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**FILED**  
DEBBIE HARMON, CLERK

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DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

VESTER A. WILSON, III, and, JULIA R.  
WILSON,

Plaintiffs,

vs.

JOHN POWERS, individually, JOHN  
POWERS, JR., individually, RYAN  
CONSTRUCTION RETIREMENT FUND,  
Michael Ryan, Trustee, MICHAEL RYAN,  
individually, and DOE DEFENDANTS 1-  
100,

Defendants.

Cause No. DV-09-627 #126  
Department No. 2

**OPINION AND ORDER**

Pending before the Court are:

1. Plaintiffs' *Motion for Sanctions* (Doc. # 81);
2. Defendant Ryan Construction Fund's *Motion for Summary Judgment Re: Dismissal of Ryan Construction Retirement Fund* (Doc. # 90);
3. Defendants' *Motion for Summary Judgment Re: Count IV (Fraud/Negligent Misrepresentation)* (Doc. # 92)

4. Defendants' *Motion for Summary Judgment Re: Count I* (Rescission/Revocation) (Doc. #95);

5. Defendants' *Motion for Summary Judgment Re: Count V* (Civil Conspiracy) (Doc. #97)

6. Plaintiffs' *Motion to Compel* (Doc. # 99), filed October 14, 2011; and

7. Defendants' *Motions in Limine* (Doc. #101).

The Court continues to consider and intends to treat the motions listed as items 1-5 and 7 above in a separate opinion or opinions. In the interest of a just, speedy and inexpensive resolution of this matter pursuant to Montana Rule of Civil Procedure 1, the Court now considers Plaintiffs' *Motion to Compel* (Doc. # 99), which has been fully briefed.

#### **A. BACKGROUND**

Plaintiffs Vester A. Wilson, III ("Mr. Wilson") and Julia R. Wilson (collectively, the "Wilson") are represented by Reid J. Perkins, Esq. of Worden Thane P.C. Defendants John Powers, John Powers, Jr., Ryan Construction Retirement Fund, and Michael Ryan (collectively, "Defendants") are represented by Brian J. Smith and Kathryn S. Mahe of Garlington, Lohn & Robinson, PLLP.

The Wilsons are suing Defendants to (a) rescind or revoke their obligations under an agreement with respect to a \$270,000 loan on the alternate theories of mistake, fraud, and lack of consideration (Count I), (b) offset their obligations with respect to the \$270,000 loan under that agreement for usury (Count III), (c) recover damages for fraud/negligent misrepresentation with respect to the agreement for the \$270,000 loan (Count IV), and (d) recover damages for civil conspiracy (Count V). *Compl.* (Doc. # 1). Defendants counterclaimed to recover on a \$270,000

promissory note Plaintiffs signed. (Doc. # 8). In addition, Defendants asserted sixteen affirmative defenses to Plaintiffs' *Complaint*. *Id.*

In their *Response Brief in Opposition to Motion to Compel* (Doc. # 106) filed October 25, 2011, Defendants stated that:

The principal remaining on the \$270,000 Loan is \$266,646.15. . . Plaintiffs have paid \$145,882.06 in interest. . . Thus, the amount of interest owing through the term of the loan was \$40,981.06. Accordingly, Defendants are seeking \$307,627.21, plus interest from November 22, 2010, at the contract rate (12%) until a verdict is reached, as provided by statute, and attorneys' fees (which continue to accrue), as provided in the contract.

(Doc. # 106 p. 16-17).

Based on the stipulation of the parties, this Court signed a *Protective Order* on October 25, 2011, protecting all private and confidential financial information produced in discovery from dissemination. (Doc. # 107).

## **B. DISCUSSION**

### **B.1 Standard**

Plaintiffs move for an order compelling Defendants John Powers, John Powers, Jr., and Michael Ryan individually to answer written discovery.<sup>1</sup> (Doc. # 99). Montana Rule of Civil Procedure 37 provides in pertinent part:

#### **(a) Motion for an Order Compelling Discovery.**

**(1) *In General.*** On notice to other parties and all affected persons, a party may move for an order compelling discovery. The motion

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<sup>1</sup>While Plaintiffs appear to have incorrectly cited Montana Rule of Civil Procedure 26(c) in their *Motion to Compel*, the Court deems Plaintiffs to have made this motion pursuant to Montana Rule of Civil Procedure 37.

must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action.

...  
**(3) Specific Motions.**

*(A) To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

- ...  
(iii) a party fails to answer an interrogatory submitted under Rule 33; or  
(iv) a party fails to respond that inspection will be permitted - - or fails to permit inspection - - as requested under Rule 34.

...  
**(4) Evasive or Incomplete Answer or Response.** For purposes of this subdivision (a), an evasive or incomplete answer or response must be treated as a failure to answer or respond.

Plaintiffs' *Motion to Compel* stated that "Defendants"[sic] have been contacted regarding this motion and have indicated that they will work with the Wilsons to produce some of the financial information. . . At the same time, Defendants have indicated an intent to object to any continuance of the summary judgment briefs they recently filed or the other motions they have promised to file in order to allow the Wilsons the opportunity for full discovery prior to responding to the motions. . . To the extent the parties can agree on a stipulated protective order and the Defendants produce certain materials, some of the items in this motion may be withdrawn." The Court considers this statement in Plaintiffs' *Motion to Compel* to be a sufficient certification under Montana Rule of Civil Procedure 37(a) that the Plaintiffs in good faith conferred or attempted to confer with the Defendants in an effort to obtain discovery

without the Court's action.

