Case No. 12-14345-CC

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.

WELLS FARGO BANK, N.A.,
Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 10-81612-CIV-HURLEY/HOPKINS

PLAINTIFF/APPELLANT'S REPLY BRIEF

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INTRODUCTION

Wells Fargo's principal argument is that the "actual knowledge" requirement for aiding and abetting claims articulated in *Lawrence v. Bank of Am., N.A.*, 455 F. App'x 904 (11th Cir. 2012), applies equally to the Receiver's FUFTA claims. But the principal case relied on by Wells Fargo in arguing for dismissal of the aiding and abetting claims specifically rejects Wells Fargo's main argument. *See El Camino Res.Ltd. v. Huntington Nat'l Bank,* 712 F.3d 917, 924 (6th Cir. 2013). In fact, in that case, the defendant bank prevailed on summary judgment on aiding and abetting but was found liable for $72 million in fraudulent transfer claims based on the same facts. *See Meoli v. Huntington Nat'l Bank (In re Teleservices Grp.),* 469 B.R. 713, 768 (Bankr. W.D. Mich. 2012). The court of appeals observed, moreover, that those two outcomes were consistent because the issue of actual knowledge is "distinct" from the issue of good faith applicable in fraudulent transfer cases. *El Camino*, 712 F.3d at 924.

Throughout its brief, Wells Fargo largely ignores the Receiver's proposed second amended complaint (the "Proposed Amendment"), even though Wells Fargo does not contend that the lower court could dismiss the action without considering the Proposed Amendment. At times, Wells

Fargo cites to allegations in the Receiver's amended complaint that are not even in the Proposed Amendment. However, the Proposed Amendment is the operative pleading on this appeal because the lower court considered the Proposed Amendment but denied leave to amend based on futility. This court's *de novo* review must consider the sufficiency of the Proposed Amendment. *Cf. Coventry First, LLC v. McCarty*, 605 F.3d 865 (11th Cir. 2010) (court of appeal reviewed *de novo* proposed amended complaint found futile by district court).

Finally, Wells Fargo makes standing and *in pari delicto* arguments that were rejected by the District Court in its order denying Wells Fargo's motion to dismiss the Receiver's amended complaint and not raised on Wells Fargo's motion for reconsideration, which the lower court granted in order to dismiss the Receiver's claims with prejudice. Those arguments do not support dismissal of the Receiver's claims.

ARGUMENT

A. *Lawrence* Does Not Apply to FUFTA, and "Actual Knowledge" Is Not Required to Plead a FUFTA Claim

Wells Fargo argues that the unpublished opinion in *Lawrence*, 455 F. App'x 904, requires "that the bank would have had to have actual

knowledge of [the customer's] fraudulent activities" in order to be subject to fraudulent transfer liability. Answer Br. at 29. But *Lawrence* was not a fraudulent transfer case, and Wells Fargo is asking this Court to extend *Lawrence* far beyond the claims in that case. The only issue in *Lawrence* was "whether Plaintiffs adequately alleged the elements of" an aiding and abetting claim. *Lawrence*, 455 F. App'x at 906 ("Given that all of Plaintiffs' claims are predicated on the theory of aiding and abetting, we need only consider . . . such a claim."). Undeterred by the express language of *Lawrence*, however, Wells Fargo misstates that this court "plainly held in *Lawrence*" that "actual knowledge" is required "to trigger ***any*** liability against a bank under Florida law based upon the alleged misconduct of a bank customer." Answer Br. at 29-30. Wells Fargo is wrong.

B. The Receiver Has Pleaded a FUFTA Claim

The elements of a FUFTA claim are: "(1) there was a creditor to be defrauded; (2) a debtor intending fraud; and (3) a conveyance of property which could have been applicable to the payment of the debt due." *Nationsbank, N.A. v. Coastal Utils.*, 814 So. 2d 1227, 1229 (Fla. Dist. Ct. App. 2002). There is no requirement to plead any level of knowledge of the transferee (here Wells Fargo), let alone "actual knowledge" of a transferor's

fraudulent activity. *Id.* Neither *Lawrence* nor any other case holds that "actual knowledge" or even "lack of good faith" is an element of a fraudulent transfer or FUFTA claim. *Cf. Mukamal v. BMO Harris Bank, N.A.*, (*In re Palm Beach Fin. Partners)*, 488 B.R. 758, 771 (Bankr. S.D. Fla. 2013) ("the plaintiff never has the burden of pleading bad faith in order to negate the mere conduit defense"). Wells Fargo's contention that *Lawrence* applies to fraudulent transfer claims is misguided. Yet, much of Wells Fargo's answer brief is based on that very proposition.[1]

The Receiver's FUFTA claims stem from harm suffered by Receivership Entities that were *not* Wells Fargo customers when Theodule syphoned $38 million from those entities, which he laundered through Wells Fargo accounts ("Receivership Bank Customers"). Doc 86-1¶ 55. The Receiver alleged that "[s]ince the inception of the Ponzi scheme by Theodule, numerous and ongoing transfers—disguised as legitimate investments and

