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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

ROBERT PRITIKIN et al.,

Plaintiffs and Appellants,

v.

COMERICA BANK,

Defendant and Respondent.

H036219

(Santa Clara County  
Super. Ct. No. CV161225)

**I. INTRODUCTION**

Appellants are more than 60 individuals and entities who invested millions of dollars with Four Star Financial Services, LLC (Four Star), beginning in 1999. They received regular monthly distributions from Four Star until October 2002, when Four Star ran out of cash and ceased making distributions. At that time, appellants (hereafter, plaintiffs) suspected that Four Star was in financial trouble and stopped investing.

Many investors, including several of the plaintiffs in this case, subsequently filed lawsuits against Four Star and its principals alleging that Four Star was a Ponzi scheme. “A ‘Ponzi scheme’ is a fraudulent arrangement in which an entity makes payments to investors from moneys obtained from later investors rather than from any ‘profits’ of the underlying business venture. The fraud consists of funneling proceeds received from new investors to previous investors in the guise of profits from the

alleged business venture, thereby cultivating an illusion a legitimate profitmaking business opportunity exists and inducing further investment. [Citation.]” (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 906, fn. 2.)

In 2010, plaintiffs filed the instant action against respondent Comerica Bank. They alleged that Comerica Bank and a Comerica Bank vice-president had aided Four Star’s Ponzi scheme by manipulating Four Star’s checking account to conceal that the principal source of the funds for Four Star’s monthly distributions to investors was new investor capital. Comerica Bank demurred on the grounds that the action was time-barred under the applicable statutes of limitations, which were either three years or four years.

In its order of April 27, 2010, the trial court sustained the demurrer with leave to amend, determining that all claims against Comerica Bank were time-barred no later than May 2008. The court found that plaintiffs were placed on inquiry notice to investigate the financial institutions known to be involved with Four Star in May 2004, when the complaint in a Los Angeles County Superior Court action against Four Star was amended to allege that a different bank, First Charter Bank, had aided Four Star’s Ponzi scheme.

Plaintiffs then filed a first amended complaint in which they elaborated on their allegations that they did not know and could not have suspected Comerica Bank’s involvement in Four Star’s Ponzi scheme until October 2008, when one of Four Star’s principals disclosed Comerica Bank’s role to appellant Robert Pritikin. Comerica Bank again demurred on statute of limitations grounds.

In its order of August 31, 2010, the trial court sustained the demurrer without leave to amend, ruling that the first amended complaint showed that plaintiffs should have begun to diligently investigate the connections between Four Star and its financial institutions no later than May 2004 and therefore the action was untimely filed more than three or four years later.

On appeal from the judgment of dismissal, plaintiffs contend that the trial court erred because the allegations of the first amended complaint show that their claims

against Comerica Bank did not accrue until October 2008, since an investigation prior to that date would not have revealed Comerica Bank's role in Four Star's Ponzi scheme. As we will further explain, we determine from our independent review that it does not "clearly and affirmatively appear" from the face of the first amended complaint that the action is "necessarily" time-barred. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 (*Committee for Green Foothills*)). Therefore, we will reverse the judgment of dismissal.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. The Original Complaint***

On January 11, 2010, plaintiffs filed an action against defendants Comerica Bank and Comerica Incorporated (hereafter, collectively Comerica Bank). According to the allegations of the complaint, Four Star was formed in 1996 and managed by an attorney, Mark Cohn, and two accountants, Ronald Anson and Jack Garrett. Four Star represented to investors that it was "a highly profitable enterprise that offered safe investments and lucrative returns. . . ." Four Star's practice was to pay regular monthly distributions to its investors and it maintained a checking account at Comerica Bank from which the monthly distributions were paid. Comerica Bank also issued a personal line of credit to Anson and Garrett.

Plaintiffs further alleged that they invested approximately \$50 million with Four Star during the period of December 1999 to approximately October 2002, when Four Star ran out of cash and ceased making monthly distributions. Plaintiffs suspected that Four Star was in financial trouble and immediately stopped investing. In October 2003, Four Star was placed in involuntary bankruptcy by its creditors. During an adversarial proceeding in the bankruptcy case, the court "found that Four Star was a Ponzi scheme from January 1, 2000 to December 31, 2002."

