UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 12-13436, 12-14073

JONATHAN E. PERLMAN, Esq.,
as Court-Appointed Receiver of
Creative Capital Consortium, LLC, et al.,

Plaintiffs-Appellants

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee

On Appeal From The United States District Court
For The Southern District Of Florida
Case No. 9:11-/cv-80331-CIV-DTKH

BRIEF OF APPELLEE BANK OF AMERICA, N.A.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Bank of America, N.A. ("BANA") makes the following statements pursuant to Federal Rule of Civil Procedure 26.1 and L.R. 26.1-1.

Certificate of Interested Persons

The following persons/entities have an interest in the outcome of this appeal:

1. A Creative Capital Concept$, LLC – receivership entity
2. BAC North America Holding Company
3. BANA Holding Corporation
4. Bank of America, N.A., Appellee
5. Bank of America Corporation
6. Blum, W. Barry – counsel for Appellant
7. Cimo, David – counsel for Appellant
8. Contreras-Martinez, Carmen – counsel for Appellant
9. Creative Capital Consortium, LLC – receivership entity
10. Culleiton, Joseph E. – counsel for Appellee
11. G$Trade Financial, Inc. – receivership entity
12. Genovese Joblove & Battista, P.A. – counsel for Appellant
13. Gonzalez, Juan A. – counsel for Appellee
14. Hackett, Mary J. – counsel for Appellee
15. Hopkins, James M. – United States Magistrate Judge
16. Hurley, Daniel T.K. – United States District Court Judge

17. Josephs Jack, P.A. – counsel for Appellant
18. Josephs, Michael R. – counsel for Appellant
19. Kaufman, Dora Faye – counsel for Appellee
20. Lemoie, David P. – counsel for Appellant
21. Liebler, Gonzalez & Portuondo, P.A. – counsel for Appellee
22. NB Holdings Corporation
23. Perlman, Jonathan E., court-appointed Receiver – Appellant
24. Pickens, Dustin N. – counsel for Appellee
25. Reed Smith, LLP – counsel for Appellee
26. Reverse Auto Loan, LLC – receivership entity
27. Root, Gretchen Woodruff – counsel for Appellee
28. The Dream Makers Capital Investments, LLC – receivership entity
29. The Josephs Law Firm – counsel for Appellant
30. United Investment Club, LLC – receivership entity
31. Unity Entertainment Group, Inc. – receivership entity
32. Watterson, Kim M. – counsel for Appellee
33. Wealth Builders Circle, LLC – receivership entity

Defendant-Appellee's Corporate Disclosure Statement

Bank of America, N.A. 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.

/s/ Kim M. Watterson

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Dated: February 8, 2013

STATEMENT REGARDING ORAL ARGUMENT

Appellant has requested oral argument. For its part, however, Bank of America, N.A. ("BANA") does not believe that oral argument is necessary for the resolution of this appeal. The issues presented involve well-settled principles of state and federal law, which the district court faithfully applied in concluding that appellant had not stated cognizable Florida state law claims and dismissing the complaint with prejudice. Should this Court believe that oral argument is required, BANA will welcome the opportunity to appear and explain why the district court's orders should be affirmed and answer any questions this Court might have.

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JURISDICTIONAL STATEMENT

The Receiver was appointed by the district court in the case of *Securities & Exchange Commission v. Creative Capital Consortium, et al.*, No. 08-81565 (S.D. Fla.), and the district court therefore had jurisdiction over this matter pursuant to 28 U.S.C. §§ 754, 1692. The district court also had supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) because this matter forms part of the same case or controversy as *Creative Capital Consortium*, over which the district court had original jurisdiction.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is from a final judgment that disposes of all parties' claims. The district court entered its final judgment dismissing the Receiver's claims on May 23, 2012. (R.E. 83 (Vol. 2)). The Receiver filed a timely notice of appeal on June 22, 2012. (Dkt. 88). The Receiver also filed two motions for reconsideration (Dkt. 84, 85), which the district court denied on June 29, 2012 (R.E. 94 (Vol. 2)). On July 24, 2012, the Receiver filed a second notice of appeal—also timely—from the district court's denial of the reconsideration motions. (Dkt. 106).

STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed the Receiver's complaint with prejudice where the Receiver (a) opposed the dismissal motion by standing on his complaint and did not properly request leave to amend, and (b) requested leave to amend and submitted a proposed amended complaint in a reconsideration motion that was jurisdictionally untimely?

2. Whether the district court correctly dismissed the Receiver's claims under Florida's Uniform Fraudulent Transfer Act where it was clear on the face of the complaint that BANA was a mere conduit of the transfers in question and that the Receiver therefore could not recover?

STATEMENT OF THE CASE

Nature of the Case

This is an action filed against BANA by a court-appointed receiver seeking to recoup money that allegedly was lost by individuals who invested in a Ponzi scheme. The mastermind of the alleged Ponzi scheme was briefly a BANA customer. The Receiver's complaint, filed in the United States District Court for the Southern District of Florida, alleged causes of action against BANA for aiding and abetting the Ponzi schemer's alleged torts, as well as violations of Florida's Uniform Fraudulent Transfer Act (FUFTA).

Statement of Facts

The Receiver's factual narrative is based on alleged facts that were not before the district court. The Receiver repeatedly cites "Doc. 85-1" (*see* Br. at 18-19)—but that was a very belated proposed second amended complaint that was attached to the Receiver's untimely reconsideration motion, which he filed ***after*** the district court dismissed this action and ***after*** the jurisdictional deadline to file a reconsideration motion. The district court correctly denied the reconsideration motion—because it lacked the power to rule on it—and correctly did not consider the proposed second amended complaint. Those allegations, therefore, are irrelevant to this appeal for reasons that will be discussed further below.

The Amended Complaint (R.E. 57 (Vol. 2)), which is the operative complaint, alleged the following facts: George Theodule established numerous

business entities in 2007 and 2008 and solicited individuals to invest in them. (R.E. 57 (Vol. 2) ¶¶ 6, 8). For a brief period of time, Theodule and his business entities had accounts at BANA. (*Id.* at ¶ 66). In 2008, the Securities and Exchange Commission ("SEC") filed a complaint against Theodule and his business entities in the United States District Court for the Southern District of Florida, alleging violations of the Securities Exchange Act. (*Id.* at ¶ 10). The district court appointed a Receiver, Plaintiff-Appellant Jonathan E. Perlman, for Theodule's business entities. (*Id.* at ¶ 1; *see also Creative Capital Consortium*, No. 08-81565 (S.D. Fla., Dkt. 8)).

The Amended Complaint alleged that Theodule, acting through the Receivership Entities, paid out "false 'profits' to initial investors to trick future investors into believing that [his] promise of outrageous financial returns was a reality." (*Id.* at ¶ 9). According to the Receiver, Theodule had operated a "classic Ponzi scheme." (*Id.* at ¶ 14).

The Amended Complaint did not allege that BANA participated in Theodule's Ponzi scheme, nor did its factual allegations support an inference that BANA knew about or substantially assisted Theodule's Ponzi scheme. Even so, the Receiver alleged that BANA aided and abetted Theodule's torts and violated FUFTA. (R.E. 57 (Vol. 2) at ¶¶ 69-103). At bottom, the Receiver's effort to impose liability on BANA rested on allegations that BANA supposedly "watched" and "allowed" Theodule's various deposits, withdrawals, and transfers. (*Id.* at ¶¶ 55, 63, 67).

Proceedings and Dispositions in the District Court

A. On BANA's Motion To Dismiss, The District Court Declines To Dismiss The Aiding And Abetting Claims And Dismisses The FUFTA Claims Without Prejudice

BANA filed a motion to dismiss. It argued (among other things) that the Receiver's aiding and abetting causes of action were not supported by sufficient factual allegations on two essential elements of an aiding and abetting claim—*i.e.*, that BANA had actual knowledge of and substantially assisted the scheme. BANA also argued that the FUFTA claims failed because the Receiver did not allege that he was a FUFTA creditor, that BANA was the intended recipient of the funds, or that BANA had control over the funds. (R.E. 17 (Vol. 1)).

The district court granted BANA's motion in part and denied it in part. (R.E. 51 (Vol. 1)). In declining to dismiss the aiding and abetting claims, the court acknowledged that another district court had recently ruled that allegations of "atypical" transactions by a bank's customer were insufficient to allege the bank's actual knowledge of the scheme, but disagreed with that other court's analysis and concluded that the Receiver had "sufficiently alleged the knowledge element of [his] aiding and abetting claims to at least survive a motion to dismiss." (*Id.* at 16-17) (discussing *Lawrence v. Bank of America, N.A.*, No. 8:09-cv-2162, 2010 WL 3467501, at *5 (M.D. Fla. Aug. 30, 2010)).