[1] Wells Fargo's argument at page 31 of its Answer Brief that "the Amended Complaint is utterly devoid of any explanation as to how any of the eight Receivership Entities … are creditors of the former Receivership Bank Customers" borders on frivolous. The "Amended Complaint" is not the operative pleading because the lower court considered the Receiver's Proposed Amendment and denied leave to amend based on futility. But Wells Fargo simply ignores the allegations in the Proposed Amendment and argues about a superseded pleading.

business transactions—were made among and between Receivership Entities, including to the Receivership Bank Customers at Wells Fargo. *Id.* ¶¶ 74, 75, 82, 83.[2] The non-bank customer Receivership Entities owned and controlled the funds transferred to (and later stolen out of) Wells Fargo, so the funds were assets of those Receivership Entities. *Id.* ¶¶ 42, 43, 64, 74, 75, 77, 82, 83, 85. The Receiver then alleged in detailed charts the specifics of the inter-company transfers, identifying the Receivership Entities involved and the debtor-creditor obligations created by the transfers (the "Creditor Transfers"). *Id.* ¶¶ 74, 82.

The Receiver further alleged the Creditor Transfers were made "as business transactions for alleged investment purposes" and the non-bank customer "Receivership Entities fully expected an accounting and return of the Creditor Transfers, and a profit upon the invested funds." *Id.* ¶¶ 75, 76, 83, 84. Because the transferred funds were then taken out of Wells Fargo

[2] Because the transfers are alleged to be part of a Ponzi scheme, they are presumed to be fraudulent. *Perlman v. Delisfort-Theodule*, No. 09-80480-CIV, 2010 WL 4514249, at *1 (S.D. Fla. Nov. 2, 2010) (Hurley, J.) (citing *In re McCarn's Allstate Fin., Inc.*, 326 B.R. 843, 850 (Bankr. M.D. Fla. 2005)). The Receiver also alleged Wells Fargo's actual or constructive knowledge of the fraudulent activity and Wells Fargo's failure to either close the Receivership Entities' accounts or refuse to participate in the fraudulent transfers. Doc 86-1 ¶¶ 31 through 61, 66, 70.

and "misappropriated" by Theodule, the transfers provided no value to the non-bank customer Receivership Entities. *Id.* ¶¶ 28, 53.

The Creditor Transfers resulted in the non-bank customer Receivership Entities, whose funds were transferred to Wells Fargo and then stolen, becoming creditors of the Receivership Bank Customers. "As a result of the claims arising among the Receivership Entities from those inter-company transfers, the Receiver standing in the shoes of the Receivership Entities, is a 'creditor' of the Receivership Bank Customers as defined by FUFTA." *Id.* ¶¶ 75, 76, 83, 84. *Cf. Court-Appointed Receiver for Lancer Mgmt. Grp. v. Redwood Fin. Grp.*, No. 06-60919, 2010 WL 2822053 (S.D. Fla. July 16, 2010) (under FUFTA, a plaintiff may be "a creditor of the entity or individual who has either transferred or received assets which thwarts the creditor's attachment").

The Receiver, standing in the shoes of the non-bank customer Receivership Entities, succeeds to the inter-company debts and has a "claim" as a "creditor" under FUFTA against the Receivership Entities identified as a "debtor." These allegations are sufficient to plead the Receiver's creditor status under FUFTA. *See Perlman v. Five Corners*

Investors I, No. 09-81225-CIV, 2010 WL 962953 (S.D. Fla. Mar. 15, 2010) (Hurley, J.). Wells Fargo cites no authority to the contrary.

C. Wells Fargo Continues to Ignore That Its "Mere Conduit" Argument Is an Affirmative Defense Requiring the Bank to Demonstrate "Good Faith"

Wells Fargo's argument that, as a matter of law, it was a "conduit" and not a transferee under FUFTA with respect to deposits in the bank is likewise flawed. Answer Br. at 24-28. The recipient of a transfer is the transferee, and a claim may be pursued against "[t]he first transferee or the person for whose benefit the transfer was made." Fla. Stat. § 726.109(2)(a) (2002). A depository bank in which a deposit is made is a "transferee" of the funds transferred. *Wiand v. Wells Fargo Bank, N.A.*, No. 8:12-CIV-00557-T-27EAJ, 2013 WL 1401414, at *8 (M.D. Fla. April 5, 2013); *In re Palm Beach Fin. Partners*, 488 B.R. at 768-769; *In re Teleservices Grp.*, 469 B.R. at 767. Wells Fargo is indisputably a transferee of the funds deposited into Wells Fargo by the Receivership Entities and with respect to transfers between Wells Fargo accounts by the Receivership Bank Customers. Thus, the Receiver can avoid the transfers, and recover the amounts transferred unless Wells Fargo can establish—with regard to each transfer—that it was a mere conduit that acted in good faith and was not even on inquiry notice.

