# IN THE SUPREME COURT OF MISSISSIPPI

No. 2006-IA-00270-SCT

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*SOUTHERN FARM BUREAU*
*LIFE INSURANCE COMPANY,*

**Appellant/Defendant,**

**vs.**

***LELA BLUE, ZELTER DELYN BLUE, and***
***MICHAEL DELYN BLUE,***

**Appellees/Plaintiffs.**

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**On Interlocutory Appeal from the Circuit Court of Jones County in**
***Lela Blue, et al. v. Southern Farm Bureau Life Insurance Company, et al.***
**Civil Action No. 2005-132-CV8**

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**REPLY BRIEF OF APPELLANT**
**SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY**

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**Markham R. Leventhal (MB [redacted]**
**JORDEN BURT LLP**
**777 Brickell Avenue**
**Suite 500**
**Miami, Florida 33131-2803**
**(305) 371-2600**

**Fred L. Banks, Jr. (MB [redacted]**
**James W. Shelson (MB [redacted]**
**PHELPS DUNBAR LLP**
**111 East Capitol Street, Suite 600**
**P.O. Box 23066**
**Jackson, Mississippi 39225-3066**
**(601) 352-2300**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT REGARDING ORAL ARGUMENT

Defendant Southern Farm Bureau Life Insurance Company believes that oral argument will benefit the Court in resolving the important statute of limitations issues presented by this interlocutory appeal.

## <u>INTRODUCTION TO REPLY</u>

Although plaintiffs argue that they are <u>not</u> attempting to create or exploit a purported loophole in this Court's *Stephens* opinion,[1] they erroneously contend in a vanishing premium case exactly like *Stephens*, that the statute of limitations "does not prohibit a policyholder from bringing a claim when he/she sues before overpaying more than 3 years past the 'vanish' date." Brief of Appellees at 3 (hereinafter "Answer Brief"). According to plaintiffs, the limitations period does not commence until the end of their alleged "vanish" period. Thus, plaintiffs claim that they may arbitrarily "allege" their own limitations period. They argue further that they may plead around this Court's holding in *Stephens* with nothing but conclusory allegations because there is no requirement that they plead fraudulent concealment with particularity. If adopted, plaintiffs' arguments would open the flood gates of litigation by rendering *Stephens* virtually meaningless, casting aside the multiple court of appeals decisions which have properly followed *Stephens*. Plaintiffs' arguments should be rejected.

Plaintiffs begin their brief with a misleading and deceptive argument based on an incomplete premium illustration. Plaintiffs disingenuously attach only "PAGE 1 of 2" of the illustration. *See* Answer Brief at 4. The omitted page 2 and accompanying disclosures make clear that the illustration is <u>not</u> a guarantee or estimate of future results, that the illustration will change if dividends are reduced in future years, and that the illustration is not a contract or offer to contract.[2] While plaintiffs attempt to use a fragment from the illustration to bolster the merits of their claims, they never explain how the illustration allows them to escape the statute of limitations. Since it was delivered ***before*** the sale, the illustration could not possibly represent a

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[1] *Stephens v. Equitable Life Assur. Soc'y*, 850 So. 2d 78 (Miss. 2003).

[2] Page 2 of the illustration states that it is "not valid" without accompanying Form 8315. The detailed disclosures in Form 8315 render the plaintiffs' claims untenable.

subsequent affirmative act of concealment which prevented discovery of plaintiffs' claims, and it does not eliminate plaintiffs' obligation to demonstrate that they were unable to discover their claims despite due diligence. Reliance on the incomplete illustration is nothing but a red herring.

Plaintiffs also attempt to escape *Stephens* by arguing that the policies here are "ambiguous" and do not sufficiently put them on notice of their claims. Plaintiffs' argument is disingenuous. First, plaintiffs fail to allege that they read the policies. Thus, they are unable to rely on any ambiguity argument. Second, this Court held in *Stephens* that identical policies were sufficiently clear to put the plaintiffs on notice of their claims. Third, even if the policies were ambiguous (which they are not), the complete absence of any provisions in the policies terminating premium payments after 10 years should have immediately put plaintiffs on notice of their claims.

Moreover, their claimed ambiguity, suggesting that a reasonable policyholder could conclude that premiums could have been paid by dividends ignores the fact that the policy plainly disclaims any guaranteed dividends. With respect to dividends, it says that "this policy's share, if any, will be determined each year by the Company and credited as a dividend." CP 1:69, RE 40. In other words, there is no contractual obligation to credit any particular amount of dividends to that policy in any given year or years.

Plaintiffs also mischaracterize several pre-*Stephens* federal court decisions in an effort to support their arguments. Contrary to plaintiffs' contention, the district court's decision in *Phillips v. New England Mutual Life Insurance Co.* does not help them.[3] *Phillips* was decided before *Stephens*, in the context of a motion to remand from federal to state court, where the legal

[3] 36 F. Supp. 2d 345 (S.D. Miss. 1998).

standards and burdens are entirely different.[4] The *Phillips* court never held that vague allegations regarding a failure to disclose "actuarial computations" constituted a "subsequent affirmative act of concealment" under *Stephens*. Indeed, *Stephens* had not yet been decided, and *Phillips* acknowledged that, at the time, "[t]he Mississippi Supreme Court apparently has yet to say whether subsequent affirmative acts are required . . . to toll the statute of limitations."[5] The suggestion that *Phillips* decided "the same statute of limitations arguments" presented in this case is baseless. Answer Brief at 21-22.

