

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 FRANK AVELLINO'S RESPONSE TO PLAINTIFFS' RENEWED
EXPEDITED MOTION TO COMPEL PRODUCTION OF COMPUTERS**

Defendant, Frank Avellino, ("Avellino") files this response to Plaintiffs' renewed motion to compel the production of Avellino's computer for inspection and other relief (the "Renewed Motion"). This Court previously addressed and ruled on this issue; Avellino fully complied with the Court's directive and subsequent order and Plaintiffs have asserted nothing new to cause this Court to rule any differently. The Renewed Motion should be denied in its entirety.

Plaintiffs' Previous Motion and the Court's Ruling

On October 5, 2015, Plaintiffs filed their initial motion to compel the production of Avellino's computer (the "Motion") premised upon Avellino's deposition testimony that he deleted emails every few days. Avellino's response to the Motion set forth the controlling law in this district that a duty to preserve evidence did not arise until the service of a request for production after the commencement of the action, here January 29, 2014, *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So.2d 843, 846 (Fla. 4th DCA 2004), that Plaintiffs failed to prove that Avellino destroyed any documents after such duty arose and that Plaintiffs' reliance

on *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So.2d 547 (Fla. 4th DCA 2008), which addressed the standard for a spoliation instruction not when a duty to preserve arises was misplaced.

At the October 26, 2015 hearing on Plaintiffs' Motion Avellino's counsel advised the court that although Plaintiffs had full access to all emails of Michael Sullivan, the managing partner of the Plaintiff partnerships, Plaintiffs were unable to produce any emails between Sullivan and Avellino after the duty to preserve arose. A copy of the transcript of the October 26, 2015 hearing is attached as Exhibit "A", p. 37. More importantly, Avellino's counsel advised the Court that Avellino was instructed to and was not deleting emails and that he believed that Avellino's deposition testimony regarding the deletion of emails may have been inaccurate. Ex. A, pp. 37-38. Specifically, Avellino's counsel stated:

And, quite frankly, I will tell you this now, but I can't verify it because I haven't had the opportunity, his testimony as to e-mails and his deleting e-mails was inaccurate.

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.

Ex. A, p. 38.

Based upon the foregoing, the Court directed Avellino's counsel by November 16, 2015, to determine whether the "read" emails on Avellino's computer moved to another folder and were not deleted and, if so, provide a timeline for the period of time covered by the emails, preserve all emails, report the findings to Plaintiffs and conduct a random search of those emails to determine whether there exists information relating to the P&S partnership accounts. Ex. A,

p.p. 44-45; p. 66. The Court's November 16, 2015 order memorialized such ruling. A copy of the Order is attached as Exhibit "B".

On November 16, 2015, Avellino's counsel: a) provided Plaintiffs with a report on the computer search; b) produced additional documents responsive to Plaintiffs' discovery requests located as a result of the court directed computer search, and c) produced a privilege log of privileged documents located as a result of the computer search.

Plaintiffs' Renewed Motion

Seeking another bite at the apple, Plaintiffs' Renewed Motion continues to seek the draconian relief of the production of Avellino's computer to access his entire email account, require Avellino to provide an independent referee access to his email account at Avellino's expense, as well as other relief. The Renewed Motion continues to rely upon the deposition testimony of Avellino that he deleted emails and that the report of the computer search and document production was inadequate.

The basis upon which the Renewed Motion is premised is spacious and Plaintiffs have again failed to meet the required elements to justify the relief requested. *Menke v. Broward County School Board*, 916 So.2d 8, 11-12 (Fla. 4th DCA 2005).

Completely undercutting any basis for the relief sought by Plaintiffs, on December 8, 2015, Avellino served and filed an Errata Sheet to his deposition which denies that any emails other than spam and vendor emails have been deleted. A copy of the Errata Sheet is annexed hereto as Exhibit "C". Consequently, there is no record evidence that any emails have been deleted and Plaintiffs have failed to identify the existence of any emails contradicting such testimony.¹

¹ Plaintiffs have identified an email from Michael Sullivan to Frank Avellino dated May 11, 2011, which was not produced. This email was sent from an email address – sully@freshstarttax.com – that neither Avellino nor his

To eliminate Plaintiffs' quibbling about the computer report, on December 8, 2015, Avellino provided Plaintiffs with an amended report, a copy of which is attached hereto as Exhibit "D". Any objective review of the amended report confirms its full compliance with the Court's directive and order.

Further, Avellino has produced again the emails, with attachments, that were identified by the recent search of his computer. This search went beyond that required by the Court and included a complete search of all emails in all folders. The few emails produced have no evidentiary value.²

Plaintiffs Have Failed to Satisfy the Required Criteria

This Court is well aware of the proof required in order to enable a party to search another parties' computer: (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 at 11-12. None of these required elements have been proven by Plaintiffs.

WHEREFORE Defendant Frank Avellino respectfully requests this Court to enter an Order denying Plaintiffs' Renewed Motion in its entirety.

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counsel was aware. Consequently, a further search of Avellino's computer was conducted using this email address which resulted in the identification of no other emails to or from Michael Sullivan from this address.

² Moreover, as testified to by Michael Sullivan at his December 1, 2015 deposition, Plaintiffs' counsel has had all of his emails and documents for more than six months, having copied the hard drive on his computer and other devices and further required Sullivan to provide written consent to enable Plaintiffs to obtain access to his emails through his email provider. Plaintiffs' counsel's conspicuous silence in failing to advise the Court that they have had all of these emails for six months while demanding the same from Avellino is disingenuous, at best.

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

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.

/s/ Gary A. Woodfield
Gary A. Woodfield, Esq.
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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,

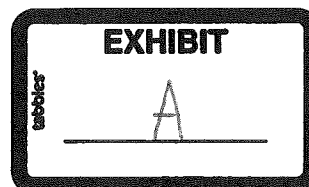
Defendants. /

Proceedings before the HONORABLE

JACK TUTER

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

Reported by: Lisa Mudrick, RPR, FPR



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1 APPEARANCES:
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14:02:07-14:03:01 Page 4

1 MR. WEBER: Your Honor, by this motion
2 plaintiffs -- well, let me take a step back,
3 Your Honor. During our last hearing we
4 mentioned that we had filed a motion for
5 spoliation. That motion seeks an adverse
6 inference as well as a striking of pleadings
7 related to defendants' deletion of e-mails and
8 relevant evidence in this action.
9 In furtherance of that motion for
10 spoliation, plaintiffs filed their expedited
11 motion to compel defendants to produce the
12 laptop computers and desktop computers that
13 they mentioned during their testimony for
14 inspection by a third party, and also to
15 authorize release of e-mails from their e-mail
16 provider.
17 THE COURT: Have you discussed this with
18 the other side? What's their position?
19 MR. WEBER: Your Honor, they object to it.
20 They don't believe they had a duty to preserve
21 this evidence. And that's really the crux of
22 their argument, that they admit that items were
23 deleted.
24 THE COURT: Are these the ones you
25 testified that they deleted their e-mails like

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1 PROCEEDINGS
2 - - -
3 BE IT REMEMBERED that the following
4 proceedings were had in the above-styled and
5 numbered cause in the Broward County Courthouse,
6 City of Fort Lauderdale, County of Broward, in the
7 State of Florida, by Lisa Mudrick, RPR, FPR, before
8 the HONORABLE JACK TUTER, Judge in the above-named
9 Court, on October 26, 2015, to wit:
10 - - -
11 THE COURT: Good afternoon everyone. More
12 discovery. I have read the stuff. Looks like
13 there's some forensic stuff and some stuff
14 related to Sullivan e-mails or something like
15 that. Let's see, whose motions are they?
16 MR. WEBER: Your Honor, Steven Weber from
17 Berger Singerman representing the plaintiffs in
18 this case.
19 There were three motions, I guess, Your
20 Honor, pending today. First one we'd like
21 heard is plaintiffs' motion, expedited motion
22 to compel defendants, Frank Avellino and
23 Michael Bienes, to produce computers for
24 inspection and produce documents.
25 THE COURT: Yes, I have read that.