According to plaintiffs, Four Star would not have been able to operate its Ponzi scheme without Comerica Bank's assistance, which began when Richard Smith, a Comerica Bank vice-president, arranged for Comerica Bank to issue a \$4.5 million

personal line of credit to Four Star's principals, Anson and Garrett, in 1999. Comerica Bank and Smith then engaged in a scheme to manipulate Four Star's checking account to maintain the illusion that Four Star was a profitable business.

Plaintiffs believe that the scheme involved Smith or an assistant calling Four Star when there was a negative balance in Four Star's Comerica Bank checking account. Four Star would then deposit enough funds to cover the overdraft. Some of the funds came from the Anson/Garrett line of credit. If Four Star made a deposit into its checking account, Comerica Bank would immediately credit Four Star and then transfer the funds out of the account (usually to the Anson/Garret line of credit), leaving the checking account balance at zero or near zero. Plaintiffs assert that "[t]he practice of starting the day with a negative balance in the Four Star Comerica Account also allowed Four Star, with Comerica's actual knowledge and cooperation, to control which checks were paid and which checks were returned on days where Four Star did not have sufficient funds . . . . [¶] . . . As a proximate result of the Banking Scheme, COMERICA materially assisted Four Star in perpetuating the illusion of a profitable business to its investors, even though it was insolvent."

Plaintiffs claim they did not know and could not have suspected the existence of facts supporting a claim against Comerica Bank prior to October 2008. After Four Star stopped making monthly distributions to investors in 2002, Four Star attempted to "deflect growing investor concern" and "provide reassurance to Four Star investors that their investments were safe. . . ." However, "many investors, including several of the Plaintiffs in this action, took immediate steps to protect their investments." These steps included filing lawsuits against Four Star and its principals in several venues, starting in October 2002.

The first action filed against a bank, according to plaintiffs, was a class action filed in Los Angeles County Superior Court on February 13, 2004, entitled *Gilbert et al. v. Cohn et al.* (Super. Ct. Los Angeles County, 2004, No. BC310846 (the *Gilbert* action)). The defendants in the *Gilbert* action included a Four Star "insider," Steven Wade, and two successors to First Charter Bank, First Community Bankcorp

and Pacific Western National Bank. Wade was a vice-president of Four Star and an officer of First Charter Bank, who, “with full knowledge of Four Star’s fraudulent scheme, solicited First Charter Bank customers to invest in Four Star.”

Plaintiffs further alleged that despite the number of legal actions by Four Star investors and creditors and an investigation of Four Star assets by an investors’ committee, no facts or allegations arose that would have put plaintiffs on actual or inquiry notice of any potential claim against Comerica Bank. In particular, plaintiffs asserted that the allegations in the *Gilbert* action did not provide notice because they were based on the conduct of a bank officer who was also an officer in Four Star. Plaintiffs also asserted that “[n]o allegations were made in either the *Gilbert* Lawsuit or any other lawsuit of any similar circumstance at any of the other banks where Four Star maintained depository accounts, including COMERICA, Bank of America, Citibank, and HSBC Bank.”

Additionally, plaintiffs alleged that Comerica Bank engaged in fraudulent concealment of its role in the Four Star Ponzi scheme, by concealing and failing to report as suspicious activity the millions of dollars of investor funds transferred from Four Star’s Comerica Bank checking account to the Anson/Garrett line of credit. Plaintiffs discovered Comerica Bank’s role in October 2008, after Cohn (one of Four Star’s principals) was sentenced in a federal criminal action arising from Four Star’s Ponzi scheme. At that time, Cohn disclosed to plaintiff Pritikin the roles of Comerica Bank and its vice-president Smith in operating the banking scheme that aided Four Star’s Ponzi scheme.