Martinez v. Hutton(In re Harwell), 628 F.3d 1312, 1323 (11th Cir. 2010). Wells Fargo's contention that "lack of control of the funds" is by itself a defense is inconsistent with *Harwell,* where this court explained that lack of actual dominion or control is only half of the equation and a party asserting a mere conduit defense must show *both* lack of control *and* good faith. *Id.*[3]

Wells Fargo cites *Freeman v. First Union Nat'l Bank*, 865 So. 2d 1272 (Fla. 2004), for the notion that Wells Fargo was not a transferee under FUFTA because there are references to the bank in *Freeman* as a "non-transferee party." Answer Br. at 25. Wells Fargo makes the absurd logical leap that *Freeman* therefore means every bank is a non-transferee party under FUFTA. As noted at pages 48-49 of the Receiver's Initial Brief, however,

[3] In *Harwell*, this court explained the near-strict liability of a transferee of a fraudulent transfer and clarified that, to avoid liability based on the judicially-crafted "mere conduit" defense, the transferee must establish *both* that it did not have dominion or control over the assets received *and* that it acted in good faith and as an innocent participant in the fraudulent transfer. *Id. Harwell* and its progeny also make it clear that a transferee's "good faith" is a defense; actual knowledge of wrongdoing (indeed any level of knowledge) is not required to plead a FUFTA claim against a bank. Nor is "lack of actual knowledge" sufficient to establish a bank's good faith in support of a mere conduit affirmative defense. *In re Palm Beach Fin. Partners,* 488 B.R. at 770-771. *Lawrence*, which expressly did not involve fraudulent transfer claims, does not change the pleading requirements under FUFTA.

Freeman did not involve a FUFTA claim against the bank as an initial transferee. The only claim against First Union in *Freeman* was "aiding and abetting a FUFTA violation." 865 So. 2d at 1277. *Freeman* has nothing to do with this case.

Wells Fargo's reliance on *Super Vision Int'l v. Mega Int'l Commercial Bank Co.*, 534 F. Supp. 2d 1326 (S.D. Fla. 2008), is also misplaced in light of *Harwell*. *Super Vision* turned on the district court's determination that the plaintiff "does not allege that [the bank] actually controlled the funds at issue." *Id.* at 1344. *Harwell* establishes, however, that that is now only half the inquiry. *Harwell*, 628 F.3d at 1323. *Super Vision* is of no moment after *Harwell*.

Wells Fargo's willful blindness to the distinction between "actual knowledge" and "good faith" is evident in its citation to *El Camino Resources Ltd. v. Huntington Nat'l Bank*, 712 F.3d 917 (6th Cir. 2013), a case Wells Fargo describes as "illustrative." Answer Br. at 20. In *El Camino*, the Sixth Circuit affirmed a summary judgment in favor of a bank on aiding and abetting claims. 712 F.3d at 924. Notably, the case was *not* decided on a motion to dismiss, and *El Camino* did *not* involve claims for fraudulent transfer liability.

To the contrary, the defendant bank in *El Camino* was held liable to a trustee for $72 million for fraudulent transfers into the bank based on the same facts alleged by the plaintiff as the basis of the aiding and abetting claims. *See In re Teleservices Grp.*, 469 B.R. 713, 768 (Bankr. W.D. Mich. 2012); *Meoli v. Huntington Nat'l Bank (In re Teleservices Grp.)*, 444 B.R. 767 (Bankr. W.D. Mich. 2011). Indeed, at the end of the *El Camino* opinion, the court of appeals noted that the plaintiff-appellant argued that the bankruptcy court's determination "that Huntington did not act in good faith" when it accepted fraudulent transfers was "evidence that Huntington had actual knowledge" of the underlying fraud that precluded summary judgment. *El Camino*, 712 F.3d at 924. The court of appeals rejected that argument, explaining that "[t]he issue of good faith, however, is distinct from the issue of actual knowledge." *Id.*[4]

[4] Wells Fargo's suggestion that the Receiver is seeking to lower the pleading standard for fraudulent transfer claims, Answer Br. at 29-30, is unsupportable. In truth, Wells Fargo is asking this Court to impose pleading standards for FUFTA claims that are neither in the statute nor recognized by any court. Wells Fargo then goes further and accuses the Receiver of "cleverly labeling his claims as fraudulent transfer claims and pleading a standard lesser than actual knowledge." Answer Br. at 29. The argument—that aiding and abetting is the only claim available against a bank under the facts here—simply ignores cases recognizing that fraudulent transfer claims are separate and distinct from aiding and

Wells Fargo never mentions the Sixth Circuit's explanation that "actual knowledge" is "distinct" from the "good faith" standard in fraudulent transfer cases when it argues that the actual knowledge standard in *Lawrence* for aiding and abetting applies equally to the Receiver's FUFTA claims. Answer Br. at 29 (arguing that "[i]n *Lawrence* this circuit … expressly held that" with respect to "claims against a bank based upon misconduct perpetrated by a customer … 'To be liable, the bank would have had to have actual knowledge of [the customer's] fraudulent activities.'"). Not only has that argument never been recognized by any court with respect to fraudulent transfer claims, it was specifically rejected by *El Camino*, 712 F.3d at 924, one of the cases principally relied on by Wells Fargo in its answer brief.

