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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' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT

Defendants, Frank Avellino ("Avellino"), and Michael Bienes ("Bienes") (collectively, "Movants") submit this reply memorandum of law in support of their Joint Motion to Dismiss Plaintiffs' Fourth Amended Complaint ("FAC").[1]

I. THE FAC DOES NOT RELATE BACK TO THE ORIGINAL COMPLAINT

Plaintiffs continue their attempt to blur the distinctions between their initial complaint ("IC"), filed in December of 2012, and their FAC, filed in October of 2014. Despite this concerted effort, they cannot help but rely on untimely additions made in the FAC, which illustrate why the new claims cannot relate back to the filing of the initial complaint and, therefore, Counts I, II, III and IV of the FAC should be dismissed with prejudice.

Plaintiffs argue, for example, that the Movants "induced front men such as Sullivan" to invest in BLMIS (Response, p. 4). This is a one-hundred-eighty degree flip from the IC, which alleged Sullivan's fraud and misrepresentation, and that the Movants were only "aiders and

[1] References to Plaintiffs' Response and Memoranda in Opposition to the motion to dismiss are designated as "Response"; to the Second Amended Complaint as "SAC," and to the Third Amended Complaint as "TAC."

abetters." (IC ¶¶ 34, 38, 42, 43,44). Sullivan has gone from the alleged instigator of the fraud in the IC to the supposed victim of the fraud in the FAC.

Similarly, Plaintiffs now include, for the first time, allegations that Movants prevented individual partners from withdrawing their funds (FAC ¶49, 73,79,84). Such allegations are not only new, but as set forth in the Motion to Dismiss, also support a direct, individual claim of these individual partners, rather than a claim which can be brought by the Partnerships. Another new allegation is that Sullivan, who in the IC is alleged to have improperly taken management fees from the capital contributions of the other partners, now became a victim of the Movants, and paid the general partners based on their advice. (IC ¶ 31(c), 33; FAC ¶50). In addition, the FAC for the first time alleges that the Plaintiffs (or their individual partners) were induced *not* to *sell* their investments – again, not only a first time appearance in the pleadings, but totally opposite than the prior claims that they were induced *to purchase* their interests (compare TAC ¶27, 135, 136 to FAC ¶49, 73, 79, 84).

As Plaintiffs point out, amended pleadings are permitted to relate back to the filing of earlier pleadings when the earlier pleadings provide "fair notice of the general factual situation." (Response, p. 5). Notifying the Movants that they are accused of *aiding Sullivan* to breach *his* fiduciary duty (IC ¶ 41-43) is not the same as alleging that they, themselves owed and breached a fiduciary duty (FAC ¶68); notifying them of a claim that the Partnerships invested in BLMIS based on Avellino's advice (TAC ¶27, 135, 136) is not the same as notifying them of a claim that investors were prevented from withdrawing their investments (FAC ¶49, 73, 79, 84); notifying them that Sullivan paid himself management fees and "kickbacks" to Movants (IC ¶31(c)), is not the same as notifying them that Sullivan relied on Avellino's advice in his decision to pay the fees (FAC ¶27); notifying them of a claim based upon receipt of hundreds of thousands of dollars

in kickbacks (SAC ¶ 31 a and b), is not the same as notifying them of a claim for tens of millions of dollars in investments (FAC ¶81, 87, 93); notifying them of a claim that the investment was based on trust cultivated by *Sullivan* through *his* church activities (IC ¶ 25) is not the same as claiming that the *Movants* are the ones who cultivated trust through *their* religious affiliations (FAC ¶ 32-36).

Janie Doe I ex rel. Miranda v Sinrod, 117 So. 3d 786 (Fla. 4th DCA 2013), upon which Plaintiffs rely, is inapposite. It involved whether a statutory claim could relate back to negligence claims – all of which were based upon the exact same conduct of sexual abuse – not on different facts as contained within the FAC. As the "new facts" in the FAC are so drastically different and opposite, in some cases, from those in the IC, the FAC does not relate back to the IC and, therefore, Counts I, II, III and IV of the FAC should be dismissed with prejudice as time barred.

II. <u>THE STATUTE OF REPOSE BARS PLAINTIFFS' FRAUD CLAIMS</u>

As set forth in Defendants' Motion to Dismiss, the continuing tort doctrine does not apply to the statute of repose; it only applies to statute of limitations. Plaintiffs' reliance on the tobacco cases is misplaced. In the tobacco cases, tobacco companies' fraudulent concealment of the health hazards of smoking had already been established. However, since detrimental reliance is an essential element of fraudulent concealment, each subsequent case focused on whether the individual plaintiff could prove that he had detrimentally relied on such misinformation. Under those circumstances, if the individual plaintiff could show detrimental *reliance* on the concealment *within the statute of repose* time period, then even if he had started smoking prior to that time, he had proven a fraudulent concealment cause of action.

