Case Nos. 12-13436-EE and 12-14073-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JONATHAN E. PERLMAN, ESQ., as court-appointed Receiver of Creative Capital Consortium, LLC, et al.,
Plaintiff/Appellant,

v.

BANK OF AMERICA, N.A.,
Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 9:11-CV-80331-CIV-DTKH

PLAINTIFF/APPELLANT'S INTIAL BRIEF

W. Barry Blum
Fla. Bar No. 379301
Carmen Contreras-Martinez
Fla. Bar No. 093475
GENOVESE JOBLOVE & BATTISTA, P.A.
100 S.E. Second Street, 44th Floor
Miami, Florida 33131
Tel.: (305) 349-2300
Fax: (305) 349-2310

CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Appellant Jonathan E. Perlman, Esq., as Receiver, hereby files his Corporate Disclosure Statement and Certificate of Interested Persons.

Corporate Disclosure Statement

Genovese, Joblove & Battista, P.A., a law firm, has no single owner of 10% or more of the equity.

Bank of America, N.A. ("BOA") is a wholly owned subsidiary of BANA Holding Corp., which is a wholly owned subsidiary of BAC North America Holding Company, which is a wholly owned subsidiary of NB Holdings Corp., which is a wholly owned subsidiary of Bank of America Corporation ("BAC"). BAC is a publicly traded entity. BAC common stock is listed on the New York Stock Exchange ("NYSE") under the symbol BAC. BAC does not have any parent corporations and no publicly held company has an ownership interest of 10% or more of BAC.

Interested Persons

Appellant, Jonathan E. Perlman, Esq., as Receiver submits the following alphabetical list of the names of the bankruptcy court judge, district court judge, attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this appellate review:

A Creative Capital Concept$, LLC – Receivership Entity

BAC North America Holding Company

BANA Holding Corporation

Bank of America, N.A., Appellee

Bank of America Corporation

Blum, W. Barry - Lead Counsel for Appellant

Cimo, David, - Counsel for Appellant

Contreras-Martinez, Carmen. – Counsel for Appellant

Creative Capital Consortium, LLC – Receivership Entity

Culleiton, Joseph E. – Counsel for Appellee

G$Trade Financial, Inc. – Receivership Entity

Genovese Joblove & Battista, P.A. - Counsel for Appellant

Gonzalez, Juan A. – Counsel for Defendant

Hackett, Mary J. - Counsel for Appellee

Hopkins, James M. – United States Magistrate Judge

Hurley, Daniel T.K. - The Honorable District Court Judge

Josephs Jack, P.A. – Counsel for Appellant, predecessor to The Josephs Law Firm

Josephs, Michael R. - Counsel for Appellant

Kaufman, Dora Faye – Counsel for Appellee

Lemoie, David - Counsel for Appellant

Liebler, Gonzalez & Portuondo, P.A. - Counsel for Appellee

NB Holdings Corporation

Perlman, Jonathan E., court-appointed Receiver - Appellant

Pickens, Dustin N. - Counsel for Appellee

Reed Smith, LLP – Counsel for Appellee

Reverse Auto Loan, LLC – Receivership Entity

Root, Gretchen Wood Ruff – Counsel for Appellee

The Dream Makers Capital Investments, LLC – Receivership Entity

The Josephs Law Firm – Counsel for Appellant

United Investment Club, LLC –Receivership Entity

Unity Entertainment Group, Inc. – Receivership Entity

Watterson, Kim M. – Counsel for Appellee

Wealth Builders Circle, LLC – Receivership Entity

STATEMENT REGARDING ORAL ARGUMENT

Appellant hereby requests, pursuant to Fed. R. App. P. 34 and 11th Cir. R. 34-3(c), that oral argument be heard in this case. This is a complex, non-frivolous appeal. Appellant respectfully submits that oral argument would aid in the decisional process.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT i

STATEMENT REGARDING ORAL ARGUMENT v

TABLE OF CONTENTS vi

TABLE OF CITATIONS viii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 3

A. The SEC Action and Appointment of the Receiver 3

B. The Proceedings Below 4

STATEMENT OF THE FACTS 14

A. The Theodule Ponzi Scheme 14

B. Theodule Finds His Way to BOA 15

C. BOA Helps Theodule Grow the Ponzi Scheme 18

D. BOA's Ongoing Knowledge and Participation in Theodule's Fraudulent Scheme 20

STANDARD OF REVIEW 22

SUMMARY OF THE ARGUMENT 24

ARGUMENT 26

A. The Lower Court Abused Its Discretion by Dismissing with

Prejudice the Receiver's Claims Without Allowing Any Opportunity to Amend……..26

B. The Lower Court Erred in Concluding, Without Reviewing the Receiver's New Allegations, That Any Amendment to the Receiver's Complaint Would be Futile……...…….……30

C. There Is No Other Basis for Denying the Receiver an Opportunity to Amend Under Rule 15(a)…….....…….33

D. The Court Erred in Dismissing the Receiver's FUFTA Claim With Prejudice……..35

1. The Court Erred by Resolving BOA's Fact-Intense Good Faith Affirmative Defense on a Rule 12(b)(6) Motion ……..……37

2. The Court Erred by Concluding That the Standard of BOA's "Good Faith" is Merely "No Actual Knowledge"……41

3. The Florida Supreme Court Decision in Freeman Does Not Support Dismissal……...47

4. Lawrence Does Not Apply to the Receiver's FUFTA Claims…….....49

CONCLUSION 51

CERTIFICATE OF COMPLIANCE 52

CERTIFICATE OF SERVICE 52

TABLE OF CITATIONS

Cases **Page(s)**

In re 8699 Biscayne, LLC,
Adv. Case No. 08-22812-BKC-AJC, 2010 WL 1375558,
(Bankr. S.D. Fla. April 2, 2010) 49

American Dental Assoc. v. Cigna Corp.,
605 F.3d 1283 (11th Cir. 2010) 23

Ashcroft v. Iqbal,
556 U.S. 662 (2009)…….. 23

Belanger v. Salvation Army,
556 F.3d 1153 (11th Cir. 2009) 22

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)……..... 23, 33

Bryant v. Avado Brands, Inc.,
187 F.3d 1271 (11th Cir. 1991) 28, 29

Bryant v. Dupree,
252 F.3d 1161 (11th Cir. 2001) 27, 28, 29, 30, 31, 33, 35

In re Cannon,
230 B.R. 546 (Bankr. W.D. Tenn. 1999) 42

Cockrell v. Sparks,
510 F.3d 1307 (11th Cir. 2007) 32

Concordia v. Bendekovic,
693 F.2d 1073 (11th Cir. 1982) 39

Coventry First, LLC v. McCarty,
605 F.3d 865 (11th Cir. 2010) 31, 32

In re Dreier LLP,
452 B.R. 391 (Bankr. S.D.N.Y. 2011).....39

Floyd v. Eastern Airlines, Inc.,
872 F.2d 1462 (11th Cir. 1989).....35

In re Evergreen Sec., Ltd.,
319 B.R. 245 (Bankr. M.D. Fla. 2003) 42, 47

Foman v. Davis,
371 U.S. 178 (1962) 27, 34

Freeman v. First Union National Bank,
865 So. 2d 1272 (Fla. 2004) 10, 12, 37, 48

Green Leaf Nursery v. E.I. DuPont De Nemours & Co.,
341 F.3d 1292 (11th Cir. 2003).....23

Hall v. United Ins. Co. of Am.,
367 F.3d 1255 (11th Cir. 2004).....31

In re Harwell,
628 F.3d 1312 (11th Cir. 2010).....6, 36, 38, 40, 50, 51

Harper v. Lawrence County,
584 F.3d 1030 (11th Cir. 2009).....36, 37, 46

Jackson v. Bellsouth Telecomm.,
372 F.3d 1250 (11th Cir. 2004).....22

Lawrence v. Bank of America, N.A.,
455 F. 904 (11th Cir. 2012) 7, 8, 9, 10, 11, 27, 30, 49, 50

Le Frere v. Quezada,
82 F.3d 1260 (11th Cir. 2009).....39

In re Lockwood Auto Group, Inc.),
428 B.R. 629 (Bankr. W.D. Pa. 2010) 42, 46

Mahone v. Ray,
326 F.3d 1176 (11th Cir. 2003).....12

Mann v. Adams Realty Co.,
556 F.2d 288 (5th Cir. 1977).....39

Mizzaro v. Home Depot, Inc.,
544 F.3d 1230 (11th Cir. 2008).....23, 24, 31

In re Model Imperial, Inc.,
250 B.R. 776, 801 (Bankr. S.D. Fla. 2000) 36, 41, 42, 45, 46, 49, 50

O'Halloran v. First Union Nat'l Bank of Fla.,
350 F.3d 1197 (11th Cir. 2003).....44, 45, 46

In re Pearlman,
440 B.R. 569 (Bankr. 2010) *aff'd* 478 B.R. 448 (M.D. Fla. 2012) 40, 46