D. *Harwell* Does Not Create Immunity for Banks and Lawyers

At pages 27-28 of the Answer Brief, Wells Fargo suggests that this Court

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abetting or other claims made against a bank. *In re Teleservices Grp.*, 469 B.R. 713 (Bankr. W.D. Mich. 2012); *Wiand v. Wells Fargo Bank, N.A.*, No. 8:12-CIV-00557-T-27EAJ, 2013 WL 1401414 (M.D. Fla. April 5, 2013); *In re Palm Beach Fin. Partners*, 488 B.R. 758, 771 (Bankr. S.D. Fla. 2013); *Wiand v. EFG Bank*, No. 810-CV-241-T-17MAP, 2012 WL 750447 (M.D. Fla. Feb. 8, 2012); *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).

ruled in *Harwell* that "banks and other intermediary institutions are to be shielded from § 550 liability." The referenced passage was part of the court's review of prior decisions considering the mere conduit defense to fraudulent transfer liability. *Harwell*, 628 F.3d at 1321.[5] Rather than announcing immunity for lawyers and banks, the *Harwell* court reversed a summary judgment in favor of a lawyer and remanded for trial on the lawyer's mere conduit defense. *Id.* at 1324. At trial, the lawyer failed to establish his good faith to support a mere conduit defense and was found liable for over $342,000 as initial transferee of fraudulent transfers into his trust account. *In re Harwell,* No. 8:08-MP-00002-MGW, 2011 WL 4566443, at *1 (Bankr. M.D. Fla. Sept. 30, 2011).

E. Senior Wells Fargo Employees "Actually Knew" of the Ongoing Fraud and the Receiver Has Adequately Pleaded "Actual Knowledge" for Aiding and Abetting

Wells Fargo's discussion of the Receiver's aiding and abetting claims largely ignores that the lower court dismissed with prejudice the Receiver's

[5] This Court observed in *Harwell* that banks and lawyers very often may be able to establish mere conduit status. *Id.* at 1324. But the defense requires that the bank or lawyer "must have acted in good faith and have been an innocent participant in the transfers in and out of [the] account in issue." *Id.* Those inquiries are fact-intensive and never ripe for determination on a motion to dismiss. *In re Palm Beach Fin. Partners,* 488 B.R. at 771.

claims on a Rule 12(b)(6) motion to dismiss. Indeed, in citing *El Camino Resources Ltd. v. Huntington Nat'l Bank*, 712 F.3d 917 (6th Cir. 2013), a case decided on summary judgment, Wells Fargo concedes that it had actual knowledge of the fraud, but argues that, because it closed the accounts sooner than the bank in *El Camino* after discovering the fraud, this case should be dismissed under Rule 12(b)(6).[6] Answer Br. at 21-22. Of course, admitting that a defendant actually knew about the fraud, and arguing the appropriateness of its subsequent actions as at least another $10.6 million was stolen, are not the stuff of Rule 12(b)(6).

Even assuming *arguendo* that *Lawrence* correctly states Florida law, and "actual knowledge" is required in order to state a claim for aiding and abetting liability against a bank, the lower court erred because the Receiver has alleged specific facts that make it "plausible" that Wells Fargo had actual knowledge of the underlying wrongdoing.

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[6] Wells Fargo discusses the time between when it first discovered the fraud and went to law enforcement, and the total period during which Theodule used Wells Fargo for his Ponzi scheme, but never discusses the lag between its actual knowledge and closing the accounts. Answer Br. at 21. The Receiver has specifically alleged that at least $10.6 million was pilfered during that critical time when Wells Fargo knew fraud was occurring.

Wells Fargo robotically cites to *Lawrence* and the mantra that "red flags" alone are insufficient to establish actual knowledge. But this case is not about "red flags" or "suspicious activity" that the bank *should have known about*. It is about unlawful activity *the bank admits it did know about*. If there were "red flags," Wells Fargo was waving them highest, but otherwise Wells Fargo conducted business as usual as Theodule pilfered millions from the Receivership Entities.

The Receiver alleged, supported by sworn testimony of a Wells Fargo fraud investigator, that Wells Fargo actually knew in May 2008 that the Creative Capital accounts were being used for criminal activity, and that the bank also knew that there was "no evidence of any investing going on and that funds were merely washing through the account from hand to hand." Doc 86-1 ¶ 54. The activity was so egregious that the fraud investigator agreed that it "raise[d] the hair on the back of your neck." *Id.* ¶ 57. That investigator and another Wells Fargo employee determined that what they actually knew in mid-May 2008 required them to contact law enforcement to report the unlawful activity, something Wells Fargo did only when it had already determined that activity involved "a serious matter." *Id.* The Receiver also alleged that, despite the bank's actual

knowledge of unlawful activity in May, Wells Fargo did not close the accounts until August, by which time over $38 million had been laundered through Wells Fargo, including over $10.6 million stolen after Wells Fargo knew enough to involve law enforcement. *Id.* ¶ 54.

Those allegations—showing that Wells Fargo *actually knew* fraud was taking place—coupled with other facts alleged by the Receiver, make it plausible that Wells Fargo had actual knowledge of the wrongdoing but continued to provide substantial assistance to Theodule's fraud by facilitating transactions that it affirmatively knew to be wrongful.

