Supreme Court of Florida

CASE NO: SC15-740
On Certified Question From
The United States Court of Appeals for the Eleventh Circuit
(Case No. 14-11959)
(District Court Case No. 12-CV-23998-CMA)

BARRY MUKAMAL, AS CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF DONALD KIPNIS, and KENNETH A, WELT, AS CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF LAWRENCE KIBLER,

Petitioners,

v.

BAYERISCHE HYPO-UND VEREINSBANK, AG, a corporation, now known as UNICREDIT BANK AG; HVB U.S. FINANCE, INC., now known as UNICREDIT U.S. FINANCE, INC.,

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

Michael A. Hanin
Kasowitz, Benson, Torres & Friedman LLP
1633 Broadway
New York, NY 10019
212.506.1700

Ann M. St. Peter-Griffith
Kasowitz, Benson, Torres & Friedman LLP
1441 Brickell Avenue, Suite 1420
Miami, FL 33131
305.377.1666

Henry Brownstein
Kasowitz, Benson, Torres & Friedman LLP
2200 Penn. Ave., N.W.
Washington, DC 20037
202.760.3400

TABLE OF CONTENTS

Page(s)

TABLE OF CITATIONS

Statutes

STATEMENT OF THE CASE

This case stems from the unsuccessful efforts of business partners Donald Kipnis and Lawrence Kibler ("Petitioners"[1]) to dodge payment of millions of dollars of federal income taxes by participating, in 2000, in a tax shelter known as Custom Adjustable Rate Debt Structure ("CARDS"). As described by the Ninth Circuit, CARDS was a financial instrument "designed to avoid the payment of federal income taxes" and "to generate the appearance of large capital losses for high net worth investors to reduce their tax income liability." *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 868 (9th Cir. 2010). Not surprisingly, numerous federal and state courts have dismissed claims virtually identical to Petitioners' here on various grounds, including statute of limitations. *See Curtis Inv., Co., LLC v. Bayerische Hyp-Und Vereinsbank, AG*, 341 Fed. App'x 487, 495-96 (11th Cir. 2009) ("*Curtis*") (dismissing all CARDS-related claims against HVB, including fraud as barred by the applicable statute of limitations).[2]

---

[1] Petitioners are the Chapter 7 Trustees for the (separate) Bankruptcy Estates of Messrs. Kipnis and Kibler.

[2] *See also Sussex Fin. Enters. v. Bayerische Hypo-Und Vereinsbank AG*, No. 08-4791 SC, 2010 U.S. Dist. Lexis 73884 (N.D. Cal. July 20, 2010), *aff'd*, 460 Fed. App'x 709 (9th Cir. 2011) (dismissing CARDS-related RICO and fraud claims) (as a courtesy, Respondents include as part of their appendix the unreported cases cited herein); *Rezner* v. *Bayerische Hypo-Und Vereinsbank AG*, No. 06-CV-02064 (N.D. Cal. July 19, 2012) (dismissing negligent misrepresentation claim); *Kerman v. Chenery Assocs., Inc.*, No. 3:06CV-338-S, 2011 U.S. Dist. Lexis 30164 (W.D. Ky. Mar. 23, 2011) (dismissing CARDS-related RICO, fraud, breach of fiduciary duty, and aiding and abetting breach of

The Eleventh Circuit has asked this Court to determine when, under Florida law, Petitioners suffered their "first injury" so as to trigger accrual of the statute(s) of limitations applicable to their claims. The answer – 2001 – is compelled by Petitioners' *own allegations* that they were injured by HVB's conduct in 2001.

Specifically, Petitioners allege that in 2000, they paid almost $400,000 in up-front fees for a 30-year loan whose "long-term" nature was supposedly critical to Petitioners' business, but that HVB terminated after only one year, in 2001. Under the "first-injury rule," a bedrock principal of Florida statute of limitations jurisprudence, Petitioners' claims accrued in 2001 (when Petitioners *allege* that HVB injured them by terminating their loan early) and expired years before Petitioners filed suit more than a decade later, in 2013. Petitioners also allege an independent injury – and necessarily "discovered" their claims against HVB – in February 2006, when HVB executed a Deferred Prosecution Agreement ("DPA") with the Department of Justice and publicly admitted that Petitioners' CARDS

---

fiduciary duty claims); *see also Malone v. Bayerische Hypo-Und Vereins Bank*, Nos. 08 Civ. 7277(PGG), 09 Civ. 3676(PGG), 2010 WL 391826 (S.D.N.Y. Feb. 4, 2010), *aff'd sub nom.*, *Malone v. Bayerische Hypo-Und Vereins Bank, AG*, 425 Fed. App'x 43 (2d Cir. 2011) (dismissing fraud, breach of fiduciary duty, and related claims based on tax-shelter transaction similar to CARDS); *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 459 (S.D.N.Y. 2009) (dismissing RICO, fraud and breach of fiduciary duty claims based on tax-shelter transaction similar to CARDS); *Salt Aire Trading LLC v. Enterprise Bank & Trust Corp.*, 967 N.Y.S.2d 869, 2013 WL 775747 (N.Y. Sup. Ct. Feb. 25, 2013) (dismissing fraud-related claims based on transaction similar to CARDS); *Shalam v. KPMG LLP*, 931 N.Y.S.2d 592 (N.Y. App. Div. 1st Dep't 2011) (dismissing civil conspiracy claim based on transaction similar to CARDS).

transaction was part of a criminal conspiracy to defraud the IRS of tax revenue on behalf of Petitioners and other taxpayers.

Because the injuries alleged in the Complaint render their claims untimely, Petitioners' argue – contrary to both logic and the Complaint – that paying "unconscionable" up-front fees for a 30-year loan that HVB terminated after only one year, and discovering that CARDS was a criminal conspiracy to defraud the IRS, were merely "hypothetical" injuries. Rather, according to Petitioners, their first "real" and "certain" injury occurred in November 2012 when the Tax Court refused to recognize Petitioners' CARDS-related tax deduction (the "Tax Court Decision"). Petitioners can disavow the injuries alleged in the Complaint no more than they can escape settled Florida law that a plaintiff's first injury, *of any kind,* triggers claim accrual.

Accepting the Petitioners' argument would require an unprecedented, unjustifiable and unmanageable extension of this Court's pronouncement in *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323 (Fla. 1990) ("*Peat, Marwick*") elucidating the accrual rules for certain professional malpractice cases. Petitioners seek (Br. at 23) a special rule applicable to "tax shelter litigation" that would extend the time in which unsuccessful tax dodgers could pursue claims of any nature against anyone connected to the tax shelter. This gambit to expand the *Peat, Martwick* rule – and to contravene more than half a century of settled Florida law

on claim accrual – must be rejected. As the District Court correctly held: (i) this is not a malpractice case; (ii) HVB was not Petitioners' accountant, advisor or fiduciary of any kind; and (iii) Petitioners' claims against HVB were not dependent on the Tax Court Decision.

HVB respectfully requests that this court respond to the Eleventh Circuit that the "first injury" rule remains the law in Florida, and that Petitioners' claims accrued in 2001 (and in no circumstances later than 2006) and were therefore time-barred when asserted in 2013.

STATEMENT OF FACTS

A. Petitioners Decide To Participate In CARDS In 2000.

Petitioners were introduced to CARDS by their certified public accountant, Michael DeSiato, whom they approached for investment advice. (A028 ¶ 76.) DeSiato was introduced to CARDS by Roy Hahn, the CARDS "promoter." (A010-30 ¶¶ 1, 17, 33-34, 76, 84.) DeSiato – not HVB – advised Petitioners to invest in CARDS, allegedly because CARDS would "increase [Petitioners' business's] bonding capacity" by providing both long-term financing and tax benefits. (A028 ¶ 76.) CARDS' long-term financing was essential not only to

obtaining the increased "bonding capacity," but also to providing Petitioners with a non-tax business purpose for entering CARDS.[3]

The Complaint alleged that the long-term nature of CARDS was a material fact that induced Petitioners into entering CARDS. *See, e.g.*, A013 ¶ 13 (HVB and the CARDS documentation "falsely stated that the loans were 30-year loans."); A027-28 ¶ 75 (one of Petitioners' alleged motivations for entering CARDS was "to secure long-term financing" to obtain bonding capacity); A034 ¶ 107 (the pattern of unlawful activity included false representations by HVB that it "intended to maintain the loans for 30 years"); A037 ¶ 117 (alleging that all of the misrepresentation and omissions "described in this Complaint," including the long-term nature of CARDS, "were material to Plaintiffs' decision to enter into the CARDS transactions"); A038 ¶ 125 (HVB made material misrepresentations "that it intended to, or was at least open to, maintaining the loans for 30 years").