The instant case is factually distinguishable as it does not involve one continuous investment by the Partnerships. As pled, the Partnerships made discrete separate investments

each year, and each time they made an investment, they alleged that they detrimentally relied on Avellino's advice, or in the FAC, on Avellino's failure to disclose the Ponzi scheme. Under these circumstances, Plaintiffs could not possibly have relied upon advice given after the investments were made, so they could not have relied, *within the repose period*, for any investments made prior to the repose period. Similar to the discrete incidents in *Woodward v. Olson*, 107 So.3d 540 (Fla. 2d DCA 2103), each new investment by the Partnerships did not restart the repose period for each earlier investment.[2]

The Plaintiffs' reliance on *Lopez-Infante v. Union Cent. Life Ins. Co.,* 809 So.2d 13 (Fla. 3d DCA 2002) is therefore similarly misplaced as that case involved continuous payments made by insureds in conjunction with individual whole life insurance policies. Each payment was required to be made under the policies and was part of one single transaction – the purchase of a whole life insurance policy. In contrast, investment into BLMIS was made independent of the subsequent payments and subsequent alleged reliance by Plaintiffs, and thus, the cases cited by Plaintiffs are not applicable.

Furthermore, contrary to Plaintiffs' assertions, the United States Eleventh Circuit Court of Appeals has not rejected the same statute of repose argument. Rather, the Court in *Walter v. Avellino,* 13-13081, 2014 WL 1663332 *2, 3 (11th Cir. Apr. 28, 2014) merely remanded the issue of the statute of repose to the lower tribunal, which, according to the circuit court, had not previously had the opportunity to even consider it.

Accordingly, Plaintiffs' Counts II and II (and IV if it is treated as fraud) of the FAC are barred by the statute of repose.

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[2] Plaintiffs' attempts to plead an inducement not to sell their investments were not made until the latest FAC, well past the statute of limitations and are too distinct from the original allegations to relate back.

III. THE STATUTE OF LIMITATIONS DOES BAR PLAINTIFFS' CLAIMS

A. Plaintiffs' Fraud Claims are not Preserved by the Delayed Discovery Doctrine

Plaintiffs' fraud counts are now premised on their allegations that the Movants failed to disclose that BLMIS was a Ponzi scheme. This Ponzi scheme was disclosed to the world in 2008.[3] In an attempt to avoid this undisputed fact, Plaintiffs argue that Avellino and Bienes concealed their conduct and involvement with the Partnerships through 2012 and thus their fraudulent concealment could not have been discovered until then (Response, p. 9).[4]

However, the allegations in the FAC belie Plaintiffs' argument. Plaintiffs' allegations throughout the FAC reveal their knowledge of the Movants' involvement in the Partnerships from the inception: Sullivan not only had knowledge, but according to the FAC obtained Avellino's advice. (FAC ¶ 41- 43, 46). Additionally, the FAC alleges that, in 2007 and 2008, other partners of the Partnership sought advice from Avellino and Bienes (¶47, 48, 49), and therefore, knew about the Movants' involvement with the Partnerships well before the Madoff Ponzi scheme was made public. Accordingly, Plaintiffs' claim to extend the statute of limitations on the fraud claims based on the delayed discovery doctrine is without merit and Counts I, II, III and IV of the FAC should be dismissed with prejudice as delayed discovery doesn't apply at all to anything but fraud and as the facts don't allow it in the fraud claims.

B. The Continuous Tort Doctrine does not Extend the Statute of Limitations for Breach of Fiduciary Duty

Plaintiffs' breach of fiduciary duty claim is not extended based on "continuing tort" theory. Plaintiffs allege that Avellino breached his fiduciary duties by failing to disclose that

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[3] Plaintiffs do not dispute that the Ponzi scheme was disclosed in 2008. Plaintiffs simply argue that it was not pled in Plaintiffs' complaint. However, this Court can take judicial notice of that fact. *See e.g. Mills v. Ball*, 372 So.2d 497, 498 (Fla. 1st DCA 1979).

[4] For support of this argument, Plaintiffs recited ¶ 66 of the FAC which refers to Sullivan's, not Movants', conduct of concealment and denial.

