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.

MICHAEL D. SULLIVAN, et al.

Defendants.

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DEFENDANT'S FRANK AVELLINO RESPONSE TO EXPEDITED MOTION TO COMPEL DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES TO PRODUCE COMPUTERS FOR INSPECTION AND TO PRODUCE DOCUMENTS

Defendant, Frank Avellino ("Avellino"), by and through his undersigned counsel, files this Response to Plaintiffs' Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents.

Plaintiffs Have Failed To Establish A Legal Or Factual Basis To Compel Production Of Defendant Frank Avellino's Personal Computer

Plaintiffs' motion seeking unfettered access to Avellino's personal computer[1] to engage in a fishing expedition to locate e-mails, which may not even exist, and other unspecified information, should be denied. Although under limited circumstances courts have granted limited access to opposing party's computers, with specific parameters, Plaintiffs have failed to establish that those limited circumstances apply here.

[1] The computer which Plaintiffs seek to have turned over is one used not only by Frank Avellino, but also his wife, Nancy Avellino, who is a non-party to this action.

Specifically, courts have indicated that a search of another party's computer might be approved if the requesting party proved: (1) evidence of any destruction of evidence or thwarting of discovery; (2) a likelihood the information exists on the devices; and (3) no less intrusive means exists of obtaining the information. *Menke v. Broward County School Board*, 916 So.2d 8, 11-12 (Fla. 4th DCA 2005). None of these required elements has been proven by Plaintiffs.

The Duty To Preserve Evidence Does Not Arise In Florida Until Litigation Has Commenced

There is no common law duty to preserve evidence in anticipation of litigation. *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So.2d 843, 846 (Fla. 4th DCA 2004). As explained by the Court in *Royal & Sunalliance,* the duty to preserve evidence can arise only by contract, by statute, or by a properly served request (after a lawsuit has been filed). *Id.* at 845. (holding that the entity leasing marine spaces had no common law duty to preserve the debris collected from a fire in the marina which partially burned a vessel); s*ee also, Gayer v. Fine Line Construction & Electric, Inc.,* 970 So.2d 424, 426 (Fla. 4th DCA 2008).

Plaintiffs, citing *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2005), argue that the duty to preserve evidence arises when the defendant could reasonably have foreseen the claim. However, *American Hospitality* is inapplicable and that is not the controlling standard in this district. *American Hospitality* addresses when a spoliation instruction is appropriate, not when a duty to preserve evidence arises.

In *American Hospitality*, a repairman was injured in a hotel using one of the hotel's ladders. The same day the injury occurred, the hotel operator destroyed the ladder. The repairman sued the hotel operator for negligence and spoliation of evidence. The repairman argued that if the ladder were available his expert could testify as to the defect in the ladder, and

without the ladder, he was at a disadvantage to prove his claim, and further, without the ladder the hotel operator could argue the ladder was not defective. The hotel operator argued that it had no legal or specific contractual duty to preserve the ladder, and it had no notice that a claim was imminent. The trial court denied a summary judgment motion on the repairman's spoliation of evidence claim, but ruled he would instruct the jury as to a rebuttable presumption of negligence.

The issue before the Court was whether the instruction given by the trial court went too far. In its analysis, the Fourth District stated that "[i]n the context of a claim for spoliation of evidence other than medical records, we have held that a defendant could be charged with a duty to preserve evidence where it could reasonably have foreseen the claim", and cited *Hagopian v. Publix Supermarkets, Inc.*, 788 So.2d 1088, 1090 (Fla. 4th DCA 2001). However, it did not affirmatively decide whether or not the hotel operator had such a duty. Instead, as its focus was on whether the proper instruction was given, the Fourth District Court held:

> In circumstances where the lost evidence was under the sole control of the party against whom the evidence might have been used to effect, and where the lost evidence is in fact critical to prove the other party's claim, an adverse inference instruction may be necessary to achieve justice in the jury's determination of the case. This would be true where the party failing to preserve the evidence argues that the thing lost was not as represented by the injured party, or that the injured party should not prevail because of the failure to present the evidence foreclosed by the loss of the item.

Id. at 550-551.

Furthermore, as explained by the Fourth District Court in *Royal & Sunalliance*, *Hagopian*, has been misconstrued to have expressly established a common law duty to preserve evidence in anticipation of litigation. *Id.* at 845-846. Pursuant to the Fourth District Court, *Haogpian* did not establish such a duty, instead it was "...focused on Hagopian's ability to prove

the case without the destroyed evidence..." *Id.* at 845-846.[2] Accordingly, when the court is making a determination of whether to give a spoliation instruction as it was in *American Hospitality*, even where there is no duty to preserve the evidence, the courts have looked at the entire circumstances, including the exclusive control of the evidence, whether the evidence is critical, and whether a party could reasonably foresee litigation. *See also Electric Machinery Enterprises, Inc. v. Hunt Construction Group, Inc., et al.*, 416 B.R. 801, 873 (M.D. Fla. 2009) ("The majority of Florida courts have held that there is no common law duty to preserve evidence *before* litigation has commenced"). By this motion, however, Plaintiffs are not seeking a spoliation instruction, but rather are seeking this court to compel Avellino to produce his personal computer for inspection. *American Hospitality* has no application on this issue.

