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## PRELIMINARY STATEMENT

Plaintiff James L. Melcher (“Plaintiff”) predicated his case against Defendant R. Brandon Fradd (“Fradd”) and Apollo Medical Fund Management, L.L.C. (“Apollo Management”) upon a Second Amended Complaint. The third cause of action alleged, essentially, that Fradd had a fiduciary duty not to divert investors from Defendant Apollo Medical Fund Management, Inc. (“Apollo Management”) into an investment company not managed by Apollo Management, and that Fradd breached his duty by diverting investors from non-party Apollo Medical Partners, Ltd. into Apollo Medical Offshore. After an eleven (11) day Jury Trial, not one witness testified that Fradd, as a Member or a Manager, owed a fiduciary duty under Delaware law to Plaintiff to share fees from Apollo Offshore with Plaintiff or that Fradd breached a fiduciary duty to Plaintiff in setting up Apollo Offshore to Plaintiff’s exclusion. To the contrary, witnesses testified, and documentary evidence conclusively demonstrated, that under the Operating Agreement of Apollo Management, Fradd did not breach any fiduciary duty by conducting his own business.

Thus, Defendants, Apollo Management and Fradd, (collectively “Defendants”) by their attorneys, Greenberg Traurig, LLP, and upon the supporting Affirmation of Leslie D. Corwin, and the exhibits annexed thereto, respectfully submit this Memorandum of Law in support of Defendants’ Motion to set aside the Jury’s verdict finding that Defendant Fradd breached a fiduciary duty and to direct that judgment be entered in favor of Defendant Fradd on that claim. In the alternative, the Court should order a partial new trial *only* on the breach of fiduciary duty claim because the instruction and Interrogatory on that claim failed to properly state Plaintiff’s cause of action.

## STATEMENT OF FACTS

### **I. Background of the Jury Trial**

In a Second Amended Complaint, Plaintiff sued Defendants based upon multiple claims including, relevant here, a claim for breach of fiduciary duty. (Exh. A.) Plaintiff's third cause of action asserts that Fradd had a fiduciary duty not to divert investors from Apollo Management into an investment company not managed by Apollo Management, and that he breached his duty by diverting investors from non-party Apollo Medical Partners, Ltd. into Apollo Medical Offshore. (*Id.* ¶¶ 48-50.) Plaintiff alleges that he was damaged by loss of fees Apollo Management would have earned from those investors. (*Id.*)

The parties engaged in an eleven (11) day Jury Trial on liability only between May 11 and May 28, 2009. The parties presented evidence on eight (8) of those days. In 1998, Plaintiff joined Fradd as a Member and a Manager of Apollo Management, entering into an Operating Agreement on January 8, 1998. (Exh. C. 69:26-70:4, 104:8-105:8; Exh. A.) Apollo Management is the general partner of a hedge fund, Apollo Medical Partners, L.P., ("Apollo Partners"), formed in 1995. (Exh. C, Tr. at 81:9-82:4; 918:26-920:6; Exh. A at 7.) The Operating Agreement of Apollo Medical Fund Management is governed by Delaware law and organized under the Delaware limited Liability Act. (Exh. A at 1, 6, 11.) Article IV, Section 3 of the Operating Agreement expressly provides that: "[a] Member does not violate a duty or obligation to [Apollo Management] merely because the Member's conduct furthers the Member's own interest." (Exh C., Tr. at 311:12-17.) Plaintiff testified under cross-examination that he knew of this section and "understood that this section meant that [he] as a member, did not violate any duty to Apollo Management or to the other members, Mr. Fradd or Mr. Margolis, because [he] managed [his] own investment advisory firm...." (Exh C., Tr. at 310:6-311:17.)

Fradd testified that he set up Apollo Medical Offshore Partners, Ltd. (“Apollo Offshore”) with Apollo Medical Equity, Inc., not Apollo Management, as the investment manager on the advice of his lawyer for tax reasons. (Exh. C, Tr. at 1040:5-1041:5.) As a result, Plaintiff did not receive performance fees from Apollo Offshore because he was not part of Apollo Offshore, a fact that Plaintiff was aware of at the time. (*Id.*, Tr. at 576:7-15.) Fradd testified that he did not inform any of Plaintiff’s investors in Apollo Partners (those investors from whom Plaintiff derived 50% of the performance fees) about Apollo Offshore because if they moved from Apollo Partners to Apollo Offshore, Plaintiff would lose fees. (*Id.*, Tr. at 1038:24-1040:16.) His testimony was not refuted.

