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.
_____/

DEFENDANTS FRANK AVELLINO AND MICHAEL BIENES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT

Defendants, Frank Avellino ("Avellino"), and Michael Bienes ("Bienes") (collectively, "Movants") submit this memorandum of law in support of their Joint Motion to Dismiss Plaintiffs' Fourth Amended Complaint ("FAC").

Introduction

The FAC was filed as a result of this Court's order granting the Movants' motion to dismiss counts for Breach of Fiduciary Duty (then Count VIII; now Count I), Fraudulent Misrepresentation (then Count X, now Count II); Fraudulent Inducement (then Count XI, now Count III) and Negligent Misrepresentation (then Count XII, now Count IV) in the Third Amended Complaint ("TAC"). The Court's order granting such relief provided that there would be no further amendments permitted.

The evolution of Plaintiffs' complaint is revealing. On December 10, 2012, Plaintiffs filed their initial complaint which asserted claims against Avellino and Bienes for: Count II – Aiding and Abetting a Breach of Fiduciary Duty; Count III – Unjust Enrichment; and Count IV – Money Had and Received. Count II centered on the allegation that Michael Sullivan, the general

partner of the Partnerships, allowed Avellino and Bienes to participate in the management of the Partnerships (Compl., ¶ 45(f)). The two remaining claims against Avellino and Bienes sought to recover "Kickbacks" Sullivan allegedly paid to Avellino and Bienes.

On December 2, 2013, Plaintiffs filed their Amended Complaint, which added several claims relating to the "Kickbacks", but did not otherwise substantively change Plaintiffs' claims against Avellino. Thereafter, on January 31, 2014, Plaintiffs moved for leave to file a second amended complaint (the "SAC") which was granted by this Court's February 20, 2014 order. The SAC asserted, for the first time, allegations that Avellino and Bienes acted as investment advisors to the Partnerships advising the Partnerships to invest all of their funds in Bernard L. Madoff Investment Securities ("BLMIS") although they should have been, and were not, registered investment advisors. SAC, ¶¶ 93-96. The focus of the SAC was on Kickbacks, of which Avellino allegedly received under $308,000.00 and Bienes under $360,000.

After an order granting the Movant's Motion to Dismiss, on June 27, 2014, Plaintiffs filed their TAC, which asserted yet more new claims against Avellino and Bienes for Fraudulent Misrepresentation (Count X); Fraudulent Inducement (Count XI) and Negligent Misrepresentation (Count XII). Each of these newly asserted claims was premised upon the same allegation: "Upon information and belief, in 1992, Defendants Avellino and Bienes advised the Partnerships, through Sullivan, to invest their funds with BLMIS." (TAC, ¶¶ 126, 132 and 138). Another new element added with the TAC was that the Movants should have advised the Plaintiffs that BLMIS operated a Ponzi scheme (i.e. ¶30). The Movants' motion to dismiss those counts and the count for breach of fiduciary duty was granted, resulting in the currently pending FAC.

Now, in an attempt to avoid a dismissal based upon events which initially transpired in 1992, Plaintiffs have included in the FAC an allegation that the damages sought in this case are the result of a "continuous pattern of fraudulent conduct." (¶ 1).[1] Additionally, Plaintiffs' attempt to create a fiduciary relationship, when there is none, by including allegations in the FAC of the Movants trustworthy reputation created by involvement in church activities. (i.e. ¶¶ 31, 32, 33, 36). In an attempt to render Movants liable for the actions of the Partnerships, with whom they had no official role, the FAC draws unsubstantiated conclusions of control from random instances which occurred over a period of decades (i.e.¶¶ 41, 42, 43, 45, 46, 47). In order to impute knowledge of BLMIS' Ponzi scheme on the Movants, the FAC includes a laundry list of items through which they allege the Movants should have known about the Ponzi scheme even though nobody else in the world did (¶ 17). Taking a totally new approach the FAC, for the first time, contains allegations of miscellaneous parties deciding not to withdraw from the Partnerships (¶¶ 49, 73, 84).

As set forth more fully below, none of the changes made by Plaintiffs in the FAC override the previous pleading deficiencies. Despite additional time and opportunity, and extensive discovery, the Plaintiffs have not been able to find the evidence sufficient to even state causes of action and thus, such claims should be dismissed with prejudice.

