

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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**DEFENDANTS' RESPONSE TO PLAINTIFFS' SECOND RENEWED MOTION TO  
COMPEL PRODUCTION OF COMPUTERS**

Defendants, Frank Avellino, ("Avellino") and Michael Bienes ("Bienes") (collectively, "Defendants") file this response to Plaintiffs' second renewed motion to compel the production of their computers<sup>1</sup> for inspection and production of all non-privileged relevant evidence (the "Motion"). This is the third time that Plaintiffs seek such drastic relief.

In response to Plaintiffs' initial motion, the Court entered its November 16, 2015 order which denied the relief sought, but rather directed Defendants to conduct searches of their computers and provide reports. A copy of the November 16, 2015 order is attached as Exhibit "A". Avellino and Bienes fully complied with the Court's order. Nevertheless, Plaintiffs filed a renewed motion premised upon Avellino's deposition testimony regarding his apparent deletion of emails. On December 8, 2015, Avellino filed an errata sheet to his deposition that clarified his testimony regarding the deletion of emails. Avellino did not delete relevant emails. This Court's January 8, 2016 order (the "Order") denied Plaintiffs' renewed motion holding that "Plaintiffs

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<sup>1</sup> The computer that Plaintiffs seek to have produced by Avellino and inspected is one used not only by Avellino, but also his wife, a non-party to this action.

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." A copy of the Order is attached as Exhibit "B".

On their third try Plaintiffs rely upon many of the same facts as the previously denied motions including the purported inconsistencies of Avellino's prior testimony regarding the deletion of emails as well as his additional testimony provided on March 18, 2016. At his recent deposition Avellino testified that his counsel had Avellino's daughter assist in the search for and production of emails and documents from his computer. Avellino's daughter was deposed on June 8, 2016. Her testimony addressed and resolved any issues regarding the deletion of emails and confirmed that a thorough search for and production of emails from Avellino's computer was performed.

With respect to Bienes, Plaintiffs rely upon the same facts as the previously denied motions including his alleged failure to provide a privilege log of the 387 documents (which consist of emails with his attorneys) he identified in his December 8, 2015 revised memo. Plaintiffs' Motion does not provide any additional evidence or facts relating to Bienes.

The Motion provides no new evidence to support the requested relief but continues to make assumptions which do not constitute evidence. Plaintiffs have failed to satisfy the criteria necessary to obtain the drastic relief sought and they assert nothing new to cause this Court to rule any differently than it did on the prior motions. The Motion should be denied in its entirety.

#### **Plaintiffs' Support for Their Motion**

In ruling on Plaintiffs' initial motion to compel production of Defendants' computers the Court carefully carved out a less intrusive means by requiring Defendants to produce reports on what existed on their computers and search for and produce responsive documents, all of which

has been done. As to Bienes, the Court additionally directed him to authorize AOL to provide his emails for the years 2008 and 2009. That has been done and AOL has no emails for those years. The Court was clear that if these tasks did not reveal discoverable evidence there would be no further discovery regarding Defendants' computers.<sup>2</sup> Defendants have complied with the Court's directives, no additional discoverable evidence exists, and Plaintiffs have not produced anything to support the existence of such evidence. The Court need look no further to deny the relief sought. Nevertheless, substantively addressing Plaintiffs' arguments, they fail to meet the requisite threshold to search Defendants' computers.

Plaintiffs' Motion recites numerous purported facts seeking to convince this Court on its third try to grant the relief requested. Hyperbole aside, the "new facts" upon which the Motion is premised are the following:

- Bienes has not produced a privilege log of the 387 documents which he identified in his December 8, 2015 revised memo filed in response to the Court's November 15, 2015 order. Motion, ¶ 11;
- Bienes was required to execute written authorization to AOL to release emails for the years 2008 and 2009 and he has failed to do so. Motion, ¶ 7;
- Avellino's amended report filed December 8, 2015 advised that emails prior to July 9, 2010 from his inbox and from December 2009 in his sent email box were deleted. Motion, ¶ 12;
- Avellino recently testified that he did not know what was spam or vendor email. Motion, ¶ 15;

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<sup>2</sup> Transcript of the October 26, 2015 hearing, pp. 47-51, attached hereto as Exhibit "C".

- Avellino recently “revealed” that his daughter conducted the search of his computer to comply with the Court’s order that required such search and it was determined that AOL automatically deleted emails after two weeks. Motion, ¶ 16;
- Avellino testified that he did nothing to ensure that emails would not be deleted, did not timely search for emails, lacked knowledge as to what was done to locate emails from Michael Sullivan and that emails not disclosed “could exist.” Motion, ¶ 16;
- AOL’s online policies do not state that emails are deleted every two weeks. Motion, footnote 3;
- Avellino has refused to make his daughter available for deposition. Motion, footnote 3;
- Avellino revealed that there could be relevant documents in a storage facility and “upon information and belief” folders of Avellino’s communication with others are in such storage facility. Motion, ¶ 18.
- On April 22, 2016, Avellino produced emails some of which were from before the time period in which Avellino contends his emails were deleted. Motion, ¶ 19.

From these purported facts Plaintiffs contend that Defendants have destroyed evidence and thwarted discovery, entitling them to the requested relief. These facts, even if accurate, fail to meet Plaintiffs’ evidentiary burden. In any event, as is set forth below, such purported facts are not accurate:

- Bienes’ 387 emails consist of privileged communications with his attorneys for which he is not required to provide a privileged log. See Response in Opposition to Compel Michael Bienes to Produce Documents in Response to Plaintiffs’ Fifth Request for Production, filed February 22, 2016, p. 3; *DLJ Mortgage Capital, Inc. v. Fox*, 112 So.

3d 644, 645 (Fla. 4<sup>th</sup> DCA 2013) (“... the failure to file a log should not be applied to categorical assertion of privilege.”);

- Bienes did provide written authorization to AOL and no mails for 2008 and 2009 were produced by AOL responsive to such request;
- The deletion of Avellino’s emails prior to July 9, 2010 was done by AOL without his knowledge or consent. Transcript of the deposition of Rachel Liersch conducted on June 8, 2016, p. 79, ln. 23 – p. 80, ln. 12, attached hereto as Exhibit “D”. No duty existed for Avellino to preserve any emails prior to that date. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So.2d 843, 846 (Fla. 4<sup>th</sup> DCA 2004).
- Avellino’s recent testimony regarding his computer merely supports what undersigned counsel advised the Court at the October 26, 2015 hearing on Plaintiffs’ initial motion that he is not computer savvy.<sup>3</sup> Having recognized such, undersigned counsel engaged Avellino’s daughter who conducted a thorough search for all relevant documents resulting in the preparation of the amended reported filed December 8, 2015, a copy of which is attached hereto as Exhibit “E” (the “Amended Report”) and the production of all documents responsive to Plaintiffs’ discovery requests. Plaintiffs have deposed Avellino’s daughter inquiring in depth as to the searches she conducted. Avellino testified that he did not delete emails and corrected his testimony at his recent deposition that AOL deleted emails after 60 days of the

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<sup>3</sup> “He is not computer savvy. He would read an e-mail. And based on AOL – and I don’t have an AOL account. I haven’t seen how it works. This is how I am told it works, and I am going to verify it on his computer when I have an opportunity. After you read an e-mail on AOL, it is moved to an old file, a different file. He has not deleted those e-mails. They are in that old file. And I am going to look and retrieve them all. So this may be much ado about nothing. There may have been no e-mails that were deleted.” Tr., p. 38.

computer's non-use, not every two weeks, which is consistent with the information obtained from AOL by his daughter. Tr., pp. 272-273; 325-326 (Attached hereto as Exhibit "F").

