

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.

**PLAINTIFFS' MOTION TO COMPEL DEFENDANTS,
FRANK AVELLINO AND MICHAEL BIENES TO PROVIDE ANSWERS TO
PLAINTIFFS' THIRD SET OF INTERROGATORIES AND
TO COMPEL FRANK AVELLINO TO APPEAR AT DEPOSITION**

Philip J. Von Kahle (the "Conservator"), as Conservator for P&S Associates, General Partnership ("P&S") and S&P Associates, General Partnership ("S&P") (the "Partnerships", and together with the Conservator, the "Plaintiffs"), pursuant to Fla. R. Civ. P. 1.380, hereby file Plaintiffs' Motion to Compel Defendants, Frank Avellino and Michael Bienes, to Provide Answers to Plaintiffs' Third Set of Interrogatories dated February 26, 2016, and to Compel Defendant Frank Avellino to Appear at a Deposition (the "Motion"), and in support thereof state as follows:

1. A hearing was held before the Court on February 24, 2016, wherein Plaintiffs were provided the opportunity to furnish a limited number of interrogatories upon Defendants

Frank Avellino and Michael Bienes (the “Defendants”), solely relating to preservation of evidence as to litigation being pursued against him for the period of 2008 through the present.

2. The Court further directed Defendants to provide answers to those interrogatories 10 days prior to the specially-set hearing on March 14, 2016 relating to Plaintiffs’ Motion to Strike Pleadings, and in the Alternative, Motion for Adverse Inference (the “Spoliation Motion”). The hearing is currently scheduled for March 14, 2016, making the deadline to provide answers by March 4, 2016. A true and correct copy of the excerpts from the transcript of the February 24, 2016 hearing is attached hereto as **Exhibit “A”**.

3. The Court also directed Defendant Frank Avellino to appear at a one hour deposition before the March 14 hearing.

4. Plaintiffs’ Third Set of Interrogatories to Defendant Frank Avellino and Michael Bienes were served on February 26, 2016 (“Third Set of Interrogatories”). Copies of the Third Set of Interrogatories are attached hereto as **Composite Exhibit “B”**.

5. The Third Set of Interrogatories required Avellino and Bienes to “answer each of the following interrogatories set forth below separately and fully in writing, under oath, on or before March 4, 2016.

6. On March 4, 2016, counsel for Plaintiffs questioned whether counsel for Avellino and Bienes would respond to the Third Set of Interrogatories that day. Despite being reminded of the Court’s directives concerning the Third Set of Interrogatories, counsel for Avellino and Bienes refused to provide answers to the Third Set of Interrogatories.

7. On March 8, 2016, counsel for Plaintiffs provided counsel for Avellino and Bienes with a copy of the transcript of the February 24 hearing.

8. To date, Defendants Avellino and Bienes have not answered to the Third Set of Interrogatories as directed to do so during the February 24, 2016 hearing. Defendants Avellino and Bienes also have not requested an extension of time to respond to the Third Set of Interrogatories.

9. Defendants failure to respond to the Third Set of Interrogatories also constitutes a waiver of their right to raise any objections. *Herold v. Computer Components, Int'l. Inc.* 252 So. 2d 576, 580 (Fla. 4th DCA 1971).

10. Therefore, Plaintiffs have found it necessary, once again, to file a motion to compel in this action and to consume the Court's invaluable time seeking the entry of an order compelling Defendants to provide answers to the Third Set of Interrogatories.

11. Defendants' failure to provide responses to the Third Set of Interrogatories and effectively prevents Plaintiffs from prosecuting the Spoliation Motion, which is currently set for hearing on March 14, 2016.

12. The undersigned counsel made a good faith effort to resolve the issues presented by this Motion without the need for judicial intervention.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 9, 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:

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*Attorneys for Steven Jacob; Steven F. Jacob
CPA & Associates, Inc.*

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Attorneys for Plaintiff

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Attorneys for Frank Avellino

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Jonathan Etra, Esq.
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Attorneys for Michael Bienes

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

EXHIBIT A

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA
CASE NO.: CACE12034123

PHILIP J. KAHLE,
Plaintiff,

vs.

MICHAEL BIENES, et al.,
Defendant.