Finally, plaintiffs offer absolutely no explanation as to why they did not file their claims in 1995 or within three years thereafter. The alleged 10 year "vanish" period for the first two of their four policies, sold in 1985, expired in 1995. The "vanish" period for the third policy expired in 1997, and the plaintiffs describe the terms of their fourth policy as "virtually identical" to the first three. Yet plaintiffs continued to pay premiums for ten additional years and did not file this lawsuit until August 3, 2005. There is simply no excuse for plaintiffs' time barred claims.

In sum, none of the plaintiffs' arguments allow them to escape *Stephens*. This Court should affirm its holding in *Stephens* and clarify that conclusory allegations of fraudulent concealment or mere nondisclosure are insufficient to toll the statute of limitations. The trial court's order denying the motion to dismiss should be reversed.

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[4] *Id.* at 347 (heavy burden of persuasion placed on defendant to prove "no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court") (internal quotations omitted).

[5] *Phillips*, 36 F. Supp. 2d at 349. *Phillips* concluded only, for purposes of federal court removal from jurisdiction, that "***this court cannot say that it would be impossible*** for a state court to conclude that defendants took affirmative steps to fraudulently conceal plaintiffs' cause of action." *Id.* at 350 (emphasis added).

# ARGUMENT

## I. PLAINTIFFS MISCHARACTERIZE AND ATTEMPT TO ESCAPE THE HOLDINGS OF *STEPHENS*

Plaintiffs incorrectly state in their Answer Brief that "a careful reading of *Stephens* clearly shows that plaintiffs' claims are timely." Answer Brief at 10. According to plaintiffs, a "careful" reading of *Stephens* means that policyholders may completely ignore the terms of their policies and their obligation of due diligence because causes of action based upon vanishing premium allegations are automatically tolled in all cases until the end of the alleged vanish period. *Id.* at 11. Plaintiffs reach this conclusion only by ignoring the *Stephens* opinion and the dual prerequisites of the fraudulent concealment statute.

### A. Under *Stephens,* Plaintiffs' Claims Accrued At The Time Of Sale And Expired Three Or Six Years Later

*Stephens* holds that claims for fraud in the sale of a life insurance policy accrue at the time of sale, and the statute of limitations begins to run at that time. *Stephens*, 850 So. 2d at 83. Plaintiffs acknowledge this on page 14 of their Answer Brief: "In *Stephens*, this Court held that a fraud claim accrues upon the completion of the sale induced by false representation, or upon the consummation of the fraud." Despite this acknowledgement, plaintiffs proceed to ignore this holding and argue that the statute of limitations does not begin to run until the expiration of their alleged "vanish" date, ten years after the policies were sold.[6] *Stephens* does not support plaintiffs' position. 850 So. 2d at 83 ("The purchase of the policies were made in 1972; thus the causes of action accrued in 1972 . . . . **the statute of limitations ran in 1978**.") (emphasis added).

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[6] *See* Answer Brief at 11 (arguing "*Stephens* allows a cause of action for plaintiffs who have not paid premiums for more than 3 years past the 'vanish' date") (footnote omitted).

In this case, plaintiffs purchased their life insurance policies in 1985, 1987, and 1995. Under *Stephens*, plaintiffs' causes of action accrued upon the sale of the policies in 1985, 1987, and 1995, and the statute of limitations ran in 1991, 1993, and 1998, respectively. The plaintiffs did not file suit until 2005, which was "well outside of the statute of limitations." *Id.*

### B. Plaintiffs' Ambiguity Argument Has No Effect On The Tolling Analysis Under *Stephens*; Plaintiffs' Policies Are Not Ambiguous

Plaintiffs attempt to escape *Stephens* by mistakenly arguing that their policies are "ambiguous." *See* Answer Brief at 12-13. But *Stephens* held that identical policies were not ambiguous and put the plaintiffs on notice of their claims. In any event, plaintiffs' ambiguity argument does not allow them to escape the two-pronged test for tolling under *Stephens*. Moreover, the argument is disingenuous because plaintiffs fail to allege they read their policies. *See* Answer Brief at 5 ("it does not matter if a party reads the contract"). The plaintiffs' ambiguity argument does not create an exception to the test for tolling under *Stephens*, nor does it excuse the plaintiffs from their obligation to demonstrate due diligence. There is no question that the policies were sufficient to put the plaintiffs on notice of their claims. It is undisputed that the policies contain no provisions terminating premium payments after ten years. The complete absence of any such provisions would, at a minimum, put any reasonable person on inquiry notice of a vanishing premium claim.

#### 1. The Premium Provisions In Plaintiffs' Policies Are Substantively Identical To Those In *Stephens*

Plaintiffs' policies are substantively identical to the policies at issue in *Stephens*, which this Court expressly held were unambiguous. In *Stephens*, plaintiff Henry Palmer alleged that his out-of-pocket premiums were to vanish at age 58, and "then the premium would be ***fully paid with dividends***." 850 So. 2d at 80 (emphasis added). This Court contrasted the agent's alleged promise with the actual terms of Palmer's schedule page which contained the following language:

BENEFITS AND PREMIUMS TABLE

| BENEFITS | MONTHLY PREMIUM | PREMIUM PERIOD |
|---|---|---|
| LIFE INSURANCE | $45.88 | TO AGE 70 |
| | $37.97 | THEREAFTER |

*Id.* at 80. The Stephenses' policies were similar and required premium payments for the joint-life of the spouses.