14:03:11-14:04:05 Page 5

1 every three days or something like that?
2 MR. WEBER: Correct, Your Honor. Avellino
3 and Bienes both testified, after weeks of
4 trying to get their depositions, and I have the
5 relevant positions here if Your Honor would
6 like portions of their testimony. And in
7 response to their testimony, that's when
8 plaintiffs filed their motion for spoliation.
9 THE COURT: Okay. How far back is it that
10 you want to look into their computers? And
11 what exactly are you trying to forensically
12 extract from the computers?
13 MR. WEBER: Your Honor, what we are trying
14 to extract and look for are simply e-mails
15 between the defendants and Michael Sullivan and
16 partners of the partnerships that show the
17 control that defendants, Avellino and Bienes,
18 had over the partnerships, and also the
19 correspondence that they had with the partners
20 showing that they corresponded frequently about
21 the partnerships' investments, information
22 about the partnerships. And, Your Honor, there
23 may be other relevant evidence as well in these
24 computers that we are seeking. And to avoid
25 releasing any confidential or privileged

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14:04:17-14:05:13 Page 6

1 information, that's why we asked Your Honor for
2 a third party to review what's on the
3 computers, what's in the e-mail accounts, and
4 produce that to plaintiffs.
5 Now, it's hard to tell how far we'd like
6 to go back. But I think to see what universe
7 of documents are out there first would be a
8 good start. And then we can determine how far
9 we need to go back.
10 **THE COURT:** Okay. Well, are these company
11 laptops or servers or what? What's the genesis
12 of these e-mails? Where are they derived from?
13 **MR. WEBER:** Your Honor, they are personal
14 e-mail accounts. One is Michael Bienes's
15 e-mail account with AOL. And the other is an
16 e-mail account that defendant Avellino uses
17 with his wife also from AOL.
18 Now, they may use them for other business
19 purposes, like communicating with the
20 partnerships S&P and P&S and also the partners,
21 but they are AOL e-mail accounts. And that's
22 why, Your Honor, as part of the motion we'd
23 like them to -- defendants to authorize AOL to
24 release their e-mails because they were likely
25 deleted by defendants themselves.

14:05:22-14:06:08 Page 7

1 **THE COURT:** So you want me either to let
2 you issue a subpoena or direct them to sign a
3 consent for e-mails from AOL for what period of
4 time?
5 **MR. WEBER:** Well, the problem with the
6 subpoena, Your Honor, is that numerous courts
7 have found you cannot subpoena the provider
8 directly. You need to have the party sign a
9 consent form authorizing the provider to
10 release the documents. So that's what we are
11 seeking.
12 **THE COURT:** So you want me to direct them
13 to sign a consent. How far back again?
14 **MR. WEBER:** I think we'd like at
15 least 'til, if possible, Your Honor, 'til -- I
16 believe they testified they started e-mailing
17 in 2004 at the latest. So I think 'til at
18 least 2004.
19 **THE COURT:** Well, does AOL retain records
20 that far back?
21 **MR. WEBER:** I have been trying to get in
22 contact with AOL and their general counsel, but
23 have been unable to obtain a return phone call,
24 Your Honor. And that's as much information as
25 I have right now.

14:06:22-14:07:10 Page 8

1 **THE COURT:** Okay. So what is the first
2 thing you must do to convince me that I should
3 allow you to forensically examine the
4 computers? What is it that you have as far as
5 evidence or case law or whatever to say that I
6 should just let you go open up their hard
7 drives and look on their computers?
8 **MR. WEBER:** Yes, Your Honor. May I
9 approach, Your Honor?
10 **THE COURT:** Yes.
11 **MR. WEBER:** That's just a copy of the
12 motion, Your Honor, with tabs.
13 **THE COURT:** I do have the motion, of
14 course.
15 **MR. WEBER:** It has tabs so I can refer to,
16 Your Honor.
17 Your Honor, you will see the first sticky
18 tab number one, not the yellow translucent one,
19 but the yellow Post-It note --
20 **THE COURT:** Number one?
21 **MR. WEBER:** -- with the one on it.
22 **THE COURT:** Yeah.
23 **MR. WEBER:** You will see this is an e-mail
24 from Matthew Carone to James Judd. And at the
25 bottom of the string is an e-mail, Thursday,

14:07:31-14:08:30 Page 9

1 December 25th, 2008, from franknanc@aol.com,
2 which is the e-mail address that Avellino has
3 testified he uses, to Matthew Carone. And the
4 subject line is Re: P&S, which is one of the
5 plaintiffs in this case. And Mr. Avellino
6 states, "I have been informed by P&S that legal
7 counsel has been retained and then you can do
8 at this time is wait for information."
9 **THE COURT:** "All you can do at this time."
10 **MR. WEBER:** "All you can do at this time
11 is wait for information from the authorities as
12 this goes on. I believe you will be advised as
13 to what you can do when the information is
14 available. Best, Frank."
15 And you will see below there's another
16 e-mail from Matthew Carone which appears to be
17 to defendant Avellino.
18 Now, it's plaintiffs' position that this
19 e-mail and others should have been produced in
20 response to plaintiffs' request for production
21 to defendant Avellino. And you will see in the
22 translucent tab number one, Your Honor, which
23 is a reference to a request for production that
24 was served on defendant Avellino which seeks,
25 it's number 19, all documents that relate to

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14:08:45-14:09:35

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1 any contact with or communication between you
2 and/or Avellino and Bienes and any partners of
3 P&S or S&P.

4 Now, this e-mail that I first referred to
5 claiming refers to communications between Frank
6 Avellino and Matthew Carone, one of the
7 partners of S&P, regarding S&P and P&S. And it
8 should have been produced but it wasn't
9 produced, Your Honor, because defendant
10 Avellino has testified that he has been
11 deleting e-mails every three days or sometimes
12 overnight.

13 And we believe that this e-mail is just
14 one example of e-mails that should have been
15 produced and that were not produced.

16 **THE COURT:** Where did you get this e-mail
17 from?

18 **MR. WEBER:** Your Honor, as part of the
19 settlement that was entered into with prior
20 defendant, Michael Sullivan -- I am sorry, Your
21 Honor, I am sorry. This is an e-mail we
22 obtained from third party Matthew Carone. He
23 provided documents to us which we have then
24 produced to defendants. This was the
25 subject -- these e-mails were the subject of

14:11:05-14:12:04

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1 subject P&S.

2 It's interesting, Your Honor, that's Diane
3 Bienes who then responds to that e-mail. And
4 if you look at the body of that e-mail, Your
5 Honor, it says, "Hi Matt. Don't think there is
6 need to be concerned. They stocks we see are
7 invested in are all solid and not in areas that
8 are in banking. We have watched the current
9 trades and so far all is fine. If you want you
10 can call Frank who should still be in Palm
11 Beach until the weekend when he returns to NYC,
12 period," and then it goes on.

13 And this is just one of the e-mails that
14 appears to be referring to the partnerships.
15 And again, while it was Diane Bienes who
16 responded, you will see that it began with an
17 initial e-mail from Matthew Carone to Michael
18 Bienes.

19 **THE COURT:** When did they testify as to
20 this idea that they were deleting e-mails by
21 habit every two or three days, or that
22 testimony that's in the record somewhere, when
23 did that begin?

24 **MR. WEBER:** Defendant Avellino was deposed
25 on September 9, 2015, by the plaintiffs. And

14:09:48-14:10:46

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1 the previous motion that was before Your Honor,
2 the ones about Bienes's deposition and whether
3 we could use those e-mails. This is one of the
4 e-mails within that subset.

5 And while defendant Avellino and defendant
6 Bienes take the position that you don't need to
7 get any documents from us, you can get them
8 from third parties, we don't know what other
9 documents are out there, Your Honor. We don't
10 know who has them. We don't know what e-mails
11 have been sent between defendant Avellino and
12 defendant Bienes. And that's precisely the
13 reason we want access to their e-mail account
14 and their computer to see firsthand what is
15 there.

16 As to defendant Bienes, Your Honor, you
17 will see that Post-It number two, not
18 translucent number two, Post-It number two,
19 again, this is an e-mail chain. You will
20 notice that the first e-mail at the top of the
21 document is between Matthew Carone and
22 DmBienes, which is Diane Bienes. But you will
23 see at the bottom of the e-mail that she
24 actually begins with an e-mail from Matthew
25 Carone to Michael Bienes, March 18, 2008,

14:12:31-14:13:11

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1 he testified that -- here we go, Your Honor.
2 May I hand you a copy, Your Honor?

3 **THE COURT:** Just read it to me.

4 **MR. WEBER:** On page 101 of volume one,
5 defendant Avellino's testimony taken on
6 September 9, 2015, the question is:
7 "Okay. And so your personal practice is
8 to remove e-mails every three days or so, and
9 it has been since you've had e-mail?"

10 "Yes.

11 "Did it ever become a point in time where
12 you stopped that practice?"

13 "Did I stop the practice of deleting?"

14 "Question: Yes.

15 "Answer: No. It's random.

16 "Question: And that's been going on since
17 about 2004?"

18 "Answer: Since e-mails.

19 "Question: Okay. Since at least 2004?"

20 "Answer: Yeah."

21 **THE COURT:** So he is admitting deleting
22 e-mails even while this litigation has been
23 commenced?