_____ /

PROCEEDINGS HAD AND TAKEN BEFORE
THE HONORABLE JACK TUTER
FEBRUARY 24, 2016
9:17 a.m. - 9:29 a.m.

REPORTED BY:
MILLICENT DE CAMPS, COURT REPORTER
NOTARY PUBLIC, STATE OF FLORIDA

1 THE COURT: So now, what do you want me to do?

2 MR. ZEICHMAN: If they're -- they're not aware of
3 any, then overrule their objections and we'll just find
4 that they're --

5 THE COURT: Well, if they're not aware of any --

6 MR. ZEICHMAN: Your Honor, how is not being
7 aware --

8 THE COURT: Sir -- sir. Don't argue with me.

9 MR. ZEICHMAN: I apologize.

10 THE COURT: That's not appropriate. Now what is it
11 you want to say?

12 MR. ZEICHMAN: Your Honor, saying, "We're not aware
13 of any documents," is not certifying that such documents
14 don't exist. If they're going to claim they're not
15 aware of any documents, we'd like to know what efforts
16 they've undertaken to ascertain whether those documents
17 exist --

18 THE COURT: All right, send them two
19 interrogatories on the subject. You need to answer them
20 ten days before the hearing, okay? All right, that's my
21 ruling. Write it up. The rest of the stuff, if you
22 guys want to still pursue it, you need it a special set;
23 okay.

24 (9:29 a.m.)

25

COMPOSITE EXHIBIT B

**IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT, IN
AND FOR BROWARD COUNTY, FLORIDA**

**Case No: 12-034123(07)
Complex Litigation Unit**

P&S ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership; and S&P
ASSOCIATES, GENERAL PARTNERSHIP, a
Florida limited partnership, PHILIP VON KAHLE
as Conservator of P&S ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited partnership, and
S&P ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership,

Plaintiffs,

v.

STEVEN JACOB, an individual, STEVEN F.
JACOB, CPA & ASSOCIATES, INC., a Florida
corporation, FRANK AVELLINO, an individual,
and MICHAEL BIENES, an individual,
STEVEN JACOB, et al.,

Defendants.

**PLAINTIFFS' THIRD SET OF INTERROGATORIES
TO DEFENDANT FRANK AVELLINO**

Plaintiffs, P&S Associates, General Partnership (“P&S”), S&P Associates, General Partnership (“S&P”) and Philip Von Kahle as Conservator on behalf of P&S and S&P (“Conservator”) (collectively and individually referred to as, the “Partnerships” or “Plaintiffs”), by and through their undersigned attorneys, pursuant to Fla.R.Civ.P., R.1.340, request that Defendant Frank Avellino (“Defendant”), answer each of the following interrogatories set forth below separately and fully in writing, under oath, on or before March 4, 2016.

Respectfully submitted,

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
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and

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on February 26, 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:

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Attorneys for Defendant, Michael Bienes

By: s/Leonard K. Samuels

DEFINITIONS AND INSTRUCTIONS:

The following definitions shall apply to this First Set of Interrogatories:

A. “You”, “Your”, or “Defendant” as used herein means Frank Avellino and includes any and all agents, employees, servants, attorneys and any other person or entity acting or purporting to act on his behalf, including but not limited to 27 Cliff, LLC.

B. “P&S” as used herein means Plaintiff P&S Associates, General Partnership, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on its behalf.

C. “S&P” as used herein means Plaintiff S&P Associates, General Partnership, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on its behalf.

D. Unless otherwise specified herein, the time frame for each interrogatory is from and including January 1, 1992 to the present.

E. “Person” as used herein means any natural person or any entity, including without limitation any individual, firm, corporation, company, joint venture, trust, tenancy, association, partnership, business, agency, department, bureau, board, commission, or any other form of public, private or legal entity.

F. Any reference herein to any public or private company, partnership, association, or other entity includes such entity’s subsidiaries and affiliates, as well as the present and former directors, officers, employees, attorneys, agents and anyone acting on behalf of, at the direction of, or under the control of the entity, its subsidiaries or its affiliates.

G. “Related to”, “relating to”, “referring to” or “references” as used herein means containing, constituting, showing, mentioning, reflecting, evidencing, discussing, or pertaining in any way, directly or indirectly, to the subject matter identified in the Request, and includes any documents supporting, denying, underlying or used in the preparation of any document called for by each Request.

