No. 13-13081-CC

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

QUENTIN WALTER and WELDON J. STOUT,

Plaintiffs-Appellants,

v.

FRANK J. AVELLINO and NANCY CARROLL AVELLINO,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida, Fort Pierce Division
Case No. 2:12-cv-14411, Hon. Donald L. Graham

REPLY BRIEF

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ARGUMENT AND CITATIONS OF AUTHORITY

I. THE PARTIES AGREE ABOUT SEVERAL ISSUES THAT SUBSTANTIALLY NARROW THE SCOPE OF THIS APPEAL

In light of the prior briefing, the parties agree about several issues that substantially narrow the scope of this litigation.

A. The Avellinos Are Correct That The Statute Of Limitations Cannot Run From The October 1, 2008 Letter

The Avellinos correctly argue that the statute of limitations cannot run from the October 1, 2008 letter: even if it contained omissions or misrepresentations, Mr. Stout and Ms. Walter did not purchase or sell any securities in connection with it. *See* Avellinos' Br. at 14-16.

Given this state of affairs, what remains of the lawsuit is this: The complaint (Doc. 1) was filed on November 16, 2012. The only purchases or sales of any security that occurred within the five-year statute of limitations, *see* 28 U.S.C. § 1658(b), are (1) Ms. Walter's $10,000 investment on June 1, 2008 (Doc. 26 ¶ 6), and (2) Mr. Stout's withdrawal "during 2008 in the amount of $9,000" (Doc. 26 ¶ 7). Mr. Stout's withdrawal caused no injury. Accordingly, the Court must affirm the dismissal with prejudice of Mr. Stout's federal securities claims.

But Ms. Walter's $10,000 June 1, 2008 securities claim, her $40,000 December 29, 2006 securities claim, and all her state claims remain at issue. *See infra* Arguments I.B, II & III. Additionally, this Court should remand for the District Court to exercise its discretion in the first instance whether to exercise supplemental jurisdiction over Mr. Stout's state law claims. *See infra* Argument IV.

B. The Avellinos Agree That, In Light Of *Merck & Co.* v. *Reynolds*, Ms. Walter's June 1, 2008 Investment Of $10,000 Was Not Time Barred On Its Face

In *Merck & Co.* v. *Reynolds*, the Supreme Court expressly rejected the "inquiry notice" standard on which the District Court relied in dismissing the lawsuit as time barred. 559 U.S. 633, 652, 130 S. Ct. 1784, 1798 (2010). Given *Merck*'s holding, the Avellinos "agree that the amended complaint does not show on its face that Walters['s] 2008 investment was time barred." Avellinos' Br. at 4 n.2. Accordingly, the parties agree that the District Court's dismissal of Ms. Walter's $10,000 claim as time barred (Doc. 45 at 6-8) was error.

C. Ms. Walter Concedes That The *Pro Se* Original And Amended Complaints Lack Particularity Without The October 1, 2008 Letter

Unable to point to the October 1, 2008 letter, Ms. Walter concedes that the *pro se* original complaint's and *pro se* amended complaint's allegations do not satisfy the heightened pleading-with-particularity requirements for securities fraud claims. *See* Fed. R. Civ. P. 9(b); 15 U.S.C. § 78u-4(b)(1). For that reason, the Court need not resolve the Avellinos' arguments (Avellinos' Br. at 24-26) that the *pro se* amended complaint did in fact supersede the *pro se* original complaint or that the original complaint contained insufficient allegations regarding scienter, reliance, and causation.

D. Only Three Issues Remain

Only three issues remain for this Court's determination. First, is Ms. Walter's $40,000 claim timely on the face of the complaint per the continuing-fraud exception? *See infra* Argument II. Second, did the District Court err when it failed to *sua sponte* grant Ms. Walter leave to amend her *pro se* pleadings? *See infra* Argument III. Third, should this Court remand for the District Court to exercise its discretion in the first

instance whether to exercise supplemental jurisdiction over Mr. Stout's state law claims? *See infra* Argument IV.

II. MS. WALTER'S $40,000 DECEMBER 29, 2006 SECURITIES CLAIM IS NOT TIME BARRED ON ITS FACE PER THE CONTINUING-FRAUD EXCEPTION

Per the continuing-fraud exception, Ms. Walter's $40,000 December 29, 2006 claim is timely on the face of the amended complaint.