Perlman v. Delisfort–Theodule,
Case No. 09-80480-CIV, 2010 WL 4514249,
(S.D. Fla. Nov. 2, 2010) 38

Perlman v. Five Corners Investors I,
Case No. 09-81225-CIV, 2010 WL 962953,
(M.D. Fla. March 15, 2010).....37, 38

In re Seminole Walls & Ceilings Corp.,
446 B.R. 572 (Bankr. M.D. Fla. 2011) 42

In re Skolnick,
363 B.R. 626 (Bankr. S.D. Fla. 2007) 50

Steinberg v. Barclay's Nominees (Branches) Ltd.,
Case No. 04-60897-CIV, 2008 WL 4601042
(S.D. Fla. Sept. 30, 2008) 39, 46

Steinberg v. Alpha Fifth Group,
Case No. 04-60899-CIV, 2010 WL 1332844
(M.D. Fla. Mar. 30, 2010) 39

Stephens v. Dep't of Health & Human Servs.,
901 F.2d 1572 (11th Cir. 1990).....23

In re Stewart,
280 B.R. 268 (Bankr. M.D. Fla. 2001) 36

Terry v. June,
432 F. Supp. 2d at 645 47

Thomas v. Town of Davie,
847 F. 2d 771 (11th Cir. 1988).....27

In re Toy King Distributors, Inc.,
256 B.R. 1 (Bankr. M.D. Fla. 2000).....36

In re Venice–Oxford Assoc. Ltd,
236 B.R. 820 (Bankr. M.D. Fla. 1999) 37

Wagner v. Daewoo Heavy Indus. Am. Corp.,
314 F. 3d 541 (11th Cir. 2002).....27

Wiand v. Dewane,
Case No. 8:10-CV-246-T-17 MAP, 2011 WL 4460095,
(M.D. Fla. July 11, 2011) 37

Wiand v. EFG Bank,
Case No. 8-10-CV-241-T-17-MAP, 2012 WL 750447
(M.D. Fla. Feb. 8, 2012) 40, 46

Wiand v. Waxenberg,
611 F. Supp. 2d 1299 (M.D. Fla. 2009) 41, 44, 46, 47

In re World Vision Entm't,
275 B.R. 641 (M.D. Fla. 2002) 42

Rules

Fed. R. Civ. P. 12..... 5, 9, 22, 25, 32, 41, 51

Fed. R. Civ. P. 15.....26, 27, 35

Fed. R. Civ. P. 59.....12, 13

Fed. R. Civ. P. 60.....12, 13

Fed. R. Civ. P. 62.1.....13

Other Authorities and Statutes

11 U.S.C. § 548.....36, 37

28 U.S.C. § 754.....1

28 U.S.C. § 1291.....1

28 U.S.C. § 1367.....1

28 U.S.C. § 1692.....1

31 U.S.C. § 5311.....16

Fla. Stat. § 726.101.....5

Fla. Stat. § 726.105.....36, 37

Fla. Stat. § 726.106.....36

STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1367(a) because this matter is ancillary to *SEC v. Creative Capital Consortium, et al.*, Case No. 08-81565-CIV-Hurley/Hopkins, and under 28 U.S.C. § 754 and 1692, as actions having been brought by a court-appointed receiver.

This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The initial appeal (Case No. 12-13436-EE) is an appeal from a final judgment entered by the district court on May 23, 2012, that disposes of all the parties' claims. No motion was filed that tolled the time for appeal, and the notice of appeal was timely filed on June 22, 2012. This court has appellate jurisdiction over the second appeal (Case No. 12-14073-EE) under 28 U.S.C. § 1291. The second appeal is an appeal from an order denying the plaintiff's motion for reconsideration of the May 23, 2012 dismissal order and request for leave to file a second amended complaint. The district court entered the order denying the motion for reconsideration on July 2, 2012. Appellant's notice of appeal of the order was timely filed on July 24, 2012.

STATEMENT OF THE ISSUES

1. Whether the lower court abused its discretion by dismissing the Receiver's claims with prejudice, based on an unpublished decision issued after the court first ruled that the Receiver had sufficiently pled these claims, where the Receiver in his opposition brief had requested an opportunity to amend if the court reconsidered its prior ruling and informed the court he was prepared to submit an amended complaint adding numerous additional facts he had obtained in discovery demonstrating that defendant knew it was aiding and abetting a breach of fiduciary duty, as well as proof of defendant's lack of good faith (an essential element of the affirmative defense defendant raised to the Receiver's Florida Uniform Fraudulent Transfer Act ("FUFTA") claim).

2. Whether the lower court erred in concluding that any attempt by the Receiver to amend the previously upheld complaint would be "futile," without even reviewing the Receiver's proposed amended pleading.

3. Whether the lower court erred in finding that the Receiver failed to allege sufficient facts making it plausible that defendant knew it was aiding and abetting a breach of fiduciary duty against bank customers and others.

4. Whether the lower court erred by dismissing with prejudice the Receiver's FUFTA claims based on the "mere conduit" affirmative defense, which requires the defendant to affirmatively prove that it acted in "good faith," where the court had previously ruled that the Receiver's complaint was adequately pleaded.

STATEMENT OF THE CASE

A. The SEC Action and Appointment of the Receiver

This is an action by Jonathan E. Perlman, Esq. ("Receiver"), a court appointed receiver, against Bank of America, N.A. ("BOA"). It was filed as an ancillary action arising from the receivership established as part of an enforcement action filed by the Securities and Exchange Commission ("SEC") styled *United States Securities and Exchange Commission ("SEC") v. Creative Capital Consortium, LLC, et al.*, Case No. 08-81565-Civ-Hurley/Hopkins (S.D. Fla.). Doc 1 ¶10.

On December 29, 2008, the SEC filed a complaint against George Theodule, and companies he controlled, Creative Capital Consortium, LLC and A Creative Capital Concept$, LLC. The SEC alleged that Theodule and the companies fraudulently sold unregistered securities and violated various sections of the Securities Exchange Act of 1934. *Id.*

At the SEC's request, the court appointed the Receiver to oversee the two entities. In two subsequent orders, the court expanded the receivership to include six other entities, to-wit: United Investment Club, LLC; Reverse Auto Loan, LLC; Wealth Builders Circle, LLC; The Dream Makers Capital Investment, LLC; G$Trade Financial, Inc.; and Unity Entertainment Group, Inc. *Id*. ¶11. The eight entities in the receivership are referred to as the "Receivership Entities."

The Receiver soon determined that the Receivership Entities had no legitimate business operations and that so-called "profit" payments to investors by the Receivership Entities came from money raised from other investors, confirming that the Receivership Entities operated as nothing more than a classic Ponzi scheme. *Id*. ¶14.

B. The Proceedings Below

The Receiver filed this ancillary action against appellee BOA in March 2011, alleging that BOA knowingly helped Theodule perpetrate his Ponzi scheme against the Receivership Entities and other victims. Doc 1. The Receiver's claims included aiding and abetting breach of fiduciary duty, aiding and abetting conversion, and three counts for avoidance and recovery of fraudulent transfers under the Florida Uniform Fraudulent

Transfer Act ("FUFTA"), FLA. STAT. § 726.101 *et. seq*. Doc 1 ¶¶69-131. The Receiver made other common law and statutory claims that were not included in the Receiver's amended complaint and are not germane to this appeal.

In May 2011, BOA moved to dismiss the Receiver's claims under Fed. R. Civ. P. 12(b)(6). Doc 17. As to aiding and abetting, BOA argued "that the Receiver ha[d] not sufficiently pleaded either the knowledge or substantial assistance elements" of an aiding and abetting claim. Doc 51 at 9. As to the FUFTA claims, BOA argued "two bases for dismissal." *Id*. at 23. First, BOA argued that it "was not the intended recipient of the purported transfers and never had control over the transferred funds—*i.e.*, the Bank was a mere conduit and therefore cannot be liable for recovery under FUFTA." *Id.* BOA also argued that the Receiver "failed to sufficiently allege his status as a FUFTA creditor." *Id.* at 25.

On December 22, 2011, the lower court denied BOA's motion to dismiss the aiding and abetting claims, holding that the Receiver's factual allegations in his complaint met the requirements of Rule 12(b)(6). *Id.* In the December 22 order the court ruled:

> In light of [the Receiver's] factual allegations, the Court cannot say that there is no factual support for the Receiver's ultimate allegation that the Bank had knowledge of the underlying Ponzi scheme and associated violations. As a preliminary matter, the Court notes that the assistance alleged goes beyond silence or inaction. Rather, the Bank affirmatively assisted, for example, the breach of fiduciary duty by effecting the transfers of funds from the entity accounts to Theodule's personal accounts.

Id. at 14-15.