Based on these and other allegations, plaintiffs asserted causes of action for aiding and abetting fraud, aiding and abetting conversion, conspiracy to commit fraud and conversion, aiding and abetting breach of fiduciary duty, violation of Business and Professions Code section 17200 et seq., and aiding and abetting a violation of Business and Professions Code section 17200 et seq.

### ***B. Demurrer to the Original Complaint***

Comerica Bank demurred to the complaint on the grounds that each cause of action was time-barred under either three-year statutes of limitations (Code Civ. Proc., § 338, subdivisions (c) and (d)),<sup>1</sup> or four-year statutes of limitations (§ 343, Bus. & Prof. Code, § 17208). In support of its demurrers, Comerica Bank argued that plaintiffs' causes of action against Comerica Bank accrued no later than 2004 because the allegations of the complaint showed that by 2004 plaintiffs "knew they were the victims of a Ponzi scheme, retained counsel, conducted investigations, and filed actions against Four Star and its banks to recover their Four Star losses."

Comerica Bank also requested judicial notice of numerous complaints and court documents filed in actions in other venues against Four Star and its principals, including the *Gilbert* action. It contended that these publicly available records showed that plaintiffs could not rely upon the delayed discovery rule because a reasonable investigation would have revealed Comerica Bank's alleged role in the Ponzi scheme more than four years before they filed the instant action in 2010.

Additionally, Comerica Bank argued that the doctrine of equitable estoppel did not apply because plaintiffs were already on notice of a potential claim against Comerica Bank; Comerica Bank could not be liable for aiding and abetting a breach of fiduciary duty because it did not owe a fiduciary duty to plaintiffs; and plaintiffs failed to state facts sufficient for the causes of action for aiding and abetting fraud, aiding and abetting conversion, and aiding and abetting breach of duty, since the allegations that Comerica Bank had actual knowledge of the fraudulent scheme were conclusory.

### ***C. The April 27, 2010 Order***

The trial court granted Comerica Bank's request for judicial notice and sustained the demurrers with leave to amend in its order of April 27, 2010.

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<sup>1</sup> All statutory references hereafter are to the Code of Civil Procedure unless otherwise indicated.

In sustaining the demurrers, the trial court ruled that Comerica Bank had established that (1) plaintiffs always knew that Four Star had accounts at Comerica Bank, since they were paid by checks drawn on Four Star's Comerica Bank checking account; (2) by May 2004 the plaintiffs in the *Gilbert* action (including some plaintiffs who are also plaintiffs in this action) had amended their complaint to include a theory that a bank at which Four Star had accounts had helped Four Star to commit fraud; (3) as a result, no later than May 2004 all plaintiffs "were on inquiry notice to investigate connections between Four Star and its principals and management personnel at financial institutions known to be involved with Four Star." The court further determined that if an investigation into "Comerica executive personnel" had taken place in 2004, "then the alleged connection between Anson and Garrett at Four Star [and] Smith at Comerica could have been discovered."

**D. *The First Amended Complaint***

Plaintiffs subsequently filed a first amended complaint (the amended complaint) on May 18, 2010. The amendments directed to the statute of limitations issue included the allegations that Comerica Bank had intentionally concealed its Four Star banking scheme from federal authorities when Comerica Bank knew they were conducting an investigation of Four Star's Ponzi scheme.

Plaintiffs also added more detail to their allegations that they could not have reasonably discovered the factual basis for their claims against Comerica Bank until October 2008, when Four Star principal Cohn revealed Comerica Bank's role in aiding Four Star's Ponzi scheme. According to plaintiffs, the allegations in the *Gilbert* action did not give them constructive knowledge in 2004 of facts that would support a claim against a bank based on wrongdoing in its capacity as a depository bank. They explained that in the *Gilbert* action, the allegations against First Charter Bank were based upon the bank's breach of fiduciary duty to Four Star investors whose investment portfolios were managed by the bank, and also upon a bank officer's false representations, in his capacity as an officer of Four Star, regarding Four Star's financial condition. Plaintiffs further asserted that "[w]hile there were

also allegations against First Charter Bank based on wrongdoing in its capacity as a depository bank, Plaintiffs investigated those allegations against First Charter Bank and found them to be without any factual basis whatsoever.”