This Court rejected the Stephenses' argument that their premiums would vanish after 20 years and Palmer's argument that his premiums were due to be paid from dividends once he reached the age of 58, finding that the policies were unambiguous:

> The terms of the policy . . . ***unambiguously*** state that the Stephenses' premium was payable for the joint-life of the spouses, i.e., until such time as one of the spouses died. The ***unambiguous, written terms*** of Palmer's policy stated that a monthly premium of $45.88 was payable until he reached age 70 and a monthly premium of $37.97 was payable thereafter. Both policies also had a general provision that ***unambiguously*** prohibited any oral modification to the insurance policies.

*Id.* at 83.

Plaintiffs' allegations are identical to the allegations in *Stephens*. The premium provisions in their policies are indistinguishable from those reviewed by this Court in *Stephens*. Each of the plaintiffs' policies in this case contains a Schedule Page. As in *Stephens*, the Schedule Page unambiguously states the amount of premium, and the number of "years premiums payable" – 80, 78, 54, and 39 years, respectively. For example, Michael Delyn Blue's life insurance policy, purchased by Lela Blue in 1985,[7] contains the following premium provisions:

SCHEDULE PAGE

| BENEFIT | BENEFIT AMOUNT | YEARS PREMIUM PAYABLE | ANNUAL PREMIUM |
|---|---|---|---|
| WHOLE LIFE AAL | $10,000 | 60 | 92.70 |

CP 1:66, RE 37.

This Court's analysis in *Stephens* is controlling; the premium provisions in the policies are unambiguous and plaintiffs' claims are time-barred.[8]

### 2. The Dividend Provisions In Plaintiffs' Policies Are Substantively Identical To Those In *Stephens*

Plaintiffs' policies provide for the payment of discretionary dividends, just like the plaintiffs' policies did in the *Stephens* case. Plaintiffs argue that an ambiguity is created by the dividend section of Southern Farm's policy form, Section 4, which provides that the policy

[7] Plaintiffs confirm in their Answer Brief that the alleged misrepresentations were made solely to plaintiff Lela Blue, and that she purchased all four of the life insurance policies at issue in this lawsuit. *See* Answer Brief at 3 (agent met with Lela Blue); *id.* at 3, n.1 ("representations were made to Lela Blue, [and] she purchased the policy" insuring Michael Delyn Blue); *id.* at 8 (Lela Blue purchased all four life insurance policies over a 10-year period).

[8] Plaintiffs' reliance on authorities from Michigan and Illinois (Answer Brief at 24-25) is misguided because this Court in *Stephens* squarely addressed each of the issues raised by plaintiffs in this case. Nevertheless, numerous courts in other jurisdictions have dismissed nearly identical "vanishing" premium claims as barred by the statute of limitations. *In re Lutheran Brotherhood Variable Ins. Prods. Co. Sales Practices Litig.*, 2002 WL 1023150 (D. Minn. May 17, 2002) (granting partial summary judgment on statute of limitations grounds); *Thelen v. Mass. Mut. Life Ins. Co.*, 111 F. Supp. 2d 688 (D. Md. 2000) (dismissing fraud and breach of contract claims at the pleading state); *Ruddy v. Equitable Life Assur. Soc'y*, 2000 WL 964770 (D. Md. June 20, 2000) (dismissing various tort and contract claims); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 107 F. Supp. 2d 841 (W.D. Mich. 2000) (same); *Pearson v. Mnfr's Life Ins. Co.*, 1996 WL 939271, *2 (N.D. Fla. Oct. 2, 1996) (dismissing "vanishing premium" claims because similar policy language put plaintiffs on notice that the alleged representation was false); *Cole v. Equitable Life Assur. Soc'y*, 707 N.Y.S. 2d 56, 56-57 (N.Y. App. Div. 2000) (finding plaintiffs' fraud, misrepresentation, and fiduciary duty claims barred).

owner may elect to apply dividends to four options, including cash payments, premium reduction, interest accumulation, and purchase of paid-up additions.[9] But the insurance policies in *Stephens* contained virtually identical provisions regarding application of dividends. *See generally* CP 3:393-96, 416-32, CP 4:460-64, 484-86, 491-97, 502-05, 511, 549-58; RE 95-144 (copies of the life insurance policies analyzed by this Court in *Stephens*).

The Joint Life Policy issued to the Stephenses and considered in that case includes, at Page Five, a section entitled DIVIDENDS, which provides the policy owners with the option of choosing four alternatives for the application of dividends:

> 1. CASH: Paid in cash.
>
> 2. PREMIUM PAYMENT: Applied toward payment of any premium then due if the remainder of the premium is duly paid.
>
> 3. DIVIDEND ADDITIONS: Applied to provide paid-up additional joint whole life insurance on the Insured. (This option shall apply if no election is in force three months after the Equitable mails the dividend notice.)
>
> 4. DIVIDEND ACCUMULATIONS: Accumulated with interest at 3% compounded annually. Accumulations may be increased each year by excess interest as determined by the Equitable.