As to the Receiver's FUFTA claims, the court stated in the December 22 order that, "the allegations in the Complaint set forth facts sufficient to support the knowledge requirement of aiding and abetting liability [under *Martinez v. Hutton (In re Harwell*), 628 F.3d 1312 (11th Cir. 2010), and] they also sufficiently defeat the good-faith and innocence aspects of a mere-conduit defense for the purposes of a motion to dismiss." Doc 51 at 25. The court observed that:

> While some transfers may have occurred at a time when Bank of America was truly an innocent conduit, the allegations in the Complaint are sufficient to state a claim that the Bank subsequently gained knowledge of the underlying scheme and lost its innocence. With respect to those transfers, the Bank cannot take advantage of the mere conduit defense at this stage, and the motion to dismiss must be denied.

Id. On BOA's second argument as to the FUFTA claims, the court ruled that the Receiver had not pleaded facts sufficient to demonstrate his status as a

"creditor" under FUFTA. *Id.* at 25-26. The lower court thus granted the motion to dismiss the FUFTA claims "without prejudice to be re-filed with allegations regarding the actual transfers the Receiver seeks to recover and how the receivership entities, the Receiver, and the Bank fit within FUFTA's debtor-creditor framework." *Id.* at 26.

On January 9, 2012, the Receiver filed a five-count amended complaint. Doc 57. Counts I and II were the same aiding and abetting claims the court upheld in the December 22 order. Counts III-V were amended claims under FUFTA. The Receiver alleged the same facts as to BOA's "knowledge" that the court previously held sufficient to support the FUFTA claims. *Compare* Doc 1 ¶¶1-68 with Doc 57 ¶¶1-68. The Receiver added new allegations to establish the parties' and Receivership Entities' statuses under the FUFTA debtor-creditor framework. Doc 57 at ¶¶79–103.

BOA then filed a second motion to dismiss the Receiver's amended complaint in its entirety, and argued again that the Receiver failed to plead adequately BOA's "knowledge" required for aiding and abetting, the same grounds the lower court rejected in denying BOA's prior Rule 12(b)(6) motion. Doc 67. BOA's second motion to dismiss the aiding and abetting claims was based on *Lawrence v. Bank of America, N.A.*, No. 11-12401, 2012

WL 89904 (11th Cir. Jan. 11, 2012), an unpublished opinion issued two days *after* the Receiver had filed his amended complaint. Doc 67 at 5-7. BOA argued that *Lawrence* required the Receiver to plead facts that show that "the bank *actually knew* about the Ponzi scheme—not merely that the bank should have, or could have known about it." *Id*. at 6. BOA argued that the Receiver's amended complaint "allege[d] only that the customer engaged in atypical transaction and thus the bank should have known about the scheme," and that those allegations failed to state a claim for aiding and abetting under the *Lawrence* case. *Id*. BOA argued in passing that *Lawrence* required the court to apply the "actual knowledge" standing to the Receiver's FUFTA claims as well. *Id.*

BOA also reargued that the Receiver did not plead that BOA was the intended recipient of any transfers of had control over any funds. Doc 67 at 18-19. That argument was made in BOA's first motion to dismiss and specifically rejected by the lower court. Doc 51 at 23 ("the Bank argues that it was not the intended recipient of the purported transfers and never had control over the transferred funds, *i.e.*, the Bank was a mere conduit and therefore cannot be liable for recovery under FUFTA"). Only two pages of BOA's 17-page second motion to dismiss addressed the issue of whether

the Receiver adequately pleaded that he was a "creditor" under FUFTA, which the lower court had ruled was the only issue to be decided. Doc 67 at 16-17.

On March 23, 2012, the Receiver filed his response in opposition to BOA's second motion to dismiss. Doc 76. The Receiver argued that BOA was not permitted to file a second Rule 12(b)(6) motion as to Counts I and II, that *Lawrence* did not detract from the lower court's prior ruling that the Receiver had pleaded facts as to BOA's knowledge sufficient to state claims for relief, and that *Lawrence* did not under any circumstances apply to the FUFTA claims in Counts III-V. *Id*. The Receiver pointed out that *Lawrence* was decided after he had filed his amended complaint pleading facts in reliance on the court's December 22 order denying BOA's motion to dismiss. *Id.* at 3. In the response, the Receiver advised the court "that discovery in the case ha[d] yielded even more facts supporting his allegations that Bank of America actually knew about the Theodule Ponzi scheme," and the Receiver asked the court for leave to amend his complaint if the court changed course and found "the allegations in the

Amended Complaint somehow insufficient to allege actual knowledge."[1] *Id.* at 12 n. 8.

On May 23, 2012, the lower court entered an order dismissing the Receiver's entire amended complaint with prejudice and entered a final judgment against the Receiver. Doc 82; Doc 83. The court relied exclusively upon *Lawrence* in dismissing the aiding and abetting claims in Counts I and II of the amended complaint. Doc 82 at 2-3. The court also referred to *Lawrence* in concluding that "the face of the Amended Complaint makes clear that the Bank acted as a mere conduit … and that the Bank acted with good faith." *Id.* at 4. The court also cited to *Freeman v. First Union National Bank,* 865 So. 2d 1272 (Fla. 2004), a case involving claims for aiding and abetting fraudulent transfers under FUFTA, claims not made in the

[1] After filing the amended complaint, and despite BOA's efforts to delay all discovery, the Receiver took several depositions of bank personnel, including BOA's corporate compliance officer, and BOA produced over 2200 pages of documents. Doc 85 at 7. This new evidence fortified the ultimate facts alleged in the Receiver's complaint and amended complaint (which the district court had already ruled were adequate to state claims for relief). Moreover, the court had not issued a scheduling order establishing any deadline for amending pleadings.

Receiver's amended complaint.[2] *Id.* at 4-5.

By dismissing the Receiver's amended complaint with prejudice, the court did not afford the Receiver any opportunity to amend his claims to address the intervening decision in *Lawrence*. Doc 82 at 5. The court did not refer to the Receiver's request in his response for leave to amend or the Receiver's proffer that discovery had revealed additional evidence "supporting that Bank of America actually knew about the Theodule Ponzi scheme." *Id.* Instead, without having reviewed any proposed amended pleading, the court stated: "the Court finds that granting leave to amend the Amended Complaint would be futile in light of the legal conclusions stated in this Order." *Id.*

On June 21, 2012, the Receiver filed a motion for reconsideration of the lower court's May 23 order dismissing the Receiver's complaint with prejudice. Doc 84. The Receiver sought reconsideration of the *with prejudice* component of the May 23 order, and the Receiver attached to the motion to

[2] In the December 22 order on BOA's first motion to dismiss, the district court relied on *Freeman* in dismissing the Receiver's claim for aiding and abetting fraudulent transfers (Count IX of the original complaint). Doc 51 at 21. The court did not even mention *Freeman* in its analysis of the Receiver's three FUFTA claims (Counts VI-VII), let alone apply the case to dismiss the FUFTA claims. *Id.* at 23-26.

reconsider a proposed second amended complaint which included 19 paragraphs with additional facts about BOA's knowledge of Theodule's wrongdoing. Doc 85-2. Those were the facts to which the Receiver was referring when he asked for leave to amend in his response to BOA's second motion to dismiss if the court retreated from its prior ruling that the Receiver had adequately pleaded BOA's "knowledge" for purposes of aiding and abetting and FUFTA liability. Doc 76 at 12 n. 8.

The Receiver filed the motion for reconsideration 15 minutes beyond the 28-day filing deadline under Rule 59 (and filed a corrected motion hours later), but within the time permitted to file a Rule 60(b) motion.[3] Doc 84; Doc 85. The next day, because the 30-day appeal deadline would expire if the motion for reconsideration was deemed untimely under Rule 59, the Receiver filed a notice of appeal of the May 23 final judgment, the first of the two consolidated appeals that are before the court. Doc 88.

On July 2, 2012, the lower court entered an order denying the Receiver's motions for reconsideration. Doc 94. That order stated in pertinent part:

[3] Motions seeking reconsideration filed after the Rule 59(e) deadline should be considered also as having been brought pursuant to Rule 60(b). *See Mahone v. Ray*, 326 F.3d 1176, 1178 n. 1 (11th Cir. 2003).

> Had the motions been filed within the deadline, **the Court would have been inclined to reconsider its order dismissing Plaintiff's claim with prejudice in light of the new allegations in Plaintiff's proposed Second Amended Complaint**. These allegations were first presented to the Court in the motions for reconsideration and go well beyond the conclusory allegations and allegations of suspicious activities and red flags in the First Amended Complaint.

Id. at 1-2 (emphasis added).

On July 10, 2012, the Receiver filed a motion for clarification of the court's order denying his motions for reconsideration, seeking clarification as to whether the court had denied only the Receiver's Rule 59 motion or both the Rule 59 and Rule 60(b) motion. Doc 103. The Receiver also noted that it was unclear whether the lower court's July 2 order was a Rule 62.1 "indicative ruling" given the language regarding the sufficiency of the Receiver's new allegations. *Id.*

On July 16, 2012, lower court entered an order on the Receiver's motion for clarification stating that the Receiver was not entitled to relief under Rule 60(b). Doc 104. On July 24, 2012, the Receiver filed a notice of appeal of the lower court's July 2 order denying the Receiver's two motions for reconsideration, the second of the two appeals that are the subject of this consolidated initial brief. Doc 106.