As alleged in the Complaint, Petitioners did not examine the CARDS deal documents or understand the CARDS transaction before deciding to participate in December 2000. (A028 ¶ 77.) Petitioners instead relied on the advice of their accountant, DeSiato. (A0028 ¶ 26). The Complaint does not allege that HVB

---

[3] The Tax Court Decision held that bonding capacity was "vital" to Petitioners' business. *Kipnis v. C.I.R.*, Nos. 30370–07, 30373–07, 2012 WL 5371787, at *2 n.2 (U.S. Tax Ct. Nov. 1, 2012). Because bonding capacity is determined by, among other things, the long-term nature of Petitioners' debt, *id*., Petitioners sought "to secure long-term financing" through CARDS, *id*. at *2.

acted as Petitioners' lawyer, accountant, advisor or agent (because HVB did not). Petitioners instead supposedly relied on the "reputation" of HVB, who acted as the lender for the CARDS transaction. (A016 ¶ 25, A028 ¶ 77, A034 ¶ 100.)

B. Petitioners' CARDS Transaction Terminates In 2001.

Petitioners entered into a CARDS transaction in December 2000, which was implemented through a "contrived series of steps" (A023 ¶ 53) designed to generate the appearance of large and artificial capital losses for Petitioners.

First, on December 5, 2000, HVB entered into a credit agreement (the "Credit Agreement") with Wimbledon Financial Trading, LLC ("Wimbledon") for a €6,700,000 loan (the "Loan" or "CARDS loan"). (A028 ¶ 78.) Petitioners later assumed the Credit Agreement to facilitate CARDS's tax benefits. (A029 ¶ 81; A221; A231.)

The Credit Agreement for the CARDS loan contained express non-reliance, merger, and no-duty clauses that made clear that HVB did not act as Petitioners' lawyer, accountant, agent or advisor. The non-reliance clause stated that "(a) [t]he Borrower is not relying (for purposes of making any investment decision or otherwise) upon the advice, counsel or representations . . . of [HVB]; (b) . . . has made its own borrowing and investment decisions based upon its own judgment . . . and not upon any view express by [HVB]; (c) . . . is a sophisticated and informed person that has a full understanding of the terms . . .; and (d) . . . (ii) [HVB] has

[not] given the Borrower . . . any advice, counsel, assurance, guaranty or representations whatsoever[.]" (A180-81§ 5.17.)[4] The merger clause provided that the Credit Agreement "contains the entire agreement between the parties . . . and supersedes all oral statements and prior writings with respect thereto." (A196 § 10.19.) The Borrower (later Petitioners) also acknowledged that HVB was not "acting as a fiduciary or financial or investment advisor for the Borrower." (A181 § 5.17(d)(i).)

Second, on December 21, 2000, Petitioners entered into: (i) a purchase agreement and assumption agreements with Wimbledon (A029 ¶¶ 80-81; A221; A231); and (ii) a letter agreement with HVB (the "Non-Reliance Letter"). (A242-3.)

Underscoring that HVB was not Petitioners' lawyer, accountant, advisor or agent in connection with CARDS, Petitioners "represent[ed], warrant[ed] and acknowledge[d]" in the Non-Reliance Letter that, among other things, "HVB makes no guarantee or representation whatsoever as to the expected performance

[4] The Court may consider the documents that are part of HVB's Appendix, which was part of the record in both the District Court and the Eleventh Circuit, because they are attached to the Complaint, directly referred to in and central to the Complaint, and/or they concern matters of which a court may take judicial notice. *See One Call Prop. Servs. v. Sec. First Ins. Co.*, 165 So.3d 749, 752 (Fla. 4th DCA 2015) ("where the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss"); *Shannon v. Cheney Bros.*, 157 So. 3d 397, 400 n.1 (Fla. 1st DCA 2015) (taking judicial notice of records in another court case); § 90.202(6), Fla. Stat. (2015).

or results of the Transaction (including the legal, tax, financial or accounting consequences thereof), and [Petitioners] have not engaged in or entered into the Transaction in reliance upon any such guarantee or representation." (A242.)

Third, Petitioners engaged in a series of steps to generate artificial capital losses. Petitioners ultimately claimed a cost basis in the *entire* €6,700,000 loan, even though their share of the loan represented only 15% (€1,005,000). (*See* A029 ¶ 80.)

In January 2001, Petitioners paid $382,000 in CARDS-related fees from the proceeds of their share of the Loan. (A030 ¶ 84.) An unspecified portion of those fees were paid to Petitioners' accountant DeSiato; Petitioners' wholly-owned business acquired the balance of their share of the Loan. (*Id*.)

On November 13, 2001, HVB terminated Petitioners' CARDS transaction. (A0030 ¶ 85.) On December 5, 2001, "[a]ll of the borrowed funds were repaid with the pledged collateral." (*Id*.)

The Complaint does not allege that Petitioners communicated or transacted with HVB on any matters since December 2001.

C. Petitioners Claim Losses On Their 2000 And 2001 Tax Returns And Ignore Subsequent IRS Warnings About CARDS.

Petitioners used their CARDS transaction to claim ordinary losses on their 2000 and 2001 tax returns of $3,866,243 and $1,426,039, respectively. *Kipnis v. C.I.R.*, Nos. 30370–07, 30373–07, 2012 WL 5371787, at *1 (U.S. Tax Ct. Nov. 1,

2012). Petitioners also took deductions for the fees they paid to enter CARDS. *Id*. In order to obtain those tax benefits, Petitioners represented to the Tax Court that they had a good-faith business reason (*i.e.,* non-tax reason) for obtaining the CARDS Loan: obtaining long-term bonding capacity. *See id.* ("[Petitioners] claim they entered into CARDS for nontax reasons—to obtain funds" to increase their bonding capacity); *id.* at *7 (the disclosure statement on Petitioners' tax return "stated that [Petitioners'] business purpose in entering into the transaction was to obtain funds to contribute to" their business).

Beginning in March 2002, the IRS issued several notices identifying CARDS as a scheme that was not allowable for federal income tax purposes. On October 28, 2005, the IRS advised taxpayers of a settlement initiative whereby CARDS customers could avoid certain tax penalties by relinquishing their CARDS-related tax benefits and agreeing to pay a reduced penalty. (A049 n.2.) Petitioners do not allege that they participated in this IRS settlement initiative.

D. HVB Admits Its Wrongful Participation In CARDS In 2006.

On February 13, 2006, HVB executed a Statement of Admitted Facts (the "SAF") in connection with the DPA. In the SAF, HVB admitted its role in facilitating certain tax shelters, including CARDS, that were devised by others and used by high net worth individuals, such as Petitioners, to avoid paying taxes. (A096, A098.) With respect to CARDS, HVB admitted that it participated with

taxpayers, among others, in a tax shelter transaction involving certain "fraudulent and illegal elements." (A129.) In connection with the DPA, HVB paid $29,635,125 to the United States, including disgorgement of fees collected through participation in CARDS and other tax shelters.[5] (A098, A131.) HVB further agreed to cooperate with the DOJ's criminal investigations and to implement compliance and ethics improvements, including "new procedures regarding the review and approval of transactions that have potential tax benefits," "a training and educational program for relevant personnel," and "adoption of ethics and 'best practices' guidelines." (A099-101, A131.) HVB satisfied the DPA's requirements and the DOJ withdrew the investigation in August 2007. (A094-95.)

E. In 2007, Petitioners Challenge The IRS's Refusal To Recognize The Tax Losses Generated By CARDS.

On October 4, 2007, the Commissioner of the IRS issued a Notice of Deficiency in connection with Petitioners' tax returns. (A245, A249.) Undeterred by the numerous IRS notices regarding CARDS and HVB's public admissions that Petitioners' CARDS transaction was part of a criminal conspiracy designed to

[5] Petitioners argue that HVB paid a "promoter penalty" (Br. at 2) in connection with the DPA, as purportedly alleged in paragraph 69 of the Complaint. This argument is *not* supported by paragraph 69 or any other paragraph in the Complaint. It is also factually incorrect. What HVB paid the DOJ it paid as a disgorgement of its fees earned in connection with CARDS. (A98.)

defraud the United States of tax revenue, Petitioners petitioned the IRS Commissioner for a redetermination.[6] (*Id*.)