CP 3:418, RE 101 (Milton and Helen Stephens policy). Henry Palmer's policy contained four similar alternatives. CP 4:503, RE 131 (Henry E. Palmer policy). Similarly, the Southern Farm policies provide the following options for application of dividends:

> A. **Cash.** Dividends are paid in cash.
>
> B. **Reduce Premium.** Dividends are applied toward the payment of a premium due during the following policy year, if the balance of

[9] Plaintiffs contend incorrectly that the Southern Farm policies "do not specify by whom and by what source" the premiums would be paid at various times. Answer Brief at 12. Just as the Schedule Page spells out each policy's premium requirements, the Cover Page for each of the plaintiffs' four policies specifically provides that the policy owner is responsible for premiums by providing that the insurance contract is issued "in consideration of the application and ***of the payment of premiums.***" *See, e.g.*, CP 1:63, RE 34 (Policy of Michael Delyn Blue).

premium is paid. If the balance is not paid or if there is no premium due, the dividend will be paid in cash. This option will not apply if premiums are being paid monthly under a special premium payment agreement.

C. **Accumulate with Interest.** Dividends are left to accumulate with interest. Interest will be credited at a rate of at least 3% per year, compounded annually.

D. **Paid-Up Additions.** Dividends are applied to purchase additional participating paid-up insurance payable under the same conditions as this policy. The cash value of any paid-up additions will always be equal to or greater than the dividends used to provide such additions.

CP 1:69, RE 40 (Michael Delyn Blue policy); CP 1:85, RE 55 (Leah C. Blue policy); CP 1:103, RE 72 (Lela A. Blue policy); CP 1:119, RE 87 (Delyn Blue policy). None of these dividend provisions terminate plaintiffs' obligation to pay premiums.[10]

This Court held that the policies in *Stephens*, containing dividend provisions substantively identical to the policies involved in this case, unambiguously explained the policies' premium payment requirements despite the plaintiff's dividend allegations. 850 So. 2d at 80. Because the policies in *Stephens* are unambiguous, so too are the policies in this case. Plaintiffs' ambiguity argument fails.

### C. Under *Stephens*, A Plaintiff Must Plead And Prove The Dual Prerequisites Of Tolling To Invoke The Fraudulent Concealment Statute

After first establishing that so-called vanishing premium causes of action accrued at the time of the sale of the insurance policies, and expired six years later, *Stephens* then rejected the plaintiffs' argument that the statute of limitations could be tolled for fraudulent concealment under Miss. Code Ann. § 15-1-67. *Stephens* reiterated the standard for when the statute of

[10] Plaintiffs also rely upon a dividend provision in the 1995 policy which states that "[o]ther uses [of dividends] may be made available by the Company," to support their contention that premiums were to vanish or disappear. Answer Brief at 7. This general policy provision is unhelpful to plaintiffs. The policy contains no vanishing premium promise and does not even contain the words "vanishing premium" or "disappearing premium." CP 1:119, RE 87.



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limitations may be tolled for fraudulent concealment: "plaintiffs have a two-fold obligation to demonstrate that (1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) due diligence was performed on their part to discover it." 850 So. 2d at 84. This Court later clarified that the first prong of the test requires a "subsequent affirmative act of concealment which was designed to prevent and which did prevent discovery of the claim." *Andrus v. Ellis*, 887 So. 2d 175, 181 (Miss. 2004).

### 1. As A Matter Of Law, There Is No Fraudulent Concealment Because The Plaintiffs Had The Written Policies Which Contained No Vanishing Premium Term

As a preliminary matter, plaintiffs have no claim for fraudulent concealment because the written terms of their policies contradict the alleged misrepresentations:

> The plaintiffs all had the written insurance policies. The policies were unambiguous and clearly stated the terms of payment. There was no affirmative act to prevent discovery, the terms were written into the policy.

850 So. 2d at 84.

As in *Stephens*, plaintiffs claim that they were induced to purchase life insurance policies which did not contain any provisions guaranteeing that premiums would vanish in 10 years.[11] The policy documents delivered at the time of sale flatly refute that claim. Accordingly, plaintiffs cannot establish fraudulent concealment as a matter of law.

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[11] Ironically, the plaintiffs take issue with the fact that their life insurance policies were not delivered until several weeks after the sales presentations, and then assert that "it does not matter if a party reads the contract." Answer Brief at 5. There is no allegation in the Complaint, however, that the policies were not timely delivered. Moreover, plaintiffs ignore that their policies were issued after an application and underwriting process. Each of the plaintiffs' policies came with a 10-day "free look" period which provides that the "Owner may return this policy to the Company or to its authorized agent within 10 days after receiving it for a full refund of premium." Plaintiffs' attempts to discount the "free look" period are nonsensical. The "free look" period is a valuable benefit, in that it allows the policy owner to review the contract once it is delivered and cancel it with no penalty if the terms are different from what the policy owner expected, or if it ***does not contain a particular term*** the policy owner expected it to have such as a promise that premiums will vanish after just 10 years. CP 1:63, RE 34 (Policy Cover Page).

