

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

CASE NO.: CACE 12-034123 (07)

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

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**DEFENDANT MICHAEL BIENES'S
RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION
TO COMPEL WITH SUPPORTING MEMORANDUM OF LAW**

Defendant, Michael Bienes, hereby files this Response in Opposition to Plaintiffs' Motion to Compel Defendant Bienes to Produce Documents in Response to Plaintiffs' Third Request for Production, stating:

INTRODUCTION

On January 23, 2015, Plaintiffs served their Fourth Request for Production of Documents to Bienes ("Fourth Request"). On February 13, 2015, Plaintiffs served a Notice of Intent to Serve Subpoena Duces Tecum With Deposition Upon Dianne Bienes ("Notice of Intent"). On February 23, 2015, Bienes objected to the Notice of Intent and on February 27, 2015, Bienes served his objections to the Fourth Request ("Response"). Plaintiff filed the instant motion on March 26, 2015.

Plaintiffs' motion should be denied. Bienes has agreed to amend his responses to all but requests 11 and 27 of the Fourth Request, subject to the Court's resolution of Bienes' continuing

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objection to the onerous and unduly burdensome manner in which Plaintiffs' requested production of "electronically stored information" or "ESI" responsive to every request. A copy of the "Schedule A" appended to both the Fourth Request and Notice of Intent is attached as **Exhibit A**. Request 11 and the entirety of the Notice of Intent impermissibly intrudes on Bienes' and his non-party wife Dianne Bienes' constitutionally protected right to privacy in their financial affairs. Request 27, moreover, is alarmingly overbroad and unduly burdensome in that it asks for all documents Bienes exchanged with 20 different people or entities over a 43 year period. For these reasons, explained in more detail below, the motion should be denied.

BACKGROUND

In Plaintiffs' sixth attempt to state viable causes of action against Bienes and other parties, the Fifth Amended Complaint again alleges that Bienes received "kickbacks" from Sullivan totaling approximately \$357,790.84. *See* Fifth Am. Compl. ¶ 46. In discovery responses, Plaintiffs have taken the position that a portion of these so-called "kickbacks" were paid to an entity allegedly controlled by Bienes, 56 Arlington House, LLC ("56 Arlington"). There is no allegation, nor has there been any evidence presented to suggest, that Bienes' wife Dianne received any of the alleged "kickbacks." And this is not a situation where Plaintiffs need more information to determine whether she did. In fact, the opposite is true. Plaintiffs have access to all the pertinent accounting records and other financial information and it shows conclusively that Mrs. Bienes received no money.

ARGUMENT

In light of Bienes' agreement to amend his responses to all but requests 11 and 27 of the Fourth Request, this discovery dispute boils down to two document requests: (i) the production of "all documents concerning 56 Arlington"; and (ii) "all documents and communications

exchanged between [Bienes] and any person identified in Plaintiffs' Response to Interrogatory Number 2 of Defendant Michael Bienes' First Set of Interrogatories"; Plaintiffs' onerous ESI request; and the Notice of Intent to subpoena Bienes' non-party spouse, Dianne Bienes.

I. The Scope of Permissible Discovery

While the permissible scope of discovery is indeed broad, it is not unlimited. *See East Colonial Refuse Serv., Inc. v. Velocci*, 416 So. 2d 1276, 1277 (Fla. 5th DCA 1982); *see also* Fla. R. Civ. P. 1.280(b). To be discoverable, the information sought must be relevant to the proceeding and admissible or reasonably calculated to lead to the discovery of admissible evidence. *Allstate Ins. Corp. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). *See also Velocci*, 416 So. 2d at 1277; *see also McCarty v. Estate of Schultz*, 372 So. 2d 210, 212 (Fla. 3d DCA 1979) (party may not utilize the discovery process for a "mere fishing expedition or general inquisitorial examination of papers with a view to ascertaining whether something of value may or may not show up"). And even if the relevance standard is met, "the particular items or information sought to be discovered may be privileged and therefore beyond permissible discovery." *See Velocci*, 416 So. 2d at 1278-78, n.2 (citing *Central Florida Skates, Inc. v. Thomas*, 393 So. 2d 1200 (Fla. 5th DCA), *rev. denied*, 402 So. 2d 608 (Fla. 1981)). Thus, the trial court has broad discretion to disallow requests that are unreasonable and oppressive, or protect privileged information.¹