- AOL's online policies do not disclose its policy of deleting emails if their service is not utilized for a period of time, which policy was unknown to Avellino and recently discovered by Avellino's daughter. Ex. C, p. 35, ln. 21 – p. 37, ln. 14; p. 51, ln. 19 – p. 53, ln. 2.
- Avellino voluntarily made his daughter available for deposition and her testimony resolves any issues that may have existed regarding the deletion of emails.
- Plaintiffs' Motion to Compel Inspection of Defendant Frank Avellino's Storage Facility was denied by this Court's June 16, 2016 order. Plaintiffs' belief that such facility had relevant discovery was unsupported and has been refuted. There are no documents in the undersigned counsel's storage facility relevant to this action. Affidavit of Gary Woodfield, sworn to June 21, 2016, a copy of which is attached hereto as Exhibit "G".
- Plaintiffs' reliance on emails dated before the dates identified in the Amended Report as to when no emails exist on Avellino's computer were explained by Avellino's daughter at her deposition – they are attached to other emails that were within the time frame. Ex. D, p. 44, ln. 24 – p. 45, ln. 14.

### **Argument**

To meet their burden enabling Plaintiffs access to Defendants' computers, Plaintiffs must introduce 1) evidence that there has been destruction of evidence or thwarting of discovery; 2) that the devices likely contain the requested information; and 3) no less intrusive means exist to

obtain the requested information. *Menke v. Broward County School Board*, 916 So.2d 8, 11-12 (Fla. 4<sup>th</sup> DCA 2005).

Plaintiffs' third try for such relief consists of an exhaustive recitation of the inconsistencies in the testimony of Avellino, who admitted he lacks knowledge of computers, regarding the deletion of emails. This is nothing new; undersigned counsel so advised the Court at the hearing on Plaintiffs' first motion on October 26, 2015. See, p. 4, fnnt. 2, *infra*. At that time undersigned counsel engaged Avellino's daughter to assist in the search and production of emails. Avellino's testimony regarding the deletion of emails was cleared up by his daughter's testimony. In any event, Avellino's testimony does not establish that potential evidence Avellino was required to preserve has been deleted and does not constitute the requisite evidence to support the relief granted. Plaintiffs can point to no evidence that relevant documents have been destroyed.

The same is true as to Bienes. His failure to provide a privilege log for the emails with his counsel is not new evidence, nor does it support Plaintiffs' conclusion that Bienes has destroyed evidence, or provide a legal basis to support the relief requested.

Plaintiffs' suppositions or assumptions do not constitute evidence. AOL, not Avellino, deleted sent emails prior to December 2, 2009 and received emails from July 9, 2010 (Exhibit D), which deletions were beyond Avellino's knowledge or control. In any event, Avellino had no duty to preserve evidence until August 2013, when he was served in this action, well after the time period of the deleted emails. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So.2d at 846.

Throughout their repeated motions Plaintiffs have argued that Defendants had a duty to preserve evidence from at least December 2008, when Madoff's Ponzi scheme was publically

disclosed. Plaintiffs not only provide no support for the proposition that a duty to preserve evidence which may have been owed to others (in this case, Madoff's trustee), provides Plaintiffs standing to rely upon such duty, this very argument has been previously made by Plaintiffs' attorneys and flatly rejected. *Point Blank Solutions, Inc. v. Toyobo America, Inc.*, 2011 WL 1456029 (S. D. Fla. April 5, 2011). ("The Court is reluctant to create a new legal precedent which would establish some type of free-floating or shifting duty which other parties could latch onto in order to seek the sanctions which the parties with standing choose not to pursue." *Id.* at \*2; "The shifting duty theory is incompatible with the basic rule that a duty is owed to a specific party." *Id.* at \*18). Plaintiffs' attorneys continue to argue this previously rejected shifting duty theory without disclosing to the Court that they previously asserted such argument and lost.

Moreover, Plaintiffs can point to no evidence establishing the destruction of evidence or thwarting discovery. Plaintiffs' contention "upon information and belief" that Avellino has documents in undersigned counsel's storage facility which "may" be relevant hardly rises to the level of evidence, Motion, p. 10, has been refuted by undersigned counsel, Ex. G, and rejected by the Court's June 16, 2016 order. Defendants' valid objections to Plaintiffs' overreaching discovery demands do not constitute thwarting discovery.

In fact, in light of Ms. Liersch's testimony, the contention that relevant evidence that has not been produced exists on Avellino's computer has been refuted. She testified as to the searches performed and the documents located and produced. Ex. D, p. 7, ln. 16 – p. 14, ln. 13. While Plaintiffs may claim that Ms. Liersch is not a forensic expert,<sup>4</sup> such expertise is not required to perform searches to locate and produce relevant emails. The unrefuted evidence is that a thorough search of Avellino's computer has been performed, that relevant documents

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<sup>4</sup> Ms. Liersch, however, is an honor graduate from Harvard with a major in Economics and worked at JPMorgan as an investment banking analyst. Ex. D, p. 75, ln. 20 – p. 76, ln. 15.

produced and that no relevant documents that have not been produced exist on Avellino's computer.

This Court has recognized that a request to examine a computer hard drive should only be authorized in limited strictly controlled circumstances because unlimited access would constitute irreparable harm. Order at 2, 3. Yet, without supporting evidence, that is exactly what Plaintiffs seek. Most troubling is Plaintiffs' failure to identify precisely what relevant discovery exists that has not been produced, and yet, they are seeking to have access to the entire computer of both Avellino and Bienes. Plaintiffs have been provided by Sullivan all of his emails so they have all email communication between Avellino and Sullivan including those that occurred prior to the date that AOL deleted Avellino's emails. Plaintiffs have not and cannot identify relevant evidence that exists on Defendants' computers that has not been produced. That is fatal to the relief sought.

