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 REPLY BRIEF

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INTRODUCTION

This Reply Brief is submitted on behalf of Jonathan E. Perlman, as Receiver, in response to the Answer Brief filed by Appellee Bank of America, N.A. ("BOA") and in furtherance of the Receiver's arguments in his Initial Brief.

The cornerstone of BOA's position is that this Court cannot consider the facts alleged in the Receiver's proposed amended complaint on this appeal. That argument is simply wrong. When a court determines that any amendment would be futile, this Court will consider all facts the plaintiff might proffer to support its proposed amendment.

BOA misstates the cases of *Wagner v. Daewoo Heavy Industries America Corp.*, 314 F.3d 541 (11th Cir. 2002), and *Bryant v. Dupree,* 252 F.3d 1161 (11th Cir. 2001), when it argues that *Wagner* effectively overruled *Bryant.* More disturbingly, BOA misrepresents the substance of this Court's holding in *Wagner* and goes so far to suggest that words crafted by BOA's counsel are actually quotations from this Court.

BOA falsely accuses the Receiver of having "flouted" the Federal Rules by failing to file a motion for leave to amend with a proposed amended complaint. In truth, BOA filed an improper second motion to dismiss that

was barred by the federal rules. The Receiver was not then obligated to respond as if the motion was appropriate and to concede BOA's position that the Court's December 22 order holding that the Receiver had stated claims for aiding and abetting and Florida Uniform Fraudulent Transfer Act ("FUFTA") was error.

Finally, BOA attempts to justify the lower court's unprecedented dismissal under Rule 12(b)(6) of the Receiver's FUFTA claims, based upon BOA's mere conduit affirmative defense. That ruling is indefensible because BOA's good faith, or lack of it, is not an element of the Receiver's claims. No court before this case ever dismissed a FUFTA claim under 12(b)(6) based on the mere conduit defense.

Even if the court could reach the mere conduit affirmative defense on a Rule 12(b)(6) motion, BOA acknowledges that the defense requires a determination of whether BOA had actual or constructive knowledge, that is, whether BOA knew or should have known, of the wrongful nature of the transfers. The Receiver has alleged sufficient facts to place BOA's good faith an issue. The defense cannot be resolved on a motion to dismiss.

ARGUMENT

A. BOA misstates the applicable standard of review

BOA says that the standard of review applicable to the lower court's denial of leave to amend based on futility is "abuse of discretion" and "limited." Ans. Br. at 15. This Court disagrees. *Cf. Mizzaro v. v. Home Depot, Inc.*, 544 F.3d 1230, 1236 (11th Cir. 2008) ("because denial of leave to amend based on futility is a legal conclusion, we review the denial *de novo*"); *Brisson v. Ford Motor Co.*, 349 F. App'x 433, 434 (11th Cir. 2009) (same).

B. This Court can review the facts in the Receiver's second amended complaint to determine that an amendment would not be futile

BOA goes "all in" *sans* authority on its argument that the additional facts alleged in the Receiver's proposed second amended complaint "form[ ] no part of this appeal and the Receiver's attempt to rely on [them] is impermissible." Ans. Br. at 43 n.10; *see id.* at 3, 23 n.3. While BOA surely wishes that were so, as its position on appeal otherwise is indefensible, BOA is wrong. Moreover, because BOA ignores those facts in its Answer Brief, it is uncontroverted that the Receiver's proposed second amended complaint states claims for aiding and abetting and under FUFTA.

The lower court dismissed the Receiver's complaint with prejudice and,

without considering any proposed amendment, stated that "granting leave to amend the amended complaint would be futile." Doc 82 at 5. Thus, the Receiver may present to this Court whatever facts might be alleged to state a claim for relief. *Bryant v. Dupree*, 252 F.3d 1161, 1164 (11th Cir. 2001); *Brisson v. Ford Motor Co.*, 349 F. App'x 433, 435 (11th Cir. 2009); *cf. Kaloe Shipping Co. v. Goltens Serv. Co.*, 315 F. App'x 877, 882 (11th Cir. 2009) (although no motion for leave to amend was filed below, the Court reversed a dismissal with prejudice because "[f]urther amendment would not be futile"); *Sayre v. Shoemaker*, 263 F.2d 370 (5th Cir. 1959) (reversing Rule 12(b)(6) dismissal with prejudice because "appellant has suggested to this Court several different ways in which the complaint might possibly be amended so as . . . to state a claim upon which relief can be granted). [1]

