently obstreperous comment that the Plaintiff’s counsel considered “anyone with an attorney-client relationship” to be his client, his communications with which he did not want to include within a log. The Plaintiff waived any privilege which did exist long ago by not timely providing a privilege log.

Furthermore, the objection that each request is not calculated to lead to the discovery of admissible evidence is refuted by glancing at the request itself, which contains only thirteen paragraphs personally tailored to this specific case. See, for example, Ex. B., p. 3. The “explanation” that the discovery is irrelevant “because it seeks documents from Plaintiff’s attorney” is a total non-sequitor. *Id.* Relevancy does not depend upon the identity of the person from whom documents are sought, particularly when, as in the instant case, the discovery request was custom designed based upon this particular plaintiff’s claims. Plaintiff’s qualification that he is producing “non-privileged” documents therefore remains evasive as it is impossible to tell what has been withheld, particularly since he won’t even identify who he considers his clients to be.

The response to the first paragraph within the request for production, in addition to the generic privilege/relevance objection raised in every response, also claims that the first request is ambiguous “as to what is meant by ‘referencing any introductions for any of the general partners of the Partnerships by Avellino.’” Ex. B., p. 3. This is the first time that the Plaintiff raised an

objection to this particular phrase; his previous, boilerplate objection that every request was ambiguous, had no significance. Plaintiff should not be permitted to introduce new objections in its second supplemental response to discovery. Furthermore, the term “referencing” is not only a commonly used word within the English language, but it is specifically defined within the Request to Produce itself. Information sought relating to those investors that Plaintiff contends Avellino introduced to the Partnerships is critical. Whether hiding behind his objections or simply lacking such information, Plaintiff must adequately respond.

Plaintiff’s references to documents produced also raises uncertainty as to whether full production is being made. Plaintiff’s repeated response: “Responsive documents include, without limitation, . . .” Ex. B., p. 3. Does this mean that there are other documents that are not being produced?

Conclusion

For the reasons set forth in the Amended Motion to Strike and Memorandum of Law in Support of Motion to Strike, the second supplemental responses of the Plaintiff remain woefully insufficient – particularly as a third attempt to comply with the rules of civil procedure. Defendant Avellino respectfully requests that all relief requested in the motion to strike should be granted and that his fees in bringing this motion be awarded.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May 2014, 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.

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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.,

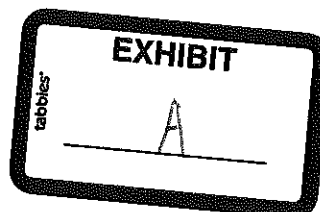
Defendants.

**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.

IN THE CIRCUIT COURT FOR THE
SEVENTEENTH JUDICIAL CIRCUIT
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FLORIDA

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

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.

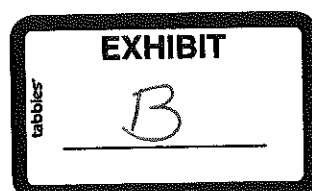
**PLAINTIFFS' SECOND SUPPLEMENTAL RESPONSES AND OBJECTIONS TO
DEFENDANT FRANK AVELLINO'S REQUEST TO PRODUCE TO PLAINTIFF**

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.

Messana, P.A.
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By: /s/ Thomas M. Messana

Thomas M. Messana
Florida Bar No. 0991422



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.

Gary Woodfield

From: Gary Woodfield
Sent: Wednesday, April 30, 2014 8:35 AM
To: Steven D. Weber
Cc: Brenda Petroni
Subject: RE: Service of Court Document - Case No. 12-034123

Cute, but not very informative. If you will identify those clients with whom you are withholding production on a claim of privilege, I am inclined to agree with your request. However, without such identification I cannot do so. If you are unwilling to identify the clients with whom you are withholding production we can have the judge decide. I will have my assistant contact you to schedule a hearing. Thanks.

Gary Woodfield, Esq.
Haile, Shaw & Pfaffenberger, P.A.
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North Palm Beach, FL 33408
Telephone: (561) 627-8100
Facsimile: (561) 622-7603
Email: gwoodfield@haileshaw.com

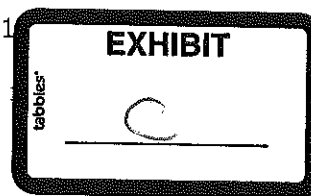
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From: Steven D. Weber [mailto:SWeber@bergersingerman.com]
Sent: Tuesday, April 29, 2014 8:23 PM
To: Gary Woodfield; Thomas Zeichman
Subject: RE: Service of Court Document - Case No. 12-034123

Anyone with an attorney-client relationship.

From: Gary Woodfield [mailto:gwoodfield@haileshaw.com]
Sent: Tuesday, April 29, 2014 5:46 PM
To: Thomas Zeichman
Cc: Steven D. Weber
Subject: RE: Service of Court Document - Case No. 12-034123



This begs the question as to who are the "clients"? Other than the conservator, do you consider anyone else to be a client?

Gary Woodfield, Esq.
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From: Thomas Zeichman [<mailto:tzeichman@messana-law.com>]
Sent: Tuesday, April 29, 2014 4:32 PM
To: Gary Woodfield
Cc: Steven D. Weber
Subject: Re: Service of Court Document - Case No. 12-034123

Gary,

With respect to your discovery requests, can we agree that correspondence between counsel and client is entitled to privilege and does not need to be logged on a privilege log?

Also, when do you anticipate providing supplemental responses?

Thank you.

Thomas

Sent from my iPhone

On Apr 29, 2014, at 4:05 PM, "Gary Woodfield" <gwoodfield@haileshaw.com> wrote:

Thank you for your responses. I will review them and advise whether we intend to proceed with our motion. In the meantime, please provide a privilege log.

Gary Woodfield, Esq.
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From: Thomas Zeichman [<mailto:tzeichman@messana-law.com>]
Sent: Monday, April 28, 2014 9:01 PM
To: Gary Woodfield
Cc: Brenda Petroni; eservices
Subject: Service of Court Document - Case No. 12-034123

Gary,

Attached are the Conservator's supplemental responses.

| | |
|---|--|
| Court in which proceeding is pending | 17 th Circuit, Broward County, FL |
| Case Number | 12-034123 (07) |
| Name of Initial Party for Plaintiff | P&S Associates, General Partnership |
| Name of Initial Party for Defendant | Michael D. Sullivan |
| Title of each document served within this email | <ol style="list-style-type: none">1. PLAINTIFFS' SECOND SUPPLEMENTAL RESPONSES AND OBJECTIONS TO DEFENDANT FRANK AVELLINO'S REQUEST TO PRODUCE TO PLAINTIFF2. PLAINTIFF, CONSERVATOR PHILIP J. VON KAHLE'S SECOND SUPPLEMENTAL RESPONSES TO FRANK AVELLINO'S NOTICE OF SERVING FIRST SET OF |

| | INTERROGATORIES TO PLAINTIFF |
|---------------------------|------------------------------|
| Sender's name | Thomas G. Zeichman |
| Sender's telephone number | 954-712-7400 |

<image001.jpg>

Thomas Zeichman

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