Argument

I. Plaintiffs' Fraud Claims are Barred by the Statute of Repose

The FAC's fraud claims, Counts II and III, as well as Count IV which alleges intentional misrepresentations, are premised upon allegations that Sullivan and Powell formed the

[1] References to (¶) are to the FAC unless otherwise noted.

Partnerships in 1992 (¶ 26) and could begin investing in BLMIS only because they were referred by the Movants (¶ 28). The investments began in 1993 (¶ 31), so although Plaintiffs removed from the FAC the allegation in the TAC that the alleged misrepresentations took place in 1992 (TAC, ¶126, 132, 138), they would have had to have been made before the first investment in 1993 or there could have been no reliance upon them. Similarly, the last alleged misrepresentation or omission which caused an investment must have been made before the last investment of 2008. Likewise, any effort to sell their investments would have had to have been made before December 2008 when the BLMIS Ponzi scheme was made public.[2]

Florida's statute of repose for fraud provides that an action for fraud "must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered." § 95.031(2), *Florida Statutes.* The TAC setting forth these new allegations of fraud based, *inter alia*, on the failure to warn of the Ponzi scheme and to stop Plaintiffs from investing, was filed for the first time on June 27, 2014 – over twenty years after the alleged fraud. The FAC's allegations of partners deciding not to sell their investments were first mentioned even later and are even more different from the initial allegations. (¶¶ 49, 73, 84). These allegations do not relate back to the 2012 initial complaint as they are entirely new facts which provide the basis for entirely different causes of action. *Lefebvre v. James*, 697 So. 2d 918, 920 (Fla. 4th DCA 1997).

Accordingly, Plaintiffs are precluded from asserting the FAC's fraud claims which, on their face, are time barred. *Philip Morris USA, Inc. v. Hess*, 95 So. 3d 254, 260 (Fla. 4th DCA

[2] The FAC for the first time mentions some individual partners deciding not to withdraw from the Partnerships based upon communications with the Movants (i.e. ¶¶ 49, 73, 84), but the Partnerships cannot even bring these claims based upon statements made to individual partners. See, *Fort Pierce Corp. v. Ivey*, 671 So. 2d 206 (Fla. 4th DCA 1996).

2012).[3] Unlike a statute of limitations, at the end of the time period set forth in a statute of repose – here, 12 years after the commission of the alleged fraud – the cause of action ceases to exist. *WRH Mortgage, Inc. v. Butler*, 684 So. 2d 325, 327 (Fla. 5th DCA 1996).[4] Since Count IV is also based upon intentional fraudulent conduct, it should likewise be construed as a fraud claim and thus, barred by §95.031(2), *Florida Statutes*. *Ostreyko v. B.C. Morton Organization, Inc.*, 310 So. 2d 316, 318 (Fla. 3rd DCA 1975) (negligent misrepresentation actions sound in fraud rather than negligence).

In an apparent attempt to circumvent the statute of repose Plaintiffs have now alleged "a continuous pattern of fraudulent conduct" (¶ 1). Assuming *arguendo* they have pled a continuous tort with the requisite specificity, the continuous tort doctrine does not even relate to statutes of repose. *Woodward v. Olson*, 107 So. 3d 540 (Fla. 3rd DCA 2013) (recognizing that no Florida court has ever applied the continuing tort doctrine to statutes of repose, stating "[f]irst and foremost, the continuing tort doctrine is inapplicable in this case because it applies to statutes of limitations, not statutes of repose." *Id*. at 544.) This is consistent with a reading of the statute itself. There would be no need for bifurcated deadlines if they were treated the same. There would be no reason for *Florida Statute* 95.031 (2) to require that an action for fraud "must" be begun within 12 years after the date of the commission of the alleged fraud if there were exceptions to the rule. In that case, it would be redundant to the statute of limitations.

[3] The First District has certified that it is in conflict with the Fourth District on the issue of whether the trial court reversibly erred in denying a requested jury instructions and verdict question on the statute of repose, section 95.031(2), Fla. Stat. *See R. J. Reynolds Tobacco Company v. Hiott*, 129 So. 3d 473 (Fla. 1st DCA 2014); *Philip Morris USA, Inc. v. Buchanan*, 2014 WL 3406430 (Fla. 1st DCA July 14, 2014). However, until the Supreme Court rules on such issue, this court is bound to follow the decision of the Fourth District. *State v. Hayes*, 333 So.2d 51 (Fla. 1976).

