IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 12-034123 (07)

P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; 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,

v.

MICHAEL D. SULLIVAN, *et al.*,

Defendants.
_____/

PLAINTIFFS' RESPONSE AND MEMORANDA IN OPPOSITION TO DEFENDANT FRANK AVELLINO'S AND MICHAEL BIENES' MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Plaintiffs P & S Associates, General Partnership ("P&S"), S & P Associates, General Partnership ("S&P") (collectively, the "Partnerships" or "Plaintiffs"), by and through their undersigned attorneys, file this Response and Memoranda in Opposition to Defendant Frank Avellino's and Michael Bienes' Motion to Dismiss Third Amended Complaint (the "Motion"). In support thereof, Plaintiffs state as follows:

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INTRODUCTION

Defendants' motion to dismiss relies on disputed, incorrect issues of fact that contradict allegations in the Third Amended Complaint (the "Complaint"). Its statute of limitations and repose defenses should be raised, if at all, on a motion for summary judgment and are improperly asserted here.

Chiefly, Defendants improperly assume the dates that Plaintiffs' fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty claims accrued. Given the well settled law that granting a motion to dismiss on the grounds of statute of limitations and statute of repose is improper unless "the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law" (*Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007)), – and those facts do not appear in the Complaint – the Motion should be denied for five reasons:

First, Plaintiffs' claims for fraudulent inducement and fraudulent misrepresentation (the "Fraud Claims) should not be dismissed because (i) the Complaint alleges that they were brought within four years of when they could have been discovered and (ii) the Fraud Claims relate back to the original complaint in this action or the Second Amended Complaint (which were both timely filed).

Second, Plaintiffs' negligent misrepresentation claim and breach of fiduciary duty claim should not be dismissed because the Complaint alleges that they were timely brought within the four year statute of limitations.

Third, Plaintiffs pled the Fraud Claims with the required particularity because the Complaint states Defendants made a fraudulent omission, the substance of their omission, the time frame in which it was made, and the context in which it was made.

Fourth, the Fraud Claims should not be dismissed because the Complaint alleges acts that fall within the 12 year statute of repose period and that Plaintiffs continued to detrimentally rely on Defendants' fraudulent omissions after the statute of repose date.

Finally, Plaintiffs' civil conspiracy claim should not be dismissed because Plaintiffs' underlying fraud claims are timely.

Accordingly, the Motion should be denied.

STATEMENT OF FACTS

Defendants Avellino and Bienes ("Defendants") were among the first people to establish feeder funds for Bernard L. Madoff Investment Securities, LLC ("BLMIS"), and raised money for Madoff since the 1960's. But since 1992, they were prohibited by the Securities and Exchange Commission from participating in the sale of securities pursuant to a judgment entered in Case No. 1:92-cv-08314-JES in the Southern District of New York.

As a result, and as alleged since the original complaint in this action, Defendants used Michael Sullivan and the Partnerships as front men to continue investing funds in Madoff. Defendants recommended and advised the Partnerships to invest their funds with BLMIS, gave the Partnerships access to BLMIS, and omitted telling the Partnerships that Madoff was a Ponzi scheme – something which Defendants knew or should have known because of numerous red flags they witnessed throughout the more than 30 years they invested money with Madoff. After

it was publicly revealed in 2008 that Madoff ran BLMIS as a Ponzi scheme, it was discovered that the Partnerships lost millions of dollars.

On or about March 3, 2014, Defendants filed the instant motion seeking to dismiss Plaintiffs' claims for fraudulent misrepresentation, fraudulent inducement, negligent misrepresentation, breach of fiduciary duty, and civil conspiracy. Defendants' Motion makes improper assumptions of fact as to when those claims accrued. Accordingly, and as set forth below, the Motion should be denied.

ARGUMENT

I. PLAINTIFFS' FRAUD CLAIMS ARE NOT TIME-BARRED BECAUSE THEY WERE BROUGHT WITHIN FOUR YEARS OF WHEN THEY COULD HAVE BEEN DISCOVERED.