Groom v. Bank of Am., No. 8:08-CV-2567-JDW-EAJ, 2012 WL 50250 (M.D. Fla. Jan. 9, 2012), does not help Wells Fargo. There, as in *Lawrence*, the court determined that no specific facts were alleged to demonstrate that anyone at the bank had actual knowledge of any wrongdoing. Instead, the court determined that merely a "conclusory statement that a defendant 'actually knew'" of wrongdoing would not support an aiding and abetting claim where the actual facts pleaded in the complaint suggested only that the bank "should have known that something was amiss." *Id.* at *3. Here, of course, the allegations of actual knowledge are detailed and grounded upon sworn testimony of a Wells Fargo employee that the bank actually

knew that fraudulent activity was occurring, but took no action to stop it until more than $38 million had been run through Wells Fargo. That *is* sufficient to state a claim under Rule 12(b)(6), and the lower court's order dismissing the aiding and abetting claims with prejudice must be reversed.

F. Wells Fargo's Alternative Bases for Dismissal with Prejudice Are Without Merit

Wells Fargo devotes more than half of its argument to asking this Court to affirm the lower court's dismissal with prejudice of the Receiver's claims based on standing and *in pari delicto*—two grounds the district court rejected in denying Wells Fargo's motion to dismiss the Receiver's Amended Complaint. Doc 52. Neither ground was raised in the motion for reconsideration and neither supports the dismissal with prejudice.

1. The Receivership Entities Have Suffered Actual, Cognizable Injury

Constitutional standing under Article III of the United States Constitution "requires (1) a cognizable injury suffered by the plaintiff (2) that is fairly traceable to the defendant's conduct and is (3) redressable by a court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Because

standing concerns the conduct of the parties and its injurious effect, the Court's inquiry is necessarily case-specific.[7]

Wells Fargo's standing arguments rest upon a mischaracterization of the Receiver's claims. At the outset of its standing argument, Wells Fargo misleadingly paraphrases the Receiver's pleadings and tells the Court:

> The Receiver brought the instant action attempting to recover "*investor funds*" allegedly misappropriated by Theodule and/or the Receivership Entities. *See, e.g.,* Amended Complaint (R. at 75, 79, 81), ¶¶43, 64, 69.

Answer Br. at 33 (emphasis added).[8] Wells Fargo implies that the referenced allegations show that these "investor funds" were not property of the Receivership Entities. But Wells Fargo is not being candid with the Court. For example, ¶ 64 of the Amended Complaint, cited by Wells Fargo as support for its claim that the Receiver does not allege ownership of the

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[7] Wells Fargo's standing arguments in Parts C and D of its brief are based on the Receiver's allegations and thus are "facial" challenges to standing. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). To satisfy Constitutional requirements based upon a facial challenge to standing, the Receiver need only have stated general factual allegations of injury resulting from Wells Fargo's conduct. *Bischoff v. Osceola County*, 222 F.3d 874, 878 (11th Cir. 2000).

[8] Wells Fargo again cites to the Amended Complaint, not the operative Proposed Amendment. Paragraph 69 of the Amended Complaint related to a different claim and is not even in the Proposed Complaint.

"investor funds," actually reads:

> Theodule wrongfully asserted dominion and control ***over the property of the Receivership Entities by misappropriating in excess of $30 million in investor funds*** for his personal use and benefit, ***causing financial injury and damage to the Receivership Entities***. These funds are specifically identified in the schedule attached hereto as Composite Exhibit "A."

Doc 19 ¶ 64, Doc 86-1 ¶ 69 (emphases added).

Wells Fargo knows full well that the funds fraudulently transferred to Wells Fargo and then converted by Theodule and others were property of the Receivership Entities. The district court explained this distinction in its order denying Wells Fargo's motion to dismiss based on standing. Doc 52 at 5. While funds originated with investors, as Theodule lured investors to pool their money in the Receivership Entities, the specific schedules attached to the Receiver's pleadings make clear that the funds were converted after they were owned and controlled by the Receivership Entities. Doc 86-1, Ex. A. Any suggestion that the Receiver has not alleged that the misappropriated funds were property of the Receivership Entities is simply incorrect.

The Receiver is not seeking to recover for any wrong committed in connection with Theodule's inducing the investors to contribute to the

Ponzi scheme (so called "Ponzi scheme torts" or "solicitation torts"). Rather, the Receiver is seeking to recover only for fraudulent transfers, conversion and breaches of fiduciary duty that resulted in the loss of Receivership Entities' funds misappropriated by Theodule and his hoodlums (the "embezzlement torts"). Courts have repeatedly held that where former management has fraudulently diverted corporate assets, the corporation has suffered injury that a Receiver has standing to pursue through avoidance actions. *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995); *cf. Dillon v. Axxsys Int'l,* 185 F. App'x 823, 830 (11th Cir. 2006) (once principals decided to use corporate funds for non-business purposes, plaintiffs became creditors and possessed a viable claim under FUFTA); *see Perlman v. Delisfort-Theodule*, 2010 WL 4514249, at *3 (S.D. Fla. Nov. 2, 2010), *aff'd,* 451 F. App'x 846 (11th Cir. 2012); *Goldberg v. Chong,* No. 07-20931-CIV-HUCK, 2007 WL 2028792, at *3-4 (S.D. Fla. July 11, 2007). Notably, not one case on standing cited by Wells Fargo invokes a FUFTA claim.