[4] Such a bar is particularly appropriate for claims of fraud that are most susceptible to stale memories, lost evidence and witnesses that have disappeared. *Kish v. A.W. Chesterton Company*, 930 So. 2d 704, 707 (Fla. 3rd DCA 2006).

Plaintiffs may contend that the initial complaint filed on December 10, 2012 was filed within four years of the disclosure of the BLMIS Ponzi scheme and thus these new claims fall within the four year Statute of Limitations pursuant to the relation back provision of Rule 1.190(c), Florida Rules of Civil Procedure. However, Rule 1.190(c) provides that a newly asserted claim will relate back to the date of the initial filing if it "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading…" While amendments should be liberally granted, a party cannot defeat the statute of limitations by filing a new cause of action and labeling it an amended complaint. *School Bd. Of Broward County v. Surette,* 394 So. 2d 147, 154 (Fla. 4th DCA 1981).

The test to determine whether an amendment sets forth a new cause of action is whether such amendment is based upon the same specific conduct, transaction or occurrence between the parties. An amendment that merely makes more specific that which is already alleged or changes the legal theory will relate back. However, alleging new facts upon which a claim is based wholly separate and distinct from the facts previously alleged will not relate back to the original filing. *Lefebvre* at 920.

The facts alleged for the first time with the TAC, some of which were revised in the FAC, – that there were a plethora of "red flags" through which the Movants knew or should have known of the Ponzi scheme, that Avellino and Bienes advised or made it possible for the Partnerships to invest in BLMIS, that they should have advised Plaintiffs of the Ponzi scheme, and that Avellino and Bienes should be responsible not only for the few hundred thousand dollars in Kickbacks but also for the tens of millions of dollars invested by Plaintiffs (¶¶ 15-17, 18, 22, 24, 25, 27 – 29, 38-40, 44, 50, 51) – asserted new and significantly different conduct

wholly separate and distinct from the previously asserted facts and claims of kickback payments made beginning in 2003. The allegations made for the first time in the FAC – that some partners may have withdrawn and/or sold their investments had the Movants advised them of various "facts" (¶¶ 49, 73, 84) – are even more distinct from the claims initially made, and are not close to the "same specific conduct, transaction or occurrence" as claims based upon receiving kickbacks, or as buying the securities.[5] Therefore, they do not relate back to the date of the original filing.[6]

The Supreme Court's recent decision in *Caduceus Properties, LLC v. Graney*, 137 So. 2d 987 (Fla. 2014) does not change the analysis or outcome. The Supreme Court's decision in *Caduceus* resolved a conflict between the first and fifth districts on the issue of whether an amended complaint which seeks to add a party relates back to the filing of the initial pleading for the purpose of the statute of limitations. The Court held that an otherwise time barred amendment that names a third party defendant as a party defendant does relate back to the date of the third party complaint as long as the provisions of Rule 1.190(c) are met. *Id.* at 992-993. The Court emphasized that the trial court retains the discretion to deny such claims if they do not arise from the same "conduct, transaction, or occurrence" of the earlier pleading. *Id.* at 994.

Therefore, Counts II, III and IV should be dismissed based upon the statute of repose as the continuing tort doctrine does not apply and the filing of these counts in 2014 does not relate back to the initial filing in 2012. Assuming, *arguendo*, that these counts do relate back to 2012, then the suit is still barred as more than 12 years passed after the 1993 alleged "inducement" (if

[5] These are claims the Partnerships should not make at all, as they are individual claims, at best.
[6] Plaintiffs may argue that the claim that Avellino and Bienes advised the Partnerships to invest in BLMIS was first asserted in the SAC (¶ 93). However, Plaintiffs did not seek leave to file the SAC until January 31, 2014, well after the running of the four year Statute of Limitations. Therefore, any argument based upon the SAC would be fruitless.

the continuing torts doctrine does not apply); if the continuing torts doctrine does apply, then any investments made before December 11, 2000 would still be barred.[7] *See, e.g. In Fischler v AmSouth Bancorporation*, 971 F.Supp. 533 (M.D. Fla. 1997) (a sale of securities which occurred outside of the repose period "must be dismissed [from a federal statutory cause of action] as a matter of law" although another purchase was made within the permitted period and the plaintiffs had alleged that each time they purchased stock, the defendants failed to disclose material facts. *Id*. at 537).