Defendants' argument that the Fraud Claims (Counts X and XI) were untimely filed beyond the four year statute of limitations and do not relate back to the original complaint is based on a disputed issue of fact that is improperly asserted by their motion to dismiss: that Plaintiffs could have discovered the Fraud Claims against Defendants on December 11, 2008 when it was publically revealed that BLMIS was a Ponzi scheme. This argument must fail because it contradicts the allegations in the Complaint. *Visor v. Buhl*, 760 So. 2d 274, 275 (Fla. 4th DCA 2000) (stating that on a motion to dismiss "[a]ll reasonable inferences must be drawn in favor of the pleader").

As an initial matter, "[o]nly under extraordinary circumstances where the facts in the complaint, taken as true, conclusively show that the action is barred by the statute of limitations, should a motion to dismiss on this ground be granted." *Ambrose v. Catholic Soc. Servs., Inc.*, 736 So. 2d 146, 149 (Fla. 5th DCA 1999) (also considering statute of repose).

There is nothing in the Complaint that supports the assumption that the Fraud Claims against Defendants could have been discovered within four years of the discovery of the Madoff Ponzi scheme. In fact, it is specifically pled that "only after gaining access to the Partnerships' books and records, that the Conservator was able to uncover the improper activities alleged." Complaint ¶ 52. Indeed, without access to the books and records of the Partnerships – and this Court can take judicial notice of the litigation required to appoint the Conservator and gain access to those books and records (*Carone*, et al. *v. Sullivan*, et al., Case No.: 12-24051) – Plaintiffs were unable to discover that Defendants gave Sullivan access to BLMIS; Defendants advised the Partnerships, through Sullivan, to invest in BLMIS; and that Defendants intentionally did not inform the Partnerships that BLMIS was a Ponzi scheme.

In short, Defendants' assumption that Plaintiffs could have reasonably discovered the Fraud Claims within four years of December 11, 2008 is not pled in the Third Amended Complaint. Rather, it is improperly asserted here through a motion to dismiss given that when the Fraud Claims could have been discovered is a disputed issue of fact. *Port Marina Condo. Ass'n, Inc. v. Roof Servs., Inc.*, 119 So. 3d 1288, 1290 (Fla. 4th DCA 2013) (stating that the court must "accept all well-pleaded facts and reasonable inferences from those facts as true, and confine [itself] to the allegations within the four corners of the complaint"); *Ambrose v. Catholic Soc. Servs., Inc.*, 736 So. 2d 146, 150 (Fla. 5th DCA 1999) (denying motion to dismiss on statute of repose and statute of limitation grounds because the allegations in complaint are "sufficient to raise the issue of whether Ms. Ambrose's cause of action for fraud accrued in April 1998").

To the extent that Defendants nonetheless advance the argument that the Fraud Claims could have been reasonably discovered within four years of December 11, 2008 and that those

claims do not relate back to the original complaint (which they do not dispute was timely filed within four years) – they are also wrong.

"It is well-settled that the rule permitting amendments to pleadings, and the relation-back doctrine, are to be liberally construed and applied." *Arch Specialty Ins. Co. v. Kubicki Draper, LLP*, 137 So. 3d 487, 490 (Fla. 4th DCA 2014), reh'g denied (May 23, 2014). "Further, the pleadings and the trial are intended to 'arrive at the truth,' rather than to engage in a game in which the 'technique of the maneuver captures the prize.'" *Id.* Fla. R. Civ. P. 1.190 (c) allows an amendment to relate back to the date of an original pleading "when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

Along those same lines, "[h]owever, a new cause of action—and even a new legal theory—can relate back to the original pleading so long as the new claim is not based on different facts, such that the defendant would not have "fair notice of the general factual situation." *Janie Doe 1 ex rel. Miranda v. Sinrod*, 117 So. 3d 786, 789 (Fla. 4th DCA 2013) *review granted,* SC13-1834, 2014 WL 2730440 (Fla. June 11, 2014).

Indeed, only recently, in *Caduceus Properties, LLC v. Graney*, 137 So.3d 987 (2014), the Florida Supreme Court reiterated that relation back under "rule 1.190(c) is to be liberally construed and applied" and that "Florida has a judicial policy of freely permitting amendments to the pleadings." *Id.* at 992. The Court stated that "the relation back of pleadings under rule 1.190(c) when the claims 'arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth' in the third-party complaint is consistent with this judicial policy." *Id.* at 992.