Brisson, 349 F. App'x 433, is quite like this case on this issue, and it rejects BOA's argument that no facts beyond the dismissed amended complaint are before this Court. In *Brisson,* as here, the district court dismissed a complaint with prejudice and stated that any attempt to amend

[1] Decisions of the Fifth Circuit entered before September 30, 1981, are binding in the Eleventh Circuit, and may only be overturned by an *en banc* decision of this Court. *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1982) (*en banc).*

would be futile. *Compare Brisson*, 349 F. App'x at 435 *with* Doc 82 at 5. On appeal, the defendant, like BOA here, argued that the Court was limited to reviewing the lower court's futility determination based on the allegations of the dismissed complaint because plaintiffs never asked for leave to amend in the district court. *Brisson*, 349 F. App'x at 435. This Court rejected that argument—which is the same argument upon which BOA rests on this appeal.

Although the Court in *Brisson* affirmed the lower court's order dismissing the plaintiffs' warranty claims, the Court reversed the dismissal with prejudice because plaintiffs stated facts in their appellate brief that they could meet the pleading requirements the lower court imposed. *Id.* Specifically, this Court accepted representations "in [Plaintiffs'] brief that if the *Ocana* requirements do apply in this case, 'they can plead the specific'" facts necessary to state a claim under those standards.[2]

[2] The Court was referring to *Ocana v. Ford Motor Co.*, 992 So.2d 319 (Fla. 3d DCA 2008), a similar Florida court class action in which a Florida appellate court announced specific pleading requirements that Ford argued applied to the plaintiffs' claims in *Brisson*. The case thus is analogous to this action, where BOA argued that *Lawrence v. Bank of America,* 455 F. App'x 904 (11th Cir. 2012), changed the pleading requirements applicable to the Receiver's claims.

This Court in *Brisson* rejected the very argument BOA makes here—that the futility of plaintiffs' claims can be determined only on the allegations of the dismissed complaint. *Id.* The Court noted that the district court's dismissal order said that "permitting [plaintiffs] to file a second amended complaint would be an exercise in futility." *Id.* at 435. Accordingly, the plaintiffs were not required to do anything more since "the district court told the plaintiffs not to bother even attempting to amend because the court was deciding in advance that they could not do so." *Id.* The Court "decline[d] to hold against the plaintiffs' their failure to defy the district court's order telling them, in effect, not to file a motion to amend. *Id.*[3]

The court in *Bryant*, 252 F.3d 1161, also reversed a "futility" determination based on an appellant's representation as to facts that could be alleged. In *Bryant* a case discussed in greater length at pp. 13-17 *infra*, the Court overturned a dismissal with prejudice without leave to amend where the plaintiffs, relying on a prior district court order upholding their complaint, did not file an amended complaint but "filed a response [to a

[3] Of course, BOA continues to ignore that the Receiver did request leave to amend in its response to BOA's procedurally-improper second motion to dismiss. Doc 76 at 12, n. 8 15.

renewed motion to dismiss] which included a request for leave to amend." *Id.* at 1163. This Court reversed the lower court's conclusion that any amendment would be futile because, on appeal, "[t]he plaintiffs have indicated … that if given the chance to amend, they will meet the PSLRA's pleading requirement. Thus, allowing the plaintiffs to amend their complaint would not be futile." *Id.* at 1164.

Here, the record includes the Receiver's proposed amendment which adds additional and more specific facts, including identifying bank personnel who actively assisted Theodule by, among other things, bypassing security measures designed to root out customers engaging in fraud and illicit activity. Doc 85-1. These facts are put forward in the Receiver's Initial Brief at pages 18-22 as well. This Court thus has facts before it demonstrating that, even if the *Lawrence* standards apply as argued by BOA, the Receiver can plead facts meeting those standards. This Court thus can readily determine that an amendment would not be futile.[4]

[4] For these reasons, BOA's fixation on the untimely Rule 59 motion, and the Receiver's Rule 60 motion, is largely beside the point. Because the lower court "told the [Receiver] not to bother even attempting to amend," *Brisson*, 349 F. App'x at 435, any failure to file a timely Rule 59 motion does not affect the Receiver's entitlement to dispute the lower court's legal

This Court cannot, as BOA suggest, turn a blind eye to the allegations in the proposed pleading. Doc 85-1. The factual allegations are, at a minimum, "representations in the Receiver's brief," *see* Initial Brief at 18-22, as to the additional facts the Receiver can and will plead in its second amended complaint. Indeed, the proposed second amended complaint filed below is the surest kind of "representation," given that the Receiver actually submitted the proposed amendment to the district court. Moreover, because the Receiver's Rule 60 motion included the proposed second amended complaint and the appeal from the denial of that motion is part of this consolidated case, the amended pleading is organically part of the record on appeal as well.