STATEMENT OF THE FACTS

A. The Theodule Ponzi Scheme

Beginning in November 2007, and throughout 2008, George Theodule, a Haitian national, operated a massive Ponzi scheme targeting working class Haitian-Americans in South Florida, Atlanta, New Jersey and Chicago. Doc 57 ¶3. Holding himself out as a Christian pastor and using his Haitian roots to gain people's trust and confidence, Theodule lied that he was sharing his investment expertise and a portion of all profits to help Haitian communities in the United States, Haiti and Sierra Leone. *Id.* ¶16. Investors were attracted primarily through word-of-mouth and Theodule and his cohorts met personally with small groups to tout their ability to double investor funds in just 90 days by trading stocks and options. *Id.* ¶17.

Theodule organized more than 100 "investment clubs" as vehicles to collect illicitly obtained funds. *Id.* ¶9. The clubs pooled investor funds to be sent to Creative Capital Consortium, LLC and other Receivership Entities, minus a 10% commission, for the 90-day investment period. *Id.* ¶25. In truth, the investment clubs served only to funnel funds to the Receivership Entities to be misappropriated by Theodule for himself, his wife and his friends and family. *Id.* ¶26.

Typical of a Ponzi scheme, some initial investors were paid "returns" on their investments as Theodule promised. The Receivership Entities paid out $20.8 million in false "profits" to initial investors to trick future investors into believing Theodule was generating huge financial returns. *Id.* ¶27. The investment profits, however, were paid entirely from new investor funds in order to fuel the Ponzi scheme and encourage new investors to join the charade. *Id.*

Prior to being shut down by the SEC in December 2008, Theodule took in more than $68 million, almost all from the lifetime savings and retirement funds of his Haitian-American victims. Theodule ultimately kept $20.2 million for himself and gave $23.6 million to his wife, friends, family and associates. *Id.* ¶28.

B. Theodule Finds His Way to BOA

Theodule could not have accomplished his scheme without the assistance of a bank willing to take incoming money (often large amounts of cash) from investment clubs and wash the money from account to account with no real business purpose. *Id.* ¶29. Theodule and the Receivership Entities first operated the Ponzi scheme through accounts at Washington Mutual Bank ("WAMU"), and then at Wachovia Bank

("Wachovia"). *Id.* By July 2008, however, WAMU and Wachovia closed all Theodule-related accounts due to suspicious activity that Wachovia described as "funds washing through the account from hand to hand" with "no evidence of any investing going on" and "no transactions consistent with the operation of a business." *Id.*

No longer welcome at WAMU and Wachovia, Theodule needed to find a bank that would agree to accept transfers and ignore their patently illicit nature. BOA was an obvious choice for Theodule as BOA was known for taking on customers engaged in unlawful activities, including Ponzi schemes, in violation of the Bank Secrecy Act, 31 USC § 5311 *et seq.*, and other federal laws. *Id.* ¶30.

Indeed, at that time, both the *New York Times* and *Wall Street Journal* were chronicling BOA's roles in other Ponzi schemes in which BOA was reported to have actual and constructive knowledge of unlawful customer activity. *Id.* ¶31. These articles followed news releases announcing millions of dollars of fines paid by BOA in settlements with the Manhattan District Attorney and NASD due to BOA's admitted failures to implement required anti-money laundering controls and to "know its customers" as required by the Bank Secrecy Act. *Id.* ¶33.

Pursuant to these settlements and the Bank Secrecy Act, BOA implemented a risk-based anti-money laundering compliance program including internal policies, procedures, and controls designed to guard against money laundering. *Id.* ¶ 35. BOA also designated a compliance officer to coordinate and monitor day-to-day compliance with the Bank Secrecy Act and anti-money laundering requirements. *Id.* Such business practices are referred to in banking as "Know Your Customer" requirements. They require banks to: (1) know the true identity of their customers and their businesses; (2) monitor customer transactions to determine that a legitimate business purpose exists for transfers in and out of customer accounts; and (3) determine if any transactions are unusual or suspicious and, if so, to report those transactions to the proper authorities. *Id.* ¶35. If necessary, banks are to close accounts that exhibit continued suspicious activity. *Id.*

BOA's compliance program requires that BOA conduct enhanced due diligence on all new customers, including obtaining information regarding the background and nature of a new customer's business operations, which BOA independently verifies by running internet searches, checking public records, and contacting a customer's prior banker(s). *Id.* ¶37. BOA's written

policies require execution of "Know Your Customer" forms, including a complete history of the client, the nature of the client's business, sources of expected transfers, the estimated amount of client wire transfers and check activity, and other client information. *Id.*

The policies and practices BOA had in place made it fully aware that Theodule was involved in an investment money laundering and Ponzi scheme, but BOA affirmatively aided and participated in Theodule's ongoing fraud. *Id.* ¶39.

C. BOA Helps Theodule Grow the Ponzi Scheme

In July 2008, a few days after Wachovia closed his accounts for suspicious activity, Theodule showed up at BOA's North Miami, Florida branch with a man named Evens St. Claire, one of his Ponzi scheme insiders. Doc. 85-1 ¶68; Doc 57 ¶40. Theodule and St. Claire met with BOA's Vice President, Armogan "Steve" Manikum, the BOA Manager at the North Miami branch. *Id.* Vice-President Manikum had a prior business history with Theodule's cohort St. Claire, who regularly brought new clients to Manikum at BOA. Doc 85-1 ¶68. In fact, St. Clair and Manikum had a company together, STNM Foods and Commodities, Inc., in which Manikum was Vice-President and St. Claire was President. *Id.* ¶69. That

relationship violated BOA's Code of Ethics and the relationship between Manikum and St. Claire and Theodule was the subject of a BOA internal investigation. *Id.* ¶70.

At that first meeting with St. Claire and Theodule, Manikum personally opened two personal accounts for Theodule, and directed his staff to open three other accounts for Unity Records, Inc., one of the Receivership Entities. *Id.* Manikum ignored BOA policies by failing to document why Theodule was opening accounts in North Miami, over 50 miles from Palm Beach County where Manikum knew Theodule lived and worked. Doc 85-1 ¶43; Doc 57 ¶43. BOA policies identify an account opening far from the holder's residence or business as unusual and suspicious activity. *Id.* Doc 57 ¶35; Doc 85-1 ¶79.

Manikum later personally opened three more accounts in the name of Creative Capital Consortium, LLC. Doc 85-1 ¶74. The five accounts Manikum personally opened for Theodule and Creative Capital are the only accounts Manikum personally opened for any customer in his six-year tenure as branch manager. *Id.*

While personally opening the accounts for Theodule and Creative Capital, Manikum disabled BOA's ChexSystems® feature, a clearinghouse

service that would have signaled that Theodule had accounts shut down by two banks for suspected money laundering and fraudulent activity. *Id.* ¶¶75, 76. When other BOA employees were directed by Manikum to open Theodule-related accounts, BOA's ChexSystems® feature was again disabled to aid Theodule. *Id.* ¶75. Thus, not only did Manikum fail to adhere to Bank Secrecy Act requirements and BOA policies, he did so in a manner for which there is no plausible explanation other than that he knew of Theodule's scheme and was acting to aid him in stealing from his clients, who were also BOA customers. *See also Id.* ¶83, Doc 57 ¶65.

D. BOA's Ongoing Knowledge and Participation in Theodule's Fraudulent Scheme

In addition to skirting both legal requirements and its own policies when opening Theodule-related accounts, BOA failed to comply with the well-known federal requirement to report all cash transactions in excess of $10,000. Doc 57 ¶64; Doc 85-1 ¶64. Despite many cash transactions over $10,000, BOA filed only two Currency Transaction Reports ("CTRs") related to Theodule accounts. Doc 85-1 ¶81. Because CTRs are generated automatically, this violation of law required deliberate and concerted activity by BOA employees to avoid scrutiny of Theodule's accounts. Doc

85 at 5.

At BOA, unlike at his previous banks, Theodule dropped any pretense that investor funds were going to the supposedly legitimate financial services firm, Creative Capital Consortium, LLC, for securities investing. Doc 57 ¶63; Doc 85-1 ¶63. Rather, investor money, after being deposited in "investment club" accounts at BOA (which BOA allowed, even though its policies prohibited "investment club accounts," because they were a known indicator of Ponzi schemes), almost always flowed immediately and directly to Theodule's personal accounts at BOA. *Id.* BOA then allowed Theodule to withdraw large amounts in cash or to spend the investor funds on personal expenses through a BOA-issued debit card. *Id.* BOA also allowed the investment clubs to withdraw purported "investments" in large cash amounts. Doc 57 ¶57; Doc 85-1 ¶57. Significantly, because the investment clubs themselves were maintained at BOA, the Bank saw the full picture of the fraud, and was not privy to just a small piece of a larger puzzle.

