

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.

**SECOND RENEWED MOTION TO COMPEL DEFENDANTS  
FRANK AVELLINO AND MICHAEL BIENES TO PRODUCE  
COMPUTERS FOR INSPECTION AND TO PRODUCE DOCUMENTS**

Plaintiffs first sought the turnover of Defendants Frank Avellino (“Avellino”) and Michael Bienes’s (“Bienes”) (collectively, “Defendants”) computers because they both testified that they delete their e-mails every three days, and sometimes daily. On January 8, 2016, this Court denied Plaintiffs’ first *Renewed Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents*, **without prejudice** because “Plaintiffs have failed to make an adequate showing to support a forensic examination of Defendants’ personal computers.” Second Order (as defined below) at 2. In reaching its decision, the Court relied on an errata sheet submitted by Defendant Frank Avellino, which in relevant part, asserted that Avellino only deleted “spam or vendor e-mails,” and that he did not otherwise delete e-mails. Since then, Plaintiffs have deposed Avellino and learned that Avellino did not know what a spam or vendor e-mail was,<sup>1</sup> and that, according to Avellino, AOL

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<sup>1</sup> Avellino later testified as follows:

automatically deletes all of his e-mails every two weeks. The inconsistencies in Avellino's testimony alone justify entry of an order compelling Avellino to turnover his computer to a neutral third party. However, Plaintiffs have also obtained additional discovery demonstrating that Defendants Frank Avellino and Michael Bienes have thwarted discovery, and are likely destroying evidence. Accordingly, Plaintiffs request that the Court enter an Order directing Avellino and Bienes to turn over their computers to a *neutral* forensic examiner, so that the a proper search of the computer drives can be conducted to determine if relevant evidence remains on the computer, or alternatively whether relevant evidence has been erased, destroyed or otherwise disposed of.

## **I. BACKGROUND**

1. On May 19, 2014, Defendant Frank Avellino filed a Supplemental Response to Plaintiffs' First Request for Production of Documents (the "Supplemental Response"). In response to the Supplemental Response, Avellino agreed to produce all documents and communications exchanged between S&P and/or P&S and himself. A true and correct copy of the Supplemental Response is attached hereto as **Exhibit "B"**.

2. On October 5, 2015, Plaintiffs filed their initial Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers and to Produce Documents (the "First Motion to Compel") because Defendants testified that they delete their e-mails approximately every three days (and often daily) and have done so continuously during the pendency of this

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**Hyman:** Okay. So safe to say before you signed this you didn't know or understand what vendor or spam e-mails were, right?

**Avellino:** No, I didn't.

**Hyman:** Why did you sign it then?

**Avellino:** Because I now know what it is. That's probably what I did.

[Transcript of March 18, 2016 Deposition Transcript of Frank Avellino ("March Avellino TR") at 297:14-20]. A true and correct copy of the March Avellino TR is attached hereto as **Exhibit "A"**.

litigation. [**Exhibit “C”** at 17:22-18:20; 100:25-101:22]; [**Exhibit “D”** at 90:16-91:6]. The Court scheduled a hearing on the First Motion to Compel on October 26, 2015.

3. Plaintiffs also filed a Motion to Strike Pleadings and in the Alternative Motion for Adverse Inference (the “Spoliation Motion”), seeking the imposition of sanctions against Defendants as a result of their destruction of relevant evidence.

4. During the October 26th hearing on the First Motion to Compel, Defendant Bienes’ counsel admitted to the deletion of e-mails and Defendant Avellino’s lawyer conceded that not all documents may have been produced:

**THE COURT:** Let me stop you again. I apologize for interrupting, but I have to try to get these things out. I am like Columbo sometimes, get these things out of my brain or they stick there. Are you saying that he deleted every e-mail business or personal within whatever timeframe he was doing as soon as he read it whatever?

**MR. ETRA:** That's his testimony, and yes.

\* \* \*

**MR. WOODFIELD:** If your Honor wishes, give me an opportunity and I will confirm that. I need to go physically look at his computer. I always thought when I communicated with him on discovery that he understood what he was doing on the computer. I now realize he hasn't.

*See* [Excerpts from the October 26, 2015 Hearing Transcript are attached hereto as **Exhibit “E,”** at 22:2-11; 39:10-15].

5. On November 16, 2015, the Court entered the Order on Plaintiffs’ Expedited Motion to Compel (the “Deleted E-mails Order”) which required Defendants to search the electronic folders of their e-mail accounts and produce e-mails that they should have produced or identified on a privilege log in response to Plaintiffs’ discovery requests. [A true and correct copy of the Deleted E-mails Order is attached hereto as **Exhibit “F.”**].

6. Defendants were also ordered to produce a report or memo detailing the period of time for which e-mails exist in the folders of Defendants' e-mail accounts, and the court otherwise deferred ruling on the Motion to Compel. *Id.*

7. Additionally, Bienes was required to execute written authorization to his e-mail service provider to release any e-mails he sent or received from his e-mail address during the years 2008 and 2009. *Id.*

8. On November 16th, Plaintiffs received a "memo" from Avellino and a "memo" from Bienes regarding their production and privilege logs in response to the Deleted E-mails Order. *See* [**Exhibit "G"; Exhibit "H"**]. Both memos and productions raised questions concerning Defendants' compliance with the Deleted E-mails Order and demonstrate that additional relevant e-mails exist.

9. Because of problems with the memos and production, Plaintiffs filed a Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Renewed Motion") on November 20, 2016. The Court scheduled a hearing on the Renewed Motion for December 11, 2015.

10. On December 8, 2015, three days before the December 11 hearing Avellino and Bienes created a revised "memo" which provided additional detail concerning the e-mails and evidence in their possession custody and control. *See* [**Exhibit "I"; Exhibit "J"**].

11. In Bienes's revised memo, Bienes revealed that as of November 20, 2015, there were no e-mails in Bienes's new mail, old mail, drafts or sent folder, but in actuality there were 387 privileged communications that were saved, and 4 additional saved messages dated October 26, 2015, October 28, 2015, and November 12, 2015. In direct contravention of the Deleted E-mails Order, Bienes has not produced a privilege log as it relates to the 387 documents.

12. Avellino's amended report revealed that Avellino somehow had e-mails dating from July 9, 2010 to the present in his inbox, and that there were e-mails dating from December, 2009 to the present in his sent e-mail inbox.

13. That day, Avellino also filed an errata sheet, contradicting his earlier sworn deposition testimony of affirmatively deleting e-mail daily. The errata sheet provided in relevant part that Avellino did not delete e-mails, but "only deleted spam and vendor e-mails." A true and correct copy of Avellino's Errata Sheet is attached hereto as **Exhibit "K."**

14. The Court thereafter denied the Renewed Motion *without prejudice*. The Court also noted that "the record indicates that the personal computers likely contain the requested **and long sought after** information." (emphasis added). A true and correct copy of the Second Order is attached hereto as **Exhibit "L."**

15. However, Avellino subsequently testified that he does not know what a vendor or spam e-mail is.<sup>2</sup> [March Avellino TR at 297:14-16]. In fact on March 18, 2016, Avellino testified as follows:

**Hyman:** Do you know the difference between a spam e-mail and a vendor e-mail, what they are?

**Avellino:** No.

**Hyman:** So you have no idea as to what a spam e-mail is?

**Avellino:** No.

**Hyman:** You have no idea as to what a vendor e-mail is?

**Avellino:** No.

*Id.* at 295:3-12.

16. Avellino further testified and for the first time revealed that his daughter conducted a "search" of all of his e-mails and computers and determined that AOL automatically deleted all of his e-mails two weeks after he read them.<sup>3</sup> [March Avellino TR at 287:13-19].

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<sup>2</sup> On March 18, 2016, Plaintiffs deposed Avellino for one hour and 15 minutes on his errata sheet and his preservation of evidence.

17. In addition to the foregoing, Avellino testified that:

- His internet service provider automatically deleted all e-mails [March Avellino TR at 285:12-23];<sup>4</sup>
- Avellino did nothing to ensure that e-mails or other relevant evidence would not be deleted [March Avellino TR at 272:21-25, 285:12-23] (“I didn’t do anything specific to preserve”);
- Avellino did nothing to search for relevant e-mails or other electronically stored information that could be relevant to this action until after Plaintiffs sought sanctions against him [March Avellino TR at 319:3-25, 321:17-22];
- Avellino lacked knowledge as to what was done to locate e-mails from Michael Sullivan; [March Avellino TR at 289:16-25, 290:1-18]
- Avellino understood that he was to search for e-mails exchanged between he and Michael Sullivan but failed to search for such e-mails for more than a year and a half. [March Avellino TR at 320:20-25, 321:1-25]; and
- Relevant e-mails that were not disclosed in Avellino’s report could exist. [March Avellino TR at 328]

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

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 “M”**. The foregoing table and article make it clear that AOL **does not** automatically delete e-mails every two weeks. Plaintiffs have requested an opportunity to depose Avellino’s daughter to investigate the inconsistencies between Avellino’s claims and AOL’s policies. However, Avellino has refused to make her available for her deposition, which has necessitated the filing of a separate Motion to Reopen Discovery on a Limited Basis, to Compel Rachel Rosenthal Liersch to Appear at Deposition.

<sup>4</sup> Specifically, Avellino testified as follows:

**Hyman:** What did you do to prevent the delation[sic] of e-mails every two weeks?  
**Avellino:** There is nothing to do. It’s out of my control. It’s in AOL’s control.  
**Hyman:** You didn’t print them out?  
**Avellino:** There’s no reason to.  
**Hyman:** Why is there no reason to?  
**Avellino:** Because there’s no reason to. It’s my objective opinion that there’s no reason to.

*Id.*

18. In addition to the foregoing, on April 1, 2016, Avellino revealed that there could be a significant number of documents and communications which could be relevant to this action are currently being in a storage facility maintained by his lawyer. On information and belief, the “file folders” of people with whom Avellino communicated are currently in that storage facility.<sup>5</sup>

19. Further, on April 22, 2016, Avellino produced additional documents, with bates AVELLINO\_P&S000851-AVELLINO\_P&S000889. The documents produced by Avellino included at least 5 different e-mails which were sent to Avellino before July 9, 2010.

## II. LEGAL ARGUMENT

“[L]imited and strictly controlled inspections of information stored on electronic devices may be permitted.” *Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163, 166 (Fla. 1st DCA 2014) (citing *Menke v. Broward Cnty School Bd.*, 916 So.2d 8, 11 (Fla. 4th DCA 2005) (“[Rule 1.350 is] broad enough to encompass requests to examine [electronic information storage devices] but only in limited and strictly controlled circumstances”). Such inspections should be allowed where: 1) “there was evidence of destruction of evidence or thwarting of discovery”; (2) “the device likely contained the requested information”; and (3) “no less intrusive means existed to obtain the requested information.” *Id.* at 166. (citing *Holland v. Barfield*, 35 So. 3d 953, 955 (Fla. 5th DCA 2010); *Menke*, 916 So. 2d at 12). There is no question that the foregoing factors are present.

First, there is clearly evidence of either destruction of evidence or thwarting of discovery. Avellino initially testified that he deleted e-mails every three days. Avellino then filed an errata

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<sup>5</sup> Avellino testified that he printed out communications which are material and saved them in a folder. Avellino also testified that all the “folders” have been turned over to his counsel. Avellino refuses to allow Plaintiffs to inspect the storage facility, which has prompted the filing of an additional motion to compel.

sheet stating that he only deleted spam and vendor e-mails, even though Avellino did not know what a spam or vendor e-mail was. Shortly after that, Avellino's *lawyer* claimed that:

If you don't use your AOL account for a 60-day period, they delete half the e-mails on your system. And the only thing they could tell me is there's a yellow dot next to my client's e-mail account, which means that at some point in time, and they can't tell us when, at some point in time his e-mail account was not used for 60 days and consequently AOL deleted half of the e-mails.

[Transcript of December 11 Hearing at 39:4-14].<sup>6</sup> Despite his lawyer's position, Avellino did not testify that AOL deleted his e-mails because they were not used, but instead claimed that AOL automatically deleted his e-mails every two weeks. Considering the various positions taken by Avellino, and the lack of any foundation for the lawyer's "expert" testimony on the functionality and email account settings of Mr. Avellino's AOL account, there is no question that the only way to determine what actually happened, is through the turnover of Avellino's computer. In fact, even Avellino testified that he has no understanding of what was or is in his computer or what has been produced to Plaintiffs.

Avellino's inconsistent explanation as to what happened to the e-mail is not the only conduct which shows that Avellino is thwarting discovery. Although Avellino provided a report stating that he had no e-mails in his inbox from before July 9, 2010, he was unable to explain why there were three e-mails dated before that date [March Avellino TR at 328], and conceded that there could be more e-mails in files that were in Avellino's possession custody or control.<sup>7</sup>

*Id.* Avellino's production of documents on April 22, 2016 further confirms that fact.

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<sup>6</sup> Excerpts from the December 11 Hearing Transcript are attached hereto as **Exhibit "N"**. The Court relied on the representations of Avellino's counsel because "Mr. Woodfield is an officer of the Court, and he's not going to be throwing his law license around on a discovery motion." *Id.* at 37:21-25. These recent disclosures, including AOL's actual policy for deleting e-mails (*infra* Note 9) call into question Mr. Woodfield's actual knowledge of the disposition of the e-mails on Defendants' computers.

<sup>7</sup>Specifically, Avellino testified as follows:

**Hyman:** So if you look at this it says, June 8, 2010. You said in your report there are no e-mails in your inbox from before July 9<sup>th</sup> of 2010



To prevent the Court from further inquiring into his misconduct, Avellino filed a false errata sheet stating that he only deleted “spam and vendor” e-mails.<sup>8</sup> However, Avellino testified that he had no idea as to what a spam or vendor e-mail was.<sup>9</sup> Because Avellino’s errata sheet was clearly a sham, his original testimony must stand. Therefore, Avellino also testified that he deletes all of his e-mail regularly.

Despite his testifying that he deletes e-mails every two to three days, Avellino later testified that the systematic deletion of e-mails occurred because his internet service provider, AOL, automatically deletes his e-mails every two weeks. [March Avellino TR at 284:16-20, 285:5-23]. That explanation is implausible in light of Avellino’s prior testimony. Further, AOL does not automatically delete e-mails if they were not read. Instead a person must elect to have all e-mails automatically deleted by affirmatively turning on a setting with AOL. Therefore, the

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**Avellino:** That’s right.  
**Hyman:** So is your report inaccurate?  
**Avellino:** No.  
**Hyman:** Then why is there this e-mail?  
**Avellino:** Because there aren’t any. I mean if I search and they’re not there, they’re not there.  
**Hyman:** But isn’t this e-mail before July 9, 2010?  
**Avellino:** I can’t explain that.  
**Hyman:** Okay. So are there other unexplained missing e-mails?  
**Avellino:** Not that I know of.  
**Hyman:** So far we’ve seen three e-mails in your inbox that are dated before July 9, 2010 e-mail. Is that correct?  
**Avellino:** Yes.  
**Hyman:** And could there be more?  
**Woodfield:** Object to the Form of the Question.  
**Avellino:** I don’t know.

[March Avellino TR at 328].

<sup>8</sup> If true, given Mr. Avellino’s admitted inability to search and secure his own computer records, a forensic examination is the only way to verifiably search his computer to determine what happened to the data stored there.

<sup>9</sup> The excerpt below from the March 18 Deposition summarizes the false nature of Avellino’s errata sheet:

**Hyman:** Okay. So [it’s] safe to say before you signed [the errata sheet] you didn’t understand what spam or vendor e-mails are?  
**Avellino:** No I didn’t.

[March Avellino TR at 297:14-17.]

timing of the automatic deletion of e-mails by AOL raises questions as to whether Avellino intentionally deleted evidence, or attempted to ensure that relevant evidence was preserved. *See supra* Note 3.

Avellino's conduct in connection with discovery also shows that Avellino has thwarted discovery. Avellino could not explain why he waited two years to search for e-mails he exchanged with Sullivan. Avellino also disclosed that he has a series of "hard copy" file folders and other documents, which may contain relevant information to this case. Among others, Avellino has a folder of communications he exchanged with Bienes and Michael Sullivan.<sup>10</sup> On information and belief, Avellino has other documents in storage which may be relevant to this matter.<sup>11</sup> Avellino's counsel instructed Avellino as to the substance of his testimony during his deposition.<sup>12</sup> [March Avellino TR at 325:24-25, 326:1-4]; *see also The Haskell Co. v. Georgia Pacific Corp.*, 684 So. 2d 297, 298 (Fla. 5th DCA 1996) ("We recognize that the coaching of witnesses during depositions may obstruct the fact-finding process of discovery.").

In fact, Avellino's lack of concern of his discovery obligations is made clear by the following exchange:

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<sup>10</sup> Avellino claimed that he provided all of the folders at issue to his counsel. [March Avellino TR at 282:23-25, 283:1-7]. ("Q: So you have no idea as to what happened to the Michael Sullivan Folder? A: No.") However, Avellino lacked knowledge of whether those documents were actually produced to Plaintiffs. *Id.* at 292-293. It is highly unlikely that the e-mails in those folders were produced, because they were printed in 2015 and were produced to Plaintiffs in November and December of 2015. Yet, Avellino testified that he created the folders in 2009/2010. It is therefore unlikely that the documents in Avellino's folders were produced to Plaintiffs.

<sup>11</sup> Plaintiffs have filed a separate Motion to Compel the Inspection of Avellino's "storage facility".

<sup>12</sup> Specifically, Avellino testified that "[t]hey delete by policy now, **Mr. Woodfield just reminded me**, they delete e-mails if the AOL account of the ones that I read were not used." [March Avellino TR at 325:24-25, 326:1] (emphasis added). Additionally, Avellino testified as follows:

**Hyman:** Mr. Avellino, when I walked into the room you were discussing things with your attorney. Was it the substance of your testimony.  
**Avellino:** Yes.

*Id.* at 331:20-23. When questioned about the substance of his conversation with counsel, Avellino refused to answer those questions on the basis of privilege.

**Hyman:** So as far as you were concerned, all those e-mails were gone and deleted?

**Avellino:** By AOL

**Hyman:** Yes.

**Avellino:** Yes

**Hyman:** You didn't care, did you?

**Avellino:** No.

**Hyman:** Well, isn't there litigation being pursued against you?

**Avellino:** So.

**Hyman:** That didn't matter to you?

**Avellino:** We're here now, aren't we?

**Hyman:** Correct.

**Woodfield:** Just answer his question.

**Avellino:** That's what I am saying.

**Hyman:** So your answer is the fact that litigation was being brought against you, it didn't matter to you in terms of saving documents?

**Avellino:** You said that. I didn't say that.

**Hyman:** Okay. I asked you: Did the fact that litigation was being pursued against you create any need to save e-mails and you said so.

**Avellino:** I said so.

**Hyman:** What does that mean?

**Avellino:** It means whatever I did, I did, I followed through. If I don't have them, I don't have them. What do you want me to do?

[March Avellino TR at 322: 5-25, 323: 1-9]. Avellino also testified that the only thing he did to make sure that e-mails were saved was "search the files." *Id.* at 324:8-13. The foregoing exchange makes it clear that Avellino was never concerned with the preservation of relevant evidence, and recklessly, if not in bad faith, destroyed relevant evidence.

Unlike Avellino, who attempted to justify his systematic deletion of e-mails, Bienes did not attempt to qualify his systematic destruction of evidence. He admitted to deleting his e-mails regularly. [Exhibit C at 90:16-91:6; Exhibit D at 22:2-11; 39:10-15]. The report provided by Bienes suggests that he deleted e-mails without concern for whether they contain relevant evidence, because apparently the only e-mails that Bienes did not delete prior to the filing of the Spoliation Motion are privileged communications with counsel that are not discoverable. [Exhibit J]. The existence of 387 allegedly privileged e-mails — for which no privilege log has

been produced<sup>13</sup> — strongly suggests that Bienes had other e-mails and electronically stored communications with Avellino and others that were deleted after the inception of this case.

