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 STRIKE PLEADINGS, AND IN THE ALTERNATIVE MOTION FOR ADVERSE INFERENCE

Defendant, Frank Avellino, ("Avellino") files this response to Plaintiffs' Motion to Strike Pleadings, and in the Alternative Motion for Adverse Inference (the "Motion to Strike"). This Court has previously determined that Plaintiffs have failed to establish the existence of any spoliation of evidence by Avellino or satisfy any of the elements necessary to obtain the drastic relief sought. See, Order on Plaintiffs' Renewed Expedited Motion to Compel Production of Computer, dated January 8, 2016 (the "Order"), a copy of which is attached as Exhibit "A". Plaintiffs' Motion to Strike offers no new support for the relief sought. Accordingly, the Motion to Strike should be denied in its entirety.

Factual and Procedural Background

On October 5, 2015, Plaintiffs filed their Motion to Strike together with a motion to compel the production of Avellino's computer (the "Motion to Compel"). Both motions were premised upon identical grounds: that Avellino failed to produce email communications with Michael Sullivan because Avellino testified at his deposition that he deleted emails every few

days. At the October 26, 2015, hearing on Plaintiffs' Motion to Compel, Avellino's counsel advised the Court that Avellino was instructed to and was not deleting emails and that he believed that Avellino's deposition testimony regarding the deletion of emails may have been inaccurate and that, in fact, emails were not being deleted.

The Court's November 16, 2015 order directed Avellino's counsel to determine whether emails on Avellino's computer were deleted and provide a timeline for the period of time covered by the emails, preserve all emails, report the findings to Plaintiffs and conduct a random search of those emails to determine whether there exists information relating to the P&S partnership accounts. Avellino's counsel fully complied with the Court's order. Nevertheless, Plaintiffs filed a renewed Motion to Compel quibbling about Avellino's responses to the Court's November 16, 2015 order.

On December 8, 2015, Avellino served and filed an Errata Sheet to his deposition which denied that any emails other than spam and vendor emails have been deleted. A copy of the Errata Sheet is annexed hereto as Exhibit "B". In response to Plaintiffs' complaints about the computer report Avellino filed pursuant to the Court's November 16, 2015 order, on December 8, 2015, Avellino provided Plaintiffs with an amended report, a copy of which is attached hereto as Exhibit "C". Further, Avellino has produced all of the emails, with attachments, that were identified by the recent search of his computer. This search went beyond that required by the Court and included a complete search of all emails in all folders. All email communication between Avellino and Sullivan in Avellino's possession has been produced or identified on a privilege log.

Plaintiffs' Renewed Motion to Compel was heard on December 11, 2015, and denied by the Order which found that Plaintiffs failed to provide any evidence that Avellino destroyed

evidence or thwarted discovery. Order at 3. Plaintiffs' Motion to Strike is premised upon the same ground as their Motion to Compel which the Court found to be insufficient.

Plaintiffs Have Failed to Establish the Existence of Spoliation or Satisfy Any of the Criteria Required to Obtain Relief Due to Spoliation of Evidence

Citing *Golden Yachts, Inc. v. Hall,* 920 So.2d 777, 781 (Fla. 4th DCA 2006), the Motion to Strike identifies the three threshold questions that a court must address before imposing any relief due to spoliation of evidence. Not only do Plaintiffs fail to meet any of these three criteria, there exists no evidence of spoliation to necessitate even addressing these factors. See Order, at 3. Plaintiffs' statements to the contrary are factually inaccurate and disingenuous, at best.

Golden Yachts defines spoliation as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence[.]" *Id.* at 781. Plaintiffs' spoliation claim is based upon their contention that Avellino has produced no email communication with Michael Sullivan and that Avellino "regularly and systematically deleted emails" and continues to do so. Motion to Strike, p. 2. Both of these claims are untrue.

On December 8, 2015, as result of Avellino's counsel's search of Avellino's computer pursuant to the Court's November 16, 2015 order, emails between Avellino and Sullivan were produced and a privilege log prepared for those privileged communications withheld. It should be noted that none of these emails have any evidentiary value and, in any event, Plaintiffs' counsel has had all of these emails for more than six months.[1]

Avellino's deposition testimony, as modified by his errata sheet, is clear and unequivocal – no emails other than spam and vendor emails have been deleted. Ex. B. Plaintiffs offer no

[1] Michael Sullivan testified at his December 1, 2015 deposition that Plaintiffs' counsel has had all of his emails and documents for more than six months, having copied the hard drive on his computer and other devises and further required Sullivan to provide written consent to enable Plaintiffs to obtain access to his emails through his email provider.

other evidence to support their contention of spoliation. Lacking any evidence of the spoliation of evidence by Avellino, there is no need to even address the three pronged criteria set forth in *Golden Yachts.* In any event, Plaintiffs fail to meet any of the three criteria, much less satisfy them all as required in order to obtain their requested relief.