Emails deleted by AOL from Avellino's computer are not recoverable; a forensics' report is not required or justified to confirm such fact. AOL has no emails of Bienes for 2008 or 2009. Failing to identify what they believe exists and is missing, Plaintiffs seek the broadest of relief consisting of the "inspection and production to Plaintiffs of all non-privileged relevant evidence" gleaned from Defendants' computers. Motion, at p. 17. A less intrusive method to obtain relevant evidence exists and has been utilized by this Court in its November 16, 2015 order. Ex. A. Subsequently, Avellino's daughter has conducted a complete search of his computer and all relevant emails have been produced, and Bienes has sought from AOL, his emails for 2008 and 2009.

Plaintiffs' request to have Avellino's entire computer searched for other unspecified information and documents is a clear violation of both Avellino and his wife's constitutional

privacy rights. (The computer is used by both Avellino and his wife and contains personal and confidential information). Plaintiffs' request to have Bienes' entire computer searched for other unspecified information and documents is a clear violation of his constitutional privacy rights. In addition to the violation of their constitutional privacy rights, Avellino and Bienes communicate with their counsel for this and other litigation through email, and thus, they need their computer to continue these communications. Avellino and Bienes would not only be prejudiced if their entire computers were taken to be inspected, but their communications with counsel are clearly privileged and cannot be subjected to any fishing expedition by Plaintiffs.

### **Conclusion**

As this Court has previously stated, inspection of electronic devices may be appropriate if three elements are established: 1) there is evidence of destruction of evidence or thwarting discovery; 2) the devices likely contain the requested information; and 3) no less intrusive means exists to obtain the requested information. Order, at 3. None of these elements has been met. By their compliance with the Court's November 16, 2015 order, Defendant Avellino searched for and produced all relevant discovery on his devices, and Bienes requested his emails from AOL and there are none. There is no evidence that the devices likely contain additional information that has not been produced. There is no evidence of the destruction of evidence or thwarting discovery and this Court's November 16, 2015 order set forth a less intrusive means that obtained the requested information which has been further augmented by the searches conducted by Ms. Liersch. None of the requisite elements for the production of Defendants' devices has been met. Make no mistake; this is a fishing expedition that the Court should not condone. Plaintiffs' Second Renewed Motion to Compel Production of Computers should be denied in all respects.

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

*Attorneys for Defendants Frank Avellino  
and Michael Bienes*

660 U.S. Highway One, Third Floor

North Palm Beach, FL 33408

Phone: (561) 627-8100

Fax: (561) 622-7603

gwoodfield@haileshaw.com

bpetroni@haileshaw.com

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

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22nd day of June, 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.

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

## SERVICE LIST

THOMAS M. MESSANA, ESQ.  
THOMAS ZEICHMAN, ESQ.  
MESSANA, P.A.  
SUITE 1400, 401 EAST LAS OLAS BOULEVARD  
FORT LAUDERDALE, FL 33301  
[tmessana@messana-law.com](mailto:tmessana@messana-law.com)  
[tzeichman@messana-law.com](mailto:tzeichman@messana-law.com)  
*Attorneys for Plaintiffs*

LEONARD K. SAMUELS, ESQ.  
ETHAN MARK, ESQ.  
MICHAEL O. WEISZ, ESQ.  
ZACHARY P. HYMAN, ESQ.  
BERGER SINGERMAN  
350 EAST LAS OLAS BOULEVARD, STE 1000  
FORT LAUDERDALE, FL 33301  
[emark@bergersingerman.com](mailto:emark@bergersingerman.com)  
[lsamuels@bergersingerman.com](mailto:lsamuels@bergersingerman.com)  
[mweisz@bergersingerman.com](mailto:mweisz@bergersingerman.com)  
[zhyman@bergersingerman.com](mailto:zhyman@bergersingerman.com)  
[mvega@bergersingerman.com](mailto:mvega@bergersingerman.com)  
[DRT@bergersingerman.com](mailto:DRT@bergersingerman.com)  
*Attorneys for Plaintiff*

PETER G. HERMAN, ESQ.  
PETER G. HERMAN, ESQ.  
THE HERMAN LAW GROUP, P. A.  
1401 E. BROWARD BLVD., STE 206  
FORT LAUDERDALE, FL 33301  
[pgh@thglaw.com](mailto:pgh@thglaw.com)  
*Attorneys for Defendants Steven F. Jacob  
and Steven F. Jacob CPA & Associates, Inc.*

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 R. 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:

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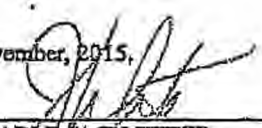
EXHIBIT

A

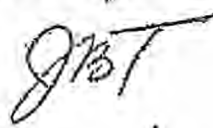
- a. On or before November 16, 2015, Defendant Bienes shall search the folder of deleted e-mails of his e-mail account Michaelbienes@aol.com, and all other folders of e-mails related to the e-mail account Michaelbienes@aol.com that are accessible by Defendant Bienes, and produce to Plaintiffs a timeline 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.  


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.

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**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

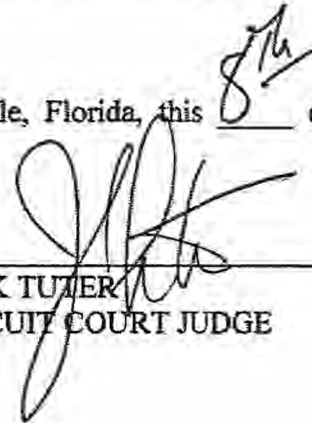
constitute irreparable harm,” and possibly “expose confidential, privileged information to the opposing party.” *Id.* (citation omitted). As such, inspections of electronic devices may be appropriate if: “(1) there [is] evidence of destruction of evidence or thwarting of discovery; (2) the device likely 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 8<sup>th</sup> day of January, 2016.

  
\_\_\_\_\_  
JACK TUTER  
CIRCUIT COURT JUDGE

Copies to:

Gary A. Woodfield, Esq., Haile Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408

Peter G. Herman, Esq., Tripp Scott, 110 SE 6th Street, 15th Floor, Fort Lauderdale, FL 33301

Thomas M. Messana, Esq., Messana, P.A., 401 East Las Olas Blvd., Suite 1400, Fort Lauderdale, FL 33301

Jonathan Etra, Esq., Broad and Cassel, One Biscayne Blvd., 21st Floor, 2 S. Biscayne Blvd., Miami, FL 33131

Leonard K. Samuels, Esq., Berger Singerman, LLP, 350 East Las Olas Blvd., Suite 1000, Fort Lauderdale, FL 33301

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.