¹ *See Sunrise Shopping Center, Inc. v. Allied Stores Corp.*, 270 So. 2d 32, 34 (Fla. 4th DCA 1972) (trial court had discretion to quash third-party subpoena that was unreasonable and oppressive because witness did not have knowledge of facts asserted); *Travelers Indem. Co. v. Salido*, 354 So. 2d 963, 964 (Fla. 3d DCA 1978) (trial court erred in not quashing subpoena that requested irrelevant information because discovery "cannot be utilized to explore all the minute details of a controversy or delve into immaterial or inconsequential matters").

II. Plaintiffs' are not entitled to discovery Bienes' and his non-party wife's constitutionally protected private financial information.

Request 11, which asks for production of all 56 Arlington documents, and the entirety of the Notice of Intent, constitute improper and unjustified invasions of Bienes' and his wife's right to privacy. What's more, the information Plaintiffs' seek has no relevance to any remaining claim in this action. Plaintiffs allegedly have the information showing transfers to 56 Arlington House. What all other documents relating to 56 Arlington House may show is irrelevant, and its disclosure would necessarily reveal Bienes' and his non-party wife's personal financial dealings and constitute an invasion of their privacy rights.

The Florida Constitution provides for a constitutional right of privacy. Art. I, section 23. "Court orders compelling discovery constitute state action that may impinge on constitutional rights, including the constitutional right of privacy." *Berkeley v. Eisen*, 699 So.2d 789, 790 (Fla. 4th DCA 1997). "[P]ersonal finances are among those private matters kept secret by most people." *Woodward v. Berkery*, 714 So.2d 1027, 1035 (Fla. 4th DCA 1998) citing *Winfield v. Div. of Pari-Mutual Wagering*, 477 So.2d 544 (Fla. 1985)). In *Winfield* the Florida Supreme Court expressly recognized that an individual had a legitimate expectation of privacy in financial institution records. *Id.* at 547. In *Berkeley v. Eisen*, the fourth district court of appeals recognized an individual's investment records are also subject to this constitutionally protected zone of privacy. *Berkeley, supra*, 699 So.2d at 790. Additionally, "the burden to prove the information is relevant or reasonably calculated to lead to the discovery of admissible evidence is on the party seeking the information." *Id.* (citing *Spry v. Prof'l Emp'r Plans*, 985 So.2d 1187, 1188–89 (Fla. 1st DCA 2008)). This determination can be made only after an evidentiary hearing. *Id.* In fact, it is a departure from the essential requirements of law for a court to order production of personal

financial information without first conducting an evidentiary inquiry into its relevance. *Rowe*, 89 So. 2d at 1103. The assertions or arguments of a party's attorney, moreover, are not sufficient evidence of relevance. *See DiSarrio v. Mills*, 711 So. 2d 1355, 1357 (Fla. 2d DCA 1998).

Plaintiffs' demand for all documents concerning 56 Arlington and their attempt to take the deposition duces tecum of Dianne Bienes, an innocent non-party, is overreaching and abusive. In point of fact, it not only constitutes an improper invasion of Bienes' and his wife's constitutionally protected right of privacy, it typifies just the sort of "fishing expedition" and general inquisition that the Florida Rules of Procedure and the case law interpreting them are designed to prevent. *See, e.g., McCarty*, 372 So. 2d at 212. This information has no relevance to this litigation and is not otherwise subject to disclosure. Moreover, Plaintiffs' have made absolutely no factual showing of a compelling need for such information as the law requires. Indeed, Plaintiffs have not even tried. Accordingly, Plaintiffs' motion to compel should be denied and Bienes' objections to request 11 of the Fourth Request and to the entirety of the Notice of Intent should be sustained.

III. Plaintiffs' request for all documents exchanged between Bienes and 20 different people or entities is overbroad and unduly burdensome.