Moreover, Dianne Bienes, who may share an e-mail address with Michael Bienes<sup>14</sup> testified that she deletes e-mails every day. [Excerpts from the Transcript of the September 25 Deposition of Dianne Bienes at 48:1-19,49:11-16, attached hereto as **Exhibit “O”**]<sup>15</sup>.

Further, this Court has ordered Bienes to submit a consent form to retrieve e-mails from AOL. If Bienes had provided AOL a consent form, this should have resulted in the production of additional e-mails and documents to Bienes.<sup>16</sup> [Deleted E-mails Order at 2]. However, to date, Bienes has yet to produce any additional documents or e-mails or communications. Nor has Bienes complied with the Court’s directives in obtaining additional e-mails from AOL. *Id.*

In addition to the foregoing: (i) Avellino and Bienes claimed that they had a joint defense agreement with Michael Sullivan and withheld documents on the basis of that privilege, even though Michael Sullivan testified that he never entered into a joint defense agreement with Avellino; (*compare* Deposition Transcript of March 8, 2016 Deposition of Michael D. Sullivan at 10:11-15<sup>17</sup> with Defendant Frank Avellino’s Amended Privilege Log Relating to Documents Produced in Response to Plaintiffs’ Fifth Request for Production of Documents dated October 5,

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<sup>13</sup> Providing a privilege log for 387 e-mails is not overly broad or unduly burdensome, and Plaintiffs have been required to review more than 10,000 e-mails to provide a privilege log in connection with this matter.

<sup>14</sup> While Dianne Bienes claimed that she did not share an e-mail address with Michael Bienes, Avellino testified that the e-mail address that Dianne Bienes claimed to own was Michael Bienes’s e-mail address. [March Avellino at TR 305:14-17, 306: 8-25].

<sup>15</sup> Specifically Dianne Bienes testified as follows:

**Q:** Do you delete all of your e-mail correspondence, your e-mail correspondence?

**A:** Yes.

**Q:** And that’s because why?

**A:** I have no need for it after I’ve corresponded to someone.

*Id.* Dianne Bienes also falsely testified that she never discussed investments in the Partnerships with partners. *Id.* at 140:24-25, 141:1-6.

<sup>16</sup> A true and correct copy of Bienes’s consent form is attached hereto as **Exhibit “P”**.

<sup>17</sup> Excerpts from the Transcript of Michael D. Sullivan is attached hereto as **Exhibit “Q”**.

2015 [**Exhibit “R”**]; (ii) Avellino and Bienes also claimed that they entered into an oral common defense/joint defense agreement in 2010, but later testified that “the only time I spoke to Mr. Bienes, for the first time in seven years [or since 2008], was” when he appeared for his deposition in September, 2015. [March Avellino TR at 311:14-25]; (iii) Avellino and Bienes provided evasive answers to discovery as it relates to his preservation of evidence (*see* Avellino and Bienes’s Responses and Objections to Plaintiffs Third Set of Interrogatories)<sup>18</sup> [**Composite Exhibit “S”**]; (iv) Avellino concealed his daughter’s involvement in the search for e-mails in response to the Third Set of Interrogatories (*id.*) (“Defendant has had conversations with his attorney regarding preserving evidence”); (iv) Avellino and Bienes took no action to ensure that relevant materials were preserved (*id.*);<sup>19</sup> (v) Avellino and Bienes did not timely produce any documents *see* [¶¶ 1, *supra*; **Exhibit “T”**]<sup>20</sup>; and (vi) Avellino disclosed, **for the first time and after 4 years of litigation**, the existence of a storage facility which may contain relevant

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<sup>18</sup> Notably when asked what they did to **preserve** evidence, both Avellino and Bienes responded by stating “**defendant has not knowingly or intentionally destroyed any evidence in connection with this litigation.**” *Id.* Avellino and Bienes’s Responses to Plaintiffs’ Third Set of Interrogatories were also nearly identical.

<sup>19</sup> In *Metro. Opera Ass’n, Inc. v. Local 100, Hotel Employees & Rest. Employees Intern. Union*, 212 F.R.D. 178, 222 (S.D.N.Y. 2003), for example, the court issued the harsh sanction of striking pleadings because:

counsel (1) never gave adequate instructions to their clients about the clients’ overall discovery obligations, what constitutes a “document” or about what was specifically called for by the Met’s document requests; (2) knew the Union to have no document retention or filing systems and yet never implemented a systematic procedure for document production or for retention of documents, including electronic documents; (3) delegated document production to a layperson who (at least until July 2001) did not even understand himself (and was not instructed by counsel) that a document included a draft or other non-identical copy, a computer file and an e-mail; (4) never went back to the layperson designated to assure that he had “establish[ed] a coherent and effective system to faithfully and effectively respond to discovery requests,”; and (5) in the face of the Met’s persistent questioning and showings that the production was faulty and incomplete, ridiculed the inquiries, failed to take any action to remedy the situation or supplement the demonstrably false responses, failed to ask important witnesses for documents until the night before their depositions and, instead, made repeated, baseless representations that all documents had been produced.

*Id.* (internal citations omitted).

<sup>20</sup> Exhibit T is a true and correct copy Avellino’s witness and exhibit list in connection with the Spoliation Motion. As set forth in that witness and exhibit list, Avellino only produced e-mails in November 16 and December 8, 2015 respectively, even though he was obligated to produce those e-mails in March, 2014. Avellino fully understood the nature of that obligation. [March Avellino TR at 320:20-25, 321:1-8].

information. [**Exhibit “U”**.]<sup>21</sup> Based on the foregoing misconduct concerning discovery, it is no surprise that Plaintiffs have been forced to file more than 15 motions to compel in connection with this matter.

Second, the Court has previously found that the evidence sought is likely in Avellino and Bienes’s computer. [Second Order at 2].

Finally, there is no less intrusive means to search for and obtain the information sought. Avellino and Bienes’ testimony makes it clear that some evidence was on their computer and the only way to determine if it was there or still is there is to examine the computers. *See, e.g.* [March Avellino TR at 291:14-19] (**Q:** So you have no idea as to why there’s old e-mails from that date? **A:** No.”). Avellino and Bienes have proven that they are unreliable and simply incapable of properly preserving and searching for discoverable records. Therefore, having an independent third party inspect their computers will ensure that Plaintiffs are provided with the discovery which Avellino and Bienes have likely been withholding.<sup>22</sup> At a minimum, the independent examiner would provide a verifiable explanation of what happened to the data and other relevant materials on their computers.

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<sup>21</sup>The existence of the storage facility raises questions about Avellino’s deposition testimony that he shredded documents concerning partners of the Partnerships in 2004. Excerpts of the September 9 Deposition Transcript of Frank Avellino at 101:22-25, 102:1-10, attached hereto as **Exhibit “V.”** Moreover, Avellino has refused to permit Plaintiffs to inspect the storage facility, even though there are no privileged materials in that facility, because even though Avellino does not know what is in the “dozens of boxes” there, according to Avellino none of the materials are relevant. Plaintiffs have filed a Motion to Compel the Inspection of Avellino’s storage facility.

<sup>22</sup> When asked about his knowledge or understanding of computers, Avellino testified that:

There’s one basis thing that nobody ever paid attention to, and I said it from day one. If you gave me a computer, **I wouldn’t know what to do with it period.** . . . So when you say to me did I delate [sic], did I read, did I keep that’s all foreign to me. . . So when we talk about e-mails, you can take the computer and throw it in the river as far as I’m concerned. That’s my opinion. That’s what I do. That’s what I don’t like to do. I don’t like computer e-mails.

[March Avellino TR at 294:3-25 (emphasis added)].

To avoid concerns relating to the disclosure of private and confidential information, Plaintiffs have submitted a proposed order, which includes sufficient protections to ensure that Defendants' privacy rights are protected. *Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163, 166 (Fla. 1st DCA 2014) (allowing the turnover of a party's cell phone where the order "limits the data that the expert may review to the nine-hour period immediately surrounding the accident; it gives Petitioner's counsel a front-row seat to monitor the inspection process; and it allows Petitioner the opportunity to interpose objections before Respondents can obtain any of the data."). Specifically, the order will provide the following protections: (i) the Independent Referee will determine the scope and nature of the search to be run on Defendants' computers if there is a dispute as to that issue; (ii) the Independent Referee will provide Defendants an index of all of the files on his computer prior to producing or opening any files and Defendants will be provided an opportunity to claim that certain documents are privileged based on the index; (iii) Defendants will have a second opportunity to review the actual files that are being produced to Plaintiffs and assert a claim of privilege as to those documents before they are produced; and (iv) any inadvertent disclosure of privileged material will not constitute a waiver of the right to assert a privilege. [Exhibit "W" at 3].<sup>23</sup> These protections are sufficient to ensure that Avellino and Bienes' privacy rights are protected. *In re Honza*, 242 S.W.3d 578, 583 (Tex. App. 2008) (applying uniform standards) (finding that an order directing the turnover of computers while preserving the right to assert a privilege was appropriate.).

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<sup>23</sup> During the October 26, 2015 hearing, Bienes admitted that his concerns about privacy and privileged information would be precluded if this Court allowed Bienes' counsel to review any documents first:

**THE COURT:** And why, if I directed your client to sign a consent to get those e-mails and let you view them first, is that any kind of invasion?

**MR. ETRA:** If you let me view them first, I acknowledge it's probably not an invasion and I would be able to produce only what's relevant. Because in their relief they say it goes to a referee. And we withhold privileged information. They get everything else about his life.

Exhibit D at 26:12-22.

Additionally, the fact that Avellino's daughter, who has no legal interest in connection with this matter, has reviewed Avellino's computer and searched for relevant e-mails further mitigates against a finding that there are no less intrusive means to determine what evidence exists or has been destroyed.<sup>24</sup> [March Avellino TR at 287-288]. Avellino's counsel also refuses to make his daughter available for deposition.

### **CONCLUSION**

At the hearing on the Second Motion, the Court noted that:

the question is whether there is more, whether there's more, whether there's more that he could not obtain despite his best efforts in compliance with my order. So that's the issue that I'm struggling with.

[Transcript of December 11, 2015 Hearing at 37:21-25, 38:1].

Although Plaintiffs, at that time, had not demonstrated that there was more to be done, the subsequent evidence presented conclusively demonstrates that the only way to fairly determine what happened to the missing e-mails, is through the utilization of an independent forensic investigation of Defendants' computers. Because Plaintiffs have established that (i) there is thwarting of discovery; (ii) it is likely that the requested information exists or was destroyed; and (iii) that there is no less intrusive means to obtain the information sought, the Court must order Avellino and Bienes to turnover their computers.

**WHEREFORE** Plaintiffs respectfully request the Court enter an Order: (i) compelling Defendants to produce the Computers referenced in the Motion to Compel; authorization to access Defendants' e-mail accounts (including usernames and passwords); Bienes' iPad; and other electronic devices by which they access their e-mails to an independent referee for

---

<sup>24</sup> Plaintiffs first learned of Avellino's daughter in connection with the production of documents on March 18, 2016, when Avellino testified that she searched through his computer for material that relates to the instant action. [March Avellino TR at 326:1-4].



inspection and production to Plaintiffs of all non-privileged relevant evidence and issue a report as to what documents and e-mails have been deleted or exist, at cost to the Defendants; (ii) ordering Defendants to allow an independent referee, at cost to Defendants, to access their e-mail accounts and produce any non-privileged e-mails to Plaintiffs; (iii) allowing Plaintiffs to supplement their *Motion to Strike Pleadings*, and in the *Alternative Motion for Adverse Inference*; (iv) requiring Defendants to attend depositions and be questioned based on any additional documents and e-mails produced prior to any hearing on Defendants' Motion for Summary Judgment; and (v) granting such further relief the Court deems just and proper.

Dated: April 26, 2016

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on April 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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By: s/Leonard K. Samuels  
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EXHIBIT A -  
March 18, 2016 Deposition  
Transcript of Frank Avellino

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

CASE NO.:12-034123 (07)

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,

vs.

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

Defendants.

Boca Raton, Florida

March 18th, 2016

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

DEPOSITION OF FRANK AVELLINO  
VOLUME III

1           Taken on behalf of the Plaintiff before  
 2   Renne Burns, Court Reporter, Notary Public in  
 3   and for The State of Florida at Large, pursuant to  
 4   Plaintiffs' Notice of Taking Deposition in the above  
 5   cause.

6  
 7  
 8   APPEARANCES:

9       For The Plaintiffs:

10       BERGER SINGERMANN LLP  
 11       1450 Brickell Avenue, Suite 1900  
 12       Miami, Florida 33131  
       By ZACHARY HYMAN, ESQUIRE  
       MICHAEL WEISS, ESQUIRE (via telephone.)

13       For The Defendants:

14       HAILE, SHAW & PFAFFENBERGER, P.A.  
 15       660 U.S. Highway One, Third Floor  
 16       North Palm Beach, Florida 33408  
       By GARY A. WOODFIELD, ESQUIRE

17  
 18                           I N D E X

19   Witness

20   FRANK AVELLINO

21       Direct Examination by Mr. Hyman ..... 4

## E X H I B I T I N D E X

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1     THEREUPON,

2                     FRANK AVELLINO,

3             Being a witness in the notice heretofore  
4     filed, being of lawful age, and being first duly  
5     sworn in the above cause, testified on his oath as  
6     follows:

7             THE WITNESS:   I do.

8             MR. WOODFIELD:   Just note the time,  
9     please.   I have an 11 o'clock.

10            MR. HYMAN:   Yes.   We only have an hour and  
11     15 minutes, so let's move along.

12            THE WITNESS:   Go right ahead.

13                     DIRECT EXAMINATION

14     BY MR. HYMAN:

15            Q     Good morning, Mr. Avellino.   Because we're  
16     here on a very brief deposition, normally I'd go  
17     through the ground rules associated with one.  
18     However, for purposes of brevity, I assume you know  
19     the general rules for deposition.   Is that correct?

20            A     Yes, I do.

21            Q     Okay.   Mr. Avellino, what have you done to  
22     preserve evidence, or documents in connection with  
23     this litigation?

24            A     Everything is there, whatever it was.   I  
25     didn't do anything specific to preserve, but it's



1 all there.

2 Q How did you make sure that nothing was  
3 deleted?

4 A I never deleted anything. I read it and  
5 it went to the read file.

6 Q That wasn't my question.

7 A That's what I did.

8 Q I said how did you make sure? Did you do  
9 anything to ensure after it went to your read file  
10 that it wasn't deleted?

11 A Yes.

12 Q What did you do?

13 A I didn't delete it.

14 Q Okay. Did you pay attention to what went  
15 into your read file?

16 A Whatever I read I read as read.

17 Q Did your wife have access to your e-mail  
18 account?

19 A No.

20 Q Does your wife share e-mails with you?

21 A No.

22 Q Do people send e-mails addressed to -- let  
23 me take that back.

24 Is it correct that your e-mail address is  
25 franknanc@aol.com?

1           A     Yes.

2           Q     What does the n-a-n-c in your e-mail  
3 address stand for?

4           A     It's my wife, Nancy.

5           Q     And it's your testimony today that people  
6 do not send e-mails to the e-mail address, franknanc  
7 addressed, to your wife at all?

8           A     They do.

9           Q     What happens when the e-mails are  
10 addressed to your wife to that e-mail address?

11          A     They're read like every other.

12          Q     Are they read by you or by your wife?

13          A     Me and my wife.

14          Q     How does your wife read those e-mails?

15          A     I tell her to come and read it.

16          Q     So, she reads it next to you?

17          A     Yes.

18          Q     She looks at it. Does she ever read the  
19 e-mails on her own?

20          A     No, she doesn't know how.

21          Q     Does she ever respond to e-mails on her  
22 own?

23          A     I respond for her.

24          Q     So whenever people e-mail Nancy Avellino,  
25 they're actually also e-mailing you?

1           A     Yes.

2                   MR. HYMAN:   We'll mark this as A.

3                           (Thereupon, Plaintiffs' Exhibit A was  
4                   marked for Identification by the  
5                   reporter.)

6   BY MR. HYMAN:

7           Q     I'm handing you the official version that  
8   the court reporter has marked.

9                   What have I handed you?

10          A     You handed me something from Michael  
11   Bienes.

12          Q     And who is it to?

13          A     It's to Frank.

14          Q     Who is Frank?

15          A     That's me.

16          Q     And the e-mail address, franknanc@aol.com,  
17   that's your e-mail address?

18          A     Yes.

19          Q     Below franknanc what does it say?

20          A     It says Dear Frank.   Do you want me to  
21   read it?

22          Q     No.   Directly below it says sent...

23          A     Sent Friday, February 19th, 2010 1:24 p.m.

24          Q     What does that mean?

25          A     That's when it was sent by Michael Bienes.

1           Q     So it was sent by Michael Bienes on  
2     February 19th, 2010 to you.  Is that correct?

3           A     Yes.

4           Q     At the bottom of the page there's a mark,  
5     it says:  Avellino\_P&S000733.  Do you know what that  
6     means?

7           A     No.

8           Q     No?  If I told you that this means that it  
9     was produced by your counsel to us in connection  
10    with the litigation would you believe it?

11          A     Yes.

12          Q     Would you agree that this has been  
13    produced by your counsel to us in connection with  
14    this litigation?

15                MR. WOODFIELD:  Objection.  He doesn't  
16    know.

17                MR. HYMAN:  Okay.

18    BY MR. HYMAN:

19          Q     Does this accurately reflect an e-mail  
20    sent by Michael Bienes to you?

21          A     Yes.

22          Q     Okay.  It discusses a woman named -- so in  
23    the e-mail, in the third sentence down, it discusses  
24    a woman named Becky.

25                Who is Becky?

1           A       I believe it's our accountant.

2           Q       Who is your accountant?

3           A       Becky McDonough.

4           Q       What accounting firm does --

5           A       Ahern, Jasoc.

6           Q       Have you ever talked to Ms. McDonough

7 about the partnerships?

8           A       S&P?

9           Q       Yes.

10          A       No.

11          Q       So for purposes of this, when we're  
12 referring to partnerships, it's S&P and/or P&S.  
13 When we refer to Michael Sullivan, we're talking  
14 about him individually. Just so you're clear about  
15 that stuff.

16          A       No. The answer is no, I did not speak to  
17 her about S&P.

18          Q       Did you ever talk to her about anything  
19 involving the partners of S&P?

20          A       No.

21          Q       Did Nancy Avellino, or you on behalf of  
22 Nancy Avellino, ever talked to or mention anything  
23 involving affairs with the partners to Becky?

24          A       No.

25          Q       Did you ever communicate with anybody

1 involved with the partnerships, like Michael  
2 Sullivan?

3 A Yes.

4 Q Did you view communications with Michael  
5 Sullivan as communications with the partnerships, or  
6 on behalf of the partnerships at certain times?

7 A Only with Michael Sullivan.

8 Q Yes. If I asked you did you communicate  
9 with the partnerships or give us communications  
10 between you and the partnerships, you'd understand  
11 that to mean we're asking for communications between  
12 you and Michael Sullivan. Is that correct?

13 A Yes.

14 Q Okay.

15 MR. HYMAN: Let me hand you what's --  
16 fortunately, I came prepared. So just to keep  
17 things going quickly, I've handed the court  
18 reporter what we'd like to have marked as  
19 Exhibit B.

20 As we mark the exhibit, I'd ask you to  
21 please take a look at it and we will hand you  
22 the official vision as you finished reading it.

23 (Thereupon, Plaintiffs' Exhibit B was  
24 marked for Identification by the  
25 reporter.)