The more detailed allegations in the amended complaint also included plaintiffs’ allegation that “[a]t the same time that [they] were attempting to investigate and recover their lost investments in Four Star, the FBI as well as forensic accountants working for the Four Star bankruptcy trustee were also actively investigating the Four Star Ponzi Scheme, including reviewing bank records of Four Star’s accounts at COMERICA and interviewing COMERICA personnel. Yet, prior to Mark Cohn’s disclosure of the Banking Scheme, COMERICA successfully concealed its wrongful conduct from the forensic accountants and from the FBI. Neither the FBI, with its subpoena powers, nor the bankruptcy trustee’s forensic accountant, with its fraud detection training, discovered the Banking Scheme or suspected that COMERICA had assisted Four Star’s fraud. Since neither the FBI nor the forensic accountants could figure it out, no reasonable investigation by Plaintiffs could have uncovered the factual basis for their claims against COMERICA prior to Mark Cohn’s disclosure of the Banking Scheme. Consequently, the statute of limitations on Plaintiffs’ claims did not start to run until Mark Cohn publicly disclosed the Banking Scheme in October 2008.”

The causes of action included in the amended complaint are the same as the causes of action in the original complaint.

#### ***E. Demurrers to the Amended Complaint***

In its demurrer to the amended complaint, Comerica Bank argued that plaintiffs had again failed to “plead around the statute of limitations.” Comerica Bank maintained that the newly added allegations did not show that the delayed discovery rule applied and emphasized its argument that the statute of limitations began to run in May 2004, when plaintiffs “absolutely suspected that Four Star’s banks were involved with and assisting the Four Star Ponzi scheme by shifting funds between accounts and thereby preventing investors from discovering the fraud.” Comerica Bank also

rejected any contention by plaintiffs that Comerica Bank's alleged wrongdoing was wholly different and therefore a separate accrual date applied.

Additionally, Comerica Bank rejected plaintiffs' claim that Comerica Bank had concealed its role in the Four Star Ponzi scheme and therefore the doctrine of fraudulent concealment applied to toll the statute of limitations. Comerica Bank argued that the doctrine did not apply because it did not have a confidential or fiduciary relationship with plaintiffs, and also because they were on notice of their potential claims by May 2004.

Comerica Bank further argued that in the absence of any factual allegations to support the conclusory statement that Comerica Bank had actual knowledge of Four Star's wrongdoing, the amended complaint failed to state facts sufficient for the causes of action for aiding and abetting fraud, aiding and abetting conversion, and aiding and abetting breach of duty.

In support of its demurrers, Comerica Bank filed a request for judicial notice of 32 complaints and other public records involving Four Star, including the amended complaint in the *Gilbert* action filed on May 24, 2004.

#### ***F. Opposition to the Demurrers to the Amended Complaint***

In opposition to the demurrers, plaintiffs reasserted their contention that the delayed discovery rule applied, such that the statutes of limitation were tolled until a reasonable investigation would have revealed a factual basis for the claims against Comerica Bank. Plaintiffs contended that the amended complaint pleaded "facts showing that they diligently attempted to recover their losses from culpable parties, including forming an investors' committee that examined Four Star'[s] assets and reviewed its records, and retaining counsel to pursue lawsuits against known defendants. [Citation.] Plaintiffs' failure to detect the Banking Scheme cannot be attributed to lack of reasonable diligence, since even the Four Star bankruptcy trustee, the FBI and the U.S. Attorney, utilizing all of the resources and legal authority at their disposal, were unable to detect such wrongdoing in their investigations of the Four Star Ponzi scheme. [Citation.] It is clear in hindsight that without cooperation from

an insider, the Banking Scheme was not detectible [*sic*] from document analysis alone.”

Plaintiffs also reiterated their contentions that the *Gilbert* action did not place them on inquiry notice with respect to potential claims against Comerica Bank, since “the allegations of similar wrongdoing against First Charter [Bank] were factually baseless . . . and . . . all publicly available information regarding Comerica[ Bank’s] involvement in Four Star’s operations was entirely consistent with legitimate banking activity, and did not support a reasonable inference of fraud.”