In *Caduceus*, the Court considered whether an amended complaint filed after the statute of limitations period expired related back under rule 1.190(c) to the filing of a third-party complaint. *Id.* The Court found that "As applied to the facts before us, in this case, "[t]here is no dispute ... that the claims [set forth by the plaintiffs in their amended complaint] ... 'arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading.'" *Id.* at 994. In support of its finding, the Court recited well-settled case law that the relation back doctrine is to be liberally applied and that the "the purpose underlying statutes of limitations—namely, preventing lack of notice and prejudice to the defendant—is not implicated where the plaintiff's amended complaint relates back to the filing of the [complaint], as long as the [] party was brought into the suit prior to the expiration of the statute of limitations and the plaintiff's claims concern the same conduct, transaction, or occurrence at issue in the [] complaint." *Id.* at 992.

Here, the Fraud Claims are timely because they relate back to the original complaint filed in this action and at the very latest to the Second Amended Complaint – which were both timely filed.

The Third Amended Complaint relates back to the original complaint because it was specifically alleged in the original complaint that "Many of the general partners were introduced to the Partnerships through Frank Avellino and Michael Bienes." Original Complaint ¶ 14. It also alleges that the Partnerships invested tens of millions of dollars in BLMIS and lost millions of dollars as a result of those investments (*Id* ¶¶ 16, 17), that "Avellino was given a significant, inappropriate and unlawful control over the Partnerships", and that Avellino and Bienes used the

Partnerships as a "front men to" to invest with BLMIS to avoid the scrutiny of regulators (*Id.* at 31(b)).

Although Plaintiffs are asserting new causes of action, those causes of action arise out of the same above occurrences and transactions alleged in the original complaint because they relate to Defendants using the Partnerships and Sullivan as front men to invest in BLMIS while omitting the fraudulent nature of that entity. Accordingly, Defendants had "fair notice of the general factual situation" to which they are named as Defendants in this action, and the claims asserted and facts alleged in the Third Amended Complaint are timely because they relate back to the original complaint in this action.

Even if the Third Amended Complaint does not relate back to the original complaint, it at least relates back to the Second Amended Complaint, which alleges that "Avellino and Bienes advised Sullivan and thus the Partnerships to invest all of the Partnerships' funds with BLMIS" and that "Avellino and Bienes facilitated the Partnerships investment with BLMIS." Second Amended Complaint ¶ 20.

Although Defendants claim that the Second Amended Complaint was not timely filed because it was filed more than four years after Madoff publicly revealed that BLMIS was a Ponzi scheme, that argument is based on an assumption on the part of Defendants because there is nothing in the pleadings that states that Plaintiffs could have discovered their fraud claims against Defendants at that time, and Defendants' assumption is contradicted by the allegations in the Complaint.

Accordingly, Plaintiffs' Fraud Claims should not be dismissed because they were timely asserted and relate back to the original and/or the Second Amended Complaint.

II. PLAINTIFFS' BREACH OF FIDUCIARY DUTY AND NEGLIGENT MISREPRESENTATION CLAIMS ARE NOT TIME BARRED.

Even though Defendants admit that a negligent misrepresentation claim sounds in fraud and Defendants cite case law in support of that proposition (Motion at 8), they nonetheless claim that the discovery rule in Fla. Stat. 95.031(2) does not apply to it here (stating that the statute of limitations on an action founded on fraud does not begin until the facts giving rise are "discovered or should have been discovered with the exercise of due diligence"). They are wrong again.