1 THE WITNESS: Okay.

2 BY MR. HYMAN:

3 Q What have I just handed you?

4 A You handed me a piece of paper that says  
5 from Michael Sullivan, Wednesday, February 24, 2010  
6 11:54 a.m. Avellino Frank, franknanc@aol.com.

7 Q Does this accurately reflect an e-mail  
8 sent from Michael Sullivan to you?

9 A Yes.

10 Q Do you recall receiving this e-mail?

11 A I don't recall it, but apparently I see  
12 it.

13 Q So, looking back at what was marked as  
14 Exhibit A -- if you'd like, you don't have to  
15 necessarily turn to it, I'll explain it to you. It  
16 was marked as February 19th, 2010.

17 This next e-mail was dated February 24th,  
18 2010. So they were sent within a week of each  
19 other. Is that correct?

20 A Yes.

21 Q Do you know whether you produced the  
22 e-mail, which I've handed you that's marked as  
23 Exhibit B, to Plaintiffs?

24 A I don't know.

25 Q Do you have any idea as to what -- do you

1 know if you've provided the document that's marked  
2 as Exhibit B to Mr. Woodfield?

3 A I don't know.

4 Q Do you know what you've provided to Mr.  
5 Woodfield?

6 A No.

7 Q Why don't you know what's been provided to  
8 Mr. Woodfield?

9 A Because whatever was provided was probably  
10 in bulk, or asked for by Mr. Woodfield and I would  
11 give it to him. That's why I don't remember which  
12 one it was.

13 Q So how would you figure out what to give  
14 Mr. Woodfield?

15 A Whatever he asked for.

16 Q Okay.

17 A Whatever I had.

18 Q So let's talk about that a little bit.  
19 For example, if Mr. Woodfield asked for e-mails with  
20 you and Michael Sullivan.

21 A Yes.

22 Q What did you do to get it to him?

23 A Whatever I had, I would have e-mails from  
24 Michael Sullivan. Whatever I had in the file he  
25 would have.



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 the question.

2 MR. HYMAN: You can answer.

3 THE WITNESS: Not everything. I don't  
4 know. I mean, you're going back to my memory  
5 and I don't have one. But whatever I had that  
6 I put in a file was there. Then when I moved,  
7 I probably got rid of a lot of stuff anyhow so  
8 probably it was gone when I moved.

9 BY MR. HYMAN:

10 Q When did you move?

11 A I moved in 2004. And then I moved out of  
12 Nantucket in 2014.

13 Q So then why would the Michael Sullivan  
14 folder be destroyed?

15 MR. WOODFIELD: Object to the form of the  
16 question.

17 MR. HYMAN: I'm sorry. Let me rephrase.

18 BY MR. HYMAN:

19 Q If you moved in 2004, how is it that a  
20 folder created in 2009 was destroyed in connection  
21 with your move in --

22 A I don't know.

23 Q So, you have no idea as to what happened  
24 to the Michael Sullivan folder?

25 A No.

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 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

1 saved?

2 A Not true. You're making a statement that  
3 I don't believe.

4 Q What don't you believe?

5 A You said if there's litigation and I'm  
6 supposed to save e-mails that are important to  
7 litigation, I don't care? That's ridiculous.

8 Q So then what are you doing to make sure  
9 e-mails that go into your old file aren't deleted?

10 A Right now?

11 Q Yes.

12 A They are read. And if they're important,  
13 I ask Mr. Woodfield, he says do not delete. I do  
14 not delete, of course, I never did. I read it, make  
15 a copy of it and send it to Mr. Woodfield.

16 Q But when it goes to the old file it gets  
17 deleted every two weeks?

18 A Yes.

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

21 BY MR. HYMAN:

22 Q So effectively by putting it into the old  
23 file you're basically deleting?

24 MR. WOODFIELD: Listen to his question. I  
25 think there's confusion on your understanding

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           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.

1           Do you have a file for Ms. Duarte? Wait,  
2 I apologize. That was Mr. Bienes' claim.

3           Do you have any other files for anybody  
4 who is a partner of P&S Associates or S&P Associates  
5 General Partnerships?

6           MR. WOODFIELD: When you say "file," are  
7 you referring to these physical files?

8           MR. HYMAN: These physical files that he  
9 testified to, correct.

10          THE WITNESS: Not that I recall.

11 BY MR. HYMAN:

12          Q     Going back to this as well. When you said  
13 earlier you really make sure to keep track of the  
14 e-mails that you deem relevant, does that mean you  
15 don't --

16          MR. WOODFIELD: Objection to the form of  
17 the question.

18          Sorry, go ahead and finish.

19 BY MR. HYMAN:

20          Q     You testified earlier that you only make  
21 sure to keep e-mails that relate to litigation.

22          A     Yes.

23          Q     So, do you delete other e-mails regularly?

24          A     I don't delete anything.

25          Q     Do you care what happens to other e-mails

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.

1 MR. WOODFIELD: Just answer his questions.

2 BY MR. HYMAN:

3 Q Do you know the difference between a spam  
4 e-mail and a vendor e-mail, what they are?

5 A No.

6 Q So, you have no idea as to what a spam  
7 e-mail is?

8 A No.

9 Q You have no idea as to what a vendor  
10 e-mail is?

11 A No.

12 Q Okay.

13 MR. HYMAN: Please mark this as Exhibit D.

14 (Thereupon, Plaintiffs' Exhibit D was  
15 marked for Identification by the  
16 reporter.)

17 BY MR. HYMAN:

18 Q Do you recognize this document?

19 A Yes.

20 Q What is this?

21 A It says Re: P&S Associates General  
22 Partnership vs. Michael D. Sullivan, et al.  
23 Deposition of Frank Avellino, September 9, 2015.  
24 And it states different pages, different lines and  
25 different exhibits.

1           Q     Okay. Whose signature is that at the  
2 bottom?

3           A     That's my signature.

4           Q     And did you sign this?

5           A     Yes, I did.

6           Q     So, do you know what this document is, an  
7 errata sheet?

8           A     Yes.

9           Q     Do you know what an errata sheet is?

10          A     It says something about erasing things,  
11 delating things.

12          Q     So an errata sheet is when once you  
13 provide a deposition, if you want to change your  
14 testimony you fill out what you changed it to and  
15 why.

16                 Did you understand that when you signed  
17 this document?

18          A     Yes.

19          Q     Did you understand that this document was  
20 signed under penalty of perjury?

21          A     Yes.

22          Q     So earlier you testified you have no idea  
23 as to what spam or vendor e-mails are. Do you  
24 remember that?

25          A     Yes.



1           Q     So why is it now that you're testifying  
2 under oath that you only delete spam or vendor  
3 e-mails?

4           A     Because that's what I do know.

5           Q     Beforehand did you do that?

6           A     Evidently. This is something I know now  
7 on November 23rd, 2016, or whatever it was.

8           Q     November 23rd, 2016 is the first time you  
9 learned that you're deleting spam e-mails?

10          A     It can't be --

11          Q     Or 15.

12          A     Yeah, 15. It's okay. Yes, basically yes.  
13 I mean, this is, you know...

14          Q     Okay. So safe to say before you signed  
15 this you didn't really know or understand what  
16 vendor or spam e-mails were, right?

17          A     No, I didn't.

18          Q     Why did you sign it then?

19          A     Because I now know what it is. That's  
20 probably what I did.

21          Q     So beforehand, before you knew what spam  
22 and vendor e-mails were, were you deleting those?

23          A     It probably said spam.

24          Q     How did you know it said spam?

25          A     Well, it says spam on the computer, I

1 think.

2 Q And vendor e-mails, how did you know what  
3 a vendor email was?

4 A Because somebody is trying to sell me  
5 something.

6 Q For example, if Michael Sullivan's e-mail  
7 somehow had spam in the title, would you delete it?

8 A Spam in the title?

9 Q Yeah. You said the e-mail said spam in  
10 the title of it, right?

11 A I don't know what you mean by that. I  
12 don't know what you mean.

13 Why would it say spam in the title?

14 Q Well, isn't that how you knew it said that  
15 it was a spam e-mail?

16 A No.

17 Q Then how did you know what a spam e-mail  
18 was?

19 A It says spam on the computer, that's about  
20 it.

21 If I see something that somebody is  
22 selling me something, it's probably -- spam and  
23 vendor to me are one of the same. That's where it  
24 would go.

25 Q Okay. In connection, you've been sued

1 before. Is that correct?

2 A Yes.

3 Q When was the first time you were sued in  
4 connection with Madoff?

5 A Probably in 2009/2008, I think.

6 Q Were you first sued December 28th, 2008 by  
7 investors in the Kenn Jordan Foundation?

8 A Probably, if you say so. Yes, I guess so.

9 Q That was the maid case. Where your former  
10 maid made allegations.

11 A Yes.

12 Q And don't worry, we're not going into  
13 those again. But at that point, were you  
14 represented by counsel?

15 A Yes.

16 Q Was your counsel Mr. Woodfield?

17 A Yes.

18 Q Did Mr. Woodfield talk to you at all about  
19 preserving evidence, keeping your e-mails, anything  
20 like that?

21 A There was nothing to talk about  
22 preserving, keeping, doing, nothing that I can  
23 recall.

24 Q Does Mr. Woodfield know that you're, as  
25 I'll call it computer illiterate, or as you've

1 testified earlier --

2 MR. WOODFIELD: Objection to the form of  
3 the question.

4 THE WITNESS: Say it again?

5 BY MR. HYMAN:

6 Q Does Mr. Woodfield know that you are not  
7 competent or not comfortable using a computer?

8 A Yes.

9 Q When did Mr. Woodfield first learn about  
10 this inability to use one?

11 A I don't remember.

12 Q Was it whenever you relationship with him  
13 first started?

14 A I don't know. I don't remember. I really  
15 don't remember.

16 Q At some point before 2012, was  
17 Mr. Woodfield aware of the fact that you're not  
18 comfortable using computers?

19 MR. WOODFIELD: Objection to the form of  
20 the question.

21 MR. HYMAN: You can answer.

22 THE WITNESS: Yes.

23 BY MR. HYMAN:

24 Q Did Mr. Woodfield ever explain to you hey,  
25 maybe you should talk to somebody else about making

1     sure that your e-mails aren't deleted?

2           A     Not that I know of.

3           Q     Did you ever talk to anybody about what  
4     you should be doing with your computers in this  
5     litigation stuff?

6           A     No.

7           Q     No? Did you ever try to save e-mails in  
8     connection with the Kenn Jordan litigation pursued  
9     against you?

10          A     Not that I recall.

11          Q     Did you produced documents to the Kenn  
12     Jordan investors that sued you?

13          A     I don't recall.

14          Q     Do you know how you produced documents to  
15     the investors in the Kenn Jordan Foundation that  
16     sued you?

17          A     I may have sent them a letter is all. I  
18     can't remember.

19          Q     Did you provide Mr. Woodfield with any  
20     files or folders relating to the Kenn Jordan  
21     investments?

22          A     Yes.

23          Q     Did you ever provide e-mails to Mr.  
24     Woodfield regarding the Kenn Jordan Foundation?

25          A     I don't recall.

1           Q     But you may have provided e-mails to Mr.  
2     Woodfield?

3           A     I don't recall.

4           Q     Is it possible?

5           A     I don't know.

6           Q     And you were again sued after the Kenn  
7     Jordan lawsuit, starting in December, 2008. I  
8     believe a second one was filed in March, 2009. Is  
9     that correct?

10          A     Yes.

11          Q     Were there any other lawsuits filed  
12     between March, 2009 and December, 2010?

13          A     I believe so.

14          Q     Were they against you?

15          A     Yes.

16          Q     Did it relate to your involvement with  
17     Madoff?

18          A     Yes.

19          Q     Did you ever produce documents in  
20     connection with the litigation that had been  
21     initiated between 2009 and 2010 to those people who  
22     were involved in litigation against you?

23          A     I may have.

24          Q     Do you know?

25          A     No.

1           Q     Do you know if you produced e-mails to  
2     those people in connection with litigation?

3           A     I don't recall.

4           Q     Did you talk to Mr. Woodfield about the  
5     importance of keeping stuff in good condition? I'm  
6     sorry. Keeping, as you said, making sure that  
7     documents relating to litigation, or important  
8     documents as you've called them, are kept back in  
9     2009/2010?

10          A     Maybe.

11          Q     But you don't recall?

12          A     No.

13          Q     And you were again sued in 2010 by  
14     Mr. Picard. Is that correct?

15          A     Yes.

16          Q     Did Mr. Woodfield talk to you about saving  
17     important e-mails in relation to the issues relating  
18     to the Picard litigation?

19          A     Picard sent me all their stuff. I never  
20     had to send them anything.

21          Q     Did Picard ever ask you to send them  
22     anything?

23          A     No.

24          Q     Were you ever subpoenaed by a grand jury  
25     in connection with Madoff?

1           A       I don't recall.

2           Q       Was Mr. Bienes ever subpoenaed by a grand  
3 jury?

4           A       I don't recall.

5           Q       Did you ever produce or endeavor to  
6 produce documents or e-mails to the grand jury that  
7 may or may not have subpoenaed you?

8           A       Definitely not.

9                   MR. HYMAN: We'll mark this as Exhibit E.

10                               (Thereupon, Plaintiffs' Exhibit E was  
11 marked for Identification by the  
12 reporter.)

13 BY MR. HYMAN:

14           Q       Do you recognize this document,  
15 Mr. Avellino?

16           A       Yes.

17           Q       So, we'll start at the bottom. It's an  
18 e-mail dated October 21st, 2013 from  
19 franknanc@aol.com.

20           A       Yes.

21           Q       Is that your e-mail address?

22           A       Yes.

23           Q       It's signed Nancy. Is that correct?

24           A       Yes.

25           Q       Did you actually write that e-mail?



1           A     Yes.

2           Q     So all the communications between Nancy  
3     Avellino, or all e-mail communications between Nancy  
4     Avellino and anybody were actually typed up and  
5     written by you.  Is that correct?

6           A     Yes.

7           Q     So in the bottom e-mail it says, "For your  
8     information this lawsuit was filed before 11,  
9     December, 2012.  They have just taken their sweet  
10    time to serve us.  The Monsignor must be so upset."

11                   What lawsuit is this referring to?

12          A     I don't know.  I don't recall.  I don't  
13    know.

14          Q     Okay.  So let's go up to the e-mail above  
15    it.  It's an e-mail from dmbienes to  
16    franknanc@aol.com.

17          A     Yes.

18          Q     That's Michael Bienes' e-mail address to  
19    you.  Is that correct?

20          A     Yes.

21          Q     It was sent on October 21st, 2013.  Is  
22    that correct?

23          A     Yes.

24          Q     So, if you look at the second paragraph.

25          A     Yes.

1           Q     It says, "We hadn't any idea that this  
2     action was started in 2012 and although Vincent  
3     alluded to a lawsuit involving Sullivan he, in his  
4     priestly manor, did not go into details."

5                     I may have actually gotten the wrong  
6     e-mail. But I'll keep asking question about this  
7     one.

8           A     Go ahead.

9           Q     So dmbienes, is that Michael Bienes'  
10    e-mail?

11          A     That's his, yes. But I think that's his  
12    wife's Dianne.

13          Q     Does Dianne Bienes communicate with  
14    Michael Bienes' help, like Nancy does with yours?

15          A     I have no clue.

16          Q     So, do you know if when Dianne Bienes  
17    receives an e-mail she shares it with Michael  
18    Bienes?

19          A     I don't know.

20          Q     But it's possible they do?

21          A     I don't know.

22          Q     Okay.

23                     MR. HYMAN: I'm handing you what's going  
24    to be marked as Exhibit F.

25                             (Thereupon, Plaintiffs' Exhibit F was

1                   marked for Identification by the  
2                   reporter.)

3       BY MR. HYMAN:

4           Q       It's an e-mail from dmbienes to you dated  
5       10/9/2013. Do you recognize this e-mail?

6           A       Yes.

7           Q       So when you read in the third paragraph,  
8       it says, "Several months ago when we were meeting  
9       with Becky we mentioned that an action was brought  
10      against Sullivan but Carone & others and her  
11      reaction wasn't there a time limit on such cases.  
12      Evidently not."

13                   Who is Becky?

14          A       Becky McDonough is the accountant.

15          Q       How would Becky McDonough know about the  
16      lawsuit involving Sullivan, Carone and others?

17                   MR. WOODFIELD: Objection to the form of  
18      the question.

19                   THE WITNESS: I have no idea.

20       BY MR. HYMAN:

21          Q       Did Becky know about the lawsuit being  
22      filed against Sullivan, Carone and others?

23          A       Not that I know of.

24          Q       It says, "We mentioned that an action was  
25      brought against Sullivan."

1           So, is it true that Becky discussed  
2 partnership affairs with Mr. Bienes?

3           A     Not that I know of.

4           Q     Why would she and Mr. Bienes be talking  
5 about a lawsuit being filed against Mr. Sullivan?

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

8           THE WITNESS:  I have no idea.

9 BY MR. HYMAN:

10          Q     Did you guys have general conversations  
11 with folks at Ahearn, Jasco about or involving  
12 Mr. Sullivan?

13          A     No.

14          MR. HYMAN:  Please mark this as Exhibit G.

15                (Thereupon, Plaintiffs' Exhibit G was  
16 marked for Identification by the  
17 reporter.)

18 BY MR. HYMAN:

19          Q     I just handed you an exhibit.  It says,  
20 Wednesday, October 14th, 2015 aol.. franknanc.  Do  
21 you know what that means down hear at the bottom?

22          MR. WOODFIELD:  Yeah, you said October 14.

23          MR. HYMAN:  I'm sorry.  That says 21st, I  
24 apologize.  It says October 21st, 2015.

25

1 BY MR. HYMAN:

2 Q Do you know why it says Wednesday October  
3 21st, 2015?

4 A No.

5 Q Do you know whether this e-mailed was  
6 printed on Wednesday, October 21st, 2015?

7 A I have no idea.

8 Q Seeing the date of October 15th, 2015,  
9 does that refresh your recollection as to when you  
10 may have provided these e-mails to your lawyer?

11 A Maybe.

12 Q So would it be safe to say that this  
13 e-mail was printed out on October 21st, 2015?

14 MR. WOODFIELD: Objection to the form of  
15 the question. Answer if you can.

16 THE WITNESS: I don't know.

17 BY MR. HYMAN:

18 Q So, you have no idea as to why it says  
19 October 14th --

20 A May I go back to a statement I made  
21 before?

22 If the October 9th was sent by Dianne  
23 Bienes, I may not have looked at it until much  
24 later.

25 Q So for this one, for example, was sent

1     October 9th, 2013.  You're saying the first time you  
2     looked at the e-mail was October 21st, 2015?

3             A       I didn't say that.  I said I may have read  
4     it a week later, which gives the AOL doctrine of  
5     deleting files after two weeks legitimate.  We're  
6     going back to dates.  And when you look at the  
7     dates, and I told you and I'll state it over and  
8     over again.  Right now on my computer there may be  
9     e-mails I haven't looked at since last week.  I  
10    probably didn't look at it.

11            MR. WOODFIELD:  Just answer his question.

12            THE WITNESS:  Well, that's the question.

13            MR. HYMAN:  Mr. Avellino, I appreciate  
14    your concern and frustration involving  
15    computers.  The real purpose of the question  
16    was just to ask when the e-mail was provided.

17            THE WITNESS:  I don't know.  I'm assuming  
18    October 21 is when it was printed.

19            MR. WOODFIELD:  Don't make assumptions.  
20    You either know or you don't know.

21            THE WITNESS:  I don't know.

22    BY MR. HYMAN:

23            Q       I'm handing you what's been marked as  
24    Exhibit G.

25            Do you recognize this e-mail?  It's an

1 e-mail from Michael Bienes to you dated 4/1/2014.