18 Proceedings before the HONORABLE

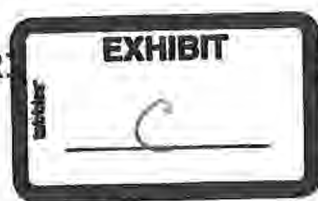
19 JACK TUTER

**CERTIFIED  
COPY**

21 Monday, October 26, 2015  
22 Broward County Courthouse  
23 201 Southeast Sixth Street  
24 Fort Lauderdale, Florida 33301  
25 2:01 - 3:02 p.m.

Reported by: Lisa Mudrick, RPR, FPR

MUDRICK, INC.



1 requests.

2 MR. ETRA: All right.

3 THE COURT: I can tell everybody that I do  
4 not let people randomly search computers. The  
14:45:01 5 difficulty in my experience with these  
6 forensics has been that once I do issue the  
7 order and the lawyers narrow the search,  
8 inevitably they are back within a month telling  
9 me they got a gazillion e-mails and they have  
14:45:17 10 no idea whether they are really responsive to  
11 the search, because they searched under like  
12 law firm names, and every e-mail was copied to  
13 a law firm for whatever purpose. So it just  
14 creates sometimes the search terms more of a  
14:45:31 15 dilemma than the inspection itself.

16 As it pertains to Bienes, I can tell you  
17 where I am leaning, but I am not ready to issue  
18 signing an order yet on this. My inclination  
19 is to first we are going to have to find out  
14:45:52 20 from AOL how far back they store this stuff on  
21 a server. If they've got a two- or three-year  
22 record retention, this whole thing may be moot.

23 MR. WOODFIELD: And I tried also. AOL is  
24 somewhat impenetrable to get information out  
14:46:03 25 of.

1 THE COURT: I understand, no phone  
2 numbers, no contacts, no nobody. Until you sue  
3 them you don't hear from them. That's the kind  
4 of company they are, I think.

14:46:10 5 I am going to tell you where I am leaning  
6 is during the, maybe the '08 and '09 years,  
7 compel Mr. Etra to have his client sign a  
8 release to AOL for e-mails during that period  
9 of time, those two-year window, to have those  
14:46:30 10 e-mails directed only to Mr. Etra. And then  
11 Mr. Etra can do a search of those e-mails to  
12 determine whether he thinks that there's  
13 something related to the partnership issues  
14 that are in dispute here. If he thinks not,  
14:46:47 15 then one of two things can happen. You can let  
16 him come over and look at a random sampling of  
17 the e-mails to say these are all personal,  
18 attorney's eyes only, can't be copied, can't be  
19 used, can't be in any other way.

14:47:00 20 If that's not successful, then if you  
21 think that everything he has is personal and  
22 it's non-discoverable, then you will make such  
23 a statement to him. If you think there's  
24 something that is discoverable or maybe  
14:47:12 25 attorney/client, you will create a log. And

1 the best thing I can do is say that I will do  
2 some kind of an in camera inspection based on  
3 the dispute between the parties.

4 If you get a sampling and it turns out  
14:47:24 5 that, as you say, this is nothing but  
6 mumbo-jumbo, there's nothing here that's going  
7 to relate to these partnerships, then I am not  
8 going to let any further discovery issue in the  
9 case.

10 So I think I will let him do a random  
11 sampling of the relevant years which you've  
12 pointed in out in these e-mails, maybe '08 and  
13 '09, to get those e-mails if they exist. I  
14 think what we'll end up finding out is AOL has  
14:47:48 15 a three- or five-year record retention, and  
16 nobody is going to get anything because they  
17 have all since been wiped from the server.

18 MR. WEBER: Your Honor, may I say  
19 something?

14:47:54 20 THE COURT: No. Wait a minute. Let me  
21 make sure I am finished here.

22 So I haven't said I am reducing that to an  
23 order. So I am leaving it for thought that  
24 that's probably where I am going in this case  
14:48:05 25 to save everybody coming back for another

1 hearing at another time to relitigate the exact  
2 same issues again.

3 Now tell me what you want to say, sir.

14:48:16 4 MR. WEBER: Your Honor, just this '08/'09  
5 timeframe you mentioned. I would be reluctant  
6 -- I have shown you documents that suggest that  
7 timeframe. But all the way up until the  
8 lawsuit is filed in 2012 are extremely  
9 relevant. Because one of our principal  
14:48:29 10 defenses is that Bienes and Avellino were in  
11 communication with Sullivan and preventing him  
12 from filing --

13 THE COURT: Okay. But would you not think  
14 based on what you have shown me that if they  
14:48:40 15 didn't write any e-mails relating to these  
16 partnerships in this e-mail, personal e-mail  
17 account that he had between '08 and '09,  
18 wouldn't you say that something would have to  
19 exist during those years based on what you were  
14:48:51 20 saying to me? Or they just started to write  
21 e-mails in '11 and '12 relating to the  
22 partnership?

23 MR. WEBER: Your Honor, I don't know.

24 THE COURT: And that's why I am saying if  
14:48:57 25 you don't know, then Mr. Etra is right, you are

1 on a fishing expedition, and I am not going to  
2 let you just wholesale look through five years  
3 of their hard drive. I will give you the two  
4 years as a random sampling to see if anything  
14:49:10 5 exists, without prejudice. And if it does  
6 exist then we are going to discuss what period  
7 of time he might be able to inquire further or  
8 whether then I will permit a forensic  
9 examination.

14:49:21 10 MR. WEBER: Can we have the opportunity to  
11 inquire further, though, Your Honor? Let's say  
12 he doesn't have an '08 or an '09. Because as  
13 you saw, it appears that Ms. Bienes is  
14 responding --

14:49:30 15 THE COURT: If he doesn't have any '08s or  
16 '09s relating to the partnership, then I might  
17 allow you to send him some more  
18 interrogatories, a few interrogatories to say  
19 did you write any in these years.

14:49:41 20 But, see, I am reluctant to say, honestly,  
21 sir, as scant as the evidence is at this stage  
22 in the case, I am reluctant to say, well, wait  
23 a minute, he didn't write any in '08, he didn't  
24 write any in '09, when pertinent times from  
14:49:54 25 these e-mails you have shown me becomes

1 you don't know an answer or don't have an answer,  
2 that's fine. I don't want you to guess if you don't  
3 have, you know, certainty that what you're telling  
4 me is what you know or what you've seen, okay?

5 A. Okay.

6 Q. All right.

7 MR. WEISZ: Mr. Woodfield provided  
8 some documents to us yesterday. I'm assuming that  
9 you have a set of those with you or in front of you  
10 or near you?