Even assuming *arguendo* in this case Avellino had a duty to preserve his emails when he could have reasonably foreseen Plaintiffs' claims[3], as alleged by Plaintiffs, the alleged emails are not critical to prove Plaintiffs' claims against Avellino, and the emails are not under the sole control of Avellino. The emails received and sent by Avellino are also in the control of the other parties sending and receiving the emails. In fact, Plaintiffs have recently produced the alleged deleted emails between Sullivan and Avellino.[4] In addition, the alleged destroyed emails are not critical to Plaintiffs' case. Unlike the defective ladder in *American Hospitality,* the alleged deleted emails are not the subject of the instant lawsuit, nor are they the critical evidence for

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[2] As further explained by Judge Klein in the concurring opinion, it was the trial court who reasoned that the party could anticipate litigation, and the appellate court's decision did not confirm this duty. In fact, Judge Klein affirmatively stated the party did not have a duty to preserve the evidence at the time of the accident, i.e. in anticipation of litigation. *Id.* at 847.

[3] There is also an issue of when Avellino could have reasonably foreseen Plaintiffs' claim. Plaintiffs assert that Avellino could have foreseen their claim either on December 8, 2008 when Madoff was revealed as a fraud to the world, or by December 29, 2008, when they believe Avellino was first sued in connection with his dealing with BLMIS. However, Plaintiffs have failed to show how either of these events, which were not brought by Plaintiffs, placed Avellino on notice that he would be sued by Plaintiffs in Florida for the instant claims relating to alleged kickbacks he received from Sullivan.

[4] Plaintiffs have had Sullivan's records, including his emails, for quite some time but have previously refused to produce them to Avellino claiming work-product privilege, which privilege they have now decided to waive when they believe it is to their strategic advantage.

Plaintiffs' claims (i.e. Plaintiffs cannot say that without the deleted emails they cannot prove their case).

Based on the law in the Fourth District, Avellino had no duty to preserve his emails until after the instant lawsuit was filed and a discovery request was served on Avellino, the latter of which was on January 29, 2014.

Plaintiffs Have Failed to Prove that Avellino Destroyed any Evidence in Violation of his Duty to Preserve Evidence

Plaintiffs are seeking this court to compel Avellino to produce his entire computer so that an intrusive search of his computer can be conducted of all the data that exists on the computer, including privileged communications, and other personal and confidential information. Such an intrusive search is not permitted. *See, Menke*, 916 So.2d at 10-11.[5] As stated above, there are limited circumstances in which courts have allowed limited access to opposing counsel's computers, with specific parameters, such as when there was an intentional destruction of critical evidence in violation of a duty to preserve evidence, and there are no other methods available to obtain the evidence. Plaintiffs have failed to prove these circumstances entitling them to the relief sought.

Although Avellino testified that, as a practice, since he first started using emails, ten or twelve years ago, he deletes emails every few days, there is no evidence presented by Plaintiffs that Avellino used email to communicate with Sullivan or any other party in the lawsuit since January 29, 2014, when his duty to preserve evidence commenced. There is no evidence presented that Avellino used emails as a primary source of communication; that he even had email communications with any of the parties in this lawsuit on any regular basis; or that any

[5] The court in *Menke* compares such a broad request to a party being asked to produce its business or personal filing cabinets for inspection by its adversary to see if they contain any information useful to the litigation. *Id.* at 10.

alleged deleted emails would have related to this litigation and the issues raised therein.[6] Plaintiffs could have, yet failed, to make such inquiry at Avellino's deposition, and further failed to produce any other evidence that email communications took place.

In an attempt to prove Avellino deleted emails in violation of his duty to preserve evidence, Plaintiffs have attached to their motion six emails which appear to be between Avellino and Sullivan or Matthew Carone. The latest email attached is dated May 4, 2009, long before Avellino's duty arose to preserve emails (and before he acquired his computer), and some of the emails attached to the motion have no relevance to the issues raised in this litigation. It is assumed these emails were obtained from Michael Sullivan, with whom Plaintiffs entered into a settlement agreement which included a requirement for Sullivan to cooperate with Plaintiffs. Michael Sullivan's counsel has stated that Sullivan provided all his documents, including all emails, to Plaintiffs' counsel, and also gave authorization for Plaintiffs to obtain emails through his email server. Accordingly, if there were more emails between Sullivan and Avellino, or more recent emails, Plaintiffs presumably would have attached them to their motion as evidence of Avellino's alleged destruction of evidence.[7] Since none were attached, nor produced by Plaintiffs to Avellino in response to discovery demands, it is safe to assume there are none. Accordingly, Plaintiffs have failed to prove that emails related to this litigation ever existed, much less have been deleted by Avellino after his duty to preserve evidence arose. Furthermore, although Plaintiffs are seeking to have **all** the data on Avellino's computer searched, Plaintiffs

[6] Avellino testified that he shares an email address with his wife, Nancy Avellino, and there is no evidence presented that the emails deleted by Avellino were his or his wife's emails.