After a trial in 2012, the Commissioner affirmed the IRS' disallowance of Petitioners' CARDS-generated tax deductions, and required Petitioners to pay a combined total of $1,978,743 in 2000-2001 back taxes. *Kipnis*, 2012 WL 5371787, at *13. The Tax Court disallowed Petitioners' CARDS-related deductions because, among other things, Petitioners "did not [subjectively] have a business purpose for entering into" it.[7] *Id*. The Tax Court Decision did not impose tax-related penalties on Petitioners.

F. Petitioners File A Lawsuit Against HVB In 2013.

On November 5, 2013 – 12 years after HVB terminated Petitioners' CARDS loan and more than seven years after HVB admitted publicly that CARDS was a fraud against the Government – Petitioners filed the Complaint asserting seven claims arising out of HVB's CARDS-related conduct between 2000 and 2001: violation of Florida's RICO statute ("Count I"); common law fraud ("Count II");

---

[6] Petitioners state, without record citation (because none exists), that Petitioners appealed "on the advice of counsel." (Br. at 4.) Critically, though, none of the alleged conspirators, including HVB, advised Petitioners to appeal.

[7] The Tax Court also found that Petitioners' CARDS transaction "lacked economic substance," it "could not be profitable," and that CARDS "reduced [Petitioners'] wealth by more than $500,000 and would have reduced it even further had the CARDS transaction lasted longer than one year." *Kipnis*, 2012 WL 5371787, at *11-13.

aiding and abetting fraud ("Count III"); civil conspiracy to commit fraud ("Count IV"); breach of fiduciary duty ("Count V"); aiding and abetting breach of fiduciary duty ("Count VI"); and negligent supervision ("Count VII"). (A034-44 ¶¶ 97-164.) The Complaint did not allege a claim for professional malpractice, and did not allege that HVB acted as Petitioners' agent, advisor, accountant or fiduciary.

The Complaint alleged three categories of alleged "damages": (i) the "CARDS transaction fees" that Petitioners paid in 2001 for the CARDS loan they did not receive; (ii) the CARDS-related "tax benefits" that Petitioners allege HVB knew would not be upheld by the Tax Court (*see, e.g.*, A021, Subheading 3), plus the interest owed on the unpaid taxes (*i.e.,* money available to Petitioners for the 11 years prior); and (iii) "clean-up costs" in the form of "legal fees and expenses" that Petitioners incurred when, instead of entering the IRS amnesty program, they chose to litigate with the IRS over their artificial CARDS-generated tax deductions. (A015-44 ¶¶ 20, 96, 112, 122, 130, 139, 146, 156, 163.) As alleged in the Complaint, each of these categories of damages "flowed from" HVB's alleged conduct in 2000 and 2001 – *i.e.* a "conspiracy solely to generate fees" by duping Petitioners into participating in CARDS. (A021, Subheading 2.)

On January 10, 2014, HVB moved to dismiss the Complaint on the grounds that under settled Florida law, Petitioners' claims accrued no later than December 2001, and that Petitioners' claims were therefore time-barred no later than

December 2006. (A006, Dkt. No. 31.) HVB further argued that Petitioners' fraud-related claims failed on their merits in light of, among other things, the Eleventh Circuit's decision in *Curtis*, which held that a CARDS taxpayer-plaintiff could not allege reliance on HVB in light of identical non-reliance and merger clauses in the CARDS documents. *Kipnis v. Bayersiche Hypo-Und Vereinsbank, AG*, No. 13-CV-23998 (S.D. Fla.), Dkt. 31 at 14-16. HVB also argued that Appellant's claims premised on the existence of a duty failed on their merits in light of the no-duty clause in CARDS documents. *Id*. at 17-18.

On January 31, 2014 Petitioners filed their opposition to HVB's motion to dismiss. (A007, Dkt. No. 43.) Relying principally on *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So. 2d 1323 (Fla. 1990), Petitioners argued that under Florida law concerning the accrual of professional malpractice claims, Petitioners' claims against HVB did not accrue until November 2012, when the Tax Court rendered a final decision denying Petitioners' CARDS-related tax deduction. (A007, Dkt. No. 43.)

G. <u>The District Court's Opinion.</u>

On April 3, 2014, the District Court dismissed each of Petitioners' claims as time-barred. The District Court held that: (i) Petitioners' payment of fees constituted an injury, which occurred no later than December 2001, when HVB terminated Petitioners' "long-term" CARDS loan after one year (*see* A060); and

(ii) "broadly construe[ing]" the allegations in the Complaint, Petitioners had alleged that '"HVB's last act in further of the [alleged] tax shelter' occurred in 2003." (A056 (modification in original).) Petitioners' claims were therefore "clearly time-barred" under the applicable four- and five-year statutes of limitations. (*See id.*)

The Petitioners expressly disavowed reliance on the "discovery rule" in their briefing below. The District Court nonetheless generously applied[8] the "discovery rule" to Petitioners' fraud-based claims and concluded they were time-barred. Specifically, the District Court held that, given the Complaint's allegation that HVB misrepresented its intention to maintain the CARDS loan for 30 years, after HVB terminated the loan after only one year in December 2001 "a reasonably diligent party would have been compelled to explore the nature of this discrepancy, including the possibility of fraud and conspiracy." (A057 (citing *Curtis*, 341 Fed. App'x at 496).) Petitioners' fraud-based claims, to which the discovery rule could apply, were therefore time-barred as of 2005 and 2006.[9]

---

[8] The District Court "assume[d] the applicability of the discovery rule," even though Petitioners conceded that they "do not rely on the discovery rule or other methods of equitable tolling." (A056 n.7 (quoting Petitioners' response brief).)

[9] The District Court noted *in dicta* that, even applying the discovery rule "liberally" to Petitioners' non-fraud claims, Petitioners still knew (or should have known) of HVB's alleged misconduct "no later than December 31, 2007," and "would have needed to file those claims no later than December 31, 2011" (A058-59). This is because, among other things: (i) HVB admitted in the February 2006 DPA that CARDS was designed "to generate transaction fees" from participants (A057); (ii) the IRS notified Petitioners on October 4, 2007 that their CARDS transaction "lacked economic substance and the tax benefits . . . were being

The District Court considered and rejected Petitioners' argument for an unprecedented extension of Florida law governing accrual of the two-year statute of limitations for malpractice claims (set forth in *Peat, Marwick* and its progeny) to the non-malpractice claims (each of which have either a four- or five-year statute of limitations) alleged in the Complaint:

> In the context of a professional malpractice action, the holding of *Peat, Marwick* is quite persuasive, since the harm sustained by the client/plaintiff is entirely 'hypothetical and damages claims are speculative' until the outcome of the underlying action is determined.
>
> Under the present circumstances, the rule announced in *Peat, Marwick* is much less persuasive, and the case is wholly distinguishable.

(A060 (internal citation omitted).)

The District Court correctly recognized that Petitioners' sought-after expansion of *Peat, Marwick* had already been rejected by the Florida Supreme Court in subsequent decisions; that "the holding of *Peat, Marwick* is [not] as far-reaching as Plaintiffs would have the Court believe" (A061); and that *even malpractice cases* (which this is not), claim accrual is not invariably "held in abeyance until the conclusion of any collateral litigation." (A061-2 (quoting

---

disallowed" (*id.*); and (c) that Petitioners "filed petitions in the tax court on December 31, 2007" (A057-58). Thus, according to the District Court, Petitioners' claims were time-barred, at the absolute latest, "no later than" December 31, 2012." (A059).

Larson & Larson, P.A. v. TSE Indust., Inc., 22 So. 3d 36, 44 (Fla. 2009) ("*Larson*")).)

The District Court recognized that *Peat, Marwick* concerned "accounting malpractice" (A060) but that HVB was not Petitioners' accountant and that Petitioners asserted no claim for professional malpractice. (A060-61.) The District Court further recognized that, "[i]n stark contrast to the accountant in *Peat, Marwick* who denied committing malpractice" – and where "until the tax court determination, both the [plaintiffs] and [defendants] believed that the accounting advice was correct" (A061) – HVB publicly admitted its fraudulent CARDS-related conduct in 2006. (*Id*.)

In distinguishing *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061 (Fla. 2001) ("*Blumberg"*), another Florida case upon which Petitioners relied regarding a claim against plaintiff's insurance agent, the District Court recognized that one of the Florida Supreme Court's policy reasons for the *Peat, Marwick* rule – preventing the "premature disruption" of "an otherwise harmonious business relationship" between the professional/agent and the client/principal by forcing the client to sue – was wholly absent from the instant case:

> any business relationship between Plaintiffs and HVB was concluded in December 2001, when the CARDS transaction terminated. And whatever residual relationship, if any, remained between the parties could not be termed "harmonious" after the admission in the DPA, a public record, came to light.