### 2. Plaintiffs Failed To Allege A Subsequent Affirmative Act Of Concealment

In their Answer Brief, plaintiffs failed to identify any post-sale act by Southern Farm designed to prevent plaintiffs from discovering their alleged claims. Plaintiffs assert that their Complaint is "riddled with allegations of concealment" (Answer Brief at 15), but they fail to identify any part of the Complaint alleging a subsequent affirmative act of concealment. This is fatal to their concealment claim.

This Court has held that "***subsequent affirmative*** acts of concealment" are required to establish fraudulent concealment for tolling purposes. *Andrus*, 887 So. 2d. at 181 (emphasis added). Despite this holding, plaintiffs argued, and the trial court erroneously agreed, that they could satisfy this requirement by merely repeating a series of conclusory allegations and "buzzwords" in their Complaint. Plaintiffs' Answer Brief merely repeats those vacuous allegations. Answer Brief at 15-19. It is well-settled, however, that allegations of fraud must be pled with particularity to survive dismissal pursuant Miss. R. Civ. P. 9(b), and it is insufficient for plaintiffs to merely "intertwine fraudulent concealment" claims into their allegations of fraudulent inducement to plead around that statute of limitations. *Sanderson Farms, Inc. v. Ballard*, 917 So. 2d 783 (Miss. 2005); *see also Robinson v. Southern Farm Bureau Cas. Co.*, 915 So. 2d 516 (Miss. Ct. App. 2005) (claims barred by statute of limitations where plaintiffs "vaguely referenced misrepresentations and concealment attributable to [the defendant] without specifying any factual basis" and where plaintiffs failed to comply with Miss. R. Civ. P. 9(b)).

Upon examination, all portions of the Complaint quoted in the Answer Brief are devoid of any affirmative act subsequent to the sale of the policies.[12] For instance, although plaintiffs

[12] The quotations from the Complaint reproduced at page 15 through the first half of page 17 of the Answer Brief involve allegations relating to the sales of the insurance policies, and by definition cannot be ***subsequent*** affirmative acts.

repeatedly use the word "conceal," and the phrase "actively concealed," they fail to identify any affirmative act to conceal:

- Southern Farm Bureau and Defendants fraudulently **concealed** the real reason why Plaintiffs had to pay additional out-of-pocket premiums.

- Defendants fraudulently concealed from Plaintiffs, **both at the time of the sale and their dealings with the Plaintiffs from the time of the sale until the present**, material information regarding the ability of the premiums to remain limited in number and whether the policies were good investments and savings/retirement plans.

- **To present**, Defendants have fraudulently **concealed** the underlying inflated assumption to their policies.

- **To this date**, Defendants have fraudulently **concealed** Southern Farm Bureau's inflated dividend and/or interest rate projections.

- **To this date**, the agent Defendant and Southern Farm Bureau have fraudulently **concealed** Southern Farm Bureau's inflated dividend and/or interest rate projections.

Answer Brief at 17-19 (emphasis in original). These are nothing but alleged inactions. There is nothing "affirmative" about them. As this Court explained in *Sanderson Farms*, "merely alleging the other side has complete control of the data simply will not suffice." *Id.* (mandating dismissal where plaintiffs had their written contracts and failed to adequately allege acts of concealment).

Thus, plaintiffs here are reduced to making the groundless claim that a failure to act constitutes active concealment:

- **After** the sale of the subject policies, Southern Farm Bureau and the agent Defendants ***actively*** **concealed** Southern Farm Bureau's inflated dividend and/or interest rate projections and the fact that premiums were not guaranteed to be limited in number ***by failing to meet with Plaintiffs annually*** to discuss dividends and/or interest actually paid on the policies and how that affected premiums.

- Further, Southern Farm Bureau **actively concealed** the original fraud ***by* failing to disclose *on the annual statement (or any other document)*** to Plaintiffs that they had to pay additional out-of-pocket premiums because of Southern Farm Bureau's failure to meet its inflated dividend and/or interest rate projections.

- The agent Defendant ***actively*** **concealed** Southern Farm Bureau's inflated dividend and/or interest rate projections and the fact that premiums were not guaranteed to be limited in number ***by failing to meet with Plaintiffs annually*** to discuss dividends and/or interest actually paid on the policies and how that affected premiums.

*Id.* (italicized emphasis added; other emphasis in original). But an alleged failure to act can never be deemed an affirmative act. *See Mayronne v. Reassure Am. Life Ins. Co.*, 136 Fed. App'x 705, 706 (5th Cir. 2005) (unpublished) (life insurer's failure to directly respond to insured's letter, which stated insured's understanding that his premiums would vanish after seven years, did not constitute an affirmative act of concealment).

The plaintiff in *Mayronne* claimed his insurer was actually on written notice that plaintiff believed his premiums should vanish after seven years. *Id.* at 706. The plaintiff claimed his insurer's failure to inform him that premiums would not vanish was an affirmative act of concealment. *Id.* Rejecting this argument, the Fifth Circuit court held that the plaintiff "was at all relevant times capable of reviewing his policy, which would have revealed to him that the policy did not provide an end to his premiums after seven years." *Id.*

In this case, plaintiffs' policies, on their face, inform plaintiffs that premium payments are required for a specific number of years. Accordingly, plaintiffs in this case, like the plaintiff in *Mayronne*, have not satisfied the requirement that the alleged fraudulent concealment must be a subsequent affirmative act.