BLMIS was a Ponzi scheme. However, as stated above, this fact was disclosed to the world in 2008, and thus, any alleged breach of fiduciary duty claim would have had to be brought within four years, which Plaintiffs failed to do.

Plaintiffs' attempt to avoid this shortcoming by alleging that Avellino continued to breach his fiduciary duties by consulting with and advising Sullivan on the management of the Partnerships. However, not only have Plaintiffs failed to allege with specificity this "continuing breach" and resulting damages, the "facts" as alleged by Plaintiffs do not support the application of the continuing tort doctrine.

The cases Plaintiffs cite for support of their argument are not applicable to this case. *Kravitz v Levy*, 973 So.2d 1274 (Fla. 4th DCA 2008), for example, involved a non-discharged personal representative of an estate which had never been closed, with the corresponding statutory requirements, and an indication that " [i]f Passon had in fact been discharged as executor and kept the estate assets for himself . . . , then this may be a garden variety tort . . . for which the statute of limitations would have long since run." *Id.* at 1277 (Fla. 4th DCA 2008). The other cases cited by Plaintiffs are similarly inapplicable as they involved the narrow, specific issues of inverse condemnation (*Millender v State DOT*, 774 So. 2d 767 (Fla. 1st DCA 2000)); restrictive covenants (*Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1043 (11th Cir. 2014)); and a continuing *contractual* obligation to maintain a waterway and nonperformance during the term of the contract. (*City of Quincy v. Womack*, 60 So. 3d 1076, 1078 (Fla. 1st DCA 2011)). The instant case involves neither a personal representative, a contract nor a continuing obligation, but rather independent allegedly tortious transactions.

The instant case is more analogous to *Crossman v. Asset Acceptance, LLC,* 2014 WL 2612031 (M.D. Fla. 2014), in which the court rejected the continuous tort doctrine, explaining

that once a violation occurs a "new cause of action, based on the exact same failure to act, does not separately arise every day thereafter." *Id.* at *4. Similarly, Plaintiffs cannot turn each investment after the first 1993 investment, into a "serial violation", or if Plaintiffs' theory was accepted, the purchases in the 1990s could theoretically never be time-barred

IV. PLAINTIFFS' CLAIMS ARE NOT ADEQUATELY PLED

A. Fraud

Plaintiffs' reliance on *Picard v. Merkin*, 440 B.R. 243 (Bankr. S.D. N.Y. 2010) to argue that they do not need to plead fraud with specificity is misplaced. First, Picard involves a bankruptcy matter and the Federal Rules of Civil Procedure. More importantly, although the Bankruptcy court in *Picard* stated that in bankruptcy cases, the trustee, who is a third party outsider to the fraudulent transaction, should be given greater latitude in pleading fraud, Plaintiffs are not in a similar position here. Plaintiffs, by their own admission, have been provided written statements from Sullivan regarding the alleged involvement and statements, or lack of statements, made by Avellino. (Response, p. 2). Sullivan was the general partner of the Partnerships during all material times herein, and thus, Plaintiffs apparently have obtained the specific facts which should have enabled them to plead fraud with specificity, if in fact there are such facts. Plaintiffs failed to comply with Rule 1.120(b), and Counts II and III of the FAC should be dismissed with prejudice[5]

B. Fiduciary Duty and Defendants' Knowledge of Madoff's Ponzi Scheme

Plaintiffs' argument that they have properly pled Defendants' knowledge of the Ponzi scheme and a fiduciary relationship between the Partnerships and Movants clearly demonstrates the ever changing material facts and theories they allege in each new version of their complaints.

[5] In fact, Plaintiffs have refused to provide a copy to Defendants' counsel of the written statement by Sullivan. Thus, not only have Plaintiffs not apprised Defendants of the specific allegations of fraud against them, but Plaintiffs are preventing Defendants from discovering relevant information.

Although parties may amend their pleadings, Plaintiffs have abused the amendment process by totally abandoning facts, and creating new, sometimes contradictory ones, in each successive complaint in an attempt to find some facts which will withstand a motion to dismiss. Faced with the Court's statement that this is the final attempt Plaintiffs have to amend their pleadings, they have now landed on yet a new theory and facts. Plaintiffs have gone from alleging in the first two versions of their complaint that Sullivan, not Movants, had a fiduciary duty to the Partnerships, and that Movants only aided and abetted Sullivan, to alleging, in the SAC, that Movants had fiduciary duties to the Partnerships. Even those facts were altered in the TAC, and now, in the FAC, Sullivan is no longer the instigator of the fraud who breached his duty to the Partnerships, but is instead a victim of the fraud.