2 Is this an e-mail sent from Michael Bienes  
3 to you?

4 A Yes.

5 Q Do you know why your lawyers wanted him to  
6 take the Fifth in this case?

7 A No.

8 Q Did you discuss whether Mr. Bienes would  
9 take the Fifth in this case?

10 A No.

11 Q Did you have regular telephonic  
12 communications with Mr. Bienes about this case?

13 A No.

14 Q Did you understand that communications  
15 between you and Mr. Bienes would be confidential?

16 A I assumed so. I don't know. I guess so.

17 Q Why do you guess so?

18 A Because I don't know.

19 Q Did you ever have a discussion with him  
20 about hey, if I talk to you, you talk to me, we're  
21 in the same boat, it should be confidential?

22 A The only time I spoke to Mr. Bienes, for  
23 the first time in seven years, was in this office at  
24 this desk.

25 Q Okay.

1 MR. HYMAN: I'm handing you -- mark this.

2 (Thereupon, Plaintiffs' Exhibit H was  
3 marked for Identification by the  
4 reporter.)

5 BY MR. HYMAN:

6 Q So moving forward. You said that the  
7 first time in seven years that you saw Mr. Bienes  
8 was in this room?

9 A Right.

10 Q Have you talked to him though?

11 A Had I talked to him?

12 Q Have you talked to Mr. Bienes before that?

13 A No.

14 Q I'm showing you what's an e-mail.

15 A Okay.

16 Q It's dated August 31st, 2015. First one  
17 is, "Dear Frank, do you remember what we said." The  
18 next one is your response.

19 Do you remember sending this e-mail to  
20 Mr. Bienes?

21 A Yes.

22 Q And it says here, "Can I call you on the  
23 telephone? Where should I call? I'm here in  
24 Florida. My telephone number is (561)655-5561."

25 A Yes.



1           Q     Did you have a phone conversation with Mr.  
2     Bienes?

3           A     I don't recall.

4           Q     So, you may have talked to Mr. Bienes in  
5     the past seven years before you saw him in this  
6     room?

7           A     Not that I recall.

8           Q     So, you have no idea as to whether or not  
9     you did or didn't have that phone conversation with  
10    Mr. Bienes?

11          A     No.

12          Q     Do you know who Helen Chaitman is?

13          A     Yes.

14          Q     Who is Helen Chaitman?

15          A     She's an attorney that's suing the Picard,  
16    or SIPPA.

17          Q     What's your relationship with  
18    Ms. Chaitman?

19          A     I met her once. She wanted to take my  
20    case against Picard. And since she was suing in  
21    class form, I said okay. That was it.

22          Q     Okay. Did Mr. Sullivan ever forward you  
23    communications relating, or an exchange between he  
24    and Helen Chaitman?

25          A     He may have.

1           Q     Do you know whether S&P and P&S were ever  
2     sued by Picard?

3           A     I don't know.

4           MR. HYMAN:   We'll mark this as Exhibit I.

5                   (Thereupon, Plaintiffs' Exhibit I was  
6           marked for Identification by the  
7           reporter.)

8     BY MR. HYMAN:

9           Q     I handed you what's been marked as Exhibit  
10    I.

11                   Do you recognize this e-mail?   It's an  
12    e-mail from Michael Sullivan to you and Nancy  
13    Avellino.

14          A     Yes.

15          Q     Dated November 8th, 2011.

16          A     Yes.

17          Q     It says, "Subject:   P&P/P&S Settlements."  
18    Do you remember receiving this e-mail?

19          A     No.

20          Q     Do you know why Mr. Sullivan is sending  
21    you a settlement agreement between the partnerships  
22    and Picard?

23          A     No.

24          Q     But it's evident to you that Mr. Sullivan  
25    is e-mailing you settlement agreements between the

1 partnerships and Picard that haven't been executed?

2 A No.

3 Q Did you ever talk to Mr. Sullivan about  
4 lawsuits being pursued by Picard against him?

5 A No.

6 Q Did you ever talk about Mr. Picard's  
7 efforts to recover monies with Mr. Sullivan?

8 A No.

9 Q Did you ever talk about Mr. Picard at all  
10 with Mr. Sullivan?

11 A Not that I recall.

12 Q Did Mr. Sullivan ever send you an e-mail  
13 involving Mr. Picard?

14 A I don't recall.

15 Q If I told you that Mr. Sullivan sent you  
16 an e-mail saying the trustee can eat my shorts,  
17 would that refresh your recollection?

18 A No.

19 Q And if I were to hand you the e-mail that  
20 he sent, would you, and I can find it. But would  
21 you basically acknowledge that it was sent but not  
22 have a recollection of receiving it?

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

25 MR. HYMAN: I agree with that one. That

1           was an objectionable question.

2       BY MR. HYMAN:

3           Q     You don't recall when you first started  
4     looking through your e-mails?

5           A     No.

6           Q     Do you know if it was in the past two  
7     years?

8           A     I don't know.

9           Q     So, you also understand that  
10    communications with the partnerships, or S&P and  
11    P&S, involve communications with Mr. Sullivan. Is  
12    that correct?

13          A     Yes.

14               MR. HYMAN: Please mark this as Exhibit J.

15                       (Thereupon, Plaintiffs' Exhibit J was  
16                       marked for Identification by the  
17                       reporter.)

18       BY MR. HYMAN:

19           Q     Did you ever search for e-mails between  
20    Nancy Avellino and Michael Sullivan?

21          A     No.

22           Q     Do you know if Nancy Avellino communicated  
23    with Michael?

24          A     I don't recall.

25           Q     Did you ever search for any e-mails

1     between Nancy Avellino and Mat Carone?

2           A     No.

3           Q     When you type e-mails between -- if Nancy  
4     Avellino was e-mailing Mat Carone, it was actually  
5     you who was typing up the e-mail. Is that correct?

6           A     Yes. She writes it out and I copy it.

7           Q     Okay. Do you ever talk to her about the  
8     substance of it or anything along those lines?

9           A     No, she has her own mind.

10          Q     Did you ever search for any e-mails  
11     involving any of the other partners of the  
12     partnerships?

13                 For example, Fernando Esteban. Could you  
14     search for e-mails between you and he?

15          A     Yes.

16          Q     Did you produce those?

17          A     I did produce them, yes.

18          Q     So, I've handed you what's been marked as  
19     Exhibit J. Do you recognize this document?

20          A     Yes.

21          Q     Have you ever seen it before?

22          A     Yes.

23          Q     What is this document?

24          A     It's my response to the first request for  
25     production of documents.

1           Q     Do you remember discussing the substance  
2     of this response with Mr. Woodfield?

3           A     Yes.

4           Q     So how is it that you remember discussing  
5     the request for production but not any of the other  
6     e-mails or whatnot that we were discussing?

7           A     I don't know.

8           Q     So, could you please turn to page three of  
9     the document?

10          A     Yes.

11          Q     If you look at response -- and before I go  
12     into that, did you ever exchange e-mails with James  
13     Jordan?

14          A     I don't recall.

15          Q     Did you ever exchange e-mails with anybody  
16     who was related to James Jordan?

17          A     I don't recall.

18          Q     But you were the managing partner of the  
19     Kenn Jordan Foundation. Is that correct?

20          A     Yes.

21          Q     Is the Kenn Jordan Foundation associated  
22     with the Jordan family, which also invested in S&P  
23     and P&S?

24          A     Not that I recall.

25          Q     Do you recall sending a check for the

1 benefit of Margaret Esteban to the partnerships?

2 A Yes. The Esteban's I recall totally.

3 Q Did you search for any e-mail exchanges  
4 between you and any of the members of the Jordan  
5 family?

6 A No.

7 Q Did you search for any e-mails between you  
8 and Scott Holloway?

9 A No.

10 Q Did you search for any e-mails between you  
11 and Vincent Barone?

12 A No.

13 Q Any e-mails between you and Edith Rosen?

14 A I don't even know who it is, no.

15 Q Sam Rosen?

16 A No.

17 Q Gary Chapman?

18 A No.

19 Q Ralph Fox?

20 A No.

21 Q Donald Kahan?

22 A Who is that?

23 Q Donald Kahan, Gilbert Kahan, who is the  
24 former principal of Paragon Ventures. I believe he  
25 also invested with your son through --

1           A     Maybe, yes. Now that I'm looking at the  
2     name, yes.

3           Q     Did you search for any e-mail exchanges  
4     between you and Mr. Kahan?

5           A     I don't recall any.

6           Q     Do you recall being asked questions about  
7     e-mail exchanges between Mr. Sullivan and Mr. Kahan  
8     during your deposition and Mr. Kahan's, through  
9     Paragon Adventures, investment with the  
10    partnerships?

11          A     I don't recall.

12          Q     Would that have cued you in to the fact  
13    that maybe you should run a search for Mr. Kahan in  
14    your e-mails?

15               MR. WOODFIELD: Object to the form of the  
16    question.

17               MR. HYMAN: You can answer.

18               THE WITNESS: No.

19    BY MR. HYMAN:

20          Q     So in the response it says, "As a result  
21    the parties meet and confer. Plaintiffs' agreed to  
22    limit this request to all document exchanged between  
23    Defendant and S&P and P&S."

24               Do you understand that to mean all  
25    documents exchanged between you and Mr. Sullivan?



1           A       Yes.

2           Q       So did you search for e-mail exchanges  
3 between you and Mr. Sullivan at that time?

4           MR. WOODFIELD:   At what time?

5           MR. HYMAN:   Let's see, when this was  
6 signed.   At or around May 19th, 2014.

7           THE WITNESS:   I may have.   If there was  
8 anything there, I gave it to Mr. Woodfield.

9 BY MR. HYMAN:

10          Q       Do you know if you gave them to  
11 Mr. Woodfield in 2014?

12          A       I don't know.

13          Q       If I told you that no e-mails were  
14 produced to us until 2015, would that refresh your  
15 recollection?

16          A       No.

17          Q       So, you don't really remember what you did  
18 in 2014 to try to find e-mails exchanged between you  
19 and Mr. Sullivan?

20          A       I might have looked for e-mails between me  
21 and Mr. Sullivan, but they weren't there.   There  
22 were none there.

23          Q       So there were no e-mails between you and  
24 Mr. Sullivan --

25          A       No.

1 Q -- in 2014?

2 A If there were, they weren't on my files.  
3 AOL had no files between me and Mr. Sullivan on  
4 file.

5 Q So as far as you were concerned, all those  
6 e-mails were gone and deleted?

7 A By AOL?

8 Q Yes.

9 A Yes.

10 Q You didn't care, did you?

11 A No.

12 Q Why not?

13 A What for?

14 Q Well, isn't there litigation being pursued  
15 against you?

16 A So.

17 Q That didn't matter to you?

18 A We're here now, aren't we?

19 Q Correct.

20 MR. WOODFIELD: Just answer his question.

21 THE WITNESS: That's what I am saying.

22 BY MR. HYMAN:

23 Q So your answer is the fact that litigation  
24 was being brought against you, it didn't matter to  
25 you in terms of saving documents --

1           A       You said that. I didn't say that.

2           Q       Okay. I asked you: Did the fact that  
3 litigation was being pursued against you create any  
4 need to save e-mails and you said so.

5           A       I said so.

6           Q       What does that mean?

7           A       It means whatever I did I did, I followed  
8 through. If I don't have them, I don't have them.  
9 What do you want me to do?

10          Q       So you deleted e-mails after 2012 that  
11 were relevant to this case?

12          A       I didn't delete --

13               MR. WOODFIELD: Objection to the form of  
14 the question.

15               THE WITNESS: -- anything.

16 BY MR. HYMAN:

17          Q       You didn't make sure that they were saved.

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

20               MR. HYMAN: You can answer.

21               THE WITNESS: I don't know what you're  
22 talking about.

23 BY MR. HYMAN:

24          Q       So you did nothing to make sure that the  
25 e-mails were preserved?

1           A       I did everything. Day by day I still do  
2 everything.

3           Q       That's from 2015 forward, correct?

4           A       Maybe.

5           Q       Did you change your behaviors after you  
6 spoke with Mr. Woodfield in 2015 about preserving?

7           A       Evidently, yes.

8           Q       So before that you weren't doing anything  
9 to make sure you e-mails were saved?

10          A       I did what I could.

11          Q       And what could you do?

12          A       Search the files.

13          Q       Okay. And how did you search the files?

14          A       By going through the read e-mails.

15               MR. HYMAN: Give me two minutes.

16               MR. WOODFIELD: Sure.

17                       (A brief recess.)

18               MR. HYMAN: Let's mark this as K.

19                       (Thereupon, Plaintiffs' Exhibit K was  
20 marked for Identification by the  
21 reporter.)

22 BY MR. HYMAN:

23          Q       So earlier you testified that your  
24 daughter called AOL to talk about the deletion of  
25 e-mails. Do you recall that?

1           A     Yes.

2           Q     Do you know if your daughter ever told AOL  
3     to stop deleting e-mails?

4           A     I don't know.

5           Q     Did she discuss why AOL had the policy of  
6     deleting e-mails every two weeks?

7           A     It's not every two weeks, I stand  
8     corrected.

9           Q     What is it then?

10          A     I told you. I'm not negligent, but I  
11     don't understand computers. So Gary Woodfield  
12     instructed Rachel to find those e-mails that he said  
13     were important to the case.

14          Q     Okay.

15          A     So, she went ahead. I know she spent  
16     several days with the people at AOL. And they  
17     informed her that they would delete e-mails  
18     automatically, as their policy, after 60 days of not  
19     going to those e-mails. She did find them, that's  
20     why I was confused as why you had e-mails that were  
21     older than the date that you saw down here. She did  
22     get those e-mails from AOL. She did find them. She  
23     did find the e-mails that were there for 60 days.

24                 They delete by policy now, Mr. Woodfield  
25     just reminded me, they delete e-mails if the AOL

1 account of the ones that I read were not used. They  
2 start delating half, starting with the last one  
3 first, half of those read e-mails and not used.  
4 That's what they said. That's their policy.

5 Q When did you find out about this policy?

6 A When Rachel Wearsch informed Mr.  
7 Woodfield.

8 Q And when did Ms. Wearsch inform Mr.  
9 Woodfield?

10 A I don't recall, but it was some time in  
11 2015.

12 So, she did look for those e-mails that  
13 you said that were relevant to a suit or a case.

14 Q I'm handing you what's been marked as  
15 Exhibit K.

16 If you look at the e-mail from the bottom,  
17 it's an e-mail between -- the bottom one is an  
18 e-mail between Mr. Bienes and you.

19 Do you recognize this e-mail?

20 A Yes.

21 Q Do you see the date on the e-mail?

22 A Yes.

23 Q Was it sent June 10th, 2010?

24 A Yes.

25 Q That's after July 9th, 2010. Is that

1 correct?

2 A Yes.

3 Q Why is this e-mail here if you didn't  
4 preserve e-mails dated before July 9th, 2010?

5 A I just said that that e-mail was probably  
6 picked up by Rachel when she searched the files.

7 Q So for all you know there could be more  
8 files that are dated before July 9th, 2010 that are  
9 in your e-mail?

10 A Maybe.

11 Q And there could be e-mails that are  
12 relevant to this that are dated before July 9th,  
13 2010 that exist --

14 MR. WOODFIELD: Objection to the form of  
15 the question.

16 MR. HYMAN: -- correct?

17 MR. WOODFIELD: If you know.

18 THE WITNESS: Exist where?

19 MR. HYMAN: In your AOL account.

20 THE WITNESS: Not according to what they  
21 said. That AOL, after those days that they  
22 don't get anybody looking for them they're not  
23 there. So this might have been picked up by  
24 Rachel when she looked at them again.

25

1 BY MR. HYMAN:

2 Q So, if you look at this it says, June 8th,  
3 2010. You said in your report there are no e-mails  
4 in your inbox from before July 9th of 2010.

5 A That's right.

6 Q So is your report inaccurate?

7 A No.

8 Q Then why is there this e-mail?

9 A Because there aren't any. I mean, if I  
10 search and they're not there, they're not there.

11 Q But isn't this e-mail before July 9th,  
12 2010?

13 A I can't explain that.

14 Q Okay. So are there other unexplained  
15 missing e-mails?

16 A Not that I know of.

17 Q So far we've seen three e-mails in your  
18 inbox that are dated before the July 9th, 2010  
19 e-mail. Is that correct?

20 A Yes.

21 Q And could there be more?

22 MR. WOODFIELD: Objection to the form of  
23 the question.

24 THE WITNESS: I don't know. This might  
25 have been in the Bienes file that I said.



1 Remember I picked it up and said I have a  
2 Bienes file. I have a --

3 MR. HYMAN: Carone file?

4 THE WITNESS: Not a Carone file.

5 BY MR. HYMAN:

6 Q Do you have a Donald Kahan file?

7 A No.

8 Q Do you have an Esteban file?

9 A Yes.

10 Q So, do you have a Wallick file?

11 A I don't know who that is.

12 Q You don't recall a Greg or Cindy Wallick?

13 A No.

14 Q Okay. So going back down to the e-mail,  
15 at the bottom it says, "Dear Frank. I received a  
16 summons today to appear before the grand jury on  
17 June 30th. It was issued by AUSA Lisa Barone. I  
18 have no other info at this time. Hope all is well  
19 with Nancy and yourself. Love Michael."

20 A Right.

21 Q So does that refresh your recollection as  
22 to whether or not you were subpoenaed to appear  
23 before a grand jury?

24 A I never went to a grand jury.

25 Q Did you receive a summons to appear before

1 a grand jury?

2 A I don't recall. That I would have  
3 remembered.

4 Q But you didn't appear before a grand jury?

5 A Never.

6 Q Did you produce documents instead of  
7 appearing in front of a grand jury?

8 A No.

9 Q In the response it says, "Dear Frank, the  
10 good news is that we are back together again;  
11 subject to our attorney's instructions. The man is  
12 so far out as to be ludicrous. We might get a book.  
13 XXX your brother."

14 That's an e-mail from Michael Bienes to  
15 you?

16 A Yes.

17 Q Dated December 11th, 2010?

18 A Yes.

19 Q Is there anything else that happened  
20 around that time, December 11th, 2010?

21 A I can't recall.

22 Q Isn't that three days after you were sued  
23 by Mr. Picard?

24 A No.

25 Q Do you know if you were sued by Mr. Picard

1 on December 8th, 2010?

2 A I don't recall.

3 Q Could Mr. Bienes be discussing the lawsuit  
4 by Mr. Picard?

5 MR. WOODFIELD: Object to the form of the  
6 question.

7 THE WITNESS: Not that I know of.

8 BY MR. HYMAN:

9 Q Did the filing of Mr. Picard's lawsuit  
10 trigger a need to have a discussion about what to do  
11 with evidence, discovery, or anything like that?

12 A No.

13 Q Did it matter to you?

14 A Of course it matters.

15 MR. HYMAN: Let me check with counsel, I  
16 think we're done.

17 (Discussion off the record.)

18 MR. HYMAN: Back on the record.

19 BY MR. HYMAN:

20 Q Mr. Avellino, when I walked into the room  
21 you were discussing things with your attorney. Was  
22 it the substance of your testimony?

23 A Yes.

24 Q What did you just discuss with  
25 Mr. Woodfield?

1 MR. WOODFIELD: Object to the form of the  
2 question. And don't answer the question.

3 THE WITNESS: No, I won't.

4 MR. WOODFIELD: He's not answering.  
5 There's no pending question and we can have a  
6 discussion off the record as confidential.

7 MR. HYMAN: Was it about the substance of  
8 your testimony?

9 MR. WOODFIELD: Actually, it wasn't. But  
10 we're not going any further than that.

11 MR. HYMAN: Okay.

12 BY MR. HYMAN:

13 Q Earlier you testified that after  
14 discussions with Mr. Woodfield you remembered what  
15 happened with your e-mails. Do you recall that  
16 testimony?

17 A Yes.

18 Q What did you discuss with Mr. Woodfield?  
19 What else did you discuss in connection with your  
20 testimony and what you recall the process of your  
21 e-mails?

