

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, et al.,

Plaintiffs,

vs.

STEVEN JACOB, et al.

Defendants.

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**PLAINTIFFS' MOTION TO COMPEL THE INSPECTION  
OF DEFENDANT FRANK AVELLINO'S STORAGE FACILITY**

Plaintiffs, by and through the undersigned counsel, hereby file this Motion to Compel the Inspection of Defendant Frank Avellino's Storage Facility and in support thereof state:

1. On or about February 26, 2016, Plaintiffs served onto Defendant Frank Avellino ("Avellino"), Plaintiffs' Sixth Request for the Production of Documents (the "Sixth Request for Production"). A true and correct copy of the Sixth Request for Production is attached hereto as **Exhibit "A."**

2. On March 18, 2016, prior to responding to the Sixth Request for Production, Avellino was deposed, among others, on the issue of whether Avellino preserved evidence and deleted e-mails.

3. During the deposition, Avellino testified that he maintains a paper folder of documents and communications that were exchanged with "everybody he talk[ed] to." March 18, 2016 Deposition Transcript of Frank Avellino at 281:18 ("Avellino TR").<sup>1</sup>

4. Specifically, Avellino testified as follows:

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<sup>1</sup> Excerpts of the deposition of the March 18<sup>th</sup> Deposition of Frank Avellino are attached hereto as **Exhibit "B"**.

**Hyman:** Did you read every single e-mail you had to determine if it was from Michael Sullivan?

**Avellino:** No.

**Hyman:** How did you know that it was an e-mail from Michael Sullivan?

**Avellino:** Because I have a file called Michael Sullivan.

**Hyman:** So you have a file in your inbox called Michael Sullivan?

**Avellino:** No. I had a file, a physical file of paper that said Michael Sullivan?

**Hyman:** When did you create a physical pile of paper that said Michael Sullivan?

**Avellino:** I do that with everybody I talk to.

*Id.* at 281:5-21.

5. Avellino then testified that he turned over folders of documents and communications concerning Michael Sullivan, Michael Bienes and others to his counsel. *Id.* at 283:1-7; 292: 17-20.

6. However, neither Avellino nor his counsel has confirmed that the contents of the folders have been searched or reviewed for responsive documents, or that any documents from these folders have been produced to Plaintiffs.

7. After Avellino's deposition, Avellino responded to the Sixth Request for Production. A true and correct copy of Avellino's Response to the Sixth Request for Production is attached hereto as **Exhibit "C"**.

8. In response to Request for Production Number 1, which seeks e-mails or other electronically stored information produced by Avellino to any party in any litigation in which Avellino was a party that was created between December 8, 2008, and July 9, 2010, Avellino responded that there is a storage facility with "dozens of boxes of materials" that have not been searched. He asserts that requiring his counsel to search the boxes for documents responsive to the request for production would be "overly broad and unduly burdensome to search those boxes for relevant evidence". *Id.*

9. Avellino did not object to Request for Production Number 1 on the basis that the materials in the storage facility were privileged, or were otherwise confidential.

10. Avellino also claims that the e-mails “regardless of their content has no bearing or relevance in this action.” *Id.* However, Avellino acknowledged that did not search the boxes for relevant evidence, and therefore Avellino’s relevancy objection lacks merit.

11. In addition, Avellino has testified that is was his routine practice to delete all e-mails from his computer every two days and often daily. **Exhibit “D”** at 17:22-18:20; 100:25-101:22. Later Avellino testified that his AOL account deleted all e-mails after two weeks. Avellino TR at 285: 12-23. As such, the boxers in storage may be the only repository that still contains hard print copies of deleted computer records. Until either Avellino searches the storage facility for relevant documents, or Plaintiffs are provided an opportunity to search it, there is no way of knowing if hard copies of previously deleted e-mails are in the storage facility, or if the storage facility contains discoverable materials.

12. Accordingly, a search of the records in the storage facility could lead to the discovery of admissible evidence.

13. Because the existence of the records in the storage facility has just been disclosed, and because there is no verifiable testimony that these records have previously been searched to determine if they contain responsive documents to outstanding discovery requests, (and none of those documents are claimed to be privileged), Plaintiffs should be permitted to inspect the records in the storage facility.

14. Further, Avellino’s objections concerning the burdensome nature of searching through the storage facility are without merit because it is not supported by competent evidence. *Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197, 1199 (Fla. 4th DCA 2000) (noting that objections to discovery based on it being overly burdensome must be supported by some evidence). The

fact that Avellino claims that there are dozens of boxes, does not allow a party to subjectively determine whether inspecting the materials in those boxes would be overly burdensome.