Alternatively, plaintiffs maintained that Comerica Bank was equitably estopped from asserting the statute of limitations defense, since, as alleged in the amended complaint, Comerica Bank had intentionally concealed its wrongdoing and as a result plaintiffs could not identify Comerica Bank as a defendant despite reasonable diligence.

#### ***G. The August 31, 2010 Order***

In its August 31, 2010 order, the trial court granted Comerica Bank’s request for judicial notice and sustained the demurrers to all causes of action in the amended complaint without leave to amend.

The trial court determined that the “judicially noticed material establishes that by no later than May 2004 all present Plaintiffs were on inquiry notice to investigate connections between Four Star and its principals and management personnel at financial institutions known to be involved with Four Star such as Comerica.”

The trial court rejected plaintiffs’ contention that they could not have discovered Comerica Bank’s alleged role in concealing and maintaining Four Star’s Ponzi scheme until October 2008, stating: “This is a clear attempt to invoke the delayed discovery rule. These allegations are not accepted as true by the Court in light of the judicially noticed material and without these allegations, Plaintiffs[’] attempt to invoke the delayed discovery rule fails.”

The court also rejected plaintiffs’ argument that Comerica Bank was equitably estopped from asserting a statute of limitations defense in light of the court’s finding



[Citations.]” (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.)

After reviewing the allegations of the complaint, the complaint’s exhibits, and the matters properly subject to judicial notice, we exercise our independent judgment as to whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

However, where, as here, the defendant demurs on the primary ground that the action is time-barred under the affirmative defense of the statute of limitations, we apply the following standard: “ “ “A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint [and matters subject to judicial notice]; it is not enough that the complaint shows that the action may be barred. [Citation.]” [Citation.]’ [Citation.]” (*Committee for Green Foothills, supra*, 48 Cal.4th at p. 42; § 430.30, subd. (a); see also *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1026-1027.)

### **B. *The Parties’ Contentions***

On appeal, plaintiffs argue that the trial court erred in sustaining Comerica Bank’s demurrers, for three reasons: (1) the amended complaint includes sufficient allegations to show that the delayed discovery rule applies, and therefore the complaint was timely filed in 2010, because a reasonable investigation would not have revealed a factual basis for their claims against Comerica Bank until October 2008 when Four Star principal Cohn revealed the Comerica Bank banking scheme that had aided Four Star’s Ponzi scheme; and (2) the trial court improperly rejected the allegations that a diligent investigation would have not have revealed the factual basis for the claims against Comerica Bank before October 2008; and (3) alternatively, Comerica Bank is estopped from asserting the statute of limitations defense because it intentionally concealed its role in the Four Star Ponzi scheme.

Comerica Bank responds that the trial court correctly determined that the applicable three and four year limitations periods began to run in 2004, when the complaint in the *Gilbert* action was amended to allege that Four Star's Ponzi scheme involved the "shuffling of funds among First Charter [Bank] accounts held by different entities run by Four Star's managers, by payments from Cohn or other lawyers' attorney trust accounts, or by private lines of credit maintained by Anson and Garrett at First Charter[ Bank]." In Comerica Bank's view, "[t]he judicially-noticed facts and plaintiffs' own admissions demonstrate that by May 2004, they suspected Four Star's banks were involved with and assisting the Four Star Ponzi scheme by shifting funds between accounts and thereby preventing investors from discovering the fraud."

In light of the May 2004 allegations in the *Gilbert* action against First Charter Bank, Comerica Bank rejects plaintiffs' contention that it was not possible through the exercise of reasonable diligence to discover Comerica Bank's alleged role in Four Star's Ponzi scheme before October 2008. Comerica Bank argues that "neither this court nor the trial court is obligated to accept unreasonable deductions of fact or allegations that conflict with judicially noticeable facts." Alternatively, Comerica Bank argues that plaintiffs were placed on inquiry notice with respect to potential wrongdoing by Comerica, independently of the *Gilbert* action, before May 2004 as a result of plaintiffs' earlier investigation of the Four Star Ponzi scheme, as well as by the filing of lawsuits against Four Star and plaintiffs' knowledge that their monthly distribution checks from Four Star were drawn on Comerica Bank accounts.

