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, *et al.*,

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' FOURTH 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 and Michael Bienes' (collectively, "Defendants") Motion to Dismiss Fourth Amended Complaint (the "Motion"). In support thereof, Plaintiffs state as follows:

Summary of Argument

Defendants Motion should be denied because it relies on disputed, incorrect factual assumptions that contradict or ignore allegations in the Fourth Amended Complaint (the "FAC"). Plaintiffs have now alleged many specific facts to support assertions made since the inception of this case. Plaintiffs have always asserted that: (i) Sullivan was a "front man" for Avellino and Bienes; (ii) Avellino was given an unlawful control over the Partnerships and actively

participated in its management; and, (iii) that Avellino and Bienes knew that distributions were improperly made. *See* Original Complaint ¶¶ 31(b), 32, 42(f); FAC ¶ 1. Avellino's and Bienes' deceit of the Partnerships and Sullivan arise from those same facts, and many of the specific facts in the FAC are confirmed from discovery recently obtained by the Conservator. Sullivan has confirmed in writing that: (i) Avellino was the "the main source" of the business; (ii) the business could be taken back by Avellino at any time; and (iii) Avellino's value to the Partnerships was so significant that the business would be worth nothing if Avellino died. *See* Exhibit 1 to FAC. Ultimately, Plaintiffs' Original Complaint was filed within four years of the Madoff collapse, rendering the claims set forth in FAC, all of which are governed by four year statute of limitations, timely.

Plaintiffs should prevail on Defendants' various statute of limitations arguments even if this Court were to find that the claims in the FAC do not relate back to the Original Complaint. The continuing tort and delayed discovery doctrines save all of Plaintiffs' claims as detailed below. Claims based on misrepresentations made outside of the twelve year statute of repose that might otherwise preclude portions of Plaintiffs' fraud and negligent misrepresentation claims are also saved as the essential element of reliance is well within the statute of repose. Finally, Avellino and Bienes are equitably estopped from asserting any statute of limitations defenses due to their concealment of relevant facts and inducement of forbearance of suit against them.

Moreover, none of the defenses raised by Avellino and Bienes are ripe for adjudication on a motion to dismiss. *Aquatic Plant Mgmt., Inc. v. Paramount Eng'g, Inc.*, 977 So. 2d 600, 604 (Fla. 4th DCA 2007) (unless "the facts constituting the defense affirmatively appear on the complaint and establish conclusively that the statute of limitations bars the action as a matter of law"). This Court should consequently deny the Motion and allow Plaintiffs to continue this suit.

Both pre-suit and post-suit, the Defendants have delayed the Plaintiffs' ability to obtain relief for far too long.

ARGUMENT

I. The Fourth Amended Complaint's Claims Arise Out of The Same Conduct, Occurrences, and Transactions As Set Forth in the Original Complaint.

Defendants argue that the FAC is time barred because it does not relate back to the timely filed Original Complaint. Their argument fails because the underlying facts of the FAC arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the [O]riginal [Complaint]," as required under Fla. R. Civ. P. 1.190(c) to relate back. *Caduceus Properties, LLC v. Graney*, 137 So.3d 987 (Fla. 2014) (citing Fla. R. Civ. P. 1.190(c)).

In *Caduceus Properties*, the Florida Supreme Court recently reiterated the well-settled law that the relation back doctrine is to be liberally applied. The *Caduceus* Court explained:

> 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. Likewise, "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).

In this case, the FAC's allegations that Avellino and Bienes knew of the BLMIS Ponzi scheme, advised the Partnerships to invest in BLMIS, and made material omissions and misrepresentations to get them to do so (and the causes of actions related thereto) arise from the same conduct, transaction, or occurrence set forth in the Original Complaint. The Original

Complaint alleges, among other things, that "despite the prohibition imposed by the SEC, Avellino and Bienes found people such as Sullivan who were willing to act as 'front men to operate partnerships so that they could continue to raise and pool money from other to invest with BLMIS but avoid the scrutiny of the regulators." Original Complaint ¶ 31(b). It was later discovered that Avellino and Bienes used such "front men" to avoid SEC scrutiny because they were intimately involved in the BLMIS Ponzi scheme, and were not allowed to register with the SEC by Madoff, but nonetheless engaged in the sale of securities even though they were prohibited from doing so by the SEC. FAC ¶¶ 17(j), 17(k), 17(l) 17(m) 17(n), 18-20, 23, 25, 25, 55.

