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April 25, 2013

Via CM/ECF

John Ley, Clerk of Court
United States Court of Appeals for the 11th Circuit
Elbert P. Tuttle Court of Appeals Building
56 Forsyth Street, NW
Atlanta, Georgia 30303

Re: Citation of Supplemental Authority
Jonathan E. Perlman, Esq., Appellant vs. Bank of America, N.A., Appellee
Consolidated Case Nos. 12-13436-EE and 12-14073-EE

Dear Mr. Ley:

Appellee Bank of America, N.A. hereby responds to Appellant Jonathan Perlman's (the "Receiver's") April 17, 2013 letter submitted pursuant to Rule 28(j).

The Receiver states that *Mukamal v. BMO Harris Bank N.A.*, 2013 WL 1114356 (Bankr. S.D. Fla. Feb. 26, 2013), shows that the district court supposedly shifted the burden to the Receiver to disprove the mere conduit defense—and that this was not proper. At the threshold, it is stretching the language of Rule 28(j) to say that a Bankruptcy Court case, which is binding on neither the district court nor this Court, is a "pertinent and significant authority." Fed. R. App. P. 28(j).

In any event, *Mukamal* does not help the Receiver because, contrary to the Receiver's suggestions, *Mukamal* explicitly acknowledges that a district court may grant a motion to dismiss when "the complaint affirmatively and clearly shows the conclusive applicability" of an affirmative defense. *Id.*, 2013 WL 1114356, at *5 (quoting *Jackson v. BellSouth Telecommc'ns*, 372 F.3d 1250, 1277 (11th Cir. 2004)). The district court's dismissal of the Receiver's complaint, and Bank of America's argument on appeal, relied on *Jackson* and related controlling precedent (from this Court and the Florida courts). It was clear on the face of the Receiver's complaint that the mere conduit defense barred his FUFTA claims and the district court therefore correctly dismissed the case. (Appellee's Br. at 33-46).

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Since the Receiver has brought *Mukamal* to this Court's attention, it is worth noting that *Mukamal* also agrees with the district court's ruling in other ways: it correctly holds that a plaintiff does not state a claim for aiding and abetting fraud against a bank unless the plaintiff plausibly alleges that the bank had "actual knowledge" of the fraud—and "should have known" allegations are not sufficient. 2013 WL 1114356, at *8-9. And *Mukamal* properly relies upon controlling Florida case law which conclusively states that a bank has "no duty to investigate its customer's banking activities …." *Id.* at *9.

For these reasons, *Mukamal* does not strengthen any of the Receiver's arguments on appeal.

Very truly yours,

Kim M. Watterson, Esq.

KMW:sk

cc: All counsel of record (service via CM/ECF)