11 MR. WOODFIELD: I have them, yes.

12 Q. Okay. So I'm going to be referring to  
13 those documents a little bit later in the  
14 deposition. I just wanted to make sure that they  
15 were available for you to use.

16 So Ms. Liersch, you were asked at a  
17 particular point in time to help gather some emails.  
18 Can you please explain to me what your understanding  
19 was of what you were asked to do?

20 A. I was asked to search for emails from a  
21 list of names.

22 Q. Okay, and so who asked you to do that?

23 A. Mr. Woodfield.

24 Q. I apologize, I did not mean to cut your  
25 answer. If you hadn't finished --



1           A.       It's okay. That's it. I was asked to  
2       search a list of names by Gary Woodfield on Frank's  
3       AOL email account.

4           Q.       And Frank is Frank Avellino, your  
5       father?

6           A.       My stepfather.

7           Q.       Your stepfather, okay. Do you have any  
8       particular skill or training in searching computers  
9       for emails?

10          A.       I do not.

11          Q.       Had you ever been asked to do something  
12       like this before?

13          A.       No.

14          Q.       What did you understand that you were  
15       looking for or supposed to do?

16          A.       I understood that I was supposed to find  
17       all the emails sent or received from the list of  
18       names I was given.

19          Q.       Okay, and in order to do that, what did  
20       you do?

21          A.       I searched by their last name and by a  
22       known email address, if that was available.

23          Q.       Okay. So before you did the search, in  
24       order to actually get to the information, what did  
25       you do?

1 A. I --

2 Q. How did you access the information? I  
3 mean, did you go to the computer? Did you do  
4 this -- how did you get on to the computer?

5 A. I turned on the computer. I typed --

6 Q. So you were actually -- you were  
7 actually using the computer that your stepfather  
8 uses?

9 A. No.

10 Q. What computer were you using to do the  
11 search?

12 A. My computer. I have -- I did do part of  
13 the search on their computer and part of the search  
14 on my computer. There's been multiple searches.

15 Q. Okay. So first of all, tell me which  
16 did you do first? Did you first do the search from  
17 your computer?

18 A. I believe I first did a search from my  
19 computer.

20 Q. Okay. Tell me -- just walk me through  
21 the steps, you know, after your computer was on,  
22 what did you do in order to conduct your search?

23 A. I typed in www.aol.com, logged in or --  
24 and went to the section that says search, and typed  
25 in a last name.

1 Q. Okay. Whose account did you log into?

2 A. Frank Avellino's AOL account.

3 Q. Then what did you do when you got access  
4 to his account?

5 A. I searched the emails.

6 Q. Tell me how you did that.

7 A. Typed in a last name and saw what emails  
8 came up. I also went into his contacts and searched  
9 last names there to find out any known email  
10 addresses which then I also searched for.

11 Q. Okay. So tell me how you go into the  
12 contact list and search a name to find out if there  
13 are any emails from that person or sent to that  
14 person.

15 A. Well, I don't think your question is  
16 either clear or accurate. You don't search in  
17 contacts if there's emails sent or received. You  
18 search in contacts for contact information.

19 Q. So the contact folder will give you a  
20 list of people whose emails are stored; is that  
21 right?

22 A. I believe -- I don't know how AOL works  
23 so I don't know if it's stored or if Frank manually  
24 inputted those emails. Excuse me, email addresses,  
25 not emails.

1 Q. What date did you do this search?

2 A. I believe it was sometime in November  
3 was the first one.

4 MR. WOODFIELD: Whatever you  
5 recall.

6 A. I believe it was in November.

7 Q. Okay.

8 A. But I don't remember the exact date  
9 though, so.

10 Q. Okay. And so when you looked in  
11 contacts, did you see an actual list of names?

12 A. Yeah, there's lists of names, yes.

13 Q. Okay, and what did you do with that  
14 information? Did you copy it? Did you print it?

15 A. I did not print or copy the contact  
16 list.

17 Q. And what did you use the contact list  
18 for?

19 A. To search for the emails. So --

20 Q. And how would --

21 A. So for example, if I was searching for  
22 an email for Gary Woodfield, I'd type in Woodfield  
23 in the contacts and then whatever email addresses  
24 were there, I would search for those email addresses  
25 and I would search also just for Woodfield.

1 Q. Okay, and how did you verify that typing  
2 in the name Woodfield would draw up all email  
3 addresses for Gary Woodfield?

4 A. I did it several times and I did it to  
5 the best of my ability.

6 Q. Okay, but my question is, how were you  
7 able to verify that by typing in Woodfield, the  
8 contact list would provide you all email addresses  
9 associated with Gary Woodfield?

10 A. No, because it's not all email addresses  
11 associated with Gary Woodfield, it's all email  
12 addresses that that account has known to it which  
13 isn't by whether or not an email is sent or  
14 received. As I said, I believe Frank manually  
15 inputted known emails. It's not an advanced account  
16 like, for say, my Yahoo account that remembers  
17 things once you send or receive an email. It's very  
18 outdated.

19 Q. Okay. So looking in contacts would not  
20 necessarily give you all of the email addresses that  
21 Gary Woodfield may have used to send an email to  
22 your stepfather, right?

23 A. That is correct.

24 Q. And that would be true for every name in  
25 the contact list. Looking at the contact list would

1 not necessarily provide you with every email address  
2 a particular person used to communicate with your  
3 stepfather?

4 A. I believe so. As I said, I'm not that  
5 familiar with the AOL account. I don't believe that  
6 it saves all emails like the new advanced accounts.  
7 But I also searched by last name in hopes to vet  
8 that issue.

9 Q. So after you went into the contact list,  
10 did you then go into the emails?

11 A. To search, yes.

12 Q. Okay. Tell me what you did from the  
13 contact list. How did you get -- you know, where  
14 did you go next?

15 A. I clicked on either new mail, old mail,  
16 something along those lines, but I don't remember  
17 what I clicked on but you go back to the emails and  
18 then there is a box that says search mail, and in  
19 there I typed in all the information I had to search  
20 each name.

21 Q. Okay, and where did you get the  
22 information that you used?

23 A. From the contacts.

24 Q. Okay.

25 A. Or from the actual name I was provided.

1 Q. And who provided you with names?

2 A. Gary Woodfield.

3 Q. And were these -- was the information  
4 you were searching, where was it stored?

5 A. In the AOL account, wherever it was.

6 Q. Okay. Is that the only place you  
7 searched for emails, on the AOL account?

8 A. I also looked on Frank's computer and  
9 didn't see any emails stored.

10 Q. Okay. So when did you look on Frank's  
11 computer?

12 A. When I was first asked to search. His  
13 computer does not save emails.

14 Q. How do you know that?

15 A. I did as thorough a search as I could.

16 Q. What qualifications do you have to  
17 search hard memory drives --

18 A. None.

19 Q. -- or any memory drives on a computer in  
20 order to verify that, in fact, the search was  
21 complete, thorough and, in fact, did not reveal  
22 emails?