Plaintiffs' *Reply Brief in Further Support of Motion to Compel* (Doc. # 121), filed almost three weeks after this Court's *Protective Order*, stated, "Under the broad scope of discovery, the Defendants' own financial information and other records related to their relationship with Cornerstone are discoverable. Granting the motion to compel remains appropriate." (Doc. # 121 p. 2). The Court therefore proceeds to consider Plaintiffs' motion.

## **B.2 General Concerns**

Defendants have objected repeatedly that Plaintiffs' discovery requests: (1) seek privileged information by nature of Plaintiffs' phrasing of the request (2) are vague or otherwise worded improperly, (3) are not reasonably calculated to lead to discovery of admissible evidence as they relate to loans not at issue, (4) are not reasonably calculated to lead to discovery of admissible evidence to the extent they relate to the promissory note for the face amount of \$695,000, (5) contain private and confidential information, and (6) are unduly burdensome. In addition, Defendants objected to providing a privilege log as outside the scope of discovery, not reasonably calculated to lead to admissible evidence, and requesting information protected by the work product doctrine.

In their briefing, Plaintiffs have stressed the broad nature of the discovery process, the definition of relevance under the Montana Rules of Evidence, and provided a tabular matrix of their requests, Defendants' objections, and Plaintiffs' argument.

In response, Defendants devoted most of their brief to responding to *Plaintiffs' Reply Brief in Further Support of Motion for Sanctions* (Doc. # 100), making conclusory statements

that Plaintiffs' requests are unduly burdensome, constructing an argument that work-product shelters essentially all of Defendants' counsel's mental processes, making conclusory statements that documents related to the \$695,000 loan are not relevant, asserting that Defendants are not required to create a privilege log, and offering a self-serving justification for Defendants' dubiously asserted narrow interpretation of the phrase "received any portion of the money that Cornerstone Financial took as its commission."

### **B.2.a Recurring Objection that the Requests are Privileged**

Defendants, without citing any case on point, argue that the phrasing in Plaintiffs' Requests for Production No. 32, 33, 34, 35, 36, 38, 39, 40, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, and 57 (seeking "non-privileged" documents which "support[]" or "refute[]" various claims, factual contentions and allegations) and in the phrasing in Plaintiffs' Interrogatories No. 39, 40, 41, 42, 43, 44, and 45 (asking for the basis for any defenses) make them requests for the legal opinions of Defendants' counsel.

Montana Rule of Evidence 401 provides in pertinent part:

Relevant evidence means evidence *having any tendency to make the existence of any fact* that is of consequence to the determination of the action *more or less probable* than it would be without the evidence.

The Court reads Plaintiffs' discovery production request to merely request "relevant" documents, communications, and electronic data in that the documents have any tendency to either make the existence of the allegation either more probable (support) or less probable (refute). *See, e.g., Hinkel v. Racek*, 514 N.W.2d 382 (reviewing court does not weight the evidence but "simply ascertain[s] whether there was some *relevant* evidence to *support* the finding of probable

cause”)(emphasis added). Indeed, the Court concludes the relevance interpretation is the only reasonable reading of Plaintiffs’ request. As the Montana Supreme Court stated in *Richardson v. State*, 2006 MT 43, ¶ 52, 331 Mont. 231, 130 P.3d 634:

When an interrogatory can reasonably be interpreted, in the context of the claims and defenses at issue, as seeking discoverable information, the recipient of the interrogatory must interpret it that way rather than imputing some meaning to the request which would render it vague, ambiguous, or objectionable in some other respect.

Accordingly, Defendants should be compelled to provide documents, communications, and electronic data to the Plaintiffs, as Defendants’ claim of privilege is invalid. See Mont. R. Civ. P. 33(b)(4).

With respect to Plaintiffs’ request for the basis of any defenses, the Montana Supreme Court, in explaining the theory behind notice pleading, recently reiterated that the discovery process provides liberal opportunity to disclose more precisely the basis of a defense:

“ . . .Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”

*Griffin v. Moseley*, 2010 MT 132, ¶ 39, 356 Mont. 393, 234 P.3d 869 (quoting *Spaberg v. Johnson*, 143 Mont. 500, 503, 392 P.2d 78, 80 (1964) (quoting *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957))). The Court fails to see how the mere request to disclose the basis for a defense could be “privileged” when the Montana Supreme Court has so recently stated that the liberal opportunity for discovery permits such disclosure. In a notice pleading system, the failure to disclose the basis of a defense seems, at the least, highly likely to prejudice the claimant if the basis of such defense is not disclosed upon request during discovery.

Accordingly, Plaintiffs' motion should be granted with respect to their requests for the basis for a claim or defense.