### 3. Plaintiffs Failed To Perform Due Diligence To Toll The Statute Of Limitations

Plaintiffs also failed to establish the second prong of the fraudulent concealment statute – that the "the fraud remained undiscoverable by reasonable diligence for such a long time that the date on which [the plaintiffs] filed their complaint fell within the tolled limitations period."

*Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199, 206 (Miss. 1999) (quoting *Stevens v. Lake*, 615 So. 2d 1177, 1181 (Miss. 1993)). Plaintiffs' Answer Brief confirms that they did not exercise even minimal due diligence as required by the fraudulent concealment statute.

Incredibly, plaintiffs contend that: (1) their failure to read the insurance policies is irrelevant because they are bound by the written insurance contracts anyway, and would not have understood the policies if they had read them (Answer Brief at 5-6); and (2) they exercised diligence 10 years after they purchased the policies "by contacting Defendants to determine why their policies were not paid-up when represented." (Answer Brief at 19). According to plaintiffs, no act of diligence was required until their premiums failed to vanish. Answer Brief at 19. Mississippi law is to the contrary. *See, e.g.*, *Sanderson Farms*, 917 So. 2d at 790 (holding plaintiffs claims were barred and the statute of limitations was not tolled where "the plaintiffs do not demonstrate any action by them to obtain any of the allegedly concealed information").

This Court established in *Stephens* that the statute begins to run in a case like this at the time of the purchase <u>*unless*</u> the plaintiffs meet the two-pronged test for tolling. 850 So. 2d at 84. The due diligence prong must be analyzed in light of the legal requirement that an individual has an "obligation to read" the written contract. *Id.* at 82; *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So. 2d 1254, 1257 (Miss. 1991) (plaintiffs were "under an obligation to read [the] contract"); *accord Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988) (applying Mississippi law and holding that a "[p]laintiff is not permitted a 'leisurely discovery of the full details of the alleged scheme'") (internal citations omitted).[13]

[13] Plaintiffs are incorrect in their assertion that the "duty to read" does not exist or is excused by their conclusory allegations of fraudulent concealment. Answer Brief at 6. As the Fifth Circuit explained in *Ross v. Citifinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003), the *Stephens* case reaffirms a party's duty to read his or her insurance policy in the statute of limitations context. *Id.* at 465 ("*Stephens*, 850 So. 2d 78, is highly persuasive authority that the Mississippi Supreme Court would bar plaintiffs' claims."). The *Ross* court explained that although two

By the time the plaintiffs performed their single alleged act of diligence in this case in 1995 or later,[14] the statute of limitations period had long expired. Plaintiffs were not entitled to sit on their rights for over a decade before taking any action. *See Andrus*, 887 So. 2d at 181 (plaintiffs could not establish due diligence where they received copies of their loan documents but "failed to object or inquire further regarding the fact that their understanding of the transaction differed from the insurance disclosure").

Moreover, plaintiffs cannot avoid their obligation to perform due diligence by simply alleging that they would not have understood the policy if they had read it. *See generally*, *EquiFirst Corp. v. Jackson*, 920 So. 2d 458 (Miss. 2006) (rejecting plaintiffs' argument that they should be excused from their duty to read the contract because one plaintiff had difficulty reading and the other was rushed when executing the contract); *McKenzie Check Advance of Mississippi, L.L.C. v. Hardy*, 866 So. 2d 446, 455 (Miss. 2004) ("[A] contracting party is under a legal obligation to read a contract before signing it.") (citation omitted).

Finally, plaintiffs claim incorrectly that "[w]hether one exercised due diligence to discover the fraud is a question of fact for the jury to decide." Answer Brief at 20. Ignoring *Stephens*, plaintiffs rely upon *Donald v. Amoco Production Co.*, 735 So. 2d 161 (Miss. 1999), in which the Court stated that "the statute of limitations commences upon discovery of an injury,

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exceptions to the duty to read exist, neither the *fraud in factum* exception nor the equitable relief exception applies unless the plaintiffs claim: (i) that they misapprehended the very nature of the document (*e.g.*, believing a new lease was merely a corrected signature page for an existing contract); or (ii) that they are seeking an equitable remedy (*e.g.*, rescission) rather than damages. *Id.* The court in *Ross* concluded that the plaintiffs had a duty to read the loan and credit insurance agreements whose terms they later claimed had been misrepresented. *Id.* (distinguishing authorities referenced in plaintiffs' Answer Brief). The plaintiffs here, like the plaintiffs in *Stephens* and *Ross*, had an unflagging duty to read their insurance contracts.

[14] The Complaint fails to allege any particulars such as the date, circumstances, or conversation that allegedly took place between Lela Blue and her agent after she realized her obligation to make premium payments had not ceased in 1995.

and discovery is an issue of fact to be decided by a jury when there is a genuine dispute." *Id.* at 167. The *Donald* case is inapposite because it did not involve allegations of fraud, but rather, involved undiscoverable hazardous waste upon land. No contracts were delivered in *Donald* at the time of the transaction which disclosed the existence of hazardous waste. In *Stephens*, this Court affirmed the trial court's order dismissing plaintiffs' complaint with prejudice where the contracts disclosed the existence of lengthy premium obligations. 850 So. 2d at 83. As in *Stephens*, plaintiffs here have not alleged due diligence and cannot invoke the tolling statute as a matter of law.