(A063.)

The District Court also identified another critical distinction between this case and *Peat, Marwick*/*Blumberg*: unlike the "inextricably intertwined" professional negligence in those cases, Petitioners' claims against HVB were "not legally dependent on a finding by the tax court that the CARDS transactions at issue lacked economic substance." (*Id.*) To the contrary, the Petitioners could have "simultaneously challeng[ed] the IRS deficiency determination and [timely] fil[ed] suit against HVB." (*Id.*) Petitioners appealed.

H. The Eleventh Circuit Certifies A Question To The Florida Supreme Court.

On April 17, 2015, the Eleventh Circuit issued a *per curium* decision. (A065-89.) After summarizing its understanding of Florida law and the parties' competing positions, the Eleventh Circuit stated that "[i]t is not clear under Florida law when Plaintiffs first suffered injury, and thus when their claims against HVB accrued for purposes of the applicable statutes of limitations." (A089.)

The Eleventh Circuit has now requested that this Court decide the issue of when Plaintiffs first suffered injury under Florida law. The Eleventh Circuit explicitly stated that the question certified to this Court "is not intended to restrict the Supreme Court's consideration of the issues or the manner in which the

answers are given." (A089 (emphasis added).)[10] *See also Fla. Virtual Sch. v. K12, Inc.*, 148 So. 3d 97, 98 (Fla. 2014) (rephrasing certified question because, among other reasons, the "federal court specifically stated that our analysis is not limited"); *Tyne v. Time Warner Entm't Co., L.P.*, 901 So. 2d 802, 805-806 (Fla. 2005) (same). Therefore, the possible accrual dates referenced in the certified question – *i.e.*, October 4, 2007 (when the IRS issued its notice of deficiency) and November, 2012 (when Petitioners' dispute with the IRS was final) – in no way limit this Court's consideration of any of the issues, including when the Petitioners' first suffered actionable injury.[11] (A089.)

SUMMARY OF THE ARGUMENT

The Complaint in this action alleges that HVB induced Petitioners to enter CARDS by portraying CARDS as a long-term loan; that the long-term nature of

---

[10] Accordingly, Petitioners' argument (Br. at 7) that the Eleventh Circuit "rejected the arguments advanced by the District Court and Defendants for earlier accrual dates" is therefore categorically false.

[11] Neither party has ever argued – and the District Court did not hold – that Petitioners suffered their first injury when the IRS issued its notice of deficiency on October 4, 2007. To the contrary, the District Court stated only that under a "liberal application of the discovery rule" (A058 (emphasis added)) – immaterial to when Petitioners first *suffered* injury – Petitioners' claims would have accrued "no later than" the date the IRS issued notices of deficiency. *Id*. As appropriate, then, this Court should rephrase the certified question from the Eleventh Circuit. *See Jordan v. State*, 143 So. 3d 335, 338 (Fla. 2014) (rephrasing certified question because legal doctrines referenced therein were "inapplicable to the case at bar"); *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1034 (Fla. 2004) (rephrasing certified question in response to Petitioners' and *amici curiae* objections that the certified question read erroneous requirement into FRFRA statute).

CARDS was vital to Petitioners' business and to claiming certain tax deductions; and that after Petitioners' paid "unconscionable" fees for the CARDS loan in 2001, HVB terminated that loan in December 2001. The Complaint therefore alleges – without ambiguity or qualification – that Petitioners were injured by HVB's misconduct in 2001. Accordingly, under the "first injury" accrual rule that has been Florida law for over half a century, Petitioners' claims accrued in 2001, and had long been time-barred when Petitioners brought them more than a decade later.

To salvage their patently stale claims, Petitioners argue for an unprecedented expansion of the inapplicable principle of Florida law that certain professional negligence-related injuries accrue only after a court determines that the professional's underlying advice was error, because beforehand, the "injury" is sufficiently uncertain. In a thorough and well-reasoned opinion, the federal District Court rejected Petitioners' attempt to graft this inapposite accrual principle onto Petitioners' non-malpractice claims; this Court should reach the same result.

First, Petitioners' argument (Br. at 1, 11-15) that they suffered no actionable injury until 2012, when the Tax Court Decision deprived them of the benefit of their supposed "tax shelter bargain." There is no such thing as a "tax shelter bargain," and even if there was, Petitioners did not strike one with HVB. Petitioners' argument simply disregards the injury that Petitioners *allege* they suffered in 2001, when HVB purportedly duped them into paying "unconscionable

fees" for a long-term CARDS loan that HVB terminated wrongfully. This dispositive allegation in the complaint mirrors Petitioners' sworn representations to the Tax Court that Petitioners participated in CARDS to obtain a long-term loan. Under the first injury rule, Petitioners' claims accrued in 2001 regardless of whether the full extent of Petitioners' damage was known and whether *other* related injuries had manifested. Notably, if Petitioners were indifferent to obtaining long-term financing, then Petitioners perjured themselves in the Tax Court proceedings when they gave sworn testimony that their "primary motive" for entering CARDS was to obtain a long-term loan. *See* Section I.

Second, Petitioners' argue (Br. at 11-15, 19-23) that *Peat, Marwick* fashioned what Petitioners style a "finality accrual rule" (*see, e.g.*, Br. at 15) or "tax shelter litigation" accrual rule. These imagined legal principles – fabricated from whole cloth by the Petitioners – are without support in this Court's precedent. HVB was not Petitioners' accountant, advisor or fiduciary, and Petitioners' claims against HVB were not dependent of the Tax Court Decision whether to allow Petitioners a tax deduction. It would therefore be unprecedented – and wrong – to expand *Peat, Marwick*'s accrual rule to Petitioners' claims. *See* Section II.

Third, Petitioners' "policy" arguments (Br. at 17-18) are predicated on a Complaint – unlike the Complaint in this case – where the asserted claims were contingent on the outcome of another litigation (*i.e.,* the Tax Court Decision). That

was not the case here, where Petitioners could have timely pursued their claims against HVB and simultaneously challenged the IRS' deficiency determination. Petitioners' remaining policy arguments (Br. at 23-25) rely on demonstrably flawed assumptions and hypothetical claims that were never (and could not be) asserted. Worse, Petitioners' proposed "tax shelter litigation" and "finality" accrual rules are absurd and unworkable, and would dramatically extend the limitations periods for the indefinite multitude of cases that bear some conceivable relationship to a tax-reduction strategy or a litigation. *See* Section III.

ARGUMENT

I. Under The First Injury Accrual Rule, Petitioners' Claims Have Expired.

The Complaint is dispositive of when Petitioners' claims accrued. The Complaint *alleges* that Petitioners suffered injury in 2001 when, after paying exorbitant fees for the long-term CARDS loan, HVB terminated that loan after only one year. Under the first injury rule, Petitioners' claims accrued at that time. Accordingly, Petitioners' RICO claim (which carries a five-year statute of limitations) and remaining claims (which carry four-year statutes of limitations) expired in 2006 and 2005, respectively.

A. The First Injury Accrual Rule.

More than 60 years ago, this Court held that "a cause of action accrues when the last element constituting a cause of action occurs" (§ 95.031(1), Fla. Stat. (2015)), which generally occurs when the first injury commences:

> [W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time ***and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date***.

City of Miami v. Brooks, 70 So. 2d 306, 308 (Fla. 1954) (emphasis added).

Under this so-called "first injury rule, the required manifestation of injury need not be the one for which the plaintiff seeks to recover." *In re Engle Progeny Cases Tobacco Litig. Pertains To: Patricia Bowman*, No. 2008-CA-15000, 2011 Fla. Cir. LEXIS 1719, at *9 (Fla. 4th DCA Oct. 4, 2011) ("*In re Engle*"). Further, "a plaintiff who is aware of both her injury and the likely cause of her injury is not allowed to circumvent the statute of limitations by waiting for a more serious injury to develop from the same cause." *Id*. at *10; *see also Workman v. R.J. Reynolds Tobacco Co.*, No. 08-80029-CIV, 2008 WL 2219803, at *1 (S.D. Fla. May 28, 2008) (immaterial that "related injuries may later manifest themselves.")