The FAC's allegations regarding Defendants' fraudulent conduct and relationship to the Partnerships arise out of that "front man" allegation because it is pled that because Avellino and Bienes could not invest with Madoff due to their own improprieties, they needed to utilize and control "front men," like Sullivan, so that they could continue to benefit from the BLMIS Ponzi Scheme, and they fraudulently induced front men such as Sullivan and the Partnerships to invest in BLMIS. The conduct and occurrences upon from those facts arise were pled in the original complaint:

- Avellino and Bienes found people such as Sullivan to act as front men so that they could continue to raise and pool money from others to invest with BLMIS but avoid the scrutiny of the regulators. *Compare* Original Complaint ¶ 31 *with* FAC ¶¶ 23, 37, 38, 40-46, 53-56.
- The Picard lawsuit specifically references S&P and P&S as examples of investment vehicles in which such "front" was used. *Compare* Original Complaint ¶31(b) with FAC ¶25.
- Many of the general partners were introduced to the Partnerships through Frank Avellino and Michael Bienes. *Compare* Original Complaint ¶ 14 *with* FAC ¶¶ 49, 50, 52-58.
- The Partnerships collectively invested tens of millions of dollars in BLMIS. *Compare* Compl. ¶ 16 *with* FAC ¶¶ 27, 31.

- The roots of the investment were grounded in trust carefully cultivated for years, stemming from participation in the church. *Compare* Original Complaint ¶ 25 *with* FAC ¶¶32-36, 57, 58.
- Avellino was given a significant, inappropriate and unlawful level of control over the Partnerships. *Compare* Original Complaint ¶¶ 31(b), 32 *with* FAC ¶¶ 25, 40-46, 65, 66.
- The Partnerships lost millions of dollars by investing in BLMIS. *Compare* Original Complaint ¶ 17 *with* FAC ¶¶ 31, 39, 51.
- Millions of dollars were mismanaged, inappropriately accounted for, or misappropriated at the direction of Defendants. *Compare* Original Complaint ¶ 19 *with* FAC ¶¶ 52, 61.
- The assets of the Partnerships were funneled to Sullivan, Avellino and Bienes, in the form of commissions or referral fees. *Compare* Original Complaint ¶ 23 *with* FAC ¶ 61.

Thus, the FAC relates back to the date of the filing of the Original Complaint because Defendants had "fair notice of the general factual situation" to which they are named as Defendants in this action. *Arch Specialty Ins. Co. v. Kubicki Draper, LLP*, 137 So. 3d 487, 490 (Fla. 4th DCA 2014), reh'g denied (May 23, 2014) ("It is well-settled that the rule permitting amendments to pleadings, and the relation-back doctrine, are to be liberally construed and applied").

To the extent that the FAC relates back to the Original Complaint, the only timeliness issue that needs to be addressed by this Court is whether Plaintiffs can proceed on fraud claims based on misrepresentations that fall outside of the statute of repose. Plaintiffs' remaining arguments concerning the statute of limitations will focus on reasons, such as the delayed discovery and continuing tort doctrines, as to why the FAC must stand, even absent relation back.