**II. Plaintiff Fails to Present Any Evidence As to Fradd’s  
Fiduciary Duties as a Member or a Manager Under Delaware Law**

Plaintiff’s hedge fund “expert”, New York attorney Michael Tannenbaum (“Tannenbaum”), an attorney who is not admitted to practice law in the State of Delaware, (*Id.*, Tr. at 689:15-17) did not present *any testimony concerning the fiduciary duties under Delaware law owed* between by either Managers or Members.<sup>1</sup> On direct examination, Tannenbaum merely testified that where two owners of a hedge fund management company manage a domestic hedge fund, and an offshore hedge fund is established that invests in the same stocks as the domestic hedge fund, that “the owners of the company, if they are going to split the domestic fees in a particular way or subject to a particular formula, they would be splitting --- the custom

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<sup>1</sup> Defendants moved for the exclusion of Tannenbaum arguing that his testimony concerning the custom and practice in the hedge fund industry was not related to whether or not under Delaware law, or the Operating Agreement, Defendant Fradd had a fiduciary duty not to divert investors from an investment company managed by Apollo Management, into an investment company not managed by Apollo Management, (presumably Apollo Equity), and whether he did in fact breach a duty by diverting investors. (*Id.*, Tr. at 648:26-652:18.) Defendants also claimed that such testimony would confuse the jury, (*id.*, Tr. at 652:9-10), which it obviously did. The Court denied the motion to exclude Tannenbaum’s testimony, ruling that “What we will do, we will allow the plaintiff’s expert to offer testimony on the breach of fiduciary duty claim from his proposed expert, Michael Tannenbaum, as to custom and practice in the hedge fund industry with respect to fee sharing among owners of a company that manages a domestic hedge fund where there is also an offshore hedge fund that invests in substantially the same investments.” (*Id.*, Tr. at 656:9-16.) Defendants’ exception was noted. (*Id.*, Tr. at 656:17-18.)

and usage would be they are splitting the offshore funds in precisely the same manner.” (*Id.*, Tr. at 678:20-679:5.) Adding undue weight to irrelevant testimony, Tannenbaum also asserted that he could not “think of a situation involving two U.S. owners where the formula for the U.S., for the U.S. management fee, performance fee split formula, is not applied precisely the same way in the offshore situation.” (*Id.*, Tr. at 680:22-681:3.)

Astonishingly, on cross-examination, Tannenbaum agreed that it is the “**agreement of the entity that manages the offshore hedge fund**, the entity that receives the performance fees governs who is to receive those performance fees....”, (*Id.*, Tr. at 691:25-692:5) (emphasis added), but that he had never reviewed the Apollo Medical Offshore documents, thus did not know who was to receive the performance fees under that governing document, (*Id.*, Tr. at 692:6-8.) Tannenbaum conceded that Plaintiff failed to provide him with **any** of the formation documents in this action. (*Id.*, Tr. at 683:17-684:2; 685:12-16.) He admitted that Plaintiff’s attorneys **never informed** him that:

- the Operating Agreement of Apollo Management did not require a Member or a Manager who establishes an offshore fund to make Apollo Management the manager of the offshore, (*Id.*, Tr. at 685: 17-23);
- Plaintiff and Fradd **never signed an agreement** that provided that Plaintiff was to receive fees from Apollo Offshore, (*Id.*, Tr. at 685:26-686:6); and
- there was a provision in the Operating Agreement of Apollo Management that stated that “A member does not violate a duty or an obligation to the company merely because the member’s conduct furthers the member’s own interest.” (*Id.*, 688:10-689:4).

Prior to closing arguments, Plaintiff moved to conform to the evidence his third cause of action for breach of fiduciary duty. Realizing that he had failed to put in sufficient evidence in support for his cause of action, Plaintiff sought to change his claim to one for breach of fiduciary duty for Fradd’s failure to pay Plaintiff his alleged share of the fees from Apollo Offshore. (*Id.*, Tr. at 1306:4-19). The Court denied this Motion. (*Id.*, Tr. at 1309:24-1310:2.)

