

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.

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**MOTION TO REOPEN DISCOVERY ON A LIMITED BASIS, TO  
COMPEL RACHEL ROSENTHAL LIERSCH TO APPEAR AT DEPOSITION**

After the close of discovery, Defendant Frank Avellino (“Avellino”) revealed that his daughter Rachel Rosenthal Liersch Rosenthal (“Liersch”) ran searches of his e-mails and allegedly was responsible for the production of electronically stored information. Based on Avellino’s testimony, Plaintiffs requested that Avellino make his daughter Rosenthal available for deposition. However, Avellino refused to do so. Accordingly, Plaintiffs respectfully request that the Court enter an Order Reopening Discovery on a Limited Basis To Compel Rachel Rosenthal Liersch to Appear at a Deposition, and in support thereof state:

1. Pursuant to the Court’s Pre-Trial Order, the deadline for the parties to issue discovery expired on February 26, 2016.

2. On March 18, 2016, after the close of discovery, Plaintiffs deposed Avellino to investigate Avellino's practices in connection with his preservation of e-mails<sup>1</sup>, his deletion of e-mails and the production of electronically stored information.

3. During the March 18, 2016 deposition, Avellino testified that AOL automatically deletes his e-mails after two weeks. Transcript of March 18 Deposition of Frank Avellino ("Avellino TR") at 283-284.<sup>2</sup>

4. When asked about how AOL deletes his files and what happened to the e-mails which Avellino claims were deleted, Avellino disclosed, for the first time that his daughter, "went digitally through all the AOL instruments and found out from them. She spent days on telephones, on e-mails, and that's when she found out that AOL has a policy that gets rid of files. They do not keep files after a certain time, and I believe it was two weeks." *Id.* at 287:12-19.

5. Avellino was subsequently questioned about what Liersch, who is not a party to this action and who has no common interest with Avellino, found during the course of her investigation, but Avellino could not recall anything. *Id.* at 288. Among others, Avellino claimed to lack knowledge of (i) why AOL allegedly deleted e-mails every two weeks (*id.* at 287);<sup>3</sup> (ii)

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<sup>1</sup> Plaintiffs have filed numerous motions seeking clarification of Defendants document preservation, collection and discovery responses. Based on numerous inconsistencies and recent disclosure of spoliation of evidence through the deletion of emails, Plaintiffs have renewed their motion for a forensic examination of Defendants computers.

<sup>2</sup> Excerpts from the March 18 Deposition Transcript are attached hereto as **Exhibit "A"**.

<sup>3</sup> The table is an excerpt from AOL's website that describes the AOL's policy in maintaining e-mails.

what his daughter did to search for e-mails that were responsive to any discovery requests (Avellino TR at 288:1-13); (iii) what e-mails or documents were located by Liersch (*id.* at 289-290); and (vi) how Liersch was able to retrieve the e-mails she allegedly located that could not be found by Avellino. *Id.* at 291:10-19.

6. Moreover, Avellino repeatedly claimed that he did not understand how computers work, and that “[i]f you gave me that computer, I wouldn’t know what to do with it . . . So when you say to me did I delete, did I read, did I keep that’s all foreign to me.” *Id.* at 294:3-17.

7. Based on the foregoing, Plaintiffs requested that Avellino make Liersch available for a deposition to understand what Avellino did to search for and produce electronically stored information to Plaintiffs. However, Avellino refused to make her available.

8. The failure to produce Liersch for deposition prevents Plaintiffs from obtaining relevant information relating to whether Avellino destroyed e-mails or other relevant evidence in bad faith, which would support Plaintiffs’ pending spoliation claims.

Folder	Limits and Timelines
Inbox	Emails will remain in your <b>Inbox</b> folder until you delete them (even the emails that you've read).
Sent	Sent emails will remain in your <b>Sent</b> folder until you delete them.
Spam	Emails in your <b>Spam</b> folder will be automatically deleted after 5 days.
Recently Deleted or Trash	Emails you delete may be deleted immediately or may remain in your <b>Recently Deleted</b> or <b>Trash</b> folder for up to 7 days.
My Folders	Emails saved to any of the subfolders in your <b>My Folders</b> mail folder will never be deleted until you delete them.