Plaintiffs should not be allowed to continually change the material facts and theories with the hopes something will stick to plead viable claims against the Movants.

V. EQUITABLE ESTOPPEL DOES NOT PRESERVE PLAINTIFFS' CLAIMS

Plaintiffs argue that their claims are not barred by statute of limitations because of the doctrine of equitable estoppel. However, equitable estoppel does not apply to this case. It only applies when a person's "conduct has induced another into forbearing suit within the applicable limitations period." *MajorLeague Baseball v. Morsani*, 790 So. 2d 1071, 1079 (Fla. 2001).

In the instant case there are no allegations of how the Movants induced the Plaintiffs to refrain from filing their lawsuit. While Plaintiffs refer to several paragraphs as support for their argument that they were prevented from pursuing the instant case until 2012, none of the paragraphs mention any time after 2008 except for paragraphs 65 and 66.

Paragraph 65 alleges that Avellino was active in the management of the Partnerships, received copies of documents between the Partnerships and their counsel, and directed Sullivan

in recovering against Picard. There is not one allegation that the Movants, while managing the Partnerships, prohibited or prevented them from filing this suit. The sole allegation that the Movants helped in concealing kickbacks until 2012 is irrelevant to the remaining allegations within the FAC. There is no allegation that the Movants concealed the Ponzi scheme until 2012, nor could there be. There are detailed allegations about the' knowledge of the Movants' involvement with the Partnerships as early as 2007, so Plaintiffs cannot argue that they did not sue Movants earlier because they didn't know of Movants' involvement.

Paragraph 66 contains no allegations of anything which the Movants did, but is based solely upon actions of Sullivan. Conduct of Sullivan cannot be used against the Movants. *See, e.g. Univ. of Miami v. Bogorff,* 583 So. 2d 1000, 1004-05 (Fla. 1991) *holding modified on other grounds by Tanner v. Hartog,* 618 So. 2d 177 (Fla. 1993) ("Any conduct of Dr. Koch which may have tolled the running of the statute of limitation as to him cannot be imputed to Lederle so as to toll the statute to it."). Since there are no allegations which show the Movants induced the Plaintiffs not to sue earlier, there is no equitable estoppel. *See, John Doe No. 23 v. Archdiocese of Miami, Inc.*, 965 So.2d 1186 (Fla. 4th DCA 2007) (breach of fiduciary duty unrelated to delay in filing suit not basis for equitable estoppel).

Furthermore, the allegation that Sullivan "attempted to prevent" the partners from accessing records does not mean that Plaintiffs didn't know that they had a cause of action for fraudulent concealment. Both "…successful concealment of the cause of action and a fraudulent means to achieve that concealment" are required. *S.A.P. v. State, Dept. of Health & Rehabilitative Services,* 704 So. 2d 583, 585 (Fla. 1st DCA 1997). The allegation that Avellino's conduct was "intended to shield him and Bienes from the ramifications of their breaches of fiduciary duty" falls short of what is necessary to plead equitable estoppel. Intent is irrelevant

without "successful concealment" and, if the Movants intended to conceal their involvement and the Ponzi scheme until 2012, they were obviously not successful.

Nor would the allegations of Sullivan's efforts to keep the books from the Plaintiffs have created a basis for equitable estoppel even if they had been undertaken by the Movants. *See, e.g., Prather v. Neva Paperbacks, Inc.,* 446 F.2d 338, 341 (5th Cir. 1971) (affirming a summary judgment despite the argument that the plaintiff could not file a plagiarism suit until he had obtained a copy of a book because he did not allege that he was ignorant of his cause of action and therefore only showed "ignorance of evidence, not ignorance of a potential claim.").

Plaintiffs simply have not pled either that they were ignorant of a potential claim or that the Movants prevented them from filing this lawsuit. Equitable estoppel can therefore not be used as a way to defeat the statute of limitations, nor does it apply at all to the statute of repose. *See, e.g., Univ. of Miami v. Bogorff, at 1003*.

CONCLUSION

While it may at times be inappropriate to grant a motion to dismiss on the basis of the statute of limitations or when a continuing tort is an issue, there are times – such as this – when it is fully justified. Plaintiffs cannot change the immutable fact of when Madoff's scandal was made public, or the dates it first filed its claims of failure to sell securities, of the Movants victimizing Sullivan, or of the Plaintiffs claiming anything other than improper kickbacks. Accordingly, Counts I, II , III and IV of the FAC should be dismissed with prejudice.

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 1st day of December, 2014.

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