The court dismissed the FUFTA claims without prejudice, instructing the Receiver that any attempt to replead his claims needed to include specific allegations showing his entitlement to relief. (*Id.* at 26).

B. The Receiver Files An Amended Complaint Reasserting His Aiding And Abetting Claims And Attempting To Replead His FUFTA Claims

Early in 2012, the Receiver filed his Amended Complaint. He reasserted his aiding and abetting claims and also attempted to replead his FUFTA claims to cure the deficiencies the district court had identified. (R.E. 57 (Vol. 2)). As a whole, the Amended Complaint (like the original complaint) was long on sweeping assertions that attempted to contort BANA's legitimate banking practices into complicity in Theodule's scheme, but short on any specific factual averments supporting the Receiver's conclusory accusations. Indeed, the factual averments in the Amended Complaint were identical to those in the original complaint. (Br. at 7; *also compare* R.E. 57 (Vol. 2) ¶¶ 1-68 *with* Dkt. 1 ¶¶ 1-68).

More specifically, the Receiver did not allege any facts making it plausible that BANA directly participated in Theodule's scheme or had any knowledge that the Receivership Entities were being operated as a Ponzi scheme as opposed to legitimate businesses. As for the FUFTA claims, the Amended Complaint added a few conclusory allegations, plus dollar amounts of the alleged fraudulent transfers. (*See* R.E. 57 (Vol. 2) at ¶¶ 79-103).

On the key knowledge element (relevant to both the aiding and abetting claims and the FUFTA claims), all of the Receiver's allegations were conclusory and lacked any factual detail supporting his assertions about BANA's supposed "knowledge" of the scheme. Some of the allegations were speculative and thinly-disguised "should have known" accusations—*i.e.*, that BANA should have

identified supposed red flags the Receiver claims could have alerted it to the Theodule's alleged fraud. (*See id.* at ¶¶ 65-68).[1]

When the conclusory declarations were stripped away, all that remained were allegations showing a routine banking relationship between BANA and Theodule. Thus, the Receiver sought to impose liability on BANA based on nothing more than his allegation that Theodule deposited funds into, and transferred funds between, accounts at BANA.

C. This Court Issues Its Opinion In *Lawrence v. Bank Of America, N.A.*, Concluding That Allegations Of A Bank Customer's Atypical Banking Practices Are Insufficient To State The Claim That The Bank Knew Of Its Customer's Fraud

A few days after the Receiver filed his Amended Complaint, this Court ruled in *Lawrence v. Bank of America, N.A.* that allegations that a Ponzi schemer engaged in atypical banking transactions are insufficient to support an inference that the bank had actual knowledge of the scheme—a necessary element of an aiding and abetting claim. 455 F. App'x 904, 906-07 (11th Cir. Jan. 11, 2012). In reaching this conclusion, this Court explained that under settled law, banks do

[1] For instance, the Receiver alleged that BANA knew of and participated in the scheme because all of the bank accounts involved were allegedly held at BANA (*id.* at ¶ 67), that BANA "knew that the millions of dollars deposited … and then transferred directly to Theodule belonged to Theodule's unsuspecting investors," that BANA "knew Theodule and Creative Capital had been shut down at prior institutions," and that it "knew that neither Creative Capital nor Theodule were licensed brokers or financial advisors" (*id.* at ¶ 68). The Receiver, however, did not provide any factual detail that would support an inference that BANA "knew" what the Receiver alleged it knew.

not have the duty to investigate their customers' transactions—even allegedly suspicious transactions—and thus "should have known" allegations will not suffice to state an aiding and abetting claim. *Id.* at 907. This Court, following controlling Florida law, concluded that a bank cannot be held liable for engaging in a routine customer relationship with someone who, it turns out, is committing a fraud. *Id.* at 906-07. Thus, in the end, this Court affirmed the district court's decision and endorsed the reasoning underlying it. (R.E. 51 (Vol. 1) at 16-17). This Court also affirmed the district court's dismissal with prejudice, agreeing that amendment of the complaint would be futile. *Lawrence*, 455 F. App'x at 907.

D. When BANA Moves To Dismiss The Amended Complaint Based On *Lawrence*, The Receiver Stands On His Allegations And Does Not Properly Request Leave To Amend

BANA moved to dismiss the Receiver's aiding and abetting claims in light of this Court's *Lawrence* decision and his FUFTA claims on the grounds that they still did not state a claim under controlling law. (R.E. 67 (Vol. 2)).

BANA began by noting that the district court had previously declined to dismiss the aiding and abetting claims based on its view that allegations of a customer's atypical banking transactions were sufficient to support an inference on the "knowledge" element of an aiding and abetting claim. (*Id.* at 8). But, BANA pointed out, this Court concluded just the opposite in *Lawrence*. (*Id.* at 9) (quoting *Lawrence*, 455 F. App'x at 907 ("[a]lthough Plaintiffs alleged the transactions were atypical and therefore [BANA] should have known of the Ponzi scheme, such allegations are insufficient under Florida law to trigger [aiding and abetting]

liability")). Therefore, BANA argued, the Receiver's allegations—as in *Lawrence*—did not state legally cognizable aiding and abetting claims. (*Id.* at 13).

With regard to the Receiver's repleaded FUFTA claims, BANA noted that *Lawrence* also undermined the district court's earlier conclusion that allegations regarding "atypical transactions" might support an inference that BANA lacked the good faith required to assert a mere-conduit defense. (*Id.* at 14). BANA also argued that the Receiver had not alleged that BANA had control over the funds in question—and he thus had not cured the deficiencies that led the district court to earlier dismiss the FUFTA claims without prejudice. (*Id.* at 14-15).

The Receiver elected to stand on his Amended Complaint—arguing that *Lawrence* was distinguishable because the Amended Complaint contained allegations that "independently establish[ed] that Bank of America *actually knew* of Theodule's misdeeds." (R.E. 76 (Vol. 2) at 11) (emphasis in original). Attempting to hedge his bets, however, the Receiver added a footnote stating:

> The Receiver notes that recent discovery in the case has yielded even more facts supporting his allegations that Bank of America actually knew about the Theodule Ponzi scheme. To the extent that the Court finds the allegations in the Amended Complaint somehow insufficient to establish actual knowledge, the Receiver requests that he be granted leave to amend his pleadings accordingly.

(*Id.* at 12 n.8).

Although the Receiver purported to have "more facts," he did not indicate what those supposedly new facts were or how they would support his claims. (*See* R.E. 76 (Vol. 2)).

E. Based On *Lawrence's* Reasoning, The District Court Dismisses The Amended Complaint With Prejudice

The district court dismissed the Receiver's complaint with prejudice. (Dkt. 82). On the aiding and abetting claims, the court noted that its earlier decision "attempted to reconcile a variety of cases with conflicting outcomes"—among them, the Middle District of Florida's *Lawrence* opinion, with which it had disagreed. (*Id.* at 2). But, the district court acknowledged that this Court had since "affirmed the district court's order in *Lawrence*, stating that '[a]lthough Plaintiffs alleged the transactions were atypical and therefore [the Bank] should have known of the Ponzi scheme, such allegations are insufficient under Florida law to trigger liability.'" (*Id.*) (quoting *Lawrence*, 455 F. App'x at 907).

The district court also concluded that *Lawrence's* "reasoning sheds substantial light on the exact issue presented by [BANA's] motion," even though *Lawrence*, as an unpublished opinion, does not "constitute binding precedent" under this Court's Rules. (*Id.* at 2-3). The district court then held that "[w]ith the benefit of the Eleventh Circuit's reasoning on this issue," it was clear that "the Receiver's allegations [were] insufficient as a matter of law to state a claim for aiding and abetting liability." (*Id.* at 3). More specifically, applying *Lawrence's* holding that under established law "banks have no duty to investigate even suspicious transactions," the district court concluded that the Receiver's allegations of atypical transactions "[did] not demonstrate the actual knowledge required for aiding and abetting claims." (*Id.* at 3).

