



Rev. 2/11

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CIVIL APPEAL STATEMENT

Please TYPE. Attach additional pages if necessary.

11th Circuit Docket Number: 12-14345-CC

Caption: JONATHAN E. PERLMAN, ESQ., as Court-Appointed Receiver of Creative Capital Consortium, LLC et al. Plaintiff v. WELLS FARGO BANK, N.A. Defendant.	District and Division: Southern District of Florida
	Name of Judge: Honorable Daniel T.K. Hurley
	Nature of Suit: Statutory Action by Receiver
	Date Complaint Filed: 12/21/2010
	District Court Docket Number: 10-81612-cv-Hurley/Hopkins
Date Notice of Appeal Filed: 08/15/2012	
<input type="checkbox"/> Cross Appeal <input type="checkbox"/> Class Action	
Has this matter previously been before this court?	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
If Yes, provide	
(a) Caption:	
(b) Citation:	
(c) Docket Number:	

	Attorney Name	Mailing Address	Telephone, Fax, and Email
For Appellant:	W. Barry Blum, Esq.	Genovese Joblove & Battista,	Tel: 305 349-2300
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<input type="checkbox"/> Other (Specify)		West Palm Beach, FL 33401	ehallak@foxrothschild.com

Please CIRCLE/CHECK/COMPLETE the items below and on page 2 that apply.

Jurisdiction	Nature of Judgment	Type of Order	Relief
<input checked="" type="checkbox"/> Federal Question	<input checked="" type="checkbox"/> Final Judgment, 28 USC 1291	<input checked="" type="checkbox"/> Dismissal/Jurisdiction	Amount Sought by Plaintiff: \$ <u>68,000,000.00</u>
<input type="checkbox"/> Diversity	<input type="checkbox"/> Interlocutory Order, 28 USC 1292(a)(1)	<input type="checkbox"/> Default Judgment	Amount Sought by Defendant: \$ _____
<input type="checkbox"/> US Plaintiff	<input type="checkbox"/> Interlocutory Order Certified, 28 USC 1292(b)	<input type="checkbox"/> Summary Judgment	Awarded: \$ _____ to _____
<input type="checkbox"/> US Defendant	<input type="checkbox"/> Interlocutory Order, Qualified Immunity	<input type="checkbox"/> Judgment/Bench Trial	Injunctions:
	<input type="checkbox"/> Final Agency Action (Review)	<input type="checkbox"/> Judgment/Jury Verdict	<input type="checkbox"/> TRO
	<input type="checkbox"/> 54(b)	<input type="checkbox"/> Judgment/Directed Verdict/NOV	<input type="checkbox"/> Preliminary <input type="checkbox"/> Granted
		<input type="checkbox"/> Injunction	<input type="checkbox"/> Permanent <input type="checkbox"/> Denied
		<input type="checkbox"/> Other _____	

Based on your present knowledge:

(1) Does this appeal involve a question of First Impression? Yes No
 What is the issue you claim is one of First Impression?

(2) Will the determination of this appeal turn on the interpretation or application of a particular case or statute? Yes No
 If Yes, provide
 (a) Case Name/Statute
 (b) Citation
 (c) Docket Number if unreported

(3) Is there any case now pending or about to be brought before this court or any other court or administrative agency that
 (a) Arises from substantially the same case or controversy as this appeal? Yes No
 (b) Involves an issue that is substantially the same, similar, or related to an issue in this appeal? Yes No
 If Yes, provide
 (a) Case Name
 (b) Citation
 (c) Docket Number if unreported
 (d) Court or Agency

(4) Will this appeal involve a conflict of law
 (a) Within the Eleventh Circuit? Yes No
 (b) Among circuits? Yes No
 If Yes, explain briefly:

(5) Issues proposed to be raised on appeal, including jurisdictional challenges:
 A. Whether the lower court abused its discretion by dismissing with prejudice the Plaintiff/Receiver's "aiding and abetting" claims (1) based on an unpublished decision of this Court issued after the lower court had earlier denied a motion to dismiss and ruled that the Receiver's aiding and abetting claims were sufficiently pleaded; (2) without giving the Receiver even one opportunity to amend his complaint after the unpublished decision was raised, despite the Receiver's indication in its opposing papers that additional facts obtained in recent discovery could be put forth in an amended pleading if the court reconsidered its prior ruling that the Receiver's complaint adequately stated claims for aiding and abetting.
 B. See additional page attached.