We also know that the district court judge, having prejudged in its dismissal order that no facts could possibly be alleged to state a claim under *Lawrence*, later acknowledged that his "futility" determination was erroneous. Doc 94. While this indication may have been fortuitous, given that the court dismissed the case with prejudice without considering the

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conclusion of "futility" by presenting to this Court what facts the Receiver can and will plead. *Id.*; *Bryant*, 252 F.3d at 1164.

new facts, BOA cannot sweep under the rug that the lower court itself has questioned the correctness of its own order. *Id.*

Brisson and *Bryant* demonstrate that when reviewing a dismissal without leave to amend based on futility, this Court will consider representations in an appellant's brief of what facts can be alleged in an amended complaint. It is manifest, therefore, that the proposed second amended complaint—however presented to this Court—cannot be ignored as BOA suggests it should. The federal rules are, above all else, designed to have matters determined on the merits. *See Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Pretending that certain facts do not exist, or that a district court did not acknowledge its own error, when it is there for the world to see, does not fulfill that worthy purpose.

C. BOA misrepresents this Court's decisions in *Wagner* and *Bryant*

BOA misstates what it calls "controlling law" in its discussion of *Wagner v. Daewoo Heavy Industries America Corp.*, 314 F.3d 541 (11th Cir. 2002) (*en banc*).[5] BOA attempts to mislead this Court about what *Wagner* holds and

[5] In *Wagner*, the Court receded from *Bank v. Pitt*, 928 F.2d 1108 (11th Cir. 1991), which had held that a party represented by counsel had to be given at least one opportunity to amend its complaint under any circumstances, even if it did not seek leave to amend. *Wagner* replaced the *Bank* rule with

says. In reality, *Wagner* and the other cases cited by BOA on the point have nothing to do with this case. Certainly, the cases do not support BOA's premise that a party will never be allowed to amend unless it files a motion for leave to amend, attaching the proposed amendment, regardless of the underlying circumstances and procedural posture of the case. Ans. Br. 20.

BOA's advocacy crosses the line at page 24 of the Answer Brief, when it misrepresents this Court's opinion in *Wagner*, 314 F.3d 541. Specifically, BOA declares in its brief:

> In enunciating the new rule [in *Wagner*], this Court shifted the basic inquiry from "was there any reason ***not*** to grant leave to amend?" to "did the plaintiff fulfill the procedural and substantive requirements for seeking leave to amend?" *Id.*

Ans. Br. at 24. That passage, *including the quotation marks,* is immediately followed by the citation "*Id.*" with no introductory signal. That is a representation by BOA to this Court that the cited authority (the Court's decision in *Wagner*, 314 F.3d at 542): "(i) directly states the proposition, (ii) identifies the source of a quotation, or (iii) identifies an authority referred to in the text." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at

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the following rule: "A district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court."

54 (Columbia Law Review Ass'n *et al.* eds., 19th ed. 2010).[6] BOA thus represents that the quoted language is from this Court's opinion in *Wagner* and that *Wagner* directly states the proposition that this Court was shifting some inquiry to "did the plaintiff fulfill the procedural and substantive requirements for seeking leave to amend?" Ans. Br. at 24.

In truth, the quoted language is *not* in *Wagne*r; it is BOA's argument represented to be a quotation from this Court's opinion. It is also outlandish to suggest that *Wagner* directly states the proposition concocted by BOA's lawyers. *Wagner* does not say what BOA attributes to this Court; the case never even discusses that concept or anything like it. BOA's presentation of its counsel's words as coming from this Court's opinion belies the weakness in BOA's position on this appeal.

Wagner, 314 F.3d 541, does not undermine the presumption in favor of liberal amendments, which is founded in the Rule 15(a) dictate that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P.

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[6] *See also* ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION, 44.2 at 371 (ALWD & Darby Dickerson eds., 4th ed. 2010); 11th Cir. R. 28-1(k) provides: "Citations of authority in the brief shall comply with the rules of citation in the latest edition of either the "Bluebook" (a Uniform System of Citation) of the "AWLD Manual" (Association of Legal Writing Directors' Citation Manual: A Professional System of Citation)."