23 A. None.

24 Q. Okay. Did any of the emails have  
25 attachments?

1           Q.     Did you ever -- I'm sorry, I think I was  
2 cutting you off.

3           A.     I believe at one time it was fee based  
4 but I don't know for certain and if and when that  
5 ever changed.

6           Q.     Okay. Do you know whether or not the  
7 AOL account that was on your stepfather's -- that  
8 your stepfather had access to had any limit on how  
9 much data could be stored?

10          A.     I don't know the answer to that.

11          Q.     Do you know whether or not your  
12 stepfather's computer ever had some sort of  
13 malfunction or crash that caused any data to be  
14 lost?

15          A.     Not to my knowledge, but I cannot answer  
16 that question.

17          Q.     Do you know whether or not the hard  
18 drive or any other memory drive on your stepfather's  
19 computer has ever been changed?

20          A.     Not to my knowledge, but I don't know.

21          Q.     Now, I understand that you received or  
22 you communicated directly with AOL as part of the  
23 efforts you undertook to search for the email. Can  
24 you please describe for me why you called AOL?

25          A.     I called AOL because when looking at the

1 computer -- sorry, at the email account at Gary's  
2 direction, that there was a stop at a certain date  
3 where there are no emails found. So --

4 Q. A stop meaning, no emails --

5 A. There's no emails prior to a certain  
6 date.

7 Q. Okay.

8 A. So in an effort to figure out what  
9 happened, I contacted AOL and spoke to a  
10 representative there.

11 Q. Okay, and did you have any actual email  
12 correspondence with this representative?

13 A. No.

14 Q. So what did you ask the representative  
15 and what were the responses that you received?

16 A. I asked the representative what happened  
17 to the emails prior to the dates given and I was put  
18 on hold for a long time, and she came back and told  
19 me that his account was an account that if it was  
20 not logged into for sixty days, that all the emails  
21 would be deleted.

22 Q. Did you receive anything in writing  
23 indicating the fact --

24 A. No, sorry, I misspoke. Not all the  
25 emails, half the emails at that time would be

1 deleted. And did I receive -- and then she said  
2 that there was a yellow dot next to his computer --  
3 I'm sorry, next to his account that indicated that  
4 that had happened to his account.

5 Q. And any other information concerning  
6 when this yellow dot was created?

7 A. No. I asked if she could determine when  
8 that actually took place for the account. She told  
9 me she could not -- not that she couldn't tell me,  
10 that that information wasn't available. I asked if  
11 the emails could be retrieved that were deleted.  
12 She said they could not be retrieved. I asked if  
13 she could send me documentation of this conversation  
14 and she said she could not.

15 Q. Did you ask her whether it was possible  
16 that any of those emails were actually stored on the  
17 laptop?

18 A. I did not ask that question.

19 Q. And I assume you don't know whether they  
20 could or couldn't?

21 A. You're right. I do not know.

22 Q. Now, if I understand your testimony  
23 correctly -- well, let me just ask a different  
24 question. Starting in December of 2008, which I  
25 believe is the starting date when you indicated that

1 to you've attached the emails, you've attached the  
2 ones that you found?

3 A. Yes.

4 MR. WEISZ: Gary, the documents you  
5 provided do not have the attachments. Were those  
6 provided separately?

7 MR. WOODFIELD: As I sit here, I  
8 don't recall.

9 Q. Okay, but I assume, Ms. Liersch, that  
10 these attachments are not part of the package that  
11 you have?

12 MR. WOODFIELD: That's correct.

13 A. Yes, I don't see it here.

14 Q. So the next one is an email dated  
15 December 7, 2015 and to me, this appears to be two  
16 emails on one page and that is a complete string of  
17 emails?

18 A. I believe so, yes.

19 Q. This email is a question to you  
20 concerning whether or not you were able to  
21 understand what may have happened to some of the  
22 emails on your stepfather's AOL account and whether  
23 or not the emails were or could have been deleted,  
24 right?

25 A. I'm sorry, could you repeat that?

1           Q.       Yeah. This email concerns the  
2 investigation of whether or not emails might have  
3 been deleted from your stepfather's account?

4           A.       Correct.

5           Q.       And the circumstances surrounding how  
6 the deletion occurred?

7           A.       Correct. It was the information -- it's  
8 a recount of the information I was provided.

9           Q.       Okay, and your email on Monday,  
10 December 7, 2015, references a link to a term of  
11 service.

12          A.       Right.

13          Q.       Did you actually download the terms of  
14 service?

15          A.       I didn't download it. I mean, I clicked  
16 on it and it opened up in another window.

17          Q.       All right. And do you know if those  
18 were the terms of service that were in place in  
19 2008, in 2009?

20          A.       I don't know and -- no, I don't know.

21          Q.       Okay. Did you look at the terms of  
22 service that you actually opened to see if, in fact,  
23 there was any indication that -- if there was  
24 inactivity or no one signed onto the account for  
25 sixty days, half the emails would be deleted?

1           A.       No. As I says in this email, I looked  
2       at it and it doesn't directly state what I was told.

3                   MR. WEISZ: Let's mark this email  
4       as Exhibit 3, please.

5                   (Whereupon, the One page email dated  
6       December 7, 2015 was marked as Plaintiff's Exhibit  
7       Number 3 for Identification.)

8           Q.       The next email, again, appears to be a  
9       single page dated November 30, 2015 at 2:55 p.m.  
10      This is an email you wrote?

11          A.       Yes.

12          Q.       What does this email describe?

13          A.       It describes a snapshot of their email  
14      account.

15          Q.       Okay. When you say a snapshot, did you  
16      actually take a screen shot?

17          A.       No, but I looked in each folder and  
18      wrote down -- I mean, it's obviously not a screen  
19      shot. I typed up the information.

20          Q.       Okay, and is this information taken from  
21      the web-based AOL account or is this information  
22      taken from data stored on the laptop?

23          A.       From the internet.

24          Q.       Okay. Did you check to see if any of  
25      this information was also contained on the laptop?

1 that goes beyond the first page. Is that consistent  
2 with what you're looking at?

3 A. As far as I know, yes.

4 Q. From which computer did you send this  
5 email?

6 A. Probably mine. Mine.

7 Q. All right, and then the email behind  
8 that is an email dated Monday, May 23, 2016 at  
9 10:34 a.m.

10 A. Yes.

11 Q. That's an email from Mr. Woodfield to  
12 you?

13 A. Yes.

14 Q. And it appears to be the same email  
15 that's at the bottom of the first page we looked at?

16 A. Yes.

17 Q. And then the page after that appears to  
18 be an email dated Tuesday, April 1, 2014, that has a  
19 sticker mark with Plaintiff's Exhibit number?