**B.2.b. Recurring Objection that Request is Vague or Worded Improperly**

**B.2.b.i. Vague**

As discussed above, under *Richardson*, if a discovery request can be reasonably interpreted in the context of the claims and defenses at issue as seeking discoverable information, the recipient must treat it that way. In the case at bar, Defendants objected to a request to produce copies of any and all checks "which are in your possession or reasonably attainable and which are from Cornerstone Financial to yourself, your family, and/or any business entity to which you are a member or shareholder," because the phrase "reasonably attainable" was vague. (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 13; Doc. # 88 Ex. 1, 2, 4.) A reasonable interpretation of this phrase in the context of the claims and defenses in this case which would seek discoverable information is "not unduly burdensome to obtain in the responding party's possession, custody, or control." *See* Rule 34(a), M. R. Civ. P. Defendants have not provided the Court with any argument or authority illustrating that such phrase is "vague." Moreover, as discussed below, Defendants have made no showing that any of Plaintiffs' requests are unduly burdensome. Accordingly, Plaintiffs' motion should be granted with respect to requests to the extent Defendants have objected on the basis of vagueness and Defendants should provide such documents, including, without limitation, their relevant bank account documents showing account numbers.

**B.2.b.ii. Worded Improperly**

Defendants devote the bulk of pages 13 and 14 of their response brief to justifying a misinterpretation of Plaintiffs' Interrogatory Number 9. Interestingly, Defendants describe Plaintiffs' request thus: "Interrogatory No. 9 and Request for Production No. 10 seek information regarding times when Defendants received a portion of Cornerstone Financial's commission." The actual wording of Plaintiffs' Interrogatory Number 9 is, in pertinent part:

For each instance in which yourself [sic]. . .*received any portion of the money that Cornerstone Financial took as its "commission,"* "settlement charges," or other fees, please state . . .

Pl. Interrog. No. 9. This language is unambiguous. Defendants' continued assertion that "Defendants never received a portion of Cornerstone Financial's commission" in its response brief is an evasive response when, to use Defendants' own words, "Mr. Congdon and Mr. Kovick agreed to pay Mr. Powers, Mr. Ryan, and Joe Berlin \$73,800 . . . The method arranged for the payment of that amount was that Mr. Kovick and Mr. Congdon would make payments on this amount based upon the commissions on particular loans."<sup>2</sup> (Doc. # 106 p. 13). The Court fails to see how this scenario involving the \$73,800 is not an instance in which Mr. Powers "received any portion of the money that Cornerstone Financial took as its "commission."

Assuming *arguendo* that the request was ambiguous with respect to such scenario, reference to *Richardson* would resolve the ambiguity in favor of disclosure. This action involves allegations of usury and conspiracy to commit usury and any information bearing upon a possible methodology for commission of usury or on the relationship between the Defendants and

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<sup>2</sup>Mr. Congdon and Mr. Kovick are Cornerstone Financial's principals.

Cornerstone Financial is relevant to the case. Therefore, Defendants should certainly disclose (and provide documents relating to) any instance in which a percentage of Cornerstone Financial's commissions, settlement fees, or other charges are used as a metric in any financial arrangement involving any of the Defendants, their family members, or any business entity in which any Defendant or any Defendant's family member is a shareholder.

Accordingly, Plaintiffs' motion should be granted with respect to Plaintiffs' Interrogatory Number 9 and Request for Production Number 10.

**B.2.c. Recurring Objection that Request Relates to Loans Not At Issue**

Similarly, Defendants' recurring objection that Plaintiffs' requests are not reasonably calculated to lead to the discovery of admissible evidence because the requests relate to loans not at issue is without merit under the circumstances of this case. Information relating to loans other than the \$270,000 loan are either relevant or reasonably calculated to lead to the discovery of admissible evidence because such information may be directly relevant to the Defendants' relationship with Cornerstone and the methodology for usury or fraud. Accordingly, Defendants' objection is without merit and Plaintiffs' motion should be granted regarding each and every discovery request subject to such objection.

**B.2.d. Recurring Objection that Request Relates to \$695,000 Loan**

The Court notes that Defendants objected to Plaintiffs' requests as they related to the \$695,000 loan before this Court determined that Plaintiffs' claims with respect to the \$695,000 were *res judicata*. For purposes of discovery, the fact that Plaintiffs' claim relates to a \$695,000 loan that is or may be *res judicata* is unimportant. Information relating to the \$695,000 loan is

relevant to facts at issue in the remaining claims in this action. For example, information regarding payments from Defendants to Cornerstone Financial is directly relevant to the nature of the relationship between Defendants and Cornerstone, an issue in the usury and conspiracy claims in this action regardless of whether the payments are related specifically to the remaining 270,000 loan claim. In addition, the extensive documents and arguments the Court has reviewed in this now eight volume file show that information related to the \$695,000 loan including any account number associated with such transactions is obviously relevant to reconstructing the \$270,000 loan transaction in this action. Accordingly, Defendants recurring objection that a request is not reasonably calculated to lead to admissible evidence because it is related to the \$695,000 loan is without merit and Plaintiffs' *Motion to Compel* should be granted in this respect.

#### **B.2.e. Recurring Objection that Information is Private and Confidential**

As noted above, the parties stipulated to a *Protective Order* for private and confidential financial information produced during the discovery process. Because such private and confidential information has adequate protection, this objection is no longer merited. Accordingly, Plaintiffs' motion should be granted with respect to information Defendant has asserted is private and confidential.

#### **B.2.f. Request for Production 3 - Privilege Log**

Defendants argue that "the rules of discovery do not require a party to create documents in response to a request for production," citing Montana Rule of Civil Procedure 34. (Doc. # 106 p. 3). Accordingly, Defendants provided no privilege log to this Court as support for its response

to Plaintiffs' motion.