### **III. Instruction And Interrogatory On Breach Of Fiduciary Duty Claim Are Inconsistent with Plaintiff's Claim**

Nevertheless, over Defendants' objections, this Court determined to instruct the Jury of breach of fiduciary duty as follows:

Breach of a fiduciary duty. The manager of an LLC owes a fiduciary duty of due care, good faith and loyalty to the members of an LLC. The clause in the Operating Agreement which allows a member to act in his own self interest[] does not absolve a manager of his financial duty to the company and to the members who own it. In this case you must determine whether the Plaintiff has proven by a preponderance of the evidence that the Defendant Fradd breached that duty of good faith and loyalty by setting up an offshore branch of the hedge fund and then not sharing the profits of the offshore branch with Mr. Melcher and or by diverting investors from the domestic hedge fund into the offshore.

*(Id., Tr. at 1456:7-23).*<sup>2</sup>

The Court determined to provide the Jury with Interrogatories on issues of liability, the seventh of which addressed the claim for breach of fiduciary of duty (the "Seventh Interrogatory"). (Exh. D.) The Seventh Interrogatory queried "Did the Plaintiff prove by a preponderance of the evidence that the Defendant Fradd breached his fiduciary duty to the Plaintiff by setting up the offshore hedge fund, Apollo Medical Offshore, and then not sharing the profits of the offshore branch with Mr. Melcher and/or by diverting investors from the domestic hedge fund into the offshore one? Yes or no?" *(Id.)*

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<sup>2</sup> The Court made the parties proposed Jury Instructions a Court Exhibit. (Exh. C, Tr. at 1311:7-11; Exh. E.) Defendants' proposed instruction on breach of fiduciary duty stated:

Under the law, a person may have a fiduciary duty to another either in contract or in law. A party's violation of that duty constitutes a breach. In this case, you must first determine whether Defendant Brandon Fradd owed a fiduciary duty to Plaintiff James Melcher under the Operating Agreement not to divert investors from an investment company managed by Defendant Apollo Medical Fund Management, L.L.C. into an investment company not managed by Defendant Apollo Medical Fund Management, L.L.C. If you determine from a preponderance of the evidence that Fradd owed that duty to Melcher, you must then determine from a preponderance of the evidence whether Fradd breached that duty by diverting investors from Apollo Medical Partners, Ltd. into Apollo Medical Offshore Ltd. If you determine from a preponderance of the evidence that Fradd did not breach that duty, you must find for Fradd.

(Exh. E at 21.)



Prior to Justice Mills instructing the Jury, Defendants noted an exception to the Seventh Interrogatory, and thus by reference the instruction on breach of fiduciary duty, asserting that the Seventh Interrogatory did not properly reflect Plaintiff's breach of fiduciary duty claim. (*Id.*, Tr. at 1314:6-20.) Defendants contended that the Seventh Interrogatory should state: Did the plaintiff prove by a preponderance of the evidence that the defendant Fradd breached his fiduciary duty to plaintiff by setting up the offshore hedge fund, Apollo Medical Offshore, with an investment manager that was not Apollo Medical Fund Management. (*Id.*) The Court noted the exception. (*Id.*, Tr. at 1315:14.)

On May 28, 2009, the Jury returned a verdict, answering "Yes" to the Seventh Interrogatory by a vote of six-to-zero. (*Id.*, Tr. at 1479:2-11.)

### ARGUMENT

#### **I. Plaintiff Failed to Present Sufficient Evidence For a Jury to Find that Fradd Breached A Fiduciary Duty, Thus Verdict Should Be Entered For Fradd**

Pursuant to CPLR § 4404(a), "[a]fter a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law ... where the verdict is contrary to the weight of the evidence, [or] in the interest of justice...." CPLR § 4404(a). To grant a motion to set aside a verdict and direct that judgment in favor of a party, the Court must find that there can be "not valid line of reasoning and permissible inferences that could have lead rationale jurors to the conclusion they reached, [and] the evidence was legally insufficient to support the jury's verdict...." *Stephenson v. Hotel Employees & Restaurant Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 844 N.E.2d 1155, 811 N.Y.S.2d 633 (2006); *Busker on the Roof Ltd. Partnership, Co. v. M.E. Warrington*, 283 A.D.2d 376, 377, 725 N.Y.S.2d 45, 47 (1st Dep't 2001) (affirming trial court's

granting of defendant's motion to set aside jury verdict for, *inter alia*, breach of fiduciary duty in plaintiff's favor pursuant to CPLR § 4404(a) where plaintiff failed to prove defendant owed plaintiff a fiduciary duty).

