FOURTH CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

NO. 2011-CA-1540

ECETRA N. AMES,

Plaintiff-Appellant,

versus

JOHN B. OHLE, III, J.P. MORGAN CHASE & CO. f/k/a BANK ONE CORPORATION, DOUGLAS STEGER, AND KENNETH A. BROWN,

Defendants-Appellees.

CIVIL PROCEEDING

Appeal from the Civil District Court,
Parish of New Orleans, State of Louisiana
Docket No. 2011-440
The Hon. Ethel S. Julien, Judge

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ISSUES FOR REVIEW

1. Whether the district court correctly dismissed the petition under one- and five-year prescriptive periods where the petition alleges that plaintiff incurred injuries from 1999 through 2002, plaintiff did not sue until 2009, and plaintiff did not satisfy her burden to prove *contra non valentem.*

2. Whether the federal court's determination that plaintiff did not exercise the due diligence required to toll the statute of limitations under the federal claim alleged in plaintiff's substantively-identical federal complaint collaterally estops plaintiff from relitigating in state court the due diligence required to prove *contra non valentem.*

3. Whether plaintiff's claims are perempted under the Louisiana Trust Code's three-year preemptive period where plaintiff accepted in 2003 a final accounting provided by the trustee of her trust but did not sue until 2009.

4. Whether Bank One can be held vicariously liable for its former employee's fraud where the petition does not and cannot allege that the former employee's work as trustee for plaintiff's trust was part of his job at the Bank, that the Bank received payment for its former employee's work on plaintiff's trust, or that the Bank was aware of its former employee's fraud.

INTRODUCTION

In October 2009, plaintiff Ecetra Ames sued Bank One Corporation n/k/a JPMorgan Chase & Co., former Bank One employee John Ohle, and several others in federal court. Plaintiff's complaint centered around allegations that Ohle engaged in fraud from 1999 to 2002 while serving as trustee for a Trust established for plaintiff's benefit. Judge Helen Berrigan dismissed the complaint, holding that plaintiff's claim for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") was untimely under its four-year statute of limitations and declining to exercise jurisdiction over plaintiff's state-law claims.

Judge Berrigan explained that plaintiff entered into a Settlement Agreement with Ohle in 2003 in which plaintiff made a litany of charges about Ohle's conduct that her complaint recited nearly word-for-word. Thus, Judge Berrigan held, plaintiff discovered at least some of her injuries in 2003. Judge Berrigan rejected plaintiff's argument that the limitations period was tolled until Ohle's criminal trial in 2010 because Ohle concealed his withdrawal of funds from the Trust. Judge Berrigan explained that as part of the Settlement Agreement, Ohle gave plaintiff an accounting in which he listed each of the withdrawals as "loans" to unknown third parties. Because plaintiff did not authorize Ohle to loan Trust funds, Judge Berrigan held that Ohle's accounting placed plaintiff on notice of more fraud.

Plaintiff filed her petition in this case in January 2011. Plaintiff's petition is virtually identical to her federal complaint, except that she swapped her dismissed RICO claim for a claim under its state-law equivalent. Judge Ethel Julien dismissed plaintiff's claims against Bank One on the ground that they are prescribed.

Judge Julien's judgment should be affirmed. The petition shows on its face that plaintiff's claims are prescribed under the five-year period governing her Racketeering Act claim and the one-year period governing her remaining claims, alleging that plaintiff incurred injuries from 1999 through 2002 while Ohle was trustee. The burden thus shifted to plaintiff to demonstrate an exception to prescription. The petition alleged the discovery rule and fraudulent concealment prongs of *contra non valentem*, but plaintiff did nothing to prove the exceptional circumstances that the Supreme Court requires to invoke that doctrine.

Nor could plaintiff satisfy her burden. Plaintiff concedes she knew about some of Ohle's fraud in 2003. R. I:9 ¶ 47. While the petition alleges that plaintiff did not learn the "full extent" of Ohle's fraud until his 2010 trial (*id.*), the Supreme Court has made clear that "prescription is not interrupted/suspended until a plaintiff has 'full knowledge of the extent of damage.'" *Marin v. Exxon Mobil Corp.*, 2009-2368 (La. 10/19/10), 48 So. 3d 234, 250. Plaintiff has no answer for that rule. On the contrary, plaintiff's original federal complaint—filed before Ohle's trial—

asserted the same claims that she asserts in her petition, refuting any suggestion that the trial revealed facts necessary to alert plaintiff that she may have a claim.

Even if plaintiff's discovery of additional fraud at Ohle's trial were relevant, prescription does not await a plaintiff's "actual knowledge of facts that would entitle him to bring a suit," requiring only notice to "'put the injured party on guard and call for inquiry.'" *Id.* at 246 n.12. Judge Berrigan noted that plaintiff "could have … learned about each and every unauthorized transaction" revealed at Ohle's trial simply by looking at Ohle's 2003 accounting, which listed millions of dollars of unauthorized "loans." *Ames v. Ohle*, 2010 WL 5055893, at *4 (E.D. La. Dec. 1, 2010). A document showing that several million dollars from plaintiff's Trust were "loaned" without her permission is surely enough to put her on notice of fraud.

In short, plaintiff chose in 2003 to settle her dispute with Ohle despite knowing about at least some of his misconduct, rather than sue and use the discovery process to uncover the full extent of that misconduct. Now that the government has done the discovery work for her, plaintiff does not get a second bite at the apple.

Even if plaintiff's claims were not prescribed, there are several independent grounds upon which the judgment can be affirmed. First, in holding that plaintiff's claims were not timely under the discovery rule or the fraudulent concealment doctrine, Judge Berrigan found that plaintiff did not exercise "due diligence" in investigating Ohle's misconduct. *Ames*, 2010 WL 5055893, at *4. The Supreme Court

holds that plaintiffs must prove their "due diligence" to invoke the discovery rule and fraudulent concealment prongs of *contra non valentem*. *Allstate Ins. Co. v. Fred's Inc.*, 2009-2275 (La. 1/19/10), 25 So. 3d 821, 821. Thus, Judge Berrigan's determination that plaintiff did not exercise due diligence collaterally estops plaintiff from arguing here that she did exercise due diligence.

Second, because this case centers around Ohle's work as trustee for the Trust, it is governed by the Louisiana Trust Code's three-year peremptive period. The petition acknowledges that Ohle gave plaintiff an accounting of the Trust in 2003. Therefore, plaintiff's claims are perempted under the Trust Code.

Third, the petition does not state a cause of action against Bank One. The petition alleges a respondeat superior theory, seeking to hold the Bank responsible for Ohle's misconduct. However, the petition does not (and cannot) allege that Bank One was a party to the instrument creating the Trust; that Ohle's work for the Trust was part of his job at the Bank; that the Bank earned so much as a nickel from Ohle's work for the Trust; or that the Bank was aware of Ohle's fraud. Rather, plaintiff bases her respondeat superior theory on the notion that *any* employer that permits its employee to work on an outside activity is liable if the employee commits fraud in performing that outside activity—an incredibly expansive theory that could wreak havoc for Louisiana employers.