The Avellinos correctly argue that the 5-year statute of limitations is not subject to equitable tolling. Avellinos' Br. at 16 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363, 111 S. Ct. 2773, 2782 (1991)). Indeed, *Lampf* did hold "the equitable tolling doctrine is fundamentally inconsistent with the [2]-and-[5]-year structure" of the statute of limitations. 501 U.S. at 363, 111 S. Ct. at 2782. But that reality tells only part of the story, because the continuing-fraud exception can render timely otherwise untimely claims without disturbing *Lampf*'s holding.

The continuing-fraud exception provides that "when a defendant has committed a violation within the repose period, it allows a plaintiff to hold the defendant accountable for previous violations that are part of the same scheme." *Goldenson* v. *Steffens*, 802 F. Supp. 2d 240, 259

(D. Me. 2011). In other words, when one claim of continuing fraud is timely, all claims are timely. *See id.* Importantly, the continuing-fraud exception "does not violate the *Lampf* Court's conclusion that principles of equitable tolling do not apply to § 1658(b) [because it] does not allow a claim to go forward more than five years after a defendant's final violation." *Id.* Numerous district courts throughout the country have applied the continuing-fraud exception to render securities plaintiffs' claims timely. *E.g.*, *id.*; *In re Dynex Capital, Inc.*, 2009 U.S. Dist. LEXIS 96527, at *61 (S.D.N.Y. Oct. 19, 2009) ("in a case such as this one in which a series of fraudulent misrepresentations is alleged, the period of repose begins when the last alleged misrepresentation was made" (punctuation and citations omitted)); *Plymouth County Ret. Ass'n* v. *Schroeder*, 576 F. Supp. 2d 360, 378 (E.D.N.Y. 2008) ("the five year statute of repose first runs from the date of the last alleged misrepresentation regarding related subject matter"); *Quaak* v. *Dexia, S.A.*, 357 F. Supp. 2d 330, 338 (D. Mass. 2005) ("the statute of repose runs from the date of the last fraudulent misrepresentation").

For these reasons, because Ms. Walter's $10,000 June 1, 2008 claim is not time barred on the face of the amended complaint, Ms. Walter's $40,000 December 29, 2006 claim is similarly not time barred.

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO *SUA SPONTE* GRANT MS. WALTER, AS A *PRO SE* PARTY, AT LEAST ONE OPPORTUNITY TO AMEND HER NON-FUTILE SECURITIES FRAUD CLAIMS

The parties agree that leave to amend should not be granted when it would be futile. *Compare* Appellants' Br. at 26, *with* Avellinos' Br. at 27. But the parties disagree whether leave would be futile here and whether the District Court was required to *sua sponte* grant Ms. Walter at least one opportunity to amend.

A. Amendment Would Not Be Futile

For two reasons, Ms. Walter should be afforded at least one opportunity to amend her pleading to address the elements of scienter, reliance, and causation, and to plead with particularity. First, the District Court never addressed the sufficiency or particularity of Ms. Walter's allegations until it entered the dismissal order (Doc. 45). The Avellinos do not contest this. *See* Avellinos' Br. at 26-29. Second, Ms. Walter's claim would not be futile because she might in fact be able to allege scienter, reliance, and causation sufficiently and with particulari-

ty. For instance, it is possible that Mr. Avellino sent Ms. Walter a letter or spoke with her, before her June 1, 2008 $10,000 investment, and communicated misrepresentations or omissions from which scienter, reliance, and causation might be alleged with particularity.

Although the Avellinos contend an amended complaint would be futile, they never explain why that is so. *See* Avellinos' Br. at 7, 26-29. Instead, they point out (Avellinos' Br. at 26-27) that Ms. Walter never moved to amend. But this is misguided: *pro se* litigants have no such obligation. *Compare Wagner* v. *Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 & n.1 (11th Cir. 2002), *with Bank* v. *Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). And this Court typically vacates or reverses dismissals when district courts fail to *sua sponte* grant *pro se* plaintiffs leave to amend non-futile claims at least one time. *Clark* v. *Maldonado*, 288 Fed. App'x 645, 647 (11th Cir. 2008) ("pursuant to *Bank*, we vacate the district court's dismissal of Clark's complaint and remand for the district court to allow Clark to amend his complaint"); *Spear* v. *Nix*, 215