Under Delaware law, which governs the Operating Agreement, (Exh. B at 11), to sustain a cause of action for breach of fiduciary duty, Plaintiff must plead that: (1) a fiduciary duty exists; and (2) a fiduciary breached that duty. *Heller v. Kiernan*, No. Civ. A. 1484-K, 2002 WL 385545, at \*3 (Del. Ch. Feb. 27, 2002).<sup>3</sup> The Delaware Limited Liability Company Act (the "LLC Act"), under which the Operating Agreement was organized, (Exh. B at 1, 6), does not set forth the fiduciary duties of a manager of a limited liability company ("LLC"). Rather, the Act states that to the extent a member or manager has duties at law or in equity, including fiduciary duties, to an LLC or to another member or manager "or is otherwise bound by a[n] [LLC] agreement, the member's or manager's or other person's duties *may be expanded or restricted or eliminated by provisions in the limited liability company agreement.*" Del. Code tit. 6, § 18-1101(c) (emphasis added).

Plaintiff failed to submit any evidence that Fradd owed Plaintiff fiduciary duties under Delaware law as a Member and Manager of Apollo Management, much less whether Fradd owed Plaintiff a fiduciary duty to share the performance fees of Apollo Offshore.<sup>4</sup> Indeed, this duty does not exist under the LLC Act. *See* Del. Code tit. 6, § 18-1101(c). Further, the Operating Agreement, which pursuant to the LLC Act dictates the fiduciary duties owed by Members and Managers, does not provide that a Member or a Manager who separately forms an offshore

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<sup>3</sup> Defendants' incorporated the language from *Heller v. Kiernan* in their Proposed Jury Instructions and cited to the case as authority for the instruction. (Exh. E at 21.)

<sup>4</sup> Defendants assume for this branch of Defendants' Motion that the instruction on breach of fiduciary duty and the Seventh Interrogatory were correct. However, as set forth in Section II, *infra*, Defendants' maintain that the instruction on breach of fiduciary duty and the Seventh Interrogatory were erroneous as a matter of law.

hedge fund has a *fiduciary duty* to share performance fees with the other Members. (*See generally* Exh. B.)

Notably, Tannenbaum, who is not licensed in Delaware, *failed* to even read the Operating Agreement. (Exh. C, Tr. at 687:3-23.) However, even Tannenbaum's testimony, that "the custom and usage would be they are splitting the offshore funds in precisely the same manner," (Tr. at 678:21-679:5), does not establish the first element of breach of fiduciary duty under Delaware law: that Fradd owed a *fiduciary duty* under Delaware law or the Operating Agreement, to share the performance fees of Apollo Offshore with Plaintiff. *Heller*, 2002 WL 385545, at \*3.<sup>5</sup>

In fact, the evidence was that Fradd did not owe Plaintiff any duty. The Operating Agreement, which under the Act governs the fiduciary duties owed by members and managers, provides that "[a] Member does not violate a duty or obligation to [Apollo Management] *merely because the Member's conduct furthers the Member's own interest.*" (Exh. B at 11.) Plaintiff himself, who ran his own offshore fund without Fradd, testified that he "understood that this section meant that [he] as a member, did not violate any duty to Apollo Management or to the other members... because [he] managed [his] own investment advisory firm...." (Exh. C Tr. at 311:12-17.) Accordingly, Plaintiff utterly failed to present legally sufficient evidence to support the jury's verdict that Fradd had a fiduciary duty to share fees from Apollo Offshore with Plaintiff, and somehow breached that alleged duty by failing to do so. This Court should therefore grant Defendants' motion to set aside the jury's verdict on the claim for breach of fiduciary duty and direct that judgment in favor of Fradd. *See Stephenson*, 6 N.Y.3d 265, 844

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<sup>5</sup> Notably, Tannenbaum contradicted himself when he agreed that in fact it is "*agreement of the entity that manages the offshore hedge fund, the entity that receives the performance fees governs who is to receive those performance fees...*", (Tr. at 691:25-692:5) (emphasis added). Thus, when Fradd set up Apollo Offshore with Apollo Equity (of which Plaintiff was not a party) as its Manger, it was the agreement of Apollo Equity that governed the allocation of performance fees, not custom and practice.

N.E.2d 1155, 811 N.Y.S.2d 633; *Busker on the Roof Ltd. Partnership, Co.*, 283 A.D.2d at 377, 725 N.Y.S.2d at 47.