STATEMENT OF THE CASE

The petition alleges that plaintiff hired Ohle in 1998 to provide tax and financial planning services. R. I:3 ¶ 12. In December 1999, plaintiff executed an instrument establishing the Trust, naming Ohle as trustee. R. I:3 ¶ 14. The petition does not and cannot allege that the instrument so much as mentions Bank One. R. II:232-39. Plaintiff initially funded the Trust with $5 million, followed by contributions of an additional $3 million over the next two years. R. I:3-4 ¶¶ 14, 16-17.

Ohle approached plaintiff in 2001 about investing in a hedge fund called Carpe Diem. R. I:4-5 ¶¶ 18-19. Plaintiff agreed to invest $5 million in Carpe Diem "Warrants," and the Trust invested $2 million. R. I:4-5 ¶¶ 19, 23. The petition charges that without plaintiff's knowledge, Ohle gave investment broker Douglas Steger a $350,000 commission for those purchases. R. I:4-6 ¶¶ 18, 21, 23-24. The petition further alleges that in November 2001, Ohle took $347,834 from Carpe Diem, sending $250,000 to his friend Ken Brown and keeping the rest. R. I:6 ¶¶ 29-30. Finally, from 2000 through 2002, Ohle allegedly withdrew some $4 million from the Trust (R. I:8-9 ¶¶ 41-43), before returning those funds in 2003.

The petition alleges that Ohle "used Plaintiff's money to fund Brown as the third-party investor" in a tax strategy called "HOMER." R. I:7 ¶ 33. Bank One and Ohle sold HOMER to third parties while Ohle was employed by Bank One from

late 1999 through early 2002. R. I:7 ¶ 31; R. I:31 ¶ 143. The petition does not and cannot allege that plaintiff entered into a HOMER transaction.

In 2002, plaintiff sold her Carpe Diem Warrants, and Ohle sold the Trust's Warrants. R. I:8 ¶¶ 37, 39. Although plaintiff believed that the approximately $4.1 million she received from selling her Carpe Diem Warrants was to be wired to her personal account, Ohle deposited the proceeds in a Trust account. R. I:8 ¶¶ 37-38.

The Ames-Ohle Settlement Agreement. The petition admits that in 2003, plaintiff entered into a Settlement Agreement with Ohle, settling plaintiff's claims against Ohle arising out of his administration of the Trust. R. I:9 ¶ 47; *see* R. I:73, Ex. B (filed under seal). The Settlement Agreement contains allegations that in many instances are copied near-verbatim in the petition. R. I:73 at 4-5. For example, like the petition (R. I:15 ¶ 59(e); R. I:25-26 ¶¶ 111-12), the Settlement Agreement alleges that Ohle improperly gave Steger $350,000 in connection with the Carpe Diem transactions and "deposited $4.1 million of Ames' personal funds in the Trust's bank account." *Ames*, 2010 WL 5055893, at *3. As part of the Settlement Agreement, plaintiff accepted an accounting of the Trust ("Final Account") provided by Ohle. R. I:9 ¶ 46; *see* R. I:73, Ex. B at Ames 308, 318-34.

The Ohle Criminal Case. The petition alleges that in November 2008, the federal government indicted Ohle. R. I:5 ¶ 22. The government charged that both Bank One and plaintiff were victims of Ohle's fraud. Ohle engaged in a "scheme to

defraud" Bank One regarding HOMER transactions (R. I:108-10 ¶¶ 79, 82), and embezzled plaintiff's funds. R. I:117-23 ¶¶ 97-105. Ohle was convicted in June 2010, sentenced to five-years imprisonment, and ordered to pay $350,000 in restitution to plaintiff and over $1 million to Bank One. R. II:373.

Plaintiff's Federal-Court Lawsuit. In October 2009, plaintiff sued the defendants herein in the U.S. District Court for the Eastern District of Louisiana. The complaint, as amended, asserted claims under RICO as well as the same six state-law claims asserted in this case. R. I:162-203.

Judge Berrigan dismissed plaintiff's RICO claim as untimely. Judge Berrigan first held that plaintiff "discovered … the misappropriation of the funds in her trust account … in 2003." *Ames*, 2010 WL 5055893, at *3. Judge Berrigan next rejected plaintiff's claim that the limitations period should be tolled because Ohle "fraudulently concealed" his misconduct. *Id.* In response to plaintiff's claim that Ohle concealed transfers from the Trust, Judge Berrigan noted that "these transfers were all available in the bank records of the Trust." *Id.* For example, "in the final accounting that Ohle provided to Ames there is an entry for $347,834 as a 'loan.'" *Id.* (citing R. I:73, Ex. B at Ames 333). "Ohle's final accounting is replete with similar 'loan' entries, despite the fact that he had no authority to loan any of the Trust's funds." *Id.* (citing R. I:73, Ex. B at Ames 327-31, 333).

Because plaintiff ignored "these warning signs of misconduct," Judge Berrigan held, plaintiff was "not entitled to equitable tolling under the fraudulent concealment doctrine." *Id.* at *4. Declining to exercise pendent jurisdiction over plaintiff's state-law claims, Judge Berrigan dismissed them without prejudice.

Plaintiff's State-Court Lawsuit. On January 14, 2011, plaintiff filed her petition. Plaintiff's petition is virtually identical to her federal complaint, except that it replaces the RICO claim asserted in the federal complaint with a claim under its state-law equivalent, the Louisiana Racketeering Act. On May 27, 2011, Judge Julien held a hearing on the exceptions filed by Bank One, Brown, and Steger. Judge Julien entered a judgment granting Bank One's exception of prescription on July 12, 2011, dismissing all claims against the Bank and reserving its remaining arguments. R. 3:529. On July 28, 2011, Judge Julien entered a judgment and opinion dismissing without prejudice all claims against Brown, dismissing with prejudice certain claims against Steger, and dismissing without prejudice the remaining claims against Steger. R. III:534-37.

ARGUMENT

I. Judge Julien Correctly Dismissed Plaintiff's Claims As Prescribed.

A. Plaintiff's claims are subject to prescriptive periods of no longer than five years.

Assuming that the Trust Code does not apply (*but see supra* at 28-30), a five-year prescriptive period governs plaintiff's Racketeering Act claim (La. Rev.

Stat. § 15:1356(H)), and a one-year period governs her remaining claims. La. Civ. Code art. 3492. Plaintiff disputes Judge Julien's ruling with respect to the breach of fiduciary duty, breach of contract, and fraud claims, arguing that they are subject to a ten-year period under La. Civ. Code art. 3499. Brief of Plaintiff ("Br.") at 8-10.

Louisiana law provides that "[a]ny claim for breach of a fiduciary responsibility of a financial institution … may only be asserted within one year of the first occurrence thereof." La. Rev. Stat. § 6:1124. The Court of Appeal has applied Section 6:1124's one-year prescriptive period to affirm dismissal of breach of fiduciary duty claims against Bank One. *Matthews v. Bank One Corp.*, 44,818 (La. App. 2 Cir. 10/28/09), 25 So. 3d 952, 955; *see Richardson v. Capital One, N.A.*, 11-30 (La. App. 5 Cir. 6/14/11), 2011 WL 2328017, at *2; *Costello v. Citibank (S.D.)*, 45,518 (La. App. 2 Cir. 9/29/10), 48 So. 3d 1108, 1112. Cases cited by plaintiffs (at 9) did not name banks as defendants and therefore are inapposite.