### D. The "Latent Injury" Statute Does Not Apply In This Case

Again ignoring this Court's analysis in *Stephens*, plaintiffs argue that the "latent injury" subsection of Miss. Code Ann. § 15-1-49 delayed accrual of their claims for ten years. Answer Brief at 13. This Court considered Section 15-1-49 in *Stephens*. and implicitly rejected any argument that fraud or deceit in the sale of a life insurance policy results in "latent injury or disease" under the statute. 850 So. 2d at 82 ("purchaser's right of action for such deceit accrues upon the completion of the sale induced by such fraudulent representation, or upon the consummation of the fraud.") (quoting *Dunn v. Dent*, 153 So. 798 (1934)).

This Court held that, pursuant to Miss. Code Ann. § 15-1-49, the plaintiffs' claims in *Stephens* accrued immediately. 850 So. 2d at 82. Similarly, there is no injury or disease here, latent or otherwise. Plaintiffs are incorrect that the latent injury statute applies in a case such as this, where there is only alleged economic injury, the policy documents disclosing the alleged claim were delivered at the time of the transaction, and the claims and policies at issue are in all material respects identical to those at issue in *Stephens*.

### E. Even Under Plaintiffs' Erroneous Application Of The Fraudulent Concealment Statute, Their Claims Are Time-Barred

Remarkably, plaintiffs allege their claims are timely even though Lela Blue admits she "paid more than 6 years past the 'vanish' date for her 3 policies" before filing this lawsuit. Answer Brief at 12. Even under their own misguided interpretation of the fraudulent concealment statute, this admission is fatal to plaintiffs' claims.

Plaintiffs concede they had actual knowledge beginning in 1995 that the four whole life insurance policies, which they characterize as "virtually identical," (Answer Brief at 7) had no guaranteed vanishing point after 10-years of premium payments. Without regard to whether the plaintiffs read their policies, understood their policies, or were ill-informed about actuarial assumptions underlying their policies, the plaintiffs had actual knowledge that they paid premiums after the alleged "vanish date." The plaintiffs have no excuse for waiting ***ten more years*** to file this lawsuit. Thus, their claims are untimely. *Stephens*, 850 So. 2d at 85 (The Stephenses and Palmer "knew in 1992 and 1995 respectively, that their [premiums] should have ceased or 'vanished' according to their own allegations concerning the agent's representations.").

## II. PLAINTIFFS' RELIANCE ON PRE-*STEPHENS* FEDERAL DISTRICT COURT AUTHORITIES IS MISPLACED

Plaintiffs' reliance upon *Phillips v. New England Mutual Life Insurance Co.*, 36 F. Supp. 2d 345 (S.D. Miss. 1998), is misplaced. Plaintiffs contend that in *Phillips*, "Honorable Tom Lee addressed the same statute of limitations arguments that are being made by Southern Farm Bureau in this case." Answer Brief at 21. This argument ignores that *Phillips* was decided long before the *Stephens* case and before this Court had clarified what a party must plead and prove to establish the dual prerequisites of tolling in a case alleging fraud in the inducement of life insurance sales. Plaintiffs further disregard that *Phillips* applied an entirely different federal fraudulent joinder standard in assessing the fraudulent concealment allegations in that case. That fraudulent joinder standard eliminated the plaintiffs' pleading burden and placed a heavy burden on the defendant to prove federal jurisdiction in *Phillips*. *Id.* at 347.

In addition, *Phillips* was decided six years before the Mississippi Supreme Court's decision in *Andrus* requiring subsequent and affirmative acts to satisfy the first prong of the tolling statute. The *Phillips* Court specifically noted that the Mississippi Supreme Court had never addressed "whether subsequent affirmative acts of concealment are required to toll the statute when, as in the case at bar, the underlying action itself is based on fraud." *Id.* at 349. This Court addressed and rejected the applicability of *Phillips* in *Stephens,* 850 So. 2d at 84-85, but contrary to plaintiffs' argument, this Court in *Stephens* had neither the occasion nor the authority to "overrule" *Phillips*, a federal district court opinion applying federal removal jurisdiction law.

Nevertheless, since this Court issued the *Stephens* opinion, the Fifth Circuit Court of Appeals effectively superseded the *Phillips* decision in *Ross v. Citifinancial, Inc.*, holding that "Mississippi law is unambiguous: Plaintiffs must prove a subsequent affirmative act of fraudulent concealment to toll the limitations." 344 F.3d at 463-64. Accordingly, plaintiffs' attempt to plead around *Stephens* by simply borrowing catch-phrases such as "inflated dividend assumptions," and "artificial actuarial computations" directly from the *Phillips* case is insufficient to establish the first prong of the fraudulent concealment statute. Mississippi law has developed and now requires strict compliance with both prongs of the statute to invoke its tolling provisions. The *Phillips* court could not and did not address the very same arguments being made by Southern Farm in this case.