I CERTIFY THAT I SERVED THIS CIVIL APPEAL STATEMENT ON THE CLERK OF THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND

SERVED A COPY ON EACH PARTY OR THEIR COUNSEL OF RECORD, THIS 11th DAY OF September, 2012.

W. Barry Blum

NAME OF COUNSEL (Print)


SIGNATURE OF COUNSEL

Please ATTACH portion of district court, tax court, or agency record described in 11th Cir. R. 33-1(b): (a) judgments and orders appealed from or sought to be reviewed; (b) any supporting opinion, findings of fact, and conclusions of law filed by the court or the agency, board, commission, or officer; (c) any report and recommendation adopted by an order; (d) findings and conclusions of an administrative law judge when appealing a court order reviewing an agency determination; (e) any agency docket sheet or record index.

ATTACHMENT TO CIVIL APPEAL STATEMENT

Question 5 - continued

B. Whether the lower court, relying on this Court's unpublished decision in *Lawrence*, erred by dismissing with prejudice the Receiver's claims under the Florida Uniform Fraudulent Transfer Act ("FUFTA") based on the "mere conduit" affirmative defense despite that: (1) *Lawrence* did not involve or even address FUFTA or the "mere conduit" affirmative defense, and (2) this Court's decision in *In re Harwell*, 628 F.3d 1312 (11th Cir. 2010), establishes that the "mere conduit" defense requires affirmative proof by a defendant that it acted in good faith.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 10-81612-CV-HURLEY/HOPKINS

JONATHAN E. PERLMAN,

Plaintiff,

vs.

WELLS FARGO BANK, N.A.,

Defendant.

**ORDER GRANTING MOTION FOR RECONSIDERATION
AND DENYING MOTION FOR LEAVE TO AMEND**

THIS CAUSE is before the Court upon Defendant Wells Fargo Bank, N.A.'s ("the Bank's") Motion for Reconsideration [ECF No. 80], in which the Bank requests that the Court revisit its earlier decision not to dismiss the Plaintiff's aiding and abetting and fraudulent transfer claims. While that motion was pending, Plaintiff filed a Motion for Leave to File a Second Amended Complaint [ECF No. 86]. For the reasons to follow, the Court will deny Plaintiff's motion for leave to file and grant the Bank's motion for reconsideration.

A. Defendant's Motion for Reconsideration

In a previous Order dated November 22, 2011 (the "Dismissal Order") [ECF No. 52], the Court dismissed certain claims in the original complaint with prejudice and allowed Plaintiff's aiding and abetting and fraudulent transfer claims to go forward. In the instant motion, the Bank asks the Court to reconsider its decision in light of an intervening unpublished Eleventh Circuit opinion. *See Lawrence v. Bank of Am.*, 455 Fed. Appx. 904 (11th Cir. 2012) ("*Lawrence II*").

In the Dismissal Order, the Court considered whether a plaintiff could properly plead the actual knowledge element of an aiding and abetting claim by alleging atypical business transactions. Dismissal Order 17-19 [DE # 52]. In concluding that such allegations could be sufficient, the Court attempted to reconcile a variety of cases with conflicting outcomes. *See, e.g., Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975) (“[I]f the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability.”); *Lawrence v. Bank of America, N.A.*, No. 8:09-cv-2162-T-33TGW, 2010 WL 3467501, *4 (M.D. Fla. Aug. 30, 2010) (“*Lawrence I*”). The Court was troubled by but disagreed with the district court opinion in *Lawrence I* because it expressly considered atypical business transactions and found them insufficient to allege actual knowledge of an underlying violation. 2010 WL 3467501 at *4.