Moreover, as this Court recently held, claims alleging "breach of fiduciary duty or fraud" have a "prescriptive period of one year" under art. 3492. *Brown v. Schreiner*, 2010-1436 (La. App. 4 Cir. 11/9/11), 2011 WL 5394732, at *2. *Brown* adheres to this Court's prior holding that "fraud" claims "are governed by the liberative prescription of one year." *Bell v. Demax Mgmt.*, 2001-0692 (La. App. 4 Cir. 7/24/02), 824 So. 2d 490, 492; *accord, e.g., Winn Fuel Serv. v. Booth*, 45,207 (La. App. 2 Cir. 4/14/10), 34 So. 3d 515, 519; *Hollingsworth v. Choates*, 42,424

(La. App. 2 Cir. 8/22/07), 963 So. 2d 1089, 1094. Plaintiff cites (at 10) *dela Vergne v. dela Vergne*, 99-0364 (La. App. 4 Cir. 11/17/99), 745 So. 2d 1271, in support of her argument that fraud claims are subject to a ten-year prescriptive period, but *dela Vergne* stated that "[f]raud and misrepresentation are generally considered offenses, delicts or torts." *Id.* at 1276. And this Court later made clear in *Brown* and *Bell* that fraud claims are governed by art. 3492.

As for plaintiff's breach of contract claim, this Court "review[s] only issues which were submitted to the trial court … unless the interest of justice clearly requires otherwise." Uniform Rules, Courts of Appeal, Rule 1-3. While plaintiff argued below that her "fraud and breach of fiduciary duty claims" are governed by art. 3499 (R. III:401), she did not include her breach of contract claim in that argument. That argument is therefore waived. *See Muhammad v. New Orleans Police Dep't*, 2002-0306 (La. App. 4 Cir. 6/26/02), 822 So. 2d 183, 188 n.3 (appellant waived argument not made in opposition to exception of prescription).

Plaintiff's argument also fails on the merits. "The nature of the duty breached determines whether the action is in tort or in contract." *Gallant Inv. v. Ill. Cent. R.R.*, 2008-1404 (La. App. 1 Cir. 2/13/09), 7 So. 3d 12, 17. "The classic distinction between damages *ex contractu* and damages *ex delicto* is that the former flow from the breach of a special obligation contractually assumed by the obligor, whereas the latter flow from the violation of a general duty owed to all persons."

Id. "Even when tortfeasor and victim are bound by a contract, courts usually apply the delictual prescription to actions that are actually grounded in tort." *Id.*

Plaintiff's breach of contract claim is grounded in tort. The petition does not allege that plaintiff entered into a contract with Bank One. Instead, the petition alleges only that plaintiff entered into "oral contracts" with "certain" unspecified "members" of the "Enterprise" to satisfy "fiduciary duties." R. I:29 ¶ 128; *id.* ¶ 129 (alleging under contract claim that "Enterprise" gave plaintiff "false" and "negligent" advice). Thus, plaintiff's contract claim does not allege "the breach of a special obligation contractually assumed" by Bank One (*Gallant Inv.*, 7 So. 3d at 17), but rather seeks to hold Bank One liable for Ohle's embezzlement under a breach of fiduciary duty theory. Under similar circumstances, the Court of Appeal has held that Section 6:1124 or art. 3492 governs claims nominally captioned as breach of contract. *E.g.*, *Matthews*, 25 So. 3d at 955 ("underlying conduct" was "the unauthorized withdrawal of funds," *i.e.*, "breach of fiduciary duty").[1]

[1] *See also Kroger Co. v. L.G. Barcus & Sons*, 44,200 (La. App. 2 Cir. 6/17/09), 13 So. 3d 1232, 1235 (art. 3492 governed breach of contract claim because petition "does not allege that a specific contract provision was breached, but that [defendant's] services were ineffective"); *Sanderson v. First Nat'l Bank*, 98-352 (La. App. 4 Cir. 11/18/98), 723 So. 2d 1036, 1038 (art. 3492 governed claim that bank breached contract by transferring funds from customer's personal to corporate account); *Copeland v. Wasserstein, Perella & Co.*, 278 F.3d 472, 479 (5th Cir. 2002) ("misfeasance in the performance of a contract for professional services … gives rise to a claim in tort, which prescribes in one year").

Finally, plaintiff finds prescription of all claims against Bank One to be "inconsistent" with Judge Julien's implicit conclusion that the fiduciary duty and contract claims are not prescribed as to defendant Doug Steger. Br. 10-11. There is no inconsistency. Steger is not a bank and so is not subject to the one-year prescriptive period set forth in Section 6:1124. Regardless, plaintiff's breach of contract claim is grounded in tort and therefore is subject to a one-year prescriptive period.

B. All of plaintiff's claims are prescribed on the face of the petition.

Under art. 3492, "prescription commences to run from the day injury or damage is sustained." The petition alleges that plaintiff incurred injuries from 1999 through 2002, while Ohle was trustee of the Trust. R. I:3-9 ¶¶ 13-47. Because plaintiff did not sue until 2009, prescription is evident on "the face of the petition." *Hogg v. Chevron USA*, 2009-2632 (La. 7/6/10), 45 So. 3d 991, 998; *see Bell*, 824 So. 2d at 492 ("petition has prescribed on its face" because "conversion" of plaintiff's funds "took place from 1990 to 1996, but suit was not filed until 2000"); *Metro Elec. & Maint., Inc. v. Bank One Corp.*, 05-1045 (La. App. 3 Cir. 3/1/06), 924 So. 2d 446, 449-50. Consequently, "the burden shifts to the plaintiff to show why the claim has not prescribed." *Hogg*, 45 So. 3d at 998.

C. *Contra non valentem* does not make plaintiff's claims timely.

In seeking to evade prescription, plaintiff cites the discovery rule and fraudulent concealment prongs of *contra non valentem*. Br. 11-19. The Supreme Court

has emphasized that "'*contra non valentem* only applies in exceptional circumstances.'" *Marin*, 48 So. 3d at 245. "When the plaintiff's claim is prescribed on its face," the petition's "mere allegation" of *contra non valentem* does not suffice. *Netherland v. Ethicon, Inc.*, 35,229 (La. App. 2 Cir. 4/5/02), 813 So. 2d 1254, 1261. Rather, "plaintiff must *prove* the case for a suspension of prescription." *Id.* (emphasis added); *accord Black v. Whitney Nat'l Bank*, 618 So. 2d 509, 516 (La. App. 4 Cir. 1993) ("When [plaintiff] pled *contra non valentem*, the burden of proof was upon [plaintiff] to prove *contra non valentem*"); *Anowi v. Nguyen*, 11-468 (La. App. 5 Cir. 12/13/11), 2011 WL 6187110, at *3; *Lewis v. Calcasieu Corr. Ctr.*, 2000-878 (La. App. 3 Cir. 12/6/00), 795 So. 2d 346, 347. Judge Julien correctly found that plaintiff did not prove "exceptional circumstances" here.