Comerica Bank also contends that plaintiffs err in claiming that their causes of action did not accrue until they discovered facts specifically implicating Comerica Bank, since knowledge of the defendant's identity is not required to trigger the statute of limitations.

Finally, Comerica Bank argues that plaintiffs do not allege facts sufficient to show that it should be equitably estopped from asserting a statute of limitations defense due to fraudulent concealment, since plaintiffs cannot allege that Comerica

Bank had a confidential or fiduciary duty of disclosure and plaintiffs were already on inquiry notice of their potential claims.

We understand the central issue in this appeal to be whether the allegations of the amended complaint show that plaintiffs' action was timely filed under the delayed discovery rule articulated by the California Supreme Court in *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797 (*Fox*) and other decisions (see, e.g. *Poosh v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788 (*Poosh*); *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623 (*Grisham*); *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383 (*Norgart*)). Therefore, we will begin our analysis of the merits of plaintiffs' contentions with an overview of the delayed discovery rule.

### ***C. The Delayed Discovery Rule***

The California Supreme Court has established the rules governing the affirmative defense of the statute of limitations. A statute of limitations prescribes the period "beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox, supra*, 35 Cal.4th at p. 806.) "[It] strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Poosh, supra*, 51 Cal.4th at p. 797.)

"Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all its elements.' [Citations.] An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.]" (*Fox, supra*, 35 Cal.4th at pp. 806-807.) "Discovery of the cause of action occurs when the plaintiff 'has reason . . . to suspect a factual basis' for the action. [Citations.]" (*Poosh, supra*, 51 Cal.4th at p. 797.)

"The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they

have ‘ ‘ ‘ information of circumstances to put [them] *on inquiry*’ ’ ’ or if they have ‘ ‘ ‘ *the opportunity to obtain knowledge* from sources open to [their] investigation.’ ’ ’ [Citations.]” (*Fox, supra*, 35 Cal.4th at pp. 807-808, fn. omitted.)

Relevant to our demurrer review, the California Supreme Court has instructed that “[i]n order to rely on the discovery rule for delayed accrual of a cause of action, ‘[a] plaintiff whose complaint shows on its face that his [or her] claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.’ [Citation.]” (*Fox, supra*, 35 Cal.4th at p. 808.)

Our Supreme Court has further instructed that “[s]imply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period.” (*Fox, supra*, 35 Cal.4th at pp. 808-809; see also *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 286-287.)

However, “ignorance of the identity of the defendant does not delay accrual of a cause of action. . . .” (*Fox, supra*, 35 Cal.4th at 813.) “That is because identity of the defendant is not an element of any cause of action. [Citation.]” (*Norgart, supra*, 21 Cal.4th at p. 399; see also *Cypress Semiconductor Corp. v. Superior Court* (2008) 163 Cal.App.4th 575, 586-587.)

Although the statute of limitations issue normally poses a question of fact, on demurrer we assume the truth of the properly pleaded allegations regarding the

plaintiff's inability to discover the cause of injury within the limitations period despite reasonable diligence in investigating the cause. (*Fox, supra*, 35 Cal.4th at pp. 802, 814-815.)

**D. Analysis**

In the present case, the parties agree that the applicable statutes of limitations are either three-year statutes of limitations (§ 338, subdivisions (c) and (d)), or four-year statutes of limitations (§ 343; Bus. & Prof. Code, § 17208)<sup>2</sup>. The parties disagree as to the accrual date for the causes of action that plaintiffs assert against Comerica Bank.

Comerica Bank contends that the trial court correctly determined that the face of the amended complaint and matters judicially noticed show that the causes of action accrued no later than May 2004, when the *Gilbert* action was amended to include allegations of wrongdoing by one of Four Star's depository banks and plaintiffs knew as well that Comerica Bank was also a Four Star depository bank, and therefore the original complaint was untimely filed more than three or four years later in 2010.