Moving on to the FUFTA claims, the district court dismissed those as well, concluding that it was clear on "the face of the Amended Complaint that the Bank acted as a mere conduit of Theodule's fraudulent transfers" and "acted with good faith." (*Id.* at 4). The court noted that the central question in evaluating BANA's good faith was whether the Bank had (1) "actual knowledge" of Theodule's fraudulent purpose or (2) "knowledge of such facts or circumstances as would have induced an ordinarily prudent person" to make an inquiry that would have led to knowledge of the fraud. (*Id.*). On the first question, the court noted that it had "already concluded that the Receiver [had] not properly alleged the Bank's actual knowledge." (*Id.*). On the second question, the court concluded that because "banks have the right to assume that individuals who have the legal authority to handle an entity's accounts do not misuse the entity's funds," the "atypical transactions and other red flags" the Receiver had alleged did not "comprise facts or circumstances that would have induced an ordinarily prudent bank to make inquiry …." (*Id.*) (internal quotation marks and alterations omitted) (citing *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1205 (11th Cir. 2003), and *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299, 1319 (M.D. Fla. 2009)).

Finally, the district court dismissed the Amended Complaint with prejudice because "granting leave to amend … would be futile in light of the legal conclusions stated in this Order." (*Id.* at 5). The court entered final judgment for BANA. (R.E. 83 (Vol. 2)).

F. The Receiver Files Two Jurisdictionally Untimely Motions To Reconsider—Which The District Court Is Powerless To Grant—In An Effort To Change Course And Try To Find A Way To Amend His Complaint Post-Dismissal

After judgment was entered, the Receiver filed a motion for "Reconsideration of Order of Dismissal and Request for Leave to File a Second Amended Complaint." (Dkt. 84). Specifically, the motion requested reconsideration of the "with prejudice" portion of the dismissal order, invoking Rule 59(e) and Rule 15(a) and attaching the report of a "bank security expert."

The motion was filed 29 days after the entry of judgment and thus was too late. Fed. R. Civ. P. 59(e) (motion to alter or amend a judgment "must be filed no later than 28 days after the entry of the judgment"). Even though the motion requested permission under Rule 15(a)(2) to amend the complaint, the Receiver acknowledged that grant of Rule 59 relief was a prerequisite to his ability to amend his complaint. (Dkt. 84 at 7). The Receiver did not attach a proposed amended complaint to the motion (although the motion referred to one), nor did he explain why the supposedly new facts could not have been discovered or presented to the court prior to dismissal. (*See* Dkt. 84).

Later that same day, the Receiver filed a "Corrected Motion to Reconsider." (Dkt. 85). That motion again requested relief under Rules 59 and 15—but added a footnote making a passing request that, in the alternative, the motion be construed as a Rule 60(b)(6) motion for relief from judgment (Dkt. 85 at 3 n.1). The Receiver admitted that his original motion to reconsider was not timely. (*Id.*) ("[t]he Eleventh Circuit has held that whenever a Rule 59(e) motion is not timely

filed, it may be construed as a motion for relief from judgment under Rule 60(b)(6)") (citing cases). Finally, the Receiver attached to the corrected motion, for the first time, a proposed second amended complaint. (Dkt. 85, Ex. A).

BANA moved to strike the Receiver's post-judgment motions on the ground that they were untimely under Rule 59. With regard to the Receiver's Rule 60 request, BANA pointed out that the Receiver had not even attempted to show, as Rule 60(b)(2) requires, that the "new" facts could not have been discovered before the 28-day deadline or explain why he otherwise would be entitled to Rule 60 relief. (Dkt. 89).

The district court denied the Receiver's motions because they were untimely. (R.E. 94 (Vol. 2) at 1). As the court explained, a motion for reconsideration under Rule 59(e) must be filed within 28 days of the entry of judgment—and the Receiver's motion was not. (*Id.*). The court further explained that because Rule 6(b) bars a district court from extending Rule 59's deadline, it was "without jurisdiction" to do so. (*Id.*). The court then mentioned in passing that if it had been presented with the "newly-discovered evidence" in a timely fashion, it would have been inclined to reconsider the with-prejudice portion of its order. (*Id.* at 1-2). "However," the court concluded, "because Plaintiff did not file the motions for reconsideration within the … deadline specified in the Rules, the Court is simply unable to consider them …." (*Id.* at 2).

G. The District Court Denies The Receiver's Last-Gasp Motion To "Clarify," Determining That It Had Made No "Indicative Ruling" And That The Receiver Had Failed To Demonstrate Entitlement To Relief From The Judgment

About ten days after the district court denied the Receiver's reconsideration motions, the Receiver filed yet another motion—this one seeking "clarification" of whether the district court's denial of the reconsideration motions constituted an "indicative ruling" under Fed. R. Civ. P. 62.1(b), *i.e.*, that the court had determined that it would grant the motion if the case were remanded, or had determined that the motion raised a substantial issue. (R.E. 103 (Vol. 2)).

In ruling on this motion, the district court first noted that Rule 62.1 permits indicative rulings to be made only as to timely motions, and the Receiver's Rule 59 motion was not timely. (R.E. 104 (Vol. 2) at 1). Next, the district court addressed the Receiver's argument that his untimely Rule 59 motion should be considered a Rule 60 motion for relief from the judgment. The court pointed out that the Receiver "failed to demonstrate that the prerequisites for relief under Rule 60(b) were satisfied" because he "did not show that the 'newly discovered evidence' included in the motions for reconsideration could not have been discovered in time to file the motions prior to the Rule 59 deadline as would be required under Rule 60(b)(2)" or "explain why this case would fall within the exceedingly narrow catch-[all] provision of Rule 60(b)(6)." (*Id* at 2) (citing Fed. R. Civ. P. 60(b)). Thus, the court concluded, recharacterization of the Rule 59 motion as a Rule 60 motion would be pointless because the Receiver was not entitled to Rule 60 relief.

The Receiver filed two timely appeals—one from the entry of judgment following the dismissal order and the other from the denial of the reconsideration motions.

STANDARDS OF REVIEW

This appeal involves two issues. The first is whether the district court abused its discretion in dismissing the Receiver's Amended Complaint without leave to amend. Whether to grant leave to amend is "entrusted to the sound discretion of the trial court and [is] reviewed only for abuse of discretion." *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315 (11th Cir. 1999) (citations omitted). Accordingly, this Court's review is "limited." *Id.*

The second issue is whether the district court erred in dismissing the Receiver's FUFTA claims. This Court "review[s] a grant of a motion to dismiss for failure to state a claim *de novo*, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Harris v. United Auto. Ins. Group, Inc.*, 579 F.3d 1227, 1230 (11th Cir. 2009) (citation and internal quotations omitted).

SUMMARY OF ARGUMENT

This litigation is a tale of the Receiver's legally insufficient allegations and jurisdictionally barred efforts to rescue his deficient complaint. After his complaint was dismissed with prejudice, the Receiver deployed several tactics in an effort to wind back the clock and gain permission to amend his complaint. The district court correctly rejected these efforts.

The Receiver does not challenge the district court's conclusion that his aiding and abetting claims did not survive scrutiny under controlling law. Instead, with respect to these claims, the only question he raises is whether the district court erred in dismissing without leave to amend. Under settled law, the answer is no. The Receiver's arguments to the contrary are based on distortions of the district court record, a fundamentally flawed view of the controlling law, and reliance on superseded case law.

The federal court's framework for litigating a case from complaint through a motion for dismissal is clearly spelled out in the Federal Rules of Civil Procedure and the case law. After the plaintiff files a complaint, the defendant examines it and may argue that the complaint should be dismissed under Rule 12(b)(6). The plaintiff, in turn, examines the defendant's motion to determine if it has sounded out real defects in the complaint. If so, the plaintiff has the right under Rule 15 to amend in an effort to cure the complaint's problems. Then, if intervening case law reveals additional problems with the complaint or the plaintiff discovers additional facts that he needs to draw to the court's attention at the pleading stage, he may

seek further leave to amend. In this regard, this Court's precedents expressly provide that a plaintiff must make a motion for leave to amend under Rule 15 and, in so doing, must describe the substance of the new allegations and how they will cure the complaint's deficiencies. A passing reference to the possibility of an amendment, made in a footnote in an opposition to a dismissal motion, will not suffice.

This framework strikes the necessary balance between the plaintiff's interest in redress and a fair hearing; the defendant's interest in defending itself and avoiding extensive litigation over meritless claims; and the court's interest in adjudicating causes fairly and economically. The plaintiff has multiple chances to state his claim; the defendant has the ability to test the complaint; and the court can assess and adjudicate, at one time, all the facts that might bear on the plaintiff's claim.

Here, the Receiver flouts the Federal Rules and tries to upset this settled framework. When BANA pointed out the amended complaint's infirmities in light of this Court's opinion in *Lawrence* and other controlling law, the Receiver could have moved for leave to amend his complaint. But he chose not to do so, instead arguing that his complaint as it stood was sufficient to state a claim. Although the Receiver inserted a passing reference in his opposition to the dismissal motion suggesting that he had "even more facts supporting his allegations," he did not move for leave to amend or even say what those facts were. The district court considered the allegations that were actually before it—those in the Amended Complaint—and concluded that the Receiver had not stated legally cognizable

claims for relief. The court also properly declined to speculate regarding facts that the Receiver had not presented and dismissed the complaint with prejudice.