II. Plaintiffs' Claims are Barred by the Statute of Limitations

A. Fraud Claims

The fraud claims contained in Counts II and III of the FAC are also barred by the statute of limitations, as is Count IV if it is considered to be a fraud claim. The statute provides that a fraud claim must be commenced within four years of when the facts giving rise to the claim were discovered or should have been discovered. § 95.11(3)(j), *Florida Statutes.*

The FAC alleges that Sullivan asked the Movants to help him invest in BLMIS (¶ 23), that the Partnerships could invest in BLMIS only upon the referral of the Movants (¶ 28) and that, as a result, they began investing in 1993. (¶ 31). The Court can take judicial notice of the fact that the BLMIS Ponzi scheme was publically revealed on December 11, 2008, the latest time by which the facts giving rise to the claim became known. *See, e. g., Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC,* 424 B.R. 122 (SDNY 2010), *aff'd,* 654 F.3d 229 (2d Cir. 2011), *cert. dismissed,* 132 S. Ct. 2712 (2012). Thus, the

[7] Assuming, *arguendo*, that the continuing tort doctrine does apply to the statute of repose and the counts do not relate back, then Plaintiffs would still not permitted to claim damages for investments made before sometime in 2002. Even under the Plaintiffs' best case scenario, applying both the doctrines of relation back and continuing tort – neither of which actually apply - they could not maintain a cause of action for the investments made before December 11, 2000.

newly asserted fraud claims filed within the TAC on June 27, 2014, and within the FAC on October 5, 2014, were filed considerably more than four years after the date when the facts giving rise to the claims became known or could have been discovered (assuming *arguendo* Plaintiffs could not have discovered the alleged fraud before December 11, 2008) and are time barred.[8]

Plaintiffs may contend that the initial complaint filed on December 10, 2012 was filed within four years of the disclosure of the BLMIS Ponzi scheme and thus these new claims fall within the four year Statute of Limitations pursuant to the relation back provision of Rule 1.190(c), Florida Rules of Civil Procedure. For the reasons set forth above, the doctrine of relation back cannot be used in this case to allow the filing of claims based upon such different facts.

In an attempt to salvage their complaint, Plaintiffs have added an allegation that the torts have been continuous. While the doctrine of continuous torts has been recognized in Florida for certain claims, it cannot apply to actions which occurred prior to the limitations period, but only to those which occurred within the limitations period. *Black Diamond Properties, Inc. v. Haines*, 69 So. 3d 1090 (Fla. 5th DCA 2011) ("Where the doctrine applies, a plaintiff may recover damages for tortious acts *committed within the limitations period* prior to the filing of suit." *Id.* at 1094, citing *Suarez v. City of Tampa*, 987 So. 2d 681, 685 (Fla. 2nd DCA 2008)). Therefore, even if the continuous tort doctrine is applied, it serves only to permit the Plaintiffs to assert a

[8] Plaintiffs previously argued that they could not have learned that their investments were in BLMIS until they obtained the books and records of the Partnerships, however such argument is contrary to their allegations in the FAC. Not only did Sullivan have knowledge that the investments were in BLMIS (¶ 21, 23), other partners, and the Partnerships' accountants, had knowledge that the investments were in BLMIS (¶ 42, 43, 44, 47, 48, and 49).

claim for any investments made within four years of when the case was filed (i.e. 2010 since relation back does not apply; 2008 if it did apply).

B. Negligent Misrepresentation and Breach of Fiduciary Duty Claims

Count I (Breach of Fiduciary Duty), and Count IV (if it is considered to be for negligence rather than fraud) are also barred by the statute of limitations. The discovery rule of §95.031(2)(a), *Florida Statutes,* does not apply to these claims. *Ryan v. Gonzalez,* 841 So. 2d 510, 518 (Fla. 4th DCA 2003). These causes of action, therefore, must be commenced within four years of when the cause of action accrued. §95.11(3)(a) and (p), *Florida Statutes.* A cause of action accrues when the last element of the cause of action occurs, in this case, damages. §95.031(1), *Florida Statutes.* Plaintiffs incurred damages when they invested in the Partnerships between 1992 and 2008, only the last investment of which could even arguably (depending upon when in 2008 it was made) have been made within four years of the suit being filed in 2012, and that is only if the doctrine of relation back applied. Furthermore, as set forth above, because these causes of action are also based upon the newly alleged conduct, the relation back provision of Rule 1.190(c) does not apply, and only investments made in or after 2010 are actionable.