Plaintiffs maintain that the amended complaint adequately alleges, under the delayed discovery rule, that their causes of action against Comerica Bank did not accrue until October 2008, when Four Star principal Cohn disclosed Comerica Bank's role in aiding Four Star's Ponzi scheme, because a diligent investigation would not have revealed the factual basis for their claims against Comerica Bank before that time.

We reiterate that our resolution of the issue is governed by the California Supreme Court's instruction that “ “[a] demurrer based on a statute of limitations

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<sup>2</sup> “The Courts of Appeal are split as to whether the delayed discovery rule applies to a claim brought under [Bus. & Prof. Code] section 17200 and our Supreme Court, while noting the conflict, has yet to resolve the matter. [Citations.]” (*M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, 1531.) We need not address the issue because it has not been raised on appeal.

will not lie where the action may be, but is not necessarily, barred. [Citation.] In order for the bar . . . to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint [and matters subject to judicial notice]; it is not enough that the complaint shows that the action may be barred. [Citation.]” [Citation.]’ [Citation.]” (*Committee for Green Foothills, supra*, 48 Cal.4th at p. 42.) We also reiterate that we must assume the truth of all facts properly pleaded by the plaintiff. (*Evans, supra*, 38 Cal.4th at p. 6.)

Applying this standard, we determine from our independent review that the face of the complaint and matters subject to judicial notice do not clearly and affirmatively show that plaintiffs’ action against Comerica Bank is necessarily time-barred. Even assuming that the face of the amended complaint shows that plaintiffs’ causes of action accrued in May 2004 and would be barred by May 2008 without the benefit of the discovery rule, we find that plaintiffs have adequately pleaded that despite diligent investigation they could not have reasonably discovered facts supporting the causes of action against Comerica Bank before October 2008. (See *Fox, supra*, 35 Cal.4th at pp. 808-809.)

First, plaintiffs specifically pleaded facts showing the time and manner of their discovery of the existence of facts supporting a cause of action against Comerica Bank (see *Fox, supra*, 35 Cal.4th at p. 808): “In or about October 2008, following his sentencing in the Cohn Wire Fraud Action, Cohn disclosed for the first time to one of the Plaintiffs, Plaintiff PRITIKIN, the existence of the [Comerica] Banking Scheme and COMERICA’s and Smith’s roles in the Banking Scheme and the Four Star Ponzi Scheme.”

Second, plaintiffs specifically pleaded facts showing their inability to have made earlier discovery despite reasonable diligence (see *Fox, supra*, 35 Cal.4th at p. 808): “At the same time that Plaintiffs were attempting to investigate and recover their lost investments in Four Star, the FBI as well as forensic accountants working for the Four Star bankruptcy trustee were also actively investigating the Four Star Ponzi Scheme, including reviewing bank records of Four Star’s accounts at [Comerica

Bank] and interviewing [Comerica Bank] personnel. Yet, prior to Mark Cohn's disclosure of the [Comerica Bank] Banking Scheme, COMERICA successfully concealed its wrongful conduct from the forensic accountants and from the FBI. Neither the FBI, with its subpoena powers, nor the bankruptcy trustee's forensic accountant, with its fraud detection training, discovered the Banking Scheme or suspected that [Comerica Bank] had assisted Four Star's fraud."

Plaintiffs also alleged that they "conducted an investigation and have determined that there is no factual basis to assert that First Charter [Bank], in its capacity as a depository bank holding Four Star accounts, engaged in any active conduct to participate in or to assist Four Star's fraud. To the extent that the Amended *Gilbert* Complaint's allegations that First Charter [Bank] participated in the 'shuffling of funds among First Charter accounts', and/or that First Charter [Bank] participated in the 'transfers of assets needed to perpetuate' the fraud, are construed to mean that First Charter [Bank] itself engaged in active conduct to move funds between accounts to support the fraud, as opposed to passively sitting by while the accountholder, Four Star, actively moved funds between accounts, then these allegations are without any factual basis whatsoever."

