

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' JOINT MOTION TO
DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT**

Defendants, Frank Avellino (“Avellino”), and Michael Bienes (“Bienes”) file this Joint Motion to Dismiss Plaintiffs’ Fourth Amended Complaint (“FAC”), and in support thereof, state as follows:

1. On August 25, 2014, this Court granted Defendants’ joint motion to dismiss Plaintiffs’ Third Amended Complaint (“TAC”) dismissing Counts VIII (Breach of Fiduciary Duty), X (Fraudulent Misrepresentation), XI (Fraudulent Inducement) and XII (Negligent Misrepresentation) with leave to amend one last time.

2. On October 5, 2014, Plaintiffs filed the FAC which includes considerable additional, though still insufficient, allegations, and rearranges the counts. The causes of action previously dismissed by this Court are now contained within Count I (Breach of Fiduciary Duty), Count II (Fraudulent Misrepresentation), Count III (Fraudulent Inducement) and Count IV (Negligent Misrepresentation).

3. Each count of the FAC incorporates historical allegations purporting to explain why Avellino and Bienes should have known that Madoff was operating a Ponzi scheme, how they created trustworthy reputations, and how they exercised control over Sullivan and the

Plaintiff partnerships (“Partnerships”), but all are insufficient. The FAC even contains some allegations of totally distinct “facts” which were never before raised and, like those allegations within earlier amendments, cannot be raised for the first time now.

4. Counts II, III and IV are barred by the statute of repose which provides that an action for fraud must be commenced at the latest within 12 years after the commission of the alleged fraud. §95.031(2)(a), *Florida Statutes*. The FAC’s attempts to circumvent the absolute bar of the statute of repose or the statute of limitations by attempting to plead a continuous tort are not sufficient to revive the expired claims; nor would be efforts to relate the amendment back to the original complaint. The continuous tort doctrine does not apply at all to the statute of repose.

5. All counts are barred on their face by the statutes of limitations. Counts II, III and IV are based upon alleged intentional, fraudulent conduct and must be commenced within four years of when the facts giving rise to the claim were discovered or should have been discovered (here, December 11, 2008 when Madoff’s Ponzi scheme was publically revealed). §§95.11(3)(a) and (j); 95.031(2)(a), *Florida Statutes*. Similarly, Count I (and Count IV if it is deemed to be negligence instead of an intentional tort) is also barred by the statute of limitations as it must be commenced within four years of when the cause of action accrued. §95.11(3)(a), *Florida Statutes*, i.e., when the last element of the cause of action occurs, in this case, damages. Plaintiffs incurred damages when they invested in the Partnerships, well before four years before the commencement of this action. There can be no relation back because the newly asserted claims are based upon new and different conduct not set forth in the initial complaint. Assuming the doctrine of continuing torts applies, there is nonetheless no cause of action for damages which were incurred earlier than four years from when the operative pleading was filed.

6. Each count of the FAC is also based upon the allegation that “Sullivan met with Avellino and Bienes because he wanted to continue investing with BLMIS”, and therefore “asked Avellino and Bienes if they could get accounts for him at BLMIS” because he wanted the high rate of return. (¶ 23). The Plaintiffs cannot escape the fact that there was no duty, representation or reliance as the Partnerships themselves initiated, requested and pursued the investments for which they now seek to hold Avellino and Bienes responsible and as the Movants had no role or responsibility within the Partnerships.

7. Count I, for Breach of Fiduciary Duty, fails to state a cause of action, *inter alia*, because no basis for a fiduciary duty has been alleged. The conclusory allegations are legally insufficient, and the purported facts supporting the allegations do not sufficiently allege the acceptance of trust or otherwise create a fiduciary duty.

8. Counts II, III and IV similarly contain only conclusory allegations and insufficient facts to create a duty or a right to rely, or to otherwise comply with Rule 1.120(b) or to set forth with sufficient particularity the specific alleged misrepresentations and dates thereof.

9. The documents upon which the FAC is based negate the allegations of the FAC. The Partnership Agreements, for example (FAC Exhibits A and B) grant exclusive control to the general partners, thereby nullifying the allegations of Avellino and Bienes’ control (par. 8.01). Similarly, the apparently incomplete and admittedly altered letter which is attached as Exhibit C does not support Plaintiffs’ inference of Avellino’s control.

WHEREFORE, Defendants Frank Avellino and Michael Bienes request this Court to enter an order dismissing Counts I, II, III and IV of the Fourth Amended Complaint 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.

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