It is axiomatic that the first-injury rule governs claim accrual in Florida. *Tobin v. Damian*, 772 So. 2d 13, 16 (Fla. 4th DCA 2000) (a "cause of action accrues and the statute begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained"); *Hynd v. Ireland*, 582 So. 2d 772, 773 (Fla. 4th DCA 1991) (claims accrue even though "not all the damages resulting from appellee's alleged fraud had then been sustained. Clearly, damage actually occurred, although the

amount remained uncertain, and appellant had more than the mere possibility of future damage."); *Kellermeyer v. Miller,* 427 So. 2d 343, 346 (Fla. 1st DCA 1983) ("Although the exact amount of the Petitioners' damages might not have been foreseen at that time, this is not the test.").[12]

In a telling omission, Petitioners disregard *City of Miami* – and the first-injury rule entirely – in a 25-page brief ostensibly addressing claim accrual under Florida law. In exchange for the relevant legal principles, Petitioners fabricate a "finality accrual rule" (Br. at 8, 19, 22, 23) and supposed accrual standards for "tax-related claims" (Br. at 12, 14, 21, 23). Both have no support in Florida case law or statute.

---

[12] *See also Elkins v. R.J. Reynolds Tobacco Co.*, 65 F. Supp. 3d 1333, 1337 (M.D. Fla. 2014) (Florida's first injury rule is a "long-standing rule [whereby]… the statute begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained have been ascertained"); *Cohen v. World Omni Fin. Corp.*, 751 F. Supp. 2d 1289, 1292-94 (S.D. Fla. 2010), *aff'd* 426 F. App'x 766 (11th Cir. 2011) ("In Florida, the cause of action accrues immediately upon the first injury caused by another's wrongful act, even though related injuries may later manifest themselves"); *Lion Life, LLC v. Regions Bank*, No. 12-81145-CIV-MARRA, 2013 WL 2367823, at *2 (S.D. Fla. May 29, 2013) (same, collecting cases); *Fla. Power & Light Co. v. Allis-Chalmers Corp.*, No. 86-1571-CIV, 1989 U.S. Dist. LEXIS 16640, at * 19 (S.D. Fla. Mar. 20, 1989), *aff'd* 893 F.2d 1313 (11th Cir. 1990) ("a party need not have complete knowledge of the full extent of the damages for which it seeks legal relief in order for the limitations period to accrue") (citations omitted); *Bowers v. N. Telecomm., Inc.*, No. 93-50083-LAC, 1995 U.S. Dist. LEXIS 20141, at *5 (N.D. Fla. Sept. 25, 1995) ("Plaintiff need not realize the full extent of his or her injuries to begin the limitations period").

B. Petitioners Allege They Were First Injured In 2001; Thus, Their Claims Are Barred Under The First-Injury Rule.

Petitioners' argument that they were not injured until the Tax Court disallowed their CARDS-related tax deductions in 2012 does violence to the first-injury rule because the Complaint expressly alleges Petitioners suffered their first injury in 2001.

The Complaint alleges that the 30-year term of their CARDS loan was a material fact that induced them to enter CARDS because it provided them bonding capacity for their business. (*See, e.g.,* A013 ¶ 13 (HVB and the CARDS documentation "falsely stated that the loans were 30-year loans."); A027-28 ¶ 75 (one of plaintiffs' alleged motivations for entering CARDS was "to secure long-term financing" to obtain bonding capacity); A034 ¶ 107 (one alleged materially false representation was that "HVB intended to maintain the loans for 30 years"); A037 ¶ 117 (alleging that HVB's intent to maintain CARDS for 30 years was "material to Plaintiffs' decisions to enter into the CARDS transaction"); A038 ¶ 125 (alleging a misstatement of material fact that "HVB represented that it intended to . . . maintain[] the loans for 30 years")); *see also Kipnis*, 2012 WL 5371787, at *2, n.2 (finding as a matter of fact after trial that long-term financing was "vital" to plaintiffs' business "because it affected [the] ability to acquire surety bonding."); *Kipnis v. Bayerische Hypo-Und Vereisnbank, AG*, No. 14-11959 (11th Cir.), Appellants' Reply Br. filed Oct. 2, 2014, at 4 n. 1 ("Plaintiffs spent years,

hired experts, and presented substantial testimony to the effect that, for them, the CARDS strategy had a business purpose").

The Complaint further alleges that the "unconscionable fees" (A014-15, 033 ¶¶ 17, 20, 96) Petitioners paid for CARDS in 2001 constituted damages on account of HVB misrepresenting the term of and prematurely terminating the loan in 2001. (*See* A036 ¶ 112 ("fees paid to the CARDS Dealers" constituted damages that "reasonably flow from" "promoting, facilitating, and misrepresenting" the CARDS loan); A036 ¶ 113 (Plaintiffs' damages were a "reasonably foreseeable result of the CARDS Dealers' pattern of unlawful activity," which included terminating and misrepresenting the term of the loan); A038 ¶ 122 ("the CARDS transactions fees" constituted damages that "reasonably flow from HVB's fraud," which included terminating and misrepresenting the term of the loan); A040 ¶ 130 (same, regarding the aiding and abetting fraud claim); A041 ¶ 139 (same, regarding the conspiracy to commit fraud claim); A042 ¶ 146 (same, regarding the breach of fiduciary duty claim); A043 ¶ 156 (same, regarding the aiding and abetting breach of fiduciary duty claim). Petitioners therefore allege that their first injury occurred upon the payment for, and termination of, their CARDS loan in 2001. *See Greenberg v. Wells Fargo Bank, N.A.*, No. 8:14-CV-2071-T-17MAP, 2015 WL 1647964, at *2-3 (M.D. Fla. Apr. 14, 2015) (applying the first-injury rule and finding tort claims against bank time-barred, "[a]s pleaded within the four corners

of the Amended Complaint"). Notably, the Complaint does not allege that their injury "flowed from" the adverse Tax Court Decision.

Petitioners had to allege that the early termination of their loan constituted injury. Otherwise, they would have contradicted their sworn representations to the Tax Court that they paid fees for CARDS "primarily for non-tax reasons," *i.e*., to obtain a long-term loan to increase their bonding capacity. *See Kipnis*, 2012 WL 5371787, at *1.[13] Indeed, if Petitioners were indifferent to obtaining long-term financing and instead bargained solely for a tax strategy in exchange for a fee, Petitioners not only perjured themselves before the tax court but also knowingly engaged in an illegal "tax shelter bargain" that lacked economic substance. Petitioners' brief sanitizes their admission to the Eleventh Circuit that until the Tax Court Decision, they "received exactly what they bargained for – advice and implementation of a tax strategy in exchange for a fee." *Kipnis v. Bayerische Hypo-Und Vereisnbank, AG*, No. 14-11959 (11th Cir.), Appellants' Brief filed June 18, 2014, at 10. But the implementation of a "tax strategy" for a fee with no business purpose is *per se* illegal.[14]

---

[13] Petitioners made these representations to the Tax Court because they could only claim a tax deduction if CARDS was "likely [to] produce economic benefits other than generate a tax deduction." *Kipnis*, 2012 WL 5371787, at *10; *see also id*. at *11.

[14] Coincidentally, the Tax Court found, as a matter of fact, that Petitioners "did not [subjectively] have a business purpose for entering into" CARDS. *Kipnis*, 2012 WL 5371787, at *13. Thus, if the Tax Court decision had any bearing on the

Because the last element of each of Petitioners' claims occurred in December 2001, those claims – subject to five and four year statutes of limitation[15] – were clearly time-barred when Petitioners brought them in 2013.

II. The *Peat, Marwick* Accrual Rule Does Not Apply To The Claims Asserted Against HVB.

Petitioners argue (Br. at 10-17) that this Court should apply the accrual principle for malpractice cases articulated in *Peat, Marwick* and its progeny to Petitioners' non-malpractice claims, and, indeed, onto any "tax related" claim. Such an unprecedented expansion of *Peat, Marwick* is unwarranted.

A. *Peat, Marwick* Has Never Been Applied and Does Not Apply To The Types of Claims Asserted Against HVB.

Peat, Marwick and its progeny address the accrual rules for professional negligence claims in Florida, and stand for the proposition that the "injury" in a professional negligence case can be "insufficiently certain" until after a final judgment adverse to the client is entered. Yet Petitioners here did not (and could not have) asserted claims for professional negligence (or even in the nature of

---

timeliness of Petitioners' claims (it does not), this finding would compel dismissal of all of Petitioners' claims on their merits. *See, e.g.*, *Salt Aire Trading LLC*, 2013 WL 775747, at *7 (the "failure of the shelter . . . were the consequences of [plaintiff's] undisputed tax objectives," not any conduct by HVB).