After his gamble (that is, standing on the aiding and abetting claims as pleaded) did not pay off, the Receiver attempted to wind back the clock. Disregarding the rules and this Court's precedents, the Receiver—for the first time—sought permission to amend his complaint and told the court about the additional facts he believed would cure the deficiencies in his claims. But, as the district court correctly concluded, because 29 days had passed since the entry of judgment, it had no power to consider the Receiver's jurisdictionally untimely filings.

Now, on appeal, the Receiver asserts that the district court erred by not granting him leave to amend in its dismissal order (despite the fact that he had not moved for leave or described the substance of his supposed additional facts) and by not considering the Receiver's untimely proposed amendment (despite the fact that the district court had no jurisdiction to do so). There was no error. Based on controlling law, the district court correctly dismissed the Receiver's complaint with prejudice and then correctly concluded that it could not overstep the bounds of its power to consider jurisdictionally untimely motions to alter the judgment.

The Receiver's challenge to the district court's dismissal of his FUFTA claims fares no better. Applying settled FUFTA law, as well as Florida law defining the relationship between a bank and its customers, the district court correctly concluded that the Receiver's claims failed as a matter of law. The complaint's allegations showed only that BANA had received routine deposits

from its customers. Thus, it was clear on the face of the complaint that FUFTA liability could not be imposed on BANA because it was a "mere conduit" that never had control of the funds.

The basic truth about the district court litigation, which the Receiver works assiduously to obscure and avoid, is that he failed to state a claim against BANA despite ample opportunity to do so. This Court should affirm.

ARGUMENT

I. The District Court Properly Dismissed The Receiver's Complaint Without Granting Leave To Amend

The Receiver does not argue, because he cannot, that the district court erred in dismissing his aiding and abetting claims based on this Court's *Lawrence* decision.[2] The district court's decision was manifestly correct, so the Receiver trains his fire elsewhere—namely, the court's dismissal without leave to amend. But as settled case law shows, this target is not susceptible to attack, either.

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[2] The Receiver's only claim of error regarding the aiding and abetting claims is that the district court did not permit further amendment. Br. at 26-35. In the district court, the Receiver argued that his aiding and abetting claims met *Lawrence's* requirements. (R.E. 76 (Vol. 2) at 8-12). The Receiver has abandoned this argument on appeal. Although he alludes to this issue in his Statement of the Issues, *see* Br. at 2, he never mentions it again or develops any argument on it—he does not challenge *Lawrence's* analytical framework, which the district court followed, or explain how the allegations in his Amended Complaint could meet the *Lawrence* standard. Consequently, the Receiver has waived those arguments. *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306 (11th Cir. 2012) (argument not made in appellant's opening brief is waived). This waiver cannot be cured. *Id.* at 1307 (addressing an issue for the first time in a reply brief is "too late").

As shown below, under controlling Eleventh Circuit law, a party seeking leave to amend must fulfill procedural and substantive requirements. Procedurally, he must formally and explicitly move for leave to amend. Substantively, he must provide the district court with his proposed amended complaint or set out its substance. By requiring a plaintiff to put all of his factual allegations before the district court before it rules on a dismissal motion, these requirements preserve the resources of both the district and appellate courts and prevent piecemeal adjudication.

The Receiver did not do anything that created an obligation for the district court to consider whether he should have another chance to amend his complaint. When faced with BANA's motion to dismiss, the Receiver neither filed a motion to amend nor informed the district court of the substance of what any amendment would look like. The proposed second amended complaint the Receiver finally tried to offer came too late—as part of his reconsideration motions filed more than 28 days after the entry of final judgment. Controlling case law forecloses any conclusion that the district court erred in not affording the Receiver leave to amend in these circumstances.

A. The District Court Correctly Denied The Receiver's Post-Dismissal Motions, Which Were Jurisdictionally Barred, And Correctly Did Not Consider The Allegations In The Attached Proposed Second Amended Complaint

The Receiver contends that the district court erred in dismissing his complaint with prejudice without considering the proposed second amended complaint. Br. at 31. But the Receiver did not file the proposed amendment until

after his complaint had been dismissed, and furthermore, he attached the proposed amendment to a jurisdictionally untimely reconsideration motion. Thus, not only did the district court ***correctly*** decline to consider the allegations in his proposed second amended complaint—it ***lacked the power*** to consider them.

The Receiver's argument that the district court should have considered his proposed second amended complaint suffers from two problems, one logical and one legal. The logical problem is that the Receiver's argument conflates two separate events. In May 2012, the district court—examining all of the allegations the Receiver had put before it—dismissed the complaint with prejudice. (Dkt. 82 at 5). Then, 29 days later, in June 2012, the Receiver included his proposed second amended complaint as an attachment to an untimely reconsideration motion. Dkt. 85-1. The Receiver's argument—that the district court erred by dismissing the complaint in May without considering allegations in a document that was filed in June—therefore is nonsensical. In advancing this argument, he effectively asks this Court to make an extraordinary ruling: that the district court abused its discretion by not being clairvoyant.

The Receiver faces another hurdle, this one legal. To begin with, Rule 15(a) "has no application once the district court has dismissed the complaint and entered final judgment for the defendant. Post-judgment, the plaintiff may seek leave to amend if he is granted relief under Rule 59(e) or Rule 60(b)(6)." *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361 n.22 (11th Cir. 2006) (citations omitted). Thus, the fate of the Receiver's efforts to put his proposed second amended complaint before the district court hinged on whether he had timely

moved under Rule 59(e). He had not. The district court entered final judgment on May 23, 2012. (R.E. 83 (Vol. 2)). Rule 59(e) directs that a motion to alter or amend a judgment must be filed "no later than 28 days after the entry of the judgment"—here, June 20, 2012. The Receiver's motions (Dkt. 84, 85) were filed on June 21, 2012 and therefore were not timely—as he has acknowledged (Dkt. 85 at 3 n.1; Dkt. 88 at 1 n.1).

Indeed, the law absolutely barred the district court from considering the Receiver's motions to reconsider (and anything contained in or attached to them). As this Court has explained, "[t]imeliness constitutes a jurisdictional dimension central to … the motion for reconsideration. Just as an untimely filed notice of appeal cannot invoke a circuit court's jurisdiction, an untimely filed motion to alter or amend cannot invoke a trial court's jurisdiction." *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1129 (11th Cir. 1994); *see also id.* at 1128 (Federal Rule of Civil Procedure 6(b) "forbids a court to enlarge the time within which a Rule 59(e) [reconsideration] motion may be served.").

Consequently, this Court should reject the Receiver's attempts to obfuscate what took place in the district court and ignore the settled law regarding untimely reconsideration motions. The district court did the only thing it could have: deny the Receiver's jurisdictionally untimely motions for reconsideration and decline to consider the proposed amended complaint attached to that untimely motion. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all …. [W]hen it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.")

(internal citation and quotations omitted). Far from being erroneous, the district court's approach was manifestly correct.[3]

B. Because The Receiver Did Not Move For Leave To Amend Or Advise The District Court Of The Substance Of The New Factual Allegations He Claimed He Could Make, He Failed To Do What Controlling Law Requires

In addition to his misconceived argument that the district court should have considered his jurisdictionally untimely proposed second amended complaint, the Receiver attempts another line of attack, arguing that the district court's dismissal of his complaint "without affording [him] an opportunity to amend was an abuse of discretion." Br. at 26. The settled law in this Circuit requires a plaintiff seeking leave to amend to file a motion to that effect and inform the district court of what his proposed amendments are and how they would cure the complaint. The basic flaw in the Receiver's argument—which he ignores—is that he never properly requested leave to amend his complaint.

Under the Receiver's view, the district court was supposed to look at his footnote in his opposition to dismissal and think of all the conceivable facts that

[3] Despite these insurmountable logical and legal problems, the Receiver nonetheless refers numerous times to the allegations in the proposed second amended complaint. *See e.g.* Br. at 18-20, 43, 47, 49, 50. Because the district court was legally barred from considering the proposed second amended complaint, none of its allegations can be considered on this appeal. In fact, the Receiver seems to have some awareness that the proposed second amended complaint is not properly before this Court because he makes only a passing comment that amendment of his complaint would not be futile, citing the district court's denial of his reconsideration motions. Br. at 32 (citing Dkt. 94 at 1).

could be added to his complaint that would permit it to state a claim. *See* Br. at 33. That argument effectively invokes the now-superseded rule of *Bank v. Pitt*, 928 F.2d 1108 (11th Cir. 1991) (per curiam)). In *Bank*, this Court had ruled that a plaintiff must be granted an opportunity to amend his complaint even if he did not ask the district court for leave to do so. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc) (explaining and overruling *Bank*). When a panel of this Court found itself constrained by *Bank* to remand a case to the district court so that the plaintiff would have an opportunity to amend—despite the fact that he had never asked the district court for leave to amend—this Court granted rehearing en banc in order to do away with the *Bank* rule. *Id.* at 542.