In the first 30 days that the Theodule BOA accounts were open, BOA transferred $2.2 million of unsuspecting investors' life savings from investment clubs to the Theodule-related accounts, and allowed Theodule

to transfer another $1.3 million of investor funds into Theodule's personal accounts at BOA. Doc 57 ¶¶53, 60; Doc 85-1 ¶¶53, 60. In total, BOA funneled $19 million into Theodule's Ponzi scheme. Doc 57 ¶66; Doc 85-1 ¶66.

BOA corporate representatives have acknowledged that the account activity in the Theodule accounts, on its face, was money laundering, with no other apparent explanation. Doc 85 ¶5. A banking law expert, who attended the depositions of BOA representatives, likewise concluded that BOA officers and employees had to have knowledge of the illegal conduct, and they aided Theodule in his scheme.[4] Doc 85 at 5.

STANDARD OF REVIEW

A district court order granting a motion to dismiss under Rule 12(b)(6) for failure to state a claim is reviewed *de novo*, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009); *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1262 (11th Cir. 2004). A *de novo* standard of review is also applied to a district court order granting a

[4] The expert report of Elizabeth Marchese is attached as Exhibit B to the Receiver's proposed second amended complaint. *See* Doc 85-2.

motion to dismiss for failure to meet a heightened pleading standard, if applicable. *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1236 (11th Cir. 2008).

In considering a motion to dismiss for failure to state a claim, the reviewing court must also favor the plaintiff with all reasonable inferences arising from allegations in the complaint. *Stephens v. Dep't of Health & Human Servs.*, 901 F.2d 1572, 1573 (11th Cir. 1990). A complaint must provide the basis for a plaintiff's entitlement to relief, and raise that right to relief above the level of mere speculation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). The plausibility standard is not akin to a probability requirement; a claim is stated if the factual allegations"raise a reasonable expectation that discovery will reveal evidence" that supports the alleged claims. *American Dental Assoc. v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (citing *Twombly*, 550 U.S. at 556).

Denial of leave to amend a complaint is reviewed for abuse of discretion. *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1300 (11th Cir. 2003). However, a denial of leave to amend based on

the futility of an amendment is a legal conclusion, and is reviewed *de novo*. *Mizzaro*, 544 F.3d at 1236.

SUMMARY OF THE ARGUMENT

The lower court abused its discretion by dismissing the Receiver's claims with prejudice, and without giving the Receiver any opportunity to amend, based on an unpublished decision issued after the lower court had previously ruled that the Receiver's claims were sufficiently pleaded. The court failed to afford the Receiver any chance to amend his pleading to meet the new decision despite that the Receiver notified the court that he possessed additional facts obtained in discovery demonstrating defendants "lack of good faith and actual knowledge that it was aiding money laundering in furtherance of a Ponzi scheme," and requested an opportunity to amend if the court reversed its prior ruling that the Receiver's complaint stated claims for aiding and abetting and adequately pleaded BOA's knowledge under FUFTA.

The lower court further erred in concluding that any attempt by the Receiver to amend the previously-upheld complaint would be "futile," without the court even reviewing the Receiver's proposed amended pleading. The error of the court's "futility" finding was tacitly recognized

by the court when it reviewed the additional facts the Receiver had asked to add to his complaint and acknowledged that those facts would cause the court to reconsider its order of dismissal with prejudice.

Over and above the error in dismissing the Receiver's claims with prejudice without affording the Receiver any opportunity to amend to add the new facts he had discovered, the court erred by dismissing with prejudice the Receiver's FUFTA claims based on the "mere conduit" affirmative defense which requires BOA to prove that it acted in "good faith." Based on the allegations in the amended complaint (even prior to the additional facts the Receiver had discovered to add to its second amended complaint), it was error to resolve the "good faith affirmative defense on a Rule 12(b)(6) motion. Whether a transferee can avoid liability as a good faith, mere conduit is a fact-intensive issue that depends on the facts of each particular transaction. The Receiver's amended complaint, and even more clearly its proposed second amend complaint, alleges facts that cannot be rejected on a motion to dismiss that make it plausible that BOA did not act in good faith with regard to the fraudulent transfers at issue.

The lower court's dismissal of the Receiver's amended complaint with prejudice should be vacated. The matter should be remanded with

instructions to deny BOA's motion to dismiss the amended complaint or allow the Receiver to file a second amended complaint to allege the facts it requested to submit which the lower court failed to consider before dismissing the Receiver's amended complaint with prejudice.

ARGUMENT

A. The Lower Court Abused Its Discretion by Dismissing with Prejudice the Receiver's Claims Without Allowing Any Opportunity to Amend

The lower court dismissed the Receiver's amended complaint with prejudice on May 23 without giving the Receiver leave to amend. Doc 82. The court did so despite having ruled in its December 22 order that the Receiver's allegations stated aiding and abetting claims and adequately pleaded BOA's "knowledge" for purposes of the FUFTA claims. Doc 51 at 15. The lower court's dismissal with prejudice of the Receiver's amended complaint without affording the Receiver an opportunity to amend was an abuse of discretion.

"The court should freely give leave [to amend] when justice so requires." FED. R. CIV. P. RULE 15(a)(2). The Supreme Court has made clear that "this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of

relief, he ought to be afforded an opportunity to test his claims on the merits." *Foman v. Davis,* 371 U.S. 178, 181-82 (1962) (citation omitted). Rule 15(a) thus "severely restricts a court's discretion to dismiss a complaint without leave to amend. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001); *Thomas v. Town of Davie,* 847 F.2d 771, 773 (11th Cir. 1988). This construction of Rule 15(a) furthers the purpose of the Federal Rules to resolve litigation on the merits. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 545 (11th Cir. 2002) (citing *Foman*, 371 U.S. at 178, 181-82). It is error to dismiss a complaint with prejudice where the plaintiff asks for leave to amend and the court had denied a previous motion to dismiss arguing the same grounds, justifying the plaintiff's belief that no additional allegations were required. *Bryant*, 252 F.3d at 1163.

Here, relying on the lower court's December 22 order upholding his aiding and abetting claims and knowledge allegations under FUFTA, the Receiver filed his amended complaint with the same allegations as to BOA's knowledge made in his original complaint. Doc 1 ¶¶1-68; Doc 57 ¶¶1-68. When BOA filed its second motion to dismiss, arguing that the decision in *Lawrence v. Bank of America, N.A.*, No. 11-12401, 2012 WL 89904 (11th Cir. Jan. 11, 2012), heightened the pleading requirements for aiding

and abetting, the Receiver in his response asked for leave to amend if the court altered its prior ruling upholding the Receiver's complaint (and identical amended complaint). Doc 76 at 12, n. 8. Thus, when the court reversed its position and determined for the first time in the May 23 order that the Receiver's allegations did not state a claim, the Receiver had no opportunity to amend his allegations as to BOA's "knowledge" because the court dismissed the claims with prejudice.

In *Bryant*, 252 F.3d 1161, this court reversed a dismissal with prejudice entered after the district court had previously upheld the plaintiff's complaint on a motion to dismiss. That is precisely what happened here and *Bryant* is squarely on point.

In *Bryant*, the plaintiffs sued under the Securities and Exchange Act of 1934. The district court denied a motion to dismiss, finding that the complaint adequately pleaded a claim under the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *Bryant,* 252 F.3d at 1163 (citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1273 (11th Cir. 1991) ("*Bryant I*")). The district court, however, certified to this court for interlocutory review the question of whether the PSLRA altered the *scienter* requirement for securities fraud cases. This court

held that it did not, stating that the PSLRA required a plaintiff to "plead with particularity facts which give rise to a strong inference that the defendant acted in a severely reckless fashion, but that allegations of motivation and opportunity, without more, do not meet this burden." *Id.* (citing *Bryant I*, 187 F.3d at 1285-87).

On remand, the defendants "renewed their motion to dismiss" based upon this court's intervening decision in *Bryant I*, and "plaintiffs filed a response which included a request for leave to amend." *Bryant*, 252 F.3d at 1163. The lower court then dismissed the amended complaint with prejudice without giving the plaintiffs an opportunity to amend. *Id.* This court reversed that final judgment of dismissal and remanded with instructions to permit plaintiffs to amend to file a second amended complaint. *Id.* at 1165.

The *Bryant* court noted that— as in this case—the district court had previously ruled that the plaintiffs' allegations stated a claim for relief. *Id.* at 1164. The court pointed out that "in denying the original motion to dismiss, the district court stated that the plaintiffs' allegations . . . satisfied the heightened pleading requirement. Rather than indicating infirmities in the complaint, the district court's prior opinion created the exact opposite

impression." *Id*. (citation omitted). Thus, it was error for the lower court not to permit the plaintiffs' to file a second amended complaint.