22 MR. WOODFIELD: I'm directing him not to  
23 answer. We're not going there.

24 MR. HYMAN: Okay. We'll deal with it  
25 later, because you're not supposed to coach

1           your witness.

2           MR. WEISS:   Zach, we're done.

3           MR. HYMAN:   We're done.   Thank you,  
4           Mr. Woodfield.

5           MR. WOODFIELD:   It's 12:10.   Thank you.

6                       (The deposition was concluded at  
7           12:10 p.m.)

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CERTIFICATE OF OATH

STATE OF FLORIDA            )  
                                      : SS  
COUNTY OF PALM BEACH    )

I, the undersigned authority, certify that  
FRANK AVELLINO personally appeared before me and was  
duly sworn.

WITNESS my hand and official seal this  
30th day of March, 2016.

---

RENNE BURNS, Court Reporter  
Commission No.: FF 156433  
Notary Public - State of Florida  
My Commission Expires: 09-05-18

## 1 REPORTER'S DEPOSITION CERTIFICATE

2  
3 STATE OF FLORIDA )  
4 : SS  
COUNTY OF PALM BEACH )

5 I, RENNE BURNS, a Court Reporter, certify  
6 that I was authorized to and did stenographically  
7 report the deposition of FRANK AVELLINO; that a  
8 review of the transcript was requested; and that the  
9 transcript is a true and complete record of my  
10 stenographic notes.

11 I FURTHER CERTIFY that on the 30th day of  
12 March, 2016, I notified GARY A. WOODFIELD, ESQ. that  
13 the deposition of FRANK AVELLINO was ready for  
14 reading and signing by the witness.

15 I further certify that I am not a  
16 relative, employee, attorney, or counsel of any of  
17 the parties, nor am I a relative or employee of any  
18 of the parties' attorney or counsel connected with  
19 the action, nor am I financially interested in the  
20 action.

21 Dated this 30th day of March, 2016.

22  
23 \_\_\_\_\_  
24 RENNE BURNS, Court Reporter  
25

1 TO: GARY A. WOODFIELD, ESQ.  
2 660 U.S. Highway One, Third Floor  
3 North Palm Beach, FL 33408

4 RE: P&S ASSOCIATES, GENERAL PARTNERSHIP, A  
5 FLORIDA LIMITED PARTNERSHIP; AND S&P ASSOCIATES,  
6 GENERAL PARTNERSHIP, A FLORIDA LIMITED PARTNERSHIP,  
7 PHILIP VON KAHLE AS CONSERVATOR OF P&S ASSOCIATES,  
8 GENERAL PARTNERSHIP, A FLORIDA LIMITED PARTNERSHIP,  
9 AND S&P ASSOCIATES, GENERAL PARTNERSHIP, A FLORIDA  
10 LIMITED PARTNERSHIP vs. MICHAEL D. SULLIVAN, AN  
11 INDIVIDUAL, STEVEN JACOB, AN INDIVIDUAL, MICHAEL D.  
12 SULLIVAN & ASSOCIATES, INC., A FLORIDA CORPORATION,  
13 STEVEN F. JACOB, CPA & ASSOCIATES, INC., A FLORIDA  
14 CORPORATION, FRANK AVELLINO, AN INDIVIDUAL, MICHAEL  
15 BIENES, AN INDIVIDUAL, VINCENT BARONE, AN  
16 INDIVIDUAL, AND PREMIER MARKETING SERVICES, INC., A  
17 FLORIDA CORPORATION

18 At the conclusion of your deposition given  
19 in the above-styled cause you indicated you wished  
20 to read and sign the transcript.

21 This letter is to advise you that your  
22 deposition is ready, and we ask that you call our  
23 office at (561) 471-2995 at your earliest  
24 convenience for an appointment to come in.

25 If you are a party in this action and your  
attorney has ordered a copy of this transcript, you  
may wish to read his copy and forward to us a  
photostatic copy of your signed correction sheet.

It is necessary that you do this as soon  
as possible (i.e, 30 days unless otherwise directed)  
so that the original may be filed with the Clerk of  
the Court.

If you have any reason which you would  
like for me to place on your deposition as to your  
failure to sign the same, please advise.

Thank you for your prompt attention.

BY: RENNE BURNS, Court Reporter

Date: March 30th, 2016



## 1      CORRECTION SHEET:

2      NAME:    GARY A. WOODFIELD, ESQ.

3            RE:    P&S ASSOCIATES, GENERAL PARTNERSHIP, A  
 4      FLORIDA LIMITED PARTNERSHIP; AND S&P ASSOCIATES,  
 5      GENERAL PARTNERSHIP, A FLORIDA LIMITED PARTNERSHIP,  
 6      PHILIP VON KAHLE AS CONSERVATOR OF P&S ASSOCIATES,  
 7      GENERAL PARTNERSHIP, A FLORIDA LIMITED PARTNERSHIP,  
 8      AND S&P ASSOCIATES, GENERAL PARTNERSHIP, A FLORIDA  
 9      LIMITED PARTNERSHIP vs. MICHAEL D. SULLIVAN, AN  
 10     INDIVIDUAL, et. al.

11            The following corrections, additions or  
 12      deletions were noted on the transcript of the  
 13      testimony which I gave in the above-captioned matter  
 14      held on March 18th, 2016:

15      PAGE(S)            LINE(S)            SHOULD READ  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

EXHIBIT B -

May 19, 2014 Defendant, Frank  
Avellino's Supplemental  
Response to Plaintiff's First  
Request for Production

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 SUMMPLEMENTAL RESPONSE TO  
PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

Defendant, Frank Avellino, files his supplemental response and objections to Plaintiff's First Request for Production of Documents dated January 29, 2014 (the "Request") as follows:

**GENERAL OBJECTIONS**

1. Defendant objects to the characterization of the Request as continuing in nature which goes beyond the obligations set forth in Rule 1.280(e), Florida Rules of Civil Procedure.
2. Defendant objects to the production of documents at the offices of plaintiff's counsel. Documents will be produced or made available for inspection at a mutually convenient location in Palm Beach County, Florida or as otherwise agreed to between the parties.
3. Defendant objects to the definition of "You" or "Your" or "Defendant" to the extent that it seeks privileged communications with their attorneys and accountants.
4. Defendant objects to this request to the extent it requires to produce documents in a manner otherwise as permitted by the Florida Rules of Civil Procedure.

5. Defendant objects to the time period commencing in 1992 as overly burdensome. Defendant has no obligation to nor has he maintained potentially responsive documents going back to 1992.

These objections are incorporated into each of the requests unless otherwise stated.

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

1. All documents exchanged between Defendant and S&P; P&S; Michael D. Sullivan; Steven Jacob; Michael D. Sullivan & Associates, Inc., a Florida corporation; Steven F. Jacob, CPA & Associates, Inc.; Gregg Powell; Kelco Foundation, Inc., a Florida Non Profit Corporation; Vincent T. Kelly; Vincent Barone; Edith Rosen; Sam Rosen; Premier Marketing Services, Inc., a Florida corporation; Grosvenor Partners, Ltd.; Avellino Family Foundation, Inc.; Mayfair Ventures; Kenn Jordan Foundation; Elaine Ziffer; James & Valerie Brue Judd; Roberta and Vania Alves; Janet A. Hooker Charitable Trust; Gilbert Kahn and Donald Kahan; Carone Family Trust; Carone Gallery, Inc. Pension Trust; Carone Marital Trust #1 UDT 1/26/00; Carone Marital Trust #2 UTD 1/26/00; Matthew D. Carone Revocable Trust; James A. Jordan Living Trust; Fernando Esteban; Margaret "E.K. Esteban; James A. Jordon; Marvin Seperson; and/or Scott Holloway; and any partner of P&S and/or S&P.

**RESPONSE:** As a result of the parties meet and confer, Plaintiffs agreed to limit this request to all documents exchanged between Defendant and S & P and P & S. With such limitation, the documents previously produced respond to this request. Defendant continues to search for responsive documents but has produced all such documents that have been located at this time.

2. All documents exchanged between Avellino & Bienes and S&P; P&S; Michael D. Sullivan; Steven Jacob; Michael D. Sullivan & Associates, Inc., a Florida corporation; Steven F. Jacob, CPA & Associates, Inc.; Gregg Powell; Kelco Foundation, Inc. a Florida Non Profit Corporation; Vincent T. Kelly; Vincent Barone; Edith Rosen; Sam Rosen; Premier Marketing Services, Inc.; a Florida Corporation; Grosvenor Partners, Ltd.; Avellino Family Foundation, Inc.; Mayfair Ventures; Kenn Jordan Foundation; Elaine Ziffer; Michael Bienes; Richard Wills; and/or Scott Holloway; and any partner of P&S and/or S&P.

**RESPONSE:** As a result of the parties meet and confer, Plaintiffs agreed to limit this request to all documents exchanged between Avellino & Bienes and S & P and P & S. However, with this limitation, this request remains overly burdensome, harassing and requires the production of documents which are irrelevant and not likely to lead to admissible evidence. Avellino & Bienes ceased doing business more than twenty years ago. To the extent that any records still exist they have no relevance to this litigation and would require a significant expenditure of time and money to locate and produce.

3. All documents related to communications between Defendant and S&P; P&S; Michael D. Sullivan; Steven Jacob; Michael D. Sullivan & Associates, Inc., a Florida Corporation; Steven F. Jacob, CPA & Associates, Inc.; Frank Avellino; Gregg Powell; Kelco Foundation, Inc., a Florida Non Profit Corporation; Vincent T. Kelly; Vincent Barone; Edith Rosen; Sam Rosen; Premier Marketing Services, Inc., a Florida Corporation; Michael Bienes; Scott Holloway; Richard Wills and any partner of P&S and/or S&P.

**RESPONSE:** As a result of the parties meet and confer, Plaintiffs agreed to limit the request to all documents exchanged between Defendant and S & P and P & S. With such limitation, the documents previously produced respond to this request. Defendant continues to search for responsive documents but has produced all such documents that have been located to date.

4. All documents related to any payments, transfers of funds, and/or compensation that You receive from Avellino & Bienes; S&P; P&S; Michael D. Sullivan; Steven Jacob; Michael D. Sullivan & Associates, Inc., a Florida Corporation; Steven F. Jacob, CPA & Associates, Inc.; Frank Avellino; Gregg Powell; Sullivan & Powell; Kelco Foundation, Inc. a Florida Non Profit Corporation; Vincent T. Kelly; Vincent Barone; Edith Rosen; Sam Rosen; Premier Marketing Services, Inc., a Florida Corporation; Scott Holloway; and/or any partner of P&S and/or S&P.

**RESPONSE:** As a result of the parties meet and confer, Plaintiffs agreed to limit this request to all documents exchanged between Defendant and S & P and P & S. With such limitation, the documents previously produced respond to this request. Defendant

**continues to search for responsive documents but has produced all such documents that have been located at this time.**

5. All documents that refer to or reflect the transactions and/or events alleged in the Amended Complaint in this action.

**RESPONSE:** As a result of the parties meet and confer, Plaintiffs agreed to limit this request to all documents exchanged between Defendant and S & P and P & S. With such limitation, the documents previously produced respond to this request. Defendant continues to search for responsive documents but has produced all such documents that have been located at this time.

6. All documents that reflect Your receipt of any of the Kickbacks alleged in the Amended Complaint in this action.

**RESPONSE:** Defendant received referral fees from or on behalf of Michael Sullivan, records of which will be produced if located.

7. Unless such documents have been produced in response to a previous request, all documents concerning the factual basis for any affirmative defense that You will assert in this action.

**RESPONSE:** Objection. No answer has been filed by Defendant in this action. Defendant is unable at this time to identify what affirmative defenses, if any, he intends to assert in this action.

8. All documents related to Avellino & Bienes' involvement with S&P and/or P&S, and/or the involvement of any partners in P&S and/or S&P with Avellino & Bienes.

**RESPONSE:** As a result of the parties meet and confer this request has been limited to those partners of S & P and P & S of whom Avellino is aware, which includes Michael Sullivan and Gregory Powell.

Since this involves records of Avellino & Bienes, Avellino's objection to Request No. 2 is incorporated herein. Subject to and without waiving such objections, Defendant does not believe any responsive documents exist.

9. Any and all correspondence between You and any of current and/or former partner of P&S and/or S&P; including but not limited to any correspondence between You and any of the named Defendants in this action.

**RESPONSE:** See response to Request No. 1.

10. All communications made regarding investment advice and/or financial performance of S&P and P&S to partners of the P&S and/or S&P and/or potential investors in P&S and/or S&P.

**RESPONSE:** Defendant does not believe any such documents exist.

11. Any and all documents relating to your investment or decision to invest in P&S and/or S&P.

**RESPONSE:** Defendant does not believe any such documents exist.

12. Any and all documents and communications concerning the suitability of investment in P&S and/or S&P regardless of whether those persons or entities who received such communications or documents actually invested in S&P and/or P&S.

**RESPONSE:** Defendant does not believe any such documents exist.

13. Any and all documents relating to communications between You and/or Avellino & Bienes and any entity whose name includes the term “Holy Ghost.”

**RESPONSE:** Pursuant to the parties meet and confer, Plaintiffs’ counsel advised that “Holy Ghost” was an investor in Avellino & Bienes. Avellino continues to have no



recollection of “Holy Ghost” or that it was an investor in Avellino & Bienes. To the extent Plaintiffs seek production of documents from Avellino & Bienes, Avellino incorporates his response to Request No. 2 herein. Subject to such objections, Avellino does not believe any such documents exist.

14. Any documents which evidence or relate to any transfers made to any entity in which you hold an interest, and any subsequent transfers thereafter that relate to P&S and/or S&P.

**RESPONSE:** Pursuant to the parties meet and confer, Plaintiffs have agreed to limit this request to documents relating to transfers relating to P & S and S & P. Avellino will produce any documents responsive to this request that can be located.

15. Any and all documents and correspondence concerning You and the Securities and Exchange Commission, the Florida Office of Financial Regulation, and any other Governmental Regulatory Agency, including but not limited to any internal memorandum concerning compliance with regulations promulgated by such entities.

**RESPONSE:** Objection. This request is overly burdensome, and seeks documents irrelevant to this action and not likely to lead to admissible evidence. Additionally, the term “internal memorandum” is vague and ambiguous. Subject to and without waiving such objections, Defendant has no responsive documents other than possibly documents regarding a 1992 consent judgment entered into with the SEC, which documents are irrelevant and not likely to lead to admissible evidence, and, in any event, are publically available. Pursuant to the parties meet and confer, Plaintiffs requested that Avellino identify any documents that may have been sealed. Avellino is not aware of any such documents.

16. All documents evidencing or referencing that You and/or Avellino & Bienes were active in the management of the Partnerships.

**RESPONSE:** None exist.

17. All documents evidencing or relating to any transfers made to Reverend Richard Wills and/or Christ Church United Methodist in Ft. Lauderdale by You or on Your behalf, or by Avellino & Bienes or on Avellino & Bienes' behalf.

**RESPONSE:** Pursuant to the parties meet and confer, Plaintiffs agreed to limit this request to documents relating to P & S and S & P. Subject to such limitation, Avellino will produce all such responsive documents that can be located.

18. All correspondence between You and Reverend Richard Wills.

**RESPONSE:** Pursuant to the parties meet and confer, Plaintiffs agreed to limit this request to documents relating to P & S and S & P. Subject to such limitation, Avellino will produce all such responsive documents that can be located.

19. All documents that relate to any contact with, or communication between You and/or Avellino & Bienes and any partners of P&S and/or S&P.

**RESPONSE:** This seeks the same documents as sought by Request Nos. 9 and 13. Defendant incorporates herein his responses to those requests.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 19<sup>th</sup> day of May 2014, the foregoing document is being served on those on the attached service list by email.

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

*Attorneys for Defendants*

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By: /s/ Gary A. Woodfield  
Gary A. Woodfield, Esq.  
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*Attorneys for Defendants Kelco Foundation, Inc.  
and Vincent T. Kelly*

EXHIBIT C -  
Deposition Excerpts of Frank  
Avellino Deposition dated  
September 9, 2015

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?

EXHIBIT D -  
Deposition Excerpts of Michael  
Bienes Deposition dated  
September 9, 2015

1 IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT  
2 IN AND FOR BROWARD COUNTY, FLORIDA  
3 CASE No.12-034123 (07)

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

7 -vs-

8 MICHAEL D. SULLIVAN, et al.,  
9 Defendants.

---

10 DEPOSITION OF MICHAEL BIENES  
11 VIDEOTAPED

12 VOLUME II  
13 PAGES 85 - 215

14 Thursday, September 10, 2015  
15 12:52 p.m. - 4:50 p.m.

16  
17 Berger Singerman LLP  
18 One Town Center Road  
Suite 301  
19 Boca Raton, Florida 33486  
20

21  
22 Reported By:  
Gabrielle Cardarelli, FPR, RPR  
23 Notary Public, State of Florida  
Esquire Deposition Services  
24 Job #22282  
25

1           A     Never had a housekeeper by that name.

2           Q     Okay. So you don't recall referring  
3 Ms. Duarte in to -- in to -- over to Mr. Sullivan?

4           A     I don't recall Ms. Duarte.

5           Q     Do you keep an e-mail account?

6           A     Yes, sir.

7           Q     And what is your e-mail address?

8           A     Michaelbienes@AOL.com.

9           Q     And how long have you maintained that e-mail  
10 address?

11          A     I got my first computer in '07. And I -- we  
12 signed up for AOL and I've had that address ever since.

13          Q     Okay. And do you maintain all of your  
14 e-mails?

15          A     Maintain?

16          Q     Yeah. Do you keep them? Do you keep your  
17 e-mails?

18          A     No.

19          Q     Or do you have a practice of deleting them?

20          A     I delete them.

21          Q     How often do you delete them?

22          A     Sometimes daily.

23          Q     Okay. And if you -- have you been deleting  
24 e-mails routinely and sometimes daily, since 19 -- since  
25 2007?

1           A     Yes.

2           Q     Okay.  And you maintain that through today?

3           A     Yes.

4           Q     Okay.  Do you share that e-mail address with  
5 anybody or is it just yours?

6           A     It's just mine.

7           Q     Okay.  And does your wife have an e-mail  
8 address?

9           A     Yes.

10          Q     And what is her e-mail address?

11          A     Dmbienes@AOL.com.

12          Q     And what -- how long have you had your current  
13 computer?

14          A     I don't have a computer anymore.  I mean, I  
15 have one but it's in the closet.

16          Q     Do you not use a computer?

17          A     I have a tablet.

18          Q     Oh, okay.

19          A     IPad.

20          Q     Okay.  And how long have you had your iPad?

21          A     Oh, say about a little over three years,  
22 estimated.

23          Q     Okay.  And the hard drive for your computer is  
24 in your closet, as well?

25          A     The computer is in the closet.

EXHIBIT E -  
October 26, 2015  
Hearing Transcript



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

3 COMPLEX LITIGATION UNIT

4 CASE NO: 12-034123(07)

5 P&S ASSOCIATES, GENERAL PARTNERSHIP, a  
6 Florida limited partnership; and S&P  
7 ASSOCIATES, GENERAL PARTNERSHIP, a  
8 Florida limited partnership; PHILIP  
9 VON KAHLE as Conservator of P&S  
10 ASSOCIATES, GENERAL PARTNERSHIP, a  
11 Florida limited partnership; and S&P  
12 ASSOCIATES, GENERAL PARTNERSHP, a  
13 Florida limited partnership,

14 Plaintiffs,

15 V

16 MICHAEL D. SULLIVAN, an individual,  
17 STEVEN JACOB, an individual, MICHAEL D.  
18 SULLIVAN & ASSOCIATES, INC., a Florida  
19 corporation, STEVEN F. JACOB, CPA &  
20 ASSOCIATES, INC., a Florida  
21 corporation, FRANK AVELLINO, an  
22 individual, MICHAEL BIENES, an  
23 individual, KELKO FOUNDATION, INC., a  
24 Florida non profit corporation, and  
25 VINCENT T. KELLY, an individual,

Defendants.