24 **MR. WEBER:** That appears to be the case,
25 Your Honor. And that is exactly why we are

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<p>14:13:22-14:14:10 Page 14</p> <p>1 filing this motion. 2 And I don't know if Your Honor had a 3 chance to see the reply that was filed -- 4 THE COURT: I did glance at their reply, I 5 think. 6 MR. WEBER: Our reply, Your Honor, was 7 filed this morning at about 11:30. And I can 8 give Your Honor a copy if you would like. 9 THE COURT: I don't think I saw that. 10 MR. WEBER: What's very interesting about 11 these defendants is that even before this 12 action was commenced in 2012, Your Honor, they 13 were parties to federal cases which have a 14 different duty to preserve, as Your Honor may 15 know. And so even before this action was 16 filed, and they maintain that they had no duty 17 to preserve until the action was filed, and 18 defendant Bienes asserts until he was served 19 and defendant Avellino asserts until we filed a 20 discovery request, which we dispute, Your 21 Honor. 22 But because of this federal litigation 23 they had a duty to preserve in this federal 24 litigation which was filed back as early as, I 25 believe, 2009 or 2008. That duty to preserve</p>	<p>14:15:22-14:16:11 Page 16</p> <p>1 And what's interesting about the Picard 2 complaint in 2010, Your Honor, is it 3 specifically references the partnerships and 4 defendants' relation to them. And that 5 allegation is that they used the partnerships 6 as front men to funnel in investors to BLMIS, 7 which is what we are alleging, Your Honor. And 8 that's why we are alleging they received 9 management fees from the then manager and 10 general partner Michael Sullivan, that they 11 were feeding ventures into the partnership, to 12 then go into BLMIS and continue the Ponzi 13 scheme. 14 THE COURT: Okay. So if you had it your 15 way, you want ten years of forensic inspection 16 of how many computers and who owns those 17 computers? 18 MR. WEBER: Well, Your Honor, there are 19 only two computers that were identified during 20 the testimony, so it would be those two 21 computers. I believe one was a laptop and one 22 was a desktop. So we would like a third party 23 forensic specialist to examine the computers, 24 determine whether any evidence is retrievable, 25 and if it is retrievable and relevant to</p>
<p>14:14:23-14:15:12 Page 15</p> <p>1 would have continued. And there is still 2 ongoing federal litigation which they would 3 have had a duty to preserve which then 4 overlapped with this case, Your Honor, which we 5 believe also had a duty to preserve. So those 6 documents which would have been relevant to the 7 federal case, which we believe are also 8 relevant to this case, should have been in 9 their possession when this case started. 10 THE COURT: What was the genesis of the 11 nature of the action in the federal court? 12 MR. WEBER: Well, one case, Your Honor, 13 was brought by defendant Avellino's 14 housekeeper, and it was regarding, I believe, 15 her investment with Madoff. And she had an 16 allegation that they knew or should have known 17 that it was a fraud. 18 And then you have an action commenced by 19 Irving Picard, the trustee for BLMIS, in 2010 20 which was against defendant Bienes, defendant 21 Avellino, their wives and members of their 22 families, entities related to them. And that's 23 again, that they knew or should have known that 24 Madoff was a fraud and that they profited from 25 it.</p>	<p>14:16:23-14:17:10 Page 17</p> <p>1 produce to the plaintiffs, of course, 2 protecting any privileged or confidential -- 3 valid confidential information. 4 THE COURT: Okay. Did Avellino or, I 5 guess, Bienes testify that they used these for 6 personal as well as professional usage? 7 MR. WEBER: I do not believe that is in 8 their testimony, Your Honor. But in fairness, 9 they did submit in their responses that, for 10 example, Avellino says in his response, which 11 is not testimony, Your Honor, but that he uses 12 that computer to communicate with his counsel. 13 THE COURT: Okay. 14 MR. WEBER: I don't believe that 15 Mr. Bienes submitted in his response that he is 16 no longer using the computer. I believe the 17 computer is currently located in Mr. Bienes's 18 closet, according to his testimony. 19 THE COURT: So the computer still has the 20 hard drive on it, but it's not being used right 21 now? 22 MR. WEBER: That's my understanding. 23 THE COURT: Okay. 24 MR. ETRA: May I, Your Honor? 25 THE COURT: Yes.</p>

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14:17:19-14:17:54

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14:19:20-14:20:14

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1 **MR. ETRA:** Jonathan Etra, Broad and Cassel
2 for Michael Bienes. Good afternoon.
3 **THE COURT:** What's your last name again?
4 **MR. ETRA:** Sorry, Etra, E-t-r-a.
5 **THE COURT:** I have seen you a bunch of
6 times.
7 **MR. ETRA:** Yeah.
8 **THE COURT:** But like I told the lawyers
9 this morning, people tend to tell me their
10 name, and five minutes ago I've forgotten it.
11 I can remember a face.
12 **MR. ETRA:** If you remember my face I will
13 take that.
14 **THE COURT:** Occasionally remember the
15 issues, I guess. So many different lawyers in
16 and out all day.
17 **MR. ETRA:** Your Honor, the lay of the land
18 with the stream they are swimming up, up, up,
19 upstream here. I cited two 4th DCA cases,
20 Strasser and Menke, to my knowledge the only
21 4th DCA cases to have considered the issue.
22 And in both cases those are issues that came on
23 a cert.
24 The trial court ordered a forensic
25 inspection. There's all kinds of protections

1 with it. There was a car accident and a woman
2 died, so her privacy interests were not
3 necessarily so high. And they wanted to get to
4 parts of her cell phone that would show what
5 she was doing in the moments before the car
6 accident.
7 **THE COURT:** The first thing that strikes
8 me, and I will look at this case more
9 carefully, is this case is ten years old. And
10 I have held I don't know how many forensic
11 computer inspections in the last just six years
12 since I have been a judge in complex business.
13 So I am wondering what their feeling at the 4th
14 would be these days on all these forensic
15 inspections in light of almost all of this
16 discovery turning to be electronic.
17 Did the overall -- the first headnote that
18 I saw dealt with just random overreaching
19 searches of people's computers. Is that what
20 this order is about?
21 **MR. ETRA:** A hundred percent that's what
22 our case is about, Your Honor. I mean, I will
23 jump to the facts of this case.
24 **THE COURT:** Let's get specific, okay? Let
25 me ask you specifically. He said and I thought

14:18:08-14:19:09

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14:20:24-14:21:10

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1 in some cases. And in each case the 4th DCA
2 said cert was appropriate and quashed the
3 order, and gave a lot of language to suggest
4 that it might be theoretically possible to do
5 this, but we haven't found that case yet in the
6 4th DCA.
7 **THE COURT:** Let me find your cases because
8 Joe did not point those out to me.
9 **MR. ETRA:** I stapled it to my brief, Your
10 Honor. I stapled them.
11 **THE COURT:** Okay. I have Menke.
12 **MR. ETRA:** And then Strasser follows that.
13 **THE COURT:** What was the other case?
14 **MR. ETRA:** The other one is called
15 Strasser versus Yalamanchi, and Menke versus
16 Broward County Schools is the other.
17 **THE COURT:** I have Menke versus Broward.
18 I don't see the other one you are referring to,
19 but. All right. Keep speaking, and I will
20 keep looking.
21 **MR. ETRA:** And then there is a 1st DCA
22 case called Antico, which I am not a hundred
23 percent sure whether the 4th DCA would agree
24 with the reasoning. But in that particular
25 case we can all see why the 1st DCA went along

1 he supplied me something that said that -- I
2 don't know who you represent again.
3 **MR. ETRA:** Michael Bienes.
4 **THE COURT:** Okay. That one or both of
5 these gentlemen deleted e-mails every three
6 days despite the fact that there was litigation
7 ongoing while they were doing it.
8 **MR. ETRA:** Here's our position, Your
9 Honor, and the testimony. My guy deleted
10 e-mail on a regular basis. It's a personal
11 e-mail. I delete my personal e-mail on a
12 regular basis. The big donut hole in their
13 case is that they were deleting relevant
14 evidence. They have found boxes and boxes of
15 material. And I apologize, Your Honor, I wrote
16 in my brief that there's not one e-mail they
17 pointed that was sent to Michael Bienes to
18 suggest that he was deleting related to this
19 case. I didn't realize at the very bottom of
20 that e-mail chain you see Michael Bienes's
21 name. I don't know if that's his e-mail or his
22 wife's. I don't know if it prints out that
23 way. It doesn't say Michael.Bienes@AOL.com.
24 It just says Michael Bienes. And there's no
25 text there. I don't know what that e-mail is

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14:21:19-14:22:01

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1 all about.
2 **THE COURT:** Let me stop you again. I
3 apologize for interrupting, but I have to try
4 to get these things out. I am like Columbo
5 sometimes, get these things out of my brain or
6 they stick there.
7 Are you saying that he deleted every
8 e-mail business or personal within whatever
9 timeframe he was doing as soon as he read it
10 whatever?
11 **MR. ETRA:** That's his testimony, and yes.
12 **THE COURT:** Okay. So how would the
13 deleted e-mails that might relate to the
14 partnerships not be discoverable under a
15 forensic examination?
16 **MR. ETRA:** Because we are hypothesizing
17 about a fact that's not in evidence on a matter
18 where we need an evidentiary record where we
19 are hypothesizing that there were relevant
20 e-mails that were sent to him.
21 **THE COURT:** Well, so you are telling me
22 he's got a laptop or he's got a desktop and he
23 is running these partnerships with all this
24 money and he doesn't write any e-mails
25 connected to his partnership?