[15] *See* § 772.17, Fla. Stat. (2015) (five-year limitations period for RICO claims [Count I]); § 95.11(3)(j), Fla. Stat. (2015) (four years for actions "founded on fraud" [Counts II-IV]); § 95.11(3)(p), Fla. Stat. (2015) (four years for "any action not specifically provided for in these statutes" [Counts V-VI]); § 95.11(3)(a), Fla. Stat. (2015) (four years for actions "founded on negligence" [Count VII]).

professional negligence) against HVB. As the District Court noted (A060-61): (i) HVB was not Petitioners' accountant, lawyer or agent; (ii) Petitioners do not assert a professional negligence claim; and (iii) this is not a professional negligence case.

Petitioners' attempt to graft the *Peat, Martwick* rule onto this case ignores that under Florida law, different claims accrue at different times. *See, e.g.*, *Tech. Packaging, Inc. v. Hanchett*, 992 So. 2d 309, 313 (Fla. 2d DCA 2008) ("Florida case law *consistently holds* that a cause of action for breach of contract accrues and the limitations period commences at the time of the *breach*") (emphasis added; collecting cases); *Davis v. Monahan*, 832 So. 2d 708, 709 (Fla. 2002) (limitations period for fraud claim begins when fraud is *discovered* or should have been discovered); *Larson*, 22 So. 3d at 40 (a professional malpractice claim accrues when the injury is sufficiently *certain*, which generally exists when there is a final judgment in a related proceeding). Therefore, and contrary to Petitioners' empty and unworkable assertion (Br. at 12), claim accrual under Florida law does not depend on whether some "later court ruling" has a conceivable bearing on the claims, or whether the case involves "a tax-related claim," whatever that means. *See* Section III.C., *supra*. Holding that different accrual standards apply to breach of contract claims, or fraud claims, merely because those claims were "tax related" would be a seismic departure from this Court's established precedent. *See, e.g., Tech. Packaging, Inc.*, 992 So. 2d at 313 ("Florida case law consistently holds that

a cause of action for breach of contract accrues and the limitations period commences at the time of the breach") (collecting cases).

It is therefore not surprising that Petitioners rely (*see, e.g.*, Br. at 7) on Florida Supreme Court decisions that explicitly limit their holdings to professional negligence cases. *See Peat, Marwick*, 565 So. 2d at 1327 ("[w]e hold that . . . the limitations period for accounting malpractice commenced when the United States Tax Court entered its judgment") (emphasis added); *id.* at 1325 ("the basic principles for all professional malpractice actions should be the same") (emphasis added); *Larson*, 22 So. 3d at 37-8 (resolving conflict in authority "regarding when the two-year statute of limitations begins to run on a legal malpractice claim") (emphasis added); *Fremont Indem. Co. v. Carey, Dwyer, Eckhart, Mason & Spring, P.A.*, 796 So. 2d 504, 505 (Fla. 2001) ("*Fremont*") (answering a certified question regarding "Florida's two-year statute of limitations on [] malpractice claims") (emphasis added); *Silverstrone v. Edell*, 721 So. 2d 1173, 1175-6 (Fla. 1998) (holding that "the two-year statute of limitations for litigation-related malpractice under section 95.11(4)(a) . . . begins to run when final judgment becomes final") (emphasis added); *Perez-Abreu, Zamora & Del La Fe, P.A. v. Taracido*, 790 So. 2d 1051, 1054 (Fla. 2001) ("we conclude that the [malpractice] cause of action against the Attorneys did not accrue until the related or underlying

judicial proceeding . . . settled").[16] Florida courts have also refused to extend the *Peat, Marwick* accrual rule to non-malpractice claims. *See, e.g., Nale v. Montgomery*, 768 So. 2d 1166, 1167-68 (Fla. 4th DCA 2000) (plaintiffs "cannot rely on malpractice cases to establish accrual of a cause of action and then apply it to a common law negligence action").[17]

Petitioners argue (Br. at 19-20) that "Florida courts regularly apply [*Peat, Marwick*] to non-malpractice claims," relying on (i) *Fremont;* (ii) *Blumberg* and its progeny; and (iii) an unreported federal district court case, *Loftin v. KMPG LLP*, No. 02-81166-CIV, 2003 WL 22225621 (S.D. Fla. Sept. 10, 2003) ("*Loftin*"). Petitioners are wrong.

---

[16] The lower court cases that Petitioners rely on likewise expressly addressed professional negligence claims. *See Spivey v. Trader*, 620 So. 2d 212, 214 (Fla. 4th DCA 1993) (addressing the accrual of a legal malpractice claim under "Section 95.11(4)(a), [which] governs actions against lawyers and provides for a two year [limitations] period"); *Diaz v. Piquette*, 496 So. 2d 239, 240 (Fla. 3d DCA 1986) (holding that "the period for commencing an action on [a] claim for [] legal malpractice . . . did not begin to run until the adverse judgment was affirmed on appeal"); *Haghayegh v. Clark*, 520 So. 2d 58, 59 (Fla. 3d DCA 1988) (finding that the legal malpractice claim was not time-barred "by the two-year statute of limitations," citing Section 95.11(4)(a)).

[17] Petitioners argue (Br. at 22-23) that *Nale* applied the "finality accrual rule" because the court found that plaintiff's claim accrued only when their attorneys in the underlying action filed a notice of voluntary dismissal, *i.e.* when the related action was final. Petitioners misconstrue *Nale*, in which the court held that the claim accrued when the voluntary dismissal was filed not because the case was "final," but because filing the notice of voluntary dismissal was the negligent act that caused the plaintiff's injury.

For example, *Fremont* was a malpractice case. In *Fremont,* this Court answered a certified question regarding "Florida's two-year statute of limitations on [] malpractice claims," 796 So. 2d at 505, and construed plaintiff's claims against its attorneys for breach of contract, professional negligence and breach of fiduciary duty as claims "for *legal malpractice* in the handling of the defense of claims against Fremont's insured." *Id*. (emphasis added). Notably, the Court's characterization of plaintiff's claims in *Fremont* accorded with the two-year statute of limitations for professional malpractice, which applies regardless of "whether [such claim is] founded on contract or tort." § 95.11(4)(a), Fla. Stat. (2015).

Blumberg was likewise a "negligence/malpractice cause of action." 790 So. 2d at 1065. As this Court explained in *Blumberg*, plaintiff's claim against his insurance agent was "analogous to the malpractice action against the accountants in *Peat, Marwick.*" *Id*. at 1065 n.3. That was because, among other things, the plaintiffs in *Peat, Marwick* and *Blumberg* both allegedly received bad advice from their advisor/agent, but could not be certain whether that advice caused an injury until another court made a final determination of error. Petitioners' claims against HVB are simply unlike those in *Peat, Marwick* and *Blumberg.* HVB was Petitioners' lender in the CARDS transaction; it was neither Petitioners' agent nor Petitioners' advisor. Indeed, Petitioners expressly disclaimed reliance on any

advice of any kind by HVB.[18] (A180-81§ 5.17; A0242-3.) Petitioners' claims against HVB for misrepresenting the nature and legality of the CARDS loan were not contingent on the Tax Court Decision. *See* Section II.B., *infra*. These distinguishing facts render false any analogy to *Peat, Marwick* and *Blumberg*.

Nor does the federal district court's interpretation of Florida law in *Loftin* offer support to Petitioners' position here. *First*, unlike the plaintiff in *Loftin* who "failed to allege that he has suffered an actual injury from the alleged misconduct," *Loftin*, 2003 WL 22225621 at *7, the Complaint here alleges a specific injury in 2001 that was independent of (and six years prior to) the IRS deficiency determination. *Second*, Petitioners' argument that *Loftin* applied the *Peat,*

---

[18] *Blumberg* was also premised on this Court's conclusion that the defendant was *plaintiff's* agent (*id*. at 1066 n.3); HVB was not (and is not alleged to be) Petitioners' agent for any purpose. Petitioners do not (because they cannot) cite a single case applying *Blumberg* to claims asserted against defendants other than professionals and insurance agents. *See* Br. at 19 (citing *Steele v. Mid-Continent Cas. Co.*, No. 07-60789-CIV, 2007 WL 3458543, at *2 (S.D. Fla. Nov. 14, 2007) (whether plaintiff had a timely claim against its insurance agent "is resolved … in *Blumberg*"); *id* at 20 (citing *Medical Data Systems, Inc. v. Coastal Ins. Group, Inc.*, 139 So.3d 394, 396-97 (Fla. 4th DCA 2014) (finding that the case was "analogous to *Blumberg*"). Even *Blumberg* has been limited. *See Greenberg*, 2015 WL 1647964, at *2-3 (distinguishing *Blumberg* and *Medical Data Systems* and applying the first-injury rule to dismiss tort claims against bank, despite the existence of "the underlying litigation"); *Kelly v. Lodwick*, 82 So. 3d 855, 859 n.2 (Fla. 4th DCA 2011) (distinguishing *Blumberg* in a negligence case against an insurance broker because, unlike in *Blumberg*, "there was no underlying proceeding to determine whether coverage existed because it is undisputed that coverage did not exist"); *Tokay Auto Remarketing & Leasing, Inc. v. Hull & Co., Inc.*, No. 8:11–cv–2863–T–33MAP, 2012 WL 1806113, at *5 (M.D. Fla. May 17, 2012) (declining to apply *Blumberg* to plaintiff's alleged breach of contract and declaratory judgment claims).