See AOL Mail: Features and Actions, available at <https://help.aol.com/articles/aol-mail-features-and-actions>  
A true and correct copy of AOL’s policies and features is attached hereto as **Exhibit “B”**.

9. Accordingly, good cause exists to permit Plaintiffs to depose Liersch.

10. Plaintiffs have conferred with counsel for Avellino in an attempt to resolve the issues presented by the instant motion in good faith. Counsel for Avellino did not consent to the relief sought.

WHEREFORE Plaintiffs respectfully request that the Court enter an Order: (i) Granting the Motion to Reopen Discovery on a Limited Basis, to Compel Rachel Liersch Rosenthal to Appear for a Deposition; (ii) Reopening Discovery to Permit Plaintiffs to Depose Rachel Liersch Rosenthal; (iii) Compelling Rachel Liersch Rosenthal to Appear at a Deposition; (iv) Awarding Plaintiffs Attorney's Fees and Costs; and (v) Granting such further relief as the Court deems just and proper.

Dated: April 8, 2016

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on April 8, 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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*EXHIBIT A*

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

3 CASE NO.:12-034123 (07)

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

8 Plaintiffs,

9 vs.  
10

MICHAEL D. SULLIVAN, an individual,  
11 STEVEN JACOB, an individual, MICHAEL D.  
SULLIVAN & ASSOCIATES, INC., a Florida  
12 corporation, STEVEN F. JACOB, CPA & ASSOCIATES,  
INC., a Florida corporation, FRANK AVELLINO,  
13 an individual, MICHAEL BIENES, an individual,  
VINCENT BARONE, an individual, and PREMIER  
14 MARKETING SERVICES, INC., a Florida Corporation,

15 Defendants.  
16

17  
18 Boca Raton, Florida

19 March 18th, 2016

20 11:00 a.m. - 12:10 p.m.  
21

22 DEPOSITION OF FRANK AVELLINO  
23 VOLUME III  
24  
25



1 Q Did you hand Mr. Woodfield an exact copy  
2 of the Michael Sullivan file?

3 A I handed all of the copies, the exact  
4 copy, the entire file. I kept no copies.

5 Q So you kept no copies, you gave the entire  
6 file?

7 A Yes.

8 Q Did you search your e-mails as well for  
9 anything involving Michael Sullivan?

10 A Whatever was in the e-mail I also made  
11 sure he had, but I didn't find anything. If I did  
12 find something, I would make a print and give it to  
13 Mr. Woodfield.

14 Q So tell me, how did you search your  
15 e-mails to find them?

16 A By going to the read file.

17 Q So you went to the read file?

18 A Right.

19 Q You had, you know, let's say 1,152 e-mails  
20 in the read file.

21 A Yes.

22 Q How would you parch through the 1,152  
23 e-mails to find which of those were sent to you by  
24 Michael Sullivan?

25 A It only had certain files, it doesn't have

1 all the files. AOL destroys the files, which I  
2 learned later on. After two weeks or something like  
3 that they're not there anymore.

4 Q So after two weeks AOL automatically --

5 A I assume that, yes.

6 Q You would assume that?

7 A Yes. I looked and they're not there. So,  
8 I assumed where are they and they're not there.

9 Q So what you're saying is that when you  
10 read e-mails -- earlier you said you've done nothing  
11 to destroy e-mails.

12 A Right.

13 Q But you also said that when you click on  
14 it, on the read file, it goes to the old file.

15 A Yes.

16 Q From there AOL deletes it automatically.  
17 Is that correct?

18 MR. WOODFIELD: Object to the form of the  
19 question.

20 THE WITNESS: After a certain time.

21 BY MR. HYMAN:

22 Q So then all of the e-mails you placed in  
23 your old file are automatically deleted?

24 MR. WOODFIELD: Objection to the form of  
25 the question.

1 of the word delete. Listen to his question.