14:22:07-14:22:42

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1 **MR. ETRA:** None.
2 **THE COURT:** Just he was a Hilary Clinton,
3 he just wrote --
4 **MR. ETRA:** Your Honor, this is the danger
5 of oral argument. There is no evidence he is
6 running these partnerships. He is not running
7 these partnerships. So putting the cart before
8 the horse here. He is a retired guy who is
9 sitting at home.
10 And, by the way, the particular computer
11 here, according to his testimony, is a laptop
12 that he had from '07 to, he said, about three
13 years ago, so to '12, okay?
14 **THE COURT:** '07 to?
15 **MR. ETRA:** To about '12. He said three
16 years ago, so that's what his testimony is,
17 okay? And it's been sitting in his closet ever
18 since.
19 I don't have any evidence he was running
20 these partnerships. And I shouldn't have to
21 defend against their allegation on an
22 evidentiary matter like this.
23 **THE COURT:** And if there was a forensic
24 examination as wild a fishing expedition as you
25 proclaim it might be, then he is not going to

14:22:51-14:23:18

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1 be harmed because there's nothing on there
2 except his own personal stuff?
3 **MR. ETRA:** Well, look, Your Honor, I am
4 not harmed by relevant evidence coming in. I
5 am harmed by personal intrusive matters. And
6 that's what the 4th DCA finds as well. And
7 they haven't met their burden to get there.
8 It's expensive. It's going to take a lot of
9 time. And it's personal. He is an older man
10 with -- sorry.
11 **THE COURT:** I am sorry. Did he testify
12 during the course of his deposition that he
13 used this laptop to conduct business?
14 **MR. ETRA:** No.
15 **THE COURT:** Was he asked that?
16 **MR. ETRA:** No, to my recollection he
17 wasn't asked. To my recollection he wasn't
18 asked. And to my recollection he didn't --
19 **THE COURT:** How many hours were you all in
20 deposition?
21 **MR. ETRA:** Sorry?
22 **THE COURT:** How many hours were you all in
23 deposition?
24 **MR. ETRA:** It was a day.
25 **THE COURT:** And nobody thought to ask him

14:23:25-14:23:55

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1 what did you use --
2 **MR. ETRA:** Your Honor, I am not trying to
3 go -- I am defending this deposition. They
4 didn't ask these questions. They have no
5 record to go on here. Obviously he
6 communicates with his lawyer. He communicates
7 with his doctor. This is a complete fishing
8 expedition.
9 **THE COURT:** Communicates with his doctor
10 on e-mail? I don't think so.
11 **MR. ETRA:** Okay, maybe not his doctor. I
12 don't know. Let me just state something else,
13 Your Honor. It's easy to get lost in this.
14 You have e-mail and you have hard drive.
15 **THE COURT:** It is not easy to get lost.
16 **MR. ETRA:** I find it easy to get lost.
17 **THE COURT:** I follow your argument. These
18 days I think I'm getting one of these motions
19 every week.
20 **MR. ETRA:** Okay. I apologize, Your Honor.
21 **THE COURT:** I am not naïve to the idea
22 that people go on fishing expeditions and just
23 want to go open up people's hard drives.
24 **MR. ETRA:** Can I just clarify one thing?
25 There's no evidence at all that anything in his

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14:24:04-14:24:45

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1 hard drive had anything to do with this
2 business, I mean zero.
3 **THE COURT:** That's a reason why I should
4 not permit a forensic inspection?
5 **MR. ETRA:** Right.
6 **THE COURT:** You are right, if that's what
7 I find.
8 **MR. ETRA:** Right. It was e-mails. You
9 don't need to go to his computer. You would
10 have to go to AOL. And there you basically
11 have all this personal information.
12 **THE COURT:** And why, if I directed your
13 client to sign a consent to get those e-mails
14 and let you view them first, is that any kind
15 of an invasion?
16 **MR. ETRA:** If you let me view them first,
17 I acknowledge it's probably not an invasion,
18 and I would be able to produce only what's
19 relevant. Because in their relief they say it
20 goes to a referee. And we withhold privileged
21 information. They get everything else about
22 his life.
23 If you want to go to AOL and have them --
24 they want to pay for it and have them give
25 e-mails to me, and then I have -- you know, now

14:25:44-14:26:38

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1 What do you want to tell us, sir?
2 **MR. WEBER:** Yes, Your Honor. Mr. Bienes
3 did testify on September 10, 2015, the question
4 was, on page 90:
5 "And how long have you maintained that
6 e-mail address?
7 "Answer: I got my first computer in '07.
8 And I -- we signed up for AOL and I have had
9 that address ever since."
10 **MR. ETRA:** So I stand corrected.
11 **THE COURT:** Hang on a second. Before you
12 sit down, sir, let me ask you directly. When
13 is it that you think -- again, I think I am
14 agreeing with counsel to some degree, although
15 when I am faced with these questions it's like
16 the old Ronald Reagan, trust but verify type,
17 and I don't know where the trust and where the
18 verify lies in some of these disputes between
19 you lawyers.
20 When is it that you think that there was
21 an integral period of time that Bienes was
22 e-mailing anyone with information about these
23 partnerships? In other words, if he just got
24 the computer in 2007, maybe he is not really
25 involved in this partnership dispute and these

14:24:54-14:25:32

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1 I have to produce documents, like I always have
2 to produce documents in response to their
3 request.
4 **THE COURT:** We don't have any idea, if I
5 were to direct such a consent to be signed, how
6 many e-mails he has promulgated over whatever
7 period of time?
8 **MR. ETRA:** There's no record, Your Honor.
9 They haven't made a record.
10 **THE COURT:** How was it established during
11 the deposition of how long he had this AOL
12 account?
13 **MR. ETRA:** I don't believe it was. I
14 could be wrong. I believe he said he had the
15 computer from '07, starting in '07 up to about
16 three years ago. I think he said what his AOL
17 e-mail was. I don't believe, and if I am
18 corrected, I apologize; I don't believe there
19 were any questions about when he got the AOL
20 account and how long he used it. But if
21 Mr. Weber can point to a cite, if it's in the
22 record, it's in the record. To my recollection
23 there's nothing there.
24 **THE COURT:** Hang on. He is raising his
25 hand like he is in class back there.

14:26:56-14:27:50

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1 e-mails for two or three years later. Give me
2 some period of time, some window, that you
3 think he was sending information out about
4 these partnerships on that e-mail address.
5 **MR. WEBER:** Sure, Your Honor. May I give
6 Your Honor a copy?
7 **THE COURT:** Sure. Because I am agreeing
8 with many things --
9 **MR. ETRA:** Etra.
10 **THE COURT:** -- Mr. Etra is saying here.
11 And I will have to tell you, just speaking out
12 loud but without any basis, I am thinking in
13 terms of a window by which I would let you have
14 some of these e-mails to see if there's
15 anything in there without going through eight
16 years of e-mails.
17 **MR. WEBER:** Yes, Your Honor. And this is
18 an e-mail that was produced to counsel. You
19 will see the Bates number at the bottom right.
20 It's an e-mail that is July 2008 before Madoff
21 was exposed of running a Ponzi scheme in
22 December of 2008.
23 And you will notice at the top of this
24 July 14, 2008, 2:11 p.m. e-mail, "Ray, I just
25 received this from Frank Avellino -- I received