15. Counsel for Plaintiffs has attempted to resolve the issues presented by this Motion in good faith before its filing. However counsel for Avellino refused to consent to the relief sought.

16. Permitting Plaintiffs to inspect the documents in that facility will not prejudice Avellino, because Avellino will not incur fees, and has not claimed that the documents in the facility are privileged or confidential.

WHEREFORE Plaintiffs respectfully request that the Court enter an Order: (i) Granting the Motion; (ii) Compelling Avellino to permit Plaintiffs to inspect his storage facility at a mutually agreed date and time; (iii) Compelling Avellino to produce an inventory of all documents in the storage facility; (iv) Awarding Plaintiffs attorney's fees and costs; and (v) Granting such further relief as the Court deems just and proper.

Dated: April 25, 2016

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## **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on April 25, 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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**IN THE CIRCUIT COURT OF THE  
17TH 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, ET AL.,

Defendants.

---

**PLAINTIFFS' SIXTH REQUEST FOR PRODUCTION  
OF DOCUMENTS TO DEFENDANT FRANK AVELLINO**

Pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, 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, request that Defendant Frank Avellino ("Defendant"), produce the following described documents and tangible things in accordance with Rule 1.350 and the definitions and instructions stated below, at the offices of Berger Singerman, 350 East Las Olas Blvd, Suite 1000, Fort Lauderdale, FL 33131, within 30 days of service of this Request.



**DEFINITIONS AND INSTRUCTIONS**

The following definitions shall apply to this Request:

A. “You”, “Your”, or “Defendant” as used herein means Defendant Frank Avellino, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on his behalf, or any other entity or person under the direct control of Frank Avellino.

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. “Bienes” as used herein means Michael Bienes, a named Defendant in this action, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on his behalf.

E. “Sullivan” as used herein means Michael D. Sullivan, and includes any and all agents, employees, servants, officers, directors, attorneys and any other person or entity acting or purporting to act on his behalf.

F. “Michael D. Sullivan & Associates, Inc.” as used herein means Michael D. Sullivan & Associates, Inc., 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.

G. “Sullivan & Powell, Inc.” as used herein means Sullivan & Powell, Inc., 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.

H. “Solutions in Tax, Inc.” as used herein means Solutions in Tax, Inc., 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.

I. “Powell” as used herein means Gregory O. Powell.

J. “BLMIS” as used herein means Bernard L. Madoff Investment Securities, LLC

K. “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. Any reference herein to any public or private company, partnership, association, or other entity include 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.

“Documents” shall mean the original or copies of any tangible written, typed, printed or other form of recorded or graphic matter of every kind or description, however produced or reproduced, whether mechanically or electronically recorded, draft, final original, reproduction, signed or unsigned, regardless of whether approved, signed, sent, received, redrafted, or executed, and whether handwritten, typed, printed, photostated, duplicated, carbon or otherwise copied or produced in any other manner whatsoever. Without limiting the generality of the foregoing, “documents” shall include correspondence, letters, telegrams, telexes, mailgrams, memoranda, including inter-office and intra-office memoranda, memoranda for files, memoranda of telephone or other conversations, including meetings, invoices, reports, receipts and statements of account, ledgers, notes or notations, notes or memorandum attached to or to be read with any document, booklets, books, drawings, graphs, charts, photographs, phone records, electronic tapes, discs or other recordings, computer programs, printouts, data cards, studies, analysis and other data compilations from which information can be obtained. Copies of documents, which are not identical duplications of the originals or which contain additions to or deletions from the originals or copies of the originals if the originals are not available, shall be considered to be separate documents.

“Documents” shall also include all electronic data storage documents including but not limited to e-mails and any related attachments, electronic files or other data compilations which relate to the categories of documents as requested below. Your search for these electronically stored documents shall include all of your computer hard drives, floppy discs, compact discs, backup and archival tapes, removable media such as zip drives, password protected and encrypted files, databases, electronic calendars, personal digital assistants, proprietary software and inactive or unused computer disc storage areas.

L. Documents, as defined herein, includes electronically stored information, which shall be produced in its native format including its metadata, in the manner set forth on **Schedule “A”**.

M. “Communications” shall mean any oral or written statement, dialogue, colloquy, discussion or conversation and, also, means any transfer of thoughts or ideas between persons by means of documents and includes any transfer of data from one location to another by electronic or similar means.

N. “Related to” shall mean, directly or indirectly, refer to, reflect, mention, describe, pertain to, arise out of or in connection with or in any way legally, logically, or factually be connected with the matter discussed.