The plaintiffs' reliance on two other cases this Court distinguished in *Stephens* is similarly misplaced. Answer Brief at 23 (citing *Hignite v. Am. Gen. Life & Accident Ins. Co.*, 142 F. Supp. 2d 785, 790-91 (N.D. Miss. 2001); *Myers v. Guardian Life Ins. Co.*, 5 F. Supp. 2d

423, 431-32 (N.D. Miss. 1998)). The court in *Hignite*, like the court in *Phillips*, applied the federal fraudulent joinder standard to the plaintiffs' allegations of concealment and, "resolving all uncertainties of state law in favor of the Plaintiffs," concluded that the complaint raised a "possibility that they could succeed in establishing a tort claim." *Hignite*, 142 F. Supp. 2d at 792. The *Hignite* court based its conclusion on "specific facts" alleged in the complaint which, "if proven, make it possible for the state court to toll the statute of limitations." *Id.* at 790-91. The Court cites paragraph 13 of the plaintiffs' complaint but does not quote or even summarize that paragraph. Accordingly, the *Hignite* case is not useful, especially in light of the direct relevance of *Stephens* to plaintiffs' claims. *See also Myers*, 5 F. Supp. 2d at 431-32 (referencing but not quoting allegations held sufficient to establish fraudulent concealment). Accordingly, plaintiffs' reliance on *Phillips*, *Hignite*, and *Myers* is unavailing and this Court's pronouncements in *Stephens* and its progeny control.

## III. THE CONTINUING TORT DOCTRINE DOES NOT APPLY IN THIS CASE

Plaintiffs also assert that the continuing tort doctrine tolls the statute of limitations, arguing that a new tort was committed every time the plaintiffs made a premium payment beyond the alleged "vanish" periods. Answer Brief at 25. Plaintiffs' logic is simply misguided. The Mississippi Supreme Court has clearly defined the "continuing tort" doctrine, stating:

> A "continuing tort" is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. *A continuing tort sufficient to toll a statute of limitations is occasioned by unlawful acts, not by continual ill effects from an original violation.*

*Stevens v. Lake*, 615 So. 2d 1177, 1183 (Miss. 1993) (quoting C.J.S., *Limitations of Actions*, § 177 at 230-31(1987)). The continuing tort doctrine applies only "where the defendant commits repeated acts of wrongful conduct, not where harm reverberates from a single, one-time act or omission." *Lake*, 615 So. 2d at 1183; *see also Smith v. Franklin Custodian Funds, Inc.*, 726 So.

2d 144, 148-49 (Miss. 1998) (refusing to apply the continuing tort doctrine despite continuing harm where defendant did not "commit repeated acts of wrongful conduct"). In this case, the oral representations which allegedly "induced" the various policy sales occurred one time at the point of sale. There is no basis for applying the continuing tort doctrine here.

In *Lady v. Jefferson Pilot Life Insurance Co.*, 241 F. Supp. 2d 655 (S.D. Miss. 2001), a case involving almost identical claims regarding "vanishing" premiums, an insurance agent allegedly told the plaintiff that his newly purchased policy would sustain itself after six years. *Id.* at 658. When the plaintiff was required to make premium payments beyond six years, he asserted fraud and negligent misrepresentation claims. *Id.* Because the complaint failed to allege any affirmative acts subsequent to the alleged misrepresentations at the time of sale, the Court held that the "continuing tort" doctrine failed to toll the statute of limitations. *Id.* at 662. Like the plaintiff in *Lady*, plaintiffs here fail to allege any wrongful acts other than pre-sale misrepresentations. Accordingly, the passage of time does not multiply plaintiffs' causes of action, and the "continuing tort" doctrine does not toll plaintiffs' claims.

## CONCLUSION

For the reasons set forth above, Southern Farm respectfully requests that this Court enter an Order reversing the trial court's denial of Southern Farm's Motion to Dismiss, dismissing this case, and entering judgment for the Defendants.

Respectfully submitted,

**SOUTHERN FARM BUREAU LIFE INSURANCE COMPANY**

By:______________________________
FRED L. BANKS, JR. (MB [redacted]
JAMES W. SHELSON (MB [redacted]
MARKHAM R. LEVENTHAL (MB [redacted]

*Attorneys for Southern Farm Bureau Life Insurance Company*

OF COUNSEL:

Fred L. Banks, Jr., Esquire
James W. Shelson, Esquire
PHELPS DUNBAR LLP
111 East Capitol Street, Suite 600
Post Office Box 23066
Jackson, Mississippi 39225-3066
Telephone: 601-352-2300
Facsimile: 601-360-9777

Markham R. Leventhal, Esquire
JORDEN BURT LLP
777 Brickell Avenue, Suite 500
Miami, Florida 33131-2803
Telephone: (305) 371-2600
Facsimile: (305) 372-9928

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to the following by first class mail, postage prepaid, this the 9th day of April, 2007:

Attorneys for Plaintiffs

Shane F. Langston, Esq.
David A. Busby, Esq.
LANGSTON & LANGSTON, PLLC
201 North President Street
Jackson, MS 39201

Attorneys for Wayne Stanley

J. Wyatt Hazard, Esq.
Roy A. Smith, Jr.
Tara S. Clifford
DANIEL COKER HORTON & BELL, P.A.
4400 Old Canton Road, Suite 400
Post Office Box 1084
Jackson, MS 39215-1084

Trial Judge

Honorable Billy Joe Landrum
Jones County Circuit Court
P.O. Box 685
Laurel, MS 39441

FRED L. BANKS, JR.



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