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<p>14:28:08-14:28:53 Page 30</p> <p>1 a similar response from Michael Bienes -- they 2 say the capital is safeguarded in U.S. Treasury 3 bills -- I didn't know that -- did you?" 4 And the e-mail goes on, Your Honor. Your 5 Honor, you can read it. But this e-mail deals 6 with P&S and S&P. And if you just skip all the 7 way down, you will see that this originates 8 from an e-mail to Frank Avellino where he is 9 saying, "Frank, it looks like the better days 10 of P&S are over. I am considering pulling out 11 since most of my dollar signs are in it and 2.5 12 percent will have me dipping into the 13 principal." It goes on about P&S, Your Honor. 14 THE COURT: Okay. Well, this is 2008. 15 MR. WEBER: And this is 2008, Your Honor. 16 This is before Madoff was exposed to running a 17 Ponzi scheme. 18 THE COURT: Go ahead. 19 MR. ETRA: Your Honor, this doesn't 20 involve Michael Bienes. He is saying he got a 21 response to Michael Bienes. He is not saying 22 if it was by e-mail or not. Clearly, 23 Mr. Carone, and, by the way, who we haven't had 24 a chance to depose yet. So we don't have an 25 evidentiary record on any of these e-mails,</p>	<p>14:30:03-14:30:45 Page 32</p> <p>1 not involved in the instant action, this case 2 we are only seeking relevant evidence. And we 3 are not going to be the ones who are going to 4 be inspecting the computer or the e-mails. 5 That's the purpose of retaining the special 6 master to do this for us. And if counsel wants 7 to review them before they get to us to make 8 sure no privileged information escapes his 9 careful eye, we are okay with that. He can 10 produce a privilege log for Your Honor's in 11 camera inspection. 12 THE COURT: These cases, respectfully, 13 they are older. I don't think they are on 14 point anymore. There's plenty of federal cases 15 that I have reviewed on this electronic 16 discovery. 17 MR. ETRA: Your Honor, on this one thing 18 all they have is an e-mail that has Michael 19 Bienes's name on it. Your Honor, my wife for 20 some reason when I print out e-mails from it 21 reads all Broad and Cassel, that's my firm, for 22 some reason. There's something wrong with my 23 computer. For all I know this is an e-mail to 24 Diane Bienes. It doesn't say in here -- it 25 doesn't say in here, you know, Bienes's e-mail.</p>
<p>14:29:04-14:29:51 Page 31</p> <p>1 technically speaking. 2 But, clearly, Mr. Carone is e-mailing with 3 Avellino, as you see. Where is the e-mail he 4 had with Michael Bienes? Why are we pretending 5 there's an e-mail record with Bienes when they 6 know there is none? This is really -- this 7 speaks volumes to the fact that with Bienes 8 it's a complete fishing expedition. 9 There's no evidence, for example, that 10 Michael Bienes communicated, he used e-mail 11 versus phone calls. There's nothing here, Your 12 Honor. I think the e-mail hurts them. 13 MR. WEBER: Well, there is an e-mail, Your 14 Honor. Remember, the absence of e-mail doesn't 15 mean they didn't exist. Remember, we had that 16 e-mail that we showed Your Honor from Matthew 17 Carone from Michael Bienes and Diane Bienes 18 responded to. 19 And, Your Honor, it's worthwhile to point 20 out that unlike Strasser, the case that counsel 21 has pointed out where plaintiff would have 22 unrestricted access to defendant's entire 23 computer system with all the patients' 24 confidential records and all the records of 25 defendant's entire business, including those</p>	<p>14:31:09-14:31:21 Page 33</p> <p>1 So I have nothing in the record. 2 THE COURT: You do have in the record, 3 sir, respectfully. I don't know why you keep 4 yelling at me. You do have it in the record. 5 MR. ETRA: I apologize. 6 THE COURT: These people have said that 7 they were deleting e-mails for years after they 8 were in litigation, period. Good, bad, or 9 indifferent, that is some evidence. 10 MR. ETRA: No. I -- 11 THE COURT: And you want me to just take 12 it at this guy's word that he is right, that he 13 is religious, and that he didn't delete 14 anything related to the partnership, when I 15 have nothing to verify anything when he is 16 deleting e-mails that he shouldn't be deleting 17 while he is in litigation? 18 MR. ETRA: Respectfully, Your Honor, I 19 could delete any e-mail I want that has nothing 20 to do with our litigation. 21 THE COURT: I have heard enough. 22 MR. ETRA: There is no evidence. 23 THE COURT: Have a seat. Have a seat. 24 You are yelling at me for no purpose. 25 MR. ETRA: Your Honor, I apologize. I did</p>

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1 not realize I was raising my voice.
2 **THE COURT:** Let me hear from
3 Mr. Woodfield.
4 **MR. WOODFIELD:** May I just a moment? Your
5 Honor, obviously you have vetted this, but let
6 me just make a couple points.
7 **THE COURT:** I haven't vetted it, Gary,
8 honestly. When you all --
9 **MR. WOODFIELD:** Well, when I say -- I
10 don't mean to raise the temperature, Judge.
11 **THE COURT:** -- tell me that there is no
12 evidence and I am hearing that there is, it
13 causes me some concern.
14 **MR. WOODFIELD:** Just a couple points so we
15 are clear here.
16 First of all, while Your Honor refers to
17 federal cases, the law is clearly different in
18 the 4th DCA and the federal court. And right
19 now the controlling law in this district is
20 that there is no obligation to preserve
21 evidence until a discovery request is served in
22 a pending lawsuit. That's the Royal and Sun
23 Alliance case. And that's at -- you refer to
24 it as an older case. It's still controlling
25 law. It hasn't been reversed.

14:32:19-14:32:59 Page 35

1 **THE COURT:** Well, in that case there were
2 no safeguards, there was no discussion about
3 what could be inspected. None of that occurs
4 these days in my division at least on
5 electronic discovery.
6 **MR. WOODFIELD:** I understand. I am trying
7 to separate the two. I am just saying when the
8 duty was. I am not saying you can't impose
9 safeguards. I am just saying the duty did not
10 arise until January 2014.
11 **THE COURT:** Okay. I think that goes more
12 to spoliation than it does to discovery.
13 Let me ask you about what he just said
14 about when the discussions began. When they
15 were involved in the federal cases were they
16 under any kind of obligation to preserve
17 evidence?
18 **MR. WOODFIELD:** You've got to look --
19 you've got to look to the federal law, which is
20 dramatically different from this law. But on
21 that point, let's assume there was an
22 obligation for them to preserve.
23 **THE COURT:** Well, wait a minute, Gary.
24 You are not getting away with that. This isn't
25 a political debate. I asked you a direct

14:33:08-14:33:55 Page 36

1 question. Were they under an obligation to
2 preserve evidence in those federal cases, if
3 you know?
4 **MR. WOODFIELD:** I don't -- you'd have to
5 look at the federal law. I haven't studied it
6 in that regard.
7 **THE COURT:** No, I mean, under any judge's
8 order or?
9 **MR. WOODFIELD:** No, no, nothing.
10 **THE COURT:** Okay.
11 **MR. WOODFIELD:** But the point -- but their
12 argument -- first of all, the law in this
13 circuit is clear: No duty until, in this case
14 with regard to my client, January 2014.
15 If they did owe an obligation to a federal
16 judge or plaintiffs in a federal case in New
17 York, and they breached that, these parties
18 don't have the right to enforce a breach, if
19 the breach occurred there. If they were able
20 to do that, then they are usurping the 4th DCA
21 law on the issue and imposing the federal. And
22 it's a different standard.
23 So the only e-mails that they've shown
24 that my -- first of all, Your Honor talked
25 about business. These guys have been retired

14:34:11-14:35:01 Page 37

1 since 1992. They are not in business. The
2 computer usage is their personal.
3 There is not a shred of an e-mail after
4 2009 or '10 that they produced that involves my
5 client in this case. And remember, Sullivan,
6 who was the managing partner, with whom --
7 assuming my client was involved with the
8 partnership, he would have been dealing with
9 Michael Sullivan. They have had unfettered
10 access to all of his documents, all of his
11 e-mail. And I believe they also -- I believe
12 they had him execute documents to retrieve
13 e-mails from AOL. That's what his lawyer told
14 me.
15 So armed with every e-mail that Michael
16 Sullivan ever sent, they are not able to show
17 one after 2009 or 2010, well before any
18 obligation my client had to preserve any of the
19 documents.
20 So again, the burden is on them to -- now,
21 may I just make one more statement to
22 completely confuse things? But I want to be
23 very candid with what I understand the current
24 situation.
25 First of all, my client is not deleting

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1 e-mails. He has been instructed to not delete
2 e-mails, and he is not. And, quite frankly, I
3 will tell you this now, but I can't verify it
4 because I haven't had the opportunity, his
5 testimony as to e-mails and his deleting
6 e-mails was inaccurate.
7 He is not computer savvy. He would read
8 an e-mail. And based on AOL -- and I don't
9 have an AOL account. I haven't seen how it
10 works. This is how I am told it works, and I
11 am going to verify it on his computer when I
12 have an opportunity. After you read an e-mail
13 on AOL, it is moved to an old file, a different
14 file. He has not deleted those e-mails. They
15 are in that old file. And I am going to look
16 and retrieve them all. So this may be much ado
17 about nothing. There may have been no e-mails
18 that were deleted.
19 But as we face what's in front of us
20 today, no obligation arose until January 2014.
21 And there's been -- they have all of Michael
22 Sullivan's e-mails. There are none with my
23 client after 2010.
24 **THE COURT:** Okay. Thanks.
25 Do you know, Mr. Etra, the status of your