Marwick rule to a non-malpractice claim is wrong. *Loftin* dismissed plaintiff's malpractice claim against his accountant (KMPG) as premature under *Blumberg*; but dismissed plaintiff's negligence and fraud claims for *lack of standing* because plaintiff's alleged injury was the mere *possibility* that he would have to settle with the IRS for a "hefty sum."[19] *Loftin*, 2003 WL 22225621 at *7- 8. *Third*, *Loftin* simply erred when it construed *Peat, Marwick* as holding that under Florida law, "a cause of action for malpractice arising from a tax matter does not accrue until the IRS assesses a tax deficiency against the plaintiff." *Id*. at *8. As Petitioners recognize elsewhere in their brief (Br. at 7), *Peat, Marwick* rejected that argument. 565 So.2d at 1326 (rejecting argument that "an IRS deficiency determination conclusively establishes an injury upon which to base a professional malpractice action"). *Loftin* has never been cited with approval by any court in support of Petitioners' imagined "tax shelter" accrual rule (*see* Br. at 19).

[19] *Loftin* correctly noted that if the "settlement payment amounts to nothing more than back taxes and interest, [plaintiff] will not have suffered an injury" because such amounts are not recoverable as a matter of law. *Loftin*, 2003 WL 22225621 at *7. Incidentally, the overwhelming majority of the damages sought by the Petitioners here constitute such non-recoverable "back taxes and interest" (A033 ¶95), that the Petitioners rightfully owe the U.S. Government, *i.e.*, notwithstanding their tax shelter participation. *See, e.g.*, *DCD Programs, Ltd. v. Leighton*, 90 F.3d 1442, 1447-52 (9th Cir. 1996) (back taxes and interest not recoverable).

B. Petitioners' Injury Was Certain A Decade *Before* 2012.

Petitioners argue (Br. at 1, 12-13) that their injury was only "hypothetical" until 2012 because had they prevailed in the Tax Court, they would have had "no claim against HVB."

This argument presumes – contrary to the Complaint and Petitioners' sworn representations to the Tax Court – that Petitioners were indifferent to obtaining a long-term CARDS loan (and thus had no business purpose for entering CARDS), and were indifferent to participating in a criminal conspiracy to defraud the IRS *so long as that conspiracy succeeded*.[20] But it is illegal to pay a fee for a tax shelter with no business purpose, and Petitioners cannot premise a lawsuit on their knowing and willing participation in a tax fraud. *This is why the Complaint does not and could not allege what Petitioners must now argue to salvage their claims*.

Petitioners' argument (Br. at 7) that their injury was "contingent" on the Tax Court Decision because they would suffer no "redressable harm" if they "prevail" in the Tax Court is also flatly contradicted by Petitioners' copious allegations that

[20] If Petitioners' injury was contingent upon the Tax Court ruling, then the possibility existed that the Tax Court would uphold Petitioners CARDS-based deductions. If such possibility existed, then it was not a *fact* that CARDS "would not be upheld" by the tax authorities but an opinion, and HVB cannot commit fraud based on an expression (or omission) of an opinion. *See Simmons v. Dover Drainage Dist.*, 93 Fla. 1035, 1039 (Fla. 1927) (to allege fraud, one must allege "false misrepresentations [of] ultimate material facts, not opinions or promises"); *Amazon v. Davidson*, 390 So. 2d 383, 385 (Fla. 5th DCA 1980) ("A misrepresentation to be actionable must be one of fact rather than opinion" subject to certain exceptions that do not apply here).

HVB knew that the Tax Court ***would never*** allow Petitioners' CARDS-related deductions.[21] Petitioners' allegations that, given HVB's "admissions in the DPA," CARDS could "[n]ever have withstood IRS scrutiny" (A015 ¶ 19)[22] are likewise incompatible with an injury "contingent" on the Tax Court Decision.

In short, Petitioners' injury from HVB's conduct was not contingent on the Tax Court Decision. Petitioners mistake their Complaint against HVB with a malpractice/negligence action against those who advised Petitioners to participate in CARDS. That Complaint was not filed (and could not be filed against HVB),

---

[21] *See* A013 ¶ 12 (in 2001, HVB "knew [CARDS] would not withstand IRS scrutiny"); A014 ¶ 17 (from the outset, CARDS was "nothing more than [an] illegal tax shelter"); A020 ¶ 41 (in 2001, HVB "knew that the [tax] loss could not be taken and that the deduction would be denied" by the Tax Court); A021 ¶ 44 (the opinions letters falsely stated a fact that "the tax advantages would be recognized by the IRS"); A023 ¶ 50 ("defendants knew" in 2001 that CARDS "in fact . . . would not be accepted by the IRS"); A024 ¶ 56 (in 2001, HVB "knew that the CARDS transaction would not be a legitimate means for declaring losses"); A025 ¶ 63 (in 2001, "defendants knew that the CARDS facility . . . would not be recognized by federal or state taxing authorities"); A034 ¶ 107 (HVB fraudulently misrepresented that "CARDS was legitimate"); A035 ¶ 108 (a material omission was that the legal opinions "would not be upheld" by the tax authorities); A036 ¶ 116 (alleging that a "knowingly misleading representation[] . . . of material fact" made in 2000 was that "the CARDS transaction would not entitle a taxpayer to claim for income tax purposes" the CARDS losses); *see also Kipnis*, Case No. 14-11959, Appellants' Reply Brief, filed Oct. 2, 2014, at 4 n. 1 ("[t]he claims here [are] based on [the fact that the] CARDS transaction [] never had a business purpose").

[22] HVB's public announcement that Petitioners' CARDS transaction was part of a conspiracy against the United States does not just settle when Petitioners had "knowledge of the underlying bad acts" (Br. at 17 n.6). To the contrary, HVB's admissions establish both the last possible date on which Petitioners should have discovered their claims, and an independent injury to the Petitioners.

and that action is not before this Court. HVB's conduct was not at issue in the Tax Court, and the Tax Court was not asked to decide whether HVB committed error.

III. Petitioners' Proposed Extension of *Peat, Marwick's* Accrual Rule Is Unwarranted And Unworkable.

Petitioners argue (Br. at 17-18, 23-25) that extending the *Peat, Marwick* accrual rule to this action would avoid "unnecessary litigation," avoid a "defendant-by-defendant" accrual rules, and promote "bright-line rules." The opposite is true on each count, and Petitioners' policy arguments are meritless.

A. The Policy Concerns Addressed By *Peat, Marwick* Are Absent Here.

Petitioners argue (Br. at 17-18) that having claims against HVB accrue only after the Tax Court Decision is consistent with one of the policies underlying *Peat, Marwick* – "preventing clients from having to take contrary positions in [] two actions" – because suing HVB earlier would have required them "to have simultaneously argued to the tax court that CARDS had economic substance, and to the district court that CARDS was fraudulent."

Petitioners present a false conflict. As held by the District Court (A063) and shown above (*see* Section II*, supra*), HVB's fraudulent conduct was not dispositive of whether the IRS would recognize Petitioners' CARDS-related tax deductions. Had it been, there would have been no point in Petitioners challenging the IRS tax treatment of CARDS in 2007, more than one year *after*

HVB admitted wrongdoing in the February 2006 DPA.[23] Petitioners concede the point elsewhere in their brief. *See* Br. at 11 (arguing that Petitioners' injury was contingent on the Tax Court Decision "despite HVB's admissions of wrongdoing" in the DPA).