Thus, we determine that plaintiffs have adequately alleged facts supporting a theory of delayed discovery since they pleaded specific facts to show that, despite diligent investigation of the circumstances of the injury by themselves and others, they could not have reasonably discovered facts supporting their causes of action against Comerica Bank within the applicable three or four year statutes of limitations periods. (*Fox, supra*, 35 Cal.4th at pp. 808-809.) Based on these allegations, the causes of action against Comerica Bank did not accrue until October 2008 and the original complaint was timely filed in 2010.

The California Supreme Court's decision in *Fox* supports this determination. In *Fox*, the plaintiff amended the complaint in her medical malpractice action to allege a products liability cause of action against the manufacturer of a stapler used during her surgery. (*Fox, supra*, 35 Cal.4th at pp. 804-805.) The manufacturer

demurred on the ground that the cause of action was time-barred. The court determined that the plaintiff's proposed second amended complaint was sufficient to withstand demurrer because it included specific facts to support her allegations that she could not have discovered through reasonable diligence that the stapler was a cause of her injury until the deposition of her surgeon was taken, which were allegations that the court assumed to be true for purposes of demurrer. (*Id.* at p. 811.)

Similarly, as we have discussed, plaintiffs in the present case have pleaded specific facts to support their allegations that they could not have discovered the facts supporting their claims against Comerica Bank until October 2008. We assume the truth of these allegations (*Evans, supra*, 38 Cal.4th at p. 6) and do not find them to be contradicted by the matters subject to judicial notice, including the complaint in the *Gilbert* action. Even assuming that the *Gilbert* action placed plaintiffs on inquiry notice with respect to Four Star's depository banks in May 2004, plaintiffs specifically allege that investigation of Comerica Bank by the FBI and the Four Star bankruptcy trustee's forensic accountants did not reveal any wrongdoing by Comerica Bank during the following four years. In other words, plaintiffs have alleged specific facts showing that their investigation would have not have "brought such information to light" prior to October 2008. (*Fox, supra*, 35 Cal.4th at p. 809.)

The decision on which Comerica Bank relies, *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658 (*Peregrine Funding*) does not convince us otherwise. In *Peregrine Funding*, a statute of limitations issue was raised in the context of a special motion to strike under the anti-SLAPP statute (§ 425.16). The defendant law firm contended that the plaintiff investors had sufficient knowledge before the limitations period expired to put them on inquiry notice of their malpractice claims against the law firm. The appellate court agreed, determining that the evidence presented with the anti-SLAPPs motion showed that the investors had access to specific information in the law firm's files that, if the investors had requested the files, would have placed them on inquiry notice during the limitations period. (*Peregrine Funding, supra*, at pp. 685-686.) In contrast, plaintiffs

here have specifically alleged that the professional investigators who examined Comerica Bank's records in connection with Four Star did not discover any wrongdoing by Comerica Bank; therefore, it is a reasonable inference that even if plaintiffs had requested and examined Comerica Bank's records, they, too, would have been unsuccessful in discovering that Comerica Bank had aided Four Star's Ponzi scheme.

For these reasons, we conclude from our independent review that it does not "clearly and affirmatively appear" from the face of the first amended complaint that the action is "necessarily" time-barred. (*Committee for Green Foothills, supra*, 48 Cal.4th at p. 42.) We will reverse the judgment of dismissal with directions to the trial court to enter a new and different order overruling Comerica Bank's demurrers to the amended complaint. Having reached this conclusion, we need not address plaintiffs' equitable estoppel argument.

Finally, we express no opinion regarding plaintiffs' ability to prove that the delayed discovery rule applies and accrual of their causes of action against Comerica Bank was therefore delayed until October 2008. (*Fox, supra*, 35 Cal.4th at p. 811, fn. 6.)

#### **IV. DISPOSITION**

The judgment of dismissal is reversed. The trial court is directed to enter a new and different order overruling Comerica Bank's demurrers to the first amended complaint. Costs on appeal are awarded to appellants.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P. J.

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WALSH, J.\*

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\*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.