15(a). Nor, as BOA tries to argue with its dodgy citation to *Wagner,* does the case hold that amendments are actually disfavored or that a party will be denied leave to amend if some procedural or substantive bar can be conjured. To the contrary, this Court recognizes that "[w]here it appears that a more carefully crafted complaint might state a claim upon which relief can be granted, … a district court should give a plaintiff an opportunity to amend his complaint instead of dismissing it." *Taylor v. McSwain*, 335 F. App'x 32, 33 (11th Cir. 2009). "[U]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Pioneer Metals, Inc. v. Univar USA, Inc.*, 168 F. App'x 335, 336-37 (11th Cir. 2006) (quoting *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988)).[7]

[7] *Wagner* addressed the exploitation by certain plaintiffs of the rule in *Bank*, 928 F.2d 1108, guaranteeing a party one amendment of its complaint. As the Court noted, under *Bank*, Plaintiffs could file a non-meritorious complaint, appeal a dismissal without ever seeking leave to amend and be guaranteed a reversal without regard to the merits of the complaint. *Wagner*, 314 F.3d at 543. This could lead to further district court litigation and then possibly a second appeal. *Id.* Plaintiffs thus could extract settlements from defendants based only on avoiding the cost of litigation. The Court described the process as presenting "opportunities for abuse by litigants seeking to delay resolution of a case." *Id.* (quoting *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000). The rule established in *Wagner* was meant to address "the burdens that these appeals have

D. *Bryant* is good law and requires that the dismissal with prejudice be reversed

The facts and proceedings in this case show that *Bryant*, 252 F.3d 1161, is on all fours and it requires reversal of the lower court's dismissal with prejudice. The lower court told the Receiver that his complaint was sufficient, then dismissed the same complaint with prejudice based on previously rejected arguments—and inexplicably concluded that any amendment, regardless of what facts might be alleged, would be futile. Doc 51, 82. The Receiver's reliance on the district court's December 22 Order in the Receiver's favor is what defines this case, makes *Bryant* the controlling decision from this Court and requires that the Receiver be given leave to amend.

BOA's argument that "*Bryant* is no longer good law" (Ans. Br. at 28) is simply wrong. This Court has cited *Bryant,* 252 F.3d 1161, at least eight times since the decision in *Wagner*, including in *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005) for the proposition that "[o]rdinarily" a party

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placed on defendants and the courts," *id.* at 543 n.3, and the "great trouble, time, and expense for defendants and the courts." *Id.* at 543. The Court concluded that a change in the rule was necessary to "avoid this costly, additional litigation." *Id*. *Wagner* in no way supports denying well-taken amendments in vigorously-contested litigation in which discovery has proceeded and is ongoing.

must be given at least one opportunity to amend unless there has been undue delay, undue prejudice, or an amendment would be futile. *Id.* at 1014. [8] *Wagner* did not in any manner overrule *Bryant*; *Wagner* did not even mention *Bryant*. Nor did *Wagner* address any of the issues present here which make *Bryant* applicable.

BOA is off base when it tells this Court that "*Bryant's* ultimate decision and the reasoning used to reach it, is built upon the abrogated *Bank* rule." Ans. Br. at 28. In truth, *Bryant* cited *Bank* once, as support for a general principle. *See Bryant*, 252 F.3d at 1163 ("Generally, '[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend ….'"). However, the "guaranteed" right to one amendment is not why the *Bryant* court reversed the lower court's

[8] *Langlois v. Traveler's Ins. Co.*, 401 F.App'x 425, 426 (11th Cir. 2010); *Ray v. Equifax Infor. Servs*, 327 F.App'x 819, 821 (11th Cir. 2009); *Butler v. Prison Health Servs,* 294 F.App'x 497, 500 (11th Cir. 2008); *Rance v. Winn*, 287 F.App'x 840, 841 (11th Cir. 2008); *Fox v. Prudential Fin.*, 178 F.App'x 915, 918 (11th Cir. 2006); *Sibley v. Lando*, 437 F.3d 1067, 1073 (11th Cir. 2005); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005); *Hardin v. City of Atlanta*, 141 F.App'x 796, 799 (11th Cir. 2005). *Corsello*, 428 F.3d 1008, in turn, has been cited several times by this Court for the same proposition for which *Corsello* cites *Bryant*. Those decisions do not ignore *Wagner*; rather, they reflect this Court's view that although there is no inalienable right to amend, "generally" or "ordinarily" a party must be given an opportunity to amend under Rule 15 so as to effect the purpose of the rule to have matters decided on the merits. *Corsello*, 428 F.3d at 1014.

dismissal with prejudice. Instead, *Bryant* was decided based on the Rule 15(a) factors set out in *Foman v. Davis*, 371 U.S. 178, 182 (1962), as applied to the specific facts in *Bryant*, which are *remarkably* like the facts in this case.