The same thing happened here. The lower court upheld the Receiver's aiding and abetting claims and allegations of BOA's knowledge under FUFTA in the December 22 order. After the Receiver filed his amended complaint in reliance on that order, BOA asked the court to dismiss the amended complaint based on *Lawrence*, which was decided *after* the Receiver filed his amended complaint. The court then reversed course from his December 22 order and ruled that the previously-upheld complaint failed to state a claim. The court inexplicably dismissed the amended complaint *with prejudice* without giving the Receiver any opportunity to address the court's new position, despite the Receiver's request for leave to amend if the court retreated from its prior ruling. Justice requires that the Receiver be given an opportunity to amend, as he requested, based on the lower court changing the pleading standard applicable to the Receiver's claims.

B. The Lower Court Erred in Concluding, Without Reviewing the Receiver's New Allegations, That Any Amendment to the Receiver's Complaint Would Be Futile

After reversing course from its December 22 order holding that the Receiver's complaint stated claims for aiding and abetting and adequately pleaded knowledge for purposes of FUFTA, the lower court stated without substantive explanation that "the Court finds that granting leave to amend the Amended Complaint would be futile in light of the legal conclusions stated in this order." Doc 82 at 5. That "futility" determination is a legal conclusion that is reviewed *de novo*. *Mizzaro*, 544 F.3d at 1236.

The court erred in concluding that any amendment the Receiver might make to his complaint would be "futile." Indeed, the conclusion is difficult to comprehend given that the lower court did not even review the Receiver's proposed amended pleading before concluding that any amendment would be "futile."

A court may deny leave to amend a complaint if the amendment would be futile. *Bryant*, 252 F.3d at 1163; *Hall v. United Ins. Co. of Am.*, 367 F. 3d 1255, 1263 (11th Cir. 2004). However, the denial must be based on the court's determination "that the complaint as amended would still be

properly dismissed." *Coventry First, LLC v. McCarty*, 605 F.3d 865, 868 (11th Cir. 2010) (quoting *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007). By definition, therefore, a court must at least review the amended pleading before concluding it would be futile. Here, however, after ruling that the Receiver's allegations were sufficient under Rule 12(b)(6), the lower court not only reversed its position, but without considering the Receiver's new allegations (which the Receiver asked to add if necessary), the court decided that no new allegations could possibly be added to state a claim. There is no basis for that legal conclusion.

The court's error is manifest in the fact that, when the lower court did review the Receiver's additional allegations, the court acknowledged that the new facts would have led him to reconsider the dismissal with prejudice. Doc 94 at 1. However, having dismissed the amended complaint with prejudice, the district judge concluded that he could not consider the new facts the Receiver had asked to add prior to dismissal if the court deemed it necessary. *Id.* The lower court thus confirmed that amendment would not be futile; instead, if the Receiver was given even one opportunity to amend, he would have been able to state claims for

relief that are "plausible on their face" as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

It was error for the court to conclude that any amendment would be futile without reviewing the Receiver's proposed amendment. For all the lower court knew, the Receiver could amend to allege that BOA's Chief Executive Officer had sent a memorandum to his staff saying "George Theodule is a friend who is running a Ponzi scheme. Please make sure that we do everything we can to assist him in his fraudulent activities." Surely, if that memorandum existed, an amendment would not be futile. It follows, therefore, that the court erred by concluding, *before* considering what new allegations might be made, that any amendment would be futile.

C. There Is No Other Basis for Denying the Receiver an Opportunity to Amend Under Rule 15(a)

This court has explained that a district court may decline to "allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Bryant*, 252

F.3d at 1164 (citing *Foman v. Davis*, 371 U.S. at 182-83). As discussed above, an amendment would not be futile and the court never reviewed the proposed amendment as required to reach that conclusion. There is, moreover, no other justification for denying leave to amend.

There was no undue delay by the Receiver or repeated failures to cure deficiencies by prior amendment. Indeed, there was no prior amendment with respect to the aiding and abetting or knowledge allegations, as none was necessary because the court previously found the Receiver's allegations sufficient to state those claims. Doc 1; Doc 57.[5]

BOA would not have be unfairly prejudiced by allowing the Receiver an opportunity to amend. The case is at a relatively early stage and there was no pretrial order in place setting any deadline for amendment of pleadings. The additional facts to be pleaded were developed in discovery in the litigation and provided largely by BOA employees. The mere fact that a case is ongoing for any specific period of time, "without any other evidence of prejudice to the defendants or bad faith on the part of the plaintiffs, does not justify denying the plaintiffs the opportunity to amend their

[5] The allegations in these counts are the same in both the initial Complaint and the Amended Complaint. Doc 1, Doc 57.

complaint." *Bryant*, 252 F.3d at 1164; *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1490 (11th Cir.1989), *rev'd on other grounds,* 499 U.S. 530 (1990). ("The mere passage of time, without anything more, is an insufficient reason to deny leave to amend"). The Receiver pursued this case diligently, including conducting discovery over BOA's objection. The Receiver, per the court's direction, engaged an expert witness who was preparing a report in accordance with the court's pretrial order. In fact, expert witness reports were due to be exchanged on May 26, 2012, three days after the court dismissed the case with prejudice. The Receiver was pushing the case, not delaying it. Allowing one amendment to address the new argument made by BOA based on an intervening decision, would not prejudice BOA under the standards of Rule 15(a).

D. The Court Erred in Dismissing the Receiver's FUFTA Claims with Prejudice

In addition to the abuse of discretion in not giving the Receiver an opportunity to amend, dismissal with prejudice of the Receiver's FUFTA claims was error based on the allegations in the amended complaint. The court erroneously shifted BOA's burden to affirmatively show "good faith" to sustain a "mere conduit" defense to the Receiver as a burden to allege

facts that affirmatively show BOA did *not* act in good faith. Then, ignoring a legion of other authority, the lower court erroneously equated "good faith" with "lack of actual knowledge" when applying BOA's mere conduit defense to FUFTA liability. The lower court erred on both points.

The law of this Circuit clearly precludes a transferee who does not act in good faith from asserting a mere conduit defense in response to fraudulent transfer allegations. *Martinez v. Hutton (In re Harwell),* 628 F.3d 1312, 1323 (11th Cir. 2010); *Dev. Specialists, Inc. v. Hamilton Bank, N.A. (In re Model Imperial, Inc.),* 250 B.R. 776, 797-98 (Bankr. S.D. Fla. 2000). In *Harwell,* this court stated: "we now explicitly hold that good faith is a requirement under this Circuit's mere conduit or control test." *Harwell,* 628 F.3d at 1323 n.10. To this end, in the December 22 order, the lower court acknowledged that "*Harwell* clearly requires the Bank to establish its good faith and innocence to take advantage [of] the equitable exception to liability as an initial transferee." Doc 51 at 25. [6] Because the court was required to accept

[6] Courts apply the same analytical framework when considering claims under FUFTA and the equivalent Bankruptcy Code addressing fraudulent transfers. *See In re Toy King Distribs., Inc.,* 256 B.R. 1, 126–27, 143 (Bankr. M.D. Fla. 2000) (treating Fla. Stat. § 726.105 as state law equivalent of 11 U.S.C. § 548(a)(1)(A) and Fla. Stat. § 726.106 as state law equivalent of § 548(a)(1)(B)); *In re Stewart,* 280 B.R. 268, 273 (Bankr. M.D. Fla. 2001)

the facts alleged in the Receiver's amended complaint as true, and view them in a light most favorable to the Receiver, *Harper v. Lawrence County,* 584 F.3d 1030, 1035 (11th Cir. 2009), the lower court erred in finding that, as a matter of law, BOA established that it was a "mere conduit" that acted in "good faith."

1. The Court Erred by Resolving BOA's Fact-Intensive Good Faith Affirmative Defense on a Rule 12(b)(6) Motion

Based on the facts alleged in the amended complaint, the lower court concluded as a matter of law that BOA "acted with good faith" in connection with Theodule's fraudulent transfers. Doc 82 at 4.That ruling ignores that the "mere conduit" exception to fraudulent transfer liability is an equitable affirmative defense and the "Defendant bears the burden of proving this affirmative defense." *Wiand v. Dewane*, Case No. 8:10-CV-246-T-17 MAP, 2011 WL 4460095, at *7, (M.D. Fla. July 11, 2011); *cf. Perlman v.*

(holding that Fla. Stat. § 726.105 and 11 U.S.C. § 548 "are analogous 'in form and substance' and may be analyzed contemporaneously") (citing *In re Venice–Oxford Assocs.Ltd,* 236 B.R. 820, 834 (Bankr. M.D. Fla. 1999)).This court has observed that, if there is any difference between the statutory schemes, FUFTA provides for broader liability for fraudulent transfers. *See Freeman v. First Union Nat'l*, 329 F.3d 1231, 1233-34 (11th Cir. 2003). Thus, cases discussing the standards for fraud and "good faith" under bankruptcy law are applicable when interpreting FUFTA.

Five Corners Investors I, Case No. 09-81225-CIV, 2010 WL 962953, at *3 (S.D. Fla. Mar. 15, 2010) (Hurley, J.) ("good faith defense is an affirmative defense, the burden of which is on defendants to prove.")

