

IN THE CIRCUIT COURT OF THE 17TH 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'S MICHAEL BIENES' RESPONSE TO PLAINTIFFS'
MOTION FOR AN ORDER TO SHOW CAUSE AGAINST
DEFENDANT MICHAEL BIENES

Defendant, Michael Bienes, by and through his undersigned counsel, hereby files his Response to Plaintiffs' Motion for an Order to Show Cause Against Defendant Michael Bienes as follows:

1. Plaintiffs are seeking this Court to enter an Order to Show Cause why Defendant Bienes should not be held in contempt for refusing to abide by an order, or alternatively to direct Bienes to turnover his computer to a neutral party for purposes of conducting an inspection of his computer. This is Plaintiffs' fourth attempt to have this Court direct Bienes to turnover his computer, and like their previous attempts, Plaintiffs have failed to accurately depict the facts or provide a sufficient legal basis for their request.

2. In this motion, Plaintiffs allege that Defendant Bienes did not comply with this Court's November 15, 2015 Order, because he: (1) refused to provide a privilege log; (2) has not provided any responsive emails to Plaintiffs; (3) did not submit a consent form to AOL until April 2016; and (4) did not respond to Plaintiffs' request for a random sample of emails.

Contrary to Plaintiffs' Motion, Defendant Bienes has fully complied with this Court's November 16, 2015 Order, a copy of which is attached hereto as Exhibit "A".

3. Bienes has not refused to provide a privilege log. In his Revised Memo, attached as Exhibit B, Bienes' properly identified 387 emails with his counsel, Mark Raymond. He is not required to provide a privilege log for these privileged communications. *See DLJ Mortgage Capital, Inc. v. Fox*, 112 So.3d 644, 645 (Fla. 4th DCA 2013) ("...the failure to file a log should not be applied to categorial assertions of privilege"); *Nevin v. Palm Beach County School Board*, 958 So.2d 1003, 1008 (Fla. 1st DCA 2007) (...failure to file a privilege log should not apply where assertion of privilege is not document-specific, but category specific and the category itself is plainly protected). Bienes provided the nature of these documents as emails with his counsel, and is not obligated to provide any further information, as that would reveal the information which is itself privileged and protected. *See Florida Rule of Civil Procedure 1.280(b)(6)*; *State Farm Florida Insurance Company v. Coburn*, 136 So.3d 711, 711 (Fla 2d DCA 2014) (a party is only required to file a privilege log if the information is otherwise discoverable).

4. Bienes has also provided responsive emails to Plaintiffs' counsel. As set forth in Exhibit B, Bienes forwarded to Plaintiffs' counsel documents on November 16, 2015 (BIENES 0005616 and BIENES 0005617) and on December 8, 2015 (BIENES 0005459 through BIENES 0005617.) The undersigned counsel is unaware of any requests by Plaintiffs' counsel to provide a random sample of emails, but to the extent there were such requests, there are no emails to provide other than the ones already provided to Plaintiffs' counsel.¹

¹ In response to Bienes' written authorization to AOL to search his email account for emails in the years 2008 and 2009, AOL was not able to find any emails during that time period.

5. Finally, pursuant to the Court's directive, on November 13, 2015 Defendant Bienes, through his prior counsel, sent written authorization to AOL via federal express, and served a copy to Plaintiffs. A copy of the authorization and service on Plaintiffs' counsel is attached hereto as Exhibit "C". Subsequent to that written request, Bienes' counsel withdrew as counsel. When the undersigned counsel appeared on behalf of Bienes, inquiries were made regarding AOL's failure to provide the requested emails, and it was discovered AOL required a specific notarized consent form along with payment for researching and administrative costs.² Upon receiving the specific consent form, Bienes filled it out and sent it to AOL in April 2016.

6. Plaintiffs' request for this Court to impose sanctions of civil contempt against Bienes or to direct the turnover of Bienes' computer is overreaching and unwarranted. Courts should only impose sanctions in extreme circumstances where willful non-compliance with the court's order is shown by the record. *Trustee of Chase Manhattan Mortgage & Realty Trust v. Sailboat Apartment Corp.*, 323 So.2d 654, 657 (Fla. 3rd DCA 1976). In the instant case, Bienes has complied with the Court's Order; there has been no willful non-compliance.

Plaintiffs' Motion should be denied.

HAILE, SHAW & PFAFFENBERGER, P.A.

*Attorneys for Defendants Frank Avellino
and Michael Bienes*

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² Even though the written authorization sent by Bienes' former counsel was received by AOL via federal express, AOL did not inform Bienes or his counsel that a specific form had to be executed.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd 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

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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:

6784786-1

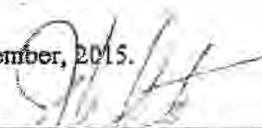
1



- 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.*


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

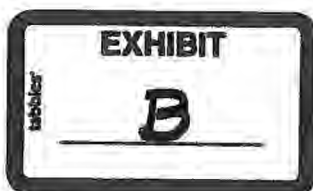
As of November 16, 2015, folders relating to the e-mail account MichaelBienes@AOL.com and their contents were as follows:

- 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.



Shane Martin

From: Shane Martin
Sent: Monday, November 16, 2015 2:47 PM
To: 'tmessana@messana-law.com'; 'Michelle L. Albrecht (MALbrecht@bergersingerman.com)'; 'blieberman@messana-law.com'; 'pgh@trippscott.com'; 'asg@trippscott.com'; 'Ellen L Eckblad (ele@TrippScott.com)'; 'rep@trippscott.com'; 'DRT@bergersingerman.com'; 'Isamuels@bergersingerman.com'; 'emark@bergersingerman.com'; 'SWeber@bergersingerman.com'; 'Michelle L Albrecht (MALbrecht@bergersingerman.com)'; 'zhyman@bergersingerman.com'; 'clamb@bergersingerman.com'; 'mvega@bergersingerman.com'; 'Brenda Petroni'; 'Gary Woodfield'; 'Susan Yoffee'; 'Cheryl Marino'
Cc: Jonathan Etra; Mark Raymond; Yaremi Portanova; Stacy Smith; Yusimy Bordes
Subject: SERVICE OF COURT DOCUMENT - P&S Associates, General Partnership et. al. v. Michael D. Sullivan, et. al. - 12-034123 (07)
Attachments: AOL Authorization to Release Personal E-Mails.pdf

Court:	IN THE CIRCUIT COURT FOR THE 17 TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA
Case No:	CACE 12-034123 (07)
Plaintiff(s):	P&S ASSOCIATES, GENERAL PARTNERSHIP, et al.
Defendant(s):	MICHAEL D. SULLIVAN, et al.
Title of Document(s):	AOL AUTHORIZATION TO RELEASE PERSONAL E-MAILS
Sender's Name:	JONATHAN ETRA
Sender's Telephone No:	305-373-9447

The enclosed document is being served upon you pursuant to Rule 2.516 of the Florida Rule of Judicial Administration.

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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,

A handwritten signature in black ink, appearing to read 'Jonathan Etra', with a small 'tr' written below the signature.

Jonathan Etra

Cc:
Steven D. Weber
Thomas Zeichman

A handwritten signature in black ink, appearing to read 'Michael Bienes', written over a printed name.

Michael Bienes
MICHAEL BIENES
Print Name

Date: NOV. 16, 2015