

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.

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

Defendant, Michael Bienes (“Bienes”), hereby files this Response in Opposition to Plaintiffs’ Renewed Expedited Motion to Compel Defendants to Produce Computers for Inspection and to Produce Documents (the “Renewed Motion”), stating:

INTRODUCTION

The Renewed Motion should be denied as improper request for “reconsideration” of issues the Court previously decided in order to expand the scope of the Court’s ruling after the fact. Just as they did in their initial motion, Plaintiffs again seek the production of and unrestricted access to Bienes’s personal computer. And just as it was with that motion, Plaintiffs again fail to make a showing that satisfies any of the many standards required for an award of such drastic relief. But Plaintiffs now go a step further in their Renewed Motion. Not only do Plaintiffs seek production of Bienes’s personal laptop—something this Court specifically declined to order in light of the Fourth DCA’s clear precedent—they now seek turn-over and

BROAD and CASSEL

One Biscayne Tower, 21st Floor 2 South Biscayne Blvd. Miami, Florida 33131-1811 305.373.9400

carte blanche access to Bienes's other personal devices, including any mobile device or cellular phone. There is simply no basis for this broad-sweeping request.

The Renewed Motion should be denied for an additional and more troubling reason: Bienes has complied with the requirements of this Court's November 16, 2015 Order which disposed of Plaintiffs' initial motion, and has bent over backwards to accommodate Plaintiffs' requests that he perform additional searches of other devices.¹ Simply put, Bienes cannot and should not be compelled to do that which he has already done or agreed to do.

For these reasons, explained in more detail below, the Renewed Motion should be denied and Bienes should be awarded the attorneys' fees and costs he incurs having to oppose it.

MEMORANDUM OF LAW

I. Bienes complied with the Court's Order dated November 16, 2015.

After hearing argument on October 26, 2015 concerning Plaintiff's prior motion ("October 26 Hearing"), this Court entered an Order on November 16, 2015 ("November 16 Order"). The November 15 Order, a copy of which is attached as **Exhibit A**, required Bienes to do essentially three things: (i) search the folder of deleted e-mails and all other folders of e-mails related to his AOL account (MichaelBienes@AOL.com) and produce to Plaintiffs (a) "a timeline stating the period of time for which e-mails exist in those folders" and (b) "any non-privileged e-mails, including but not limited to attachments, that are responsive to Plaintiffs' request for production served on Defendant Bienes in this action"; (ii) provide a written authorization for AOL to release e-mails sent or received from his account (MichaelBienes@AOL.com) for the

¹ Despite having no obligation to do so, the undersigned agreed to perform a similar search of Bienes's tablet and cellular telephone in an attempt to avoid further motion practice on this issue and a further draining of the Court's valuable resources.

years 2008 and 2009 to his attorneys; and (iii) preserve all e-mails and his computer identified in the Motion while this action is pending.² Bienes has done all three.

Bienes has provided and sent to AOL a written authorization for the release of his personal e-mails from 2008 and 2009, a copy of which is attached as **Exhibit B**. Bienes provided Plaintiffs' with a brief memo setting forth the required "timeline" of the period of time for which e-mails exist in the AOL account folders, a copy of which is attached as **Exhibit C**. Along with the timeline, Bienes also produced to Plaintiffs' counsel two responsive e-mails discovered during the search of his AOL account, bates labeled BIENES0005616-0005617, responsive documents located on Bienes's laptop bates labelled BIENES0005489-0005615, and a privilege log listing any documents withheld from production.³ A copy of Bienes's counsel's cover e-mail enclosing the documents and privilege log are attached as composite **Exhibit D**. And finally, Bienes confirmed in his memo that he had been advised to preserve his e-mails and his laptop computer on a going forward basis, as the November 16 Order required.

Despite Bienes's compliance with the November 16 Order, Plaintiffs' counsel took the position that Bienes's "memo" was somehow not sufficient. In fact, the alleged deficiencies with Bienes's memo are the only grounds Plaintiffs cite as support for their Renewed Motion. *See* Renewed Motion at ¶¶ 11-16.

Indeed, Plaintiffs devote barely 1 and ½ pages to the supposed factual basis for their Renewed Motion, see pages 11 through 13. But what is worse is they give absolutely no space to discussing either the updated AOL memo or the detailed response to their questions Bienes's counsel provided them on November 24, 2015.