"In this state, a negligent misrepresentation is considered tantamount to actionable fraud." *Ostreyko v. B. C. Morton Org., Inc.*, 310 So. 2d 316, 318 (Fla. 4th DCA 1975). In *Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So. 2d 13, 15 (Fla. 3d DCA 2002), the Third District Court of Appeal reversed the trial court's orders dismissing the plaintiffs' complaint because the trial court incorrectly found the plaintiffs' claims for negligent misrepresentation were time barred. The *Lopez* court ruled that the claims were filed within the four year limitations period because plaintiffs' negligent misrepresentation claim and other claims were filed when the plaintiffs learned of the fraud. Furthermore, the *Lopez* court found that the fraud alleged "was not complete until the appellants were no longer suffering 'consequent injuries.'" *Id.*

In this case, Plaintiffs' negligent misrepresentation claim is not time barred because it relates back to the original complaint and was brought within four years of when it could have been discovered for the reasons set forth above and as plead in the Complaint.

With respect to Plaintiffs' breach of fiduciary duty claim, Defendants seek to dismiss that claim in its entirety even though (i) it is not time barred and (ii) Defendant's admit that Plaintiffs' breach of fiduciary duty claim is at least timely as to Defendants' receipt of improper kickbacks. As admitted by the Defendants, "a cause of action accrues when the last element of the cause of action occurs, in this case, damages." Motion at 6. Here, Plaintiffs' timely filed their breach of fiduciary duty claim because it relates back to the filing of the original complaint in this action for the reasons set forth above and because it is a disputed issue of fact as to when Plaintiffs where damaged as a result of Defendants' breach of fiduciary duties.

Finally, even though Defendants admit that at least part of Plaintiffs' breach of fiduciary duty claim was timely filed with respect to the kickbacks received by Defendants, they nonetheless seek to dismiss the entirety of the claim because they allege other parts are not timely. The Motion should be denied because Defendant has articulated no basis to dismiss claims that they admit are timely.

III. PLAINTIFFS' FRAUD CLAIMS AND NEGLIGENT MISREPRESENTATION CLAIM ARE ADEQUATELY PLEAD.

Defendants admit that a fraud claim withstands a motion to dismiss when it alleges "who made the false statement, the substance of the false statement, the time frame in which it was made and the context in which it was made." *Eagletech Commc'ns, Inc. v. Bryn Mawr Inv. Grp., Inc.*, 79 So. 3d 855, 862 (Fla. 4th DCA 2012).

Yet, they ignore that the Complaint adequately pleads these facts. The Complaint pleads that both Avellino and Bienes made a fraudulent omission. Complaint ¶ 29. The Complaint pleads that the fraudulent omission was that Avellino and Bienes knew or should have known

that BLMIS was a Ponzi scheme, and the reasons why. *Id.* The Complaint also pleads that Avellino and Bienes first made that fraudulent omission in 1992 in the context of advising the Partnerships to invest with BLMIS and that the Partnerships thereafter detrimentally relied on the omission when they invested their funds in BLMIS until it was publicly revealed in 2008 that Madoff was running BLMIS as a Ponzi scheme. *Id.* ¶¶ 25, 26, 30.

Accordingly, the Complaint adequately pleads the Fraud Claims and negligent misrepresentation claim in compliance with Fla. R. Civ. P. 1.120(b) and the Motion should be denied.

IV. THE STATUTE OF REPOSE DOES NOT APPLY BECAUSE PLAINTIFFS ALLEGE THAT THEY CONTINUED TO RELY ON DEFENDANTS' OMISSIONS BEYOND 1992.

Defendants wrongly argue that the 12 year statute of repose bars the Fraud Claims because Defendants are improperly assuming those claims accrued in 1992 – when Defendants first failed to inform Plaintiffs that BLMIS was a Ponzi scheme. Their argument is meritless under the law and given the allegations in the Complaint.

"[A] claim of fraudulent misrepresentation and/or concealment requires proof of detrimental reliance on a material misrepresentation." *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 15 (Fla. 4th DCA 2012), reh'g denied (Dec. 31, 2012). A claim for fraudulent inducement similarly requires detrimental reliance. *Bankers Mut. Capital Corp. v. U.S. Fid. & Guar. Co.*, 784 So. 2d 485, 490 (Fla. 4th DCA 2001).

Under Florida law, the twelve year "statute of repose begins to run on a claim for fraudulent concealment based on an ongoing pattern of concealment when the last act of concealment on which the plaintiff relied occurs." *Philip Morris USA, Inc. v. Hallgren*, 124 So.