This distinction between "Ponzi scheme torts" and "embezzlement torts" was explained in *Knauer v. Jonathon Roberts Fin. Grp.,* 348 F.3d 230 (7th Cir. 2003):

> For our purposes, it is useful to think of Ponzi schemes as being comprised of ***two phases. First, the schemer solicits and receives money for investment***, guaranteeing high returns while doing little with the money to produce actual profits. While in this first stage, the schemer may generate some income for himself by charging a fee or paying himself a salary with the funds, … the schemer realizes most of his gains by appropriating large sums of money from the solicited funds, the pace of the withdrawals accelerating as he is ready to disband the Ponzi entity and make off with its assets. ***This "embezzlement" step of the Ponzi scheme depletes the Ponzi entity of resources, which are diverted to the entity's principal, the schemer.***

Id. at 233.

Just one month after *Knauer* was decided, this court agreed that a receiver's claims arising from the "embezzlement" phase of a Ponzi scheme—comprised of the transfer of ill-gotten investor funds to insiders or third-parties—are claims for which a receiver has Article III standing. *O'Halloran v. First Union Nat'l Bank*, 350 F.3d 1197, 1203-1204 (11th Cir. 2003). In *O'Halloran*, this Court articulated the distinction between the two types of claims as follows:

> The Ponzi scheme, however, is not the tort with which we are concerned. The complaint alleges that [the Bank] acted wrongly when it permitted [the Ponzi scheme perpetrator] to remove funds from the accounts [the Receivership Entity] maintained at [the Bank]. . . . This is the claim that is at issue here.

> We also find perhaps less significant than did the district court the fact that the funds which the trustee claims to be tortiously deprived of were substantially the fruit of fraud. . . . ***[The Receivership Entity] was responsible, according to the complaint, for the Ponzi scheme, but as the holder of voidable title to the funds (as opposed to void title) was legally injured by the [Ponzi scheme perpetrator's] withdrawals from [the Bank] accounts.*** [The Receivership Entity's] ownership of the Ponzi funds can be legally asserted against parties other than the investors themselves.

O'Halloran, 350 F.3d at 1203-1204 (emphasis added).

The Receiver's claims here are "embezzlement" claims like those this court approved in *O'Halloran* because the injury to the Receivership Entities arises from the misappropriation of Receivership Entities' funds transferred to and then from Wells Fargo as part of the second stage of the fraud—the misappropriation of funds from the Receivership Entities. These claims seek "legally cognizable" damages on behalf of the Receivership Entities, and the Receiver has standing to pursue the claims.

Wells Fargo's continued reliance on *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543 (Fla. Dist. Ct. App. 2003),[9] is meritless. As a threshold

[9] As it did below, Wells Fargo refers to *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), in support of its standing challenge. *Caplin* actually supports the Receiver's standing. The bankruptcy trustee in *Caplin* was suing on claims that belonged exclusively to certain bondholders, to the exclusion of all other creditors having an interest in the estate. *Caplin* holds

matter, *Freeman* was decided under state law and "standing in federal court is determined *entirely* by Article III and depends in no degree on whether standing exists under state law." *DDFA of S. Fla., Inc. v. Dunkin' Donuts, Inc.*, No. 00-7455-CIV, 2002 WL 1187207, at *6 (S.D. Fla. May 22, 2002) (quoting *Dalworth Oil Co. v. Fina Oil & Chem. Co.*, 758 F. Supp. 410, 411 (N.D. Tex. 1991)). *Freeman* did not involve fraudulent transfer claims and the standing discussion was *dicta*. *See* Doc 52 at 7 n.3. It was a case involving "Ponzi scheme torts" and the case implicitly recognized the "Ponzi scheme torts" and "embezzlement torts" dichotomy. The court acknowledged that "there are actions that the corporation, which has been 'cleansed' through receivership, may bring directly against the principals or the recipients of fraudulent transfers of corporate funds . . . . This was the case in *Scholes* [*v. Lehmann*, 56 F.3d 750]." *Freeman*, 865 So. 2d at 551. *Freeman* thus does not address standing with respect to claims—like those made by the Receiver here—connected with the wrongdoers' embezzlement of corporate funds out of the Receivership Entities.

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only that a bankruptcy trustee may not act solely to benefit a distinct group of creditors. *See Id.* at 429. Here the Receiver is pursuing claims for the benefit of the creditors of the Receivership Entities, not a specific group of investors.