2 MR. HYMAN: Mr. Woodfield, speaking  
3 objections are not appropriate. We have an  
4 hour and fifteen minutes. Unfortunately, I  
5 understand --

6 THE WITNESS: I do not delete anything,  
7 period.

8 BY MR. HYMAN:

9 Q But AOL does, right?

10 A AOL has a system of not saving files,  
11 that's what they said. I did not know this.

12 Q When did you learn about this?

13 A When Mr. Woodfield directed Rachel Wearsch  
14 to investigate what AOL had. She went diligently  
15 through all the AOL instruments and found out from  
16 them. She spent days on telephones, on e-mails, and  
17 that's when she found out that AOL has a policy that  
18 gets rid of files. They do not keep files after a  
19 certain time, and I believe it was two weeks.

20 Q When did you first have this discussion  
21 and investigation by Ms. Wearsch?

22 A I don't remember. Mr. Woodfield is the  
23 one that directed her.

24 Q By the way, who is Ms. Wearsch?

25 A Ms. Wearsch is my daughter.

1 Q So your daughter went through your e-mails  
2 and did an investigation to see what was there --

3 A Totally, yes, under Mr. Woodfield's  
4 direction.

5 Q Was this in 2014?

6 A I don't remember.

7 Q Was it in 2012?

8 A No. It was definitely later.

9 Q So in 2012, what did you do to look into  
10 whether or not you've got saved e-mails or other  
11 electronic information?

12 A I said I made copies of what was important  
13 for Mr. Woodfield, that's it.

14 Q So, you just made copies of whatever you  
15 deemed important at the time?

16 A Yes.

17 Q Did you talk to Mr. Woodfield about what  
18 should or shouldn't be saved?

19 A Yes. He said anything that involves  
20 litigation you will save.

21 Q When did you have this discussion with  
22 Mr. Woodfield about saving things that involve  
23 litigation?

24 A I don't remember.

25 Q Was it before 2012?

1 A I don't remember.

2 Q Was it between 2010 and 2012?

3 A I don't remember.

4 Q Was it in 2014?

5 A Maybe.

6 Q So it was probably in 2014?

7 MR. WOODFIELD: Objection to the form of  
8 the question.

9 MR. HYMAN: You can answer.

10 THE WITNESS: I don't know.

11 MR. HYMAN: Please mark this as Exhibit C.

12 (Thereupon, Plaintiffs' Exhibit C was  
13 marked for Identification by the  
14 reporter.)

15 BY MR. HYMAN:

16 Q So, in running searches through your  
17 e-mails, did you search for e-mails relating to an  
18 e-mail address of mike@sullivan4irsmatters.com?

19 A I don't know.

20 Q Do you know if your daughter ran a search  
21 for that?

22 A I don't know.

23 Q Did you run a search for  
24 mdassoc@bellsouth.net?

25 A I don't know.

1 Q Did your daughter?

2 A I don't know.

3 Q Did you run a search for  
4 sully@freshstarttax.com?

5 A I don't know.

6 Q Did your daughter?

7 A I don't know.

8 Q Did you run a search for gop9401@aol.com?

9 A I don't know.

10 Q Did you run a search for  
11 investit@bellsouth.net?

12 A I don't know.

13 Q Do you know whose e-mail addresses I just  
14 read to you?

15 A No.

16 Q If I told you those were Michael  
17 Sullivan's e-mails would that ring a bell?

18 A If I see them maybe.

19 Q Okay. Let me hand you what's been marked  
20 as Exhibit C.

21 Do you recognize this document?

22 A Yes.

23 Q What is this document?

24 A This is Defendant, Frank Avellino's  
25 amended report regarding e-mails.

1 Q Have you seen this amended report before?

2 A Yes.

3 Q Did you authorize the issuance of this  
4 report?

5 In other words did your attorney,  
6 Mr. Woodfield, send you a copy of it and say:  
7 Mr. Avellino, here's the report. I'm going to send  
8 it out and have you look at this and is this okay?