In *Wagner*, this Court en banc definitively ruled that where the plaintiff does not request leave to amend, a district court does not abuse its discretion by dismissing the complaint with prejudice. *Id.* In reaching this conclusion, this Court rejected the notion that it is ***the district court's*** responsibility to determine whether there is any conceivable way a plaintiff could successfully amend. *Wagner* established that it is instead ***the plaintiff's*** responsibility to ask for leave to amend. In enunciating the new rule, 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.*; *see also e.g. Doe v. Pryor*, 344 F.3d 1282, 1288 (11th Cir. 2003).[4]

[4] In this regard, this Court's conclusion parallels the approach the U.S. Supreme Court took a few years later in addressing Rule 8's pleading requirements. In *Twombly*, the Court formally "retire[d]" the prior standard, which had seemed to

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As this Court's opinion makes clear, *Wagner's* rule is based on and furthers paramount public policies that the *Bank* rule had frustrated: judicial economy and "the critically important concept of finality in our judicial system." *Wagner*, 314 F.3d at 542-43. As this Court explained, the *Bank* rule essentially guaranteed an appellate win—and, consequently, two "bites at the apple"—to a plaintiff whose complaint was dismissed. On the one hand, if the appellate court concluded that the plaintiff had stated a claim, the plaintiff's appeal was successful. On the other hand, if the appellate court concluded that the complaint was deficient, the plaintiff's appeal still would be successful "because [the appellate court] would then remand the case … and instruct the [district] court to permit the plaintiff to amend his complaint." *Id.* at 543. Thus, the plaintiff who stayed his hand and did not move for leave to amend reaped the benefit of appellate review without the attendant risk of a final dismissal. *Id.*

As this Court further explained, *Bank's* approach thwarted finality by turning appeals after dismissals "into interlocutory appeals" because "the district

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provide that a complaint could not be dismissed if the pleading "left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561, 563 (2007) (internal citation, quotations, and alterations omitted). Then, the Court went on to instruct that a plaintiff has an "obligation to provide the grounds of his entitlement to relief." *Id.* at 555 (internal citation, quotations, and alterations omitted). *Wagner* and *Long* similarly establish that the plaintiff must put all of his allegations before the district court—rather than requiring the district court to engage in a thought experiment to discern whether any imaginable facts could save the complaint.

court would have to entertain further proceedings" no matter whether the appellate court affirmed or reversed. *Id.* This, in turn, "added great trouble, time, and expense for defendants and the courts" and "create[d] opportunities for abuse by litigants seeking to delay resolution of a case by raising with the appellate court objections to the scope of an order that should have been raised first with the district court itself." *Id.* (internal citation and quotations omitted).

All of *Wagner's* policy concerns apply here: the need to a prevent a plaintiff from strategically sitting on his hands rather than requesting leave to amend, as well as judicial economy and finality. The Receiver does not mention *Wagner*, but apparently hopes to avoid its rule by pointing to the fact that he included, in his opposition to BANA's dismissal motion, a footnote that referenced the possibility of amendment. *See e.g.* Br. at 28. However, another decision of this Court explains why the Receiver's passing reference does not save him. This Court has ruled that merely mentioning the possibility of amendment in an opposition to a dismissal motion is not sufficient to request leave to amend. *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999). This Court directed that "[f]iling a motion is the proper method to request leave to amend a complaint," and, moreover, a "motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of [it]." *Id.* (citing Fed. R. Civ. P. 15(a) and 7(b)(1) and *Wisdom v. First Midwest Bank*, 167 F.3d 402, 409 (8th Cir. 1999) ("[P]arties should not be allowed to amend their complaint without showing" how amendment could "save the meritless claim.")).

The plaintiff in *Long* (like the Receiver here) embedded a passing request for leave to amend "in the memorandum she filed in opposition to the motion to dismiss." *Long*, 181 F.3d at 1279. This Court affirmed the district court's denial of leave to amend, holding that the plaintiff "did not file a motion for leave to amend" by simply including a request in her opposition to dismissal. *Id.* ("Failure to properly request leave to amend, when she had adequate opportunity and time to do so, precludes the plaintiff's argument on appeal that the district court abused its discretion by denying her leave.").

This Court should reach the same result here for the same reasons. Although the Receiver had ample time to do so, he did not move for leave to amend, nor did his short footnote identify the supposed "new" facts or how they would save his complaint. On appeal, the Receiver does not even mention *Long v. Satz* or explain why this case is different from *Long*.[5]

Wagner and *Long* supply the governing rules in this Circuit. Indeed, this Court has reaffirmed *Wagner* and *Long* numerous times. *See e.g. Doe*, 344 F.3d at

[5]The uncontroverted procedural history also reveals the problem with the Receiver's invocation of a de novo standard of review. When, unlike here, the plaintiff has provided a proposed amended complaint in a timely fashion, the district court's futility determination amounts to an analysis of whether the proposed amended complaint would survive a motion to dismiss. There, it makes sense to apply the same de novo review that applies to a district court's order dismissing a complaint. But here, the district court had no opportunity to apply a futility analysis to the proposed second amended complaint, because that proposed amendment was not before it. Its dismissal with prejudice was just like any other with-prejudice determination and should be accorded the same deferential review—that is, abuse of discretion. *See Burger King*, 169 F.3d at 1315.

1284; *Adams v. Kellett*, 360 F. App'x 67, 69-70 (11th Cir. 2010) (quoting *Long*, 181 F.3d at 1279). This Court also has consistently rejected efforts to qualify or weaken their holdings. This Court has concluded, for example, that the district court need not even rule explicitly on a party's request to amend that is embedded in a footnote in an opposition to a motion to dismiss. *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009). This Court also has clarified that the plaintiff must explain precisely how the supposed new facts would salvage the complaint. *Atkins*, 470 F.3d at 1361-62 & n.25.

The district court's dismissal with prejudice was fully supported, indeed required, by this settled case law. Under *Wagner*, a plaintiff must ask the district court for leave to amend, and under *Long*, that request to amend must be made in a motion that apprises the district court of the substance of the proposed amendments. The Receiver did neither.

C. The Receiver Case Law Is Based On A Legal Principle This Court En Banc Has Expressly Rejected And, In Any Event, Is Distinguishable

Despite *Wagner*, *Long*, and their progeny, the Receiver argues that the district court erred in dismissing his Amended Complaint without leave to amend. The linchpin of his argument is *Bryant v. Dupree*, 252 F.3d 1161 (11th Cir. 2001). But *Bryant* does not help him for two principal reasons.

To begin with, *Bryant* no longer is good law. *Bryant's* ultimate decision, and the reasoning used to reach it, is built upon the abrogated *Bank* rule. As explained, *Wagner* shifted the inquiry from "was there any reason *not* to grant

leave to amend?" to "did the plaintiff properly seek leave to amend?" *See e.g. Doe*, 344 F.3d at 1288.[6] *Bryant*, therefore, does not make the correct inquiry (whether the plaintiff properly requested leave to amend), instead focusing on an inquiry that is inapplicable here (whether there is any reason *not* to grant leave to amend). *Bryant*, 252 F.3d at 1163-64 (citing *Bank*, 928 F.2d at 1112). That is reason alone to reject the Receiver's reliance on *Bryant*.

And even if there were a reason to look further at *Bryant*, it is distinguishable on its own terms. To be sure, this case shares one point of similarity with *Bryant*, which the Receiver attempts to capitalize on: in *Bryant* and this case, the defendants filed a renewed motion to dismiss in light of an intervening decision of this Court. But that is where the similarity stops. In *Bryant*, the intervening decision was a purely legal ruling, while here, the intervening decision (*Lawrence*) contained both a legal ruling *and* an application of the law to materially identical facts. That distinction is critical. Unlike the *Bryant* plaintiffs, the Receiver knew that this Court had affirmed the dismissal of claims identical to his. *Id.* And the fact that the Receiver was squarely confronted with the *Lawrence* decision (both its outcome and its supporting analysis), and still chose not to amend, underscores that the district court did not err in dismissing

[6] The shift in focus *Wagner* engendered easily disposes of the Receiver's other arguments—namely, that there was no reason not to permit him to amend. Br. at 33-35. Permission to amend now turns, first, on whether there was a proper request to do so—and the Receiver cannot clear this initial hurdle. *Wagner*, 314 F.3d at 542.

with prejudice. An examination of *Bryant's* procedural history illustrates the crucial difference between that case and this one.