Shortly after the Court issued the Dismissal Order, the Eleventh Circuit 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.” *Lawrence II*, 455 Fed. Appx. at 907. Although *Lawrence II* is an unpublished opinion and therefore does not constitute binding precedent, *see* U.S.C.A. 11th Cir. Rule 36-2, its reasoning sheds substantial light on the exact issue presented by the instant motion. With the benefit of the Eleventh Circuit’s reasoning on this issue, the Court now concludes that Plaintiff’s allegations are insufficient as a matter of law to state a claim for aiding and abetting liability. Because banks have no duty to investigate even suspicious transactions, allegations of such transactions do not demonstrate the actual knowledge required for aiding and abetting claims.

Lawrence II, 455 Fed. Appx. at 907. Under this analysis of its allegations of atypical transactions, the complaint does not sufficiently allege that the Bank knowingly abetted the underlying scheme.

The Bank also asks the Court to reconsider Plaintiff's claims for avoidance and recovery of fraudulent transfers pursuant to the Florida Uniform Fraudulent Transfer Act ("FUFTA"), Fla. Stat. § 726.101. The Bank argues that *Lawrence II* also dictates dismissal of the Receiver's fraudulent transfer claims because, just as allegations of atypical transactions are insufficient to plead actual knowledge, so too are they insufficient to allege bad faith under the bad-faith exception to the mere conduit defense of a fraudulent transfer claim.

The mere conduit rule is an equitable exception to fraudulent transfer liability that requires a defendant to "establish (1) that [it] did not have control over the assets received, i.e., that [it] merely served as a conduit for the assets that were under the actual control of the [transferor] and (2) that [it] acted in good faith and as an innocent participant in the fraudulent transfer." *In re Harwell*, 628 F.3d 1312, 1323 (11th Cir. 2010). Thus, the mere conduit rule is an affirmative defense to fraudulent transfer liability. Under Florida law, a Court may consider an affirmative defense 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 Telecomms.*, 372 F.3d 1250, 1277 (11th Cir. 2004) (internal citations omitted).

In the instant case, the face of the Amended Complaint makes clear that the Bank acted as a mere conduit of Theodule's fraudulent transfers—that is, that the Bank never exercised dominion or control over the funds and that the Bank acted with good faith. In evaluating the Bank's good faith, "[t]he relevant question is whether [it] 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.’” *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299, 1319 (S.D. Fla. 2009) (quoting *United States v. Romano*, 757 F. Supp. 1331, 1338 (M.D. Fla. 1989)). The Court has already concluded that the Receiver has not properly alleged the Bank’s actual knowledge of the underlying violations. The Court further concludes 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,” *O’Halloran v. First Union Nat’l Bank of Fla.*, 350 F.3d 1197, 1205 (11th Cir. 2003), the alleged atypical transactions and other red flags do not comprise “facts or circumstances [that] would have induced an ordinarily prudent [bank] to make inquiry” *Waxenberg*, 611 F. Supp. 2d at 1319 (internal citation omitted).

It is true that the threshold for granting a motion to dismiss based on the applicability of an affirmative defense is higher than the one that applies to a Plaintiff’s duty to affirmatively allege the elements of a cause of action. *Jackson*, 372 F.3d at 1277. However, as stated in *Lawrence II*, “Florida law does not require banking institutions to investigate transactions.” 455 Fed. Appx. at 907. Clearly then, Plaintiff’s numerous allegations of atypical transactions, red flags, and the like do not provide any basis to conclude that the Bank was anything more than “an innocent participant in the fraudulent transfer.” *In re Harwell*, 628 F.3d at 1323. This being the case, although Plaintiff may have alleged the basic elements of a fraudulent transfer claim, Plaintiff’s allegations also plainly demonstrate that the mere conduit exception applies and that the fraudulent transfer claims must fail.