3d at 353 (Fla. 4th DCA 2013). "[W]hether a fraudulent act was committed within twelve years of the filing of an action can only be determined based on the timing of a particular plaintiff's alleged reliance." *R.J. Reynolds Tobacco Co. v. Buonomo*, 138 So. 3d 1049, 1051-52 (Fla. 4th DCA 2013), reh'g denied (Dec. 11, 2013).

As explained by the Fourth District Court of Appeal in *Philip Morris USA Inc. v. Cohen*, 102 So. 3d 11, 15 (Fla. 4th DCA 2012), reh'g denied (Dec. 31, 2012), the statute of repose does not apply if a plaintiff relied upon statements or omissions within 12 years of the filing of the complaint. In *Philip Morris*, the plaintiffs filed their action on May 5, 1994. "[T]herefore, [the plaintiffs'] fraudulent concealment claim had to be based on conduct that occurred after May 5, 1982—[the plaintiffs] must prove that [they] relied upon statements or omissions by [the defendants] made after that date." *Id.* Accordingly, the Court in *Philip Morris* found that even if the defendant made a fraudulent statement more than 12 years from the filing of the complaint, the statute of repose did not bar the plaintiffs' claim if the plaintiff continued to rely on that statement after that date.

Notably, the same statute of repose argument that Defendants are advancing here was recently rejected by the United States Eleventh Circuit Court of Appeals in another action against Defendant Avellino: *Walter v. Avellino*, 13-13081, 2014 WL 1663332 (11th Cir. Apr. 28, 2014). There, the plaintiffs alleged that Defendant Avellino and his wife fraudulently invested the plaintiffs' money in Bernard Madoff's Ponzi scheme. Although Defendant Avellino argued that the Eleventh Circuit should affirm the District Court's decision based on, *inter alia*, that their complaint was untimely under a five year statute of repose, the Eleventh Circuit vacated the

District Court's Order and remanded the case because at least one of the investments by the plaintiffs was timely.

In this case, and construing the allegations of the Complaint "in the light most favorable to plaintiffs" (*Hitt v. North Broward Hosp. Dist.*, 387 So. 2d 482, 483 (Fla. 4th DCA 1980)), the Fraud Claims should not be dismissed under the statute of repose because it is alleged that Plaintiffs detrimentally relied on Defendants' omissions after December 10, 2000 (the statute of respose's 12 year date prior to the filing of the complaint). Specifically, the Complaint alleges that after Defendants were barred by the SEC in 1992 (Compl. ¶ 19), that ". . . in 1992, Avellino and Bienes advised the Partnerships, through Sullivan, to invest their funds with BLMIS" (*Id.* ¶ 25); that the Partnerships then invested their funds solely with BLMIS as a result of that advice (*Id.* ¶ 27); and that the Partnerships lost millions of dollars when BLMIS was ultimately uncovered as a Ponzi scheme in 2008 (*Id.* ¶30). Nowhere in the Complaint is it plead that the Partnerships only detrimentally relied on Defendants' fraudulent omission in 1992 – and in fact, the Partnerships continued investing money in BLMIS even after December 10, 2000 in reliance on Defendants' fraudulent omissions. Accordingly, Plaintiffs pled that "[they] relied upon statements or omissions by [the defendants] made after the date by which the statute of repose operates" and Plaintiffs' Fraud Claims are not barred by the statute of repose.

V. PLAINTIFFS' CONSPIRACY CLAIM SHOULD NOT BE DISMISSED BECAUSE PLAINTIFFS' CLAIMS ARE TIMELY.

None of the claims that are the subject of the Motion are time barred or deficiently plead. Therefore, the sole reasons under which Defendants are seeking to dismiss Plaintiffs' civil conspiracy claim are meritless.

CONCLUSION

WHEREFORE the Plaintiffs request that this Court enter an order denying Defendant Frank Avellino's and Michael Bienes' Motion to Dismiss Third Amended Complaint, together with such other and further relief as the Court may deem just and appropriate under the circumstances.

Dated: August 13, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of August, 2014, a true and correct copy of the foregoing document was served on the following parties:

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