The discovery rule does not save plaintiff's claims. The discovery rule prong of *contra non valentem* tolls the prescriptive period while "the cause of action is neither known nor reasonably knowable by the plaintiff." *Marin*, 48 So. 3d at 245. As Judge Berrigan noted, plaintiff "discovered … the misappropriation of the funds in her trust account … in 2003." *Ames*, 2010 WL 5055893, at *3. Indeed, plaintiff concedes that she "knew she was injured in 2003." Br. 12.

Plaintiff nevertheless argues that the discovery rule salvages her claims, raising three principal objections to Judge Julien's contrary conclusion. First, plaintiff faults Judge Julien for focusing on the date she discovered her "injury" rather than

when she discovered her "cause of action." Br. 14. But "prescription runs from the date a person 'first suffers actual and appreciable ***damages***.'" *Marin*, 48 So. 3d at 249 (emphasis added). Accordingly, as the Fifth Circuit explained, *contra non valentem* "'does not operate to toll the running of the limitation period until such time as plaintiff discovers all of the elements of a cause of action.'" *Bourdais v. New Orleans*, 485 F.3d 294, 298 (5th Cir. 2007). "'Once a claimant learns that she has been injured, the burden is on her to determine whether she should file suit.'" *Id.*

Even if prescription were tolled until plaintiff discovered each element of her claims, plaintiff knew in 2003 that Ohle misappropriated her funds and that Bank One employed Ohle during part of the time he was trustee. Plaintiff does not explain what other "element" she needed to know in order to sue Bank One under the respondeat superior theory she asserts here. Moreover, plaintiff must show she exercised "'due diligence'" in uncovering the elements of her claims. *Marin*, 48 So. 3d at 252. For reasons explained below, she did not.

Second, and related to her first argument, plaintiff repeatedly asserts that Judge Julien erred by citing her knowledge "about the existence of Bank One in 2003." Br. 11; *accord id.* at 14-15, 18. But Judge Julien's point was not merely that plaintiff knew about Bank One's "existence," it was that plaintiff knew in 2003 that Bank One had employed Ohle during part of his tenure as trustee. That knowledge, in conjunction with plaintiff's 2003 discovery that Ohle had misappropriated

her funds, gave plaintiff all the ammunition she needed to sue Bank One under the respondeat superior theory she asserts now.

Third, plaintiff claims that she did not discover the full extent of Ohle's misconduct until the Ohle criminal case. Br. 11. However, "prescription is not interrupted/suspended until a plaintiff has 'full knowledge of the extent of damage.'" *Marin*, 48 So. 3d at 250. Rather, "'prescription runs from the date on which [plaintiff] first suffered actual and appreciable damage.'" *Id.*

Even if plaintiff's discovery of additional fraud were relevant, "'[a] prescriptive period will begin to run even if the injured party does not have actual knowledge of facts that would entitle him to bring a suit as long as there is'" enough notice "'to excite attention and put the injured party on guard and call for inquiry.'" *Id.* at 246 n.12; *see Dominion Exploration v. Waters*, 2007-0386 (La. App. 4 Cir. 11/14/07), 972 So. 2d 350, 360 (prescription "commences when enough notice to call for an *inquiry* of a claim exists, not when an inquiry reveals the facts or evidence to sufficiently *prove* the claim"). The petition alleges three instances of fraud revealed during the Ohle criminal case about which plaintiff was allegedly unaware (R. I:8-9 ¶¶ 40-47), none of which allow her to invoke the discovery rule:

- Plaintiff cites the $350,000 fee charged in connection with her Carpe Diem purchases. Plaintiff does not dispute Judge Berrigan's determination that she "discovered that she had been charged [that] fee" in 2003 (*Ames*, 2010 WL

5055893, at *1), but claims that she did not know the identity of the fee's recipient before Ohle's trial. However, as Judge Berrigan held, "the identity of who received the funds does not change her injury of having money misappropriated." *Ames*, 2010 WL 5055893, at *3. What matters is plaintiff's knowledge that Ohle charged her a fee she did not approve—a fact plaintiff discovered in 2003.

- Plaintiff points to the $347,834 that Ohle took from her Carpe Diem account as well as millions more that Ohle temporarily diverted from the Trust. But as Judge Berrigan noted, "the final accounting that Ohle provided to Ames [has] an entry for $347,834 as a 'loan.'" *Id.* (citing R. I:73, Ex. B at Ames 333). "Ohle's final accounting is replete with similar 'loan' entries, despite the fact that he had no authority to loan any of the Trust's funds." *Id.* (citing R. I:73, Ex. B at Ames 327-31, 333). Unapproved loans for millions of dollars surely put plaintiff "'on guard'" for fraud. *Marin*, 48 So. 3d at 246 n.12; *see Metro Elec.*, 924 So. 2d at 451 (rejecting *contra non valentem* because plaintiff could have discovered fraud by reviewing bank statements); *Costello*, 48 So. 3d at 1113.

- Plaintiff claims she first learned at Ohle's trial that he used Trust funds to pay for HOMER. But plaintiff did not enter into a HOMER transaction, and the ways in which Ohle used Trust funds are irrelevant to plaintiff's claims. The relevant question is whether plaintiff's funds were in fact misappropriated. *See Warden v. Barnett*, 2001 WL 422590, at *1 (5th Cir. Mar. 29, 2001) ("the initial theft

or misappropriation of [plaintiff's] stock is his injury"; defendant's uses of "the proceeds" are not "independent injuries"). Plaintiffs knew that in 2003.

Even if plaintiff were not on guard for fraud by 2003—and she plainly was—the 2008 Ohle indictment expressly informed plaintiff about the fraud cited in the petition. The indictment alleged that Ohle directed the $350,000 Carpe Diem fee to himself and "Individual A" (Brown) (R. I:118-19 ¶¶ 100-02); that Ohle transferred $347,834 from plaintiff's Carpe Diem account to himself and Brown (R. I:119 ¶¶ 103-04); and that Ohle used the Trust to fund HOMER (R. I:19 ¶¶ 102, 104). Plaintiff filed suit just 10 days shy of one year from the 2008 indictment. Although it is plaintiff's burden to prove *contra non valentem*—and although prosecutors indicting defendants with complicated financial crimes generally talk to the victims beforehand—plaintiff did not prove that she lacked knowledge of the contents of the 2008 indictment outside the prescriptive period.

Finally, plaintiff errs in citing (at 11-12) *Jordan v. Employee Transfer Corp.*, 509 So. 2d 420 (La. 1987). *Jordan* was a redhibition case placing the burden on defendant to show that plaintiffs discovered the misconduct outside the prescriptive period. Plaintiffs in *Jordan* discovered water damage in their home, but did not sue because their realtor gave them an engineer's report concluding that the house was structurally sound. Plaintiffs sued within one year after their home flooded again, when plaintiffs learned that their realtor had withheld a second engineer's

report concluding that the foundation was structurally unsound. The court held that plaintiffs' claims were timely because the initial damage did not give plaintiffs "a reasonable basis to pursue a claim against a specific defendant." *Id.* at 424.[2]

By contrast, this is not a redhibition suit, so plaintiff bears the burden to prove *contra non valentem*. And as Judge Julien recognized, plaintiff knew in 2003 that Ohle was the wrongdoer and that Bank One had been his employer.