/

Proceedings before the HONORABLE

JACK TUTER

Monday, October 26, 2015  
Broward County Courthouse  
201 Southeast Sixth Street  
Fort Lauderdale, Florida 33301  
2:01 - 3:02 p.m.

Reported by: Lisa Mudrick, RPR, FPR

1 all about.

2 THE COURT: Let me stop you again. I  
3 apologize for interrupting, but I have to try  
4 to get these things out. I am like Columbo  
14:21:19 5 sometimes, get these things out of my brain or  
6 they stick there.

7 Are you saying that he deleted every  
8 e-mail business or personal within whatever  
9 timeframe he was doing as soon as he read it  
14:21:30 10 whatever?

11 MR. ETRA: That's his testimony, and yes.

12 THE COURT: Okay. So how would the  
13 deleted e-mails that might relate to the  
14 partnerships not be discoverable under a  
14:21:40 15 forensic examination?

16 MR. ETRA: Because we are hypothesizing  
17 about a fact that's not in evidence on a matter  
18 where we need an evidentiary record where we  
19 are hypothesizing that there were relevant  
14:21:51 20 e-mails that were sent to him.

21 THE COURT: Well, so you are telling me  
22 he's got a laptop or he's got a desktop and he  
23 is running these partnerships with all this  
24 money and he doesn't write any e-mails  
14:22:01 25 connected to his partnership?

1 client with the AOL account? Was his the same  
2 way in that -- because I did used to have an  
3 AOL account, and I remember, you know, if you  
4 just read something it went away, but you  
14:36:22 5 necessarily had to go into a folder and push  
6 delete if you really wanted to delete.

7 MR. ETRA: Your Honor, I apologize for  
8 raising my voice before. And second, I don't  
9 know the answer to that question.

14:36:31 10 MR. WOODFIELD: If Your Honor wishes, give  
11 me an opportunity and I will confirm that. I  
12 need to go physically look at his computer. I  
13 always thought when I communicated with him on  
14 discovery that he understood what he was doing  
14:36:42 15 on the computer. I now realize he hasn't.

16 THE COURT: Which one has the desktop and  
17 which one has the laptop?

18 MR. ETRA: I think they are both laptops.

19 MR. WOODFIELD: Laptop.

14:36:50 20 THE COURT: Your client had a laptop and  
21 your client had a laptop?

22 MR. ETRA: Right.

23 THE COURT: And you are saying they  
24 haven't used these in years?

14:36:55 25 MR. WOODFIELD: No. No. No. He said

EXHIBIT F -

November 16, 2015 Order on  
Plaintiffs' Expedited Motion to  
Compel Defendants Frank  
Avellino and Michael Bienes to  
Produce Computers for  
Inspection and to Produce  
Documents

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

CASE NO. 12-034123 (7)

S&P ASSOCIATES, GENERAL PARTNERSHIP, ET  
AL.

Plaintiffs,

v.

STEVEN F. JACOB, an individual, ET AL.,

Defendants.

---

**ORDER ON PLAINTIFFS' EXPEDITED MOTION TO COMPEL DEFENDANTS FRANK  
AVELLINO AND MICHAEL BIENES TO PRODUCE COMPUTERS FOR INSPECTION AND  
TO PRODUCE DOCUMENTS**

THIS MATTER came before the Court on October 26, 2015, upon Plaintiffs' Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Motion"). The Court, having reviewed the Motion, heard argument from counsel for the parties, and being otherwise duly advised in the premises, it is, hereby

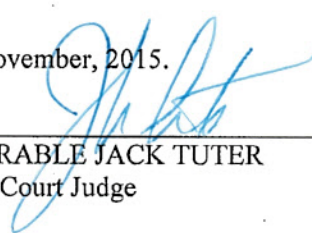
**ORDERED and ADJUDGED** that:

1. The Motion is GRANTED, in part, and DEFERRED, in part, as follows:
2. As to Defendant Avellino:
  - a. On or before November 16, 2015, Defendant Avellino shall search all folders of e-mails of his e-mail account Franknanc@aol.com, including but not limited to folders of deleted e-mails and all other folders of e-mails related to the e-mail account Franknanc@aol.com that are accessible by Defendant Avellino, and produce to Plaintiffs a timeline stating the period of time for which e-mails exist in those folders, along with a privilege log and any non-privileged e-mails, including but not limited to attachments, that are responsive to requests for production served on Defendant Avellino in this action;
  - b. Defendant Avellino shall preserve all e-mails and his computer identified in the Motion while this action is pending.
3. As to Defendant Bienes:

- a. On or before November 16, 2015, Defendant Bienes shall search the folder of deleted e-mails of his e-mail account Michaelbienes@aol.com, and all other folders of e-mails related to the e-mail account Michaelbienes@aol.com that are accessible by Defendant Bienes, and produce to Plaintiffs a timeline stating the period of time for which e-mails exist in those folders, along with any non-privileged e-mails, including but not limited to attachments, that are responsive to Plaintiffs' requests for production served on Defendant Bienes in this action, consistent with any stipulations with Plaintiffs stated in Defendant Bienes' discovery responses or court rulings on such document requests, and produce a privilege log of any privileged documents withheld from production;
- b. On or before November 16, 2015, Defendant Bienes shall deliver to the e-mail service provider of his e-mail account Michaelbienes@aol.com (the "Provider") written authorization to release any e-mails sent from or received by the e-mail address Michaelbienes@aol.com during the years 2008 and 2009 to his counsel in this action, and shall produce any non-privileged e-mails received from the Provider that are responsive to Plaintiffs' requests for production served to Defendant Bienes in this action consistent with any stipulations with Plaintiffs stated in Defendant Bienes' discovery responses or court rulings on such document requests, and produce a privilege log of any privileged documents withheld from production. Upon request by Plaintiffs, Defendant Bienes shall provide a random sampling of e-mails received from the Provider, which are not identified on a privilege log previously provided to Plaintiffs, to Plaintiffs for their inspection. If the parties are unable to resolve any dispute that may arise as to e-mails received from the Provider, Defendant Bienes shall submit any documents obtained from the Provider to the Court for an in camera inspection and the Court's determination as to what e-mails should be produced, if any.
- c. Defendant Bienes shall preserve all e-mails and his computer identified in the Motion while this action is pending.

4. The Court defers ruling on the remainder of the Motion. This Order is without prejudice to the Plaintiffs resetting the Motion for hearing.

DONE AND ORDERED in Chambers this 16 day of November, 2015.

  
\_\_\_\_\_  
HONORABLE JACK TUTER  
Circuit Court Judge

Copies furnished to:  
All counsel of record

*\* Order reflects court's ruling  
after review of hearing transcript.*

*JBT*

EXHIBIT G -  
November 16, 2015 Memo  
Received from Frank Avellino

November 16, 2015

Pursuant to the Court's directive at the hearing on October 26, 2015, we have conducted an inspection of the laptop computer owned and utilized by Frank Avellino and his wife, Nancy, (the "Computer"), including all email folders, to determine whether emails have been deleted, how far back emails exist on the Computer and to search for emails sent to or received from the individuals and entities identified in Plaintiffs' Fifth Request for Production of Documents, dated October 5, 2015, and further, identify and produce emails that are responsive to Plaintiffs' previously served four requests for production.

This inspection revealed that substantive emails have not been deleted from the Computer. Emails, once opened, move from the "new mail" folder to an "old mail" folder, but are not and have not been deleted from the Computer. The only emails that have been deleted are spam and solicitation emails from vendors. Pursuant to the Court's directive all emails are now being saved. Documents responsive to Plaintiffs' five document requests are being produced, together with a privilege log.

The Computer contains emails in the "old mail" folder from July 9, 2010 to the present; the "sent" emails on the Computer exist from December 2, 2009 to the present.



EXHIBIT H -

November 16, 2015 Memo Received  
from Michael Bienes

Memo re Defendant Michael Bienes's AOL e-mail account

November 16, 2015

Save and except for e-mails privileged communications with counsel, which Bienes objects to logging as these were exchanged during or in anticipation of litigation, the contents of his AOL e-mail account is as follows: (i) a spam folder containing approximately 20 spam or solicitation e-mails received from and after November 10, 2015; (ii) a saved mail folder containing 4 messages dated October 26, 2015 (2 e-mails); October 28, 2015, (1 e-mail); and November 12, 2015 (1 e-mail); and (iii) a notes folder containing 3 non-responsive and irrelevant e-mails dated October 15, 2014, January 8, 2015, and July 1, 2015.

Per the Court's recently entered Order, Bienes has been instructed to preserve all messages sent to or from his e-mail account on a going-forward basis.

Responsive documents located on Bienes's lap top are being produced to Plaintiffs under separate cover, together with a privilege log.

EXHIBIT I -

December 8, 2015 Revised Memo

Received from Frank Avellino

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

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

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

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

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

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

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

Dated: December 8, 2015



Gary A. Woodfield

EXHIBIT J -  
December 8, 2015 Revised Memo  
Received from Michael Bienes

### **Revised Memo re Defendant Michael Bienes's AOL E-mail Account**

As of November 16, 2015, folders relating to the e-mail account MichaelBienes@AOL.com and their contents were as follows:

- New Mail – empty
- Old Mail – empty
- Drafts – empty
- Sent – empty
- Spam Folder – approximately 20 spam or solicitation e-mails received from and after November 10, 2015
- Saved Mail - 4 messages dated October 26, 2015 (2 e-mails); October 28, 2015, (1 e-mail); and November 12, 2015 (1 e-mail).
- Recently Deleted – empty
- Saved Chats – empty
- Mark Raymond – approximately 387 privileged communications with counsel, which Mr. Bienes objects to logging as they were exchanged during or in anticipation of litigation. Two (2) e-mails in this folder were sent to Mr. Bienes from Don Masterson (see below). As they are not privileged communications, they were produced to Plaintiffs as described below.
- Notes – 3 non-responsive and irrelevant e-mails dated October 15, 2014, January 8, 2015, and July 1, 2015.

The 2 e-mails sent to Mr. Bienes by Don Masterson, mentioned above, were produced to Plaintiffs on November 16 and bates labeled BIENES 0005616 and 0005617.

In addition to the 2 e-mails produced at BIENES 0005616 and BIENES 0005617, responsive documents located on Bienes's lap top pursuant to the search of that device as referred in the e-mail to which this Updated Memo is attached were produced to Plaintiffs under separate cover, together with a privilege log of any documents withheld from that production. The bates range of the documents produced begins at BIENES 0005459 and ends at BIENES 0005617.

Bienes was instructed to preserve all messages sent to or from his e-mail account. Mr. Bienes's lap top is currently in the custody of his attorneys.

EXHIBIT K -

December 8, 2015 Defendant Frank  
Avellino's Notice of Filing Errata Sheet  
of Frank Avellino



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**  
**NOTICE OF FILING ERRATA SHEET OF FRANK AVELLINO**

Defendant, Frank Avellino, by and through his undersigned counsel, hereby gives notice of filing the attached Errata Sheet from his deposition taken on September 9, 2015.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8th day of December, 2015, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin Order No. 13-49.

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By: /s/ Gary A. Woodfield  
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[jetra@broadandcassel.com](mailto:jetra@broadandcassel.com)  
*Attorneys for Michael Bienes*

# ERRATA SHEET

RE: P&S Associates General Partnership et al.  
v. Michael D. Sullivan, et. al.

DEPO OF: FRANK AVELLINO  
TAKEN: September 9, 2015

PAGE #	LINE #	CHANGE	REASON
18	9	A. Emails are maintained on my computer from December 2, 2009 for emails sent and from July 9, 2010 for emails received. I do not delete emails, other than spam and vendor emails.	I misunderstood that emails, once opened, move to an "old" file but are not deleted.
18	13	A. No; I only delete spam and vendor emails.	Same as above
18	17	A. No. I did not delete emails other than spam and vendor emails.	Same as above
101	2	A. Maybe every day. Maybe once a week. I delete spam and vendor emails only.	Same as above
101	13	A. Yes; but only as to spam and vendor emails.	Same as above

STATE OF NEW YORK  
COUNTY OF NEW YORK

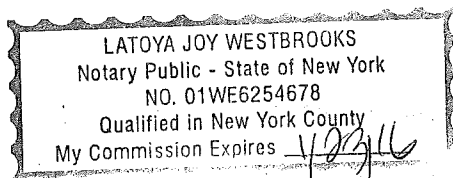
Under penalties of perjury, I declare that the corrections made herein are true and correct.

Date: 11/23/16

Frank Avellino  
FRANK AVELLINO

STATE OF NEW YORK )  
 ) ss:  
COUNTY OF NEW YORK )

Sworn and subscribed to before me this 23 date of November, 2015.



SEAL

[Signature]  
NOTARY PUBLIC  
My Commission Expires: 1/23/16

EXHIBIT L -

January 8, 2016 Order on Plaintiffs'  
Renewed Expedited Motion to  
Compel Defendants Frank Avellino  
and Michael Bienes to Produce  
Computer for Inspection

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

P&S ASSOCIATES, GENERAL  
PARTNERSHIP, a Florida limited liability  
company, *et al.*,  
Plaintiffs,

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

vs.

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

---

**ORDER ON PLAINTIFFS' RENEWED EXPEDITED MOTION TO COMPEL  
DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES TO PRODUCE  
COMPUTERS FOR INSPECTION AND TO PRODUCE DOCUMENTS**

THIS CAUSE came before the court on Plaintiffs' Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents. The court, having considered the motion and response, having heard argument of counsel, having reviewed the applicable law, and being otherwise duly advised in the premises, finds and decides as follows:

The record in the instant action reveals that on October 5, 2015, Plaintiffs filed their initial motion to compel defendants, Frank Avellino ("Avellino") and Michael Bienes ("Bienes") (collectively "Defendants"), to produce their personal computers for a forensic examination. The initial motion was filed as a result of deposition testimony that the Defendants routinely delete e-mail communications from their respective e-mail accounts. A hearing on Plaintiffs' initial motion to compel was held on October 26, 2015. Thereafter, on November 16, 2015, this Court entered an order granting in part, and deferring in part Plaintiffs' motion ("November 16, 2015 Order"). Specifically, Defendants were required to: (1) preserve their computers and all e-mails during the pendency of this action; (2) search all folders of their respective e-mail accounts; (3) produce to Plaintiffs a timeline stating the period of time for which e-mails exists in those folders; (4) produce

a privilege log, as necessary; and (5) produce any non-privileged e-mails responsive to Plaintiffs' requests for production. The court deferred ruling on Plaintiffs' request that Defendants surrender their physical personal computers for a forensic examination.

It appears that Defendants complied with this Court's November 16, 2015 Order, and produced documents to Plaintiffs that were located on their respective computers following a search by counsel. On November 20, 2015, Plaintiffs filed the instant renewed motion to compel Defendants Avellino and Bienes to produce their physical personal computers for a forensic examination. Defendants Avellino and Bienes thereafter provided Plaintiffs with amended reports identifying e-mail folders and documents that were not identified in the original reports. Plaintiffs claim that the reports provided by Defendants to Plaintiffs are insufficient, and therefore, a forensic examination of the Defendants' personal computers is necessary. On December 8, 2015, Defendant Avellino and Bienes filed separate responses to the instant renewed motion. Also on December 8, 2015, Defendant Avellino filed an errata sheet, correcting his September 9, 2015 deposition testimony. Specifically, Defendant Avellino asserts that his testimony that he routinely deletes *all* emails was based on a misunderstanding. Rather, Defendant Avellino claims that he routinely deletes *only* spam and vendor emails. On December 8, 2015, Defendants filed separate responses to Plaintiffs' renewed motion. A hearing on Plaintiffs' renewed motion to compel was held before the court on December 11, 2015.

Under Florida law, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . ." Fla. R. Civ. P. 1.280 (b) (1). Although Florida's rules governing discovery are "broad enough to encompass requests to examine a computer hard drive," such request should be authorized "only in limited and strictly controlled circumstances." *Menke v. Broward Cnty. School Bd.*, 916 So. 2d 8, 11 (Fla. 4th DCA 2005) (citation omitted). This is so because "unlimited access to anything on the computer would



constitute irreparable harm,” and possibly “expose confidential, privileged information to the opposing party.” *Id.* (citation omitted). As such, inspections of electronic devices may be appropriate if: “(1) there [is] evidence of destruction of evidence or thwarting of discovery; (2) the device likely contain[s] the requested information; and (3) no less intrusive means exist[] to obtain the requested information.” *Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163, 166 (Fla. 1st DCA 2014) (emphasis added) (citations omitted).

In the instant action, in light of the searches performed by counsel for Defendants, the record indicates that the personal computers likely contain the requested information. However, the court determines that Plaintiffs have failed to make an adequate showing to support a forensic examination of Defendants’ personal computers. For instance, Plaintiffs have failed to provide evidence that Defendants destroyed evidence or otherwise thwarted discovery, especially in light of Defendant Avellino’s errata sheet filed on December 8, 2015. Additionally, the court determines that Plaintiffs have failed to demonstrate the ineffectiveness of the lesser intrusive methods employed by this Court’s November 16, 2015 Order. Therefore, Plaintiffs’ renewed motion to compel is denied.

Accordingly, it is hereby:

ORDERED that Plaintiffs’ Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents is DENIED WITHOUT PREJUDICE.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 8th day of January, 2016.

  
\_\_\_\_\_  
JACK TUTLER  
CIRCUIT COURT JUDGE

Copies to:

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EXHIBIT M -  
AOL Mail: Features and  
Actions

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**

EXHIBIT N -  
December 11, 2015  
Hearing Excerpts

1 IN THE CIRCUIT COURT OF THE  
2 17TH JUDICIAL CIRCUIT IN AND  
3 FOR BROWARD COUNTY, FLORIDA  
Case No: 12-034123(07)  
Complex Litigation Unit

4  
5 P&S ASSOCIATES, GENERAL PARTNERSHIP, a  
6 Florida limited partnership; and S&P  
7 ASSOCIATES, GENERAL PARTNERSHIP, a Florida  
8 limited partnership, PHILIP VON KAHLE as  
9 Conservator of P&S ASSOCIATES GENERAL  
10 PARTNERSHIP, a Florida limited partnership,  
11 and S&P ASSOCIATES, GENERAL PARTNERSHIP,  
12 a Florida limited partnership,  
13 Plaintiffs,

14 vs.

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

Defendants.

---

TRANSCRIPT OF HEARING

16  
17 DATE TAKEN: Friday, December 11, 2015  
18 TIME: 10:20 a.m. - 11:25 a.m.  
19 PLACE: Broward County Courthouse  
20 201 Southeast Sixth Street  
Fort Lauderdale, Florida  
BEFORE: The Honorable Jack Tutor

21 This cause came on to be heard at the time and  
22 place aforesaid, when and where the following  
23 proceedings were reported by:

24 Cynthia S. Fleegle, RPR  
Empire Legal Support, Inc.  
110 Southeast 6th Street, Suite 1700  
Fort Lauderdale, Florida 33301  
25 (954) 241-1010

1 another set of documents to show for Mr. Bienes.

2 THE COURT: Let me see his stuff.

3 MR. SAMUELS: Your Honor, just to finish up on  
4 Mr. Avellino, if I could have a one minute reply?

5 THE COURT: Sure. Go ahead.

6 MR. SAMUELS: Okay. We have shown documents  
7 that have not been produced. I showed you that one  
8 from Mr. Sullivan. Yes, it was a different email  
9 address, but it says Michael Sullivan. It's hard  
10 to imagine that it didn't get produced, which is  
11 the problem with lawyers doing this.

12 I respect Your Honor trying to get it done that  
13 way, and it's great, and it would have been awesome  
14 if it worked. We don't think it worked. We don't  
15 thing the verified standard has been met.

16 THE COURT: In that regard, Mr. Woodfield is an  
17 officer of the Court, and he's not going to be  
18 throwing his law license around on a discovery  
19 motion. So I trust that he's done what I asked him  
20 to do.

21 The question is not that, in my opinion. The  
22 question is whether there is more, whether there's  
23 more that he could not obtain despite his best  
24 efforts in compliance with my order. So that's the  
25 issue that I'm struggling with. It's not

1 of the documents they give you, what the contract  
2 is because I questioned, "Why don't we have emails  
3 Further back?" Here's what I was told by AOL:

4 If you don't use your AOL account for a 60-day  
5 period, they delete half of the emails on your  
6 system. And the only thing they could tell me is  
7 there's a yellow dot next to my client's email  
8 account, which means that at some point in time,  
9 and they can't tell us when, at some point in time  
10 his email account was not used for 60 days and  
11 consequently AOL deleted half of the emails. And  
12 they can't tell me when that was done, and they  
13 told me that they cannot retrieve those emails. So  
14 that's why emails don't go further back.

15 And I said, Where is that in your contract? And  
16 they said, Here's the link to their contract. And  
17 I read their contract. It's not in their contact.

18 THE COURT: These providers, they make it up as  
19 they go along.

20 All right, Lenny.

21 MR. SAMUELS: Okay. Thank you, Your Honor.  
22 May I approach? I only have a couple of documents  
23 for Mr. Bienes.

24 THE COURT: Thank you.

25 MR. SAMUELS: As to Mr. Bienes, if we look at



EXHIBIT O -  
September 25, 2015 Deposition  
Excerpts of Dianne Bienes  
Deposition

IN THE CIRCUIT COURT OF THE  
SEVENTEENTH JUDICIAL CIRCUIT IN  
AND FOR BROWARD COUNTY, FLORIDA  
COMPLEX LITIGATION UNIT

P&S ASSOCIATES, GENERAL PARTNERSHIP,  
A Florida limited partnership, et al.,

Plaintiffs,

vs.

No. 12-034123 (07)

MICHAEL D. SULLIVAN, et al.,

Defendants.

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COPY

401 East Las Olas Boulevard,  
Fort Lauderdale, Florida  
Friday, September 25, 2015  
10:00 a.m. - 3:21 p.m.

D E P O S I T I O N

Of

DIANNE BIENES

Taken on behalf of the Plaintiffs  
pursuant to a notice of taking deposition

- - -

1           Q.    What do you do with your e-mails after  
2           you've sent them?

3           A.    Well, if I'm waiting for a response I just  
4           leave it on my account and then I delete it.

5           Q.    I don't understand.  If you are waiting for  
6           a response then you leave it on your account and then  
7           you delete it.  So what is -- how do you know when to  
8           delete it?

9           A.    If I send you an e-mail and I'm waiting for  
10          an answer, I keep the e-mail as sent, then if you  
11          answer me I delete it.

12          Q.    You delete the response?

13          A.    I might delete both, depending.

14          Q.    You delete the response and you delete the  
15          sent?

16          A.    Yes.

17          Q.    Why is it that you do that?

18          A.    Because my e-mails are personal e-mails  
19          between my friends and myself.

20          Q.    You don't use your e-mail for business at  
21          all?

22          A.    I'm not in business.

23          Q.    That's interesting.  We all conduct some  
24          level of business just to maintain the household.  So  
25          do you pay your bills online?

1 A. I don't have very many bills.

2 Q. The bills that you have, do you pay them  
3 online?

4 A. Occasionally.

5 Q. So would that be an example of business or  
6 no?

7 A. I consider business something I'm involved  
8 in for employment, not paying my electric bill to FPL.

9 Q. Do you delete your electric bills?

10 A. Yes, I do.

11 Q. And do you delete all of your  
12 correspondence, your e-mail correspondence?

13 A. Yes.

14 Q. And that's because why?

15 A. I have no need for it after I've  
16 corresponded to someone.

17 Q. When you go to type in someone's e-mail  
18 address that you want to e-mail, does your e-mail  
19 prompt you with a suggestion?

20 A. From my contacts?

21 Q. Correct. Does it?

22 A. Yes.

23 Q. Okay. So if you were to look at your  
24 contacts, would any of them be partners in S&P or P&S?

25 A. Not to my knowledge. They wouldn't be in my

1 Exhibit 46 for identification purposes and ask you to  
2 review it. Take your time. After you've reviewed it  
3 I'll ask you some questions.

4 MR. ETRA: I object for the reasons that we  
5 previously discussed and the way this document is  
6 being used with Mrs. Bienes.

7 BY MR. MESSANA:

8 Q. You are ready. Do you recall having this  
9 e-mail exchange with Matt Carone?

10 A. No, I do not.

11 Q. Okay. Do you see that Mr. Carone is  
12 recuperating from back surgery? See where it says  
13 that?

14 A. I know he said he had surgery, yes.

15 Q. "Hi, Dianne/Michael. I hope you are both  
16 well. I'm in Lenox still recuperating from back  
17 surgery."

18 A. Uh-huh.

19 Q. You mentioned that you had some back surgery  
20 in the past; is that correct?

21 A. Back problems.

22 Q. Back problems, okay.

23 A. My husband had back surgery.

24 Q. Okay. Do you see where he's telling Michael  
25 and you that he wrote to Frank Avellino concerning his



1 views with P&S?

2 MR. ETRA: Objection.

3 BY MR. MESSANA:

4 Q. Do you see where it says that?

5 A. Where do you see P&S?

6 Q. May I? Thank you.

7 Maybe he gave me the wrong one.

8 MR. ETRA: Excuse me. Can we go off the  
9 record?

10 MR. MESSANA: Sure.

11 [Discussion off the record.]

12 MR. ETRA: I'm not going to let her answer  
13 questions about this because I got them for the first  
14 time last night.

15 MR. MESSANA: Oh, you are going to let her  
16 answer questions about it; we are going forward.

17 MR. ETRA: Call him now. Call him now.  
18 Call him now. I got the document first time last  
19 night; it's not an insignificant document. This is  
20 exactly what the judge said not to happen.

21 MR. MESSANA: Let's call the judge.

22 MR. WEBER: I'll get the number. Here it  
23 is.

24 MR. MESSANA: My e-mail evidences that we  
25 got documents to you at 6:37 last night.

EXHIBIT P -  
November 13, 2015 Consent by  
Michael Bienes to AOL



ONE BISCAYNE TOWER  
2 SOUTH BISCAYNE BLVD.  
21ST FLOOR  
MIAMI, FL 33131  
TELEPHONE: 305.373.9400  
FACSIMILE: 305.373.9443  
WWW.BROADANDCASSEL.COM

JONATHAN ETRA  
DIRECT LINE: 305.373.9447  
DIRECT FACSIMILE: 305.995.6403  
EMAIL: JETRA@BROADANDCASSEL.COM

November 13, 2015

VIA FEDERAL EXPRESS  
Julie Jacobs, General Counsel  
AOL Legal Department  
AOL Headquarters  
770 Broadway  
New York, NY 10003


Re: *P&S Associates General Partnership, et. al. v. Michael D. Sullivan, et. al.*  
Case No.: 12-034123 (07) – Authorization to Release Personal E-mails

To Whom It May Concern:


We represent Defendant Michael Bienes in the above-styled action. By our client's signature below, please consider this his formal written authorization for AOL to release to my attention any and all e-mails sent from or received by the e-mail address Michaelbienes@aol.com during the years 2008 and 2009.

Thank you for your attention to this matter. Should you have any questions or require additional information, please contact me immediately.

Respectfully submitted,

  
Jonathan Etra

Cc:  
Steven D. Weber  
Thomas Zeichman

  
Michael Bienes  
MICHAEL BIENES  
Print Name

Date: NOV. 16, 2015



EXHIBIT Q -  
March 8, 2016 Deposition  
Excerpts of Michael Sullivan  
Deposition

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

CASE NO.: 12-34123(07)

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

Plaintiffs,

vs.

STEVEN JACOB, et al.,

Defendants.

\_\_\_\_\_ /

DEPOSITION OF

MICHAEL SULLIVAN

VOLUME 1 of 1  
Pages 1 through 166

Tuesday, March 8th, 2016  
9:30 a.m. - 2:28 p.m.

BERGER SINGERMANN, LLP  
350 East Las Olas Boulevard  
Fort Lauderdale, Florida

Stenographically Reported By:  
Ashley C. Nehme, FPR  
Florida Professional Reporter

1 A. No idea.

2 Q. Do you know what the content of that is?

3 A. No idea.

4 Q. And you understand that you and Frank  
5 Avellino are not represented by the same attorneys,  
6 correct?

7 A. Correct.

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

10 BY MR. SAMUELS:

11 Q. And you understand that when you send  
12 emails to Frank and Nancy Avellino, it would not be  
13 a privileged communication; that is, one between you  
14 and counsel?

15 A. I am not aware of that.

16 Q. Okay. Let's go to the first page of this.  
17 On November 8th, 2011, there's a communication from  
18 you to Frank and Nancy Avellino concerning, "Second  
19 Circuit in litigation of customer status for  
20 retirement account investors." Do you see that?

21 A. Yes.

22 Q. And do you know why you were sending an  
23 email concerning that subject to Frank and Nancy  
24 Avellino in 2011?

25 A. No.

EXHIBIT R -  
December 8, 2015 Amended  
Privilege Log by Frank Avellino

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**  
**NOTICE OF FILING AMENDED PRIVILEGE LOG**

Defendant, Frank Avellino, by and through his undersigned counsel, hereby files his Privilege Log relating to documents produced in response to Plaintiffs' Fifth Request for Production of Documents dated October 5, 2015. A copy of the Privilege Log is attached hereto as **Exhibit A**.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8<sup>th</sup> day of December, 2015, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-

Filing Portal in compliance with Fla. Admin Order No. 13-49.

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

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By: /s/ Gary A. Woodfield  
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Florida Bar No. 563102  
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Florida Bar No. 511919

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*Attorneys for Michael Bienes*

**DEFENDANT FRANK AVELLINO'S AMENDED PRIVILEGE LOG RELATING TO DOCUMENTS  
PRODUCED IN RESPONSE TO PLAINTIFFS' FIFTH REQUEST FOR  
PRODUCTION OF DOCUMENTS, DATED OCTOBER 5, 2015**

"AC" = Attorney-Client Communication

"JD" = Joint Defense

BATES NUMBER	DATE	TO	FROM	CC	TYPE OF DOCUMENT	SUBJECT	PRIVILEGE
AVELLINO_P&S000760 Through AVELLINO_P&S000762	12/02/11	Nancy Avellino	Helen Davis Chaitman, Esq.	Lourdes Blanco	Email String	SEC Claims	AC/JD
	12/02/11	Helen Davis Chaitman, Esq.	Nancy Avellino			SEC Claims	AC/JD
	11/29/11	Nancy Avellino	Helen Davis Chaitman, Esq.			SEC Claims	AC/JD
	11/29/11	Helen Davis Chaitman, Esq.	Nancy Avellino			SEC Claim	AC/JD
AVELLINO_P&S000763 Through AVELLINO_P&S000772	11/03/11	Michael Sullivan	Helen Davis Chaitman, Esq.		Email String	P&P/S&P Settlements	AC/JD
	10/28/11	Helen Davis Chaitman, Esq.	Thomas Wearsch, Esq.			P&P/S&P Settlements	AC/JD
	11/08/11	Frank & Nancy Avellino	Michael Sullivan			2 <sup>nd</sup> Circuit and Litigation of Customer Status for Retirement Account Investors	AC/JD
	11/08/11	Michael Sullivan	Helen Davis Chaitman, Esq.			2 <sup>nd</sup> Circuit and Litigation of Customer Status for Retirement Account Investors	AC/JD
	11/08/11	Helen Davis Chaitman, Esq.	Michael Sullivan			2 <sup>nd</sup> Circuit and Litigation of Customer Status for Retirement Account Investors	AC/JD
	11/08/11	Michael Sullivan	Helen Davis Chaitman, Esq.			2 <sup>nd</sup> Circuit and Litigation of Customer Status for Retirement Account Investors	AC/JD
	06/21/11	Tom Avellino	Michael Sullivan			Peshkin v. Levy- Church, et al. Appellant's Brief	AC/JD
	06/21/11	Helen Davis Chaitman, Esq.	Helen Davis Chaitman, Esq.			Peshkin v. Levy- Church, et al. Appellant's Brief	AC/JD



BATES NUMBER	DATE	TO	FROM	CC	TYPE OF DOCUMENT	SUBJECT	PRIVILEGE
AVELLINO_P&S000754	04/05/11	Frank & Nancy Avellino	Michael Sullivan	Helen Davis Chaitman, Esq.		S&P/P&S Claims	AC/JD
	04/05/11	Michael Sullivan, Chat Pugatch, Beth Pugatch	Helen Davis Chaitman, Esq.			S&P/P&S Claims	AC/JD
	04/04/11	Frank & Nancy Avellino	Michael Sullivan			Peshkin v. Levy- Church, et al.	AC/JD
	09/01/15	Frank and Nancy Avellino	Michael Sullivan		Email String	Legal Invoices	AC/JD
	08/25/15	Mark Raymond, Jonathan Etra, Shane Martin	Diane & Michael Bienes			Legal Invoices	AC/JD
AVELLINO_P&S000755	09/04/15	Frank & Nancy Avellino	Michael Bienes		Email	Deposition Preparation	AC/JD
AVELLINO_P&S000791 Through AVELLINO_P&S000811	03/26/12	Frank & Nancy Avellino	Michael Sullivan		Email String	U.S. Supreme Court Reply Brief	AC/JD
	03/26/12	Helen Davis Chaitman, Esq.	Helen Davis Chaitman, Esq.		Email and attached Reply Brief	U.S. Supreme Court Reply Brief	AC/JD
AVELLINO_P&S000812 Through AVELLINO_P&S000850	11/08/11	Frank & Nancy Avellino	Michael Sullivan		Email String	P&P/S&P Settlements	AC/JD
	11/03/11	Michael Sullivan	Helen Davis Chaitman, Esq.		Email	P&P/S&P Settlements	AC/JD
	10/28/11	Helen Davis Chaitman, Esq.	Thomas Wearsch, Esq.		Email and attached proposed settlement agreements	P&P/S&P Settlements	AC/JD

COMPOSITE EXHIBIT S -  
March 10, 2016 Answer to Plaintiffs'  
Third Set of Interrogatories by Frank  
and Michael Bienes

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 ANSWERS TO PLAINTIFFS'**  
**THIRD SET OF INTERROGATORIES**

Defendant, Frank Avellino ("Defendant"), responds to Plaintiffs' Third Set of Interrogatories as follows:

**GENERAL OBJECTIONS**

1. Defendant objects to Plaintiffs' Interrogatories insofar as they seek information subject to the attorney/client and/or work product privileges.
2. Defendant objects to Plaintiffs' Interrogatories and to the "definitions" set forth therein insofar as they seek information beyond the scope of any claim or defense asserted herein.
3. By responding to these Interrogatories, Defendant does not concede that any of the information requested is relevant to this action and expressly reserve the right to object to further discovery of any matter raised by their response, or any portion thereof.

4. Defendant incorporates by reference the foregoing Objections in response to each Interrogatory whether or not set forth at length below.

### **ANSWERS TO 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:** **Objection. The time period “from 2008 to the present” seeks information not relevant to this action and not likely to lead to admissible evidence. Further, efforts to retain or preserve evidence in litigation other than this action are irrelevant and not likely to lead to admissible evidence.**

**Subject to and without waiving such objection, defendant is not aware of any documents responsive to this interrogatory. Subject to and without waiving attorney client privilege, Defendant has had conversations with his attorney regarding preserving evidence but is unable to recall the dates or substance of such conversations.**

**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:** **Objection. Any such efforts or actions undertaken with regard to other litigation are irrelevant to this action and not likely to lead to admissible evidence. Further, the time period sought is overly broad and not likely to lead to admissible evidence.**

**Subject to and without waiving such objections, defendant has not knowingly or intentionally destroyed any evidence in connection with this litigation.**

**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.



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 MICHAEL BIENES'S ANSWERS TO PLAINTIFFS'**  
**THIRD SET OF INTERROGATORIES**

Defendant, Michael Bienes ("Defendant"), responds to Plaintiffs' Third Set of Interrogatories as follows:

**GENERAL OBJECTIONS**

1. Defendant objects to Plaintiffs' Interrogatories insofar as they seek information subject to the attorney/client and/or work product privileges.
2. Defendant objects to Plaintiffs' Interrogatories and to the "definitions" set forth therein insofar as they seek information beyond the scope of any claim or defense asserted herein.
3. By responding to these Interrogatories, Defendant does not concede that any of the information requested is relevant to this action and expressly reserve the right to object to further discovery of any matter raised by their response, or any portion thereof.

4. Defendant incorporates by reference the foregoing Objections in response to each Interrogatory whether or not set forth at length below.

### **ANSWERS TO 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:** **Objection. The time period “from 2008 to the present” seeks information not relevant to this action and not likely to lead to admissible evidence. Further, efforts to retain or preserve evidence in litigation other than this action are irrelevant and not likely to lead to admissible evidence.**

**Subject to and without waiving such objection, defendant is not aware of any documents responsive to this interrogatory. Subject to and without waiving attorney client privilege, Defendant has had several conversations with and emails from his attorney regarding preserving evidence but is unable to recall the dates or substance of such conversations. I did receive an email from my attorney on October 28, 2015 reminding me to preserve all emails.**

**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:** **Objection. Any such efforts or actions undertaken with regard to other litigation are irrelevant to this action and not likely to lead to admissible evidence. Further, the time period sought is overly broad and not likely to lead to admissible evidence.**

**Subject to and without waiving such objections, defendant has not knowingly or intentionally destroyed any evidence in connection with this litigation.**

**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:** **Objection. Pursuant to the Court’s ruling at the February 24, 2016 hearing, Plaintiffs were permitted to issue only two interrogatories relating to**

spoliation. Further, any such actions undertaken with regard to litigation other than this action and for the period from 2008 are inadmissible and not likely to lead to admissible evidence.

ACKNOWLEDGEMENT

By: Michael Bienes  
Michael Bienes

STATE OF FLORIDA )  
 ) SS:  
 BROWARD  
COUNTY OF ~~PALM BEACH~~ )

BEFORE ME, the undersigned authority, personally appeared Defendant Michael Bienes who, being first duly sworn, deposes and states that the answers to the foregoing Interrogatories are true and correct.

SWORN AND SUBSCRIBED before me, this 10 day of March, 2016, by Michael Bienes who is ✓ personally known to me or \_\_\_\_\_ has provided \_\_\_\_\_ as identification.

Jennifer Ashley Pixton  
Notary Public, State of  
Commission No. FF 069493

My Commission Expires: Jan. 10, 2018

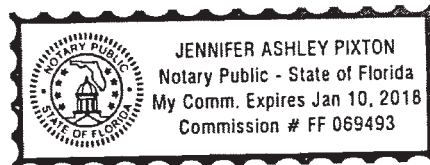




EXHIBIT T -

March 4, 2016 Defendant Frank  
Avellino's Witness and Exhibit List

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup>  
JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA

CASE NO. 12-034123 (07)

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

Plaintiffs,  
vs.

MICHAEL D. SULLIVAN, et al.

Defendants.  
\_\_\_\_\_ /

**DEFENDANT FRANK AVELLINO'S WITNESS AND EXHIBIT LIST**

Defendant, Frank Avellino, pursuant to this Court's oral ruling on February 24, 2016, identifies the following witnesses and exhibits in connection with the hearing on Plaintiffs' Motion to Strike Pleadings, and in the Alternative Motion for Adverse Inference, presently scheduled for March 14, 2016:

**I. Witnesses**

1. Frank Avellino
2. Michael Bienes
3. Philip Von Kahle, as Conservator
4. Michael Sullivan

**II. Exhibits**

1. Order on Plaintiffs' Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents, dated January 8, 2016.
2. Documents produced by Frank Avellino on November 16, 2015.