II. The Statute of Repose Does Not Bar Plaintiffs' Fraud Claims

A. The Fourth Amended Complaint Alleges That Plaintiffs Relied on Statements and Omissions After 1992.

Defendants argue that the 12 year statute of repose bars portions of Plaintiffs' fraudulent misrepresentation (Count II), fraudulent inducement (Count III), and negligent misrepresentation (Count IV) claims (the "Fraud Claims") based on their assertion that any fraud occurred on or before 1993 – when Plaintiffs first invested in BLMIS based on Defendants' misrepresentations and omissions. This argument ignores the FAC's allegations that Defendants made numerous fraudulent misrepresentations and omissions not only in 1992, but also continuing through 2008, and that Plaintiffs relied on them by investing with BLMIS and holding their money there. *See* FAC ¶¶ 31, 43, 46, 47, 48, 49, 50, 51.[1]

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."[2] *Philip Morris USA, Inc. v. Hallgren*, 124 So. 3d 350, 353 (Fla. 4th DCA 2013) (emphasis added). "[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); *Philip Morris USA, Inc. v. Kayton*, 104 So. 3d 1145, 1151 (Fla. 4th DCA 2012). Where, as here, the record demonstrates that the plaintiff justifiably relied on statements made within 12 years of filing of a complaint, the statute of repose does not bar a

[1] Defendants argue that the claims in the FAC belong to the individual partners because, in some cases, Defendants' misrepresentations and omissions were made to individual partners and not the Partnerships. They are wrong because pursuant to Fla. Stat. § 620.8102, "[a] partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner."

[2] "[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).

claim based on fraudulent concealment. *Philip Morris v. Naugle*, 103 So.3d 944, 947 (Fla. 4th DCA 2012). Critically, whether and when a plaintiff relied on the false statements or omissions of a defendant, and when a plaintiff is damaged, is a question for the jury, and is not properly decided on a motion to dismiss.[3] *Id.*

In an attempt to force a dismissal of the FAC, Defendants confuse well settled law concerning the date of reliance and statute of repose with the continuing tort doctrine and argue that because the continuing tort doctrine does not apply to the statute or repose, Plaintiffs' Fraud Claims are barred by the statute of repose. In support of their position, Defendants cite to *Woodward v. Olson*, 107 So. 3d 540 (Fla. 3d DCA 2013), a medical malpractice case, where the Third District Court of Appeal found that exacerbation of damages after the date when the acts giving rise to a claim occurred, did not preserve a claim for medical malpractice under the continuing tort doctrine. *Id.* at 545. However, here, unlike *Woodward,* Plaintiffs have alleged that they continued to rely and take action in reliance on Defendants' fraudulent statements and omissions up to and until 2008, even if those statements were made outside of the repose period. *See, e.g.*, FAC ¶ 31.

Defendants also rely on *Phillip Morris USA, Inc. v. Hess*, 95 So. 3d 254 (Fla. 4th DCA 2012). However, the plaintiff in *Hess* did not attempt to establish that he relied on any statements made outside the statute of repose period and argued that the date of reliance was immaterial. *Id.* at 261. (citing *Joy v. Brown & Williamson Tobaco Corp.*, 1998 WL 35229355, at *5 (M.D. Fla. 1998) (noting that a plaintiff must provide some proof of detrimental reliance

[3] In *Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So. 2d 13, 15 (Fla. 3d DCA 2002), for example, the Third District Court of Appeal reversed the trial court's order dismissing the plaintiffs' complaint because the trial court incorrectly found the plaintiffs' claims for fraud and negligent misrepresentation were time barred. Although not a statute of repose case, the Court recognized that reliance can be continuous and must be considered when addressing the appropriate limitations period. Furthermore, the *Lopez* court found that the fraud alleged "was not complete until the appellants were no longer suffering 'consequent injuries[,]'" or terminated their investment in a fraudulent scheme. *Id.*

within 12 years of filing a complaint to survive summary judgment)). Because of the *Hess* plaintiffs' failure to present any evidence of detrimental reliance within 12 years of the filing of the Complaint, the Fourth District Court of Appeal found that the statute of repose barred the plaintiffs' claims. *Id.* Such defect is not present in the FAC.