The fraudulent concealment doctrine is inapplicable. The fraudulent concealment prong of *contra non valentem* "is implicated only when (1) the defendant engages in conduct which rises to the level of concealment, misrepresentation, fraud or ill practice; (2) the defendant's actions effectively prevented the plaintiff from pursuing a cause of action; and (3) the plaintiff must have been reasonable in his or her inaction." *Marin*, 48 So. 3d at 252 (citations omitted). None of these elements are satisfied here, much less all three.

Plaintiff argues that "Ohle and Steger made affirmative misrepresentations in 2003 that … conceal[ed] the money misappropriated from" her. Br. 10. But to invoke *contra non valentem*, plaintiff must show that the "debtor himself" con-

[2] Although in the district court plaintiff cited *Jordan* in arguing *contra non valentem* (R. III:402), here plaintiff appears to cite *Jordan* differently. Br. 11. Plaintiff was right the first time. Under art. 3492, unlike some statutes, prescription "run[s] from the day injury or damage is sustained." The Supreme Court has confirmed this, repeatedly citing *Jordan* in discussing *contra non valentem* as an exception to prescription under art. 3492. *E.g.*, *Eastin v. Entergy Corp.*, 2003-1030 (La. 2004), 865 So. 2d 49, 56; *Harvey v. Dixie Graphics*, 593 So. 2d 351, 354 (La. 1992).

cealed her claim. *Marin*, 48 So. 3d at 245; *accord* CJS *Limitations of Actions* § 142 ("Generally, fraudulent concealment of a cause of action by a person other than the defendant will not toll the statute of limitations"); *Miley v. Consol. Gravity Drainage*, 93-1321 (La. App. 1 Cir. 9/12/94), 642 So. 2d 693, 698 (concealment by one defendant did not "suspend prescription" as to other defendants that did not make "representations" to plaintiffs). Plaintiff concedes that "Bank One did not make any affirmative misrepresentations" to her, but says that is irrelevant. Br. 17 n.28 (citing *Thomas v. N. 40 Land Dev.*, 2004-0610 (La. App. 4 Cir. 1/26/05), 894 So. 2d 1160). However, *Thomas* did not address *contra non valentem* at all, let alone reject the rule that the "debtor himself" must conceal the claim.

To be sure, anyone conspiring with Ohle to conceal his acts may not cite his own lack of affirmative misrepresentations in defending against *contra non valentem*. But the petition does not and cannot allege that Bank One played any role in the misappropriation of plaintiff's funds, and the petition admits that Ohle had long since left the Bank when he allegedly concealed information from plaintiff in 2003 during negotiations over the Settlement Agreement. R. I:31 ¶ 143.

Moreover, for the same reasons discussed above, no defendant "prevent[ed]" plaintiff from filing this lawsuit, and plaintiff did not act "reasonably" by delaying filing suit until 2009. *Marin*, 48 So. 3d at 252. Plaintiff argues that Ohle concealed his misconduct from an investigation conducted by one of her attorneys, John Wo-

gan, citing Wogan's testimony at Ohle's trial. Br. 5-6, 15-16. Even if Ohle's actions were relevant to Bank One, Judge Berrigan found that plaintiff "could have … learned about each and every unauthorized transaction" simply by looking at the Final Account that Ohle gave Wogan. *Ames*, 2010 WL 5055893, at *4.

In *Nathan v. Carter*, 372 So. 2d 560 (La. 1979), cited by plaintiff (at 16-18), a widow pregnant with her eighth child met with the manager of the company that had employed her husband until his death in a workplace accident two days earlier. Falsely promising "a large lump sum settlement," the manager "threatened" the widow "not to contact an attorney because, if she did, her workmen's compensation benefits would be cut off." *Id.* at 562-63. The widow sued six years after the accident when workers' compensation benefits ran out, foreclosure proceedings began, and the widow contacted a lawyer. *Id.* The court held that *contra non valentem* applied because "the acts of fraud and misrepresentation by defendants constituted a continuing threat calculated to prevent assertion of this claim for as long as the compensation payments continued." *Id.* at 563.

Unlike the widow in *Nathan*, plaintiff does not allege that Bank One concealed anything from her. In fact, plaintiff does not allege that *anyone* threatened her against contacting a lawyer or filing suit, much less issued a continuing threat lasting from 2003 until 2009. Nor could plaintiff so allege: the petition makes clear

that plaintiff is exceptionally wealthy (R. I:8 ¶ 40), and plaintiff admits that she was advised by counsel during negotiations over the Settlement Agreement. Br. 5.

If plaintiff felt "stymied" by Ohle's refusal "to disclose a smoking gun," she should have sued based on the conduct alleged in the Settlement Agreement and sought "further information … in discovery." *Forbes v. Eagleson*, 19 F. Supp. 2d 352, 376 (E.D. Pa. 1998), *aff'd*, 228 F.3d 471 (3d Cir. 2000). Commencement of the "limitations period will not await the plaintiff's satisfaction as to the merits of … her case, much less the defendant's voluntary self-incrimination." *Id.*

II. Judge Julien's Decision Can Be Affirmed On Other Grounds.

It "is well-settled that, if a trial court's decision is correct, it should be affirmed regardless of its reasons for judgment." *Allstate Ins. Co. v. Duncan*, 96-1603 (La. App. 3 Cir. 6/18/97), 703 So. 2d 36, 39. "Where the trial court's reasons for judgment are flawed, but the judgment is correct, the judgment controls." *Dufresne v. Dufresne*, 10-963 (La. App. 5 Cir. 5/10/11), 65 So. 3d 749, 754. Therefore, even if Judge Julien had erred in finding plaintiff's claims prescribed, there are a host of independent reasons why Judge Julien's judgment should be affirmed.

A. Collateral estoppel bars plaintiff's *contra non valentem* claim.

Judge Berrigan found that plaintiff "discovered" her injuries "in 2003" and "fail[ed] to exercise due diligence" in investigating Ohle's conduct, preventing plaintiff from invoking "the fraudulent concealment doctrine." *Ames*, 2010 WL

5055893, at *3-*4. Judge Berrigan's findings collaterally estop plaintiff from arguing that her claims are timely under the discovery rule or fraudulent concealment prongs of *contra non valentem*. This Court applies "federal" law to determine the preclusive effect of a federal court's decision. *Richards v. Bd. of Commissioners*, 2010-1171 (La. App. 4 Cir. 2/2/11), 57 So. 3d 1135, 1139. Under federal law, collateral estoppel precludes relitigating an issue raised in an earlier action if: (1) the issue is "identical to the one involved in the prior action"; (2) the issue was "actually litigated in the prior action"; and (3) "determination of the issue in the prior action" was "a necessary part of the judgment in that action." *Id.*

Contrary to Judge Julien's suggestion (R. Supp. Tr. 23), these elements are satisfied. First, this case and the federal case raise the same issue: Did plaintiff exercise the due diligence necessary to make her claims timely? Second, as Judge Berrigan's opinion makes clear, the parties litigated in the federal suit whether plaintiff exercised due diligence. Third, Judge Berrigan's determination that plaintiff did not exercise due diligence formed the basis for her judgment.