Fed. App'x 896, 902 (11th Cir. 2007) ("we cannot say that allowing Day to amend his complaint would have been futile").[1]

B. The District Court Was Required To *Sua Sponte* Grant Ms. Walter, As A *Pro Se* Party, At Least One Opportunity To Amend Her Non-Futile Claims

The Avellinos also argue (Avellinos' Br. at 26-28) that the District Court was not required to *sua sponte* grant Ms. Walter leave to amend for another reason: they claim Ms. Walter did not actually proceed *pro se* in the District Court. Instead, the Avellinos claim (Avellinos' Br. at 27-28) Ms. Walter apparently consulted with attorneys who may have ghost-written some of her filings. For that reason, the Avellinos contend Ms. Walter was a counseled party under *Wagner* and was not entitled to obtain *sua sponte* leave to amend as a *pro se* party per *Bank*. This reasoning is mistaken.

As an initial matter, the record support for the Avellinos' factual assertion is scant. In fact, the record mainly shows that Ms. Walter's attempts to retain formal counsel at the trial level were unsuccessful. *See*

[1] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

Docs. 20 at 2-3 ("retired lawyer" and "para-legal"), 40 at 2 ("retired lawyer"), 48 at 5 (inability to retain counsel).[2]

More importantly, the Avellinos cite no binding precedent for the proposition that *pro se* litigants who may have received some informal legal counsel from individuals, who may or may not have had Florida law licenses at the time, and who may or may not have ghost-written some filings, are not actually proceeding *pro se* or entitled to liberal construction of their pleadings. Rather, the rule in this Court is merely that a licensed attorney proceeding *pro se* is not "accord[ed] . . . the advantage of the liberal construction of his complaint normally given *pro se* litigants." *Olivares* v. *Martin*, 555 F.2d 1192, 1194 n.1 (5th Cir. 1977).[3] Ms. Walter is not a licensed attorney; she is therefore *pro se*, and her pleadings are entitled to liberal construction. For that reason,

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[2] The Avellinos also support their factual assertion by citing (Avellinos' Br. at 27) Ms. Walter's reply in support of her motion for reconsideration (Doc. 51), but that filing refers only to communications with Irving H. Picard (the Madoff Trustee) and counsel for other plaintiffs who are suing Mr. Avellino in a separate litigation in Massachusetts state court. These communications cannot bear the weight the Avellinos wish to place upon them.

[3] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

the District Court was required to *sua sponte* grant her at least one opportunity to amend her non-futile claim. *Compare Wagner*, 314 F.3d at 542 & n.1, *with Bank*, 928 F.2d at 1112.

IV. THIS COURT SHOULD REMAND FOR THE DISTRICT COURT TO EXERCISE ITS DISCRETION IN THE FIRST INSTANCE WHETHER TO EXERCISE SUPPLEMENTAL JURISDICTION OVER MR. STOUT'S STATE LAW CLAIMS

The Avellinos argue that after district courts dismiss federal claims, they "must" decline to exercise supplemental jurisdiction. Avellinos Br. at 26. This is plainly incorrect: the supplemental jurisdiction statute provides only that district courts "may" decline supplemental jurisdiction. 28 U.S.C. § 1367(c). The problem here is that the District Court did not exercise its discretion one way or the other. Indeed, the District Court still has not entered judgment. *See* Doc. 61. This Court should remand for the District Court to exercise its discretion in the first instance. It is possible that the District Court might determine that as long as it has to resolve Ms. Walter's $40,000 and $10,000 federal securities claims and all of her state law claims, simple efficiency and fairness require that it should also resolve Mr. Stout's state law claims, lest his estate be forced to file suit in state court and the parties have to litigate in two separate forums.

CONCLUSION

For the foregoing reasons, this Court should (1) affirm the dismissal with prejudice of Mr. Stout's federal securities claims, (2) vacate the dismissal with prejudice of Ms. Walter's $40,000 and $10,000 federal securities claim and grant leave to amend, and (3) remand for the District Court to (a) exercise its discretion whether to exercise supplemental jurisdiction over Mr. Stout's state law claims and (b) conduct further proceedings on the remaining claims.

February 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 2,099 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

February 3, 2014

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 3rd day of February, 2014, to:

John Ley, Clerk of Court
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ELEVENTH CIRCUIT
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF and regular mail on this 3rd day of February, 2014, to:

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