The recently amended Montana Rule of Civil Procedure 26(b)(6), effective October 1, 2011, "is a verbatim adoption of Federal Rule 26(b)(5) and imposes a procedure for handling of information withheld under claimed privilege, requiring the creation of a privilege log . . ." *In Re: Revisions to the Montana Rules of Civil Procedure*, AF 07-0157, M. R. Civ. P. 26 Comm. Notes (Apr. 16, 2011). Rule 26(b)(6), as currently in effect and in effect at the time Defendants' responsive brief was filed, clearly provides:

**(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the *scope of discovery* is as follows:

...

**(6) Claiming Privilege or Protecting Trial-Preparation Materials.**

*(A) Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; *and*
- (ii) describe the nature of the documents, communications, or things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.*

(Emphasis added).

Prior to the effective date of the current amendments to the Montana Rules of Civil Procedure, however, Montana courts have ordered litigants to produce a privilege log. *See, e.g., Rucker v. Farmers Insurance Exchange*, 2004 ML 1151, ¶ 37 (19<sup>th</sup> Distr.) The Court does not believe that any objection on grounds of privilege has been sustained in this *Opinion and Order*, but if so, Defendants should produce a privilege log to accompany such objections based on

privilege.

### **B.2.g. Objection that Request is Unduly Burdensome**

The Montana Rules of Civil Procedure use the phrase “undue burden” several times in the discovery context, none of which justifies continued failure to disclose in the case at bar. First, Rule 45 uses “undue burden” in the context of quashing or modifying a subpoena and no subpoena is involved at the case at bar. Rule 45, M. R. Civ. P. Next, Rule 26(b)(2)(B), provides a limitation on the disclosure of electronically-stored information that is not reasonably accessible because of undue burden or cost:

*(B) Specific Limitations on Electronically-Stored Information.* A party need not provide discovery of electronically-stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. ***On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.*** If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

The Defendants have not identified any specific source that is not reasonably accessible because of undue burden or cost. Even if Defendants had identified such a source, Defendants failed to show that any such information is not reasonably accessible because of undue burden or cost.<sup>3</sup>

Finally, Rule 26(c)(1) permits a party to seek a protective order on the grounds of undue

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<sup>3</sup>Defendants’ statement in their response brief that “as evidenced by the answers to Interrogatory No. 8, it would be unduly burdensome to require Defendants to produce every document related to loans to other parties” is not a showing of undue burden. Defendants’ answers to such interrogatory merely repeats the objection that the request is overly broad and unduly burdensome and then, subject to the objection, lists the loans on which a Defendant was a lender from 2005 to present.

burden. Rule 26(c)(1), M. R. Civ. P. The Defendants in this case have not sought a protective order on such a ground.

Therefore, Defendants’ objection on the ground of “undue burden” is without merit.

Accordingly, Plaintiffs’ motion should be granted with respect to such objection.

### B.3 Tabular Analysis of Plaintiffs’ Motion

The Court now proceeds to analyze, in tabular form, Plaintiffs’ *Motion to Compel* with respect to specific discovery requests, Defendants’ objections thereto, and the Court’s reasoning for its ruling with respect to such requests.

Plaintiffs’ Discovery Request	Objection	Rationale	Ruling
A. List all of your bank accounts and bank accounts on which you were a signatory from August 2005 to present and the corresponding physical addresses of the branch or office where the account information for each account is located. (Doc. # 99.1 Ex.1, Pl. Interrog. 2)	Seeks private, confidential financial information and Defendants will provide such information upon entering a Protective Order to safeguard privacy. (Doc. # 82 Ex. 1,4)	The Court issued its Protective rder on October 25, 2011 based upon the parties’ stipulation (Doc.#107). There is no continuing basis to withhold this information because no other objections were raised and are therefore waived. See Mont. R. Civ. P. 33(b)(4).	Granted
B. For each of the accounts requested in Interrogatory No. 2, produce true and correct copies of any bank statements for each and every month in which money went <i>from</i> your accounts(s) to any Cornerstone Financial account. (Doc. # 99.1 Ex. 1, Pl. Req. Prod. 4)	(1) not calculated to lead to the discovery of admissible evidence as it requests loans not at issue, (2) seeks information related to the Promissory Note for the face amount of \$695,000 and not reasonably calculated to lead to discovery of admissible information, (3) such information is private and confidential. (Doc. #82 Ex. 1,4)	(1)-(2)Information regarding payments from Defendants to Cornerstone Financial is directly relevant to the nature of the relationship between Defendants and Cornerstone Financial, an issue in the usury and conspiracy claims. (3) The Court issued its Protective Order on October 25, 2011 based upon the parties’ stipulation (Doc.#107).	Granted