This Court has applied collateral estoppel in similar cases. In *Richards*, the federal court determined plaintiffs' entitlement under federal law to emotional distress damages using the "zone of danger" test, remanding plaintiffs' state-law claims. 57 So. 3d at 1138-39. This Court affirmed dismissal of the subsequently-filed petition, holding that because plaintiffs' state-law claims also required proof

that they were in the "zone of danger," "[t]he doctrine of issue preclusion … bars the plaintiffs from relitigating their damages in state court." *Id.* at 1139, 1141.

Similarly, in *Samour v. La. Casino Cruises*, 2001-0831 (La. App. 1 Cir. 2/27/02), 818 So. 2d 171, plaintiff's federal complaint challenged the propriety of a drug test conducted by his employer. The federal court dismissed plaintiff's federal claims on the ground that the drug test was "reasonabl[e]" (*id.* at 175), "declin[ing] to exercise supplemental jurisdiction over [plaintiff's] state law claims." *Id.* at 173. Invoking collateral estoppel, the First Circuit affirmed dismissal of plaintiff's state-law claims because they required proof that the drug test was "unreasonable"—directly contrary to the federal court's determination. *Id.* at 175; *see Drouant v. Jones*, 2002-0356 (La. App. 4 Cir. 11/26/02), 834 So. 2d 518, 520 (citing *Samour* in giving "collateral estoppel effect" to federal bankruptcy court's determination that defendant "was intoxicated" at time of car accident in state-court personal-injury suit alleging that defendant was intoxicated).

Plaintiff made two principal points below in seeking to evade collateral estoppel. First, plaintiff argued that state and federal standards differ, asserting that *contra non valentem* focuses on when plaintiff discovers her cause of action whereas a RICO claim accrues when plaintiff discovers her injury. R. III:405. As we have said, that is both incorrect (claims accrue when plaintiff first suffers apprecia-

ble damage) and irrelevant (Judge Berrigan held that plaintiff did not exercise due diligence, which also is required to prove *contra non valentem*).

Second, plaintiff argued that under state law, "res judicata does not apply 'where the claims at issue have been dismissed without prejudice.'" R. III:405. But federal law, not state law, governs. *See Samour*, 818 So. 2d at 174. And plaintiff's argument conflates res judicata (claim preclusion) with collateral estoppel (issue preclusion). Bank One's argument is not that Judge Berrigan's *decision* bars plaintiff's *claims*, but rather that certain of Judge Berrigan's *conclusions* bar plaintiff from relitigating certain *issues*. Specifically, to prove *contra non valentem*, plaintiff must show that she exercised "'due diligence.'" *Allstate*, 25 So. 3d at 821; *accord Marin*, 48 So. 3d at 246, 252. Judge Berrigan resolved that issue, holding that plaintiff did not exercise "due diligence." *Ames*, 2010 WL 5055893, at *4. If plaintiff believed that Judge Berrigan erred in reaching that conclusion, plaintiff's remedy lay with the U.S. Court of Appeals for the Fifth Circuit, not state court.

Lycon, Inc. v. Weatherford Artificial Lift Systems, 02-318 (La. App. 3 Cir. 10/2/02), 827 So. 2d 1283, cited by plaintiff below, does not help her. Relying on *Stroik v. Ponseti*, 96-2897 (La. 9/9/97), 699 So. 2d 1072—which addressed res judicata, not collateral estoppel—*Lycon* held that a federal court's conclusion that plaintiffs failed to prove price discrimination under federal law did not preclude plaintiffs from pursuing state-law claims that required proof of price discrimina-

tion. The Third Circuit thought *Samour* distinguishable because whereas the federal court in *Lycon* dismissed the state-law claims "without prejudice" (827 So. 2d at 1284-85), the federal court in *Samour* "declined to exercise supplemental jurisdiction" over plaintiff's state-law claims. 818 So. 2d at 173.

Even if Judge Berrigan reserved plaintiff's ability to reassert certain *claims* in state court, Judge Berrigan did not "expressly reserve[]" plaintiff's ability to relitigate *issues* already resolved. *Stroik*, 699 So. 2d at 1077. In other words, while Judge Berrigan dismissed plaintiff's state-law claims without prejudice, she did not make her determination that plaintiff failed to exercise due diligence without prejudice to plaintiff's ability to relitigate that issue here. *See Teamsters Local 282 v. Angelos*, 762 F.2d 522, 525 (7th Cir. 1985) (giving collateral estoppel effect to first court's resolution of issue despite first court's reservation of plaintiff's right to file "'[a]ny claim [plaintiff] may have under the federal securities laws … in an independent action'" because first court "did not purport to reserve any particular issues (as opposed to the securities claims at large) for subsequent litigation").

Because federal decisions declining supplemental jurisdiction over pendent state-law claims are by definition without prejudice to reassertion of those claims in state court (*Bass v. Parkwood Hosp.*, 180 F.3d 234, 246 (5th Cir. 1999)), plaintiff's interpretation of *Lycon* would eliminate the collateral estoppel effect of virtually all federal decisions, allowing losing parties to use state-law claims to reliti-

gate issues all over again in state court. Plaintiff's interpretation also is inconsistent with *Richards* and *Samour*, where federal courts contemplated plaintiffs reasserting their state-law claims in state court. And it conflates res judicata and collateral estoppel, contrary to settled law in courts across the country holding that a federal court's dismissal of pendent state-law claims "without prejudice" nevertheless can have collateral estoppel effect. *E.g.*, *Walker v. City of Huntsville*, 62 So. 3d 474, 487-91 (Ala. 2010); *Oman v. Davis Sch. Dist.*, 194 P.3d 956, 965-66 (Utah 2008); *Tarus v. Borough of Pine Hill*, 916 A.2d 1036, 1050 (N.J. 2007); *Williams v. City of Jacksonville Police Dep't*, 599 S.E.2d 422, 429-31 (N.C. Ct. App. 2004).

B. Plaintiff's claims are perempted under the Louisiana Trust Code.

The Louisiana Trust Code provides: "An action for damages by a beneficiary against a trustee for any act, omission, or breach of duty shall be brought within two years of the date that the trustee renders … an accounting for the accounting period in which the alleged act, omission, or breach of duty arising out of the matters disclosed therein occurred." La. Rev. Stat. § 9:2234(A). The Trust Code also provides for a peremptive period that commences regardless of whether the accounting disclosed the alleged misconduct: any "such actions shall in all events, even as to actions within two years of disclosure, be filed within three years of the date that the trustee renders an accounting for the accounting period in which the alleged act, omission, or breach of duty occurred." *Id.*

Section 9:2234 governs here. The petition admits plaintiff was a "beneficiary" under the Trust. R. I:1 ¶ 1. Although Bank One was not "trustee," plaintiff bases her claims against Bank One on its employment of Ohle, who was trustee. R. I:9 ¶ 43. Plaintiff may not evade Section 9:2234 simply by suing the trustee's employer. *See Griffin v. JPMorgan Chase & Co.*, 2009 WL 935954, at *4 (W.D. La. Apr. 7, 2009) (Section 9:2234 applied to claim against trustee's employees).