This court has explained, moreover, that "good faith" is a fact-intensive inquiry that requires a "flexible, pragmatic, equitable approach of looking beyond the particular transfer in question to the circumstances of the transaction in its entirety." *Harwell*, 628 F.3d at 1322 (reversing a summary judgment that found transferee acted in good faith). Indeed, before dismissing the FUFTA claims with prejudice because the Receiver's amended complaint did not disprove BOA's "good faith," the lower court acknowledged that "*Harwell* clearly requires the Bank to establish its good faith and innocence to take advantage of the equitable exception to liability." Doc 51 at 25. *Cf. Perlman v. Delisfort–Theodule,* Case No. 09-80480-CIV, 2010 WL 4514249, at *2 (S.D. Fla. Nov. 2, 2010) (Hurley, J.) (recipient of fraudulent transfer bears the burden of showing evidence of good faith in support of a mere conduit defense). The court then ignored that the burden was on BOA to establish its good faith and it was error to dismiss the FUFTA claims with prejudice at the motion to dismiss stage.

Dismissal of a complaint by application of an affirmative defense is an extraordinary occurrence, appropriate only where the claim is "facially subject to an affirmative defense." *Le Frere v. Quezada,* 582 F.3d 1260, 1263 (11th Cir. 2009). Typically, only defenses such as *res judicata,* statute of limitations, and other law driven affirmative defenses support such a conclusion. *See, e.g., Concordia v. Bendekovic*, 693 F.2d 1073, 1075 (11th Cir. 1982); *Mann v. Adams Realty Co.*, 556 F.2d 288, 293 (5th Cir. 1977). For that reason, a defendant's "good faith" defense to fraudulent transfer liability should not be resolved on a Rule 12(b) motion to dismiss. *E.g. Steinberg v. Alpha Fifth Group,* Case No. 04-60899-CIV, 2010 WL 1332844 (M.D. Fla. Mar. 30, 2010) ("Even if [the defendant] has a valid argument that it was a mere 'conduit' for the transfers, that argument is an affirmative defense to be proven at trial, not on a motion to dismiss."); *Steinberg v. Barclay's Nominees (Branches) Ltd.,* Case No. 04-60897-CIV, 2008 WL 4601042, at *8 (S.D. Fla. Sept. 30, 2008) (denying motion to dismiss FUFTA claims where receiver's complaint alleged defendant was beneficiary of the value of the transfers); *Gowan v. Patriot Grp., LLC (In re Dreier LLP),* 452 B.R. 391, 426 (Bankr. S.D.N.Y. 2011) (plaintiff "need not dispute a transferee's good faith upon the face of the complaint.).

In *Kapila v. Integra Bank, N.A. (In re Pearlman),* 440 B.R. 569 (Bankr. 2010) *aff'd* 478 B.R. 448 (M.D. Fla. 2012), the court rejected a bank's argument to dismiss a fraudulent transfer complaint based on the good faith defense where the allegations were that the bank was on inquiry notice of a Ponzi schemer's fraud or insolvency. *Id.* at 577. The court held that the plaintiff's allegations that the bank ignored information regarding a borrower's financial difficulty were sufficient to rebut "good faith" at the motion to dismiss stage. *Id.* The court reasoned that, "[a]lthough the trustee's complaint does not specify how Integra would have uncovered Pearlman's fraudulent scheme had it followed up on some of the alleged 'warning signs of difficulty' it is at least plausible that Integra could have done so, given the widespread and complete nature of Pearlman's fraudulent borrowing tactics." *Id.* In affirming the denial of the motion to dismiss, the lower court explained that the "applicability [of a good faith defense] is a fact-intensive inquiry for a later stage of the case if necessary." *In re Pearlman*, 478 B.R. at 454. *Cf. Wiand v. EFG Bank,* Case No. 8-10-CV-241-T-17-MAP, 2012 WL 750447, at *5 (M.D. Fla. Feb. 8, 2012) (resolution of good faith, mere conduit defense requires a fact-intensive inquiry into bank's relationship with customer)(citing *In re Harwell,* 628 F.3d at 1323).

Here, the allegations of the amended complaint raise serious issues as to the BOA's actual knowledge or willful ignorance of Theodule's fraudulent scheme and fraudulent transfers. Doc 57 ¶¶40-68. It was error for the court to reject those facts and resolve them against the Receiver on a Rule 12(b)(6) motion to dismiss.

2. The Court Erred by Concluding That the Standard of BOA's "Good Faith" Is Merely "No Actual Knowledge"

In dismissing the Receiver's FUFTA claims with prejudice, the lower court effectively reduced the standard of "good faith" applicable to BOA to "lack of actual knowledge." However, actual knowledge is not a litmus test of whether a defendant can prove "good faith" to establish its "mere conduit" status and avoid fraudulent transfer liability. As the court stated in *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299 (M.D. Fla. 2009), under FUFTA, "the transferee's lack of actual knowledge of the debtor's fraudulent purpose is relevant to the good faith inquiry, but not dispositive." *Id.* at 1319-20.

"[F]undamental to the concept of good faith is that a transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor's fraudulent purpose." *Development Specialists, Inc. v. Hamilton Bank,*

N.A. (In re Model Imperial, Inc.), 250 B.R. 776, 797 (Bankr. S.D. Fla. 2000). Thus, "the transferee may not put on 'blinders' … where circumstances would place the transferee on inquiry notice of the debtor's fraudulent purpose of insolvency." *Id.* (quoting *In re Cannon*, 230 B.R. 546, 592 (Bankr. W. D. Tenn. 1999)). "Circumstances putting the transferee on notice as to the debtor's insolvency, an underlying fraud, or the improper nature of the circumstances of a transaction, will preclude a party from asserting a good-faith defense." *Cuthill v. Kime (In re Evergreen Secs., Ltd.),* 319 B.R. 245, 255 (Bankr. M.D. Fla. 2003*)*; *cf. Musselman v. Jasgur (In re Seminole Walls & Ceilings Corp.),* 446 B.R. 572, 596 (Bankr. M.D. Fla. 2011) ("A transferee does not take property in good faith when the transferee is on notice of at least some of the transferor's fraudulent actions").

Thus, the good faith defense to fraudulent transfer liability must be decided on case-by-case basis by looking at both actual and imputed knowledge of recipient of transfer. *Cuthill v. Greenmark, LLC* (*In re World Vision Entertainment, Inc.*), 275 B.R. 641, 659–60 (M.D. Fla. 2002); *cf. Roeder v. Lockwood* (*In re Lockwood Auto Group, Inc.*), 428 B.R. 629, 636 (Bankr. W.D. Pa. 2010) (a transferee is not automatically protected by the good-faith defense merely because it had no actual knowledge that a fraud was being

perpetrated). It was error for the court to rule that BOA acted in good faith as a matter of law unless the Receiver alleged facts to show BOA had "actual knowledge" of Theodule's fraud as to each fraudulent transfer.

The Receiver pleaded facts of numerous red flags and suspect transactions undoubtedly known to BOA, as well as violations and evasions of BOA's internal policies and legal and regulatory requirements. Doc 57 ¶¶40-68. And, in the proposed second amended complaint, the Receiver detailed improper relationship between the BOA Vice-President and Theodule and his accomplices and even more specific and deliberate actions taken to evade exposure of Theodule's suspect background and ongoing fraudulent activities. Doc 85-1 ¶¶68-85. These factual allegations preclude the application of BOA's "good faith" affirmative defense at the motion to dismiss stage.

Nonetheless, the court sought to justify dismissal of the FUFTA claims by holding banks to a lesser standard of good faith than other defendants in fraudulent transfer actions. The court initially acknowledged that the good faith defense to fraudulent transfer liability requires that BOA show it had neither "actual knowledge" nor "knowledge of such facts and circumstances as would have induced an ordinarily prudent person to

make inquiry, and which inquiry, if made with reasonable diligence, would have led to the discovery of the [transferor's] fraudulent purpose."' Doc 82 at 4 (quoting *Wiand*, 611 F. Supp.2d at 1319). Although the court purported to accept as true all of the Receiver's allegations, the court dispensed with the issue of BOA's "reasonable inquiry" obligation by citing to *O'Halloran v. First Union National Bank*, 350 F.3d 1197, 1205 (11th Cir. 2003), for the principle that "banks have the 'right to assume that individuals who have the legal authority to handle [an] entity's accounts do not use misuse the entity's funds." *Id.* The court thus decided as a matter of law that nothing alleged by the Receiver plausibly showed knowledge by BOA of any fact or circumstance that might cause a prudent person (or bank) to even make a reasonable inquiry as to Theodule's financial shenanigans.

The court essentially held, therefore, that a bank such as BOA, absent proof of its actual knowledge of fraud, can never be said to conduct itself in less than good faith because it can simply "assume" that every suspicious and unjustifiable transaction it sees is legitimate. That reasoning is erroneous on several levels.

First, *O'Halloran* does not establish a hard and fast rule as to a bank's good faith conduct that avoids fraudulent transfer liability based on some "right to assume" that bank customer's are acting appropriately. *O'Halloran* is not even a fraudulent transfer case. The claims made against the bank there were aiding and abetting embezzlement, and the case dealt with the authority of an individual to conduct transaction for the account holder. *O'Halloran,* 350 F.3d. at 1197.

