

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

CASE NO. 12-034123 (07)

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

Plaintiffs,

vs.

STEVEN JACOB, et al.

Defendants.

**PLAINTIFFS' REPLY IN SUPPORT OF SECOND RENEWED MOTION
TO COMPEL DEFENDANTS FRANK AVELLINO AND
MICHAEL BIENES TO TURNOVER COMPUTERS**

Defendants Frank Avellino (“Avellino”) and Michael Bienes (“Bienes”) (collectively, “Defendants”) did not attempt to preserve any electronically stored information, or search for any electronically stored information until after Plaintiffs filed a *Motion to Strike Pleadings, and in the Alternative, Motion for an Adverse Inference*, even though electronically stored information was first sought from them a year and a half before that. Despite the fact that there is no dispute that Defendants’ e-mails and other associated electronically stored information was destroyed without any reasonable explanation of what happened, Defendants maintain that *Plaintiffs’ Second Renewed Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents* (the “Motion”) must be denied. Specifically, Defendants claim that because Plaintiffs cannot prove that documents which were exclusively in Defendants’ possession and were destroyed by Defendants, were relevant, the Motion must be denied. Such a result cannot be permitted, as it would effectively permit parties

to intentionally delete relevant materials, and get away with it by requiring their adversary to prove the contents of files which cannot be obtained by that party. Accordingly, Plaintiffs respectfully request that the Court enter an Order granting the Motion, and directing Defendants to turn over their computers to a **neutral third party** for a forensic examination.¹

Avellino and Bienes' Alleged Searches were Deficient

There is no question that Avellino and Bienes' e-mails were deleted, and that neither Avellino nor Bienes attempted to preserve any relevant evidence until after they were faced with sanctions, as a result of their testimony that they both deleted all of their e-mails on a daily basis. However, Defendants claim that they should not be required to turn their computers over to a third party because they conducted untimely and inherently deficient searches of their e-mails.² Such conduct constitutes evidence of thwarting discovery.

Avellino argues that his computer should not be turned over, because "his daughter has conducted a complete search of his computer and all relevant e-mails have been produced." However, Avellino's daughter, Rachel Liersch ("Liersch") has no training as it relates to the analysis of a computer. Liersch Trans. at 8:7-13.³ And Liersch only ran a cursory search of a single folder in Avellino's computer. *Id.* at 14:6-23; 16:14-25; 17:23-18:19. Liersch did not: (i) search through meta-data (*id.* at 15:18-20), (ii) search any computer archives (*id.*) (iii) search

¹ Avellino also claims that some of the other discovery misconduct referenced in the Motion does not support Plaintiffs' position. However Avellino misstates the circumstances surrounding his conduct. For example, Avellino points to the fact that he allowed his step daughter to be deposed to show that he was not thwarting discovery. However, Avellino did not agree to make Liersch available for deposition until after her unavailability was used to justify the turnover of his computer. Thus, that conduct should still be considered by the Court.

² Excerpts from the deposition of Rachel Liersch are attached hereto as **Exhibit "A"**.

³ Specifically Liersch testified as follows:

Q: Do you have any particular skill or training in searching for e-mails

A: I do not.

Q: Have you ever been asked to do something like this before?

A: No.

Id. Liersch also testified that she had no training or specific knowledge as to how to forensically evaluate a computer. *Id.* at 18: 4-7.

Avellino's computer directories (*id.* at 17:13-22); (iv) search through Avellino's hard drive (*id.* at 14:16-23); (v) and did not look for e-mail attachments which could have been saved in Avellino's computer. *Id.* at 18:8-16. Those attachments would include records from the Partnerships that were sent to Avellino every quarter, as well as communications exchanged with Michael D. Sullivan. Moreover, Liersch's searches were deficient because she did not have any specific knowledge as to how to forensically evaluate or examine a computer. *Id.* at 18:4-7. Accordingly, Liersch's search of Avellino's computers cannot be used to establish that Avellino has conducted a meaningful search for electronically stored information.

Like Avellino, Bienes argues that he has attempted to locate e-mails, but Bienes has yet to provide any evidence or information concerning any efforts undertaken to locate such e-mails. Bienes claims that he could not locate any e-mails from AOL, and that he executed a consent form. However, the consent form attached to Bienes's response was deficient, and according to Bienes' counsel, Bienes did not attempt to attempt to locate such e-mails from AOL until April 2016, more than six months after the Court directed him to locate the e-mails. While Bienes claims that he could not obtain any e-mails from AOL, Bienes' counsel has refused to produce any documentation confirming that fact, or any efforts made to locate such information. Moreover, Bienes has not conducted any search of his computer to locate what could consist of relevant evidence. In any case, the fact that Bienes could not locate such e-mails from AOL mandates the turnover of Bienes' computer for an inspection, as the only way to recover the e-mails which Bienes has deleted, is through a forensic analysis. *See* Declaration of Jason Park ¶ 4 ("Park Decl.").⁴