20 A. Uh-huh.

21 MR. WOODFIELD: You have to answer  
22 audibly.

23 A. Yes. Sorry.

24 Q. And the question that Mr. Woodfield asks  
25 you is that you, at this deposition, you may be

1 asked how it is that you located an email that  
2 predates the July 2010 date as the starting date for  
3 emails on your stepfather's computer?

4 A. Yes.

5 Q. And the email that is attached as an  
6 example has an email dated June 8, 2010?

7 A. Right.

8 Q. And the response is what?

9 A. The response is --

10 Q. Why --

11 A. If you can look at the format of that,  
12 it is an email that was forwarded and that email was  
13 forwarded to someone, and thus, it was part of his  
14 sent email which dates to 2009.

15 Q. Okay. So what I see is an email that's  
16 an original message, is that right, that's sent  
17 Tuesday, June 8, 2010?

18 A. That's not -- it says original message,  
19 yes, and that's the formatting when you forward  
20 something.

21 Q. I see. So when it says original  
22 message, that means that it has been sent on to  
23 somebody else?

24 A. Yes.

25 Q. And then -- so the email was sent on --

1 MR. WEISZ: So we'll mark this last  
2 document as Exhibit 20, and if I ever get the  
3 opportunity to depose Mr. Woodfield, I'll make sure  
4 I ask him.

5 (Whereupon, the AOL terms of service was  
6 marked as Plaintiff's Exhibit Number 20 for  
7 Identification.)

8 Q. Ms. Liersch, if you can allow us another  
9 five-minute break. I just want to confer with Tom  
10 and see if there's anything else that we missed, and  
11 hopefully we'll be done or be done very, very  
12 promptly.

13 (Whereupon, a recess was taken.)

14 Q. Okay. I don't have anymore questions so  
15 unless Mr. Woodfield has questions, from our side,  
16 we're done.

17 MR. WOODFIELD: I just have a  
18 couple.

19 EXAMINATION BY MR. WOODFIELD:

20 Q. Ms. Liersch, you indicated that you're a  
21 stay-at-home mom now. Can you just briefly  
22 describe -- did you go to college?

23 A. Yes, I went to Harvard University and  
24 afterwards I graduated and was an investment banking  
25 analyst.

1 Q. What was your degree at Hartford?

2 A. Economics. I graduated with Honors.

3 Q. Did you work after you graduated from  
4 Harvard?

5 A. Yes.

6 Q. Where did you work?

7 A. JPMorgan.

8 Q. What did you do there?

9 A. Investment banking analyst.

10 Q. In connection with that, did you have  
11 occasion to use computers on a daily basis?

12 A. Yes.

13 Q. Now, are you familiar and comfortable  
14 with using the use of computers?

15 A. I am.

16 Q. Now, with regard to --

17 MR. WOODFIELD: I'm going to mark  
18 one exhibit, Michel, and unfortunately I don't have  
19 a copy for you but I can describe it. I don't think  
20 it was an issue as to what it is, and this is the  
21 Defendant Frank Avellino's notice of filing amended  
22 report regarding emails and it was filed on  
23 December 8, 2015, and it -- the notice of filing  
24 includes a two-page report entitled Defendant Frank  
25 Avellino's Amended Report Regarding Emails. I'm

1 the record, since I can't see what it says, would  
2 you please read aloud the portion of the statement  
3 that you believe is accurate and correct?

4 MR. WOODFIELD: Well, that would  
5 take awhile, but I can tell you if you look at  
6 Exhibit 4 which you marked, it's an exact recital of  
7 that.

8 MR. WEISZ: I'm sorry, Exhibit 4 is  
9 an exact recital of what Mr. Avellino wrote in his  
10 statement?

11 MR. WOODFIELD: Do you have Exhibit  
12 4 in front of you?

13 MR. WEISZ: I do.

14 MR. WOODFIELD: Is that the  
15 information -- is the information contained in --  
16 first of all, Exhibit 4 is a recital of your search  
17 of Frank Avellino's AOL account, correct?

18 A. Correct.

19 Q. And is that the information that's  
20 substantively contained within this exhibit that we  
21 just marked as Exhibit A?

22 A. Correct.

23 Q. Now, with regard to -- Frank Avellino  
24 has testified that he deleted emails every few days.  
25 From your review of Mr. Avellino's AOL account, do

1 you have any indication that substantive emails were  
2 deleted on a daily or frequent basis?

3 MR. WEISZ: Object to form. Beyond  
4 the scope and there's no foundation for this witness  
5 to have any basis to accurately verify or testify  
6 that she has the ability to determine that  
7 information.

8 Q. Okay. You can answer the question.

9 A. Okay. I don't believe he has deleted  
10 emails. Before this whole email deletion question  
11 came up, I'm not even sure he knew how to delete an  
12 email.

13 MR. WOODFIELD: Okay. No further  
14 questions.

15 FURTHER EXAMINATION BY MR. WEISZ:

16 MR. WEISZ: We mean no disrespect  
17 to Harvard University or JPMorgan. Ms. Liersch, did  
18 anything you did at either Hartford or at JPMorgan  
19 train you or prepare you to conduct a forensic  
20 examination of a computer or an AOL account to  
21 determine whether or not emails of those accounts  
22 were complete and whether emails had or had not been  
23 deleted from those accounts?

24 A. Not specifically, no.

25 Q. How about generally? What general

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 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.

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

*Attorneys for Defendant Avellino*

660 U.S. Highway One, Third Floor

North Palm Beach, FL 33408

Phone: (561) 627-8100

Fax: (561) 622-7603

[gwoodfield@haileshaw.com](mailto:gwoodfield@haileshaw.com)

[bpetroni@haileshaw.com](mailto:bpetroni@haileshaw.com)

[svoffee@haileshaw.com](mailto:svoffee@haileshaw.com)

[cmarino@haileshaw.com](mailto:cmarino@haileshaw.com)

By: /s/ Gary A. Woodfield  
Gary A. Woodfield, Esq.  
Florida Bar No. 563102  
Susan B. Yoffee, Esq.  
Florida Bar No. 511919



SERVICE LIST

THOMAS M. MESSANA, ESQ.  
THOMAS ZEICHMAN, ESQ.  
MESSANA, P.A.  
SUITE 1400, 401 EAST LAS OLAS BOULEVARD  
FORT LAUDERDALE, FL 33301  
[tmessana@messana-law.com](mailto:tmessana@messana-law.com)  
[tzeichman@messana-law.com](mailto:tzeichman@messana-law.com)  
*Attorneys for Plaintiffs*