**II. In The Alternative, The Court Should Grant a Partial New Trial on Plaintiff's Breach of Fiduciary Duty Claim: Both the Jury Instruction and Seventh Interrogatory Did Not Properly State Plaintiff's Claim for Breach of Fiduciary Duty**

If the Court does not grant Defendants' motion to set aside the jury verdict and direct judgment in favor of Fradd on Plaintiff's breach of fiduciary duty cause of action, the Court should grant a partial new trial on the issue of breach of fiduciary duty only because both the fiduciary duty jury instruction and the Seventh Interrogatory did not conform to Plaintiff's claim for breach of fiduciary duty. "A trial court is required to state the law relevant to the particular facts in issue, and a set of instructions that confuses or incompletely conveys the germane legal principles to be applied in a case requires a new trial" *J.R. Loftus, Inc. v. White*, 85 N.Y.2d 874, 875, 649 N.E.2d 1196, 1197, 626 N.Y.S.2d 52, 53 (1995) (In suit for construction contract fee, new trial was required after trial court failed to instruct jury to determine whether oral contract involved one-year warranty, and had found that such warranty existed, contract would have not been capable of performance within one year of its making and would have been unenforceable due to Statute of Frauds); *Lopato v. Kinney Rent-A-Car, Inc.*, 73 A.D.2d 565, 565, 423 N.Y.S.2d 42, 44 (1<sup>st</sup> Dep't 1979) (reversing and remanding for a new trial where instruction "removed from the jury any consideration as to whether plaintiff's previous condition was aggravated by the accident, and implanted in the jurors' minds the belief that if any part of her present disability was the result of her arthritic condition she could not recover for claims arising out of the accident).

Similarly, "posing the wrong question usually leads to an answer which is less than enlightening" and warrants a new trial. *Bustamante v. Westinghouse Elevator Co.*, 195 A.D.2d 318, 318, 600 N.Y.S.2d 35, 36 (1st Dep't 1993); *Lawson v. Brookdale Hosp. Med. Ctr.*, 43

A.D.3d 880, 882, 842 N.Y.S.2d 44, 46 (2d Dep't 2007) (granting new trial where the trial court failed to submit the proposed second interrogatory, and submitted an ambiguous interrogatory to the jury); *Garguilo v. City of N.Y.*, 280 A.D.2d 515, 516-17, 720 N.Y.S.2d 397, 398 (2d Dep't 2001) (granting a new trial where verdict sheet was confusing and interrogatories included an improper interrogatory). The Court has the discretion to order a partial new trial when a finding as to a cause of action or a separate issue is erroneous. *Creative Inception Inc. v. Andrews*, 50 A.D.2d 553, 554, 377 N.Y.S.2d 1, 2 (1st Dep't 1975).

**A. The Jury Instruction Failed to State the Law On Plaintiff's Claim for Breach of Fiduciary Duty**

The breach of fiduciary duty instruction was erroneous for two reasons: (1) the instruction on duties owed by a manager was insufficient under Delaware law and the Operating Agreement; (2) the instruction failed to properly state Plaintiff's claim for breach of fiduciary duty. First, the Court instructed the Jury, in part, that "[t]he manager of an LLC owes a fiduciary duty of due care, good faith and loyalty to the members of an LLC. The clause in the Operating Agreement which allows a member to act in his own self interests does not absolve a manager of his financial duty to the company and to the members who own it." (Exh. C, Tr. at 1456:8-15.) This was error because under the Delaware Limited Liability Company Act (the "Act"), under which the Operating Agreement is organized, (Exh. B at 1, 6), to the extent a member or manager has fiduciary duties at law or in equity to another member or manager "or is otherwise bound by a[n] [LLC] agreement, the member's or manager's or other person's duties may be expanded or *restricted or eliminated by provisions in the limited liability company agreement.*" Del. Code tit. 6, § 18-1101(c) (emphasis added). Thus, the provision of the Operating Agreement that provided that "[a] Member does not violate a duty or obligation to [Apollo Management] *merely because the Member's conduct furthers the Member's own interest,*"

(Exh. B at 11), *does* exculpate Fradd with respect to alleged duties under the law. The instruction erroneously stated the law.