² The computer identified in Plaintiffs' initial motion is Bienes's laptop.

³ Strictly speaking, Bienes was not required by the terms of the Order to perform a detailed search of his laptop, but he did so nonetheless in the spirit of cooperation and good faith.

After a brief meet and confer phone call with Plaintiffs' counsel Mr. Steven D. Weber on the afternoon of Friday, November 20, 2015, Plaintiffs filed their Renewed Motion a mere matter of minutes later, just before 5:00 p.m. on the same afternoon. Shortly after receiving the Renewed Motion, at 5:23 p.m. on November 20, the undersigned received an e-mail from Mr. Weber, ostensibly as a follow-up to the meet and confer phone conference earlier that afternoon, in which Mr. Weber posed certain questions regarding, among other things, the method by which Bienes's e-mails and laptop were searched.⁴ In response to both Mr. Weber's November 20 e-mail and the Renewed Motion, on Tuesday, November 24, 2015, the undersigned provided Mr. Weber with an updated memo and an extensive explanatory e-mail. A copy of Mr. Weber's November 20 "follow-up" e-mail and the undersigned's November 24 response, together with the updated memo it attached, are attached as **Exhibit E**.

Bienes and his counsel have made every effort to comply with the Court's November 16 Order, and have gone out of their way to address each question that Plaintiffs' counsel raised, included those which form the basis of the Renewed Motion. Unfortunately, Bienes's efforts have been to no avail, as Plaintiffs now insist on broadening the narrowly tailored relief they were granted in the November 16 Order. But, just as before, their Renewed Motion falls short of justifying a turn-over and wholesale search of Bienes's laptop, much less of his other mobile device or mobile telephone.

II. Standard on an Order for Production of a Computer

Plaintiffs bear the same burden to justify an order compelling Bienes to turn-over his mobile devices and cell phone that they did when the Court refused to grant Plaintiffs the same relief with respect to his laptop. Requests for turn-over or examination of a personal computer or

⁴ The timing of Plaintiffs' filing of the Renewed Motion in relationship to the meet and confer call and e-mail raises certain doubts about whether Plaintiffs were operating in good-faith.

other device are permissible “only in limited and strictly controlled circumstances.” *See Menke v. Broward County School Board*, 916 So. 2d 8 (2005). If the standards which govern those limited and strictly controlled circumstances are not met, the Fourth DCA has *certiorari* jurisdiction to review a discovery order that requires production of even potentially privileged information. *Strasser v. Yalmamanchi*, 669 So. 2d 1142, 1146 (1996). In such a situation, “[t]he harm [there] is irreparable because once confidential information is disclosed, it cannot be ‘taken back,’ and once the wholesale invasion into the defendant’s computer system has occurred, the damage ... may be irreversible.” *Id.* Thus, the burden still rests squarely on Plaintiffs to prove three elements: (i) intentional destruction of relevant evidence; (ii) a likelihood of retrieving the allegedly deleted information; and (iii) that there are no less intrusive means of obtaining the information. *Menke*, 910 So. 2d at 12. Plaintiffs, once again, have proved none of the three.

III. Plaintiffs still have not met their burden.

Turn-over or inspection of a personal computer, tablet, or cellular phone still is permissible *only under very limited and strictly controlled circumstances* according to controlling Fourth District precedent. This Court’s November 16 Order was perfectly consistent with this settled rule. As this Court implicitly found in declining to compel Bienes to surrender his laptop following the October 26 Hearing, Plaintiffs failed to present any evidence that Bienes intentionally destroyed relevant evidence or otherwise thwarted discovery; failed to present any evidence that the information they seek exists on Bienes’s laptop; and failed to demonstrate there were no less intrusive means of obtaining the alleged “information.”

What was true at the October 26 hearing remains true of Plaintiffs’ Renewed Motion today. The Renewed Motion points to no evidence that Bienes intentionally destroyed relevant evidence or has purposefully thwarted discovery. Likewise, Plaintiffs again have failed to present

any evidence that the information they seek could be recovered from Bienes's laptop or the other devices. Plaintiffs again present no evidence regarding the method by which they intend to seek recovery of this information. Plaintiffs again present no evidence as to how they intend to navigate through Bienes's devices in a way that would protect his confidential, private, or privileged information. Plaintiffs again present no evidence as to *who* they intend to serve as their "expert" or computer information technician. And Plaintiffs again present no evidence regarding the qualifications of or the manner in which the expert might try to recover this information.