Moreover, the Court also finds fraudulent transfer liability of a bank under these

circumstances at odds with the reasoning in *Freeman v. First Union Nat'l Bank*, 865 So. 2d 1272 (Fla. 2004). In *Freeman*, the Florida Supreme Court rejected a cause of action for aiding and abetting fraudulent transfers against a bank that was the primary banker for a Ponzi schemer after it effectuated wire transfers on the schemer's behalf even after the schemer was sued and a court issued an injunction freezing the accounts at the bank. *Id.* at 1274 n.3. To allow Plaintiff in the instant case to circumvent the outcome in *Freeman* by holding a bank liable for its customer's deposits into its own accounts would undermine the Florida Supreme Court's demonstration of "the narrow focus of the FUFTA and its limitations." *Id.* at 1277.

In reconsidering the Dismissal Order and dismissing the aiding and abetting and fraudulent transfer claims, the Court must also determine whether to dismiss the claims with or without prejudice. Because this determination presents the same issues as Plaintiff's motion for leave to amend, the Court will address it in the following section.

B. Plaintiff's Motion for Leave to Amend

Generally, leave to amend is freely given. Fed. R. Civ. P. 15(a)(2). However, leave to amend may be denied if amendment would be futile—i.e., the proposed amended complaint would still fail to state a claim. *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1077 (11th Cir. 2004). In the instant case, Plaintiff has already amended the complaint once. In addition, upon review of the proposed second amended complaint, the Court finds that Plaintiff has done little more than allege further "red flags" (or elaborate on those previously stated) that should have, upon investigation, alerted the Bank to the ongoing Ponzi scheme. But as the Court has discussed at length above, Florida law places no requirements on banks to investigate red flags.

Order Granting Motion for Reconsideration and Denying Motion for Leave to Amend

Perlman v. Wells Fargo Bank, N.A.

Case No. 10-cv-81612-DTKH

None of Plaintiff's amended allegations would establish that the bank had *actual knowledge* of the underlying violations. Thus, granting leave to submit the proposed complaint would be futile.¹

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant's Motion for Reconsideration [ECF No. 80] is **GRANTED**.
2. Upon reconsideration, all of Plaintiff's claims against Defendant in this action are **DISMISSED WITH PREJUDICE**.
3. Plaintiff's Motion for Leave to File a Second Amended Complaint [ECF No. 86] is **DENIED**.
4. Pursuant to Fed. R. Civ. P. 58(a), the Court will enter final judgment by separate order.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 10th day of August, 2012.


Daniel T. K. Hurley
United States District Judge

Copies provided to counsel of record

¹In a related action, the Court noted that certain new allegations that were untimely presented may have been sufficient to warrant granting leave to amend. *See Perlman v. Bank of Am., N.A.*, No. 9:11-cv-80331-DTKH (July 2, 2012) (ECF No. 94). The new allegations in the instant case, however, while timely presented, are not of a similar character to those in *Bank of America*.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 10-81612-CV-HURLEY/HOPKINS

**JONATHAN E. PERLMAN,
Plaintiff,**

vs.

**WELLS FARGO BANK, N.A.,
Defendant.**


FINAL JUDGMENT AND CLOSE OUT

THIS CAUSE is before the Court following the Court's Order Granting Motion for Reconsideration and Denying Motion for Leave to Amend. Pursuant to Rule 58(a), Fed. R. Civ. P., the Court now enters final judgment in favor of Defendant.

It is hereby **ORDERED** and **ADJUDGED** that:

1. **FINAL JUDGMENT** is entered against Plaintiff, Jonathan E. Perlman, who shall take nothing by this action, and in favor of Defendant, Wells Fargo Bank, N.A., who shall go hence without day.
2. All pending motions not otherwise ruled upon are **DENIED AS MOOT**.
3. The Clerk is directed to mark this case as **CLOSED**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 14th day of August, 2012.


Daniel T. K. Hurley
United States District Judge

Copies provided to counsel of record