LEONARD K. SAMUELS, ESQ.  
ETHAN MARK, ESQ.  
STEVEN D. WEBER, ESQ.  
BERGER SINGERMAN  
350 EAST LAS OLAS BOULEVARD, STE 1000  
FORT LAUDERDALE, FL 33301  
[emark@bergersingerman.com](mailto:emark@bergersingerman.com)  
[lsamuels@bergersingerman.com](mailto:lsamuels@bergersingerman.com)  
[sweber@bergersingerman.com](mailto:sweber@bergersingerman.com)  
[DRT@bergersingerman.com](mailto:DRT@bergersingerman.com)  
*Attorneys for Plaintiffs*

PETER G. HERMAN, ESQ.  
TRIPP SCOTT, P.A.  
15<sup>TH</sup> FLOOR  
110 SE 6<sup>TH</sup> STREET  
FORT LAUDERDALE, FL 33301  
[pgh@trippscott.com](mailto:pgh@trippscott.com)  
[ele@trippscott.com](mailto:ele@trippscott.com)  
*Attorneys for Defendants Steven F. Jacob  
and Steven F. Jacob CPA & Associates, Inc.*

JONATHAN ETRA, ESQ.  
MARK F. RAYMOND, ESQ.  
SHANE MARTIN, ESQ.  
CHRISTOPHER CAVALLO, ESQ.  
BROAD AND CASSEL  
One Biscayne Tower, 21<sup>st</sup> Floor  
2 South Biscayne Blvd.  
Miami, FL 33131  
[mraymond@broadandcassel.com](mailto:mraymond@broadandcassel.com)  
[ssmith@broadandcassel.com](mailto:ssmith@broadandcassel.com)  
[ccavallo@broadandcassel.com](mailto:ccavallo@broadandcassel.com)  
[jetra@broadandcassel.com](mailto:jetra@broadandcassel.com)  
*Attorneys for Michael Bienes*

**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.

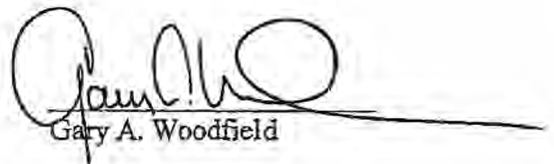
The Computer has the following folders all contained through the AOL account (there are no emails saved to the computer from the AOL account); as of November 30, 2015, the status is as follows:

- 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

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

EXHIBIT

F

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 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

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Plaintiffs,

v.

MICHAEL D. SULLIVAN, et al.,

Defendants.

**DEFENDANT FRANK AVELLINO'S NOTICE OF FILING**  
**AFFIDAVIT OF GARY WOODFIELD**

Defendant, Frank Avellino, by and through his undersigned counsel, hereby gives notice of filing the attached Affidavit of Gary Woodfield pursuant to Court order dated June 16, 2016.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of June, 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 Defendant Avellino*  
660 U.S. Highway One, Third Floor  
North Palm Beach, FL 33408  
Phone: (561) 627-8100  
Fax: (561) 622-7603  
[gwoodfield@haileshaw.com](mailto:gwoodfield@haileshaw.com)  
[bpetroni@haileshaw.com](mailto:bpetroni@haileshaw.com)  
[syoffee@haileshaw.com](mailto:syoffee@haileshaw.com)  
[yvolcv@haileshaw.com](mailto:yvolcv@haileshaw.com)

By: /s/ Gary A. Woodfield  
Gary A. Woodfield, Esq.  
Florida Bar No. 563102  
Susan B. Yoffee, Esq.  
Florida Bar No. 511919



SERVICE LIST

THOMAS M. MESSANA, ESQ.  
THOMAS ZEICHMAN, ESQ.  
MESSANA, P.A.  
SUITE 1400, 401 EAST LAS OLAS BOULEVARD  
FORT LAUDERDALE, FL 33301  
[tmessana@messana-law.com](mailto:tmessana@messana-law.com)  
[tzeichman@messana-law.com](mailto:tzeichman@messana-law.com)  
*Attorneys for Plaintiffs*

LEONARD K. SAMUELS, ESQ.  
ETHAN MARK, ESQ.  
MICHAEL O. WEISZ, ESQ.  
ZACHARY P. HYMAN, ESQ.  
BERGER SINGERMAN  
350 EAST LAS OLAS BOULEVARD, STE 1000  
FORT LAUDERDALE, FL 33301  
[emark@bergersingerman.com](mailto:emark@bergersingerman.com)  
[lsamuels@bergersingerman.com](mailto:lsamuels@bergersingerman.com)  
[mweisz@bergersingerman.com](mailto:mweisz@bergersingerman.com)  
[zhyman@bergersingerman.com](mailto:zhyman@bergersingerman.com)  
[mvega@bergersingerman.com](mailto:mvega@bergersingerman.com)  
[DRT@bergersingerman.com](mailto:DRT@bergersingerman.com)  
*Attorneys for Plaintiff*

PETER G. HERMAN, ESQ.  
PETER G. HERMAN, ESQ.  
THE HERMAN LAW GROUP, P. A.  
1401 E. BROWARD BLVD., STE 206  
FORT LAUDERDALE, FL 33301  
[pgh@thelaw.com](mailto:pgh@thelaw.com)  
*Attorneys for Defendants Steven F. Jacob  
and Steven F. Jacob CPA & Associates, Inc.*

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.

**AFFIDAVIT OF GARY WOODFIELD**

COUNTY OF PALM BEACH        }  
STATE OF FLORIDA            } ss:

Before me, personally appeared Gary Woodfield who, being duly sworn, deposes and states;

1. I am counsel for Frank Avellino ("Avellino"), a named defendant in the above captioned action. I submit this affidavit pursuant to the Court's Order Denying Plaintiffs' Motion to Compel the Inspection of Defendant Frank Avellino's Storage Facility, dated June 16, 2016.

2. Plaintiffs' motion sought to inspect what they alleged were files in Avellino's storage facility to locate and produce emails and other responsive documents to Plaintiffs' outstanding discovery requests.

3. The storage facility referred to in the motion is not Avellino's storage facility but rather is my firm's storage facility that contains closed files including pleadings and discovery

from other actions in which I have represented Avellino.


4. The files in our firm's storage facility do not contain emails or documents responsive to Plaintiffs' discovery demands in this action.

  
GARY WOODFIELD

STATE OF FLORIDA

COUNTY OF PALM BEACH

Subscribed and sworn to before me this 21<sup>st</sup> day of June, 2016 by Gary Woodfield, who is personally known to me or who produced \_\_\_\_\_ as identification.

  
Notary Public  
Print Name: \_\_\_\_\_

[SEAL]