Request 27, as written, seeks "all documents and communications exchanged between [Bienes] and any person identified in Plaintiffs' Response to Interrogatory Number 2 of Defendant Michael Bienes' First Set of Interrogatories." Confusingly, there are no such "persons" identified in interrogatory 2. The only "person" identified in that interrogatory answer is Bienes himself. Thus, while Plaintiffs to this day have not clarified their intent, Bienes believes the reference to interrogatory 2 is an unintentional typographical error and that Plaintiffs intended instead to refer to interrogatory 3, which lists 20 different persons or entities as

investors Plaintiffs' allege Bienes "solicited" to invest in the Partnerships over the astonishingly long period from January 1, 1992 to today. If this is correct, request 27 is patently overbroad and unduly burdensome. As such, Bienes' objection to this request should be sustained. Nevertheless, Bienes is not in possession of any such documents, and any documents he did have were already produced to Plaintiffs.²

IV. Bienes' objections to Plaintiffs' ESI requests should be sustained.

Both the Fourth Request and Notice of Intent are unduly burdensome to the extent Plaintiffs seek production of ESI pursuant to the Schedule A they attach. As Bienes stated in his objections, the retrieval of any ESI in the manner Plaintiffs request would require Bienes and his wife to incur expenses that are simply not justified. Those expenses are particularly not justified where, as here, the ESI implicates private, protected financial information of Bienes and his wife and Plaintiffs' fail to offer any compelling reason for its disclosure. For this additional reason, Plaintiffs' motion to compel should be denied and Bienes' objections to Schedule A sustained.

V. No documents or information has been withheld on the basis of the general objections.

Plaintiffs' go to great lengths to point out how baseless they believe Bienes' general objections to the Fourth Request are. Plaintiffs fail to mention, however, that paragraph 12 of Bienes' Response states quite clearly that "[n]o documents or information is currently being withheld on the basis of the foregoing general objections." The suggestion that each or any of the general objections are incorporated in Bienes' individual responses is a red herring. Thus, to the extent Plaintiffs' motion seeks an order overruling Bienes' general objections to the Fourth Request, it should be denied.

² Bienes produced over 5,000 pages of documents to Plaintiffs on December 11, 2014.

CONCLUSION

For the reasons stated above, Plaintiffs' motion to compel should be denied and Bienes' objections to the Fourth Request and Notice of Intent sustained.

WHEREFORE, Defendant, Michael Bienes, respectfully requests that the Court enter an Order: (i) denying Plaintiffs' motion to compel, (ii) sustaining his objections to the Fourth Request and Notice of Intent, (iii) awarding Bienes his reasonable attorneys' fees and costs incurred defending Plaintiffs' motion to compel, and (iv) awarding such other and further relief as the Court deems just and proper under the circumstances.

Dated this 20th day of April, 2015.

Respectfully submitted,

/s/ Shane P. Martin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 2015, this notice and the aforementioned interrogatories were served via E-mail to: **(i)** Thomas E. Messana, Esq., Thomas Zeichman, Esq., Messana, P.A., 401 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, FL 33301 (tmessana@messana-law.com, tzeichman@messana-law.com) (Counsel for Plaintiffs); **(ii)** Leonard K. Samuels, Esq., Etan Mark, Esq., Steven D. Weber, Esq., Zachary P. Hyman, Esq., Berger Singerman LLP, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301 (lsamuels@bergersingerman.com, emark@bergersingerman.com, sweber@bergersingerman.com, zhyman@bergersingerman.com) (Counsel for Plaintiff Margaret Smith); **(iii)** Peter G. Herman, Esq., Tripp Scott, 110 S.E. 6th Street, 15th Floor, Ft. Lauderdale, FL 33301 (pgh@trippscott.com) (Counsel for Steven Jacob and Steven F. Jacob CPA and Associates); **(iv)** Paul V. DeBianchi, Esq., Paul V. DeBianchi, P.A., 111 S.E. 12th Street, Ft. Lauderdale, FL 33316 (Debianchi236@bellsouth.net); **(v)** Gary A. Woodfield, Esq., Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 (gwoodfield@haileshaw.com, bpetroni@haileshaw.com, eservice@haileshaw.com) (Counsel for Defendant Frank Avellino); **(vi)** Harry Winderman, Esq., One Boca Place, 2255 Glades Road, Boca Raton, FL 33431 (harry4334@hotmail.com); **(vii)** Matthew Triggs, Esq., Andrew Thomson, Esq. Proskauer Rose LLP, 2255 Glades Road, Suite 421 Atrium, Boca Raton, FL 33431 (mtriggs@proskauer.com, athomson@proskauer.com, florida.litigation@proskauer.com); and **(viii)** Robert J. Hunt, Esq., Debra D. Klingsberg, Esq., Hunt & Gross, P.A., 185 Spanish River Boulevard, Suite 220, Boca Raton, FL 33431 (bobhunt@huntgross.com, dklingsberger@huntgross.com, eService@huntgross.com, Sharon@huntgross.com).