H. “Document(s)” as used herein means any written, printed, graphic or recorded matter and any other object or tangible thing, including, without limitation, the original and all non-identical copies and drafts (including all copies and drafts that are different on the basis of revisions, strikeouts, additions, marginalia of any kind, highlighting, comments, or other distinguishing characteristics whether written, printed, tangible, or electronic) of any of the following: correspondence; memoranda; notes; minutes; advertising and press releases; transcripts; affidavits; summaries; calendar, journal or diary entries; recordings, whether audio, video, digital, magnetic, or other; surveys, tables, charts or other spreadsheet or statistical compilations; ledgers and other financial records or statements; and any and all computer data including electronic mail, electronic records, electronic documents and any other electronically or computer stored data (including text, graphics, audio and/or video), whether or not ever printed or displayed, and whether stored on hard drive, server or mainframe. The term “document(s)” shall also include the files in which any responsive documents are maintained,

including file folders and file jackets. The meaning of “document(s)” shall be construed as broadly as permitted by the Florida Rules of Civil Procedure.

I. “Identify” as used herein shall mean:

(i) when used in reference to an individual, to state his full name, his present or last known address, his telephone number, the full name and present or last known address of his employer or business, and his position with such employer or business.

(ii) when used in reference to a corporation, partnership, unincorporated association, or other entity, to state its full name and its present or last known address, and fully describe the business or activity in which the entity is engaged.

(iii) when used in reference to a document, to state the date, author, type of document, the person or persons to whom it or copies of it were sent, and its present or last known location and custodian. If any document was, but is no longer, in your possession or custody or subject to your control, state what disposition was made of it, the date of such disposition, and the reason for such disposition.

(iv) when used in reference to a statement, a representation, a directive or other information, state the time and date it was made, the location where it was made, the location where it was received (if other than the location where it was made), and the nature and specific content of it, and identify each person to whom it was made, each person present when it was made or received, and each person having care custody or control of it in any form.

J. “Describe” as used herein means to explain with full particularity any and all responsive facts, acts, occurrences, omissions, information, and other responsive detail, including, without limitation, the following:

(i) The identity of each and every person who has knowledge of the fact, act, occurrence, omission, information or detail;

(ii) The date of each fact, act, omission or occurrence;

(iii) A narrative description of each fact, act, occurrence, omission, information or detail; and

(iv) The identity of each and every document related to the fact, act, occurrence, omission, information or detail.

K. As used herein, the conjunctions “and” and “or” shall be interpreted in each instance as meaning “and/or” so as to encompass the broader of the two possible constructions, and shall not be interpreted disjunctively so as to exclude any information or documents otherwise within the scope of any Interrogatory.

L. Any pronouns used herein, shall include and be read and applied as to encompass the alternative forms of the pronoun, whether masculine, feminine, neuter, singular or plural, and

shall not be interpreted so as to exclude any information or documents otherwise within the scope of the Interrogatory.

M. The singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronoun, and vice versa.

N. If you object to identifying a document or communication on the basis of privilege, for each and every such document and communication specify:

- (i) The type or nature of the document or communication;
- (ii) The general subject matter of the document or communication;
- (iii) The date of the document or communication;
- (iv) The author, addressee, and any other recipient of the document or communication; and
- (v) The basis on which you contend you are entitled to refuse to identify the document or communication.

O. If you cannot answer any Interrogatory after conducting a reasonable investigation, you should so state; however, you must answer to the extent you can, stating what information you do have, what information you cannot provide, and stating what efforts you have made to obtain the unknown information.

INTERROGATORIES

Interrogatory No. 1: Identify all documents and communications which relate to or otherwise evidence any efforts to retain or preserve of evidence in connection with litigation being pursued against You from 2008 to the present.

Response:

Interrogatory No. 2: Please identify any efforts or actions undertaken by You to ensure that evidence in connection with litigation being pursued against You from 2008 to the present is preserved or properly retained, and is not destroyed.

Response:

Interrogatory No. 3: Please state, with specificity, all actions undertaken by You to locate and/or produce documents in response to any request for production or subpoena issued to You in connection with litigation being pursued against You from 2008 to the present.