Whether the Evidence Existed at One Time

The Motion to Strike fails to identify any "evidence" that may have existed at one time that now no longer exists. Rather, Plaintiffs falsely state in footnote 2 of the Motion to Strike that Avellino produced no documents pertaining to the transfer of funds from the Partnerships to Avellino when, in fact, a document identifying such transfers was produced months ago, and that the emails between Avellino and Sullivan were not produced which now is no longer accurate since all such emails have been produced or identified in the privilege log. Plaintiffs' insinuation or supposition that other documents should exist has no factual support and does not rise to the level of proof necessary to establish that documents that once existed no longer exist, which Plaintiffs must satisfy to obtain the relief requested.[2]

Whether Avellino Had a Duty to Preserve the Evidence

As previously addressed in connection with Plaintiffs' Motion to Compel, Florida law on when the duty to preserve evidence arises is unclear and inconsistent. Decisions in this district hold that there is no common law duty to preserve evidence in anticipation of evidence. *Royal & Sunalliance v. Lauderdale Marine Center,* 877 So.2d 843, 846 (Fla. 4th DCA 2004); *Gayer v. Fine Line Construction & Electric, Inc.,* 970 So.2d 424, 426 (Fla. 4th DCA 2008). Plaintiffs rely upon *American Hospitality Management Co. of Minnesota v. Hettiger,* 904 So.2d 547 (Fla. 4th DCA 2005), arguing that the duty to preserve evidence arises when the defendant could

[2] Plaintiffs' argument that "it is highly likely that Defendants have not produced documents" (Motion to Strike, p. 2, footnote 1), does not satisfy Plaintiffs' burden of introducing facts that documents not produced have been destroyed; Plaintiffs' assumption is not evidence.

reasonably have foreseen the claim. However, *American Hospitality,* relying upon *Hagopian v. Publix Supermarkets, Inc.,* 788 So.2d 1088, 1090 (Fla. 4th DCA 2001), addressed when a spoliation instruction is appropriate and did not affirmatively decide when a duty to preserve arises. *Id.* at 550-551. Moreover, the court in *Royal & Sunalliance,* observed that *Hagopian* has been misconstrued to have expressly established a common law duty to preserve evidence in anticipation of litigation which it did not. *Id.* at 845-846.

Even accepting Plaintiffs' contention that a duty arose for Avellino to preserve his emails when he could reasonably foresee Plaintiffs' claims, the earliest possible date would have been December, 2010, with the filing of Madoff trustee's complaint which contained allegations regarding the Partnerships. Avellino has not deleted any substantive emails since that date. Exhibits B and C.

Plaintiffs argue that Defendants had a duty to preserve evidence from at least December 2008, when Madoff's Ponzi scheme was publically disclosed. Plaintiffs not only provide no support for the proposition that a duty to preserve evidence which may have been owed to others (in this case, Madoff's trustee), provides Plaintiffs standing to rely upon such duty, this very argument has been previously made by Plaintiffs' attorneys and flatly rejected. *Point Blank Solutions, Inc. v. Toyobo America, Inc.,* 2011 WL 1456029 (S. D. Fla. April 5, 2011). ("The Court is reluctant to create a new legal precedent which would establish some type of free-floating or shifting duty which other parties could latch onto in order to seek the sanctions which the parties with standing choose not to pursue." Id. at *2; "The shifting duty theory is incompatible with the basic rule that a duty is owed to a specific party." Id. at *18). For Plaintiffs' attorneys to argue the shifting duty theory and not disclose to the Court that they previously asserted such argument and lost is deplorable.

There exists no basis to grant the striking of pleadings as sought by Plaintiffs. "Dismissal or default, the harshest of all sanctions, are reserved for cases in which one party's loss of evidence renders the opposing party completely unable to proceed with its case or defense." *Fleury v. Biomet, Inc.*, 865 So.2d 537, 539 (Fla. 2nd DCA 2004).

As to whether an adverse inference instruction should be given, *American Hospitality* provides: "In circumstances where the lost evidence was under the sole control of the party against whom the evidence might have been used to effect, and where the lost evidence is in fact critical to prove the other party's claim, an adverse inference instruction may be necessary..." *Id.* at 550-551. Even if the duty to preserve exists here, which it does not, Plaintiffs fail to meet this standard. The purported "lost evidence" – the Avellino/Sullivan emails – were not in the sole custody of Avellino, but rather have been in the custody of Plaintiffs for more than six months and, thus, are hardly "lost". Moreover, such emails are not critical for Plaintiffs to prove their claim.

Whether the Evidence was Critical to Plaintiffs' Ability to Prove its Case

At their disingenuous best, Plaintiffs allege that the documents exchanged between Avellino and Sullivan (the general manager of the Plaintiff Partnerships) "are critical to Plaintiffs' claims" and that "Defendants have deprived Plaintiffs of that crucial evidence by destroying it." Motion to Strike, pp. 5 - 6. As stated above, no such evidence has been destroyed and, in fact, has now been provided to Plaintiffs by Avellino. In any event, Plaintiffs have had for more than six months every single email sent or received by Sullivan. While it is doubtful that the emails between Avellino and Michael Sullivan constitute "critical" evidence (*Jordan ex rel. Shealy v. Masters,* 821 So.2d 342, 347 (Fla. 4th DCA 2002) (missing evidence must be

"essential" to plaintiff's prima facie case), Plaintiffs could not conceivably suffer any prejudice since they are in possession of the "evidence" of which they complain they have been deprived.