<p>C. For each instance in which Defendants transferred money to Cornerstone Financial, Please provide: (a) the date, (b) amount, and (c) reason for the transfer. (Doc. # 99.1, Ex. 1, Pl. Interrog. 3)</p>	<p>Same as for item B. above (Doc. # 82 Ex. 1, 4).</p>	<p>Same as above (item B). Also, such information is relevant to failure of consideration and the amount of interest charged or reserved.</p>	<p>Granted</p>
<p>D. For each instance in which Cornerstone Financial transferred money to you, please provide the: (a) date, (b) amount and (c) reason for the transfer. (Doc. # 99.1, Ex. 1, Pl. Interrog. 4)</p>	<p>(1) not calculated to lead to discovery of admissible evidence and (2) private and confidential. (Doc. # 82 Ex. 1, 2, 4)</p>	<p>(1) Information regarding payments from Cornerstone Financial to Defendants is directly relevant to the nature of the relationship between Defendants and Cornerstone, an issue in the usury and conspiracy claims in this action. It is also reasonably calculated to lead to admissible evidence regarding methodology for extracting usurious interest. Plaintiffs should receive information allowing them to recreate the disbursements that involved the \$270,000 loan. (2) The parties have stipulated to a protective order protecting private and confidential information.</p>	<p>Granted</p>
<p>E. Produce any and all non-privileged documents, communications and electronic data which support or refute your answer to item D above (Interrogatory No. 4). (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 7).</p>	<p>Same as for item D above. (Doc. # 82 Ex. 1, 2, 4)</p>	<p>Same as for item D above.</p>	<p>Granted</p>

<p>F. Relative to loans in which Cornerstone Financial was involved, list each and every loan on which you were named as a lender and/or out of which you received some financial benefit despite not being named as a lender. For each loan on which you received some financial benefit when you were not a named lender; (b) the amount you received, and (c) the calculation used by the person paying the benefit to determine the amount of benefit which you received. (Doc. # 99.1, Ex. 1, Pl. Interrog. 8).</p>	<p>(1) overly broad and unduly burdensome. (Doc. # 82 Ex. 1, 2, 4)</p>	<p>(1) Defendants have failed to establish that the request is overly broad or unduly burdensome. The answers to such interrogatory would reasonably be maintained in the ordinary course of business and the request is reasonably calculated to lead to admissible evidence on the issues of the relationship between Cornerstone Financial and Defendants, the amount of interest reserved, charged, or taken, and failure of consideration.</p>	<p>Granted</p>
<p>G. Produce your books, financial records, and file related to each loan referred to in Interrogatory Number 8 (Item F above). (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 9).</p>	<p>(1) not reasonably calculated to lead to the discovery of admissible evidence, (2) seeks private and confidential information, and (3) is overly broad and burdensome. (Doc. # 82 Ex. 1, 2, 4)</p>	<p>See item F above. In addition, the parties have stipulated to a protective order which should protect any private and confidential information produced in discovery.</p>	<p>Granted</p>

<p>H. For each instance in which you, any family member, or any business entity of which you or a family member are a member or shareholder, received any portion of the money that Cornerstone Financial took as its “commission,” “settlement charges,” or other fees, please state: (a) what loan the commission, charge or fee was associated with . . . (See Doc. # 99.1, Ex. 1, Pl. Interrog. 9 for full interrogatory).</p>	<p>Defendants did not object to this interrogatory and answered “None.” Subsequently, Defendants revealed that they had received a portion of the money that Cornerstone Financial took as its “commission” but provided an explanation that the money was the result of an unwritten settlement agreement. (Doc. # 82 Ex. 1, 2, 4)</p>	<p>Defendants failed to object to this interrogatory and have waived any objection. See Mont. R. Civ. P. 33(b)(4). This interrogatory is relevant to the issues of the relationship between Cornerstone Financial and Defendants, the methodology of usury, and scope of conspiracy. See also the Court’s discussion of this request in the body of this <i>Opinion and Order</i>.</p>	<p>Granted</p>
<p>I. Produce any and all non-privileged documents, communications and electronic data which support or refute your answer to the prior interrogatory. (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 10)</p>	<p>Defendants did not object and merely answered that they had no responsive documents. (Doc. # 82 Ex. 1, 2, 4)</p>	<p>Defendants failed to object to this interrogatory and have waived any objection. This interrogatory is relevant to the issues of the relationship between Cornerstone Financial and Defendants and the methodology of usury and scope of conspiracy.</p>	<p>Granted</p>
<p>J. For the \$270,000, \$165,000 loan, and \$695,000 loan please state who drafted the promissory note, trust indenture or mortgage, escrow agreement, and from whom you obtained forms (Doc. # 99.1, Ex. 1, Pl. Interrog. 13)</p>	<p>(1) to the extent the request seeks information related to the promissory note for \$695,000, it is not reasonably calculated to lead to admissible evidence (Doc. #82 Ex. 1)</p>	<p>Information related to the promissory note for \$695,000 is reasonably calculated to lead to admissible evidence on the issues of the relationship between the Defendants and Cornerstone Financial.</p>	<p>Granted</p>

<p>K. Produce copies of any and all checks which are in your possession or reasonably attainable and which are from Cornerstone Financial to your, your family, and/or any business entity to which you are a member or shareholder. (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 13)</p>	<p>(1) overly broad, (2) vague as to what constitutes “reasonably attainable” and (3) is not reasonably calculated to lead to the discovery of admissible evidence. (Doc. #82 Ex. 1, 2, 4)</p>	<p>(1) Defendants have failed to demonstrate that this request is overly broad; (2) Defendants should interpret “reasonably attainable” so that it is not vague, i.e., attainable through bank, accountant, storage company over which you have control, or computer to which you have access or control access; and (3) the request is reasonably calculated to lead to admissible evidence on the issue of the relationship between Defendants and Cornerstone Financial, methodology of usury, interest taken, reserved, or charged, and scope of conspiracy.</p>	<p>Granted</p>
<p>L. Produce copies of any and all receipts which are in your possession or reasonably attainable and which evidence cash payments (or cash equivalent) from Cornerstone Financial to you, your family, and/or any business entity to which you are a member or shareholder (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 14)</p>	<p>Same objections as to item K above. (Doc. #82 Ex. 1, 2, 4)</p>	<p>See Item K above.</p>	<p>Granted</p>
<p>M. Produce copies of all non-privileged documents in your file relating to the \$695,000 loan. (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 19)</p>	<p>(1) not reasonably calculated to lead to the discovery of admissible evidence. (Doc. #82 Ex.1)</p>	<p>Information related to the \$695,000 loan is relevant to the relationship between Cornerstone Financial and Defendants; methodology of usury; and the amount of interest taken, reserved, or charged with respect to the \$270,000 loan.</p>	<p>Granted</p>