9 A Definitely.

10 Q So going down to the old mail, it says,  
11 "Contains 1,152 e-mails from July 9, 2010 to the  
12 present." Do you recognize that?

13 A Yes.

14 Q Do you know why there's e-mails from  
15 July 9th, 2010 to the present?

16 A No.

17 Q So you have no idea as to why there's old  
18 e-mails from that date?

19 A No.

20 Q And if you go back to Exhibits A and B,  
21 could you please take a look at the date on them?  
22 Start with Exhibit A. What's the date on that?

23 A The date is February 19th.

24 Q And you produced that to Plaintiffs. Is  
25 that correct?

1 generally? After you click the read, do you pay any  
2 attention --

3 A There's one basic thing that nobody ever  
4 paid attention to, and I said it from day one. If  
5 you give me that computer, I wouldn't know what to  
6 do with it period. And I could have witnesses that  
7 come over to my house, my computer expert so-called,  
8 who has to teach me over and over again what not to  
9 do and what to do.

10 So when you say to me did I delate, did I  
11 read, did I keep, that's all foreign to me. As a  
12 matter of fact, what no one understands is I don't  
13 live by my computer e-mail. If I look at it every  
14 three or four days it's a positive. I don't like  
15 it. I don't read it. And sometimes when I look at  
16 it I say oh, I should have answered this two days  
17 ago and I never did.

18 So when we talk about e-mails, you can  
19 take the computer and throw it in the river as far  
20 as I'm concerned. That's my opinion. That's what I  
21 do. That's what I don't like to do. I don't like  
22 computer e-mails. The only thing I like on  
23 computers is to look at a set of ledgers and do what  
24 my accountant tells me to do. That's basically  
25 where we're at.



*EXHIBIT B*

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Mail — Feb 11, 2016

## AOL Mail: Features and Actions



Learn about some of the top features of your AOL Mail account, like sending text messages and using AIM in your inbox, managing your AOL Calendar, creating and using folders, and searching your mail.

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Click a heading below to expand and learn more about some of the features of AOL Mail, like sending texts right from your inbox, searching your Contacts, managing your Calendar, and setting up filters and alerts.

**+ Sending Text Messages and Using AIM in AOL Mail**

**+ Managing Your Calendar in AOL Mail**

**+ Creating and Using Folders**

**+ Saving Emails and Moving Messages**

**+ Searching Your Mail and Using Email Filters**

**– The Trash Folder and Deleting Mail**

**+ How do I delete an email or multiple emails in AOL Mail?**

**+ How do I recover an email that was recently deleted?**

**– How long are emails stored in my AOL Mail Inbox?**

Here's a quick look at how long messages are stored in your AOL Mail inbox.

**Important:**

Please remember that your emails will be permanently deleted and cannot be retrieved if your account is inactive. To keep your account active, you need to sign in to AOL Mail with your username and password at least once every 90 days.

Folder	Limits and Timelines
<b>Inbox</b>	Emails will remain in your <b>Inbox</b> folder until you delete them (even the emails that you've read).
<b>Sent</b>	Sent emails will remain in your <b>Sent</b> folder until you delete them.
<b>Spam</b>	Emails in your <b>Spam</b> folder will be automatically deleted after 5 days.
<b>Recently Deleted or Trash</b>	Emails you delete may be deleted immediately or may remain in your <b>Recently Deleted</b> or <b>Trash</b> folder for up to 7 days.
<b>My Folders</b>	Emails saved to any of the subfolders in your <b>My Folders</b> mail folder will never be deleted until you delete them.

**AOL Desktop Software storage limits:**

- If you're using the AOL Desktop Software, and have over 5,000 emails, you'll only see the most recent 5,000 messages. To see more than the most recent 5,000 emails, please open a web browser and sign in to your mail at mail.aol.com.
- The number of emails that can be saved to the Saved on My PC folder and its sub-folders is only limited by the space available on your hard disk.
- You can create up to 252 personal folders using the AOL Desktop Software.



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**+ How do I empty my Trash in AOL Mail?**

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**+ Mailbox Tips**

**+ Keyboard and Mouse Shortcuts**