There are substantial allegations in the FAC that Plaintiffs continued to rely on Defendants misstatements and omissions during the statute of repose period (after 2000), which preclude dismissal. *See Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So. 2d 13, 15 (Fla. 3d DCA 2002) (finding that statute of limitations on a fraudulent inducement claim did not begin to run until plaintiff ceased making payments). FAC ¶¶ 31, 40, 42, 45-49, 78-80, 84-87, 89-93. More importantly, the FAC pleads that the Partnerships failed to make withdrawals from BLMIS, based solely on Avellino and Bienes' misrepresentations and omissions *in 2007 and 2008*, which *ultimately caused the Partnerships to lose all of their investments with BLMIS*. FAC ¶¶ 49, 50. The FAC consequently demonstrates that Plaintiffs' reliance occurred within the statute of repose time period because the FAC unequivocally provides that each time that the Partnerships invested newly obtained money with BLMIS, or failed to withdraw money invested in BLMIS until its collapse in 2008, that action was taken in reliance on Avellino and Bienes' omissions. *See Lopez-Infante* 809 So. 2d at 13. Thus, Plaintiffs' continuous reliance on Defendants' misstatements and omissions justifies denial of the Motion.

B. Avellino's Argument Was Rejected By The Eleventh Circuit Court Of Appeals In Another Case.

The United States Eleventh Circuit Court of Appeals recently rejected Avellino's same statute of repose argument 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 plaintiff's money in Bernard Madoff's Ponzi

scheme. The trial court dismissed the complaint based on, *inter alia,* that the 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 investments by the plaintiff, occurred after the date set by the applicable statute of repose. Similarly, in this case, several of the Partnerships investments were made after the date set by the applicable statute of repose. Accordingly, Plaintiffs' Fraud Claims are not barred by the statute of repose.

III. The Statute of Limitations Does Not Bar Plaintiffs Claims.

A. Plaintiffs' Fraud Claims Are Preserved by the Delayed Discovery Doctrine.[4]

The Motion also seeks to dismiss the Fraud Claims as untimely because the FAC was filed more than four years after the public disclosure of the BLMIS Ponzi scheme in December 2008, which, according to Avellino and Bienes, is when the claims against them could have been discovered with the exercise of due diligence. Defendants' position is based entirely on an assumption that is nowhere in the FAC, and it is therefore is improper to grant Defendants' Motion, because "[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).

Even if the facts which gave rise to the discovery of claims against *Avellino and Bienes*, and not Madoff was established in the FAC, it specifically pleads that Avellino and Bienes concealed their conduct and involvement with the Partnerships through 2012. FAC ¶¶ 1, 50-52, 65-66. Specifically, the FAC alleges that "Avellino continued to be active in the management of the Partnerships and assisted in the concealment the Kickbacks received until 2012," "Avellino's

[4] "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). For statute of limitations purposes, negligent misrepresentation is therefore be treated as any other fraud claim, and the delayed discovery doctrine applies to it.

conduct was intended to shield him and Bienes from the ramifications of their various breaches of fiduciary duties," and that "in concealing his conduct, Avellino acted for himself and for Bienes" FAC ¶ 65. Additionally, the FAC pleads that "Sullivan attempted to prevent general partners of the Partnerships from accessing the Partnerships' books and records to further conceal Avellino and Bienes' involvement in the Partnerships[,]" and in 2012, denied that Avellino and Bienes had any involvement with the partnerships. FAC ¶ 66. These facts, taken in the light most favorable to the Plaintiffs, are clearly sufficient to establish that issues of fact exist as to when Avellino and Bienes' fraudulent conduct should have been discovered, and there is no allegations in the FAC that indicates that Defendants' conduct could have been discovered on or before December 11, 2008.[5] *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"); *Goodwin v. Sphatt*, 114 So. 3d 1092, 1094 (Fla. 2d DCA 2013) ("dismissal was not warranted because the complaint does not specify when [the plaintiff] knew or should have known of the [defendant's] misrepresentations.").

B. Breach of Fiduciary Duty Claim.

1. The Continuous Tort Doctrine.

In another attempt to confuse issues concerning Plaintiffs' claims, Defendants argue that Plaintiffs' Breach of Fiduciary claim (Count I) is barred by a four year statute of limitations which may not be extended by the delayed discovery doctrine, even though that doctrine cannot be used to preserve breach of fiduciary duty claims under Florida law.