Significantly, the lower court ignored that, three sentences after the passage cited by below, this court qualified its prior statement by adding: "A bank's responsibility to a depositor may be somewhat heightened when the bank has knowledge that a particular individual ostensibly representing the depositor instead intends to cause financial injury to the depositor." *O'Halloran,* 350 F.3d. at 1205. Thus, even in cases involving embezzlement (rather than fraudulent transfer liability), the bank's right to "assume" nothing is amiss is limited. *O'Halloran* does not in any manner alter the holdings of the cases on fraudulent transfer liability establishing that "a transferee may not put on "blinders" prior to entering into transactions with a debtor" and claim the benefit of the good faith defense. *Model Imperial, Inc.*, 250 B.R. 776, 801 (Bankr. S.D. Fla. 2000).

The court's reading of *O'Halloran* to allow a bank to demonstrate good faith and avoid fraudulent transfer liability by ignoring suspicious and illegal activity in favor of "assuming" all is above board is at odds with the other cases. Indeed, many of the cases cited in this brief dealing with fraudulent transfer liability hold banks to the same "good faith" standard as any other fraudulent transferee. *See*, e.g., *Harper v. Lawrence County*, 584 F.3d 1030 (11th Cir. 2009); *In re Model Imperial, Inc.*, 250 B.R. 776 (Bankr. S.D. Fla. 2000); *Steinberg v. Barclay's Nominees (Branches) Ltd.*, Case No. 04-60897-CIV, 2008 WL 4601042, at *8 (S.D. Fla. Sept. 30, 2008); *Kapila v. Integra Bank, N.A. (In re Pearlman),* 440 B.R. 569 (Bankr. 2010) *aff'd* 478 B.R. 448 (M.D. Fla. 2012); *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299 (M.D. Fla. 2009); *Wiand v. EFG Bank,* Case No. 8-10-CV-241-T-17-MAP, 2012 WL 750447, at *5 (M.D. Fla. Feb. 8, 2012); *Roeder v. Lockwood (In re Lockwood Auto Group, Inc.),* 428 B.R. 629 (Bankr. W.D. Pa. 2010). None of those cases even suggests *O'Halloran* exempts banks from the burden of establishing their good faith simply because they have some right to "assume" that the person dealing for an account holder is authorized to do so. Rather, as the *Wiand* court noted, "the transferee's lack of actual knowledge of the debtor's fraudulent purpose is relevant to the good faith inquiry, but not dispositive." *Wiand*,

611 F. Supp. 2d at 1319 -20 (citing *Terry,* 432 F. Supp.2d at 641). While a bank's right to "assume authority" may be relevant to the "good faith" inquiry, it is not dispositive.

The facts alleged in the Receiver's amended complaint make it "plausible" that BOA did not act in good faith, i.e., that BOA had knowledge of "circumstances putting [BOA] on notice as to [Theodule's' underlying fraud, or the improper nature of the circumstances of a transaction."*Cuthill v. Kime*, 319 B.R. 245. The facts pleaded in the second amended complaint (which the lower court never reviewed before dismissing the Receiver's claims with prejudice) make that even more clear.

It was error for the lower court to decide BOA's good faith and mere conduit affirmative defenses as a matter of law based on the allegations in Receiver's amended complaint. The dismissal with prejudice must be reversed and the matter remanded with instructions to deny BOA's motion to dismiss, or to allow the Receiver leave to file his second amended complaint.

3. The Florida Supreme Court Decision in *Freeman* Does Not Support Dismissal

In dismissing the FUFTA claims, the court relied in part on *Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004). *Freeman* does not support the court's resolution of BOA's fact-based good faith, mere conduit defense at the motion to dismiss stage. Indeed, *Freeman* did not involve claims like those made here against a transferee under FUFTA; instead, the case answered the certified question: "Under Florida law, is there a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee." *Id.* at 1273. The supreme court held only that the statute did not create a claim for aiding and abetting a fraudulent transfer against a non-transferee under FUFTA. *Id.* at 1277.

Here, the Receiver is asserting direct fraudulent transfer claims against BOA as a transferee who had knowledge of the fraud and participated in its concealment. *Freeman* does not apply to the Receiver's FUFTA claims against a transferee. *See 8699 Biscayne, LLC v. Indigo Real Estate, LLC (In re 8699 Biscayne, LLC),* Adv. Case No. 08-22812-BKC-AJC, 2010 WL 1375558, *3 (Bankr. S.D. Fla. April 2, 2010) (rejecting defendants' *Freeman* argument

because plaintiff's alleged defendants were transferees and active participants in the fraudulent transactions).[7]

4. *Lawrence* Does Not Apply to the Receiver's FUFTA Claims

Lawrence v. Bank of America, N.A., No. 11-12401, 2012 WL 89904 (11th Cir. Jan. 11, 2012) did not address statutory fraudulent transfer claims under FUFTA or bankruptcy law. That case involved only common law aiding and abetting claims. Moreover, the Receiver, in his amended complaint, and certainly in his second amended complaint, alleged facts that go far beyond routine banking services. The lower court acknowledged as much when he reviewed the allegations in the Receiver's second amended complaint and stated that those allegations would have caused him to reconsider his order of dismissal with prejudice. Doc 94 at 1.

The court's broad extension of *Lawrence* to FUFTA would overturn a long line of cases establishing that actual knowledge is not the test of lack of good faith in connection with fraudulent transfer liability. Those cases establish that inquiry notice of fraud is enough to foreclose a transferee's

[7] The district court understood this distinction in the December 22 order when it discussed *Freeman* only in the context of the Receiver's claims for aiding and abetting fraudulent transfers, which the court dismissed and the Receiver did not refile in his amended complaint. Doc 58 at 21.

good faith or mere conduit defense at the motion to dismiss stage. *See In re Model Imperial,* 250 B.R. at 801; *In re Skolnick,* 363 B.R. 626 (Bankr. S.D. Fla. 2007).

A glaring distinction between this case and *Lawrence* is the allegations of BOA actions that go well beyond routine banking services. The facts alleged here by the Receiver suggest not only actual knowledge, but BOA's active concealment of Theodule's fraudulent activities by BOA's Vice President and others. *Lawrence* has no bearing on the significance of those facts with regard to BOA's good faith, mere conduit defense. This case is more akin to *Martinez v. Hutton (In re Harwell)*, 628 F.3d 1312 (11th Cir. 2010) where a trustee sought to recover fraudulent transfers from an attorney who represented the debtor. *Harwell,* 628 F.3d at 1313-14. The attorney refuted liability and asserted that he was a mere conduit when the debtor's funds were placed into the attorney's trust account and then disbursed to the debtor, his family members and certain creditors at the debtor's direction. *Id.* The attorney was alleged to have been directly involved in the fraudulent transfer scheme. *Id.* at 1316. This court reversed the bankruptcy court's finding that the attorney could not be held personally liable for the fraudulent transfers. *Id.* at 1324. The court held that

irrespective of whether the attorney lacked control over the funds in his trust account, he could not establish good faith as a matter of law in order to take advantage of the equitable defense in light of the allegations regarding his direct involvement in the transfers. *Id.*

CONCLUSION

For the foregoing reasons, this court should reverse the lower court's order granting BOA's motion to dismiss pursuant to Rule 12(b)(6) and dismissing the Receiver's claims with prejudice. The court should remand the case with directions that the motion to dismiss the Receiver's amended complaint be denied or, alternatively, that the Receiver be given leave to file a seconded amended complaint.

Respectfully submitted this 9th day of November, 2012.

GENOVESE JOBLOVE & BATTISTA, P.A.
Counsel for XXXXXXX
Miami Tower, 44th Floor
100 S.E. Second Street
Miami, Florida 33131
Tel.: 305-349-2300
Fax: 305-349-2310

By: s/W. Barry Blum .
Attorney Name
Florida Bar No. 379301

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I FURTHER CERTIFY that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this computer-generated brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010's Book Antiqua, 14-point font size.

s/W. Barry Blum .
Attorney Name

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served on this 9th day of November, 2012 a true and correct copy of the foregoing brief via FedEx to counsel for Appellants, Juan A. Gonzalez, Esq. and Dora F. Kaufman, Esq. at Liebler, Gonzalez & Portuondo, P.A., Courthouse Tower, 25th Floor, 44 West Flagler Street, Miami, FL 33130 and Mary J. Hackett, Esq., Joseph E. Culleiton, Esq. and Dustin Pickens, Esq. at Reed Smith LLP, Reed Smith Centre, 225 Fifth Avenue, Pittsburgh, PA 1522, Miami, Florida 33131, and to John Ley, Clerk of the Court, United States Court of Appeals for the Eleventh Circuit, Elbert P. Tuttle Court of Appeals Building, 56 Forsyth Street, N.W., Atlanta, Georgia 30303.

s/W. Barry Blum .
Attorney Name

10501-008/110v.3