

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.

\_\_\_\_\_ /

**DEFENDANT MICHAEL BIENES'S RESPONSE IN OPPOSITION TO  
PLAINTIFFS' MOTION TO STRIKE HIS SIXTH AFFIRMATIVE DEFENSE**

Defendant, Michael Bienes, hereby files his Response to Plaintiffs' Motion to Strike Affirmative Defense, stating:

1. Bienes has properly pled his Sixth Affirmative Defense, as he has alleged the grounds upon which the defense is based and the substantial matters of law intended to be argued in support of the defense, which is all that is required under Florida Rule of Civil Procedure 1.140(b). *See, e.g., Gonzalez v. NAFH National Bank*, 93 So. 3d 1054, 1057 (Fla. 3d DCA 2012) (where a defense is legally sufficient on its face and presents a bona fide issue of fact, it is improper to grant a motion to strike).

2. In his Sixth Affirmative Defense, Bienes has sufficiently alleged that other persons may have caused or contributed to Plaintiffs' alleged damages, and that Bienes is accordingly entitled to a reduction of any damages assessed, either in whole or in part, based on Chapter 768, Fla. Stat. Until recently, Bienes could not have known the particular individuals to name, because Plaintiffs have continued to object to discovery and have either refused to

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produce documents or answer interrogatories, provided only partially responded to interrogatories, and, in the words of this Court, have repeatedly “blindsided” Bienes and other defendants and non-party witnesses by referencing or using as exhibits documents that they had not previously produced. Bienes has named those persons who he has been able to identify through Plaintiffs’ ever-changing complaints and grossly limited production they have provided to the date of his most recent pleading.

3. It is disingenuous for Plaintiffs to argue that they cannot frame a response to Bienes’s Sixth Affirmative Defense defense because Defendant failed to mention what conduct these individuals were engaged in or how it results in the reduction of damages, because it is Plaintiffs who have brought their claims against these named individuals alleging that the named individuals caused damage to Plaintiffs. Defendant has been seeking, since the commencement of this action and as recently as this week, for Plaintiffs to provide the facts, all responsive documents (in particular documents *that were requested but withheld from Bienes until they were shown to a non-party witness at a recent deposition*) and other relevant information as to how Bienes and these other named individuals are being alleged to have caused damage to Plaintiffs. Until such facts, documents, and information are produced to Bienes through discovery, he is unable to provide any further facts that the many which he has already pleaded in support of this defense.

4. Boiled down to its essence, Plaintiffs’ motion fails because it does not meet the high standard required of the relief it seeks. The striking of pleadings is not favored in Florida and all doubts are to be resolved in favor of the pleadings. *Cost Bella Development Corporation v. Costa Development Corp.*, 445 So.2d 1090, 1090 (Fla. 3d DCA 1984). Here, Bienes has sufficiently pleaded a legal affirmative defense and any further specific facts relating to this

defense will be and are properly revealed through the discovery process. The motion should be denied.

**WHEREFORE**, Defendant respectfully requests this Court enter an order (i) denying Plaintiffs' Motion to Strike Sixth Affirmative Defense, and (ii) granting Bienes such other relief as this Court deems just and equitable.

Respectfully submitted,

/s/ Shane P. Martin

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on October 8, 2015, this notice and the aforementioned interrogatories were served via E-mail to: **(i)** Thomas E. Messina, Esq., Thomas Zeichman, Esq., Messina, P.A., 401 East Las Olas Boulevard, Suite 1400, Ft. Lauderdale, FL 33301 ([tmessana@messana-law.com](mailto:tmessana@messana-law.com), [tzeichman@messana-law.com](mailto: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](mailto:lsamuels@bergersingerman.com), [emark@bergersingerman.com](mailto:emark@bergersingerman.com), [sweber@bergersingerman.com](mailto:sweber@bergersingerman.com), [zhyman@bergersingerman.com](mailto:zhyman@bergersingerman.com)) (Counsel for Plaintiff Margaret Smith); **(iii)** Peter G. Herman, Esq., Tripp Scott, 110 S.E. 6<sup>th</sup> Street, 15<sup>th</sup> Floor, Ft. Lauderdale, FL 33301 ([pgh@trippscott.com](mailto: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. 12<sup>th</sup> Street, Ft. Lauderdale, FL 33316 ([Debianchi236@bellsouth.net](mailto: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](mailto:gwoodfield@haileshaw.com), [bpetroni@haileshaw.com](mailto:bpetroni@haileshaw.com), [eservice@haileshaw.com](mailto: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](mailto: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](mailto:mtriggs@proskauer.com), [athomson@proskauer.com](mailto:athomson@proskauer.com), [florida.litigation@proskauer.com](mailto: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](mailto:bobhunt@huntgross.com), [dklingsberger@huntgross.com](mailto:dklingsberger@huntgross.com), [eService@huntgross.com](mailto:eService@huntgross.com), [Sharon@huntgross.com](mailto:Sharon@huntgross.com)).

/s/ Shane P. Martin \_\_\_\_\_  
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