Unlike the half hazard searches previously conducted, a forensic analysis of Avellino and Bienes' computers would facilitate the recovery of the electronically stored information which

⁴ A true and correct copy of the Park Decl. is attached hereto as **Exhibit "B"**.

had purportedly been deleted from Defendants' e-mail inboxes. *Id.* ¶ 5. Further, a forensic analysis of Avellino and Bienes' computers can recover attachments to e-mails, which are usually automatically saved on a computer. *Id.*¶ 8. Even if documents were deleted, fragments of those files are not, and those fragments can be reconstructed. *Id.* ¶¶ 8-10. Moreover, the absence of certain files can demonstrate the intentional destruction of relevant materials. *Id.* ¶¶ 9, 11. Because none of the foregoing processes have been effectuated, and Defendants have not conducted a meaningful search of their computers and e-mail, there is a substantial basis to order the turnover of Avellino and Bienes' computers.

Avellino's Inconsistent Testimony Establishes a Need to Conduct a Forensic Examination of His Computer

While Bienes refused to justify his regular deletion of electronically stored information, Avellino has attempted to explain what happened to his e-mails. However, Avellino's explanation of what happened is not supported by any evidence, and is inherently inconsistent. Having a neutral third party inspect Avellino's computers would shed light on that issue.

First Avellino claimed that he deleted his e-mails every two days. Then Avellino claimed that he only deleted spam and vendor e-mails.⁵ Avellino later changed his tune and testified that AOL deleted his e-mails automatically every two weeks. Motion at 2. Now, Avellino, through his daughter and counsel, claims that AOL deleted all of his e-mails because AOL deleted e-mails after 60 days of the computer's non-use.⁶ However, Avellino's daughter testified that she regularly checked Avellino's e-mails, and the only time when she did not check Avellino's e-mails was after her child was born in April, 2009. Liersch TR at 38:8-6-19. Considering the fact that Avellino claims to only have e-mails in his inbox which are from July, 2010 and forward,

⁵ According to Liersch, Avellino did not delete any spam or vender e-mails, Liersch did. Liersch TR 49:13-50:12.

⁶ Avellino also has not presented any evidence to support his claim. Instead he relies on his step-daughter's testimony which is hearsay. *See* Liersch TR 36:8-37:22.

and e-mails in his sent box from December, 2009 and forward, Avellino's claim lacks merit.⁷ After all, Avellino's daughter testified that between 2009 to the present, she did not check Avellino's e-mails during a single 60 day period which started in April 2009. Accordingly Avellino's daughter stopped accessing Avellino's e-mails between April and June in 2009, then Avellino e-mails which were sent or received prior to December, 2009 would have been preserved. Moreover, there is no explanation as to why there a significant number of e-mails were sent or received by Avellino before those dates.⁸ Further, Avellino's daughter testified that he did not know how to delete e-mails, but that she deleted spam and vendor e-mails for him. That testimony demonstrates that Avellino filed a false errata sheet.

Notwithstanding the fact that, as discussed above, a forensic analysis can ensure the recovery of such materials, a forensic analysis of Avellino's computers will also reveal when Avellino stopped accessing his e-mails, if Avellino did not check or log into his AOL database during that time period. "Computers regularly save information concerning when a user accesses a particular website. Thus if a user did not access their e-mail during a particular period of time via a web browser, that is something that may be determined." Park Decl ¶ 12.

⁷ In fact, Avellino's daughter could not explain what actually happened to Avellino's e-mails. Specifically she testified as follows:

Q: Your email on top indicates that AOL would delete one half of all his e-mail starting from the oldest messages; do you see that?

A: Maybe –

Q: -- if one half of all his e-mails would have been deleted for no activity?

A: I can't assume to know what AOL does, but maybe they sort it by folder. I have no idea.

Liersch TR 72:6-13.

⁸ Avellino claims that the e-mails were part of an attachment. However, Liersch did not testify that such e-mails were part of an e-mail chain. Instead she confirmed the substance of Avellino's testimony, which is an improper characterization of another party's testimony, and testified that e-mails which appeared to be part of a chain were "three separate e-mails which were unrelated." Liersch TR at 47:6-14.

There is No Less Intrusive Means to Locate the Materials Sought

Avellino and Bienes argue that they will be prejudiced if their entire computers were taken to be inspected, as their communications with counsel are clearly privileged. However, neither Avellino nor Bienes comprehend the process through which Plaintiffs are seeking to obtain relevant information. Specifically, Plaintiffs have set forth a procedure which ensures that a limited search of Avellino and Bienes' computers will occur and that their privacy interests will be protected.⁹ If the Motion is granted, Avellino and Bienes will be required to turnover their computer to a **neutral third party**, who will prepare a mirror image of their computers. Exhibit C at 9. The neutral third party will run searches of Avellino and Bienes computers based on terminology which is agreed to by the parties. *Id.* Once the searches have been completed, Avellino and Bienes counsel will be provided with an index of files to protect their right to privacy, and their counsel can assert privileges as it relates to those documents. *Id.* After the initial review for privilege, Avellino and Bienes' counsel will be given copies of the files which have been reproduced to again conduct a privilege review. *Id.* at 9-10 Only after the second privilege review has been completed, will Plaintiffs receive any documents from Avellino and Bienes' computers. *Id.* at 10.