The Court further instructed that “In this case you must determine whether the Plaintiff has proven by a preponderance of the evidence that the Defendant Fradd breached that duty of good faith and loyalty by setting up an offshore branch of the hedge fund and then not sharing the profits of the offshore branch with Mr. Melcher and or by diverting investors from the domestic hedge fund into the offshore.” (Exh. C., Tr. at 1456:16-23.) The instruction stated that the part of the breach of duty was in the act of setting up Apollo Offshore; yet that *was not* Plaintiff’s claim. In Plaintiff’s Second Amended Complaint, he alleged that the fiduciary duty was not to divert investors from Apollo Management into Apollo Equity, and that Fradd allegedly breached his duty by diverting investors from Apollo Partners into Apollo Offshore, which deprived Plaintiff of fees from Apollo Partners. (Exh. A., ¶¶ 48-50.) Thus, under the Second Amended Complaint as plead, *Fradd had a right to set up Apollo Offshore*, so long as he did not divert investors from Apollo Partners into Apollo Offshore, which would have deprived Plaintiff of fees. (Exh. A, ¶¶ 48-50.) The instruction did incorporate the diversion aspect of Plaintiff’s claim, but misstated the remainder, and thus failed to convey the germane legal principles of Plaintiff’s claim.

The combination of the two theories of breach of fiduciary duty--diversion and the establishment of Apollo Offshore, which was not Plaintiff’s claim--likely lead to juror confusion. Fradd’s uncontested testimony at trial was that he did not inform any of Plaintiff’s investors in Apollo Partners (those investors from whom Plaintiff derived 50% of the performance fees) about Apollo Offshore because if they moved from Apollo Partners to Apollo Offshore, Plaintiff would lose fees. (*Id.*, Tr. at 1038:24-1040:16.) Thus, the Jury could only have found that Fradd

breached a fiduciary duty by setting up Apollo Offshore, which was not Plaintiff's claim and about which Plaintiff failed to submit any evidence. For these reasons, the Court's instruction on breach of fiduciary duty was erroneous and the Court should order a new trial on the breach of fiduciary duty claim. *See J.R. Loftus, Inc.*, 85 N.Y.2d at 875, 649 N.E.2d at 1197, 626 N.Y.S.2d at 53; *Lopato*, 73 A.D.2d at 565, 423 N.Y.S.2d at 44

**B. The Seventh Interrogatory Failed to State the Law On Plaintiff's Claim For Breach of Fiduciary Duty**

Similarly, the Seventh Interrogatory failed to properly state the law and Plaintiff's claim for breach of fiduciary duty. Following the language of the Instruction, the Seventh Interrogatory asked the Jury to answer "Did the Plaintiff prove by a preponderance of the evidence that the Defendant Fradd breached his fiduciary duty to the Plaintiff by setting up the offshore hedge fund, Apollo Medical Offshore, and then not sharing the profits of the offshore branch with Mr. Melcher and/or by diverting investors from the domestic hedge fund into the offshore one? Yes or no?" (Exh. D.) As set forth above, the Seventh Interrogatory was improper because Plaintiff's claim is that Fradd breached a fiduciary duty by diverting investors from Apollo Partners into Apollo Offshore, *not* in setting up Apollo Offshore and failing to share the fees. (Exh. A, ¶¶ 48-50.) The failure to properly state the claim was erroneous.

Thus, where the Seventh Interrogatory failed to properly state Plaintiff's claim and the "law relevant to the particular facts in issue" and also could have "confuse[d] [and] incompletely convey[ed] the germane legal principles to be applied" the Court should order a new trial on the issue of breach of fiduciary duty. *J.R. Loftus, Inc.*, 85 N.Y.2d at 875, 649 N.E.2d at 1197, 626 N.Y.S.2d at 53; *Bustamante*, 195 A.D.2d at 318, 600 N.Y.S.2d at 36; *Lawson*, 43 A.D.3d at 882, 842 N.Y.S.2d at 46

**CONCLUSION**

For all the foregoing reasons, Defendants Apollo Medical Fund Management, LLC and R. Brandon Fradd respectfully submit that the Court should grant Defendants' motion to set aside the Jury's verdict on Plaintiff's Third Cause of Action for breach of fiduciary duty and direct that judgment be entered in favor of Defendant Fradd on Plaintiff's Third Cause of Action or, in the alternative, grant a partial new trial only on Plaintiff's Third Cause of Action for breach of fiduciary duty, together with such other and further relief as the Court deems to be just and proper.

Dated:           New York, New York  
                    June 12, 2009

GREENBERG TRAURIG LLP

By: 

Leslie D. Corwin  
Caroline J. Heller

The MetLife Building  
200 Park Avenue  
New York, New York 10166  
(212) 801-9200 Telephone  
*Attorneys for Defendants Apollo Medical Fund  
Management L.L.C. and R. Brandon Fradd*