

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BROWARD COUNTY

CASE NO.: 12-034123 (07)

P&S ASSOCIATES, GENERAL
PARTNERSHIP, etc., et al.,

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**DEFENDANT FRANK AVELLINO'S RESPONSE TO PLAINTIFFS' MOTION TO
COMPEL HIM TO APPEAR AT A SECOND DEPOSITION**

Defendant, Frank Avellino ("Avellino"), by and through his undersigned counsel, files his response to Plaintiffs Motion to Compel Defendant Frank Avellino to Appear at a Second Deposition (the "Motion") and as grounds therefore states as follows:

1. The changes made by Avellino to his deposition are not substantial or material to the issues in this action and have been fully explained thus, Plaintiffs are not entitled to further depose Avellino.

2. As usual, Plaintiffs overstate their case through inflated and factually inaccurate statements (irrelevant to the issue raised in the Motion) chief among those is the inflammatory, unsupported and untruthful allegation that Avellino "conceal[s] the fact that he has failed to preserve relevant evidence." Motion, ¶ 8. There is no evidence of any concealment, Plaintiffs do not allege any and this Court has already found that "Plaintiffs have failed to provide evidence that Defendants destroyed evidence or otherwise thwarted discovery,...". Order on

Plaintiffs' Renewed Expedited Motion to Compel Production of Computer, dated January 8, 2016 (the "Order"), a copy of which is attached hereto as Exhibit "A".

3. From Avellino's 138-page deposition, he filed an Errata Sheet that made five changes relating solely as to the question of the deletion of emails. Frank Avellino's Notice of Filing Errata Sheet of Frank Avellino, filed December 8, 2015, a copy of which is attached hereto as Exhibit "B". The Errata Sheet explained that Avellino's prior testimony that he deleted all emails was based on his misunderstanding that once opened emails were not deleted but rather moved to an "old " file and the only emails that he deleted were spam and vendor emails.

4. The question of what emails Avellino deleted is not a substantial issue, has been explained and vetted and is of no relevance to any issue in this action. The deleted email issue has been before this Court on multiple occasions (October 26, 2015 hearing; this Court's November 16, 2015 Order; December 11, 2015 hearing; the Order). As a result of the question of deleted emails, this Court by its November 16, 2015 order (a copy of which is attached hereto as Exhibit "C") ordered a search of Avellino's computer which resulted in a full report of such search and the production of additional documents responsive to Plaintiffs' five document requests previously served on Avellino.

5. While a reopening of a deposition may be permitted if the changes are substantial, *Felter v. Internationale Nederlanden Bank, N. V.*, 622 So.2d 123, 124 (Fla, 4th DCA 1993), further examination will not be permitted if changes are not substantial. *Allen & Company v. Occidental Petroleum Corporation*, 49 F.R.D. 337, 341 (S.D.N.Y. 1970) ("Defendant has failed to show that this change [377 in all] was so direct a contradiction of prior testimony on a vital point as to warrant further cross-examination.").

6. There exists no valid basis to submit Avellino to further questioning on this limited, narrow issue.

WHEREFORE Defendant respectfully requests this Court to enter an Order denying Plaintiffs' Motion to Compel Defendant Frank Avellino to Appear at a Second Deposition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of February, 2016, 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
17TH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

P&S ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited liability
company, *et al.*,
Plaintiffs,

CASE NO: 12-034123 CACE (07)
JUDGE: JACK TUTER

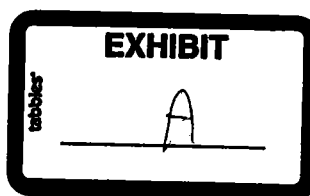
vs.

MICHAEL D. SULLIVAN, *et al.*,
Defendants.