All of these processes can be completed without opening any of Avellino and Bienes' documents or files or invading their privacy. *Id.* at 9. Moreover, because a mirror image of the computers will be created, Avellino and Bienes will not be inconvenienced. Park Decl. ¶ 16. Accordingly, there is no less intrusive means of searching for and obtaining the documents sought.

⁹ A true and correct copy of a proposed order on the Motion is attached hereto as **Exhibit "C"**.

Conclusion

Under the Florida Rules of Civil Procedure, a party is required to conduct a reasonable inquiry as to the status of relevant materials, and ensure that such materials were preserved. Avellino and Bienes were given two prior opportunities to comply with the Florida Rules of Civil Procedure. Accordingly, the Court should require Avellino and Bienes to turnover their computers to a neutral third party so that a limited search for relevant materials can be completed. Such orders are often entered in Florida courts.

WHEREFORE Plaintiffs respectfully request that the Court enter and Order: (i) Granting the Motion; (ii) Entering an Order, the form of which is attached hereto as **Exhibit “C”**; (iii) Directing Defendants to Turnover their Computers to a neutral third party for a forensic examination; (iv) Award Plaintiffs attorney’s fees and costs in connection with this Motion and the forensic examination of Defendants’ computers; and (v) Grant such further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on June 28, 2016, a copy of the foregoing was filed with the Clerk of the Court via the E-filing Portal, and served via Electronic Mail by the E-filing Portal upon:

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EXHIBIT A

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

6 -----x

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

15 Plaintiffs,

16 v.

17 STEVEN JACOB, an individual, STEVEN F.
18 JACOB, CPA & ASSOCIATES, INC., a Florida
19 corporation, FRANK AVELLINO, an individual,
20 and MICHAEL BIENES, an individual,
21 STEVEN JACOB, et al.,

22 Defendants.

23 -----x

24 - - -
25 DEPOSITION OF RACHEL LIERSCH
- - -

26 Taken before Gina M. Ruocco, LSR #516, Court
27 Reporter and Notary Public within and for the
28 State of Connecticut, pursuant to Notice and
29 the Connecticut Practice Book, at 6 Landmark
30 Square, Suite 400, Stamford, Connecticut on
31 Wednesday, June 8, 2016 commencing at 9:55 a.m.

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 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 A. Excuse me?

2 Q. Did any of the emails have attachments?

3 A. I believe so.

4 Q. Did you open any attachments?

5 A. I believe I was directed to open two
6 attachments and send them by Gary.

7 Q. Which attachments did you open and send?

8 A. I do not recall.

9 Q. Okay. Were there any emails that had
10 attachments that you did not open?

11 A. Possibly. I didn't open attachments
12 unless I was asked to, but I don't believe many of
13 the emails had attachments. Probably the only ones
14 that had attachments were the ones that I was asked
15 to open.

16 Q. Okay. Do you know what metadata is?

17 A. Excuse me?

18 Q. Do you know what metadata,
19 M-E-T-A-D-A-T-A, is?

20 A. I do not.

21 Q. Okay. Do you know whether your search
22 included any archives?

23 A. I'm not sure what you're asking.

24 Q. Do you know whether there were any
25 archives that were accessible either on the computer

1 or on AOL to conduct searches for emails?

2 A. I'm -- archiving to what?

3 Q. I'm just asking if you are aware of any
4 archives that were created or existed --

5 A. No.

6 Q. Did you search for such archives?

7 A. Given I'm not really sure what you're
8 asking, I don't think I can answer that question.

9 Q. Okay. So let me ask you this
10 differently. Do you know what protocols exist on a
11 computer or in AOL to save emails?

12 A. No. Most emails are just saved if
13 not -- if no other action is taken.

14 Q. Okay. But you are not aware from your
15 own personal knowledge how even if an email is moved
16 to another folder or, in fact, deleted, whether or
17 not that -- that email can still be retrieved from
18 somewhere?

19 A. No, I -- I don't know. You're right. I
20 don't know.

21 Q. Your stepfather's computer, how many
22 times did you search that for emails?

23 A. I think I did one search on his email.

24 Q. Okay. Tell me --

25 A. I'm sorry on his computer.

1 Q. Tell me what you did to search the
2 computer.

3 A. Oh, to search the computer?

4 Q. Yes.

5 A. I typed in AOL, I typed in -- I searched
6 around. I mean, I don't know. I just looked around
7 at icons to see if there was anything that would
8 hold. There was nothing in documents.

