

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

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

JONATHAN E. PERLMAN, Esq., as court
appointed Receiver of Creative Capital
Consortium, LLC, et al.,

Plaintiff,

v.

WELLS FARGO BANK, N.A, as
successor-in-interest to Wachovia Bank, N.A.,

Defendant.

**RECEIVER'S REPLY IN RESPONSE TO DEFENDANT'S OPPOSITION TO
THE RECEIVER'S MOTION TO AMEND THE COMPLAINT**

Plaintiff, Jonathan E. Perlman, Esq., the court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC, A Creative Capital Concept\$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G\$ Trade Financial, Inc. and Unity Entertainment Group, Inc., (collectively, the "Receivership Entities"), files this Reply to Defendant Wells Fargo Bank, N.A's ("Wells Fargo") Response in Opposition to Receiver's Motion for Leave to File Second Amended Complaint and Incorporated Memorandum of Law ("Opposition Brief") [ECF No. 87] and in support of the Receiver's Motion for Leave to File Second Amended Complaint and Incorporated Memorandum of Law ("Motion to Amend"). [ECF No. 86].

PRELIMINARY STATEMENT

Wells Fargo's opposition to the Receiver's request for leave to amend does not provide this Court with any legally (or factually) sound reason to deny leave to amend the complaint.

Wells Fargo has not – and cannot – demonstrate the presence of any of the “adverse factors” required to oppose leave to amend: undue delay, bad faith prejudice to the Defendant, or futility of the amendment. *See* Fed. R. Civ. P. 15(a); *see also Forman v. Davis*, 371 U.S. 178, 182 (1962). In this case, the Receiver seeks to amend his complaint with additional facts in support of his various claims in light of the results of discovery that were only recently obtained. Nevertheless, Wells Fargo, in its response seeks not only to have this request for leave to amend denied but dismissal of the action altogether based upon their recently filed Motion for Reconsideration of Order Granting in Part Defendant’s Motion to Dismiss and Denying Defendant’s Motion to Strike and Incorporated Memorandum of Law (the “Motion for Reconsideration”). [ECF No. 80]. This defies common sense and the case law. The Receiver should be granted leave to amend his complaint. Logically, therefore, the Court should defer ruling upon Wells Fargo’s Motion for Reconsideration based upon a *prior* complaint until it has ruled upon the pending motion for leave to file an amended complaint.¹

The law is well-settled that leave to amend should be freely given. Fed. R. Civ. P. 15(a)(2). Leave to amend will be denied only in cases marked by undue delay, bad faith or dilatory motive, futility of amendment, or undue prejudice to the opposing party. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962). Indeed, the Court should allow leave to amend “unless there is a substantial countervailing reason.” *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1110 (11th Cir. 1996) (granting leave to amend); *see also Espey v. Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) (“unless there is substantial reason to deny leave to amend, the discretion of the district courts is not broad enough to permit denial”). The request made in this case is but the

¹ A discussion of the case law relating to the proper sequence for consideration of the pending motions is contained in the Receiver’s Response in Opposition to Wells Fargo’s Motion for Reconsideration filed concurrently with this reply memorandum.

first made by the Receiver. Objections to leave to amend are considered on a motion to dismiss/failure to state a claim standard. The Receiver has stated valid claims for aiding and abetting breach of fiduciary duty, aiding and abetting conversion and for fraudulent transfers. Indeed, the Court has already determined as much in denying Wells Fargo's prior motion to dismiss. Certainly, then the proposed amended complaint, which in this regard asserts additional facts evidencing Wells Fargo's actual knowledge of the fraudulent Ponzi scheme, sufficiently states a claim for aiding and abetting breach of fiduciary duty and aiding and abetting conversion. The Receiver has also stated a sufficient claim for fraudulent transfer by asserting that Wells Fargo Bank is not a mere conduit and cannot avail itself of the mere conduit defense for the transfers it received because of its lack of good faith and because it had actual knowledge of the fraudulent Ponzi scheme.

PROCEDURAL BACKGROUND

On December 21, 2010, the Receiver filed his Complaint in this lawsuit seeking monetary damages, the avoidance of fraudulent transfers and other relief against Wells Fargo in regard to its role as one of the banks used in the multi-million dollar Ponzi scheme that is the subject matter of this receivership action. [ECF No. 1]. On April 5, 2010, the Receiver filed a First Amended Complaint as a matter of right without leave of Court thereby rendering moot Wells Fargo's pending motion to dismiss. [ECF No 19].