"Florida law, however, recognizes an exception to the general statute of limitation rules for torts that are continuing in nature." *Laney v. Am. Equity Inv. Life Ins. Co.*, 243 F. Supp. 2d

[5] This Court can take judicial notice of the litigation required to appoint the Conservator and gain access to the books and records of the Partnerships. *Carone*, et al. *v. Sullivan*, et al., Case No.: 12-24051.

1347, 1357 (M.D. Fla. 2003) (applying Florida law) (internal citations omitted). Under the continuing torts doctrine, the statute of limitations runs from the date that the tortious conduct ceases, or the date that the last tortious ***act occurs***. *Id.* (citing *Halkey-Roberts Corp. v. Mackal*, 641 So. 2d 445, 447 (Fla. 2d DCA 1994) (reversing order granting summary judgment on breach of fiduciary duty claim because the defendant's "behavior constituted continuing torts, for which the limitations period runs from the date the tortious conduct ceases.")) (emphasis added); *Millender v. State DOT*, 774 So. 2d 767, 769 (Fla. 1st DCA 2000) (the statute of limitations, in a continuing tort action, runs from the date of the last tortious act). The continuing tort doctrine permits parties to assert claims in connection with conduct that has occurred outside of the statute of limitations period, so long as the last act in furtherance of tortious conduct occurred within that period. *City of Quincy v. Womack*, 60 So. 3d 1076, 1078 (Fla. 1st DCA 2011); *accord Winn-Dixie Stores v. Dolgencorp, LLC*, 746 F. 3d 1008 (11th Cir. 2014).

In *Kravitz v. Levy*, 973 So.2d 1274, 1275-76 (Fla. 4th DCA 2008), for example, the Fourth District Court of Appeal found that the continuing tort doctrine precluded entry of summary judgment on statute of limitations grounds. In determining that the defendant could be held liable for breaches of fiduciary duty in connection with the misappropriation of assets 20 years before the lawsuit at issue was filed, the Fourth District Court of Appeal noted that so long as the defendant was a personal representative, and thus had a fiduciary duties, whether he continued to breach his fiduciary duties, despite the expiration of the statute of limitations, was a question which must be submitted to the jury. *Kravitz v. Levy*, 973 So.2d 1274, 1275-76 (Fla. 4th DCA 2008) ("Because we conclude that there is an issue of material fact as to whether the actions of the personal representative constituted continuing tort, we reverse").

In this case, Plaintiffs' fiduciary duty claim was timely brought because, as set forth in

the FAC, Avellino and Bienes breached and continued to breach their fiduciary duties through 2012 by taking action to the Partnerships' detriment for their own benefit. FAC ¶¶ 1, 31, 66, 74 ("This is an action seeking damages as a result of a continuous pattern of fraudulent conduct, aiding and abetting fraudulent conduct and various breaches [of fiduciary duties] by the Defendants.").

Because the allegations concerning Avellino and Bienes' continuing breaches of fiduciary duty are sufficient to establish a continuing tort, Plaintiffs' breach of fiduciary claim should not be dismissed on statute of limitations grounds, as Plaintiffs' claims did not accrue until Avellino and Bienes' tortious conduct ceased in 2012. *Goodwin v. Sphatt*, 114 So. 3d 1092, 1094 (Fla. 2d DCA 2013). In any case, "[w]hether the continuing torts doctrine applies to the facts of [this] case is for the trier of fact to decide[,]" and should not be addressed at this juncture. *Pearson v. Ford Motor Co.*, 694 So. 2d 61, 68-69 (Fla. 1st DCA 1997); *Rosario v. Procacci Commercial Realty, Inc.*, 717 So. 2d 148 (Fla. 2d DCA 1998).

IV. Plaintiff's Claims Are All Adequately Plead.

A. Fraud.

Florida Rule of Civil Procedure 1.120(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit."