2. *In Pari Delicto* Does Not Apply to Statutory FUFTA Claims

Wells Fargo's *in pari delicto* argument again lumps together both types of claims brought by the Receiver, which is significant because, under Florida law, the equitable defense of *in pari delicto* may not be asserted "against statutory claims to recover fraudulent transfers." *World Capital Commc'ns v. Island Capital Mgmt. (In re Skyway)*, 389 B.R. 801, 809 (Bankr. M.D. Fla. 2008); *In re Burton Wiand Receivership Cases*, No. 8:05CV1856 T27MSS, 2007 WL 963165, at *7 (M.D. Fla. Mar. 27, 2007); *Cf. Fuzion Wireless Commc'ns v. Proskauer Rose LLP (In re Fuzion Techs.)*, 332 B.R. 225, 232 (Bankr. S.D. Fla. 2005) ("*in pari delicto* defense is inapplicable when a trustee brings an action under sections 544(a), 544(b)," the bankruptcy provision making FUFTA applicable in bankruptcy matters). Thus, even if the doctrine somehow could be considered on a motion to dismiss against a Receiver, *in pari delicto* is not available as a defense to the Receiver's statutory claims under FUFTA as a matter of Florida law.

3. *In Pari Delicto* Does Not Apply to Receivers

In addition to being inapplicable to FUFTA, *in pari delicto* is improperly invoked where a lawsuit serves important public purposes. *Cf. Kulla v. E.F.*

Hutton & Co., 426 So. 2d 1055, 1057 n.1 (Fla. Dist. Ct. App. 1983) (*in pari delicto* defense is not "woodenly applied in every case" because "the principal [behind it] is founded on public policy . . . it may give way to a supervening public policy"). The important public purpose served by a receiver appointed to recover funds for the benefit of those injured by the fraud has been held to mitigate against application of *in pari delicto* against receivers. In *Scholes v. Lehman*, 56 F.3d 750 (7th Cir. 1995), the Seventh Circuit held that an innocent receiver was not subject to *in pari delicto* because to find otherwise would wholly frustrate the statutory scheme underlying the Receiver's appointment:

> The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the wrongdoer's] evil zombies. Freed from his spell they became entitled to the return of the moneys—for the benefit not of [the wrongdoer] but of innocent investors—that the [wrongdoer] had made the corporations divert to unauthorized purposes. ***Put differently, the defense of in pari delicto loses its sting when the person who is in pari delicto is eliminated.*** Now that the corporations created and initially controlled by [the wrongdoer] are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by [the wrongdoer].

Id. at 754 (citations omitted) (emphasis added). *Cf. Perlman v. Alexis*, No. 09-20865-CIV, 2009 WL 3161830, at *4 (S.D. Fla. Sept. 25, 2009) (Hurley, J.) ("The appointment of a receiver displaces the managers who had engaged in the wrongful conduct, and thus ensures that any recovery would go to the receiver and ultimately the innocent creditors, rather than the wrongdoers."). As in *Scholes*, the Receiver is not tainted by any prior wrongful conduct of Theodule and others who may have benefitted from his wrongdoings. Accordingly, *in pari delicto* does not bar the Receiver from bringing suit.

4. *In Pari Delicto* Cannot Justify a Rule 12(b)(6) Dismissal of the Receiver's Claims

The doctrine of *in pari delicto* is an equitable affirmative defense requiring factual proof by Wells Fargo. [10] "Broadly speaking, the defense prohibits plaintiffs from recovering damages resulting from their own wrongdoing." *In re Skyway*, 389 B.R. at 801 (quoting *In re Felt Mfg. Co.*, 371 B.R. 589, 608 (Bankr. D.N.H. 2007)); *see O'Halloran v. PricewaterhouseCoopers*

[10] Because the lower court found that the Receiver's original complaint was not subject to dismissal based on *in pari delicto*, Doc 52, the subsequent dismissal with prejudice cannot be supported by the defense. Thus, even if *in pari delicto* applied, this court could only remand the case for the factual findings required to resolve the affirmative defense that the district court has already determined cannot be resolved without discovery.

LLP, 969 So. 2d 1039, 1043 (Fla. Dist. Ct. App. 2007). In evaluating the defense, the court must determine whether the plaintiff's guilt "is far less in degree than defendant's, so as to make the doctrine inapplicable." *In re Burton Wiand*, 2007 WL 963165, at *7.

The defense, however, "is not an absolute standard that can be applied across the board regardless of the circumstances." *In re Fuzion Techs.*, 332 B.R. at 233. Instead, after determining the relative faults of the parties, the court "inquires if applying the doctrine would be contrary to public policy." *Turner v. Anderson*, 704 So. 2d 748, 750 (Fla. Dist. Ct. App. 1998) (quoting *Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot*, 458 A.2d 545 (Pa. Super. Ct. 1983)).

Further, the "adverse interest exception" to *in pari delicto* provides that, even if the doctrine might otherwise apply, the misconduct of an agent of a corporation may not be imputed to the corporation when the agent acts adversely to the corporation's interests. *Beck v. Deloitte & Touche*, 144 F.3d 732, 736 (11th Cir. 1998); *Seidman & Seidman v. Gee*, 625 So. 2d 1, 2-3 (Fla. Dist. Ct. App. 1992). This court has explained that an officer's "looting" of corporate assets for his own benefit is precisely the type of conduct which gives rise to the adverse interest exception to *in pari delicto*. *Liquidation*

Comm'n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339, 1355 (11th Cir. 2008). That is exactly what occurred here.