O. 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 request.

P. 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 any request.

Q. Unless otherwise specified herein, the time frame for each request is from and including January 1, 1960 to the present.

R. If you contend that you are entitled to withhold any responsive document(s) on the basis of privilege or other grounds, for each and every such document specify:

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

S. If you assert that any document sought by any request is protected against disclosure as the attorney's work product doctrine or by the attorney-client privilege, you shall provide the following information with respect to such document:

- i. the name and capacity of the person or persons who prepared the documents;
- ii. the name and capacity of all addresses or recipients of the original or copies thereof;
- iii. the date, if any, borne by the document;
- iv. a brief description of its subject matter and physical size;
- v. the source of the factual information from which such document was prepared; and
- vi. the nature of the privilege claimed.

T. You must produce all documents within your case, custody or control that are responsive to any of these requests. A document is within your care, custody or control if you have the right or ability to secure the document or a copy thereof from any other person having physical possession thereof.

U. If you at any time had possession, custody or control of a document called for under this request and if such document has been lost, destroyed, purged, or is not presently in your possession, custody or control, you shall describe the document, the date of its loss, destruction, purge, or separation from possession, custody or control and the circumstances surrounding its loss, destruction, purge, or separation from possession, custody or control.

V. All documents produced pursuant hereto are to be produced as they are kept in the usual course of business and shall be organized and labeled (without permanently marking the item produced) so as to correspond with the categories of each numbered request hereof.

W. When appropriate, the singular form of a word should be interpreted in the plural as may be necessary to bring within the scope hereof any documents which might otherwise be construed to be outside the scope hereof.

**DOCUMENTS REQUESTED**

1. All e-mails or other electronically stored information that has been produced by You to a party in litigation since December 8, 2008, which was created on or before July 9, 2010.
2. All documents which relate to or were otherwise relied upon in your responses to Plaintiffs' Third Set of Interrogatories.
3. All documents and communications which relate to or were otherwise relied upon in your responses to Plaintiffs' Fifth Set of Interrogatories.
4. All documents and communications which relate to or were otherwise relied upon in your responses to Plaintiffs' First Request for Admissions.
5. All documents and communications which support your Affirmative Defenses in this matter.

**SCHEDULE “A”****Production of Electronically Stored Information (ESI)  
FORM OF PRODUCTION**

Plaintiffs, P & S Associates, General Partnership (“P&S”), S & P Associates, General Partnership (“S&P”), (collectively referred to as, the “Partnerships”), and Philip Von Kahle as Conservator on behalf of the Partnerships (the “Conservator”, and collectively with the Partnerships, the “Plaintiffs/Judgment Creditors”), requests 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

<b><u>Eclipse Metadata Field</u></b>	<b><u>Field Description</u></b>
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

Dated: February 26, 2016

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this February 26, 2016, a true and correct copy of the foregoing document was served by Electronic Mail upon the following parties:

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Leonard K. Samuels

## ***EXHIBIT B***

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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       How would you determine whether a e-mail  
2       was an e-mail from Michael Sullivan or not?

3           A       Because I would read it.  If it said  
4       Michael Sullivan, it was from Michael Sullivan.

5           Q       Did you read every single e-mail you had  
6       to determine if it was from Michael Sullivan?

7           A       No.

8           Q       How did you know then that it was an  
9       e-mail from Michael Sullivan?

10          A       Because I had a file called Michael  
11       Sullivan.

12          Q       So you had a file in your inbox called  
13       Michael Sullivan?

14          A       No.  I had a file, a physical file of  
15       paper that said Michael Sullivan.

16          Q       When did you create this physical pile of  
17       paper that said Michael Sullivan?

18          A       I do that with everybody I talk to.

19          Q       When did you create this file of paper --

20          A       Whenever Michael Sullivan sent me  
21       something, probably 2010/2009, I don't know.

22          Q       So it's your testimony today that from  
23       2009/2010, everything Michael Sullivan sent to you  
24       you saved in a file?

25                   MR. WOODFIELD:  Objection to the form of

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           A       Yes.

2           Q       And it's February 19th, what year?

3           A       2010.

4           Q       So why is it that there's a February 19th,  
5   2010 e-mail if you claim you don't have e-mails  
6   dating from before July 9th, 2010?