Courts relax the level of particularity required where the plaintiff is a receiver or trustee who is a stranger to the conduct at issue. *See Picard v. Merkin (In re Bernard L. Madoff Inv. Sec., LLC)*, 440 B.R. 243, 254 (Bankr. S.D. N.Y. 2010); *In re Manhattan Inv. Fund Ltd.*, 310 B.R. 500, 505 (Bankr. S.D.N.Y. 2002) ("Bankruptcy courts take a liberal approach in construing allegations of actual fraud pled by a trustee, because the trustee is a third party outsider to the transaction and must plead fraud based upon second hand knowledge."). As a trustee, receiver or

conservator is pleading from second-hand knowledge, "allegations of circumstantial evidence are sufficient to establish fraudulent intent[,]" and the more complicated the transactions, the greater latitude afforded to the receiver. *Picard v. Merkin*, 440 B.R. at 254 (internal citations omitted).

Defendants admit that a party adequately pleads a fraud claim when they 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 it was made." *Eagletech Commc'ns, Inc. v. Bryn Mawr Inv. Grp.,* Inc., 79 So. 3d 855, 862 (Fla. 4th DCA 2012).

Defendants ignore that the FAC adequately pleads these facts. The FAC provides that Avellino and Bienes knew or should have known that BLMIS was a Ponzi Scheme, and the reasons why. FAC ¶ 17. It also states that:

> Avellino and Bienes knew or should have known that BLMIS was a Ponzi scheme, and they failed to disclose this material fact to the Partnerships, despite having numerous opportunities to do so, including meetings with Sullivan on a yearly or twice yearly basis regarding the Partnerships' accounts, each time Avellino and Bienes referred an investor to S&P or P&S, each time Avellino and Bienes received a kickback in exchange for such referrals, each time they responded to an inquiry from a partner regarding the Partnerships, and each time they advised partners not to withdraw from the Partnerships.

FAC at ¶ 78. The FAC establishes who made the statement: Avellino and Bienes; the substance of the false statement: omissions that BLMIS was not a fraud; the context in which the statement was made: to induce the Partnerships to invest in BLMIS and keep their money with BLMIS; and the time frame when it was made: every time that Avellino or Bienes gave advice to the Partnerships, or received a kickback from the Partnerships. There is consequently no question that these factors meet the requisite particularity.

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

denied.

1. Plaintiffs' Allegations Concerning Defendants' Knowledge Are Adequately Plead.

Defendants do not cite a single Florida case in support of their argument that Plaintiffs' allegations cannot establish Defendants' knowledge of the BLMIS Ponzi scheme as a matter of law. Nor could they.

Knowledge may be alleged generally under Fla. R. Civ. P. 1.120(b). Thus, Plaintiffs are only required to plead that Avellino and Bienes generally knew or should have known of the BLMIS fraud. *See Bankers Mut. Capital v. U.S. Fid. & Guar.*, 784 So. 2d 485, 490 (Fla. 4th DCA 2001).

Nonetheless, Plaintiffs have alleged 17 different facts which demonstrate that Avellino and Bienes knew or should have known that BLMIS was a Ponzi scheme. FAC ¶ 17. Among others, the FAC alleges that Avellino and Bienes maintained phantom books to match BLMIS statements, engaged in tax fraud in connection with their investments with BLMIS, and invoked their Fifth Amendment Privilege when asked questions about their involvement with BLMIS. *Id.* Further, whether those factual allegations and others are sufficient to establish Avellino and Bienes' knowledge that Madoff operated BLMIS as a fraud is not an issue that is properly addressed on a Motion to Dismiss. *Port Marina Condo. Ass'n, Inc. v. Roof Servs., Inc.*, 119 So. 3d 1288, 1290 (Fla. 4th DCA 2013).

B. Fiduciary Duty.

Defendants ignore the FAC's allegations by arguing that Plaintiffs have not alleged a fiduciary relationship between the Partnerships and Avellino and Bienes.

In 1927, the Florida Supreme Court acknowledged:

> The term "fiduciary or confidential relation," is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which

> influence has been acquired and abused – in which confidence has been reposed and betrayed. The origin of the confidence is immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts another.