Plaintiffs may argue that their Breach of Fiduciary Duty claim is based not only on the allegation that in 1992 Avellino and Bienes advised the Partnerships to invest in BLMIS – clearly a time-barred claim – but also on the allegation that Avellino and Bienes received "kickbacks", some of which occurred within four years of the filing of the complaint. (TAC, ¶ 113). However, Plaintiffs cannot combine time-barred claims with arguably non-time-barred claims (which alleged conduct is separated by more than a decade) to revive a time-barred claim. Nor would Plaintiffs' "continuing tort" allegation allow it to obtain damages now for

investments made in 1993, or before four years from the 2014 amendment or, at the earliest, before the suit was filed in 2012. *Black Diamond Properties*, 69 So. 3d 1090. Therefore, assuming, *arguendo*, that there were enough substantive facts pled to state causes of action for negligence and fraud, there still is no cause of action for negligent misrepresentation or fraud based upon any investment made before 2010 (or, even if relation back did apply, before December 11, 2008).

III. Plaintiffs Cannot Allege a Fiduciary Duty

Count I must fail because it does not allege all the necessary elements for a breach of fiduciary duty claim. A necessary element of a fiduciary relationship is trust, which must not only be placed by one party but also accepted by the other. *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 521 (Fla. 3rd DCA. 1994) (recognizing a fiduciary relationship between a bank and a customer where the bank knows or has reason to know of the customer's trust and confidence under circumstances exceeding an ordinary commercial transaction).

While the FAC does contain the bare, conclusory allegations that the Movants accepted Plaintiffs' trust (i.e.¶¶. 41, 68), such conclusions are insufficient. *Sussman v Weintraub*, 2007 WL 908280 at * 5 (S.D. Fla. March 22, 2007), *citing Parker v Gordon*, 442 So. 2d 273, 275 (Fla. 4th DCA 1983). Plaintiffs, having been alerted by the previous motions to dismiss that additional facts would be necessary to support the allegations, expounded upon the Movants' involvement with their respective churches and upon their reputation as charitable men. They allege that "thanks to their reputation as prominent leaders," Avellino "prevented" them from "questioning" the situation (¶58). This is a total non sequitur. The Movants' reputation did not "prevent" anything. Unable to point to any specific ways in which the Movants had manifested

an acceptance of any trust, on their fifth attempt to plead a cause of action, Plaintiffs can allege nothing more than their unilateral imposition of trust upon individuals because they had good reputations and were involved in the same church as some of the partners of the Partnerships (i.e. ¶¶ 31, 32, 33, 36).

"Simply showing that [two people] were acquaintances and belonged to the same religion will not, in our view, give rise to the higher relationship conceptually envisioned by the terms 'confidential' or 'fiduciary'". *Folz v. Beard*, 332 So. 2d 129, 130-31 (Fla. 2nd DCA 1976), *receded from other grounds, Upledger v. Vilanor Inc.*, 369 So. 2d 427 (Fla. 2nd DCA 1979) (reversing a judgment for a seller of a business against a buyer as there was no fiduciary relationship). Similarly, in an action alleging fraud in the sale of stock, *Morton v. Young*, 311 So. 2d 755 (Fla. 3rd DCA 1975), the court held that acquaintances who had lunch together occasionally and played poker weekly did not have a confidential relationship.

Dismissal at the pleading stage is warranted when the allegations do not create a fiduciary duty. In *Watkins v. NCNB Nat. Bank of Florida, N.A*, 622 So. 2d 1063, 1065 (Fla. 3rd DCA 1993), for example, the court affirmed the dismissal of a counterclaim because a lender's superior knowledge about an investment its client was making was insufficient to impose a fiduciary duty on the lender, even though it had loaned money to its client so that he could make the investment. Similarly, in *Bldg. Educ. Corp. v. Ocean Bank*, 982 So. 2d 37, 41 (Fla. 3rd DCA 2008), while the Court recognized that whether a confidential relationship exists is a determination for the fact finder to make at trial, the Court also recognized that the existence of a duty is a question of law, and therefore, the Court granted summary judgment against a party claiming a fiduciary duty.