In *Bryant*, 252 F.3d 1161, this Court reviewed the lower court's four stated reasons for denying leave to amend and found all of the reasons lacking. *Id.* at 1163-65. The *Bryant* Court never mentioned *Bank*—the case BOA claims was the foundation for the *Bryant* decision—when the Court discussed why it was reversing the lower court and remanding with directions to permit the plaintiff to file an amended complaint. *Id.*

BOA's attempt to distinguish *Bryant* "on its own terms" is ludicrous. Ans. Br. at 29. In *Bryant*, the district court denied a motion to dismiss under the PSLRA, and certified the decision for an interlocutory appeal. This Court, on that appeal, established a pleading standard stricter than adopted in the district court. *See Bryant v. Avado Brands, Inc.*, 187 F3d 1271 (11th Cir. 1999). The Court vacated the district court's order denying defendant's motion to dismiss and remanded the case "for proceedings consistent with this opinion." *Id.* at 1273.

On remand, the plaintiffs filed an amended complaint that was substantially the same as their original complaint. *Bryant,* 252 F.3d at 1164.

The defendant renewed its motion to dismiss, and the district court, applying the pleading standards adopted by this Court on the first appeal, dismissed the amended complaint with prejudice without leave to amend, despite that plaintiffs had requested additional leave to amend within their opposition papers. *Id.* at 1163. This Court reversed.

The Court noted that the district court had previously said that the plaintiffs' complaint was adequately pleaded. "Rather than indicating infirmities in the complaint, the district court's prior opinion created the exact opposite impression." *Id.* This Court ruled that the plaintiffs thus were justified in relying on the district court's order denying the first motion to dismiss *even though this Court vacated that order*. *Id.*

Here, of course, the December 22 Order, holding that the Receiver's complaint stated claims for aiding and abetting and adequately alleged facts under FUFTA, was still controlling in the case when the district court inexplicably dismissed the Receiver's claims with prejudice. Doc 82. The December 22 Order was not vacated by this Court like the order in *Bryant*; nor was there an intervening change in controlling law as in *Bryant*. The only change was this Court's unpublished decision in *Lawrence*, which is not binding precedent and is not controlling authority for purpose of

reconsidering a prior order. *See U.S. v. Hoa Quoc Ta*, No. 05-094, 2007 WL 2310113 *1 (N.D. Ga. Aug. 9, 2007) ("an unpublished opinion does not constitute 'controlling' law").

This Court stated in *Bryant* that the plaintiffs were justified in standing on the complaint that had been upheld by the district court even after the order sustaining it had been vacated by this Court. It is audacious for BOA to contend that the Receiver had no basis to rely on the December 22 Order sustaining his allegations because he was "squarely confronted" with an unpublished opinion from this Court that did not even deal with two of the four counts in the Receiver's complaint.

E. The Receiver appropriately stood on the allegations of the complaint that the court held were sufficient

A recurring theme in BOA's brief is that, after the district court denied BOA's motion to dismiss in the December 22 Order, the Receiver "got what was coming to him" because he stood on the facts alleged in his original complaint, *i.e.*, the same facts that Judge Hurley held were sufficient to state claims for aiding and abetting and FUFTA. Although the Receiver prevailed on the first motion to dismiss, BOA now suggests the Receiver

was somehow remiss because "the factual averments in the Amended Complaint were identical to those in the original complaint." Ans. Br. at 6.[9]

Of course they were! There was no reason for the Receiver to change "factual averments … identical to those in the original complaint" when the district court had just 18 days before held that the complaint was sufficient. Doc 52. The Amended Complaint was filed on January 9, 2012, before the unpublished decision in *Lawrence*. BOA's insinuation that the Receiver was not justified in relying on the court's December 22 Order is confounding.