Response:

**IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT, IN
AND FOR BROWARD COUNTY, FLORIDA**

**Case No: 12-034123(07)
Complex Litigation Unit**

P&S ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership; and S&P
ASSOCIATES, GENERAL PARTNERSHIP, a
Florida limited partnership, PHILIP VON KAHLE
as Conservator of P&S ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited partnership, and
S&P ASSOCIATES, GENERAL PARTNERSHIP,
a Florida limited partnership,

Plaintiffs,

v.

STEVEN JACOB, an individual, STEVEN F.
JACOB, CPA & ASSOCIATES, INC., a Florida
corporation, FRANK AVELLINO, an individual,
and MICHAEL BIENES, an individual,
STEVEN JACOB, et al.,

Defendants.

**PLAINTIFFS' THIRD SET OF INTERROGATORIES
TO DEFENDANT MICHAEL BIENES**

Plaintiffs, P&S Associates, General Partnership (“P&S”), S&P Associates, General Partnership (“S&P”) and Philip Von Kahle as Conservator on behalf of P&S and S&P (“Conservator”) (collectively and individually referred to as, the “Partnerships” or “Plaintiffs”), by and through their undersigned attorneys, pursuant to Fla.R.Civ.P., R.1.340, request that Defendant Michael Bienes (“Defendant”), answer each of the following interrogatories set forth below separately and fully in writing, under oath, on or before March 4, 2016.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 26, 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:

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***Attorneys for Steven Jacob; Steven F. Jacob
CPA & Associates, Inc.***

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Attorneys for Defendant, Frank Avellino

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Attorneys for Defendant, Michael Bienes

By: s/Leonard K. Samuels

DEFINITIONS AND INSTRUCTIONS:

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A. “You”, “Your”, or “Defendant” as used herein means Michael Bienes and includes any and all agents, employees, servants, attorneys and any other person or entity acting or purporting to act on his behalf, including but not limited to 56 Arlington Place, LLC.

B. “P&S” as used herein means Plaintiff P&S Associates, General Partnership, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on its behalf.

C. “S&P” as used herein means Plaintiff S&P Associates, General Partnership, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on its behalf.

D. Unless otherwise specified herein, the time frame for each interrogatory is from and including January 1, 1992 to the present.

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F. Any reference herein to any public or private company, partnership, association, or other entity includes such entity’s subsidiaries and affiliates, as well as the present and former directors, officers, employees, attorneys, agents and anyone acting on behalf of, at the direction of, or under the control of the entity, its subsidiaries or its affiliates.

G. “Related to”, “relating to”, “referring to” or “references” as used herein means containing, constituting, showing, mentioning, reflecting, evidencing, discussing, or pertaining in any way, directly or indirectly, to the subject matter identified in the Request, and includes any documents supporting, denying, underlying or used in the preparation of any document called for by each Request.

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(iii) when used in reference to a document, to state the date, author, type of document, the person or persons to whom it or copies of it were sent, and its present or last known location and custodian. If any document was, but is no longer, in your possession or custody or subject to your control, state what disposition was made of it, the date of such disposition, and the reason for such disposition.

(iv) when used in reference to a statement, a representation, a directive or other information, state the time and date it was made, the location where it was made, the location where it was received (if other than the location where it was made), and the nature and specific content of it, and identify each person to whom it was made, each person present when it was made or received, and each person having care custody or control or it in any form.

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INTERROGATORIES

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Response:

Interrogatory No. 2: Please identify any efforts or actions undertaken by You to ensure that evidence in connection with litigation being pursued against You from 2008 to the present is preserved or properly retained, and is not destroyed.

Response:

Interrogatory No. 3: Please state, with specificity, all actions undertaken by You to locate and/or produce documents in response to any request for production or subpoena issued to You in connection with litigation being pursued against You from 2008 to the present.

Response:

ACKNOWLEDGEMENT

By: _____

Title: _____

STATE OF _____)

) SS:

COUNTY OF _____)

BEFORE ME, the undersigned authority, personally appeared _____ as _____ of Defendant Frank Avellino who, being first duly sworn, deposes and states that the answers to the foregoing Interrogatories are true and correct.

SWORN TO AND SUBSCRIBED before me, this _____ day of _____, 2016, by _____, who is _____ personally known to me or _____ has produced _____ as identification.

Notary Public, State of
Commission No.

(SEAL)
My Commission Expires: