

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.

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

Defendant, Frank Avellino, files this response to Plaintiffs' Motion to Compel the Inspection of Frank Avellino's Storage Facility (the "Motion"). The Motion is yet another in the long line of Plaintiffs' spurious discovery demands. The factual basis for the Motion is faulty – there is no "Frank Avellino storage facility" - and the Motion should be denied in all respects.

1. The Motion seeks to inspect Avellino's purported storage facility to locate and produce emails responsive to Plaintiffs' Sixth Request for Production of Documents, Request No. 1 which provides:

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

2. In response to this request Avellino responded as follows:

**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.**

3. Aside from this action, for the past seven years undersigned counsel has represented Avellino, various family members and related entities in a number of actions in Massachusetts, New York and Florida. Most of these actions have been resolved. None of these actions has any relation or relevance to this action. Discovery and pleadings in some of those actions was extensive. The pleadings and discovery from those actions are in the storage facility of undersigned counsel’s firm. It is those documents and that storage facility referred to in the above quoted response to Plaintiffs’ discovery request. This is not the “Frank Avellino’s storage facility” as is mischaracterized by Plaintiffs in their Motion, but rather are the undersigned firm’s files from these other actions.

4. At his recent deposition Avellino testified that aside from searching his computer for emails responsive to the discovery requests in this action he also maintained physical files which contained emails he printed out including those from Michael Sullivan. In response to the discovery requests in this action, Avellino provided the emails from his computer and what

he characterized as his physical files to undersigned counsel. All responsive documents from the search of Avellino's computer and from the hard files provided to counsel have been previously produced in this action. The emails including those from such hard files produced in this action were not relevant to or produced in the other actions in which Avellino was a party. Thus, the firm's storage files, which contain discovery from these other actions, that Plaintiffs seek to search contain none of the discovery sought in this action.

5. In fact, Request Number 1 of Plaintiffs' Sixth Request for Production does seek documents relevant to this action but rather seeks any email produced in any of the other actions in which Avellino was a party that was created on or before July 9, 2010. The significance of such date is that is the date identified in Avellino's Amended Report Regarding E-mails, dated December 8, 2015, as how far back emails exist on Avellino's computer. See Report attached hereto as Exhibit "A".

6. Thus, what Plaintiffs' counsel is attempting to ascertain by the above document request is whether in other actions Avellino produced emails prior to the date in which he as stated he has no emails. As explained in the next paragraph, it is possible that he did but what relevance does that have to any issue in this case?

7. Avellino's computer does not have emails prior to July 9, 2010 because, unknown to Avellino at the time, his service provider, AOL, deleted them. Although not explained in the AOL contract, if a holder of an AOL account such as Avellino does not access his account for a 60 day period, AOL unilaterally and without notice deletes half of the account holder's emails starting from the oldest. AOL has confirmed that this was done on Avellino's account but did not advise when it was done. That is why Avellino's computer has no emails prior to July 9, 2010. Thus, it is conceivable that emails produced in other actions were

produced before AOL deleted Avellino's emails, but no emails or other discovery produced in those cases are relevant to any issue in this case.

8. Plaintiffs' Motion seeking the inspection of the undersigned law firm's stored files containing materials from other actions is wholly inappropriate and should be denied in all respects, together with an award of attorney's fees and costs. Unless Plaintiffs are required to pay for their continuous stream of frivolous discovery demands, this may never end.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 19th day of May, 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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**DEFENDANT FRANK AVELLINO'S**  
**NOTICE OF FILING AMENDED REPORT REGARDING EMAILS**

Defendant, Frank Avellino, by and through his undersigned counsel, hereby gives notice of filing the attached Amended Report Regarding Emails.

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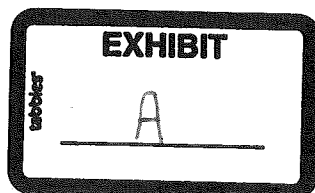
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**Defendant, Frank Avellino's Amended Report Regarding E-mails**

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:

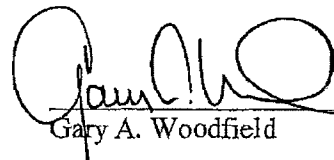
- New Mail (emails received but not yet opened) – contains 6 emails from November 22, 2015 to the present;
- Old Mail (emails received and opened) – contains 1152 emails from July 9, 2010 to the present;
- Drafts – contains 9 emails from February 5, 2015 to August 2, 2015;
- Sent – contains 772 emails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