BOA then lectures about the "framework for litigating a case from complaint through a motion for dismissal" and claims that "the Receiver flouts the Federal Rules and tries to upset this settled framework." Ans. Br. at 16-17. That argument borders on comical because this case is on appeal largely because BOA trampled upon the Federal Rules by filing an improper second motion to dismiss the Receiver's "identical" amended

[9] BOA huffs that "the Amended Complaint (like the original complaint) was long on sweeping assertions … but short on any specific factual averments supporting the Receiver's conclusory accusations." Ans. Br. 6. Again, BOA simply ignores that the district court found in the December 22 Order that the allegations BOA now belittles were sufficient to defeat BOA's Rule 12(b)(6) motion.

complaint raising previously-rejected arguments. *Compare* Doc 17 *with* Doc 67. BOA's improper filing led the lower court to a series of errors and eventually to the unprecedented ruling that, after this Court's unpublished decision in *Lawrence*, there are no facts that can ever be pleaded to state claims against a bank for aiding and abetting conversion or breach of fiduciary duty or claims under FUFTA.

BOA, not the Receiver, "flouted" the Federal Rules by filing a second motion to dismiss that was impermissible under Fed. R. Civ. P 12(g). It is settled that, when an amended complaint includes the same claims based on the same factual allegations, a defendant cannot file a second motion to dismiss making the same legal arguments the court rejected.[10] This rule has "operated to proscribe the filing of successive motions [to dismiss] since

[10] *See Sears Petroleum & Transp. v. Ice Ban Am., Inc.*, 217 F.R.D. 305, 307 (N.D.N.Y. 2003)(when plaintiff submits an amended complaint, "the defendant may bring a second motion under Rule 12 to object to the new allegations **only**")(emphasis added); *SEC v. Lucent*, No. 04-2315, 2006 WL 2168789, at *4-5 (D.N.J. June 20, 2006)(Rule 12(g), Rule 12(h)(2) and law of the case barred defendant's second motion to dismiss aiding and abetting claims that district court upheld on a previous motion to dismiss; defendant also precluded from advancing any argument it could have made in its first motion to dismiss); *In re Am. Bus. Fin. Servs.*, 384 B.R. 66, 78 (Bankr. D. Del. 2008)(amended complaint that merely adds additional factual allegations "does not permit [defendant] to re-litigate this issue").

1948." *SEC v. Lucent*, No. 04-2315 2006 WL 2168789, at *5 (quotations and citations omitted). In fact, in *Virgin Atlantic Airways Ltd. v. National Mediation Bd.*, 956 F.2d 1245 (2d Cir. 1992), the Second Circuit upheld Rule 11 sanctions against a defendant who filed a second Rule 12(b)(6) motion rearguing the same issue the court rejected on the first motion, even though the court of appeals ruled that the district court should have granted the defendant's first motion to dismiss as a matter of law. *Id.* at 1254-55.[11]

BOA did precisely what is precluded by Rule 12(g). After the district court rejected BOA's argument that the complaint inadequately pleaded facts to support the FUFTA claims, the Receiver filed an Amended Complaint raising the same four counts based on the "identical" facts. Doc

[11] Because BOA's Rule 12(b)(6) challenge to the sufficiency of the Receiver's allegations was denied by the court in the December 22 Order, the only possible procedural avenue to re-argue the ruling was a motion for reconsideration, which can be made only on very limited grounds, such as (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact,. *Bd. of Trustees of Bay Med. Ctr. v. Humana Military Healthcare Servs.*, 447 F.3d 1370, 1377 (11th Cir. 2006); BOA's motion was not a proper motion for reconsideration, because *Lawrence*, an unpublished opinion, is not binding precedent, and is not "controlling authority" for purposes of a motion for reconsideration. *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007); *U.S. v. Hoa Quoc Ta*, No. 05-094, 2007 WL 2310113 *1 (N.D. Ga. Aug. 9, 2007)(denying motion for reconsideration and stating that "an unpublished opinion does not constitute 'controlling' law").

85-1. BOA simply filed an improper second Rule 12(b)(6) motion making all of the arguments the court rejected in the December 22 Order. Doc 51. That improper motion did not obligate the Receiver to abandon his previously-upheld complaint and file a motion for leave to amend his complaint.

The Receiver is not making this point to raise the procedural impropriety of BOA's motion to dismiss as a principal issue on appeal. Rather, the Receiver needs to rebut BOA's haughty accusation that the Receiver "flouted" the Federal Rules by relying on an order holding that he adequately pleaded facts to sustain his claims, rather than conceding BOA's improper motion, abandoning the district court's December 22 Order and filing a motion for leave to amend with a proposed amended complaint. BOA's argument that its improper motion necessitated a motion for leave to amend the complaint is baseless. It is indicative, however, of the tactics BOA employed to lead the district into error in the granting of BOA's impermissible second motion to dismiss.