By Order dated November 11, 2011, the Court granted in part Wells Fargo's motion to dismiss the First Amended Complaint ("Partial Dismissal Order"). [ECF No. 52]. Nearly *eight months later*, on June 1, 2012, Wells Fargo filed its Motion for Reconsideration. Thereafter, the Receiver filed his Unopposed Motion for Extension of Time to Respond to Defendant's Motion for Reconsideration. [ECF No. 85]. The Court has not yet ruled upon the motion. To be sure,

this Court has likely deferred ruling on the Motion for Reconsideration in light of this pending request to amend because this Court, unlike Wells Fargo, is well aware of the limited resources of the Receivership Estate. As such, directing counsel for the Receiver to respond to a motion for reconsideration that may be rendered moot by the filing of an amended complaint would be detrimental to the Receivership Estate.²

Since this case was filed in 2010, discovery has proceeded and a pretrial hearing date is not scheduled until March, 2013. [ECF No. 74]. Subsequent to the Receiver taking the deposition of certain Wells Fargo employees, the Receiver filed his Motion for Leave to File a Second Amend Complaint and Incorporated Memorandum of Law (the “Motion to Amend”) [ECF No. 86] and attached thereto a proposed second amended complaint (the “Proposed Amended Complaint”).³

The Proposed Amended Complaint maintains claims of aiding and abetting breach of fiduciary duty, aiding and abetting conversion and for fraudulent transfers against Wells Fargo. The Proposed Amended Complaint, however, also provides greater detail in support of the

² Because this Court has not yet ruled upon the Receiver’s motion for extension of time and because the case law indicates that the motion to amend must be considered prior to the motion for reconsideration, the Receiver does not concede that any response is due at this time. Notwithstanding, the Receiver has filed a brief response to the Motion for Reconsideration concurrently with this reply to allow for the Court to resolve the pending motions expeditiously.

³ Wells Fargo makes pointed reference to the missing certification pursuant to S.D. Local Rule 7.1(a)(3) while acknowledging that counsel for the Receiver had advised that it was busy dealing with several matters on other fronts suggesting that this was merely an oversight. The Receiver has filed nearly a dozen pleadings in this matter and has never failed to confer with Wells Fargo as required. In light of this fact, counsel for Wells Fargo could have rectified the situation by simply contacting undersigned counsel to advise of the missing certification in which case counsel would have confirmed the oversight and promptly filed an amended motion with the Court. Instead, counsel for Wells Fargo chose to sit on this information and wait until the filing of its response to bring the oversight to the Court’s attention. This court should not reward counsel for Wells Fargo for their lack of professional courtesy in this regard by either denying this motion or imposing sanctions, as Wells Fargo suggests.

Receiver's allegations as to Wells Fargo's actual knowledge of the ongoing fraudulent scheme. In addition, the Proposed Amended Complaint clarifies the creditor status of the Receiver on behalf of the Receivership Entities in support of the fraudulent transfer claims.

Thereafter, Wells Fargo filed its Opposition Brief in response to the Receiver's Motion to Amend. Notably, in the Opposition Brief, Wells Fargo primarily re-argues its Motion for Reconsideration. The sole argument in opposition to the Receiver's Motion to Amend is that the Proposed Amended Complaint would not withstand a motion to dismiss based upon the Eleventh Circuit decision in *Lawrence v. Bank of America, N.A.*, 2012 WL 89904 (11th Cir. Jan. 11, 2012).

As set forth herein, the Receiver maintains that allowance of the Proposed Amended Complaint is necessary and appropriate under applicable law.⁴

MEMORANDUM OF LAW

I. The Claims Asserted in the Proposed Amended Complaint Are Supported by the Facts and Circumstances of the Case thus Leave to Amend Should Be Granted

Under, Rule 15 of the Federal Rules of Civil Procedure, the court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Senger Brothers Nursery, Inc. v. E.I. Dupont De Nemours & Company*, 184 F.R.D. 674, 678 (M.D. Fla.1999). Therefore, unless it appears beyond doubt that the Plaintiff cannot state a claim, leave to amend should be granted. *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Hargett v. Valley Fed. Sav. Bank*, 60

⁴ In his Response in Opposition to Wells Fargo's Motion for Reconsideration, the Receiver argues, among other reasons, that this Court should rule on the merits of this motion prior to considering Wells Fargo's Motion for Reconsideration.

F.3d 754, 761 (11th Cir. 1995) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). A justifying reason for denying leave to amend must be apparent. *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993). Leave to amend must be granted unless the district court provides a specific and significant reason for denial, such as undue delay, bad faith or dilatory motive, repeated failures to cure deficiencies, undue prejudice to the opposing party or futility of amendment. *Spanish Broad. Sys.*, 376 F.3d at 1077; *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).

None of the examples given in the *Spanish Broad Sys.* opinion justifies the denial of leave to amend in this case.

