

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.

STEVEN JACOB, et al.

Defendants.

**MOTION TO COMPEL DEFENDANT FRANK AVELLINO TO APPEAR AT A
SECOND DEPOSITION**

Plaintiffs, by and through the undersigned counsel, hereby file this Motion to Compel Defendant Frank Avellino to Appear at a Second Deposition and in support thereof state:

1. On or about September 9, 2015, Defendant Frank Avellino (“Avellino”) appeared at his deposition. During his deposition, Avellino testified that he regularly deleted e-mails and did not preserve any evidence.

2. Because of Avellino’s testimony and failure to produce relevant documents, Plaintiffs filed a Motion to Strike Pleadings, and in the Alternative Motion for an Adverse Inference (the “Spoliation Motion”). The Spoliation Motion remains pending before the Court.

3. Plaintiffs also filed an Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents, and a Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the “Renewed Motion”).

4. Three days before the hearing on the Renewed Motion, Avellino filed an errata sheet, which materially changed the substance of his testimony to state that he only deleted spam e-mails. Attached hereto as Exhibit "A" is the Avellino Errata Sheet. Moreover, after several motions and hearings, Avellino produced certain e-mails which were previously represented as being destroyed.

5. Because Avellino's Errata Sheet reflects material and substantial changes to his testimony and Avellino's production of certain e-mails, Plaintiffs are entitled to depose Avellino about those changes. *See Feltner v. Internationale Nederlanden Bank, N.V.*, 622 So. 2d 123, 124 (Fla. 4th DCA 1993); *Motel 6, Inc. v. Dowling*, 595 So. 2d 260, 261 (Fla. 1st DCA 1992).

6. Plaintiffs have requested that Avellino make himself available for deposition, but to date, Avellino has refused to appear for deposition or respond to Plaintiffs requests to schedule his deposition.

7. Avellino's conduct has forced Plaintiffs to file the instant Motion and demonstrates that Avellino has refused to comply with his discovery obligations.

8. As Avellino has repeatedly engaged in conduct intended to prevent Plaintiffs from obtaining discovery, and conceal the fact that he has failed to preserve relevant evidence, Plaintiffs submit that the Court should award them attorney's fees and costs in connection with the filing of this Motion and the taking of Avellino's Second Deposition.

WHEREFORE Plaintiffs respectfully request the Court enter an Order: (i) Compelling Defendant Frank Avellino to appear for a second deposition; (ii) Awarding Plaintiffs attorney's fees and costs in connection with the second deposition; (iii) Awarding Plaintiffs attorney's fees and costs in connection with the instant motion; or (iv) Granting such further relief as the Court deems just and proper.

Dated: February 3, 2016

BERGER SINGERMAN LLP
Attorneys for Plaintiffs
350 East Las Olas Blvd, Suite 1000
Fort Lauderdale, FL 33301
Telephone: (954) 525-9900
Direct: (954) 712-5138
Facsimile: (954) 523-2872

By: s/ LEONARD K. SAMUELS
Leonard K. Samuels
Florida Bar No. 501610
lsamuels@bergersingerman.com
Steven D. Weber
Florida Bar No. 47543
sweber@bergersingerman.com
Zachary P. Hyman
Florida Bar No. 98581
zhyman@bergersingerman.com

and

MESSANA, P.A.
Attorneys for Plaintiffs
401 East Las Olas Boulevard, Suite 1400
Ft. Lauderdale, FL 33301
Telephone: (954) 712-7400
Facsimile: (954) 712-7401

By: /s/ Thomas M. Messana
Thomas M. Messana, Esq.
Florida Bar No. 991422
tmessana@messana-law.com
Brett D. Lieberman, Esq.
Florida Bar No. 69583
bleiberman@messana-law.com
Thomas G. Zeichman, Esq.
Florida Bar No. 99239
tzeichman@messana-law.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 3, 2016, a copy of the foregoing was filed with the Clerk of the Court via the E-filing Portal, and served via Electronic Mail by the E-filing Portal upon:

Peter G. Herman, Esq.
Tripp Scott
110 SE 6th Street
15th Floor
Fort Lauderdale, FL 33301
Tel.: 954-525-7500
Fax.: 954-761-8475
pgh@trippscott.com
*Attorneys for Steven Jacob; Steven F. Jacob
CPA & Associates, Inc.*

Gary A. Woodfield, Esq.
Haile, Shaw & Pfaffenberger, P.A.
660 U.S. Highway One, Third Floor
North Palm Beach, FL 33408
Tel.: 561-627-8100
Fax.: 561-622-7603
gwoodfiled@haileshaw.com
bpetroni@haileshaw.com
eservices@haileshaw.com
Attorneys for Frank Avellino

Thomas M. Messina, Esq.
Messana, P.A.
401 East Las Olas Boulevard, Suite 1400
Fort Lauderdale, FL 33301
Tel.: 954-712-7400
Fax: 954-712-7401
tmessana@messana-law.com
Attorneys for Plaintiff

Mark F. Raymond, Esq.
mraymond@broadandcassel.com
Jonathan Etra, Esq.
jetra@broadandcassel.com
Christopher Cavallo, Esq.
ccavallo@broadandcassel.com
Broad and Cassel
One Biscayne Boulevard, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Tel.: 305-373-9400
Fax.: 305-373-9443
Attorneys for Michael Bienes

By: s/Leonard K. Samuels
Leonard K. Samuels

Exhibit A

ERRATA SHEET

RE: P&S Associates General Partnership et al.
v. Michael D. Sullivan, et. al.

DEPO OF: FRANK AVELLINO
TAKEN: September 9, 2015

PAGE #	LINE #	CHANGE	REASON
18	9	A. Emails are maintained on my computer from December 2, 2009 for emails sent and from July 9, 2010 for emails received. I do not delete emails, other than spam and vendor emails.	I misunderstood that emails, once opened, move to an "old" file but are not deleted.
18	13	A. No; I only delete spam and vendor emails.	Same as above
18	17	A. No. I did not delete emails other than spam and vendor emails.	Same as above
101	2	A. Maybe every day. Maybe once a week. I delete spam and vendor emails only.	Same as above
101	13	A. Yes; but only as to spam and vendor emails.	Same as above

STATE OF NEW YORK
COUNTY OF NEW YORK

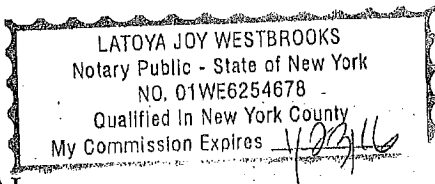
Under penalties of perjury, I declare that the corrections made herein are true and correct.

Date: 11/23/14

Frank Avellino
FRANK AVELLINO

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Sworn and subscribed to before me this 23 date of November, 2015.



SEAL

[Signature]
NOTARY PUBLIC
My Commission Expires: 11/23/16