9 Q. Do you know what a directory is?

10 A. Yes. On a computer?

11 Q. Yes.

12 A. Yes.

13 Q. Did you look in any directories on the
14 computer, on your stepfather's computer?

15 A. I didn't look -- I didn't penetrate
16 through directories on his computer. I just
17 searched and usually they have a search function.
18 So I tried searching for email addresses sort of
19 thing and nothing came up. So since nothing came up
20 for multiple names, it didn't look like there were
21 any email addresses -- sorry, emails saved on his
22 computer.

23 Q. And can you verify or certify that your
24 search was, in fact, a complete and thorough search
25 of all the directories and subdirectories on your

1 stepfather's computer?

2 A. Only that I did it to the best of my
3 ability, but as --

4 Q. And your ability is not based on any
5 training or specific knowledge on how to
6 forensically evaluate or examine a computer, is it?

7 A. No.

8 Q. Did you search to see whether or not any
9 emails or attachments to emails were on your
10 stepfather's computer?

11 A. Any -- sorry, say that again.

12 Q. Did you search your stepfather's
13 computer to determine whether or not any emails or
14 attachments to emails were on the computer?

15 A. So we discussed the emails already,
16 correct?

17 Q. Right.

18 A. So no, I did not look for any
19 attachments.

20 Q. Okay. Now, was this the first time you
21 had access to your stepfather's email account?

22 A. No.

23 Q. What is your history in terms of
24 accessing your stepfather's AOL account?

25 A. I've always, as long as I can remember,

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 you accessed your stepfather's AOL account more
2 frequently, do you recall any period of time between
3 December of 2008 and the present where you went more
4 than sixty days without checking into that account?

5 A. That's certainly a possibility.

6 Q. I'm not asking you that. I'm asking
7 whether you specifically recall such a hiatus.

8 A. I recall that I gave birth to a child on
9 April 23rd of 2009 and I was fairly busy.

10 Q. So -- congratulations, but so is it your
11 supposition that between the birth of your child in
12 April of -- what was -- April what?

13 A. April 2009.

14 Q. April --

15 A. The 23rd.

16 Q. Okay, so between April 23, 2009 and June
17 23, 2009, you did not look at your father's email
18 account even once?

19 A. I'm not stating that. I don't know.

20 Q. Okay. And that, in fact, was within
21 four-to-six months of the time in December 2008 when
22 you began checking your stepfather's email account
23 at least weekly, if not more often?

24 A. It would honestly depend on if there was
25 something going on that needed to be checked. I

1 Q. Okay. I want you to know I spent an
2 hour trying to figure out how these three emails
3 were related and how they got in one email string.
4 So thank you for explaining that.

5 A. You're welcome.

6 Q. It gives me great comfort to know that
7 these are, in fact, three separate emails that are
8 unrelated.

9 What we're going to do -- and this will
10 be a little more time consuming, but I would like
11 these three pages that we've just identified to be
12 marked as Plaintiff's Exhibit 1 for this deposition.
13 So if you could give these three pages to the court
14 reporter, she'll mark them, okay.

15 (Whereupon, the Three page emails dated
16 May 23, 2016 was marked as Plaintiff's Exhibit
17 Number 1 for Identification.)

18 Q. The next email is from you dated
19 April 19, 2016 at 11:02 a.m.

20 A. Yes.

21 Q. And this is an email that you wrote; is
22 that right?

23 A. Yes.

24 Q. And does this email reflect all of the
25 names that you searched for when you accessed your

1 forward, it's not a forward like the forward that --
2 something that was forwarded to Gary. It's one of
3 those look at my puppies pictures sort of forward or
4 a political joke forward. It's nothing of some
5 substantive or personal interaction.

6 Q. But when John would send a forward, and
7 he sent them to you and to your stepfather, did he
8 send separate emails to each or did he simply
9 forward and list all of the names to whom that email
10 was being forwarded?

11 A. I can't answer that. I would assume it
12 was a group but nothing I looked at.

13 Q. If you deleted these emails from your
14 stepfather's computer at or about the time they were
15 sent, is that because you viewed these emails as
16 spam or read an email that were not worthy of being
17 kept?

18 A. Exactly. My parents don't check email.
19 They don't use email so I figured they're not going
20 to spend time to look at pictures of kittens.

21 Q. So did you act as a, I guess, a little
22 bit of a, you know, weed picker and decide which
23 emails were not worthy of being kept, in addition to
24 simply vendor and spam emails?

25 A. I don't think that's an accurate

1 categorization. If it was something that was
2 written, even if the first line was -- if there was
3 something like, please take a look at this, that was
4 personal in nature, I did not delete it. If it was
5 clearly a forward of some sort of thing that some
6 third party somewhere put together that gets passed
7 around and fills up people's computers, yes, I would
8 sometimes make my executive decision and delete it.

9 Q. Would you tell your stepfather, this
10 email is here, you can look at it if you want to, if
11 not, I'll get rid of it?