Quinn v. Phipps, 113 So. 419 (Fla. 1927); *see also Van Woy v. Willis*, 14 So. 2d 185, 1890 (Fla. 1943); *Whittle v. Ellis,* 122 So. 2d 237, 239-240 (Fla. 2d DCA 1960).

In order to establish the existence of a fiduciary duty, a plaintiff "must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party." *Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 541 (Fla. 5th DCA 2003) (citing *Watkins v. NCNB Nat'l Bank of Fla., N.A.*, 622 So. 2d 1063, 1065 (Fla. 3d DCA 2001)). Thus, a fiduciary duty "exists where confidence is reposed on one side and there is resulting superiority and influence on the other." *Atlantic Nat'l Bank of Fla. v. Vest*, 480 So. 2d 1328, 1332-33 (Fla. 2d DCA 1985). Whether a fiduciary duty exists is "based on the circumstances surrounding [a] transaction and the relationship of the parties. *Masztal v. City of Miami*, 971 So. 2d 803, 809 (Fla. 3d DCA 2007); *see Crusselle v. Mong*, 59 So. 3d 1178, 1181 (Fla. 5th DCA 2011) (reversing a directed verdict because the existence of a fiduciary relationship should be determined by a jury).[6]

In *Barnett Bank of West Florida v. Hooper*, 498 So. 2d 923, 925-26 (Fla. 1986), for example, the Florida Supreme Court found that a fiduciary duty existed when a defendant used its superior knowledge to induce a customer into investing money with another customer who had been involved in a check kiting scheme. In so holding, the Florida Supreme Court held that, the defendant was under a fiduciary obligation to disclose material facts because the defendant

[6] Defendants rely on *Watkins v. NCNB Nat. Bank of Florida, N.A.*, 622 So. 2d 1063 (Fla. 3d DCA 1993), *Bldg Educ. Corp v. Ocean Bank*, 982 So. 2d 37, 41 (Fla. 3d DCA 2008) and *Morton v. Young*, 311 So. 2d 755 (Fla. 3d DCA 1975) to argue that they did not owe Plaintiffs any fiduciary duties. However, those cases all involve arms-length transactions, where the parties had equal bargaining positions. Here on the other hand, Avellino and Bienes had superior knowledge and used that knowledge and their influence to control Sullivan and direct the Partnerships' activities.

stood to benefit, and the plaintiff could not have learned of the purported check kiting scheme. *Id.*

The FAC unequivocally establishes the existence of a fiduciary relationship between the Partnerships and Avellino and Bienes. Like the defendant in *Hooper*, the FAC pleads that Avellino and Bienes used their superior knowledge and relationship with Sullivan to induce the Partnerships to continuously invest in BLMIS for their own benefit. Moreover, the FAC alleges a longstanding relationship of trust exchanged between Avellino and Bienes and the Partnerships.

Specifically the FAC alleges that (i) Sullivan invested with Avellino and Bienes' company prior to investing directly with BLMIS (FAC ¶21); (ii) each of the Partnerships exclusively invested with BLMIS based on Avellino and Bienes' advice (FAC ¶ 27); (iii) for decades, Avellino and Sullivan worshipped together (FAC ¶ 33); (iv) Sullivan was in a weaker position than Avellino and Bienes because of his lack of experience (FAC ¶ 37); (v) Avellino and Bienes walked down the hallway and regularly visited Sullivan at the Partnerships' offices to discuss the status of accounts with the Partnerships (FAC ¶ 41); (vi) Bienes worked to ensure Partnership distributions were timely made (FAC ¶ 41); (vii) Avellino provided the Partnerships with advice as to how to structure themselves, manage requests of partners, and communicate with BLMIS (FAC ¶ 42); (viii) Avellino and Bienes explained the operations of BLMIS and trades it allegedly made (FAC ¶ 42); (ix) Avellino met with the Partnerships' accountants and was provided quarterly reports regarding the Partnerships' rates of return (*Id.*); (x) from 2002 and on, Sullivan tracked the investments of the Partnerships and the capital they held based exclusively on Avellino's advice (FAC ¶ 45); and Avellino directed the Partnerships' activities in seeking recovery from Picard (FAC ¶65). Moreover, Avellino exercised control over the

Partnerships by threatening to prevent them from continuing to invest in BLMIS. FAC ¶ 70.[7] All of these actions were taken so that Avellino and Bienes could continue to benefit from the BLMIS Ponzi scheme at the expense of the Partnerships. FAC ¶¶ 15, 30, 74.