The plaintiffs in *Bryant* filed a shareholders' class action. *Id.* at 1163. The district court determined that the claims were properly pleaded under the Private Securities Litigation Reform Act (PSLRA)—but because the PSLRA standard was unclear, the issue was certified and accepted for interlocutory review. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1273 (11th Cir. 1999). On appeal, this Court articulated a new PSLRA pleading standard. *Id.* at 1281-87. This Court's ruling was a purely legal one, and it expressed no view on whether the plaintiffs' complaint was sufficient, instead remanding to the district court for further consideration. *Id.* at 1287.

On remand, the plaintiffs opposed the renewed motion to dismiss by defending the sufficiency of the complaint's allegations under this Court's new standard—and they also embedded in their opposition a "rather perfunctory" alternative request for leave to amend, together with a bare claim that they could allege facts that would save their complaint. *Bryant v. Avado Brands, Inc.*, 100 F. Supp. 2d 1368, 1386 (M.D. Ga. 2000). The district court dismissed the complaint with prejudice. *Id.* at 1385-86. The plaintiffs appealed and—in the opinion the Receiver relies on here—this Court reversed, concluding that the plaintiffs should have been permitted to amend. *Bryant v. Dupree*, 252 F.3d 1161, 1163-65 (11th Cir. 2001) (citing *Bank*, 928 F.2d at 1112). The plaintiffs had not "been given notice of the possible deficiencies in their complaint" because this Court's purely

legal ruling on the previous appeal had not "suggest[ed] that the plaintiffs' complaint did not satisfy the … pleading requirement." *Id.* at 1164.

By contrast here, the Receiver was on notice of the deficiencies in his complaint because this Court's *Lawrence* opinion was not a purely legal ruling—it ***applied*** the controlling rule to facts materially identical to those here. *Lawrence*, 455 F. App'x at 905-07 (holding that allegation that the bank should have known about the Ponzi scheme because of atypical or suspicious transactions did not properly allege knowledge on the part of the bank). BANA consistently argued that the Receiver's allegations were virtually indistinguishable from those in *Lawrence* and that *Lawrence* required dismissal. (R.E. 67 (Vol. 2) at 2-3). Indeed, the Receiver clearly understood the import of the *Lawrence* opinion, arguing that his allegations were different from those in the *Lawrence* complaint and that his complaint survived scrutiny under *Lawrence*. (R.E. 76 (Vol. 2) at 9-10).

Because of this important distinction, *Bryant* does not throw a lifeline to the Receiver, who was on notice of the insufficiency of his complaint and still chose not to properly request leave to amend. *Bryant* stands only for the proposition that under the now-abrogated *Bank* rule, a plaintiff who was not on notice of the deficiencies of his complaint could be afforded an opportunity to amend after having made a "rather perfunctory" request to do so.

Here, where *Bank* no longer applies and *Wagner* and *Long* control, the Receiver knew not only that his complaint was in peril, but precisely what he needed to do to try and rescue it: file a motion for leave to amend and put before the district court the specific allegations that he believed would help him plead a

legally cognizable claim. The district court hardly can be faulted for dismissing with prejudice in these circumstances—when it had no additional allegations before it to evaluate as a result of the Receiver's failure to follow the requirements of *Long* and *Wagner*. The Receiver may now regret that he ignored the established requirements for requesting leave to amend, but his arguments do not show any reversible error on the district court's part.

II. The District Court Correctly Dismissed The Receiver's Claims Under Florida's Uniform Fraudulent Transfers Act

Invoking FUFTA, the Receiver alleged that BANA was a fraudulent transferee and that he was entitled to recover funds deposited into, and transferred among, accounts of Theodule and the Receivership Entities. The district court correctly dismissed the FUFTA claims based on a correct application of controlling law that led to the unexceptional conclusion that BANA was a mere conduit of funds and that the Receiver's allegations regarding atypical banking transactions were insufficient to show the kind of knowledge that would defeat the mere-conduit defense.

FUFTA's purpose is "to prevent an insolvent debtor from transferring its assets out of the reach of its creditors" with the intent to "hinder, delay, or defraud … [those] creditors." *Steinberg v. Barclay's Nominees (Branches) Ltd.*, No. 04-60897, 2008 WL 4601042, at *10 (S.D. Fla. Sept. 30, 2008) (citing Fla. Stat. § 726.105(1)). "A 'creditor' who possesses a 'claim' may seek a number of remedies to prevent the fraudulent transfer of assets," including "avoidance of the

transfer." *Friedman v. Heart Inst. of Port St. Lucie, Inc.*, 863 So.2d 189, 192 (Fla. 2003) (quoting Fla. Stat. § 726.108).

To state a claim under FUFTA, a plaintiff must allege that: "(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., Inc.*, 814 So.2d 1227, 1229 (Fla. Dist. Ct. App. 2002). But the law is clear that a transferee who was a mere conduit for the funds in question cannot be held liable for a fraudulent transfer. (Dkt. 82 at 3-4). A defendant is a mere conduit when (1) it "did not have control over the assets received, i.e., … [it] merely served as a conduit for the assets that were under the actual control of the [transferor] *and* (2) … [it] acted in good faith and as an innocent participant in the fraudulent transfer." (*Id.*) (quoting *In re Harwell*, 628 F.3d 1312, 1323 (11th Cir. 2010)).

Here, it was clear on the face of the Amended Complaint that the mere conduit defense was an insurmountable obstacle to the Receiver's efforts to recover under FUFTA. Any conclusion to the contrary would impose investigation and policing duties on banks that are incompatible with their relationships with their customers. The district court correctly dismissed the FUFTA claims.

A. It Was Clear On The Face Of The Complaint That The Mere Conduit Defense Barred Recovery

At the threshold, the Receiver attempts to cast doubt on the district court's ruling by asserting that it should not have resolved a "fact-intensive" affirmative defense on a motion to dismiss. Br. at 37-38. The court did not err in this respect,

however. "A complaint is subject to dismissal under Rule 12(b)(6) when its allegations, on their face, show that an affirmative defense bars recovery on the claim." *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003), *overruled on other grounds* as explained in *Washington v. Albright*, 814 F. Supp. 2d 1317, 1323 (M.D. Ala. 2011). As this Court has explained, "***any*** affirmative defense … may be considered in resolving a motion to dismiss when the complaint affirmatively and clearly shows the conclusive applicability of the defense to bar the action." *Jackson v. BellSouth Telecommc'ns*, 372 F.3d 1250, 1277 (11th Cir. 2004) (emphasis added; internal citations and quotations omitted). Thus, contrary to the Receiver's argument, a district court may dismiss a complaint where any kind of defense clearly bars relief—not just where a few types of "law driven affirmative defenses" are applicable. Br. at 39.

The 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. *See* Br. at 39. Instead, each case involved a particular factual question that prevented resolution of that particular case on a motion to dismiss. *Steinberg ex rel. Lancer Mgmt. Group LLC v. Alpha Fifth Group*, No. 04-60899-CIV, 2010 WL 1332844, at *1-2 (S.D. Fla. Mar. 30, 2010) (allegedly fraudulent transfers were charitable donations to a nonprofit agency that were intended to benefit abused children; "question of fact that [could not] be considered on a motion to dismiss" was whether the agency "had legal control over the transfers and the right to use [them] for its own purposes"); *Gowan v. Patriot Group, LLC (In re Dreier)*, 452 B.R. 391, 399, 426 (Bankr. S.D.N.Y. 2011) (defendants, who were not banks,

were Ponzi scheme investors and there was a factual question about whether they received proceeds of the scheme in good faith); *Barclay's Nominees*, 2008 WL 4601042, at *1, *8 (allegedly fraudulent transfers that the defendant bank had received were returns on investment and there was a factual dispute about whether the bank itself, or its account holder, was the investor; moreover, there only had been "limited jurisdictional discovery," which did not permit the court to determine whether the mere conduit defense applied).

Importantly, the Receiver's cases did not involve routine deposits or transfers between bank accounts, like the transfers at issue here. Instead, in each of those cases, the nature of the transfer—either a charitable donation or a return on an investment—raised specific questions about whether the transfer was fraudulent, preventing dismissal of the complaint. In this case, the Receiver alleged only that BANA executed its customers' orders to deposit and transfer funds (as it was contractually obliged to do) and the nature of those routine transactions raises no thorny factual question preventing dismissal.