Finally, Plaintiffs again fail to show that there are no less intrusive means to accomplish their goals. To the contrary, by refusing to abide by the Court's November 16 Order and in good-faith acknowledge Bienes has complied with its terms, but instead seeking to broaden the already extraordinary relief they seek to encompass *additional* personal devices, Plaintiffs evidently seek the *most* intrusive means possible. In fact, it seems Plaintiffs are more interested in intimidating and badgering Bienes than they are in discovering facts relevant to their alleged claims.

CONCLUSION

Plaintiffs again have cited no case in which a trial court situated in the Fourth District granted the relief they seek *and* managed to avoid a reversal on *certiorari* review. In fact, Plaintiffs cite to the leading case on this subject in the Fourth District, *Menke*, which of course stands starkly against the proposition that Plaintiffs should be awarded a turn-over of any computer or mobile device of Bienes, particularly where Bienes has complied with this Court's November 16 Order and made every reasonable effort to address Plaintiffs' questions. Accordingly, the Renewed Motion must should denied.

Respectfully submitted,

/s/ Shane P. Martin

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ssmith@broadandcassel.com

Jonathan Etra (686905)

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Shane P. Martin (056306)

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Telephone: 305.373.9400

Facsimile: 305.373.9443

Counsel for Defendant, Michael Bienes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 8, 2015, the foregoing document was served via E-mail to: (i) Thomas E. Messana, Esq., Thomas Zeichman, Esq., Messana, P.A., 401 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, FL 33301 (tmessana@messana-law.com, tzeichman@messana-law.com) (Counsel for Plaintiffs); (ii) Leonard K. Samuels, Esq., Etan Mark, Esq., Steven D. Weber, Esq., Zachary P. Hyman, Esq., Berger Singerman LLP, 350 East Las Olas Boulevard, Suite 1000, Fort Lauderdale, FL 33301 (lsamuels@bergersingerman.com, emark@bergersingerman.com, sweber@bergersingerman.com, zhyman@bergersingerman.com) (Counsel for Plaintiff Margaret Smith); (iii) Peter G. Herman, Esq., Tripp Scott, 110 S.E. 6th Street, 15th Floor, Ft. Lauderdale, FL 33301 (pgh@trippscott.com) (Counsel for Steven Jacob and Steven F. Jacob CPA and Associates); (iv) Paul V. DeBianchi, Esq., Paul V. DeBianchi, P.A., 111 S.E. 12th Street, Ft. Lauderdale, FL 33316 (Debianchi236@bellsouth.net); (v) Gary A. Woodfield, Esq., Haile, Shaw & Pfaffenberger, P.A., 660 U.S. Highway One, Third Floor, North Palm Beach, FL 33408 (gwoodfield@haileshaw.com, bpetroni@haileshaw.com, eservice@haileshaw.com) (Counsel for Defendant Frank Avellino); (vi) Harry Winderman, Esq., One Boca Place, 2255 Glades Road, Boca Raton, FL 33431 (harry4334@hotmail.com); (vii) Matthew Triggs, Esq., Andrew Thomson, Esq. Proskauer Rose LLP, 2255 Glades Road, Suite 421 Atrium, Boca Raton, FL 33431 (mtriggs@proskauer.com, athomson@proskauer.com, florida.litigation@proskauer.com); and (viii) Robert J. Hunt, Esq., Debra D. Klingsberg, Esq., Hunt & Gross, P.A., 185 Spanish River Boulevard, Suite 220, Boca Raton, FL 33431 (bobhunt@huntgross.com, dklingsberger@huntgross.com, eService@huntgross.com, Sharon@huntgross.com).

/s/ Shane P. Martin

Shane P. Martin

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.