1 that only with regard to his guy. My client
2 uses it every single day. It's the only
3 computer he and his wife have e-mails to that
4 computer.
5 **MR. ETRA:** Your Honor, just to clarify.
6 He also testified that after he stopped using
7 the computer he has an iPad, and he uses the
8 e-mail on the iPad. So just to confuse things
9 further, I am sorry, but that's part of the
10 record.
11 **MR. WEBER:** Your Honor, may I? Just three
12 points, Your Honor.
13 So one of the portions of the testimony
14 from Avellino was, "Question: So you have made
15 no effort to retrieve deleted e-mails?
16 "Answer: No."
17 So right there you can imagine the
18 prejudice to the plaintiffs that we are not
19 getting --
20 **THE COURT:** You made a request to produce
21 for his documents in discovery?
22 **MR. WEBER:** Right, and he hasn't searched
23 for them.
24 **THE COURT:** He said in his deposition
25 again what, no efforts to obtain deleted

14:36:22-14:36:55

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14:37:44-14:38:20

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1 client with the AOL account? Was his the same
2 way in that -- because I did used to have an
3 AOL account, and I remember, you know, if you
4 just read something it went away, but you
5 necessarily had to go into a folder and push
6 delete if you really wanted to delete.
7 **MR. ETRA:** Your Honor, I apologize for
8 raising my voice before. And second, I don't
9 know the answer to that question.
10 **MR. WOODFIELD:** If Your Honor wishes, give
11 me an opportunity and I will confirm that. I
12 need to go physically look at his computer. I
13 always thought when I communicated with him on
14 discovery that he understood what he was doing
15 on the computer. I now realize he hasn't.
16 **THE COURT:** Which one has the desktop and
17 which one has the laptop?
18 **MR. ETRA:** I think they are both laptops.
19 **MR. WOODFIELD:** Laptop.
20 **THE COURT:** Your client had a laptop and
21 your client had a laptop?
22 **MR. ETRA:** Right.
23 **THE COURT:** And you are saying they
24 haven't used these in years?
25 **MR. WOODFIELD:** No. No. No. He said

1 e-mails?
2 **MR. WEBER:** "So you have made no effort to
3 retrieve deleted e-mails?
4 "Answer: No."
5 **THE COURT:** This is Avellino?
6 **MR. WEBER:** Correct. And Mr. Woodfield
7 just clarified there's a folder that --
8 **THE COURT:** Okay. I am going to make him
9 do a search on that.
10 **MR. WEBER:** Right. So we think it needs
11 to be done, we think, Your Honor.
12 Now, just two more points. I have the
13 federal case standards we have cited in our
14 reply. May I approach, Your Honor?
15 **THE COURT:** Sure. These are the ones that
16 get cited over and over to me. The 4th
17 District hasn't caught up with this yet, in my
18 opinion. They will. They will. Because they
19 are probably going to reverse me a half a dozen
20 times before we get it right here. But I just
21 don't think they have caught up yet. There's a
22 whole body of new rules.
23 **MR. WOODFIELD:** Judge Shira Scheindlin in
24 the Southern District called Zubulake I and
25 Zubulake II, and it imposes quite a broad and

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1 extensive, and I was going to say well
2 reasoned, I am not so sure about that,
3 obligation. But that obligation does not exist
4 in this circuit as it currently stands, Your
5 Honor.
6 **MR. WEBER:** But, Your Honor, my third
7 point I just want to clarify. So I cite
8 Zubulake in the reply. And then we also cite
9 Golden Yachts, Inc. versus Hall, which is a
10 4th DCA case.
11 And I have copies of this for the parties
12 and Your Honor. May I, Your Honor.
13 **THE COURT:** Sure.
14 **MR. WEBER:** Let's even assume that
15 defendants are correct when they replied, Your
16 Honor. Golden Yachts explicitly says, where I
17 put the Post-It, "Unlike an adverse presumption
18 instruction, where the court must find the
19 spoliator was duty-bound to preserve the
20 evidence, an adverse inference may arise in any
21 situation where potentially self-damaging
22 evidence is in the possession of a party and
23 that party either loses or destroys the
24 evidence," Your Honor.
25 So let's even assume that they are correct

14:41:31-14:42:48

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1 it did not protect against disclosure of
2 confidential or privileged information.
3 So I mean, this writ that she denied or
4 that she granted or they granted, the 4th, I
5 mean, it seemed like to me it's really an over
6 broad, all encompassing type order that this
7 administrative law judge must have issued to
8 the parties.
9 So all right. Without rambling on on this
10 we have got to move on, it's 20 minutes 'til.
11 I've got another hearing at 3:00.
12 The first order I am going to do is I am
13 going to issue an order to Mr. Woodfield's
14 client, to Mr. Woodfield and his client, to
15 inspect the existence of e-mails that may still
16 be in a folder or still be in existence on his
17 AOL account that he has readily available and
18 accessible to without having to ask AOL or any
19 third party to produce it, first off, to see
20 what those -- if those exist, Mr. Woodfield.
21 If they do, then I will require a couple
22 of things. One is a timeline as to from what
23 period to what period.
24 And the second thing is I will require you
25 to preserve and protect those through the

14:39:41-14:41:15

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1 that the 4th DCA laws currently stand, which we
2 don't agree with their position, they didn't
3 have a duty, they still cannot delete the
4 evidence, Your Honor. It still goes to this
5 adverse inference which plaintiffs are seeking
6 by their motion.
7 **THE COURT:** All right. Give me a second.
8 This case seems to help the defendants.
9 **MR. WEBER:** Well, Your Honor, you have to
10 look at that one point where it says that the
11 duty doesn't --
12 **THE COURT:** You see the line here, I think
13 it's easier when you are in the 4th and you've
14 got days and days and briefs and briefs and
15 staff attorneys and staff attorneys, the luxury
16 of which I don't have, is this line on seeking
17 relevant discoverable information and simply
18 wholesale opening up computer hard drives and
19 say, well, we'll figure out if there's anything
20 relevant after we open it up. That's the line
21 for me that I think that's what Judge Warner is
22 kind of talking about a little bit in this
23 opinion.
24 Let me see how she ends this. This was an
25 administrative law judge. And she points out

14:43:07-14:44:02

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1 pendency of this litigation.
2 And the third thing is I will require you
3 to report to the plaintiffs your findings in
4 that regard. If there are still undeleted and
5 stored e-mails on there, to probably avoid yet
6 more expense and cost to this, the first thing
7 I would task probably is for you to do,
8 depending on how many there are, a random
9 searching of those e-mails to see if there
10 exists information relating to the P&S
11 partnership accounts.
12 **MR. WOODFIELD:** Well, if I just may, I
13 mean, they have recently served additional
14 document requests on us where they sought
15 communication from about a dozen people,
16 including -- and then I would take those names
17 and P&S and S&P and Michael Sullivan and do a
18 search of all of them, as if I would respond to
19 an appropriate response to discovery request?
20 **THE COURT:** That might be the first step.
21 If he said that -- you said your client -- you
22 said your client continues to use the computer?
23 **MR. WOODFIELD:** Yes.
24 **THE COURT:** And the account. He said his
25 stops in '12 or something like that.

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14:44:12-14:44:47 Page 46

1 **MR. ETRA:** Yes. But the e-mails are, Your
2 Honor. He stopped using the computer but he is
3 still using the e-mail.
4 **THE COURT:** Well, just in an abundance of
5 caution, Mr. Etra, I am going to task you to do
6 the same thing --
7 **MR. ETRA:** I was going to ask you to do
8 that actually.
9 **THE COURT:** -- to see if. You know, I
10 know when I had an AOL account when you just
11 didn't read something it went away. It didn't
12 necessarily mean I deleted it. If I wanted to
13 delete something, I had to go over to a folder
14 and push delete all or something like that to
15 manually do it. So I don't know what they did.
16 I don't know how computer literate they were.
17 That's the first step.
18 Second step should there be e-mails on
19 there, in your case -- do you have the same
20 discovery directed to you that he had?
21 **MR. ETRA:** Yes, Your Honor.
22 **THE COURT:** Okay. So then the first thing
23 would be to discover or to determine if you
24 have such e-mails in existence, whether they
25 are discoverable as a result of any pending

14:45:01-14:46:03 Page 47

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
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
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
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
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
25 of.