The Trust Code's three-year peremptive period commences when "the trustee renders an accounting for the accounting period in which the alleged act, omission, or breach of duty occurred." La. Rev. Stat. § 9:2234(A). The petition alleges that Ohle submitted his accounting in 2003. R. I:9 ¶ 46. Because plaintiff did not sue until 2009, "peremption is evident on the face of the pleadings," shifting the "burden … to the plaintiff to show the action has not been perempted." *Metairie III v. Poche' Constr., Inc.*, 2010-0353 (La. App. 4 Cir. 9/29/10), 49 So. 3d 446, 449.

In the district court, plaintiff made two arguments in opposing peremption. First, plaintiff argued that the Trust Code does not apply to fraud claims. R. III:400. In fact, the Trust Code's peremptive period applies "exclusively" in "all actions brought in the state against any trustee." La. Rev. Stat. § 9:2234(D). "All" means "all"—including fraud claims. Indeed, the Louisiana legislature knows how to exclude fraud claims from a peremptive period when it so chooses. In establishing peremptive periods for lawsuits alleging accounting, legal, and insurance mal-

practice, the legislature exempted "cases of fraud." La. Rev. Stat. §§ 5604(E), 5605(E), 5606(C). There is no such carve-out under the Trust Code.

Nor is *Southern v. Bank One*, 32,105 (La. App. 2 Cir. 8/18/99), 740 So. 2d 775, cited by plaintiff below, to the contrary. In declining to apply the Trust Code, the Second Circuit noted that "funds owned by [two plaintiffs] were not in trusts." *Id.* at 779. Here, the petition makes clear that plaintiff's funds all went into the Trust at one point or another. R. I:8 ¶ 40. And contrary to plaintiff's argument, the Second Circuit subsequently applied Section 9:2234 to a case alleging "fraud." *Wright v. Larson*, 42,101 (La. App. 2 Cir. 5/2/07), 956 So. 2d 202, 204-06.

Second, citing *Morse v. Bank One*, 2005 WL 3541037 (E.D. La. Nov. 1, 2005), plaintiff argued that Section 9:2234 does not apply because Ohle's accounting failed to fully disclose his fraud. R. III:400. *Morse* held that Section 9:2234's ***two-year*** peremptive period did not apply. In this case, Bank One argues that Section 9:2234's ***three-year*** peremptive period applies. The three-year period, unlike the two-year period, applies regardless of whether the accounting disclosed the alleged misconduct. La. Rev. Stat. § 9:2234(A) ("actions shall in all events … be filed within three years of the date that the trustee renders an accounting").

The Supreme Court confirmed this in interpreting a similarly-worded statute, holding that "the statutory discovery exception is expressly made inapplicable after three years." *Teague v. St. Paul Fire & Marine Ins. Co.*, 2007-1384 (La. 1/1/08),

974 So. 2d 1266, 1274; *see id.* at 1274 n.4 ("the doctrine of *contra non valentem* does not apply to peremption"); La. Rev. Stat. § 9:2234(C) (Trust Code's peremptive period "may not be renounced, interrupted, or suspended"). Because defendants in *Morse* did not raise Section 9:2234's three-year peremptive period and the court did not address it, *Morse* is inapposite.

C. The petition does not state a cause of action against Bank One.

The petition does not adequately allege respondeat superior. The petition bases Bank One's liability on Ohle's conduct, alleging that Ohle "was acting within the course and scope of his employment with Bank One" while serving as trustee. R. I:31 ¶ 141. This Court has held, however, that an identical allegation that an employee "was acting in the course and scope of his employment" was "nothing more than a conclusion of law" that "does not set forth [a] cause or right of action." *Fasullo v. Finley*, 2000-2659 (La. App. 4 Cir. 2/21/01), 782 So. 2d 76, 81.

An employer may be held vicariously liable for its employee's intentional acts "'only if the employee is acting within the ambit of his assigned duties and also in furtherance of his employer's objective.'" *Baumeister v. Plunkett*, 95-2270 (La. 5/21/96), 673 So. 2d 994, 996. When the employer "had only a marginal relationship with the act which generated the risk and did not benefit by it," vicarious liability should be rejected. *Reed v. House of Décor*, 468 So. 2d 1159, 1162 (La. 1985). Courts "strictly construe" vicarious liability because "[l]iability should not

be broadly imposed on an employer for the torts of his employee where the employer is not himself at fault." *Woolard v. Atkinson*, 43,322 (La. App. 2 Cir. 7/16/08), 988 So. 2d 836, 840-41.

The petition alleges that plaintiff first retained Ohle in 1998—one year before Bank One hired Ohle—and that Ohle continued to defraud plaintiff after leaving the Bank in early 2002. R. I:3 ¶ 12; R. I:31 ¶ 143. The petition does not (and cannot) allege that the Trust instrument was executed by (or even mentions) Bank One; that Ohle's work for the Trust was part of his job at the Bank; that the Bank earned any fees from Ohle's work for the Trust; or that the Bank was aware of Ohle's fraud. While the petition alleges that Bank One "approved Ohle's role as trustee" (R. I:4 ¶ 15), that does not suggest that Ohle's work for the Trust was part of his assigned duties at the Bank rather than an outside activity that Ohle performed on his own time. Plaintiff's theory—that an employer that permits its employee to work on an outside activity is liable if the employee commits fraud in doing so—should be rejected. *See Hepler v. Fireman's Fund Ins. Co.*, 239 So. 2d 669, 673 (La. App. 1 Cir. 1970) ("unauthorized acts" of agent, "contrary to his firm's policy, and in violation of law," are not "chargeable" to employer).

In the district court, plaintiff made three points in support of her respondeat superior claim. R. III:409-10. First, plaintiff noted that Bank One paid Ohle. However, plaintiff does not and cannot allege that Bank One paid Ohle *to work on the*

Trust. Second, plaintiff cited allegations that Ohle and Bank One both provided wealth management services and that Ohle once used Bank One letterhead in a fax to plaintiff, but those allegations say nothing about whether Ohle's work for plaintiff was part of his assigned duties at Bank One. Third, plaintiff asserted that Bank One profited from HOMER. Even if that were true, it is perfectly consistent with the fact that plaintiff did not pay Bank One any fees as a result of Ohle's work on the Trust. Thus, plaintiff did not plead facts showing that Ohle's work for the Trust was "'within the ambit of his assigned duties" at Bank One "and also in furtherance of [Bank One's] objective.'" *Baumeister*, 673 So. 2d at 996.

The petition does not adequately allege respondeat superior under the Racketeering Act. Because "Louisiana racketeering laws are modeled upon federal 'RICO' legislation," federal cases interpreting RICO "are persuasive" in interpreting state law. *State v. Touchet*, 1999-1416 (La. App. 3 Cir. 4/5/00), 759 So. 2d 194, 197.[3] To avoid imposing treble damages against defendants that unwittingly employ individuals engaged in fraud, federal courts require plaintiffs to show that the employer "derived benefit from its representative's wrongful acts" (*Landry v. Air Line Pilots Ass'n*, 901 F.2d 404, 425 (5th Cir. 1990)), and was "an active perpetra-

[3] Plaintiff cited *Thomas* in arguing that federal RICO differs from state law on respondeat superior. R. III:411. But *Thomas* did not address respondeat superior and held that the Racketeering Act is "similar to ... federal RICO." 894 So. 2d at 1175.

tor of the fraud or a central figure in the criminal scheme." *Philan Ins. Ltd. v. Frank B. Hall & Co.*, 748 F. Supp. 190, 198 (S.D.N.Y. 1990).