7           A       As I stated before it might have been in  
8   that file, in the Sullivan file.

9           Q       But that's an e-mail from Michael Bienes.

10          A       So what.

11          Q       Do you have a Michael Bienes file?

12          A       Maybe. I don't know, I'd have to look.

13          Q       But you testified that you keep files with  
14   everybody you have dealings with.

15          A       Well, then I have one for Michael Bienes.  
16   You're saying I had, then I have.

17          Q       I'm asking. I don't know what you have or  
18   what you don't have.

19          A       Well, evidently I found it and gave it to  
20   Mr. Woodfield.

21          Q       Do you have a file for Mr. Carone?

22          A       No.

23          Q       Do you have a file for Mr. Stapleton?

24          A       Who is Mr. Stapleton?

25          Q       I apologize. Strike that.

## *EXHIBIT C*

---

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup> 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' SIXTH REQUEST  
FOR PRODUCTION OF DOCUMENTS**

Defendant, Frank Avellino, responds to Plaintiffs' Sixth Request for Production of Documents dated February 26, 2016 (the "Request") as follows:

**GENERAL OBJECTIONS**

Object to producing documents at the offices of Plaintiffs' counsel. Documents will be produced at a mutually convenient location.

Objects to the time period of January 1, 1960 to the present set forth in Q. of the definitions and instructions as overly broad and burdensome and not likely to lead to admissible evidence.



## **DEFENDANTS' RESPONSE TO REQUEST FOR PRODUCTION**

1. All e-mails or other electronically stored information that has been produced by You to a party in litigation since December 8, 2008, which was created on or before July 9, 2010.

**RESPONSE:        Objection. This request is overly broad, burdensome and not likely to lead to admissible evidence. Further, the term "litigation" is not defined. Avellino interprets such term to relate to civil actions between private parties. Avellino has provided discovery in several such actions in the past seven or more years. Such discovery is in the possession of Avellino's attorneys in storage facilities (if it has been retained). To respond to this request, undersigned counsel would be required to retrieve from an offsite storage facility dozens of boxes of materials, cull through all such materials and attempt to locate e-mails that may have been produced in such actions that were created on or before July 9, 2010. None of these other actions involve or relate to the Partnerships involved in this action or any issues raised herein. The existence of such emails, regardless of their content, has no bearing or relevance in this action. Avellino should not be required to expend the time and cost involved in such an exercise that has no relationship or relevance to any issue in this action.**

2. All documents which relate to or were otherwise relied upon in your responses to Plaintiffs' Third Set of Interrogatories.

**RESPONSE:        Avellino is not aware of any responsive documents.**

3. All documents and communications which relate to or were otherwise relied upon in your responses to Plaintiffs' Fifth Set of Interrogatories.

**RESPONSE:** Defendant has not been served with a Fifth Set of Interrogatories by Plaintiffs in this action.

4. All documents and communications which relate to or were otherwise relied upon in your responses to Plaintiffs' First Request for Admissions.

**RESPONSE:** See AVELLINO\_P&S000692

5. All documents and communications which support your Affirmative Defenses in this matter.

**RESPONSE:** P&S and S&P's Amended Partnership Agreements; books and records of the Partnerships that reflect the calculation and payment of management fees; order appointing the Conservator.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1<sup>st</sup> day of April, 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.

**HAILE, SHAW & PFAFFENBERGER, P.A.**

*Attorneys for Defendants Frank Avellino*

*and Michael Bienes*

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By: /s/ Gary A. Woodfield  
Gary A. Woodfield, Esq.  
Florida Bar No. 563102

## SERVICE LIST

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## *EXHIBIT D*

---

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

3 COMPLEX LITIGATION UNIT

4 CASE NO.: 12-034123(07)

5 P&S ASSOCIATES, GENERAL PARTNERSHIP,  
6 a Florida limited partnership, et al.,

7 Plaintiffs,

8 v.

9 MICHAEL D. SULLIVAN, et al.,

10 Defendants.

**ORIGINAL**

11 \_\_\_\_\_/  
12 One Town Center Road  
Suite 301

13 Boca Raton, Florida 33486

14 Wednesday, 10:10 a.m. - 12:59 p.m.  
15 September 9, 2015

16 DEPOSITION OF FRANK AVELLINO

17 VOLUME 1 of 2

18 (Pages 1 through 143)

19  
20  
21 Taken on behalf of the Plaintiffs before  
22 SUSAN MATOS, Court Reporter and Notary Public in and  
23 for the State of Florida at Large, pursuant to  
24 Plaintiffs' Third Re-Notice of Taking Videotaped  
25 Deposition in the above cause.

1 Q. -- to get those on the record and make  
2 sure that we're on the same page as we go along.

3 A. Right.

4 Q. So as you can tell, I'm going to be asking  
5 you a series of questions. As you know, you've been  
6 put under oath and are required to answer the  
7 questions truthfully as though you were in front a  
8 judge and jury. Okay?