<p>N. Produce any and all agreements and/or communications confirming agreements that you had with Cornerstone Financial, Robert Congdon, Keith Kovick, and/or Dennis Minemyer. (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 20)</p>	<p>(1) not reasonably calculated to lead to the discovery of admissible evidence, (2) overly broad and unduly burdensome, (3) seeks information related to loans not at issue in this litigation, (4) seeks information related to the promissory note for the face amount of \$695,000 (5) not in possession (6) not located. (Doc. # 82 Ex. 1, 2, 4).</p>	<p>(1) reasonably calculated to lead to admissible evidence regarding the relationship between Defendants and Cornerstone Financial, including through its officers and accountant. (2) Defendants failed to show that this request is overly broad and unduly burdensome and such documents would be expected to be kept in the ordinary course of business. (3)-(4) The information is reasonably calculated to lead to the discovery of admissible evidence on the issues of the Defendants' relationship with Cornerstone Financial and methodology of usury (5)-(6) Defendants should produce to the extent such documents are subject to their control</p>	<p>Granted</p>
<p>O. Produce any IRS Form 1099s or 5498s which you have received relating to the loans at issue in this suit. (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 27)</p>	<p>(1) not reasonably calculated to lead to the discovery of admissible evidence, (2) seeks non-discoverable private information, (3) not reasonably calculated to lead to admissible evidence to the extent it relates to the \$695,000 loan. (Doc. # 82 Ex. 1).</p>	<p>(1),(3) This request is reasonably calculated to lead to admissible evidence on the issues of the relationship between Defendants, Cornerstone Financial and any agents or coconspirators; methodology of usury; amount of interest. Information relating to the \$695,000 loan is relevant to trace the transaction with respect to the \$270,000 loan which Defendants allege occurred in one disbursement. (2) The parties have stipulated to a protective order to protect private information.</p>	<p>Granted</p>

<p>P. Produce your tax returns, as sent to the IRS, the Montana Department of Revenue, any other state, and/or any other government from 2005 to present, including schedules (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 28 &amp; 55)</p>	<p>(1) not reasonably calculated to lead to the discovery of admissible evidence, (2) seeks non-discoverable private information. (Doc. # 82, Ex. 1)</p>	<p>(1) reasonably calculated to lead to discoverable evidence related to the relationship between Defendants and Cornerstone Financial, interest taken or received, nature of conspiracy, methodology of usury, conspiratorial agreement, or fraud. (2) The parties have stipulated to a protective order regarding private information and Defendants failed to identify the manner in which such private information is otherwise non-discoverable.</p>	<p>Granted</p>
<p>Q. Related to loans which Cornerstone Financial located either the borrower(s) and/or the lender(s) or which were otherwise related to Cornerstone Financial, please state: (a) the total amount of money you and/or entities which you have an interest in have loaned each year since the inception of Cornerstone Financial; and (b) the total amount of profit you have made each year since the inception of Cornerstone Financial. (Doc. # 99.1, Ex. 1, Pl. Interrog. 19)</p>	<p>(1) not reasonably calculated to lead to the discovery of admissible evidence, (2) overly broad, (3) unduly burdensome, (4) requests private financial information. (Doc. # 82, Ex. 1)</p>	<p>(1) relevant to the relationship between Defendants and Cornerstone Financial and motive for civil conspiracy and fraud (2)-(3) Defendants have failed to demonstrate that the request is overly broad or unduly burdensome. (4) The parties have stipulated to a protective order regarding private financial information provided in discovery.</p>	<p>Granted</p>

<p>R. For each loan you have made related to Cornerstone Financial since its inception, please list the (a) date of the loan, (b) names of all lenders, (c) names of all borrowers on each loan, (d) corresponding full principal amount of each loan, (e) total amount sent to Cornerstone Financial by you to fund your portion, (f) total amount actually distributed to the borrowers from all lenders, (g) total amount returned to you, your family, and/or any business that you have an ownership interest in, and (h) total amount returned to lenders. (Doc. # 99.1, Ex. 1, Pl. Interrog. 20)</p>	<p>(1) not reasonably calculated to lead to the discovery of admissible evidence, (2) unduly burdensome, (3) overly broad, (4) requests private financial information, (5) duplicative. (Doc. # 82, Ex. 1)</p>	<p>(1) reasonably calculated to lead to the discovery of admissible evidence relating to agency, the relationship between Defendants and Cornerstone Financial, and methodology of usury; (2) Defendants have made no showing that the request is unduly burdensome, (3) the request is not unduly broad as such information is discoverable under any interpretation in accordance with <i>Richardson</i>, (4) the parties have stipulated to a protective order, (5) not duplicative in the context of this case as it creates a new category of loans.</p>	<p>Granted</p>
<p>S. Produce any and all non-privileged documents, communications and electronic data which supports or refutes your statement that “Mr. Wilson received, either actually or constructively, the \$165,000 at closing. Mr. Wilson directed the payment of the funds Mr. Wilson borrowed to a title company at the request of Dan Wolsky and/or Dan Klemann.”(Doc. # 99.1, Ex. 1, Pl. Req. Prod. 32; Doc. # 82, Ex. 1, 2, 4)</p>	<p>(1) by its very nature, the request seeks the mental impressions, conclusions, opinions and legal theories of counsel which are protected by the work product doctrine and not discoverable. (Doc. # 82, Ex. 1, 2, 4)</p>	<p>(1) Pursuant to <i>Richardson</i> and as discussed above, such request does not, “by its very nature” seek mental impressions, conclusions, opinions and legal theories of counsel. Defendants should produce any non-privileged documents in accordance with the request.</p>	<p>Granted</p>