12 A. Maybe.

13 Q. Let's make this April 19th email as
14 Exhibit 2.

15 (Whereupon, the One page email dated
16 April 19, 2016 was marked as Plaintiff's Exhibit
17 Number 2 for Identification.)

18 Q. Now, also at the bottom or near the
19 bottom of this email, it indicates that I've
20 attached the emails to you from John Combs. What
21 attachments went with this email?

22 A. It says here, I found four emails
23 received and five emails sent. It was those, I'm
24 presuming.

25 Q. So at the bottom when you're referring

1 A. Yes.

2 Q. Your email on top indicates that AOL
3 would delete one half of all his email starting from
4 the oldest messages; do you see that?

5 A. Yes.

6 Q. So why would his sent emails have a
7 start date of December 2009 and his old mail have a
8 start date of July 2010 --

9 A. Maybe --

10 Q. -- if one half of all his emails would
11 have been deleted for no activity?

12 A. I can't assume to know what AOL does,
13 but maybe they sort it by folder. I have no idea.

14 Q. Okay.

15 MR. WEISZ: Let's mark this then as
16 Exhibit 17, please.

17 (Whereupon, the Four page email dated
18 November 3, 2015 was marked as Plaintiff's Exhibit
19 Number 17 for Identification.)

20 Q. Let's go to the next document which is
21 October 27, 2015 at 9:15 a.m.

22 A. Yes.

23 Q. This seems to be a duplicate of what was
24 part of the most recent exhibit we marked which was
25 Exhibit 17. It appears to be part of those four

EXHIBIT B

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

CASE NO. 12-034123 (07)

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

Plaintiffs,

vs.

STEVEN JACOB, et al.

Defendants.

**DECLARATION OF JASON PARK IN SUPPORT OF SECOND RENEWED MOTION
FOR TURNOVER OF COMPUTERS**

I, Jason Park, pursuant to Pursuant to Fla. Stat. § 95.525(2), states as follows:

1. I am over eighteen (18) years of age and competent to testify to the matters stated herein.

2. I am Director of Forensic Services for US Legal Support, a litigation services firm located at 1580 Lincoln Street, Suite 930, Denver, Colorado 80203. Prior to working at US Legal Support, I was a Computer Forensic Examiner and Trainer at MD5 Group, LLC. In my capacity as a Forensic Examiner and Trainer, I have spent 8 years educating people as to how to conduct a forensic analysis of a computer.

3. In addition to the foregoing, I have more than 12 years of experience conducting forensic analysis of computers and 22 years of experience in automated litigation support. I have conducted a forensic analysis of hundreds of different computers, servers and phones.

4. Based on my experience, examining a user's e-mail account remotely through a web browser, or downloading the current contents of an email account is an ineffective means of locating e-mails or other documents which were accessed by the owner of the e-mail account, especially where there are issues concerning the possible deletion of e-mails. If a user accesses his e-mail through an actual computer program ("Email Client"), the Email Client may save e-mails on his hard disk, in an email database or in a separate folder. Accordingly, even if the e-mail is deleted from the email provider's database, those e-mails may still be recovered through a forensic examination of that user's computer, and they may still be on the hard drive on that computer.

5. On the other hand, if a user used a web browser to access his e-mail, various files or fragments of files can automatically be saved on that user's computer. Those files may contain e-mails or other documents which were viewed via the user's web browser. Those files can be recovered, and the fragments can be reconstructed through a forensic analysis of a computer.

6. Certain portions of webpages, copies of webpages, and other information accessed through a user's web browser is often saved on a computer's hard drive. When a user accesses a web browser, the contents of what they view may be cached on the user's hard drive. Although files in a computer's cache may be overwritten, fragments of those files are often preserved. Accordingly, the fragments may be used to reconstruct the data.

7. Like files in the cache, files which are processed through a computer's Random Access Memory ("RAM") may be saved to the computer's hard drive. (RAM is the type of memory which allows a computer to run programs). The contents of the RAM may be written to the hard drive in a location named "pagefile.sys". Documents may be recovered from the pagefile.sys.

8. Any documents which are opened or downloaded through the Internet or via an e-mail client are automatically saved on a computer. Those files and their locations on a hard drive are generally not known by an average computer user, and therefore may not have been deleted.

9. Thus, attachments to e-mails, which were opened are likely to be present on a computer's hard drive, unless the user has located and intentionally deleted them.

10. Even if documents were deleted, those documents may be recovered. When a user deletes a file in the ordinary use of a computer, the file remains on the hard drive until the space that file occupies is overwritten by new data. Absent a high level of sophistication with computers or purposeful use of specialized software to ensure permanent deletion by overwriting the deleted file, the ordinary deletion of a file does not completely remove it from a computer. Instead, a deleted file is overwritten by another one.

11. Simply put, absent specialized expertise in computer systems or use of file wiping tools, an ordinary user will not be able to purposely overwrite files from a computer in a way that would render them unrecoverable. However, it is possible for portions of the unallocated (free) space to be overwritten by the operating system itself during the regular course of operation.