In any event, Petitioners ignore completely that the *other* policy underlying *Peat, Marwick* – avoiding "prematurely disrupt[ing] an otherwise harmonious business relationship" between accountant and client – is completely absent here. *Peat Marwick,* 565 So.2d at 1326. The only "business relationship" between Petitioners and HVB ended in December 2001 when HVB terminated their CARDS loan, and any "harmony" that survived that termination was severed irrevocably when HVB admitted its CARDS-related misconduct in connection with the DPA in 2006.

---

[23] Notably, if Petitioners wished to seek as damages from HVB any deficiency assessed by the IRS after a tax court decision – *i.e.*, damages that are generally not recoverable as a matter of law, *see supra* – they could have and should have (among other legal options) filed timely claims against HVB and requested a stay pending an IRS decision, as other CARDS plaintiffs have done. *See Blumberg*, 790 So.2d at 1065 ("If a negligence/malpractice cause of action is filed prior to the time that a client's right to sue in the related or underlying judicial proceeding has expired . . ., then the defense can move for an abatement or stay[.]"); *see also, e.g. Kerman v. Chenery Assocs., Inc.*, No. 06-cv-00338, Dkt. No. 133 (W.D. Ky. March 4, 2009) (staying the case upon agreement of the parties until 30 days after the tax court issued its decision). Petitioners instead chose to sit on their claims for more than twelve years. That is prohibited under the first injury rule. *See In re Engle*, No. 2008-CA-15000, 2011 Fla. Cir. LEXIS 1719, at *10 (Fla. 4th DCA Oct. 4, 2011) ("A plaintiff who is aware of both her injury and the likely cause of her injury is not allowed to circumvent the statute of limitations by waiting for a more serious injury to develop from the same cause.").

Petitioners' related argument (Br. at 18) that the policies underlying statutes of limitations – *i.e.*, protecting defendants from long delays in filing lawsuits and preventing unexpected enforcement of stale claims – "are not implicated" is simply frivolous. Waiting twelve years after Petitioners' first injury is a "long delay" by any measure. Petitioners' argument that because HVB entered into the DPA in 2006 means it was not "thrown off guard" (Br. at 18) when Petitioners filed the Complaint seven years later is dead wrong, particularly since many (in fact, every) other CARDS plaintiff filed suit shortly after HVB's public admissions in the DPA. *See, e.g.*, *Rezner*, 630 F.3d 866 (filed in March 2006); *Curtis Inv., Co., LLC*, 341 Fed. App'x 487 (filed in November 2006); *Kerman*, No. 3:06CV-338-S, 2011 U.S. Dist. Lexis 30164 (filed in June 2006). Petitioners' assertion that the proceeding before the Tax Court "ensure[s] that evidence and testimony are preserved" (Br. at 18) is simply irrelevant to the policy behind statutes of limitations: "protecting defendants from long delays." It is also wrong, given that, as Petitioners' concede, the Tax and District Court actions implicate vastly different issues and evidence.

B. HVB's Position Does Not Create A "Defendant-By-Defendant" Accrual Rule.

Petitioners argue that failure to apply the *Peat Marwick* accrual rule to the non-professional malpractice claims asserted here would mean that "plaintiffs' injuries would ripen against different defendants at different dates for the same

claim . . . depend[ing] on the nature of work done by any given defendant." (Br. at 23-25).

This is speculative and false. Because Petitioners opted not to sue their accountant (DeSiato), their attorneys (Sidley), their investment banker (Chenery), or any of the other "CARDS Dealers" (A011 ¶ 6), neither HVB nor this Court have a basis to evaluate the hypothetical claims the Petitioners' might have asserted against these defendants (and whether they would have been viable, even if timely), what hypothetical injuries the Petitioners might have alleged, or when these hypothetical claims might have accrued. In any event, accrual is *claim specific*, *see* Section II, *supra,* and Petitioners' suggestion that "fact-intensive litigation over whether a defendant's misconduct was sufficiently 'malpractice-like" must occur (Br. at 25) is simply wrong. A negligence claim against a professional is a malpractice claim, "whether founded on contract or tort." §95.11(4)(a), Fla. Stat. (2015); *see also Fremont*, 796 So. 2d at 505 (construing plaintiff's claims against its attorneys for breach of contract, professional negligence and breach of fiduciary duty as claims "for legal malpractice"). Here, Petitioners did not and could not assert a malpractice claim against HVB.

Petitioners' contention (Br. 24) that it would be improper if their claims for aiding and abetting Sidley's breach of fiduciary duty accrued differently than claims for Sidley's breach of fiduciary duty assumes – incorrectly – that *Peat,*

Marwick's accrual rule would apply to Petitioners' (again) purely hypothetical claims against Sidley. It could not. Any viable claim for aiding and abetting Sidley's fiduciary duty could not relate to Sidley's professional negligence, because it is impossible to aid and abet, or conspire with, professional negligence. *See NHB Advisors, Inc. v. Czyzyk*, 95 So. 3d 444, 449 n.2 (Fla. 4th DCA 2012) ("aiding and abetting breach of fiduciary duty and conspiracy to breach fiduciary duty" are intentional torts); *Navas v. Brand*, 130 So. 3d 766, 769 (Fla. 3d DCA 2014) ("conspiracy to defraud" is an intentional tort). In other words, the type of breach of fiduciary duty claim to which the *Peat, Marwick* rule could possibly apply, was not – and could not be – asserted here.[24]

C. Petitioners' Argument Would Eviscerate Any "Bright-Line Rule" For Claim Accrual.

Petitioners' false contention (Br. at 25) that HVB's position runs contrary to Florida's supposed "bright line rule" governing claim accrual ignores that the "bright-line rule" in question – the *Peat, Marwick* accrual rule – has *never been applied to the claims asserted here*.

Petitioners' proposal to abandon claim-specific accrual and expand *Peat, Marwick* to all "tax shelter litigation" (Br. at 23) is not merely contrary to the policies that *Peat, Marwick* sought to promote, but would foment confusion and

[24] Petitioners' argument (Br. at 24 n.10) that their claims for aiding and abetting and conspiracy are timely because they "relate to malpractice, negligence and fiduciary duty" is therefore wrong.

uncertainty as to the accrual standards applicable to any and every claim that could conceivably relate to a "tax shelter," or, for that matter, a litigation. Apparently Petitioners would apply the *Peat, Marwick* accrual rule to all litigation involving "tax shelters"[25] such as the mortgage interest deduction, 401(k) plans, charitable donations, college saving plans, 501(c)(3) corporations and corporate inversions.[26] Petitioners' proposed "tax shelter litigation" accrual rule is unworkable and absurd.

In any event, Petitioners refer to "Florida's express preference for a bright line accrual rule" that does not exist *even in malpractice cases*, as evidenced by this Court's decision *rejecting* any bright-line "final accrual rule." *See Larson*, 22 So. 3d at 44 (accrual of professional malpractice claims occurs at "the time the cause of action is discovered or should have been discovered," and accrual is not "held in abeyance until the conclusion of any collateral litigation in which the client might assert a position inconsistent with the malpractice claim").

---

[25] A "tax shelter" is generally broadly defined as "any strategy that allows you legally reduce your taxes or decrease your taxable income." http://www.newyorklife.com/about/what-is-tax-shelter, last visited August 10, 2015.

[26] For this reason, and as noted above, the Eleventh Circuit's certified question as phrased lends unwarranted weight to the fact that the non-malpractice claims are brought by "taxpayers" and that the claims "relat[e] to [a] tax shelter." (A089.)

CONCLUSION

HVB therefore respectfully requests that this court respond to the Eleventh Circuit that the "first injury" rule remains the law in Florida and that Petitioners' claims were therefore time-barred when asserted in 2013.

Dated: August 10, 2015

Respectfully submitted,

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

By: */s/ Ann M. St. Peter-Griffith*
Ann M. St. Peter-Griffith

1441 Brickell Avenue, Suite 1420
Miami, FL 33131
Tel.: (305) 377-1666
AStpetergriffith@kasowitz.com

Michael A. Hanin
1633 Broadway
New York, New York 10019
Tel.: (212) 506-1700
mhanin@kasowitz.com

Henry Brownstein
2200 Penn. Ave., N.W.
Tel.: (202) 760-3400
hbrownstein@kasowitz.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Ann M. St. Peter-Griffith, certify that on August 10, 2015, I caused a true and correct copy of Respondents' Answer Brief On The Merits to be served upon the following *via eFiling Portal and Email*:

Michael G. Dickler
Dennis G. Kainen

___/s/ *Ann M. St. Peter-Griffith*____

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2), the font used in Respondents' Answer Brief On The Merits is Times New Roman 14-point.

___/s/ *Ann M. St. Peter-Griffith*___