Indeed, although the Receiver makes a sweeping declaration that the mere conduit defense cannot serve as a basis for a dismissal because it is "fact-intensive," his arguments against dismissal are mainly legal. The only factual allegations the Receiver points to as supposedly barring dismissal are contained in the proposed second amended complaint. Br. at 50. But as explained above, those allegations were contained in a jurisdictionally-barred motion, filed after dismissal, and thus have no bearing on whether the district court erred in concluding that the

mere conduit defense was clear on the face of the Amended Complaint. *See supra*, Section I.A.

Because a complaint may be dismissed where an affirmative defense is clearly applicable, the Receiver misses the mark when he argues that the district court somehow shifted the burden of proof on the mere conduit defense. Br. at 35, 38. The district court ruled that "the face of the Amended Complaint makes clear that the Bank acted as a mere conduit of Theodule's fraudulent transfers"—that is, it concluded that ***the allegations themselves*** showed that the mere conduit defense would bar recovery. (Dkt. 82 at 4). The court did not rule that the Receiver had the burden to show that the mere conduit defense is inapplicable. (*Id.*) Indeed, the Receiver's burden-shifting argument goes too far, because according to his logic, any time a court concludes that a defense is clearly applicable, it has "shifted the burden" of proving the defense to the plaintiff. Such a rule would not square with this Court's precedent, which has explicitly authorized courts to dismiss a complaint in this situation. *Jackson*, 372 F.3d at 1277.

B. The Complaint's Allegations Showed That BANA Was A Mere Conduit Of The Transferred Funds And Never Had Control Over Them

The Receiver conclusorily asserted in his Amended Complaint that BANA was the "initial transferee" and "not a conduit" of the purportedly fraudulent transfers. (*See* Am. Comp. ¶¶ 85, 94, 102). But he alleged no facts showing that BANA was the intended recipient or controlled the transferred funds. In fact, the allegations indicated otherwise—showing that the transfers were simply deposits

made by BANA's customers. The court correctly concluded that both elements of the mere conduit defense were apparent on the face of the Amended Complaint because its allegations showed that BANA "[1] never exercised dominion or control over the funds and … [2] acted with good faith." (Dkt. 82 at 4).

On appeal, the Receiver argues that the district court applied the wrong standard when it determined that BANA did not have knowledge of Theodule's scheme. That argument disregards the parameters of the relationship between banks and their customers under Florida law. The district court correctly ruled, based on Florida banking law, that BANA acted in good faith because the Receiver's conclusory knowledge allegations did not make it plausible that BANA had actual or constructive knowledge of Theodule's wrongdoing.

A review of *Lawrence's* holding on "actual knowledge"—which is an element of an aiding and abetting claim and also part of the good faith element of the mere-conduit defense—shows why the district court did not err. The plaintiffs in *Lawrence* lost money in a Ponzi scheme. *See* 455 F. App'x at 905. They brought aiding and abetting claims against BANA. *Id.* at 906. The district court dismissed the complaint and this Court affirmed, agreeing that the complaint did not plausibly allege the elements of an aiding and abetting claim—namely, that BANA actually knew of and substantially assisted in the Ponzi schemer's wrongdoing. *Id.*

With regard to actual knowledge, this Court concluded that the plaintiffs did not state a claim under Florida law by alleging that "the transactions were atypical and therefore Bank of America should have known of the Ponzi scheme." *Id.* at

907. Because "banks have the 'right to assume that individuals who have the legal authority to handle the entity's accounts do not misuse the entity's funds' … [,] … Bank of America, in providing only routine banking services, was not required to investigate [its customer's] transactions." *Id.* (citing *Home Fed. Sav. & Loan Ass'n of Hollywood v. Emile*, 216 So.2d 443, 446 (Fla. 1968) and *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1205 (11th Cir. 2003)). Thus, this Court in *Lawrence* affirmed the district court's dismissal of the complaint.

In this case, the district court began by noting that the key to the good faith determination was whether BANA had "knowledge" of Theodule's fraudulent purpose. (Dkt. 82 at 4.). Under the FUFTA standard, that knowledge could be either actual or constructive. (*Id.*) (quoting *Waxenberg*, 611 F. Supp. 2d at 1319). On the actual knowledge issue, the district court determined that *Lawrence's* "reasoning sheds substantial light on the exact issue presented by" BANA's motion to dismiss—namely, what a plaintiff must allege to make plausible the conclusion that a bank actually knew of its customer's fraud. (*Id.* at 2-3). With "the benefit of [this Court's] reasoning," the district court concluded that "banks have no duty to investigate even suspicious transactions," and therefore the Receiver's allegations of atypical transactions "[did] not demonstrate … actual knowledge." (*Id.* at 3).

Turning to the constructive knowledge issue, the district court articulated FUFTA's standard, which asks whether the defendant had "knowledge of such facts or circumstances as would have induced an ordinarily prudent person" to investigate. (*See id.* at 4). The district court correctly understood that the "ordinarily prudent person" analysis must be undertaken in the factual context of

this case—namely, in a context where the "person" is a bank. And the district court also correctly understood that (as this Court explained in *Lawrence*) a bank's duty to investigate its customers is limited. Under Florida law, "banks have the right to assume that individuals who have the legal authority to handle an entity's accounts do not misuse the entity's funds." (*Id.*) (quoting *O'Halloran*, 350 F.3d at 1205). Therefore, the "atypical transactions and other red flags" the Receiver had alleged did not "comprise 'facts or circumstances that would have induced an ordinarily prudent [bank] to make inquiry ….'" (*Id.*) (quoting *Waxenberg*, 611 F. Supp. 2d at 1319).

In sum, the district court concluded that the Receiver had not sufficiently alleged either type of knowledge—neither actual nor constructive. On this basis, the district court dismissed the FUFTA claims because it was clear on "the face of the Amended Complaint" that BANA was "a mere conduit of Theodule's fraudulent transfers" and acted in "good faith." (*Id.* at 4).

The Receiver's argument that he sufficiently pleaded his FUFTA claims is based on a "should have known" theory—that is, the Amended Complaint's allegations amounted only to declarations that BANA ***should have been*** suspicious, not that it ***in fact was*** suspicious, of Theodule.[7] This Court concluded

[7] Even averments that a bank ***in fact was*** suspicious of nefarious activity are insufficient to show actual knowledge. *O'Halloran*, 350 F.3d at 1200, 1205 (dismissing aiding and abetting claims against bank even where numerous states investigated the customer's activities, the state of Florida shut down one of the customer's businesses, other banks refused to do business with the customer, and

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in *Lawrence* that a "should have known" theory in the aiding and abetting context is incompatible with Florida law. *Lawrence*, 455 F. App'x at 907. Adoption of this theory in the FUFTA context, too, would undermine the paramount policies on which Florida law rests. The inevitable consequence of a "should have known" liability theory would be a requirement that banks scrutinize and investigate the activities underlying their customers' deposits, transfers, and withdrawals to ensure that those activities are legitimate. As explained, however, a bank does not have a duty to monitor and investigate its customers' deposits and withdrawals. *O'Halloran*, 350 F.3d at 1200, 1205; *see also In re Meridian Asset Mgmt., Inc.*, 296 B.R. 243, 264 (Bankr. N.D. Fla. 2003) (opening a bank account is "an arms-length transaction imparting no duty on behalf of the Bank to monitor and investigate"). In fact, a duty to investigate would contravene the bank's "duty of confidentiality" to its customers. *In re Meridian*, 296 B.R. at 264. Finally, "[a] refusal on the part of the bank to permit a withdrawal by a duly authorized representative of a corporate accountholder would no doubt breach the bank's deposit agreement with that accountholder." *O'Halloran*, 350 F.3d at 1205.

These basic and well-settled principles of Florida banking law are incompatible with the premise underlying the Receiver's liability theory. Indeed, as Florida's Supreme Court explained in rejecting a similar Ponzi scheme claim,

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the defendant bank notified the customer that "its accounts were being closed, but continued to service the … accounts").