In its Answer Brief, BOA tries to capitalize further on its own skirting of the Federal Rules. BOA disingenuously argues that, because "[t]he Receiver elected to stand on his Amended Complaint," and merely "hedge

his bets" by telling the court that recent discovery had yielded additional facts supporting BOA's actual knowledge of Theodule's Ponzi scheme, the Receiver opened himself up to a dismissal with prejudice—of a complaint that the court had already said was sufficient—without even one opportunity to amend. Ans. Br. at 9.

What bet was the Receiver hedging? The court had already ruled that the Amended Complaint stated claims for aiding and abetting and adequately pleaded BOA's knowledge to state FUFTA claims. *The Receiver "elected to stand on his Amended Complaint" because the district court told the Receiver it was a good place to stand*. BOA's argument that the Receiver's reliance on the December 22 Order bars him from challenging the court's dismissal with prejudice without leave to amend is unfounded.[12]

[12] BOA also takes liberties in describing the district court's December 22, Order with respect to the FUFTA claims. The district court did not "instruct[] the Receiver that any attempt to replead his claims needed to include specific allegations showing his entitlement to relief." To the contrary, the district court held that BOA had pleaded facts "sufficient to defeat the good-faith and innocence aspects of a mere conduit defense." Doc 51 at 25. The court required the Receiver to replead only additional facts to demonstrate his status as a "creditor" under the FUFTA statute. Doc 51 at 25-26.

F. BOA's FUFTA arguments ignore that its good faith affirmative defense cannot be adjudicated on a Rule 12(b)(6) motion

Context is critical in considering BOA's FUFTA arguments. It matter immensely that the lower court dismissed the Receiver's FUFTA claims with prejudice under Rule 12(b)(6) based on BOA's fact-intensive, mere conduit affirmative defense. BOA does not cite a single case where a FUFTA or analogous fraudulent transfer complaint was dismissed—even without prejudice—under Rule 12(b)(6) based upon a defendant's good faith mere conduit affirmative defense.[13]

The lower court's order cannot be upheld because "lack of good faith" is not even an element of the Receiver's FUFTA claims. *Nationsbank, N.A. v Coastal Utils., Inc.*, 814 So. 2d 1227, 1229 (Fla. Dist. Ct. App. 2002). BOA admits this in is Answer Brief at page 33. Under Florida law, "[t]he commercial conduit rule to fraudulent transfers is, however, an affirmative defense and cannot support the dismissal of the receiver's complaint with prejudice." *Fla.Dept. of Ins. v. Blackburn*, 633 So. 2d 521, 524 (Fla. Dist. Ct.

[13] Our research has not located any reported opinion, other than this case and its companion case from the same court, *Perlman v. Wells Fargo*, 10-81612-civ-Hurley/Hopkins (on appeal to this Court in Case No. 12-14345), where a FUFTA claim, or equivalent fraudulent transfer claim under bankruptcy law has been dismissed under Rule 12(b)(6) based on a good faith mere conduit defense.

App. 1994). *Cf. In re Bayou Group, LLC*, 362 B.R. 624, 638-39 (Bankr. S.D.N.Y. 2007) ("It is not incumbent on the plaintiffs to plead lack of good faith on defendants' part because lack of good faith is not an element of a plaintiff's claim "); *Brandt v. KLC Fin., Inc. (In re Equip. Acquisition Res., Inc.)*, 481 B.R. 422, 429 (Bankr. N.D. Ill. 2012) ("Inasmuch as the [mere conduit] defense … constitutes an affirmative defense, and not an element of the Plaintiff's claim, it is unnecessary for Plaintiff to preemptively plead facts negating Defendant's good faith").

Because the mere conduit defense cannot be determined on a motion to dismiss, the FUFTA inquiry should be over. Yet, BOA still tries to jump this hurdle by suggesting that "[t]he cases the Receiver cites do not articulate any sweeping rule that a complaint may not be dismissed based on the applicability of the mere conduit defense." Ans. Br. at 34. In fact, they do. Nearly every case cited by the Receiver at pages 39-40 of the Initial Brief explains that the mere conduit defense is an affirmative defense that is not proper for resolution on a motion to dismiss. *E.g. Steinberg v. Alpha Fifth Group,* Case No. 04-60899, 2010 WL 1332844 (M.D. Fla. Mar. 30, 2010) (mere conduit defense "is an affirmative defense to be proven at trial, not on a motion to dismiss"); *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); *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 mere conduit defense requires a fact-intensive inquiry into bank's relationship with customer)(citing *In re Harwell,* 628 F.3d 1312, 1323 (11th Cir. 2010).