14:46:10-14:47:12 Page 48

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.
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
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,
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.
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
25 attorney/client, you will create a log. And

14:47:24-14:48:05 Page 49

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
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
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?
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
25 to save everybody coming back for another

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14:48:16-14:48:57 Page 50

1 hearing at another time to relitigate the exact
2 same issues again.
3 Now tell me what you want to say, sir.
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
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
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
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
25 you don't know, then Mr. Etra is right, you are

14:50:04-14:50:48 Page 52

1 relevant. Okay. So all of a sudden now let's
2 jump to '10 and '11 and he is going to start
3 writing e-mails relating to the partnership.
4 My belief is that if he was using his
5 computer as a pattern to write about the
6 partnerships and to express himself in writing
7 to the other various other characters involved
8 in this, that he would be doing it consistently
9 over the years once he got that AOL account,
10 not just spontaneously in 2011 or '12.
11 I could be wrong and you are right. It is
12 without prejudice. But without getting some
13 kind of a sampling absent letting you do just
14 completely open up a hard drive, I don't know
15 any other way to satisfy myself that it's going
16 to lead to discoverable evidence.
17 **MR. WEBER:** And just be clear, Your Honor,
18 it's e-mails received or sent during that
19 timeframe.
20 **THE COURT:** That's what I asked. That's
21 what I said.
22 **MR. WEBER:** Okay.
23 **THE COURT:** Mr. Etra, how do you feel
24 about -- as I said, I haven't issued that order
25 yet. But how do you feel about that judicial

14:49:10-14:49:54 Page 51

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
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.
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 --
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.
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
25 these e-mails you have shown me becomes

14:50:59-14:51:32 Page 53

1 compromise, if it is one?
2 **MR. ETRA:** I think it's great, Your Honor.
3 I thank you for it. The only thing that I
4 still am unclear in my head on is, well, first
5 going to do the check to see if there's
6 anything to find. Sort of the second stage, so
7 it's clear, if I get the documents -- and I am
8 not sure what I am doing at that point. I am
9 searching them and then making a representation
10 about obviously if I find relevant I am going
11 to produce them. And if I don't, I am going to
12 tell them I am not producing them because they
13 are not relevant. And if there are privileged
14 -- I mean, to me it's just like a regular
15 document production.
16 **THE COURT:** Exactly.
17 **MR. ETRA:** That's fine. I just didn't
18 want to be in a position where then I hold back
19 as to privileged and say, no, everything else
20 you get to see. It's like a regular document
21 production.
22 **THE COURT:** It's like any other document
23 production; you say it's privileged or not
24 privileged.
25 **MR. ETRA:** Your Honor, I think that's

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<p>14:51:42-14:52:22 Page 54</p> <p>1 great. I thank you. 2 MR. WEBER: Your Honor, I mean, I don't 3 want to belabor this point. But if it's like a 4 regular document production and he is going 5 through these e-mails, what is the relevance 6 that he is looking for? 7 THE COURT: Well, first off, I don't know 8 what's in there. 9 MR. WEBER: Right. 10 THE COURT: And nobody in this room 11 apparently does. If he's got e-mails in there 12 where he is writing maybe a lawyer about 13 something going on in a case which I can see 14 doing or attaching to a document to it, then I 15 would assume that there's some privilege 16 attached to that. If he is writing to his 17 partner over there that, hey, listen, we see a 18 quick one here, let's do what you suggest is in 19 these e-mails, then that's probably ultimately 20 going to be discoverable if it exists. 21 But until I have a basis and some kind of 22 a foundation as to what's in there, if 23 anything, I am just not going to wholesale let 24 you all do the expansive forensic examination 25 that you want. If I am convinced that there</p>	<p>14:53:32-14:54:18 Page 56</p> <p>1 THE COURT: What else do you got? 2 MR. WEBER: Your Honor, it was our motion 3 for protective order regarding the deposition 4 of Michael Sullivan. 5 THE COURT: Oh, I remember that. This is 6 something to do with the settlement documents 7 or something with Sullivan? 8 MR. WEBER: Correct. Well, yes, Your 9 Honor. Really two points to the motion. First 10 point is that -- 11 THE COURT: Sullivan is the party you 12 settled with in this case at some point in 13 time? 14 MR. WEBER: Correct, Your Honor. He is 15 the former manager and general partner of the 16 partnerships. We reached a settlement 17 agreement with him. And we formally litigated 18 what documents related to the settlement 19 defendants were entitled to in front of Judge 20 Streitfeld. And Judge Streitfeld allowed them 21 to obtain a copy of the settlement agreement 22 with the amount stricken from the settlement 23 agreement, but then denied their motion for 24 related documents that Sullivan produced to 25 plaintiffs as part of the settlement agreement.</p>
<p>14:52:34-14:53:19 Page 55</p> <p>1 are e-mails, contrary to what these two lawyers 2 are representing that their clients were doing 3 back then, and they are pertinent to these 4 partnerships and they are showing a pattern, 5 then I may well permit a forensic inspection 6 over other years with some definitive 7 restrictions on it. 8 But right now until there is a better 9 showing, I am not going to do it. I am going 10 to treat this as a document production like you 11 have compelled or asked them to do on e-mails, 12 tasked them to do what I asked them to do. 13 In light of his agreement here then I am 14 going to direct Mr. Etra to do a consent signed 15 by your client to AOL. And again, unknown 16 commodity in the room is the length of time 17 upon which they retain these e-mails or 18 servers. If they don't exist then there's 19 nothing to be argued about and I have wasted 50 20 minutes of my time here. 21 Okay. That's my order. All right. 22 You guys had something else yet? 23 MR. WOODFIELD: We did. 24 THE COURT: You had something, right? 25 MR. WOODFIELD: We both did.</p>	<p>14:54:31-14:55:02 Page 57</p> <p>1 And you know they maintain that they are 2 entitled to a copy of the statement that 3 Sullivan has given to plaintiffs. And 4 plaintiffs maintain that that statement is work 5 product. 6 THE COURT: When was this statement 7 allegedly given? 8 MR. WEBER: It was allegedly given in 9 December 2014, Your Honor, and maybe in 10 November. 11 THE COURT: After the settlement? 12 MR. WEBER: After the settlement, Your 13 Honor. As part of the settlement it was given. 14 I think there were two days. We adjourned the 15 first time. 16 THE COURT: So they want a copy of 17 Sullivan's statement that he gave to you after 18 he settled? 19 MR. WEBER: Correct, Your Honor. 20 THE COURT: That you claim is privileged, 21 work product, what? 22 MR. WEBER: Correct, Your Honor, work 23 product. 24 THE COURT: Okay. What else? 25 MR. WEBER: And also, Your Honor, there is</p>

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14:55:15-14:55:59 Page 58

1 a -- as part of the subpoena to Mr. Sullivan
2 there was a number of documents that they set
3 forth and, you know, everything under the sun
4 relating to the partnerships that Michael
5 Sullivan might have in his possession. Our
6 position has always been that any such
7 documents should have been produced to the
8 conservator long ago in response to the order
9 appointing the conservator.
10 Now, there's representations that Sullivan
11 doesn't have anything at this point. You know,
12 if he doesn't, fine; we are happy with that.
13 But if he does, he needs to produce to
14 plaintiffs first before it goes to defendants.
15 Also, they are seeking any communications
16 between plaintiffs' counsel and Mr. Sullivan's
17 counsel leading up to the settlement. Our
18 position is those discussions are privileged,
19 Your Honor, and they are not entitled to
20 production of them.
21 **THE COURT:** All right. Thanks.
22 **MR. WOODFIELD:** Very brief, Your Honor?
23 **THE COURT:** Yes.
24 **MR. WOODFIELD:** I understand you have
25 another hearing. I obviously have no -- we

14:56:11-14:56:50 Page 59

1 scheduled to take Sullivan's deposition in two
2 days. It's not going forward because we
3 weren't able to get documents.
4 There are two things I want. I want from
5 him the partnership documents that he had. He
6 is the general partner. He had those
7 documents. He has given those to the
8 plaintiffs in this case, and they are claiming
9 work product privilege as to them.
10 **THE COURT:** Have they given you anything
11 relating to that?
12 **MR. WOODFIELD:** They have given us
13 documents involving the partnership. I don't
14 know whether those came from Sullivan. They
15 haven't been identified as such. And I don't
16 know whether I have them all. But, clearly. I
17 mean, do I need to explain that that's critical
18 to the case? I mean, it's critical to the
19 case.
20 The fact is if Sullivan still has them,
21 obviously I would get them from him before his
22 deposition. Just giving them to these guys'
23 lawyers doesn't make them privileged. That's
24 with regard to the documents. So I need those
25 documents.