The aforementioned allegations, coupled with the Bette Anne Powell letter attached to the Complaint (which contrary to Defendants' assertion is a true and correct copy except for the date) that set forth the deep relationship between Avellino and Sullivan, make it abundantly clear that Avellino and Bienes maintained a fiduciary relationship with the Partnerships.

V. The Doctrine of Equitable Estoppel Preserves Plaintiffs' Claims.

Plaintiffs' claims are not barred by any statute of limitations due to the application of the doctrine of Equitable Estoppel. As stated by the Florida Supreme Court,

> a main purpose of the statute of limitations is to protect defendants from unfair surprise and stale claims. A prime purpose of the doctrine of equitable estoppel, on the other hand, is to prevent a party from profiting from his or her wrongdoing. Logic dictates that a defendant cannot be taken by surprise by the late filing of a suit when the defendant's own actions are responsible for the tardiness of the filing.

Major League Baseball v. Morsani, 790 So. 2d 1071, 1078 (Fla. 2001). Thus, "[e]quitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position." *Id.* at 1077. "The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct." *Id.*; *Fla. Dep't of Health & Rehabilitative Servs. v. S.A.P.*, 835 So. 2d 1091, 1096 (Fla. 2002) ("The preclusive effect of the statutes of limitation can be deflected by various legal theories, including

[7] Defendants' allegation that their control of the Partnerships is contradicted by the FAC's "allegation that Sullivan exclusively controlled the partners. (¶ 60)" is based on their misreading of ¶ 60. ¶ 60 refers to "entities that he exclusively controlled", not the Partnerships. *See* FAC ¶ 60. Moreover, any conflict between the allegation Defendants had control over the Partnerships and the Partnership Agreements attached to the Complaint is the result of Defendants improper conduct in violation of the Partnership Agreements. They are thus not entitled to any positive inference from any such conflict or dismissal of the action, as they seek.

the doctrine of equitable estoppel"). In other words, equitable estoppel prevents a party from asserting a defense such as the statute of limitations, if it caused the alleged untimely filing of a complaint. *Id.*

As in *Fla. Dep't of Health & Rehabilitative Servs. v. S.A.P.*, 835 So. 2d 1091, 1096 (Fla. 2002), where allegations that a defendant concealed its misconduct were sufficient to preclude dismissal under the doctrine of equitable estoppel, equitable estoppel precludes dismissal of the FAC, because the FAC alleges that Avellino and Bienes prevented discovery of the claims against them even after BLMIS was disclosed as a Ponzi scheme in 2008. *S.A.P.*, 835 So. 2d at 1099-1100; FAC ¶¶ 1, 50-52, 65, 66.

The FAC alleges that Avellino was active in the management of the Partnerships through 2012 and on behalf of himself and Bienes, consequently prohibited Sullivan and thus the Partnerships from pursuing any claims against he and Bienes. FAC ¶¶ 65 and 66. *Meyer v. Meyer*, 25 So. 3d 39, 43 (Fla. 2d DCA 2009).

Because, as set forth in paragraphs 65 and 66 of the FAC, Avellino's and Bienes' involvement with the Partnerships prevented Plaintiffs from pursing the instant claims against them, the FAC should not be dismissed on the grounds of timeliness under the doctrine of equitable estoppel.

CONCLUSION

The FAC is timely and adequately pled, and Defendants' Motion should therefore be denied.

WHEREFORE, the Plaintiffs request that this Court enter an order denying Defendant Frank Avellino and Michael Bienes's Motion to Dismiss Fourth Amended Complaint, together

with such other and further relief as the Court may deem just and appropriate under the circumstances.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2014, a true and correct copy of the foregoing document was served on the following parties:

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