Indeed, the Receiver's Amended Complaint is currently pending before the Court; accordingly there has been no abuse of amendments by the Receiver. *Spanish Broad. Sys.*, 376 F.3d at 1077. No undue delay will be caused by the amendment. *Id.* No prior amendment has been sought. The Receiver's request for leave was made in good faith. *Id.* As argued below, the amendment will not be futile. *Id.* The Receiver should be given leave to amend the complaint to further detail the facts evidencing Wells Fargo's actual knowledge of the fraudulent scheme as alleged in the complaint in support of the Receiver's aiding and abetting claims and to seek recovery of fraudulent transfers.

Moreover, no significant prejudice to Wells Fargo is likely to result from the Proposed Amended Complaint. *See Loggerhead Turtle v. Council of Volusia Cty.*, 148 F.3d 1231, 1257 (11th Cir.1998) (noting that "[a]ny amendment to an original pleading necessarily involves *some* additional expense to the opposing party," but adding that this will not justify denial of leave where the additional expense is "of nominal proportions") (emphasis added)).

II. The Proposed Amended Complaint States Plausible Claims for Aiding and Abetting Against Wells Fargo, Therefore, the Amendment Is Not Futile

The Receiver agrees with Wells Fargo that the only ground for denying amendment here is futility. *Foman v. Davis*, *supra*, 371 U.S. at 182. Futility means that the amended complaint would fail to state a claim upon which relief could be granted. *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1042 (11th Cir.1986). The Receiver, however, parts company with Wells Fargo's position that the Proposed Amended Complaint does not meet the *Iqbal* and *Twombly* standards as further interpreted by the Eleventh Circuit in *Lawrence* and contends instead that he has plausibly stated claims for aiding and abetting and fraudulent transfer against Wells Fargo. This is particularly the case where this Court has already found that the Receiver's Amended Complaint plausibly stated a claim that Wells Fargo had actual knowledge and further stated that "the Court cannot say that there is no factual support for the knowledge element of the Receiver's aiding and abetting claims." [ECF No. 52 at 19].

This Court must apply the same standard to the Proposed Amended Complaint that it applied to the Receiver's amended complaint -- well pled allegations must be deemed true. Courts considering requests for leave to amend have determined that the same standard of legal sufficiency as applied under a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is used to determine futility. *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000); *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997); *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996). However, this standard should be applied narrowly. Leave to amend should only be denied on the ground of futility when the proposed amendment is *clearly* insufficient or frivolous on its face. *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir.1980).

Here, the Receiver's claims for aiding and abetting, even without the additional facts set forth in the Proposed Second Amended Complaint, have already been determined to be sufficiently pleaded to state a claim for which relief may be granted.⁵ However, the Receiver should be given the opportunity to amend his complaint, at least one time, since the *Lawrence* decision has been raised. The Proposed Amended Complaint not only meets the *Iqbal* and *Twombly* standard of plausibly pleading ultimate conclusions of fact, it pleads substantial additional evidence uncovered in discovery that supports those allegations in accordance with *Lawrence*.⁶

In singularly focusing on the amendments relating to the Receiver's aiding and abetting claims, Wells Fargo has overlooked the additional facts alleged in the Proposed Amended Complaint as to the fraudulent transfer claims. The Receiver has amended each of the fraudulent transfer claims in the Proposed Amended Complaint to further detail the Receiver's creditor status for purposes of asserting these claims. [ECF No. 86-1 at pp. 23 -28]. In its Partial Dismissal Order, this Court found that the Receiver had clearly alleged sufficient facts to state a cause of action for fraudulent transfer. Notwithstanding, the Receiver has incorporated additional facts obtained through discovery that further support his fraudulent transfer claims.

In sum, this Court should reject Wells Fargo's objection to the Receiver's request to amend because it has not shown that the Proposed Amended Complaint is *clearly* insufficient or frivolous on its face.

⁵ Wells Fargo seemingly implies that the Receiver did not make enough changes to the amended complaint. In fact, as is often the case, parties are given leave to amend to re-plead certain limited claims and or allegations and as such amended complaints often look much like the original complaint. Therefore, not surprisingly, the Receiver's Proposed Amended Complaint is quite similar to the Amended Complaint.

⁶ The Receiver need not detail how the allegations in the Proposed Amended Complaint more than meet the *Twombly* and *Iqbal* standard as interpreted by the *Lawrence* Court; the Second Amended Complaint speaks for itself.

CONCLUSION

Wells Fargo will not suffer any prejudice if the Court grants the Receiver's Motion to Amend. Moreover, discovery in this case is in the early stages and the trial in this matter is not set to commence until March 2013. Finally, this is the Receiver's first request for leave to amend and the amendment is not futile. Based on the foregoing, and in the interest of justice, the Receiver should be granted leave to amend.

WHEREFORE, the Receiver respectfully requests that this Court grant the Receiver's Motion for Leave to File a Second Amended Complaint to assert the claims and facts as currently known to the Receiver.

Dated: July 16, 2012
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/Carmen Contreras-Martinez
Attorney

SERVICE LIST

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