In the instant case, it is clear from the FAC that "Sullivan met with Avellino and Bienes *because he* wanted to continue investing with BLMIS", . . . and "*asked* Avellino and Bienes if they could get accounts for him at BLMIS because of the consistently high rate of return he enjoyed while investing with A & B." (¶ 23). Sullivan, and hence the Partnerships, did not ask the Movants' opinion or advice; he had already decided that he wanted the Partnerships' funds invested with BLMIS. Accordingly, since there is no relationship between the parties resulting from the Plaintiffs having approached the Movants to help them in their quest to invest with BLMIS, they attempt to create a relationship through allegations of control. However, not only are the conclusory allegations of control (¶ 69) insufficient, *Parker at* 275, the specific allegations made by Plaintiffs do not support the conclusion to which the Plaintiffs want us to jump.

Initially it is worth noting that any allegation of the Movants' control contradicts the allegation that "Sullivan exclusively controlled the partnerships." (¶ 60). Nor do the allegations that purport to impose control (i.e.¶¶ 41, 42, 43, 45, 46, 47) do so. The allegations of what the Madoff Trustee's suit alleges (¶ 25) only provides hearsay allegations contained within the Trustee's complaint; not any direct allegations of what the Movants actually did.[9] Plaintiffs could not even directly allege that the Movants undertook these actions; only that someone else *alleged* they did.

Furthermore, the exhibits attached to the complaint negate the allegation of the Movants' control. The Partnership Agreements (Exhibits A and B) grant exclusive control to the general partners (¶ 8.01) (i.e. Sullivan), and provide no role for the Movants. Additionally, the letter on

[9] The Trustee's complaint, too, is subject to a pending motion to dismiss.

which the Plaintiffs rely for the conclusion that the Movants' "control is beyond dispute" (¶ 69) does not lead to that conclusion. It refers to Avellino only as "the main source" – as someone who provided what Sullivan, as the author of the letter, described as a gift. Sullivan was very clear in the letter that "all the business ever generated through this company came in through my efforts alone," and that "all the investors are from my contacts or personal relationships that I have nurtured through the years." There are references to Avellino providing business to an undisclosed business operation of Sullivan's, and hence, allegedly Avellino would be able to cease referring such business, but there is no mention of control.[10] The law is firmly established that, in a situation such as this, in which the facts as revealed in an exhibit are inconsistent with the general allegations of a complaint, they neutralize each other and warrant the dismissal of the action. *Harry Pepper & Associates, Inc. v. Lasseter,* 247 So. 2d 736, 736-37 (Fla. 3rd DCA 1971).

IV. No Cause of Action for Fraud has been Pled

Rule 1.120(b), Florida Rules of Civil Procedure, requires that "the circumstances constituting fraud shall be stated with such particularity as the circumstances may permit." Failure to do so is fatal. *Strack v. Fred Rawn Construction, Inc.,* 908 So.2d 563, (Fla. 4th DCA 2005.

The fraud claims of the FAC fail to meet the heightened pleading requirements of Rule 1.120(b). To comply with Rule 1.120(b), the fraud claims should allege "…who made the false statement, the substance of the false statement, the *time frame in which it was made and the context* in which the statement was made." *Eagletach Communs, Inc. v. Bryn Mawr Inv. Group,*

[10] The Plaintiffs should also be required to attach the entire letter in its original form. They admittedly altered the date and appear to have omitted the end of the letter.

Inc., 79 So. 3d 855, 861-62 (Fla. 4th DCA 2012) (*quoting Bankers Mut. Capital Corp. v. U.S. Fid. & Guar. Co.,* 784 So.2d 485, 490 (Fla. 4th DCA 2001) (emphasis added). In addition, it must allege with specificity what each Defendant did or said; it cannot lump them together. *See Fellner v. Cameron*, 2012 WL 1648886 at *4 (M.D. Fla. 2012).