3. Documents produced by Frank Avellino on December 8, 2015.
4. Errata sheet filed by Frank Avellino on December 8, 2015.
5. Order on Plaintiffs' Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents, dated November 16, 2015.
6. Defendant Frank Avellino's Notice of Filing Amended Report Regarding Emails, filed December 8, 2015.
7. Amended Privilege log filed by Frank Avellino on December 8, 2015.
8. Email communication between Michael Sullivan and Frank Avellino produced by Plaintiffs.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4th day of March, 2016, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin Order No. 13-49.

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By: /s/ Gary A. Woodfield  
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*Attorneys for Michael Bienes*

EXHIBIT U -

April 1, 2016 Defendant, Frank  
Avellino's Response to Plaintiffs'  
Sixth Request for Production of  
Documents

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  
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Florida Bar No. 563102

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

EXHIBIT V -  
September 9, 2015 Deposition  
Excerpts of Frank Avellino Deposition

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 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 A. There are none.

2 Q. Where did they go?

3 A. They were shredded.

4 Q. And when were they shredded?

5 A. 2004, maybe.

6 Q. And who instructed they be shredded?

7 A. I did.

8 Q. Why?

9 A. I didn't need them. I had no space. I  
10 moved.

11 Q. Now, during the time frame that you had  
12 6550 Federal Highway, did you also maintain an  
13 office in your home?

14 A. No.

15 Q. Did Mr. Sullivan ever go to your home?

16 A. He went there on a Christmas holiday when  
17 the rest of Christ Church was there with us.

18 Q. So you would have church events at your  
19 home?

20 A. We had one event.

21 Q. One. And Mr. Sullivan was there?

22 A. With 50 other people from Christ Church.

23 Q. Do you recall any other instances of  
24 Mr. Sullivan being in your house?

25 A. Not that I recall.

EXHIBIT W:  
Proposed Order

IN THE CIRCUIT COURT OF THE  
SEVENTEENTH JUDICIAL CIRCUIT,  
IN AND FOR BROWARD COUNTY, FLORIDA  
CASE NO.: 12-034123 (07)

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

Plaintiffs,

v.

STEVEN F. JACOB, an individual, et al.,

Defendants.

---

[PROPOSED ORDER]

**ORDER ON (I) PLAINTIFFS' SECOND MOTION TO COMPEL DEFENDANTS  
FRANK AVELLINO AND MICHAEL BIENES TO PRODUCE COMPUTERS FOR  
INSPECTION AND TO PRODUCE DOCUMENTS AND (II) PLAINTIFFS' RENEWED  
EXPEDITED MOTION TO COMPEL DEFENDANTS FRANK AVELLINO AND  
MICHAEL BIENES TO PRODUCE COMPUTERS FOR INSPECTION AND TO  
PRODUCE DOCUMENTS**

THIS MATTER came before the Court on April \_\_, 2016, upon Plaintiffs' Second Renewed Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Second Motion to Compel"), Plaintiffs' Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Motion to Compel") and on December 9, 2015, upon Plaintiffs' Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Renewed Motion to Compel") (collectively, the "Motions"). The Court, having reviewed the Motions, hearing argument from counsel for the parties, and being otherwise duly advised in the premises,

**DOES HEREBY FIND:**



1. Plaintiff initially served requests for the production of documents on Defendant Avellino (“Avellino”) and Defendant Bienes (“Bienes”) in this action in January 2014.

2. After Avellino and Bienes responded to those initial discovery requests and others, Plaintiffs deposed Avellino on September 9, 2015, and Bienes on September 10, 2015. Avellino testified at his deposition that he continuously deleted his e-mails during this action and since he began using his e-mail address approximately ten years ago, that he made no effort to retrieve any of the e-mails he deleted, and that he uses a laptop computer that he has had since approximately 2011. Bienes testified at his deposition that he continuously deleted his e-mails during this action and since he began using his e-mail address in 2007, and that he began using a laptop computer in 2007, which he stores in his closet.

3. Following the depositions of Avellino and Bienes, Plaintiffs filed the Motion to Compel, which requested that this Court enter an order requiring, *inter alia*, Avellino and Bienes to produce the computers they identified during their depositions (the “Computers”) for inspection by an independent referee and the production of any non-privileged relevant evidence, including but not limited to e-mails, contained on them to Plaintiffs, at cost to Defendants.

4. On November 16, 2015, the Court entered an order on the Motion to Compel deferring a ruling on Plaintiffs’ request that Avellino and Bienes turn over their computers. Rather, the Court ordered a less intrusive method to enable Plaintiffs to obtain the requested e-mails from Avellino and Bienes. The Court required Avellino and Bienes to search all folders of e-mails of their e-mail accounts and produce to Plaintiffs a timeline stating the period of time for which e-mails exist in the folders of Avellino’s and Bienes’ e-mail accounts along with all non-privileged e-mails that are responsive to requests for production served on Avellino and Bienes in this action and, if necessary, a privilege log. Bienes was additionally required to execute written authorization to his e-mail service provider to release any e-mails he sent or received

from his e-mail address during the years 2008 and 2009. The Court additionally ordered Avellino and Bienes to preserve all e-mails and the Computers while this action is pending. The Court otherwise deferred ruling on the Motion to Compel.

5. In response to the November 16, 2015 Order, Avellino and Bienes produced documents to Plaintiffs that their counsel located on the Computers and they submitted reports and privilege logs to Plaintiffs regarding their review of the Computers and their production of those documents.

6. E-mails produced by Avellino with his report (and not Bienes' report) revealed that Bienes uses an iPad to send and receive e-mails and there was no indication in Bienes' report that any search of his iPad was performed for e-mails.

7. Plaintiffs then filed, on November 20, 2015, the Renewed Motion to Compel, which identified problems with Avellino's and Bienes' production of documents, reports, and/or privilege logs. The Renewed Motion to Compel sought, *inter alia*, an order compelling Defendants to produce the Computers referenced in the Motion to Compel and Bienes' iPad (the "Computers" shall hereafter refer to the computers Avellino and Bienes identified during their depositions and Bienes' iPad) to an independent referee for inspection and production to Plaintiffs of all non-privileged relevant evidence and issue a report as to what documents and e-mails have been deleted or exist, at cost to Avellino and Bienes. The Court scheduled a hearing on the Renewed Motion to Compel on December 11, 2016.

8. In response to the Renewed Motion to Compel, Bienes served an amended report on November 24, 2015, and Avellino served an amended report on December 8, 2015.

9. Avellino's and Bienes' amended reports identified e-mail folders and documents that were not identified on their original reports. Similarly, Avellino's updated privilege log identified documents not identified on his original privilege log to Plaintiffs.

10. In Bienes's revised memo, Bienes revealed that as of November 20, 2015, there were no e-mails in Bienes's new mail, old mail, drafts or sent folder, but that there were 387 privileged communications that were saved, and 4 saved messages dated October 26, 2015, October 28, 2015, and November 12, 2015.

11. Avellino's amended report revealed that Avellino somehow had e-mails dating from July 9, 2010 to the present in his inbox, and that there were e-mails dating from December, 2009 to the present in his sent e-mail inbox.

12. That day, Avellino also filed an errata sheet, contradicting his earlier sworn deposition testimony of affirmatively deleting e-mail daily. The errata sheet provided in relevant part that Avellino did not delete e-mails, but "only deleted spam and vendor e-mails."

13. Because of Avellino's errata sheet, the Court denied the Renewed Motion *without prejudice*. The Court also noted that "the record indicates that the personal computers likely contain the requested information."

14. However, Avellino subsequently testified that he did not know what a vendor or spam e-mail is.<sup>1</sup> [March Avellino TR at 297:14-16]. In fact on March 18, 2016, Avellino testified as follows:

**Hyman:** Do you know the difference between a spam e-mail and a vendor e-mail, what they are?

**Avellino:** No.

**Hyman:** So you have no idea as to what a spam e-mail is?

**Avellino:** No.

**Hyman:** You have no idea as to what a vendor e-mail is?

**Avellino:** No.

*Id.* at 295:3-12.

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<sup>1</sup> On March 18, 2016, Plaintiffs deposed Avellino for one hour and 15 minutes on his errata sheet and his preservation of evidence. A true and correct copy of the excerpts from the Transcript of the March 18, 2016 Deposition of Frank Avellino ("March Avellino TR") is attached hereto as **Exhibit "L"**.

15. Avellino also testified and for the first time revealed that his daughter conducted a “search” of all of his e-mails and computers and determined that AOL automatically deleted all of his e-mails two weeks after he read them.<sup>2</sup> [March Avellino TR at 287:13-19].

16. In addition to the foregoing, Avellino testified that:

- His internet service provider automatically deleted all e-mails [March Avellino TR at 285: 12-23];<sup>3</sup>
- Avellino did nothing to ensure that e-mails or other relevant evidence would not be deleted (id.);
- Avellino did nothing to search for relevant e-mails or other electronically stored information that could be relevant to this action until after Plaintiffs sought sanctions against him [March Avellino TR at 319:3-25, 321:17-22];
- Avellino understood that he was to search for e-mails exchanged between he and Michael Sullivan but failed to take action [March Avellino TR at 320:20-25, 321:1-25]; and

---

<sup>2</sup> The table is an excerpt from AOL’s website that describes the AOL’s policy in maintaining e-mails.

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 “M”**. The foregoing table and article makes it clear that AOL **does not** automatically delete e-mails every two weeks. Plaintiffs have requested an opportunity to depose Avellino’s daughter to investigate the inconsistency between Avellino’s claims and AOL’s policies. However, Avellino has refused to make her available for her deposition, which has necessitated the filing of a separate Motion to Reopen Discovery on a Limited Basis, to Compel Rachel Rosenthal Liersch to Appear at Deposition.

<sup>3</sup> Specifically, Avellino testified as follows:

- Hyman:** What did you do to prevent the delation[sic] of e-mails every two weeks?  
**Avellino:** There is nothing to do. It’s out of my control. It’s in AOL’s control.  
**Hyman:** You didn’t print them out?  
**Avellino:** There’s no reason to.  
**Hyman:** Why is there no reason to?  
**Avellino:** Because there’s no reason to. It’s my objective opinion that there’s no reason to.

*Id.*

- Relevant e-mails that were not disclosed in Avellino's report could exist. [March Avellino TR at 328]

17. In addition to the foregoing, on April 1, 2016, Avellino revealed that there could be a significant number of documents and communications which could be relevant to this action in a storage facility maintained by his lawyer. On information and belief, the "file folders" of people with whom Avellino communicated are currently in that storage facility.<sup>4</sup>

18. On or about April 13, 2016, Plaintiffs filed the Second Renewed Motion to Compel. The Second Renewed Motion to Compel sought to compel Avellino and Bienes to turnover their computer based on the substantial evidence that Avellino and Bienes thwarted discovery and destroyed evidence.

19. The Fourth District Court of Appeal previously recognized that the rules governing discovery "are broad enough to encompass requests to examine a computer hard drive but only in limited and strictly controlled circumstances . . ." *Menke v. Broward County Sch. Bd.*, 916 So. 2d 8, 11 (Fla. 4th DCA 2005); *Eugene J. Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., P.A.*, 669 So. 2d 1142, 1143 (Fla. 4th DCA 1996) (stating it is within the scope of discovery rules for a plaintiff to seek to enter a defendant's computer to search for evidence).

20. Such inspections should be allowed where: 1) there is evidence of "destruction of evidence or thwarting of discovery" (*Menke*, 916 So. 2d at 12); (2) the device likely contains relevant information (*Strasser*, 669 So.2d at 1145); and (3) there is "no less intrusive method of obtaining the information" (*Menke*, 916 So. 2d at 12).

21. As set forth in the order below, this Court will not allow access to "literally everything on the [Computers]" and will set forth mechanisms to protect against "disclosure of confidential and privileged information." *Id.* at 12.

---

<sup>4</sup> Avellino testified that he printed out communications which are material and saved them in a folder. Avellino also testified that all the "folders" have been turned over to his counsel. Avellino refuses to allow Plaintiffs to inspect the storage facility, which has prompted the filing of an additional motion to compel.

22. Here, all the factors in favor of allowing inspection of the Computers are present and the Computers can be inspected while protecting against the disclosure of confidential and privileged information to Plaintiffs.

23. First, the Court finds that there is evidence of destruction of evidence or thwarting of discovery based on the following:

- a. The inconsistent testimony of Avellino concerning the deletion of e-mails.
- b. Avellino's filing of a false errata sheet.
- c. The continuous deletion of e-mails by Avellino and Bienes.
- d. Avellino's and Bienes' failure to produce e-mails that they sent and/or received in response to Plaintiffs' discovery requests and/or the Court's November 16, 2015 Order. Avellino's and Bienes' failure to produce e-mails is further demonstrated by e-mails presented by Plaintiffs that they received from third parties that were either to or from Avellino or Bienes, yet not produced by either Avellino or Bienes.
- e. Bienes testified at his deposition that he has continuously deleted his e-mails since at least 2007 and during this action. Bienes has not sought to alter his testimony and e-mails identified in conjunction with the Motions evidence that Bienes has deleted or not produced evidence responsive to Plaintiffs' discovery requests in this action.
- f. Avellino testified at his deposition that he has continuously deleted his e-mails since approximately 2005 and during this action. A deposition errata sheet filed by Avellino after Plaintiffs filed the Motions substantially changed his deposition testimony to state that he only deleted "spam and vendor" emails and that e-mails are maintained on Avellino's

computer “from December 2, 2009 for emails sent and from July 9, 2010 for emails received.” Because the date of the earliest e-mail sent is approximately a year earlier than the date of Avellino’s earliest e-mail received, there is evidence that Avellino deleted e-mails other than “spam and vendor” e-mails from those folders that are responsive to Plaintiffs’ discovery requests and that have not been produced to Plaintiffs. E-mails identified by Plaintiffs in conjunction with the Motions that Avellino did not produce in response to the Court’s November 16, 2015 Order or discovery requests served on him in this action further evidence that he deleted evidence or thwarted discovery in this action.

- g. Avellino’s and Bienes’ original court-ordered reports regarding the contents of the Computers failed to identify documents and folders of e-mails that were subsequently identified by their amended reports.
- h. Avellino’s original privilege log failed to identify documents identified by his amended privilege log.
- i. The errors and omissions in Avellino’s and Bienes’ original reports, privilege logs, or both weigh against any finding that any amended reports and updated privilege logs provided by Avellino and Bienes completely cured the defects in their review and production of all relevant and responsive documents from the Computers and their e-mail folders.
- j. Avellino’s inability to explain why documents were produced that were not disclosed in his report.
- k. Avellino and Bienes did nothing to preserve relevant evidence.

1. Avellino testified that AOL automatically deleted his e-mails every two weeks, even though AOL's policies state that AOL automatically retains e-mails unless they are deleted.

24. Accordingly, there is evidence of destruction of evidence and/or thwarting of discovery and the first factor is met.

25. Second, the Computers contain information that is relevant to this action and responsive to Plaintiffs' discovery requests. Avellino's and Bienes' privilege logs and documents produced from the Computers in response to the Court's November 16, 2015 Order confirm that the Computers and their e-mail folders contain relevant information that is responsive to Plaintiffs' discovery requests.

26. Finally, there is no less intrusive way to obtain the information sought, a less intrusive way was previously ordered. Defendants have proven themselves incapable of searching for and producing e-mails in a manner which can be verified. They also have not established that there is a less intrusive means to search for the relevant material. Plaintiffs will be prejudiced if they cannot inspect the Computers because they will not be able to determine whether relevant, responsive evidence has been destroyed or improperly withheld by Avellino and Bienes. Moreover, this Order contains sufficient protections to ensure that Avellino and Bienes's applicable rights and privileges are protected.

Based upon the foregoing, the Court

**DOES HEREBY ORDER:**

1. The Motions are GRANTED;
2. Brett Stillman is appointed as an independent referee in this action (the "Independent Referee"). The Independent Referee shall not be considered an agent of either



Plaintiffs or Defendants, and shall only take actions which are authorized by this Order or the Court.

3. No later than May 20, 2016, Avellino and Bienes shall surrender the Computers to the Independent Referee.

4. The Independent Referee will image the Computers (or take any other step necessary for the Independent Referee to examine the contents of the Computers while maintaining their integrity) and examine the contents of the Computers for relevant documents (including but not limited to any deleted or hidden documents) in accordance with search parameters provided by Plaintiffs. Avellino and Bienes have the right to object to the search parameters provided by Plaintiffs. The Independent Referee shall resolve any dispute as to the scope of the search parameters provided.

5. After imaging the Computers, the Independent Referee shall provide an index of documents responsive to those parameters to Avellino and Bienes, who shall identify any purported confidential or privileged documents on a privilege log that shall be provided to Plaintiffs within seven (7) days of the date that the Independent Referee delivers the responsive documents to Avellino and Bienes.

6. The Independent Referee may not open any files produced by the imaging of the Computers until after Avellino and Bienes have provided a privilege log in connection with the index.

7. After receiving the privilege log from Avellino and Bienes, the independent referee shall produce the documents which are not listed in the privilege log to Avellino and Bienes. The Independent Referee may open non-privileged files to the extent necessary to copy them and provide them to Avellino and Bienes. Avellino and Bienes shall identify any additional purported confidential or privileged documents on a privilege log that shall be provided to

Plaintiffs within seven (7) days of the date that the Independent Referee delivers the responsive documents to Avellino and Bienes.

8. The Independent Referee will screen any documents identified on a privilege log by Avellino and Bienes pursuant to this Order from Plaintiffs and deliver the remainder of the documents responsive to the search parameters to Plaintiffs for their review and inspection.

9. In addition to the foregoing, the Independent referee shall take any action necessary to determine whether

10. The Independent Referee will be bound by the confidentiality order entered in this action and will insure that any and all information contained on the Computers is kept confidential in accordance with the terms of that order. The Independent Referee's review of privileged materials shall not constitute a waiver of any privilege.

11. Any document identified on any privilege log provided to Plaintiffs by Avellino or Bienes pursuant to this Order that is disputed by Plaintiffs shall be reviewed *in camera* and ruled on by the Court, with the assistance of the Independent Referee, if necessary. The Independent Referee shall not produce any document identified on a privilege log provided by Avellino or Bienes pursuant to this Order to Plaintiffs until the Court rules the document shall be produced to Plaintiffs or there is an agreement between Plaintiffs and Avellino or Bienes as to the document's production.

12. Avellino shall bear the costs associated with the Independent Referee's examination, copying, and imaging of the contents of Avellino's computer. Bienes shall bear the costs associated with the Independent Referee's examination, copying, and imaging of the contents of Bienes' computer and iPad.

13. Nothing in this Order shall preclude or limit Plaintiffs' right to seek through discovery documents and information from the Computers or from any other of Avellino's or

Bienes' computers, PDA's, cell phones, tablets, or any other source of electronically stored information or hard copy documents.

14. The Court reserves jurisdiction to enter an order awarding attorney's fees and costs to Plaintiffs in connection with the Motions.

15. The Court will hold a hearing on Plaintiffs' Motion to Strike Pleadings, and in the Alternative Motion for Adverse Inference ("Spoliation Motion") after Plaintiffs receive any responsive documents from the Computers from the Independent Referee and the Court rules on the production of any documents from the Computers.

**DONE AND ORDERED** in Chambers at Ft. Lauderdale, Broward County, Florida this \_\_\_\_\_ day of April, 2016.

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The Honorable Jack Tuter  
CIRCUIT JUDGE

Conformed copies to:  
Attorneys of Record