/s/ Shane P. Martin _____

Shane P. Martin

SCHEDULE “A”

**Production of Electronically Stored Information (ESI)
FORM OF PRODUCTION**

Plaintiffs request that all ESI (electronically stored information) be produced as follows:

ESI will be produced (printed and loaded) in 300DPI resolution or greater, Group IV Monochrome Tagged Image File Format (.TIF) files in single-page format, with **ALL** native files provided and word searchable OCR/extracted text (Optical Character Recognized – i.e. searchable text) in UTF-8 format. Color photographs should be produced as color JPEG images. Email natives will be delivered in MSG or EML format. Load files will be provided in Opticon (.OPT) format and an IPRO LFP (.lfp) format. Metadata will be provided in a DAT file with standard Concordance delimiters. The text files containing the OCR/Extracted Text shall be produced in multi-page format with the name corresponding to its associated document. **All small and oversized images should be resized to fit on 8.5x11 canvas.**

The files should be delivered with the following folder structure:

IMAGES – contains the TIF and JPG files, up to 10,000 items.
DATA – contains the OPT and LFP files and the metadata text file (DAT)
NATIVES – contains all the original native files named as the BEGDOC
TEXT – contains the document-level OCR/Extracted text files named as the BEGDOC

<u>Eclipse Metadata Field</u>	<u>Field Description</u>
BegDoc	BegDoc
EndDoc	EndDoc
BegAttach	BegAttach
EndAttach	EndAttach
Application	Application/Application Name
AttachmentIDs	Bates numbers of attachment(s)
Attachments	Names of attachment files

AttachRange	Attachment Range
Authors	Document author
BCC	BCC (Name + email)
CC	CC (Name + email)
Companies	Company name
Custodian	Custodian (Last, First)
DateCreated	Date created (MM/DD/YYYY)
DateReceived	Date email received (MM/DD/YYYY)
DateSaved	Date last saved (MM/DD/YYYY)
DateSent	Date email sent (MM/DD/YYYY)
Doctitle	Title
FileType	Document Type Description
FileExtension	File extension
Doclink	Link to native files produced
ExtractedText	Link to text files produced
Filename	Original filename
FileSize	File size in bytes
Folder	Relative Path (Inbox, Sent, etc.)
From	Sender (Name + email)
Hash_Code	MD5 hash
Header	Email header
InternetMSGID	IntMsgID
MessageID	MsgID
NumAttachments	Attachment count
NumPages	Page count
ParentID	Parent bates number
Password_Protect	Y/N field
Read	Y/N
SHA1	SHA1 hash
Sources	CD, DVD, hard drive; brief desc. of data
StoreID	Name of PST/NSF file (if relevant)
Subject	Email/Document subject
TimeReceived	Time email received (12-hour HH:MM)
TimeSent	Time email sent (12-hour HH:MM)
To	To (Name + email)

For **.xls (Excel)**, **.ppt (PowerPoint)**, and **.doc (Word)** files the following additional metadata fields should be included:

Excel_Comments	Comments
Excel_HiddenColumns	Hidden Columns
Excel_HiddenRows	Hidden Rows
Excel_HiddenWorksheets	Hidden Worksheets
Num_Lines	Number of lines

Num_Paragraphs	Number of paragraphs
Num_slides	Number of slides
Num_Notes	Number of notes
Num_HiddenSlides	Number of hidden slides
Num_Multimedia	Number of multimedia clips
Security	Security