Nothing in BOA's brief changes the law on good faith under FUFTA. Rather than recite again a long list of cases demonstrating the district court's error, the Receiver will rely principally on the cases discussed in his Initial Brief at pages 36-42 as to the standard of good faith under FUFTA. An excellent summary of the law was provided in *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299 (M.D. Fla. 2009). In *Wiand*, the court collected several cases and cogently explained the good faith standard applicable to the Receiver's FUFTA claims as follows:

> Because "good faith" is an affirmative defense, [the defendant] has the burden of demonstrating that she possessed good faith. Although FUFTA does not define "good faith," the courts apply an objective test. The relevant question is whether the transferee had actual knowledge of the debtor's fraudulent purpose or "had knowledge of such facts or 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." "[A] transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor's fraudulent purpose." Thus, 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 (citations and quotation omitted). That is the law on good faith under FUFTA. BOA's argument that the actual knowledge standard used in *Lawrence* for aiding and abetting applies to FUFTA, or that it should become the standard for banks under Florida law, is without support.[14]

The Receiver anticipated BOA's arguments about this Court's decision in *O'Halloran v. First Union National Bank*, 350 F.3d 1197 (11th Cir. 2003), and the Florida Supreme Court decision in *Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004). The Receiver refers the Court to its Initial Brief at pages 43-49. The Receiver will note again that *O'Halloran* did not suggest that a bank can turn a blind eye to all customer activity. *Cf. Wiand*,

[14] BOA continues to claim that *Lawrence* has relevance to the Receiver's FUFTA claims, even arguing that *Lawrence* "undermined the district court's earlier conclusion that allegations regarding 'atypical transactions' might support an inference that [BOA] lacked the good faith required to assert a mere-conduit defense." Ans. Br. at 9. How could *Lawrence* undermine that conclusion? *Lawrence* did not even involve or address FUFTA or the good faith, mere conduit affirmative defense which the lower court decided at the motion to dismiss stage.

611 F. Supp. 2d at 1319-20 ("transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor's fraudulent purpose"). In any event, none of these issues can be resolved on a Rule 12(b)(6) motion to dismiss.

Freeman did not involve a FUFTA claim against a transferee. The case involved the question of whether a claim for aiding and abetting a FUFTA violation was cognizable under Florida law. The Florida Supreme Court held that, because FUFTA provides a statutory cause of action, the court would not recognize a common law expansion of the remedies provided by the Legislature by extending liability under the statute beyond the transferor and transferees. The FUFTA claims here, of course, are claims against BOA as a transferee, and clearly within the statute. Just as the supreme court determined it was inappropriate for the courts to expand the universe of persons potentially liable under FUFTA, it is not appropriate for the courts to exempt from liability a specific class of defendants that the Florida legislature did not choose to exclude from the statute.

BOA is asking this Court to carve out of FUFTA, a Florida substantive statute, an exception for banks. BOA wants this Court to hold that, while

everyone else is bound to act in "good faith" in order to avoid liability as a good faith innocent transferee, banks can act at a lesser standard, even recklessly, as long as the injured party cannot plead facts to show that the bank had "actual knowledge" of the fraud. The authority BOA cites is *Lawrence*, a decision that is not even a fraudulent transfer case. BOA is, moreover, asking this Court to overrule or limit its decision in *Harwell*, 628 F.3d 1312, which holds that a party seeking to establish mere conduit status must show its "good faith" and innocence. That holding would be a significant limitation on FUFTA. And because courts apply the same analytical framework when considering claims under FUFTA and the equivalent Bankruptcy Code provisions addressing fraudulent transfers, *see* Init. Br. at 36-37 n. 6, BOA is asking this Court to greatly limit the powers available to bankruptcy trustees as well. Because banks are often intimately entangled with Ponzi schemes and other fraudulent activity, BOA is, therefore, asking this Court to significantly rewrite the law in the area of fraudulent transfers.

CONCLUSION

For the reasons in the Receiver's Initial Brief and in this Reply Brief, Jonathan E. Perlman, as Receiver, requests that this Court enter an order

vacating the May 23, 2012 Order dismissing his complaint with prejudice and remand the action to the lower for a trial on the merits.

Respectfully submitted this 15th day of March, 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 no more than 7,000 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 .
W. Barry Blum

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March, 2013 I have electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing, and also served a true and correct copy of the foregoing brief via FedEx to counsel for Appellee, 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 Kim Watterson, Esq., 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, 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 .
W. Barry Blum

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