12. Further, information concerning the frequency with which a user accesses their e-mail can be determined through a forensic analysis of their computers. Computers regularly save information concerning when a user accesses a particular website. Thus, if a user did not access their e-mail during a particular period of time via a web browser, that is something that may be determined.

13. Accordingly, if there are none of the artifacts described above, it may indicate that a computer user has intentionally deleted files, because the many of the files and folders are automatically preserved, unless a party seeks to delete them.

14. Because computer forensics involves an analysis of the data concerning a particular file or document, and not necessarily the actual contents of such a file, a forensic examiner can reconstruct deleted or otherwise overwritten files and data without viewing the underlying document itself. Simply put, a forensic analysis can be designed in such a way that viewing the actual contents of files can be avoided.

15. There are additional safeguards to protect a user's privacy when conducting a forensic analysis of a computer. It's possible to provide an index of files or fragments of files to a user before attempting to view or export them. Additionally, entering into confidentiality and/or non-disclosure agreements is very common when it comes to a forensic analysis of computers.

16. All of these processes can also be completed with minimum intrusion to a particular user, through the creation of a "forensic image" of a computer hard drive. A forensic image is a bit by bit clone of the data held on the drive and which creates an exact replica of the original hard drive, including metadata, stored on a hard drive. The forensic image is made while utilizing "write blocking" techniques. Write blocking prevents any data from the original hard drive from being altered.

Verification Pursuant to Fla. Stat. § 95.525(2)

Under penalties of perjury, I declare that I have read the foregoing Declaration and that the facts stated in it are true.

Dated June 24, 2016



JASON PARK

EXHIBIT C

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

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

Plaintiffs,

v.

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

Defendants.

[PROPOSED ORDER]

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

THIS MATTER came before the Court on June 30, 2016, upon Plaintiffs' Second Renewed Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Second Motion to Compel"), Plaintiffs' Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Motion to Compel") and on December 9, 2015, upon Plaintiffs' Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Renewed Motion to Compel") (collectively, the "Motions"). The Court, having reviewed the Motions, hearing argument from counsel for the parties, and being otherwise duly advised in the premises,

DOES HEREBY FIND:

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

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

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

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

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

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

6. E-mails produced by Avellino with his report (and not Bienes' report) revealed that Bienes uses an iPad to send and receive e-mails and there was no indication in Bienes' report that any search of his iPad was performed for e-mails.

7. Plaintiffs then filed, on November 20, 2015, the Renewed Motion to Compel, which identified problems with Avellino's and Bienes' production of documents, reports, and/or privilege logs. The Renewed Motion to Compel sought, *inter alia*, an order compelling Defendants to produce the Computers referenced in the Motion to Compel and Bienes' iPad (the "Computers" shall hereafter refer to the computers Avellino and Bienes identified during their depositions and Bienes' iPad) to an independent referee for inspection and production to Plaintiffs of all non-privileged relevant evidence and issue a report as to what documents and e-mails have been deleted or exist, at cost to Avellino and Bienes. The Court scheduled a hearing on the Renewed Motion to Compel on December 11, 2016.

8. In response to the Renewed Motion to Compel, Bienes served an amended report on November 24, 2015, and Avellino served an amended report on December 8, 2015.

9. Avellino's and Bienes' amended reports identified e-mail folders and documents that were not identified on their original reports. Similarly, Avellino's updated privilege log identified documents not identified on his original privilege log to Plaintiffs.

10. In Bienes's revised memo, Bienes revealed that as of November 20, 2015, there were no e-mails in Bienes's new mail, old mail, drafts or sent folder, but that there were 387 privileged communications that were saved, and 4 saved messages dated October 26, 2015, October 28, 2015, and November 12, 2015.

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

12. That day, Avellino also filed an errata sheet, contradicting his earlier sworn deposition testimony of affirmatively deleting e-mail daily. The errata sheet provided in relevant part that Avellino did not delete e-mails, but "only deleted spam and vendor e-mails."

13. Because of Avellino's errata sheet, the Court denied the Renewed Motion *without prejudice*. The Court also noted that "the record indicates that the personal computers likely contain the requested information."

14. However, Avellino subsequently testified that he did not know what a vendor or spam e-mail is.

15. Avellino also testified and for the first time revealed that his daughter conducted a "search" of all of his e-mails and computers and determined that AOL automatically deleted all of his e-mails two weeks after he read them.

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

- His internet service provider automatically deleted all e-mails;¹

¹ Specifically, Avellino testified as follows:

Hyman: What did you do to prevent the delation[sic] of e-mails every two weeks?

Avellino: There is nothing to do. It's out of my control. It's in AOL's control.

Hyman: You didn't print them out?

Avellino: There's no reason to.

Hyman: Why is there no reason to?

Avellino: Because there's no reason to. It's my objective opinion that there's no reason to.