<p>T. Referring to Paragraph 30 of your <i>Answer</i>, please state each and every basis for your denial of the allegation (Doc. # 99.1, Ex. 1, Pl. Interrog. 32)</p>	<p>Defendant John Powers did not object to this request and provided a response. However, the response he provided was incomplete (i.e., did not name title company, did not name property purchased) (Doc. # 82, Ex. 1). With respect to Defendants Michael Ryan and John Powers, Jr., Interrogatory 32 contains a different inquiry (Doc. # 82, Ex. 2, 4).</p>	<p>Plaintiffs' brief is incorrect in stating that Paragraph 30 of the <i>Complaint</i> alleged that "Mr. Wolsky, in fact, never received the money." Paragraph 30 of the <i>Complaint</i> alleged that "Neither Mr. nor Mrs. Wilson received the \$270,000." Compl. ¶ 30. Plaintiffs' request is granted to the extent it relates to Paragraph 30 of Defendants' <i>Answer</i> (referring to Paragraph 30 of the <i>Complaint</i>). To the extent the request refers to the statement "My Wolsky, in fact, never received the money" (and without limiting disclosure of such information under other discovery requests), the motion should be denied.</p>	<p>Granted in part and denied in part with respect to Defendant John Powers. To the extent Plaintiffs asked the other defendants the same question and received the same objection, granted in part and denied in part.</p>
<p>U. Produce all non-privileged documents, communications and electronic data which supports or refutes your answer to Interrogatory No. 32 (Item T above). (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 41).</p>	<p>(1) by its very nature this request seeks the mental impressions, conclusions, opinions and legal theories of counsel which are protected under the work product doctrine. (Doc. # 82, Ex. 1). With respect to Defendants Michael Ryan and John Powers, Jr., Request for Production 41 contains a different inquiry (Doc. # 82, Ex. 2, 4).</p>	<p>(1) Pursuant to <i>Richardson</i> and the discussion above, the request does not "by its very nature seek the mental impressions, conclusions, or legal theories of counsel."</p>	<p>Granted with respect to Defendant John Powers. To the extent Plaintiffs asked the other Defendants the same question and received the same objection, granted.</p>

<p>V. State the specific factual support for the allegation in your second affirmative defense that Wolsky deprived Wilson of the funds through fraud or deception. (Doc. # 99.1, Ex. 1, Pl. Interrog. 38)</p>	<p>(1) by its very nature this request seeks the mental impressions, conclusions, opinions and legal theories of counsel which are protected under the work product doctrine. (Doc. # 82, Ex. 1). With respect to Defendants Michael Ryan and John Powers, Jr., Interrogatory 38 contains a different inquiry (Doc. # 82, Ex. 2, 4).</p>	<p>(1) Pursuant to <i>Richardson</i> and the discussion above, the request does not “by its very nature seek the mental impressions, conclusions, or legal theories of counsel.”</p>	<p>Granted with respect to John Powers. Granted to the extent Plaintiffs received the same objection to the same question from the other Defendants.</p>
<p>W. Plaintiffs’ Requests for production No. 33, 34, 35, 36, 38, 39, 40, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, and 57 seeking “non-privileged” documents and facts supporting or refuting various claims, factual contentions, and allegations and Interrogatories No. 39, 40, 41, 42, 43, 44, and 45 asking for the factual basis for any defenses. Note: Request for Production No. 57 requests copies of exhibits which may be used at trial. Interrogatory 45 asked for all legal theories Defendants are relying on to seek damages. (Doc. # 99.1, Ex. 1)</p>	<p>Defendant John Powers objected: (1) requests seek the “mental impressions” of counsel; (2) Plaintiffs’ Req. Prod. No. 36 is related to the \$695,000 note; (3) Interrogatory 45 explicitly seeks Defendants’ attorneys’ legal theories which are expressly protected under Rule 26(b)(3). (Doc. # 106 p. 10); (4) “Request for Production 57 requests all exhibits Defendants “<u>may</u> rely on in this case. . . this is clearly directed at the mental processes of Defendants’ counsel as it does not even seek the exhibits that Defendants will rely on . . .” (Doc. # 106 p. 10). Plaintiffs’ requests to Defendants Michael Ryan and John Powers Jr. do not have the same content under the same numbers as Plaintiffs’ requests to Defendant John Powers.</p>	<p>(1) Pursuant to <i>Richardson</i> and the discussion above, the request does not by its very nature seek the mental impressions, conclusions, or legal theories of counsel. (2) Information regarding the \$695,000 note is relevant to the relationship between Defendants and Cornerstone Financial, methodology of usury, and to trace the financial transaction involving the \$270,000 note. (3) With respect to Interrogatory 45, the Court construes Plaintiffs’ request to include only the legal basis of the claim for damages. (4) Plaintiffs motion should be denied with respect to Request for Production No. 57, as Plaintiffs have not shown a substantial need for them pursuant to Montana Rule of Civil Procedure 26(b)(3)(A)(ii).</p>	<p>Granted in part with respect to all Defendants to the extent Plaintiffs received the same objection to the same question from the other Defendants; Denied with respect to Request for Production No. 57.</p>