The sole basis for plaintiff's claim that Bank One benefited from Ohle's conduct is that Ohle's work on the Trust allowed him to take plaintiff's money, which Ohle in turn used to fund Ken Brown's participation in HOMER, which in turn generated profits for Bank One. R. I:7 ¶¶ 31-35. Putting aside the fact that this Rube Goldberg-like mechanism shows that Ohle hid his actions from Bank One—why would Ohle take plaintiff's money if a large bank were a willing participant?—virtually any indirect benefit would suffice under plaintiff's theory. If, for example, Ohle had deposited plaintiff's funds in his own Bank One account, that also would "benefit" Bank One. Plaintiff may not state a respondeat superior claim absent an allegation that Bank One *directly* benefited from Ohle's misconduct.

In any event, "the mere fact that a corporation benefits from an illegal scheme will not establish that it participated as a 'central figure.'" *Kovian v. Fulton Cnty. Nat'l Bank*, 100 F. Supp. 2d 129, 133 (N.D.N.Y. 2000); *see Williams Elecs. Games v. Barry*, 42 F. Supp. 2d 785, 793 n.4 (N.D. Ill. 1999) (employer must "authorize or subsequently acquiesce in the wrongful conduct"). The petition neither alleges that Bank One was a "central figure" in a scheme to misappropriate plaintiff's funds nor that the Bank authorized or acquiesced in any such fraud.

The petition does not adequately allege apparent authority. Apparently recognizing that Ohle's work as trustee was not part of his job at Bank One, the petition alternatively asserts that the Bank may be held liable under an apparent authority theory. Thus, the petition alleges that "it was reasonable for Plaintiff to believe that Bank One was aware and approved of John Ohle's work for Plaintiff" because "Ohle provided Plaintiff and her representatives with communications with Bank One letterhead and presentations containing the Bank One logo." R. I:31 ¶ 144. That allegation does not establish apparent authority.

First, "it is the actions of the principal and not the actions of the alleged agent that must cause a third person to believe that a person is the principal's agent." *Where Angels Tread, Ltd. v. Dansby*, 37,689 (La. App. 2 Cir. 9/24/03), 855 So. 2d 906, 911. The petition bases apparent authority on Ohle's actions—*e.g.*, his use of Bank One letterhead—not on anything Bank One did.

Second, plaintiff "must rely reasonably on the manifested authority of the agent." *Boulos v. Morrison*, 503 So. 2d 1, 3 (La. 1987). While the petition alleges that "it was reasonable for Plaintiff to believe" that Bank One approved Ohle to work on the Trust (R. I:31 ¶ 144), it does not allege that plaintiff *actually* relied on Ohle's supposed authority to act on Bank One's behalf.

In the district court, plaintiff defended her apparent authority theory by arguing that it can never be resolved on the pleadings. R. III:411 (citing *Daly v.*

Reed, 95-2445 (La. App. 4 Cir. 2/15/96), 669 So. 2d 1293). *Daly* established no such *per se* bar; it held only that the particular petition there adequately alleged apparent authority. Plaintiff's position is irreconcilable with Louisiana cases that have dismissed apparent authority claims. *E.g.*, *Walton Constr. Co. v. G.M. Horne & Co.*, 2007-0145 (La. App. 1 Cir. 2/20/08), 984 So. 2d 827, 836-37.

Plaintiff's theory is barred by La. Civ. Code art. 1803. Section 1803 states that "[r]emission of debt by the obligee in favor of one obligor … benefits the other solidary obligors in the amount of the portion of that obligor." Plaintiff admits she entered into a Settlement Agreement with Ohle concerning his work on the Trust. R. I:9 ¶ 47. A respondeat superior claim by definition seeks to hold the employer liable "without regard" to its own "fault." *Sampay v. Morton Salt Co.*, 395 So. 2d 326, 328 (La. 1981). Because a vicarious liability claim would necessarily concede that Ohle's "portion" of fault is 100%, Ohle's "[r]emission of debt" via the Settlement Agreement bars recovery against Bank One.

Plaintiff argued below that the Settlement Agreement could not have released claims that "were unknown to her." R. III:410. In fact, as Judge Berrigan noted, the Settlement Agreement released all claims—whether "known" or "unknown." *Ames*, 2010 WL 5055893, at *3 (citing R. I:73, Ex. B at Ames 307). Thus, the parties "clearly intended" to resolve their dispute once and for all (La. Civ. Code art. 3076), making cases cited by plaintiff (at 16) inapposite. *See Brown v.*

Drillers, Inc., 93-1019 (La. 1994), 630 So. 2d 741, 754 (settlement agreement executed before party's death did not bar wrongful death claim that was not expressly released); *Burge v. N.W. Nat'l Ins. Co.*, 2008-1396 (La. App. 4 Cir. 6/3/09), 14 So. 3d 616, 622 (settlement agreement under which plaintiff "reserve[d] his rights" to sue "any others" did not release insurer that "was not a party to the settlement").

HOMER is irrelevant. Although plaintiff bases her claims against Bank One solely on Ohle's conduct, the petition alleges that Ohle used plaintiff's funds to further HOMER, which in turn benefited Bank One. R. I:6-7 ¶¶ 30-35. However, plaintiff's injury is Ohle's misappropriation of her money. Plaintiff does not and cannot allege that she entered into a HOMER transaction. Therefore, HOMER could not have injured plaintiff. Indeed, Ohle could have done any number of things with Trust funds—*e.g.*, bought himself a house, contributed to charity, etc.—without those uses becoming relevant to this lawsuit. Judge Julien agreed with defense counsel that "the use of the money, once stolen," does not "give rise to a separate and distinct cause of action," unless the defendant "had a part in the theft." R. Supp. Tr. 25-26. The petition does not and cannot allege that Bank One had anything to do with the theft of plaintiff's funds.

In the criminal case against Ohle, the court severed charges that HOMER was a fraudulent tax shelter from charges that Ohle defrauded plaintiff out of Trust funds. *United States v. Ohle*, 678 F. Supp. 2d 215 (S.D.N.Y. 2010). Even though

the government arguably had been injured by Ohle's marketing of HOMER, the court rejected the government's assertion that HOMER was related to Ohle's misappropriation of Trust funds merely because Ohle "'used some of the money to fund … HOMER.'" *Id.* at 225. Because plaintiff is not the government and thus cannot state claims on behalf of third parties injured by HOMER, plaintiff cannot state a claim based on HOMER.

* * * * *

The petition is plaintiff's *third* pleading asserting a respondeat superior claim against Bank One. Plaintiff has alleged all the facts she can allege. Because the claim still fails, the judgment should be affirmed for this independent reason.

CONCLUSION

Bank One respectfully requests that Judge Julien's judgment be affirmed. Bank One preserves all arguments it made below, including those that Judge Julien accepted in dismissing plaintiff's claims against Brown without prejudice.

Respectfully submitted,

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I certify that on January 13, 2012, I served a copy of the foregoing on the district court and the following counsel of record and parties by U.S. mail:

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