[7] A few other emails between Avellino and Sullivan are not attached to this motion, but recently were used by Plaintiffs during the deposition of Avellino. However, overall less than ten emails have been produced by Plaintiffs involving Avellino, and none are dated after Avellino was sued in the instant litigation, when his duty to preserve evidence arose.

have not provided **any** proof that Avellino destroyed or deleted any other information or data on his computer at any time, much less any information or data related to this litigation.

Plaintiffs Have Failed to Prove that there is a Likelihood of the Evidence they are Seeking Exists on the Computer

In addition to failing to prove that Avellino destroyed relevant evidence after his duty to preserve evidence arose, Plaintiffs have failed to show there is a likelihood that the emails and other unspecified information/documents they are seeking exist on Avellino's computer. Avellino testified that he has had his computer for about four years (i.e. since 2011) (pg 18-19). Assuming *arguendo* Avellino has deleted pertinent emails from his computer, and the deleted emails remain on his computer, they would only be emails from 2011 to the present. As stated above, there has been no evidence that there were any emails between Avellino and Sullivan, or any other party in this lawsuit, from 2011 to the present.

Furthermore, Plaintiffs are seeking to have Avellino's computer searched for other relevant evidence or information without specifying what that other relevant information or documents might be. However, Plaintiffs have failed to prove that there are any "other" documents or information relevant to this litigation on Avellino's computer. They basically are trying to bootstrap an argument that because Avellino deleted emails on his computer, his computer likely has other relevant information on his computer. However, Plaintiffs have not provided **any** evidence that Avellino created, maintained or stored any other documents or information on his computer which would be relevant to this litigation. Again, this is a subject matter that Plaintiffs could have covered at Avellino's deposition, but did not. Accordingly, Plaintiffs have failed to prove that it is likely the emails and other unspecified documents or information they seek exists on Avellino's computer.

There are Less Intrusive Methods to Obtain the Evidence

Plaintiffs are seeking to have Avellino turn over his personal computer for an independent referee to inspect the entire computer to locate emails and other unspecified documents/information relevant to this litigation. However, Plaintiffs have failed to prove that there is no less intrusive ways to obtain the information sought.

In fact, Plaintiffs have already shown that there are less intrusive methods to obtain the information they are seeking. They have obtained the emails between Avellino and Sullivan by having Sullivan produce his emails, and gaining access to Sullivan's email server. If there were any emails between Avellino and any of the partners of the Plaintiff Partnerships, they could certainly obtain those emails from their own clients. Assuming *arguendo* there were emails between Avellino and other parties related to this litigation, Plaintiffs could seek those emails, if they exist, from the other specific parties. However, Plaintiffs have provided no evidence that Avellino communicated with any other party by email.

It is impossible to address the issue of whether there are less intrusive methods to obtain the "other information and documents" Plaintiffs are seeking on Avellino's computer because the "other information and documents" have not been specifically identified. More importantly, 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.).

In addition to the violation of their constitutional privacy rights, Avellino communicates with his counsel for this litigation through email, and thus, he needs his computer to continue

these communications.[8] Avellino would not only be prejudiced if his entire computer were taken to be inspected, but his communications with his counsel are clearly privileged and cannot be subjected to any fishing expedition by Plaintiffs.

Plaintiffs have Failed to Prove that Avellino should be Compelled to Give Consent to Obtain his Email from AOL

For the reasons set forth above, Avellino should not be compelled to provide consent so that Plaintiffs can obtain his emails from AOL. Plaintiffs have failed to show a legal basis for such fishing expedition, and because Avellino and his wife use the same email through AOL, any production of emails from AOL would clearly contain personal and confidential emails of both Avellino and his wife, as well as privileged communications with their counsel.

CONCLUSION

Plaintiffs' motion, filed with bluster but lacking in evidence, fails to provide any legal or factual basis for this Court to grant such extraordinary relief compelling Avellino to produce his computer to be inspected by an independent referee. Plaintiffs' motion should be denied in its entirety.

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[8] Plaintiffs state, without citing any evidence to support, that Defendants testified that they are not currently using their computers. There is no such testimony by Avellino. The computer at issue is the only computer Avellino and his wife have and they are presently using the computer for their personal use.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being sent by electronic service via the Florida Courts E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 to all parties on the attached service this 22nd day of October, 2015.

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