"[w]e would radically alter the law of banking if we required banks to review … accounts to make certain that their customers were spending their money wisely." *Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543, 549 (Fla. Dist. Ct. App. 2003). That court also noted that the practical effects of such a ruling would be unworkable because the bank would be "required to refuse to make payments that were legal on their face …." *Id.*

Because Florida law controls the issue, "it is the duty of the [federal court] … to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule." *Bravo v. United States*, 577 F.3d 1324, 1325 (11th Cir. 2009) (per curiam) (quoting *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940)). Thus, it would not be appropriate for this Court to reach a conclusion that fundamentally alters Florida law and imposes sweeping new duties on banks—duties that would require banks to invade customer privacy (in the name of "investigating" "suspected" fraud) and decrease public access to banking services (through higher costs and customer resistance to being cross-examined by their banks about their transactions). Weighing the competing interests affected by Florida banking law, assessing the potential ramifications of any changes, and settling on appropriate solutions is properly the role of the Florida legislature, executive and judiciary, not a federal court that is adjudicating state-law claims.[8]

[8] Contrary to the Receiver's contention (Br. at 48-49), the district court appropriately deferred to the Florida state courts when it relied on a Florida Supreme Court case that "rejected a cause of action for aiding and abetting fraudulent transfers against a bank" where the bank transferred funds on behalf of a customer after the customer, an alleged Ponzi schemer, was sued and his accounts

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The Receiver tries to avoid the consequences of this settled law and policy by arguing that the district court erroneously held BANA to a "lesser standard of good faith" by supposedly ruling that only actual knowledge would do. Br. at 43. The court did no such thing. It applied FUFTA's "actual or constructive knowledge" standard within the context of Florida banking law and concluded that the Receiver had not alleged facts that "would have induced an ***ordinarily prudent [bank]*** to make inquiry …." (*Id.* at 43-44) (quoting *Waxenberg*, 611 F. Supp. 2d at 1319) (emphasis added). Thus, contrary to the Receiver's arguments, the district court did not "effectively reduce[] the standard of 'good faith'" (Br. at 41).[9]

Next, seizing on the district court's conclusion that *Lawrence's* reasoning "sheds substantial light on the exact issue presented" in this case (Dkt. 82 at 3), the Receiver attempts to argue that this case is different from *Lawrence* and "akin to" *Martinez v. Hutton (In re Harwell*). Br. at 50. The Receiver is wrong on both points. To begin with, the allegations in the Amended Complaint are not

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were frozen. (Dkt. 82 at 5) (citing *Freeman v. First Union Nat'l*, 865 So.2d 1272, 1274 n.3 (Fla. 2004)). As the district court correctly noted, *Freeman* reflects the Florida Supreme Court's conclusion regarding "'the narrow focus of FUFTA and its limitations.'" (*Id.* at 5) (quoting *Freeman*, 865 So.2d at 1277). In this case, the district court's dismissal was consonant with FUFTA's "narrow focus" and "limitations." (*Id.*)

[9] For the same reasons, the Receiver also is incorrect when he contends that the district court erred in (1) concluding that "the [s]tandard of … '[g]ood [f]aith' [i]s [m]erely '[n]o [a]ctual [k]nowledge'" (Br. at 41, Header), (2) applying aiding and abetting cases in the FUFTA context (*id.* at 45, 49), and (3) holding that a bank may put on "blinders" (*id.* at 45).

materially different from the allegations that this Court concluded were deficient in *Lawrence*.[10] In both cases, the plaintiffs' knowledge allegations rested on conclusory assertions that supposedly atypical or suspicious transactions should have raised red flags. Moreover, in both cases the defendant's knowledge of the Ponzi scheme was central: in *Lawrence*, knowledge was an element of an aiding and abetting claim, and here, lack of knowledge is an element of the mere conduit defense to FUFTA liability. The Receiver offers no explanation why knowledge in the aiding and abetting context is any different than knowledge in the mere conduit context.

The Receiver also is wrong when he asserts that this case is "akin to" *In re Harwell*. Br. at 50. In *Harwell*, the alleged fraudulent transferee was an individual, not a bank—and moreover, the individual was "the mastermind … driving all the pieces" of a "huge fraudulent conveyance" of funds into the hands of "various preferred creditors and insiders." 628 F.3d at 1316. The Receiver does not, and could not, even begin to allege facts that would make it plausible that BANA was the "mastermind" of Theodule's Ponzi scheme, and so this case is not "akin to" *Harwell*.

Nor is the Receiver helped by a string of cases he says stand for the proposition that courts "hold banks to the same 'good faith' standard as any other

[10] As explained above, the proposed second amended complaint forms no part of this appeal and the Receiver's attempt to rely on it is impermissible. *See supra*, Section I.A.

fraudulent transferee." (Br. at 46). The Receiver makes no effort to explain why those cases are analogous or why the legal principle they supposedly announce would apply here. And no wonder—even a cursory examination shows that the Receiver's cases have no applicability.

Two of them do not even touch upon the good faith standard applicable to banks. *Harper v. Lawrence County, Ala.*, 584 F.3d 1030, 1033 (11th Cir. 2009) (plaintiff brought a Section 1983 civil rights claim stemming from a jailhouse death; claim had nothing to do with fraudulent transfers); *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299, 1318-20 (M.D. Fla. 2009) (alleged fraudulent transfer was to a Ponzi schemer's wife and no bank was involved in the case). Other cases in the Receiver's string cite do involve banks, but the alleged fraudster either concededly was, or was alleged to be, a borrower—not a depositor like Theodule—and this precluded application of the mere conduit defense at the motion to dismiss stage. *In re Model Imperial, Inc.*, 250 B.R. 776, 786 (Bankr. S.D. Fla. 2000); *Kapila v. Integra Bank, N.A. (In re Pearlman)*, 440 B.R. 569, 573 (Bankr. M.D. Fla. 2010); *Barclay's Nominees*, 2008 WL 4601042, at *8; *Wiand v. EFG Bank*, No. 8:10-CV-241, 2012 WL 750447, at *5 (M.D. Fla. Feb. 8, 2012); *In re Lockwood Auto Group, Inc.*, 428 B.R. 629, 634 (Bankr. W.D. Pa. 2010).

The Receiver's cases involving borrowers—where the alleged fraudulent transfer was a loan payment—are inapplicable because a bank is the ultimate transferee of loan payments it receives from a borrower, not merely the conduit. Loan payments represent return of principal and profit to the bank, which the bank may dispose of how it pleases. *In re Chase & Sanborn Corp.*, 848 F.2d 1196, 1200

(11th Cir. 1988) ("[W]here a bank receives money from a debtor to pay off a debt owed to the bank, courts have found that the bank gained control of the funds and have allowed recovery against the bank. When banks receive money for the sole purpose of depositing it into a customer's account, on the other hand, the bank never has actual control of the funds and is not a … transferee.") (internal citations omitted). None of the Receiver's cases even begin to stand for the proposition that a bank that was merely a middleman, taking deposits and making payments and transfers in accordance with the depositor's instructions, cannot invoke the mere conduit defense.

In addition, none of the Receiver's cases undermine this Court's ruling in *In re Chase & Sanborn* that "[w]hen trustees seek recovery of allegedly fraudulent conveyances from banks, the outcome … turn[s] on whether the banks actually controlled the funds or merely served as conduits, holding money that was in fact controlled by either the transferor or the real transferee." 848 F.2d at 1200. Where, as here, a bank "receive[s] money for the sole purpose of depositing it into a customer's account, … the bank never has actual control of the funds." *Id.* Therefore, as this Court has explained, where defendants "simply held the property as agents or conduits for one of the real parties to the transaction," it would be "inequitable to allow recovery against them." *Id.*; *see also Super Vision Int'l, Inc. v. Mega Int'l Comm. Bank Co.*, 534 F. Supp. 2d 1326, 1344 (S.D. Fla. 2008) (plaintiff failed to state a claim for fraudulent transfer because "at best," the defendant bank was "the conduit, not the transferee, and … is not alleged to have controlled the funds at issue").

In sum, the Receiver did not allege that the supposedly fraudulent transfers were anything other than routine deposits and transfers. Thus, it is clear that BANA did not have control over the funds and was a mere conduit. In addition, the district court correctly applied this Court's *Lawrence* decision and controlling Florida banking law to conclude that the Receiver had not alleged the required actual or constructive knowledge of Theodule's scheme. The district court therefore correctly concluded that it was clear on the face of the complaint that the mere conduit defense barred recovery—and it therefore correctly dismissed the FUFTA claims.

CONCLUSION

The district court properly exercised its discretion by reviewing all of the factual allegations in the Amended Complaint and dismissing with prejudice. The Receiver failed to follow the settled law in this Circuit that instructs how to properly request leave to amend a complaint, and any error in this regard is his—not the district court's. In addition, the district court correctly dismissed the FUFTA claims because it was clear on the face of the complaint that BANA was a mere conduit of the transfers in question and that recovery against BANA therefore was barred. This Court should affirm.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) because this brief contains 12,328 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a).

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I served the foregoing Brief by overnight Express Mail, postage prepaid, and that I electronically filed the Brief with the Clerk of the Court using the CM/ECF system which sent notification of the filing to the following counsel of record:

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