Again, Plaintiffs' attorneys have previously unsuccessfully made this same argument. *Point Blank,* supra at *16. ("Common sense dictates that evidence obtained elsewhere cannot be 'missing' and that an adverse inference instruction (intended to compensate a party for wrongly discarded evidence) is inappropriate when evidence is in the plaintiff's possession and can be presented to the jury".).

Conclusion

Plaintiffs' Motion to Strike seeking the drastic relief of the striking of pleadings or an adverse inference instruction has no factual or legal support. No evidence has been destroyed. No duty exists to preserve the evidence purportedly destroyed. Plaintiffs possess the evidence they contend has been destroyed. Such evidence has no evidentiary value and is not critical to Plaintiffs' claims. Plaintiffs' Motion to Strike is meritless and should be denied in its entirety.

WHEREFORE Defendant Frank Avellino respectfully requests this Court to enter an order denying Plaintiffs' Motion to Strike in its entirety.

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By: /s/ Gary A. Woodfield
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of March, 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.

/s/ Gary A. Woodfield
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IN THE CIRCUIT COURT FOR THE
17TH JUDICIAL CIRCUIT IN AND FOR
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P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited liability company, *et al.*,
Plaintiffs,

vs.

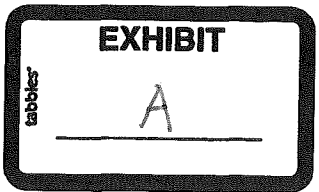
MICHAEL D. SULLIVAN, *et al.*,
Defendants.
_____/

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

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 TUTER
CIRCUIT COURT JUDGE

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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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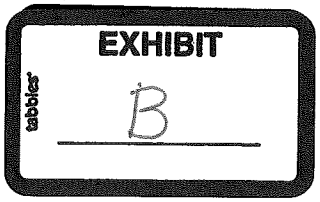

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ERRATA SHEET

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: 11/23/16

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.

LATOYA JOY WESTBROOKS
Notary Public - State of New York
NO. 01WE6254678
Qualified in New York County
My Commission Expires 1/23/16

SEAL

NOTARY PUBLIC
My Commission Expires: 1/23/16

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Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.
_____/

DEFENDANT FRANK AVELLINO'S
NOTICE OF FILING AMENDED REPORT REGARDING EMAILS

Defendant, Frank Avellino, by and through his undersigned counsel, hereby gives notice of filing the attached Amended Report Regarding Emails.

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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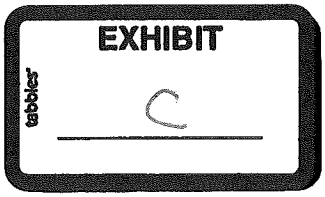

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Defendant, Frank Avellino's Amended Report Regarding E-mails

In response to various issues raised by Plaintiffs in their Renewed Expedited Motion to Compel the Production of Avellino's Computer for Inspection, undersigned counsel hereby amends his November 16, 2015 report and states as follows:

Pursuant to the Court's directive at the hearing on October 26, 2015, and subsequently entered November 16, 2015 order, an inspection of the laptop computer owned and utilized by Frank Avellino and his wife, Nancy, (the "Computer"), including all email folders, has been conducted to determine whether emails have been deleted, how far back emails exist on the Computer and to search for emails sent to or received from the individuals and entities identified in Plaintiffs' Fifth Request for Production of Documents, dated October 5, 2015, and further, identify and produce emails that are responsive to Plaintiffs' previously served four requests for production. Additionally, an additional search was conducted in light of Plaintiffs' counsel providing an email from Michael Sullivan from an email address (sully@fresshstarttax.com) that Defendant was not previously aware. This additional search was conducted both by known email addresses and by name.

The Computer has the following folders all contained through the AOL account (there are no emails saved to the computer from the AOL account); as of November 30, 2015, the status is as follows:

- New Mail (emails received but not yet opened) – contains 6 emails from November 22, 2015 to the present;
- Old Mail (emails received and opened) – contains 1152 emails from July 9, 2010 to the present;
- Drafts – contains 9 emails from February 5, 2015 to August 2, 2015;
- Sent – contains 772 emails from December 2, 2009 to the present;

- Spam (filtered by AOL) – contains 7 emails from November 25, 2015 to the present;
- Recently deleted – empty;
- Saved mail – 51 emails from June 24, 2009 to October 24, 2015;
- Saved chats – empty;
- Notes – empty;
- Unsolicited emails – new folder created to forward spam and solicitation e-mails that were previously but are no longer deleted pursuant to the Court's directive; contains 126 emails from November 8, 2015 to the present.

Additional documents identified as a result of this additional search of the Computer which are responsive to Plaintiffs' five document requests have been produced, together with a privilege log.

Dated: December 8, 2015

Gary A. Woodfield