**ORDER ON PLAINTIFFS' RENEWED EXPEDITED MOTION TO COMPEL
DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES TO PRODUCE
COMPUTERS FOR INSPECTION AND TO PRODUCE DOCUMENTS**

THIS CAUSE came before the court on Plaintiffs' Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents. The court, having considered the motion and response, having heard argument of counsel, having reviewed the applicable law, and being otherwise duly advised in the premises, finds and decides as follows:

The record in the instant action reveals that on October 5, 2015, Plaintiffs filed their initial motion to compel defendants, Frank Avellino ("Avellino") and Michael Bienes ("Bienes") (collectively "Defendants"), to produce their personal computers for a forensic examination. The initial motion was filed as a result of deposition testimony that the Defendants routinely delete e-mail communications from their respective e-mail accounts. A hearing on Plaintiffs' initial motion to compel was held on October 26, 2015. Thereafter, on November 16, 2015, this Court entered an order granting in part, and deferring in part Plaintiffs' motion ("November 16, 2015 Order"). Specifically, Defendants were required to: (1) preserve their computers and all e-mails during the pendency of this action; (2) search all folders of their respective e-mail accounts; (3) produce to Plaintiffs a timeline stating the period of time for which e-mails exists in those folders; (4) produce



a privilege log, as necessary; and (5) produce any non-privileged e-mails responsive to Plaintiffs' requests for production. The court deferred ruling on Plaintiffs' request that Defendants surrender their physical personal computers for a forensic examination.

It appears that Defendants complied with this Court's November 16, 2015 Order, and produced documents to Plaintiffs that were located on their respective computers following a search by counsel. On November 20, 2015, Plaintiffs filed the instant renewed motion to compel Defendants Avellino and Bienes to produce their physical personal computers for a forensic examination. Defendants Avellino and Bienes thereafter provided Plaintiffs with amended reports identifying e-mail folders and documents that were not identified in the original reports. Plaintiffs claim that the reports provided by Defendants to Plaintiffs are insufficient, and therefore, a forensic examination of the Defendants' personal computers is necessary. On December 8, 2015, Defendant Avellino and Bienes filed separate responses to the instant renewed motion. Also on December 8, 2015, Defendant Avellino filed an errata sheet, correcting his September 9, 2015 deposition testimony. Specifically, Defendant Avellino asserts that his testimony that he routinely deletes *all* emails was based on a misunderstanding. Rather, Defendant Avellino claims that he routinely deletes *only* spam and vendor emails. On December 8, 2015, Defendants filed separate responses to Plaintiffs' renewed motion. A hearing on Plaintiffs' renewed motion to compel was held before the court on December 11, 2015.

Under Florida law, “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action” Fla. R. Civ. P. 1.280 (b) (1). Although Florida’s rules governing discovery are “broad enough to encompass requests to examine a computer hard drive,” such request should be authorized “only in limited and strictly controlled circumstances.” *Menke v. Broward Cnty. School Bd.*, 916 So. 2d 8, 11 (Fla. 4th DCA 2005) (citation omitted). This is so because “unlimited access to anything on the computer would

constitute irreparable harm,” and possibly “expose confidential, privileged information to the opposing party.” *Id.* (citation omitted). As such, inspections of electronic devices may be appropriate if: “(1) there [is] evidence of destruction of evidence or thwarting of discovery; (2) the device likely contain[s] the requested information; and (3) no less intrusive means exist[] to obtain the requested information.” *Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163, 166 (Fla. 1st DCA 2014) (emphasis added) (citations omitted).

In the instant action, in light of the searches performed by counsel for Defendants, the record indicates that the personal computers likely contain the requested information. However, the court determines that Plaintiffs have failed to make an adequate showing to support a forensic examination of Defendants’ personal computers. For instance, Plaintiffs have failed to provide evidence that Defendants destroyed evidence or otherwise thwarted discovery, especially in light of Defendant Avellino’s errata sheet filed on December 8, 2015. Additionally, the court determines that Plaintiffs have failed to demonstrate the ineffectiveness of the lesser intrusive methods employed by this Court’s November 16, 2015 Order. Therefore, Plaintiffs’ renewed motion to compel is denied.

Accordingly, it is hereby:

ORDERED that Plaintiffs’ Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents is DENIED WITHOUT PREJUDICE.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 8th day of January, 2016.



JACK TUTLER
CIRCUIT COURT JUDGE

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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR BROWARD COUNTY
CASE NO.: 12-034123 (07)

P&S ASSOCIATES, GENERAL
PARTNERSHIP, etc., et al.,

Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

DEFENDANT FRANK AVELLINO'S
NOTICE OF FILING ERRATA SHEET OF FRANK AVELLINO

Defendant, Frank Avellino, by and through his undersigned counsel, hereby gives notice of filing the attached Errata Sheet from his deposition taken on September 9, 2015.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2015, 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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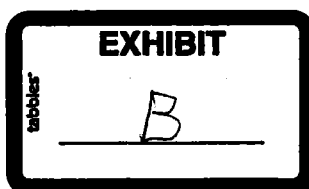
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IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 12-034123 (7)

S&P ASSOCIATES, GENERAL PARTNERSHIP, ET
AL,

Plaintiffs,

v.