9 A. Sure.

10 Q. Also, if you don't understand any  
11 questions, please let me know and I'll rephrase them  
12 to make them understandable to you. Okay?

13 A. Okay.

14 Q. And for purposes of the court reporter, I  
15 would ask that you do what you have been doing, and  
16 that is answer verbally as opposed to the nodding of  
17 head. Okay?

18 A. Sure.

19 Q. All right.

20 Do you -- do you have an e-mail address?

21 A. Yes.

22 Q. And what is your e-mail address?

23 A. It's Franknanc@aol.com.

24 Q. And how long have you used that e-mail  
25 address?

1 A. Oh, since I've had e-mail.

2 Q. Do you recall about the time that would  
3 be?

4 A. Probably ten years, twelve years.

5 Q. And do you maintain e-mails going back  
6 that far?

7 A. No.

8 Q. How long do you maintain e-mails for?

9 A. Three days. I -- I'm not an e-mail  
10 person, so...

11 Q. And so up to three days, you would hit the  
12 delete button?

13 A. I delete them overnight if I have to.

14 Q. Okay. All right. And so have you made  
15 any effort to -- to locate or find or get your hands  
16 on any e-mails that you've previously deleted?

17 A. No.

18 Q. So you've done -- made no effort to  
19 retrieve deleted e-mails?

20 A. No.

21 Q. And what type of computer do you use?

22 A. It's an ancient computer now --

23 Q. It's what? I'm sorry?

24 A. I think it's a -- a Sony, I think.

25 Q. And how long have you had this computer?



1           A.    At that point, yes, by them. By Greg and  
2    by Michael.

3           Q.    And how was that fee calculated, do you  
4    know?

5           A.    Well, he had sent statements that said  
6    50 percent of fees, half to Mr. Bienes, half to me;  
7    which means 50 percent of 100 percent.

8           Q.    And so you would get statements?

9           A.    He would send a -- a summary, if you will.

10          Q.    Okay. And did you ever tell him something  
11   to the effect of why are you paying me?

12          A.    Did I ever ask him?

13          Q.    Yes.

14          A.    No.

15          Q.    Okay. So you got a summary and you were  
16   paid a fee, based upon people who you referred into  
17   the partnership.

18          A.    People I may have spoken to. Did I refer  
19   them to them? I'm not so sure I referred them in.

20          Q.    Spoken to about their ability to invest in  
21   S&P and P&S, and that their money would then be  
22   invested in Madoff.

23          A.    Each one was different, so I can't give a  
24   broad answer on that.

25          Q.    You mentioned that you delete e-mails



1 every three days, roughly?

2 A. Maybe every day. Maybe every once a week.  
3 I mean, I -- yes, I delete them.

4 Q. And you've been doing that since you  
5 started using e-mail about ten years ago?

6 A. Yes.

7 Q. And it's been your practice ever since?

8 A. It's a practice. It's a matter of getting  
9 them off the computer.

10 Q. Okay. And so your personal practice is to  
11 remove e-mails every three days or so, and it has  
12 been since you've had e-mail.

13 A. Yes.

14 Q. Did it ever become a point in time where  
15 you stopped that practice?

16 A. Did I stop the practice of deleting?

17 Q. Yes.

18 A. No. It's random.

19 Q. And that's been going on since about 2004?

20 A. Since e-mails.

21 Q. Okay. Since at least 2004?

22 A. Yeah.

23 Q. Okay. Now, in terms of the A -- Avellino  
24 & Bienes documents and statements and records, where  
25 are those?

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 MR. HYMAN: You can answer.

2 MR. WOODFIELD: It's not his testimony.

3 THE WITNESS: Say it again?

4 BY MR. HYMAN:

5 Q So when you click on an e-mail to go to  
6 the old file it gets deleted automatically in two  
7 weeks. Is that correct?

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

10 THE WITNESS: I believe so, yes.

11 BY MR. HYMAN:

12 Q What did you do to prevent the delation of  
13 e-mails every two weeks?

14 A There's nothing to do. It's out of my  
15 control. It's in AOL's control.

16 Q You didn't try to save it in a special  
17 folder?

18 A There's no reason to.

19 Q You didn't print them out?

20 A There's no reason to.

21 Q Why is there no reason to?

22 A Because there's no reason to. It's my  
23 objective opinion that there's no reason to.

24 Q Okay. So if you get sued in litigation,  
25 there's no objective reason to make sure e-mails are