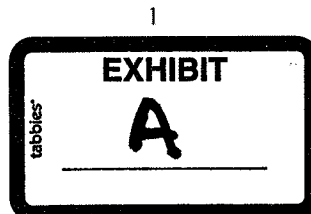
**ORDER ON PLAINTIFFS' EXPEDITED MOTION TO COMPEL DEFENDANTS FRANK
AVELLINO AND MICHAEL BIENES TO PRODUCE COMPUTERS FOR INSPECTION AND
TO PRODUCE DOCUMENTS**

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 Franknane@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 Franknane@aol.com that are accessible by Defendant Avellino, and produce to Plaintiffs a timeline stating the period of time for which e-mails exist in those folders, along with a privilege log and any non-privileged e-mails, including but not limited to attachments, that are responsive to requests for production served on Defendant Avellino in this action;
 - b. Defendant Avellino shall preserve all e-mails and his computer identified in the Motion while this action is pending.
3. As to Defendant Bienes:

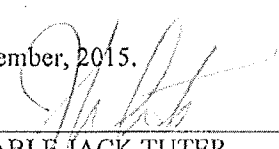
6784786-1



- a. On or before November 16, 2015, Defendant Bienes shall search the folder of deleted e-mails of his e-mail account Michaelbienes@aol.com, and all other folders of e-mails related to the e-mail account Michaelbienes@aol.com that are accessible by Defendant Bienes, and produce to Plaintiffs a timeline stating the period of time for which e-mails exist in those folders, along with any non-privileged e-mails, including but not limited to attachments, that are responsive to Plaintiffs' requests for production served on Defendant Bienes in this action, consistent with any stipulations with Plaintiffs stated in Defendant Bienes' discovery responses or court rulings on such document requests, and produce a privilege log of any privileged documents withheld from production;
- b. On or before November 16, 2015, Defendant Bienes shall deliver to the e-mail service provider of his e-mail account Michaelbienes@aol.com (the "Provider") written authorization to release any e-mails sent from or received by the e-mail address Michaelbienes@aol.com during the years 2008 and 2009 to his counsel in this action, and shall produce any non-privileged e-mails received from the Provider that are responsive to Plaintiffs' requests for production served to Defendant Bienes in this action consistent with any stipulations with Plaintiffs stated in Defendant Bienes' discovery responses or court rulings on such document requests, and produce a privilege log of any privileged documents withheld from production. Upon request by Plaintiffs, Defendant Bienes shall provide a random sampling of e-mails received from the Provider, which are not identified on a privilege log previously provided to Plaintiffs, to Plaintiffs for their inspection. If the parties are unable to resolve any dispute that may arise as to e-mails received from the Provider, Defendant Bienes shall submit any documents obtained from the Provider to the Court for an in camera inspection and the Court's determination as to what e-mails should be produced, if any.
- c. Defendant Bienes shall preserve all e-mails and his computer identified in the Motion while this action is pending.

4. The Court defers ruling on the remainder of the Motion. This Order is without prejudice to the Plaintiffs resetting the Motion for hearing.

DONE AND ORDERED in Chambers this 16 day of November, 2015.



HONORABLE JACK TUTER
Circuit Court Judge

Copies furnished to:
All counsel of record

** Order reflects court's ruling
after review of hearing transcript.*

JBT

Shane Martin

From: Shane Martin
Sent: Monday, November 16, 2015 6:44 PM
To: 'Steven D. Weber'; 'Thomas Zeichman'; 'Thomas M. Messina (tmessana@messana-law.com)'; 'Leonard K. Samuels'
Cc: Jonathan Etra
Subject: P&S/Sullivan - Memo re AOL/Lap Top
Attachments: Memo re Bienes's AOL Account and Lap Top - Bienes.pdf

Gentlemen:

Please see the attached memo.

Best,
Shane

	HOME	BIO	VCARD
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Memo re Defendant Michael Bienes's AOL e-mail account

November 16, 2015

Save and except for e-mails privileged communications with counsel, which Bienes objects to logging as these were exchanged during or in anticipation of litigation, the contents of his AOL e-mail account is as follows: (i) a spam folder containing approximately 20 spam or solicitation e-mails received from and after November 10, 2015; (ii) a saved mail folder containing 4 messages dated October 26, 2015 (2 e-mails); October 28, 2015, (1 e-mail); and November 12, 2015 (1 e-mail); and (iii) a notes folder containing 3 non-responsive and irrelevant e-mails dated October 15, 2014, January 8, 2015, and July 1, 2015.

Per the Court's recently entered Order, Bienes has been instructed to preserve all messages sent to or from his e-mail account on a going-forward basis.

Responsive documents located on Bienes's lap top are being produced to Plaintiffs under separate cover, together with a privilege log.