Thus, Wells Fargo's *in pari delicto* defense requires "an essentially equitable and necessarily factbound apportionment of responsibility" among Theodule, the Receivership Entities, other insiders of the Receivership Entities, and Wells Fargo. *Perlman v. Alexis*, at *4. Consideration of public policy, and the fact-intensive adverse interest exception available to the Receiver make it obvious that "a determination of the *in pari delicto* defense is not suitable for disposition on a motion to dismiss." *In re Skyway*, 389 B.R. at 801 (even if *in pari delicto* is properly asserted, dismissal is typically "not in the interest of justice and efficient case administration," and a motion to dismiss should be denied to allow for fact development); *Goldberg v. Chong*, No. 07-20931-CIV, 2007 WL 2028792 (S.D. Fla. July 11, 2007).[11]

[11] Wells Fargo makes arguments based on "alter ego" or "sole actor" theories. Those doctrines are also fact-intensive and in this case could apply only as an "exception" to the "adverse interest exception" to *in pari delicto*. Those determinations cannot be made on a Rule 12(b)(6) motion. In any event, there is no record support for those claims. For example, Wells Fargo's record citation for its "alter ego" theory is ¶¶ 6 and 14 of the Receiver's Amended Complaint. That allegation is "[a]t all times material hereto, George Theodule ("Theodule") was an officer, director, managing

5. Wells Fargo Mischaracterizes the Recent *Lesti* Decision

Wells Fargo's discussion of *Lesti v. Wells Fargo Bank, N.A.*, No. 2:11-CV-695-FTM-29, 2013 WL 1137482 (M.D. Fla. Mar. 21, 2013) is puzzling. The description of *Lesti* in Wells Fargo's brief—that the bankruptcy trustee in *Lesti* "attempted to assert a single claim against Wells Fargo for negligence and wire transfer liability based upon certain transactions initiated and authorized by the debtors"—is inaccurate. Answer Br. at 46.[12] In fact,

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agent, principal, and/or control person of each of the Receivership Entities" . . . and that "[s]ubsequent to his appointment, the Receiver determined that the Receivership Entities had no legitimate business operations." An allegation that a person is "an officer [and] director"—not even the sole officer and director—of an entity is no evidence at all of "alter ego" or "sole actor" status. Indeed, there are specific references to other individuals involved with the Receivership Entities, including individuals with whom Wells Fargo dealt. Doc 86-1 at ¶¶ 23, 31, 42, 46, 47, 58.

[12]Wells Fargo also inaccurately represents that the bankruptcy trustee in *Lesti* "is a partner at the same firm as the Receiver herein." Answer Br. at 46. There is no basis for that statement in this record, in the *Lesti* opinion, or in reality. It is simply false. The trustee in *Lesti* is Robert E. Tardif, Jr., an attorney in Fort Myers, Florida and a member of the U.S. Trustee's Chapter 7 Trustee panel for the Middle District of Florida. Mr. Tardif is a sole practitioner in Fort Myers, at Robert E. Tardif, Jr., P.A., as can be determined by reference to the Florida Bar website. *See* https://www.floridabar.org/names.nsf/0/41CDF137B0A8D10D85256A84001F57B1?OpenDocument. Although it matters none to the applicability of *Lesti*, Mr. Tardif is not a partner, or otherwise associated as a lawyer, at the same law firm as the Receiver. Trustee's counsel in *Lesti* is a partner of the Receiver at Genovese, Joblove & Battista, P.A.

while a negligence claim against the bank was dismissed, the court denied Wells Fargo's motion to dismiss the Plaintiffs' claim for aiding and abetting fraud, aiding and abetting breach of fiduciary duty and unjust enrichment. That is why the Receiver cited *Lesti*. The negligence claim that was dismissed, moreover, was based on the bank's clerical and administrative errors in failing to "'correctly, cautiously, and prudently' process the wire transfer pursuant to commercially reasonable security procedures." *Id*. at *9. It was not based on FUFTA or the bank's liability as the initial transferee of a fraudulent transfer.

CONCLUSION

For the foregoing reasons, the Receiver requests that this Honorable Court vacate the August 10 Reconsideration Order dismissing the Receiver's Amended Complaint with prejudice, and remand the matter to the district court with instructions to grant the Receiver leave to amend to file the Proposed Amendment, with further instructions that the Proposed Amendment states claims for relief for aiding and abetting and under FUFTA, and for further proceedings consistent with the Court's opinion.

Respectfully submitted this 24th day of June, 2013.

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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 6,629 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.

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I HEREBY CERTIFY that I have served on this 24th day of June, 2013 a true and correct copy of the foregoing brief via CM/ECF system which will send a notice of electronic filing, and also via overnight mail to counsel for Appellee, Amy S. Rubin, Esq. and Elliot Aaron Hallak at **Fox Rothschild LLP,** 222 Lakeview Avenue, Suite 700, West Palm Beach, FL 33401, 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.

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