- Avellino did nothing to ensure that e-mails or other relevant evidence would not be deleted;
- Avellino did nothing to search for relevant e-mails or other electronically stored information that could be relevant to this action until after Plaintiffs sought sanctions against;
- Avellino understood that he was to search for e-mails exchanged between he and Michael Sullivan but failed to take action; and
- Relevant e-mails that were not disclosed in Avellino's report could exist.

17. In addition to the foregoing, on April 1, 2016, Avellino revealed that there could be a significant number of documents and communications which could be relevant to this action in a storage facility maintained by his lawyer. On information and belief, the “file folders” of people with whom Avellino communicated are currently in that storage facility.²

18. On April 22, 2016, Avellino produced additional documents to Plaintiffs which included at least 5 e-mails that were sent to Avellino before July 9, 2010.

19. On or about April 26, 2016, Plaintiffs filed the Second Renewed Motion to Compel. The Second Renewed Motion to Compel sought to compel Avellino and Bienes to turnover their computer based on the substantial evidence that Avellino and Bienes thwarted discovery and destroyed evidence.

20. The Fourth District Court of Appeal previously recognized that the rules governing discovery “are broad enough to encompass requests to examine a computer hard drive but only in limited and strictly controlled circumstances . . .” *Menke v. Broward County Sch. Bd.*, 916 So. 2d 8, 11 (Fla. 4th DCA 2005); *Eugene J. Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., P.A.*, 669 So. 2d 1142, 1143 (Fla. 4th DCA 1996) (stating it is within the scope of discovery rules for a plaintiff to seek to enter a defendant’s computer to search for evidence).

Id.

² Avellino testified that he printed out communications which are material and saved them in a folder. Avellino also testified that all the “folders” have been turned over to his counsel. Avellino refuses to allow Plaintiffs to inspect the storage facility, which has prompted the filing of an additional motion to compel.

21. Such inspections should be allowed where: 1) there is evidence of “destruction of evidence or thwarting of discovery” (*Menke*, 916 So. 2d at 12); (2) the device likely contains relevant information (*Strasser*, 669 So.2d at 1145); and (3) there is “no less intrusive method of obtaining the information” (*Menke*, 916 So. 2d at 12).

22. As set forth in the order below, this Court will not allow access to “literally everything on the [Computers]” and will set forth mechanisms to protect against “disclosure of confidential and privileged information.” *Id.* at 12.

23. Here, all the factors in favor of allowing inspection of the Computers are present and the Computers can be inspected while protecting against the disclosure of confidential and privileged information to Plaintiffs.

24. First, the Court finds that there is evidence of destruction of evidence or thwarting of discovery based on the following:

- a. The inconsistent testimony of Avellino concerning the deletion of e-mails.
- b. Avellino’s filing of a false errata sheet.
- c. The continuous deletion of e-mails by Avellino and Bienes.
- d. Avellino’s and Bienes’ failure to produce e-mails that they sent and/or received in response to Plaintiffs’ discovery requests and/or the Court’s November 16, 2015 Order. Avellino’s and Bienes’ failure to produce e-mails is further demonstrated by e-mails presented by Plaintiffs that they received from third parties that were either to or from Avellino or Bienes, yet not produced by either Avellino or Bienes.
- e. Bienes testified at his deposition that he has continuously deleted his e-mails since at least 2007 and during this action. Bienes has not sought to alter his testimony and e-mails identified in conjunction with the Motions

evidence that Bienes has deleted or not produced evidence responsive to Plaintiffs' discovery requests in this action.

- f. Avellino testified at his deposition that he has continuously deleted his e-mails since approximately 2005 and during this action. A deposition errata sheet filed by Avellino after Plaintiffs filed the Motions substantially changed his deposition testimony to state that he only deleted "spam and vendor" emails and that e-mails are maintained on Avellino's computer "from December 2, 2009 for emails sent and from July 9, 2010 for emails received." Because the date of the earliest e-mail sent is approximately a year earlier than the date of Avellino's earliest e-mail received, there is evidence that Avellino deleted e-mails other than "spam and vendor" e-mails from those folders that are responsive to Plaintiffs' discovery requests and that have not been produced to Plaintiffs. E-mails identified by Plaintiffs in conjunction with the Motions that Avellino did not produce in response to the Court's November 16, 2015 Order or discovery requests served on him in this action further evidence that he deleted evidence or thwarted discovery in this action.
- g. Avellino's and Bienes' original court-ordered reports regarding the contents of the Computers failed to identify documents and folders of e-mails that were subsequently identified by their amended reports.
- h. Avellino's original privilege log failed to identify documents identified by his amended privilege log.
- i. The errors and omissions in Avellino's and Bienes' original reports, privilege logs, or both weigh against any finding that any amended reports

and updated privilege logs provided by Avellino and Bienes completely cured the defects in their review and production of all relevant and responsive documents from the Computers and their e-mail folders.