14:57:01-14:57:45 Page 60

1 With regard to the settlement statement,
2 and, yes, with regard to the sworn statement
3 that arose out of the settlement, when Judge
4 Streitfeld addressed this early on, one of
5 their arguments was, well, you've got to
6 establish a need for it and you can get it from
7 another party. Okay. The only other party is
8 Sullivan. I asked his lawyer. His lawyer
9 said, I don't have a copy of it. So they are
10 the only ones who have the statement.
11 And it's not privileged -- I think the
12 privilege is they don't articulate, if they are
13 relying upon 408 privileged communication,
14 settlement communication, that doesn't apply in
15 this case. Reading that statute or reading
16 that evidentiary rule it applies -- settlement
17 documents are privileged only as to the issues
18 of liability or the lack of liability.
19 Otherwise, they are discoverable. And I have
20 cited cases --
21 **THE COURT:** What about work product? I
22 mean, if this was an auto accident and they
23 went out and took these statements from people
24 after they settled to prepare for the
25 defendants that were left, I don't think you

14:57:54-14:58:29 Page 61

1 could hardly say that that would not be
2 anything but work product.
3 **MR. WOODFIELD:** Well, but work product can
4 be overcome if we establish a need and there's
5 no other source of that information.
6 **THE COURT:** Had he been deceased and not
7 ability to obtain his testimony. But you are
8 able to obtain his testimony at this stage,
9 right?
10 **MR. WOODFIELD:** If I ever get there before
11 he is deceased, yes.
12 **THE COURT:** Well, we may all be deceased
13 by that time.
14 All right. Anything else, Gary?
15 **MR. WOODFIELD:** No.
16 **THE COURT:** Anything else you want to say?
17 **MR. WOODFIELD:** Well, obviously the
18 communications back and forth is not
19 privileged. Again, relying upon 408 that's not
20 a basis for privileged documents.
21 **THE COURT:** Okay. First off, he has to
22 produce all the partnership documents that he
23 has. If you want to give him the same thing
24 you have given him before and state anything
25 you withheld as a privileged log and identify

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14:58:40-14:59:19

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1 what it is, you can do that. That way he knows
2 exactly what you withheld and the basis you
3 withheld it. The partnership documents are
4 clearly discoverable.
5 The statement, in my opinion, is not.
6 That's work product. It belongs to them. If
7 you take his deposition and you can somehow
8 show me at some later time that there's some
9 extraordinary reason why it would become
10 discoverable, then I will probably have to look
11 at it in camera and make a decision later.
12 Right now on its surface it sounds like it's
13 classic work product. So the denial of that
14 statement is without prejudice.
15 **MR. WOODFIELD:** As such then they can't
16 use it then at trial to impeach Sullivan?
17 **THE COURT:** Well, they can't use the
18 statement really for any purpose unless they
19 give it to you.
20 **MR. WOODFIELD:** Right.
21 **MR. WEBER:** Your Honor, you said that we
22 shall produce the partnership documents. Your
23 Honor understands that there's like 27 boxes of
24 partnership documents? We have never made
25 representations that those are all work

15:00:10-15:00:32

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1 **MR. WOODFIELD:** The point is I don't know
2 whether I have them.
3 **THE COURT:** Do you want to go to his
4 office and look at it?
5 **MR. WEBER:** Well, that's what we've
6 offered to do.
7 **THE COURT:** Either that or you get a copy
8 of it at your expense.
9 **MR. WOODFIELD:** Right.
10 **THE COURT:** So you decide which one you
11 want to do. You are entitled to them absent
12 the privileges.
13 **MR. WEBER:** I believe we have provided in
14 our response two or three.
15 **THE COURT:** You guys can talk to each
16 other out in the hallway.
17 **MR. WOODFIELD:** I need to determine which
18 ones I need copies of.
19 **THE COURT:** Fine.
20 **MR. WOODFIELD:** But they will be
21 identified as the documents they received from
22 Sullivan.
23 **THE COURT:** That's fine, however you all
24 work it out. Go to his office and determine
25 what you want to copy.

14:59:27-15:00:05

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1 product.
2 **THE COURT:** Well, Gary, if there's 27
3 boxes, what exactly do you want them to give
4 you? Because all I can do is order them to
5 give you the same thing they've given you
6 before and assert whatever privileges to those
7 documents. Have you asserted privileges to
8 some of those?
9 **MR. WEBER:** Your Honor, the -- those
10 documents that we got from Sullivan we would
11 have received back in 2013 or earlier. So
12 whatever --
13 **THE COURT:** I am asking you a simple
14 question. Did you assert privileges?
15 **MR. WOODFIELD:** Yes, eight or nine items.
16 **MR. WEBER:** Yeah, and we have done a
17 privilege log for some of those. But until --
18 we have already done our piece that would have
19 encompassed those documents and they would have
20 been produced. To produce everything --
21 **THE COURT:** Well, if you guys produced 27
22 boxes, you are going to have to pay for it,
23 Mr. Woodfield. If you already have them, then
24 I don't know why you guys are quibbling about
25 it.

15:00:38-15:01:09

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1 What did you all have set for today,
2 Mr. Woodfield?
3 **MR. WOODFIELD:** No, just the obtaining
4 these documents and the settlement
5 communication which I don't believe is
6 privileged.
7 **THE COURT:** I don't know about the
8 settlement communications yet. When is he set
9 for deposition?
10 **MR. WOODFIELD:** Well, it was this
11 Wednesday, but we postponed it.
12 **THE COURT:** Because you are going to need
13 these documents?
14 **MR. WOODFIELD:** Right. And if you look at
15 408, it clearly only applies to liability or
16 the lack of liability. There's no other
17 privilege on privileged communications.
18 **THE COURT:** The only thing I could say is
19 I think I'd have to think about this. If you
20 haven't filed a motion, file one. If you have
21 filed one, call it back up for a hearing a few
22 days before he is re-deposed or he is deposed,
23 and I will think about it.
24 **MR. WOODFIELD:** Thank you.
25 **THE COURT:** It's just too quick to make a

15:01:15-15:02:04 Page 66

1 decision on that right now.
2 Is that it?
3 **MR. WOODFIELD:** Thank you.
4 **MR. WEBER:** Thank you, Your Honor.
5 **THE COURT:** Let's set some timeframes on
6 this.
7 **MR. WOODFIELD:** May I? That's somewhat of
8 an issue. Let me tell you why. Since it's a
9 laptop it travels with Mr. Avellino. He is now
10 in New York for medical reasons. I am going up
11 there because they've scheduled depositions
12 Monday and Tuesday, the 8th and 9th of
13 November. I had planned to meet with
14 Mr. Avellino the Friday before that. I think
15 that's the 6th. So I would request that -- and
16 obviously, at that time is when I will conduct
17 this inspection. I just don't see a burning
18 need to have to travel to New York just to --
19 **THE COURT:** When is it you think you could
20 get it done?
21 **MR. WOODFIELD:** Well, the end of that next
22 week, Friday the 13th. Or make it Monday, the
23 16th of November.
24 **THE COURT:** That's not that unreasonable.
25 What about you?

15:02:10-15:02:24 Page 67

1 **MR. WOODFIELD:** Well, let me ask for a
2 more reasonable time then.
3 **MR. ETRA:** Can I travel under the same
4 deadline?
5 **THE COURT:** Sure. Write it up,
6 November 16th, unless it's agreed to by the
7 attorneys.
8 **MR. WEBER:** Thank you, Your Honor.
9 **THE COURT:** All right. You guys have a
10 good day.
11
12 (The proceeding concluded at 3:02 p.m.)
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1 C E R T I F I C A T E
2 - - -
3
4 The State of Florida
5 County of Broward
6
7 I, Lisa Mudrick, RPR, FPR, certify that I
8 was authorized to and did stenographically report
9 the foregoing proceedings, pages 1 through 67, and
10 that the transcript is a true record.
11
12 Dated November 4, 2015.
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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.

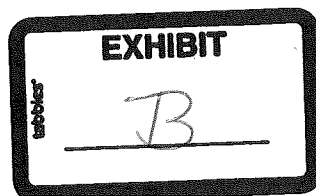
**ORDER ON PLAINTIFFS' EXPEDITED MOTION TO COMPEL DEFENDANTS FRANK
AVELLINO AND MICHAEL BIENES TO PRODUCE COMPUTERS FOR INSPECTION AND
TO PRODUCE DOCUMENTS**

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:

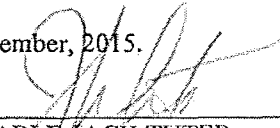
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- a. On or before November 16, 2015, Defendant Bienes shall search the folder of deleted e-mails of his e-mail account Michaelbienes@aol.com, and all other folders of e-mails related to the e-mail account Michaelbienes@aol.com that are accessible by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

JBT

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 FRANK AVELLINO'S
NOTICE OF FILING ERRATA SHEET OF FRANK AVELLINO

Defendant, Frank Avellino, by and through his undersigned counsel, hereby gives notice of filing the attached Errata Sheet from his deposition taken on September 9, 2015.

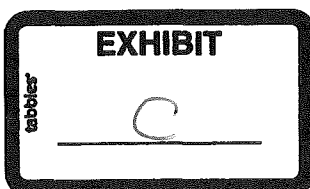
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2015, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin Order No. 13-49.

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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 FRANK AVELLINO'S
NOTICE OF FILING AMENDED REPORT REGARDING EMAILS

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

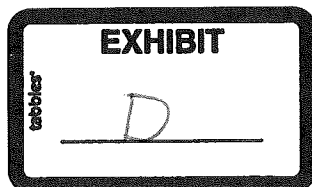
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2015, the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin Order No. 13-49.

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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) 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