Shane Martin

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

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

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

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JONATHAN ETRA
DIRECT LINK: 305.373.9447
DIRECT FACSIMILE: 305.395.6403
EMAIL: JETRA@BROADANDCASSEL.COM

November 13, 2015

VIA FEDERAL EXPRESS

Julie Jacobs, General Counsel
AOL Legal Department
AOL Headquarters
770 Broadway
New York, NY 10003

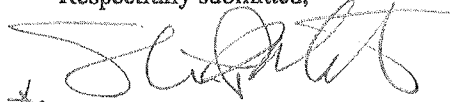
Re: *P&S Associates General Partnership, et. al. v. Michael D. Sullivan, et. al.*
Case No.: 12-034123 (07) -- Authorization to Release Personal E-mails

To Whom It May Concern:

We represent Defendant Michael Bienes in the above-styled action. By our client's signature below, please consider this his formal written authorization for AOL to release to my attention any and all e-mails sent from or received by the e-mail address Michaelbienes@aol.com during the years 2008 and 2009.

Thank you for your attention to this matter. Should you have any questions or require additional information, please contact me immediately.

Respectfully submitted,



Jonathan Etra

Cc:

Steven D. Weber
Thomas Zeichman



Michael Bienes

MICHAEL BIENES
Print Name

Date: NOV. 16, 2015

Shane Martin

From: Shane Martin
Sent: Monday, November 16, 2015 6:50 PM
To: 'Steven D. Weber'; 'Thomas Zeichman'; 'Thomas M. Messana (tmessana@messana-law.com)'; 'Leonard K. Samuels'
Cc: Jonathan Etra
Subject: P&S/Sullivan - Bienes Production and Privilege Log
Attachments: Bienes Production to Plaintiffs.pdf; Bienes - Privilege Log.pdf

Please see the attached production, bates labeled Bienes 0005459 – Bienes 0005617, and privilege log. Thank you.

Best,
Shane

Attachments

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

COMPLEX LITIGATION UNIT

CASE NO. 12-034123 (07)

P&S ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited
partnership; and S&P
ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited
partnership; PHILIP VON KAHLE as Conservator
of P&S ASSOCIATES,
GENERAL PARTNERSHIP, a
Florida limited partnership; and
S&P ASSOCIATES, GENERAL
PARTNERSHIP, a Florida limited partnership,

Plaintiffs,

vs.

MICHAEL D. SULLIVAN, an
individual, STEVEN JACOB, an
individual, MICHAEL D.
SULLIVAN & ASSOCIATES, INC.,
a Florida corporation, STEVEN F. JACOB,
CPA & ASSOCIATES, INC., a Florida
corporation, FRANK AVELLINO,
an individual, MICHAEL BIENES,
an individual, KELKO FOUNDATION,
INC., a Florida Non Profit Corporation,
and VINCENT T. KELLY, an individual,

Defendants.

DEFENDANT MICHAEL BIENES'S PRIVILEGE LOG

Date	Doc type	From	To	Subject	Bates Range	Privilege
Indeterminate	Letter	Michael Bienes	Mark F. Raymond, P.A.	SEC and BLMIS	BIENES 0005464	Attorney-Client Communication

BROAD and CASSEL

One Biscayne Tower, 21st Floor 2 South Biscayne Blvd. Miami, Florida 33131-1811 305.373.9400

Case No.: CACE 12-034123 (07)
*P&S Associates, General Partnership, et al. v.
Michael D. Sullivan, et al.*

Date	Doc type	From	To	Subject	Bates Range	Privilege
Indeterminate	Letter	Michael Bienes	Frank Brogan, Esq.	Legal Services	BIENES 0005537- 0005539	Attorney-Client Communication
Indeterminate	Excel Sheet			St. James Income Distribution/Original and Amended Returns	BIENES 0005541	Protected Private Financial Information

Shane Martin

From: Shane Martin
Sent: Tuesday, November 24, 2015 6:05 PM
To: 'Steven D. Weber'; 'Thomas M. Messana (tmessana@messana-law.com)'; 'Zachary P. Hyman'; 'Leonard K. Samuels'; 'Gary Woodfield'
Cc: Jonathan Etra
Subject: RE: S&P - our meet and confer today
Attachments: Updated Memo re Bienes's AOL Account - Bienes.pdf

Steve,

We are in receipt of your email from November 20, 2015, as well as your Renewed Expedited Motion to Compel Defendants Frank Avellino and Michael Bienes to Produce Computers for Inspection and to Produce Documents (the "Motion"), filed on the same date.