STEVEN F. JACOB, an individual, ET AL.,

Defendants.

**ORDER ON PLAINTIFFS' EXPEDITED MOTION TO COMPEL DEFENDANTS FRANK
AVELLINO AND MICHAEL BIENES TO PRODUCE COMPUTERS FOR INSPECTION AND
TO PRODUCE DOCUMENTS**

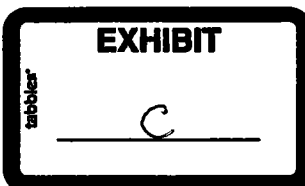
THIS MATTER came before the Court on October 26, 2015, upon Plaintiffs' Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Motion"). The Court, having reviewed the Motion, heard argument from counsel for the parties, and being otherwise duly advised in the premises, it is, hereby

ORDERED and **ADJUDGED** that:

1. The Motion is **GRANTED**, in part, and **DEFERRED**, in part, as follows:
2. As to Defendant Avellino:
 - a. On or before November 16, 2015, Defendant Avellino shall search all folders of e-mails of his e-mail account Franknanc@aol.com, including but not limited to folders of deleted e-mails and all other folders of e-mails related to the e-mail account Franknanc@aol.com that are accessible by Defendant Avellino, and produce to Plaintiffs a timeline stating the period of time for which e-mails exist in those folders, along with a privilege log and any non-privileged e-mails, including but not limited to attachments, that are responsive to requests for production served on Defendant Avellino in this action;
 - b. Defendant Avellino shall preserve all e-mails and his computer identified in the Motion while this action is pending.
3. As to Defendant Bienes:

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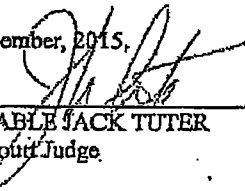


- a. On or before November 16, 2015, Defendant Bienes shall search the folder of deleted e-mails of his e-mail account Michaelbienes@aol.com, and all other folders of e-mails related to the e-mail account Michaelbienes@aol.com that are accessible by Defendant Bienes, and produce to Plaintiffs a timeline stating the period of time for which e-mails exist in those folders, along with any non-privileged e-mails, including but not limited to attachments, that are responsive to Plaintiffs' requests for production served on Defendant Bienes in this action, consistent with any stipulations with Plaintiffs stated in Defendant Bienes' discovery responses or court rulings on such document requests, and produce a privilege log of any privileged documents withheld from production;
- b. On or before November 16, 2015, Defendant Bienes shall deliver to the e-mail service provider of his e-mail account Michaelbienes@aol.com (the "Provider") written authorization to release any e-mails sent from or received by the e-mail address Michaelbienes@aol.com during the years 2008 and 2009 to his counsel in this action, and shall produce any non-privileged e-mails received from the Provider that are responsive to Plaintiffs' requests for production served to Defendant Bienes in this action consistent with any stipulations with Plaintiffs stated in Defendant Bienes' discovery responses or court rulings on such document requests, and produce a privilege log of any privileged documents withheld from production. Upon request by Plaintiffs, Defendant Bienes shall provide a random sampling of e-mails received from the Provider, which are not identified on a privilege log previously provided to Plaintiffs, to Plaintiffs for their inspection. If the parties are unable to resolve any dispute that may arise as to e-mails received from the Provider, Defendant Bienes shall submit any documents obtained from the Provider to the Court for an in camera inspection and the Court's determination as to what e-mails should be produced, if any.
- c. Defendant Bienes shall preserve all e-mails and his computer identified in the Motion while this action is pending.

4. The Court defers ruling on the remainder of the Motion. This Order is without prejudice

to the Plaintiffs resetting the Motion for hearing.

DONE AND ORDERED in Chambers this 16 day of November, 2015.


 HONORABLE JACK TUTLER
 Circuit Court Judge

Copies furnished to:
 All counsel of record

* Order reflects court's ruling
 after review of hearing transcript.