<p>X. Please itemize the damages that you claim you are entitled to, including your method of calculation for each item. (Doc. # 99.1, Ex. 1, Pl. Interrog. 46)</p>	<p>Incomplete response that does not match the <i>Answer</i>. (Doc. # 82, Ex. 1). With respect to Defendants Michael Ryan and John Powers, Jr., Interrogatory 46 contains a different inquiry (Doc. # 82, Ex. 2, 4). Defendants provided additional information in their response brief as noted in the discussion above.</p>	<p>Defendants should be required to provide a complete response in the form of an answer to an interrogatory.</p>	<p>Granted with respect to Defendant John Powers. To the extent Plaintiffs asked the other Defendants the same question and received the same objection, granted.</p>
<p>Y. Interrogatory Numbers 48, 49 (net worth for purpose of punitive damages calculation) and Req. Prod. No. 59 (documents supporting or refuting net worth calculation (such as balance sheets, etc.).</p>	<p>Defendants' response brief states that "In regards to Interrogatory Nos. 2, 48, 49, the portion of Request for Production No. 4 related to the \$165,000 and \$270,000 loans, Request for Production Nos. 27, 28, 55, and 59, these requests will be answered and, to the extent there are any responsive documents in the possession, custody, or control of Defendants, documents will be provided as soon as the Stipulated Protective Order is in place." (Doc. # 106 p. 17).</p>	<p>The Court was unable to locate a copy of Plaintiffs' Interrogatory 48 and 49 and Request for Production Number 59 or any response thereto in the case file. The Court has received no information from either party that such information has been provided. The Protective Order has been signed. Defendants' response brief indicates no objection upon the signing of the protective order. Information regarding net worth is relevant to a request for punitive damages.</p>	<p>Granted</p>
<p>Z. Produce a privilege log for any statements provided by any person listed in Interrogatory No. 1 which you claim are privileged or immune from discovery. (Doc. # 99.1, Ex. 1, Pl. Req. Prod. 3)</p>	<p>(1) outside the scope of discovery, (2) not reasonably calculated to lead to admissible evidence, (3) requests information protected by the work product doctrine.</p>	<p>See discussion above regarding privilege logs.</p>	<p>Granted</p>

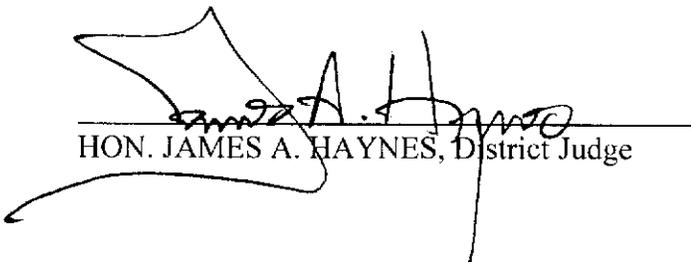
**ORDER**

**IT IS THEREFORE ORDERED:**

1. The Plaintiffs' *Motion to Compel* (Doc. # 99) is hereby **GRANTED** to the extent consistent with this *Opinion and Order*, including the dispositions contained in Section "B.3 Tabular Analysis of Plaintiffs' Requests." In all other respects the motion is **DENIED**.
2. Defendants shall provide such compelled discovery to Plaintiffs **by Wednesday, March 7, 2012.**
3. Plaintiffs shall have until **Wednesday, April 4, 2012** to provide additional evidence to the Court with respect to the following motions:
  - a. Defendant Ryan Construction Fund's *Motion for Summary Judgment Re: Dismissal of Ryan Construction Retirement Fund* (Doc. # 90);
  - b. Defendants' *Motion for Summary Judgment Re: Count IV (Fraud/Negligent Misrepresentation)* (Doc. # 92);
  - c. Defendants' *Motion for Summary Judgment Re: Count I (Rescission/Revocation)* (Doc. #95);
  - d. Defendants' *Motion for Summary Judgment Re: Count V (Civil Conspiracy)* (Doc. #97); and
  - e. Defendants' *Motions in Limine* (Doc. #101).
4. Plaintiffs shall have until **Wednesday, April 4, 2012** to file any other pretrial motions.
5. The parties shall have until **Wednesday, April 4, 2012** to provide the Court with proposed amendments to the *Second Amended Case Scheduling Order* (Doc. # 76) consistent with this *Opinion and Order*.

DATED this 16<sup>th</sup> day of February, 2012.

AK 2-16-12  
cc: counsel of record

  
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HON. JAMES A. HAYNES, District Judge