We are providing this response and the attached Updated Memo re Defendant Michael Bienes's AOL e-mail account in an effort to fully address the questions you have raised in your e-mail and Motion.

Your Question: Your e-mail raised a question concerning the method by which Mr. Bienes's lap top was searched.

Our Answer: As we discussed on our meet and confer last week, Mr. Bienes's lap top was searched through a simple search of the "C: drive" using the Windows search tool. Key words/individuals/entities based on Plaintiffs' discovery requests to Mr. Bienes were used, in particular the Fifth Request for Production. That search yielded the responsive documents we produced or logged in our November 16 production to Plaintiffs. If you would like to suggest additional or more specific search terms, we are happy to consider them.

Your Question: Your e-mail also raised a question regarding the method by which Mr. Bienes's AOL account MichaelBienes@AOL.com was searched.

Our Answer: All e-mail folders (or sub-folders) accessible to Mr. Bienes within his web-based AOL account were searched. Attached is an Updated Memo regarding that search.

Your Question: In the Motion and during our meet-and-confer you raised the question of whether Mr. Bienes's cellular phone or his tablet were searched.

Our Answer: Mr. Bienes's cell phone and tablet were not searched as they were not subject either to any deposition testimony, to your motion, or to the Court's November 16 Order and thus in our view were beyond the scope of any requirement to search. If we are wrong, please feel free to correct us. That said, we have no objection to doing so in any event.

We trust this e-mail and the attached Updated Memo answer your questions, and look forward to discussing any remaining issues with you at a mutually convenient time.

Best,
Shane

Attachment

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 E-MAIL: SMARTIN@BROADANDCASSEL.COM

www.broadandcassel.com

From: Steven D. Weber [mailto:SWeber@bergersingerman.com]
Sent: Friday, November 20, 2015 5:23 PM
To: Shane Martin
Cc: Jonathan Etra; Thomas M. Messana (tmessana@messana-law.com); Leonard K. Samuels; Zachary P. Hyman
Subject: S&P - our meet and confer today

Shane,

I was troubled by our meet and confer today and the way in which you appeared to have searched for documents on Bienes' laptop in response to the Court's attached order. As you know, we are trying to have the laptop analyzed by a forensic expert. The Court's order states that Defendant Bienes "shall preserve all e-mails and his computer identified in the Motion while this action is pending." Please be aware that any inspection of the laptop may include inspection of its metadata and hard drive for deleted documents. The laptop and its information should not be modified in any way, including by accessing its hard drive. We expect that you have taken all appropriate steps to preserve the laptop and all its information.

Thank you



Steven D. Weber

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

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

- New Mail – empty
- Old Mail – empty
- Drafts – empty
- Sent – empty
- Spam Folder – approximately 20 spam or solicitation e-mails received from and after November 10, 2015
- Saved Mail - 4 messages dated October 26, 2015 (2 e-mails); October 28, 2015, (1 e-mail); and November 12, 2015 (1 e-mail).
- Recently Deleted – empty
- Saved Chats – empty
- Mark Raymond – approximately 387 privileged communications with counsel, which Mr. Bienes objects to logging as they were exchanged during or in anticipation of litigation. Two (2) e-mails in this folder were sent to Mr. Bienes from Don Masterson (see below). As they are not privileged communications, they were produced to Plaintiffs as described below.
- Notes – 3 non-responsive and irrelevant e-mails dated October 15, 2014, January 8, 2015, and July 1, 2015.

The 2 e-mails sent to Mr. Bienes by Don Masterson, mentioned above, were produced to Plaintiffs on November 16 and bates labeled BIENES 0005616 and 0005617.

In addition to the 2 e-mails produced at BIENES 0005616 and BIENES 0005617, responsive documents located on Bienes's lap top pursuant to the search of that device as referred in the e-mail to which this Updated Memo is attached were produced to Plaintiffs under separate cover, together with a privilege log of any documents withheld from that production. The bates range of the documents produced begins at BIENES 0005459 and ends at BIENES 0005617.

Bienes was instructed to preserve all messages sent to or from his e-mail account. Mr. Bienes's lap top is currently in the custody of his attorneys.