The FAC's continued failure to plead what Avellino and Bienes each specifically said, to whom and when, fails to provide each Defendant with the requisite particularity required for a claim of fraud, and fails to state a cause of action. The allegations of representations made to individual investors (¶¶17 (o), 42, 43, 47, 48, 49) cannot be used by the Partnerships to state a cause of action on behalf of the Partnerships; at best, they might be a basis for a direct claim by the individual investors. *See, Ivey*, 671 So. 2d at 206 (a direct action is a cause of action which seeks an injury suffered directly by the shareholder which is separate from any injury sustained by any other shareholders). The additional conclusory allegation that the fraud continued is an obvious attempt to invoke the continuous tort doctrine; yet the FAC makes no attempt to comply with the requirements of pleading the substance, time and context which comprised the continuing tort or induced each of the payments alleged in the FAC (¶ 31) (i.e. failed to plead with specificity the alleged continuing fraud). Furthermore, as set forth above, the Plaintiffs' efforts to plead the requisite knowledge and duty of the Movants, and the right to rely of the Plaintiffs, have fallen short. The counts must be dismissed.

The FAC's Negligent Misrepresentation claim (Count IV) is also subject to and fails to comply with Rule 1.120(b). An action for negligent misrepresentation sounds in fraud rather than negligence. *See Johnson v. Amerus Life Insurance Co*., 2006 WL 3826774 *4 (S.D. Fla. 2006). The specificity requirements for fraud also apply to claims for negligent

misrepresentation. *Morgan v. W.R. Grace & Co.*, 779 So. 2d 503, 506 (Fla. 2nd DCA 2000). Therefore, particularly in this case, in which the same identical allegations are pled for the negligent and the fraud causes of action, the negligent misrepresentation claim fails to meet the appropriate specificity requirements and should be dismissed.

V. The FAC Contains Insufficient Allegations of the Movants' Knowledge of the BLMIS Ponzi Scheme

Counts I through IV of the FAC all fail unless the Movants knew or should have known that BLMIS was involved in a Ponzi scheme. They did not. The FAC, in a fruitless attempt to plead such knowledge, identifies what have been referred to as "red flags", but which have been found insufficient as a matter of law in other cases involving BLMIS. *See, e.g., Newman v. Family Mgmt. Corp*, 748 F.Supp. 2d 299, 310 (S.D.N.Y. 2010) (granting a motion to dismiss despite allegations of BLMIS being audited by a small firm without third party custodians, the lack of transparency, and trading discrepancies; "[f]or twenty years, Madoff operated this fraud without being discovered and with only a handful of investors withdrawing their funds as a result of their suspicions."). *SEC v. Cohmad Sec. Corp.*, 2010 WL 363844 (S.D.N.Y. 2010) also dismissed an action for statutory violations despite the alleged red flags of financial incentives, regulatory irregularities, irregularities in the defendant's personal BLMIS accounts and Madoff's demands for secrecy. That case, like the instant case, involved allegations that a defendant was a neighbor of Madoff, formed a business with him, worked on the same floor as he did, referred clients to BLMIS, and checked with Madoff or his employees in order to obtain information for clients' accounts. *See, also, Stephenson v. Citco Group Limited*, 700 F.Supp 2d 599, 622 (S.D.N.Y. 2010) (finding that an auditor must have "actually been aware of the red flags", either because they are alleged to have had actual knowledge or because the red flags were so obvious

that the auditor must have been aware of them: "merely alleging that the auditor had access to the information by which it could have discovered the fraud is not sufficient.").

Without knowledge of the Ponzi scheme the Movants had nothing to disclose. The Plaintiffs are attempting to charge the Movants with knowledge which not one other person in the financial world, including the SEC and regulatory agencies, was able to obtain. Accordingly, their claims should be dismissed.

Conclusion

Plaintiffs have had ample time and have pursued extensive discovery to develop the requisite facts to support their claims, yet they have failed to do so. They seek to impose liability on the Movants based upon ever evolving, total distinct allegations which were not made in the complaint or first amended complaint – the only pleadings filed before the statute of limitations expired. They have already had five chances to make actionable claims. Based on the foregoing, it is respectively submitted that Counts I through IV must be finally dismissed, with prejudice.

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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 5th day of November, 2014.

By: /s/ Gary A. Woodfield
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