

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup>  
JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA

CASE NO. 12-034123 (07)

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

MICHAEL D. SULLIVAN, et al.  
Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’  
JOINT MOTION TO STRIKE ALLEGATIONS IN PLAINTIFFS’  
FIFTH AMENDED COMPLAINT**

Defendants, Frank Avellino and Michael Bienes, by and through their undersigned counsel, file this Memorandum of Law in Support of their Joint Motion to Strike Allegations in Defendants’ Fifth Amended Complaint (“5AC”).

**INTRODUCTION**

On December 18, 2014, this Court entered an Order (“Order”) granting, in part, Defendants’ Motion to Dismiss Plaintiffs’ Fourth Amended Complaint, dismissing with prejudice Counts I, II, III and IV, and granting leave for Plaintiffs to file an amended complaint only as to Count I and only as to the alleged “kickbacks”.<sup>1</sup> In violation of the Order, Plaintiffs in their 5AC amended more than just Count I, and amended more than “just as to the alleged kickbacks”. In addition, Plaintiffs included in the 5AC allegations which are irrelevant and unrelated to the remaining claims, with no probative value and highly prejudicial to Defendants. Defendants seek to have all these improper allegations in the 5AC stricken.

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<sup>1</sup> The clear directive in the Order as to the limited scope of the leave to amend is consistent with the Court’s August 25, 2014 order dismissing the third amended complaint and further stating that there would be no further amendments permitted after the fourth amended complaint.

## **ARGUMENT**

### **Allegations should be stricken for failure to comply with Court Order**

Florida Rule of Civil Procedure 1.420(b) provides, “Any party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court”. In the instant case, the Order was clear that Plaintiffs were only granted leave to amend Count I and only as to the alleged “kickbacks”. Plaintiffs violated the Order by adding allegations in Count III (¶74, 75); Count IV (¶¶85, 88, 91), Count V (¶136), and Count VII (¶¶108, 110, 113). In addition, Plaintiffs added and deleted allegations in the fact section in paragraphs 1 through 51, which allegations are incorporated into all counts, and thus, substantively amend all counts, again in violation of the Order. These unauthorized and improper changes should be stricken for failure to comply with the Order. *See Lutheran Senior Citizens’ Foundation, Inc. v. Schumacher*, 355 So.2d 861 (Fla. 3<sup>rd</sup> DCA 1978); *DeWitt v Rossi*, 559 So.2d 659 (Fla. 5<sup>th</sup> DCA 1990).

### **Immaterial and Prejudicial Allegations should be Stricken Pursuant To Florida Rule of Civil Procedure 1.140(f)**

Florida Rule of Civil Procedure 1.140(f) provides “A party may move to strike or the court may strike redundant, immaterial, impertinent or scandalous material from any pleading at any time”. In the instant case, Plaintiffs have included allegations in the 5AC which relate to Madoff, the alleged history of Avellino and Bienes, and other similar allegations which are neither relevant to nor necessary for the causes of action pled.<sup>2</sup> (*See* ¶¶11, 12, 13, 14, 15, last sentence in 17, second and third sentences in 20 and 25 and 85). These allegations not only have no probative value but they are also highly prejudicial, and should be stricken. *See Rice-Lamar v.*

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<sup>2</sup> These allegations were pled in earlier versions of Plaintiffs’ complaints in support of Plaintiffs’ fraud claims, which by the Order, have been dismissed with prejudice. The remaining claims asserted in the 5AC relate only to the “kickbacks” received by Defendants. These leftover allegations are immaterial to the “kickback” claims.

*City of Fort Lauderdale*, 853 So.2d 1125 (Fla. 4<sup>th</sup> DCA 2003). Permitting Plaintiffs to include these irrelevant and prejudicial allegations in their 5AC opens the door to a wide range of discovery that is time consuming, expensive and unnecessary.

### **Conclusion**

Based on the foregoing, the allegations of the 5AC identified above should be stricken.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of 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 this 9th day of February, 2015.

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