- j. Avellino's inability to explain why documents were produced that were not disclosed in his report.
- k. Avellino and Bienes did nothing to preserve relevant evidence.
- l. Avellino testified that AOL automatically deleted his e-mails every two weeks, even though AOL's policies state that AOL automatically retains e-mails unless they are deleted.

25. Accordingly, there is evidence of destruction of evidence and/or thwarting of discovery and the first factor is met.

26. Second, the Computers contain information that is relevant to this action and responsive to Plaintiffs' discovery requests. Avellino's and Bienes' privilege logs and documents produced from the Computers in response to the Court's November 16, 2015 Order confirm that the Computers and their e-mail folders contain relevant information that is responsive to Plaintiffs' discovery requests.

27. Finally, there is no less intrusive way to obtain the information sought, a less intrusive way was previously ordered. Defendants have proven themselves incapable of searching for and producing e-mails in a manner which can be verified. They also have not established that there is a less intrusive means to search for the relevant material. Plaintiffs will be prejudiced if they cannot inspect the Computers because they will not be able to determine whether relevant, responsive evidence has been destroyed or improperly withheld by Avellino and Bienes. Moreover, this Order contains sufficient protections to ensure that Avellino and Bienes's applicable rights and privileges are protected.

Based upon the foregoing, the Court

DOES HEREBY ORDER:

1. The Motions are GRANTED;
2. Jason Park is appointed as an independent referee in this action (the “Independent Referee”). The Independent Referee shall not be considered an agent of either Plaintiffs or Defendants, and shall only take actions which are authorized by this Order or the Court.
3. No later than May 20, 2016, Avellino and Bienes shall surrender the Computers to the Independent Referee.
4. The Independent Referee will image the Computers (or take any other step necessary for the Independent Referee to examine the contents of the Computers while maintaining their integrity) and examine the contents of the Computers for relevant documents (including but not limited to any deleted or hidden documents) in accordance with search parameters provided by Plaintiffs. Avellino and Bienes have the right to object to the search parameters provided by Plaintiffs. The Independent Referee shall resolve any dispute as to the scope of the search parameters provided.
5. After imaging the Computers, the Independent Referee shall provide an index of documents responsive to those parameters to Avellino and Bienes, who shall identify any purported confidential or privileged documents on a privilege log that shall be provided to Plaintiffs within seven (7) days of the date that the Independent Referee delivers the responsive documents to Avellino and Bienes.
6. The Independent Referee may not open any files produced by the imaging of the Computers until after Avellino and Bienes have provided a privilege log in connection with the index.

7. After receiving the privilege log from Avellino and Bienes, the independent referee shall produce the documents which are not listed in the privilege log to Avellino and Bienes. The Independent Referee may open non-privileged files to the extent necessary to copy them and provide them to Avellino and Bienes. Avellino and Bienes shall identify any additional purported confidential or privileged documents on a privilege log that shall be provided to Plaintiffs within seven (7) days of the date that the Independent Referee delivers the responsive documents to Avellino and Bienes.

8. The Independent Referee will screen any documents identified on a privilege log by Avellino and Bienes pursuant to this Order from Plaintiffs and deliver the remainder of the documents responsive to the search parameters to Plaintiffs for their review and inspection.

9. In addition to the foregoing, the Independent referee shall take any action necessary to determine whether

10. The Independent Referee will be bound by the confidentiality order entered in this action and will insure that any and all information contained on the Computers is kept confidential in accordance with the terms of that order. The Independent Referee's review of privileged materials shall not constitute a waiver of any privilege.

11. Any document identified on any privilege log provided to Plaintiffs by Avellino or Bienes pursuant to this Order that is disputed by Plaintiffs shall be reviewed *in camera* and ruled on by the Court, with the assistance of the Independent Referee, if necessary. The Independent Referee shall not produce any document identified on a privilege log provided by Avellino or Bienes pursuant to this Order to Plaintiffs until the Court rules the document shall be produced to Plaintiffs or there is an agreement between Plaintiffs and Avellino or Bienes as to the document's production.

12. Avellino shall bear the costs associated with the Independent Referee's examination, copying, and imaging of the contents of Avellino's computer. Bienes shall bear the costs associated with the Independent Referee's examination, copying, and imaging of the contents of Bienes' computer and iPad.

13. Nothing in this Order shall preclude or limit Plaintiffs' right to seek through discovery documents and information from the Computers or from any other of Avellino's or Bienes' computers, PDA's, cell phones, tablets, or any other source of electronically stored information or hard copy documents.

14. The Court reserves jurisdiction to enter an order awarding attorney's fees and costs to Plaintiffs in connection with the Motions.

15. The Court will hold a hearing on Plaintiffs' Motion to Strike Pleadings, and in the Alternative Motion for Adverse Inference ("Spoliation Motion") after Plaintiffs receive any responsive documents from the Computers from the Independent Referee and the Court rules on the production of any documents from the Computers.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida this _____ day of _____, 2016.

The Honorable Jack Tuter
CIRCUIT JUDGE

Conformed copies to:
Attorneys of Record