UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)
CASE NO. 9:10-CV-81612
(Ancillary Pro. No. 08-81565-CIV-Hurley/Hopkins)

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

Plaintiff,

vs.

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

Defendant.
_____/

WELLS FARGO BANK, N.A.'S MOTION TO DISMISS COMPLAINT AND/OR MOTION TO STRIKE IMMATERIAL, IMPERTINENT, AND SCANDALOUS MATTER AND INCORPORATED MEMORANDUM OF LAW

Defendant, Wells Fargo Bank, N.A., as successor-in-interest to Wachovia Bank, N.A. ("Wachovia"), by and through its undersigned counsel and pursuant to Pursuant to Rule 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure and S. D. Local Rule 7.1, moves the Court for the entry of an Order dismissing the Complaint filed by Plaintiff, Jonathan E. Perlman, Esq., as Court appointed Receiver of Creative Capital Consortium, LLC, et. al., ("Perlman" or "Receiver"), and/or striking the immaterial, impertinent, and scandalous matter contained therein. In support hereof, Wachovia states as follows:

I. INTRODUCTION

Perlman was appointed the Receiver in the action styled: *The United States Securities and Exchange Commission v. Creative Capital Consortium, LLC, A Creative Capital Concept$, and George Theodule*, Case No. 08-81565-CIV-HURLEY/HOPKINS, formerly pending in the United States District Court, Southern District of Florida (the "SEC Action"). The Receiver contends that

"George Theodule ("Theodule") was an officer, director, managing agent, principal, and/or control person of each of the Receivership Entities", each of whom the Receiver "has determined have no legitimate business operations." *See* Complaint, ECF No. 1, ¶¶ 6, 14. Rather, it is alleged that Theodule, through the Receivership Entities, operated a "massive and widespread" Ponzi scheme, targeting the Haitian-American community, through promises that his investors would double their investments in ninety (90) days, with little or no financial risk. *See* Complaint, ECF No. 1, ¶¶ 8 - 9. Theodule allegedly effectuated his Ponzi scheme by organizing investment clubs which "served exclusively as a mechanism to funnel funds to the Receivership Entities, and then to Theodule himself, his wife Dorothy, and to his friends and family." *See* Complaint, ECF No. 1, ¶¶ 8 - 9.

Based upon the purported authority granted to him in the SEC Action, Perlman has initiated this action against Wachovia seeking to recover millions of dollars in damages allegedly incurred *by the Receivership Entities* claiming that Wachovia "failed to adhere to federal, local, and internal regulatory banking procedures and policies, ignoring numerous "red flags" associated with the conduct of Theodule and the Receivership Entities" during the four month period that they maintained accounts at Wachovia. *See* Complaint, ECF No. 1, ¶ 31. The legal theories Perlman has set forth against Wachovia in this action are that: (1) Wachovia aided and abetted Theodule's breach of his fiduciary duties to the Receivership Entities (Count I); (2) Wachovia aided and abetted Theodule's conversion of funds from the Receivership Entities (Count II); and (3) Wachovia breached a duty of care owed to the Receivership Entities in its processing of wire transfers directed by the Receivership Entities (Count III).

As discussed in detail below, the Receiver's claims against Wachovia fail to state a cause of action upon which relief can be granted and must be dismissed for the following reasons: (1) the Receiver lacks standing to bring this action against Wachovia; any claims belong to the individual creditors of Theodule and of the Receivership Entities (i.e., the Ponzi scheme investors), and there

is no allegation that they assigned their claims to the Receiver. The Receiver is not and has not brought this action as the class representative for the creditors of Theodule and the Receivership Entities. Indeed, one such investor has separately filed suit against Wachovia seeking class action relief[1] in the action styled: *Nerline Horace-Manasse, and all others similarly situated v. Wells Fargo Bank, N.A.*, Case No. 10-81623-WJZ, currently pending in the United States District Court, Southern District of Florida (the "Horace-Manasse Action")[2]; (2) since, by the Receiver's own allegations, the Receivership Entities had no legitimate business operations and were merely vehicles used by Theodule to perpetuate his Ponzi scheme, the Receivership Entities have not incurred any damages; (3) the Receivership Entities' claims are barred by the doctrine of *in pari delicto* in that they cannot recover for their own wrongdoing; (4) the Receiver fails to state a cause of action against Wachovia for aiding and abetting a breach of fiduciary duty because: (i) the allegations of the Complaint are that there was no honest person within the Receivership Entities to report Theodule's misconduct to, and (ii) the Complaint fails to show that Wachovia had actual knowledge of or provided substantial assistance to the alleged fraud. Indeed, the Receiver makes specific reference to actions taken by Wachovia to thwart the alleged fraud, including, investigating and ultimately closing numerous bank accounts within four months of when they were opened; (5) the Receiver fails to state a cause of action against Wachovia for aiding and abetting Theodule's conversion from the Receivership Entities because any money that Theodule converted from the Receivership Entities, the Receivership Entities converted from Theodule's investors; (6) the Receiver fails to state a cause of action against Wachovia for negligence or wire transfer liability because applicable law does not impose a duty upon Wachovia to investigate the prudency of wire

[1] Although Nerline Horace-Manasse ("Horace-Manasse") is seeking class action relief, no class has been certified. Wachovia vehemently opposes that any of Theodule's investors could ever state a cause of action against Wachovia or that any class could be certified or maintained, based upon the individual circumstances of their purported investments.

[2] To the extent necessary, pursuant to Federal Rule of Evidence 201, Wachovia requests that this Court take judicial notice of the pleadings filed in the Horace-Manasse Action.

transfer instructions which the Receiver contends were directed by an authorized representative of the Receivership Entities; and (7) the Receiver's claims against Wachovia for negligence or wire transfer liability are barred by the economic loss rule.

Accordingly, Perlman has not and cannot state any cognizable legal claims against Wachovia and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Perlman's Complaint should be dismissed with prejudice.

II. MEMORANDUM OF LAW

A. Standards for Motion to Dismiss

The Court may dismiss an action "for failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). "When considering a motion to dismiss, all facts set forth in the plaintiff's complaint are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto." *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir.2000). However, "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions" and "a formulaic recitation of the elements of a cause will not do." *Bell Atlantic Corporation v. Twombley,* 550 U.S. 544, 555 (2007). "Only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1950 (2009). "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of conduct, the complaint has alleged-but it has not shown that the pleader is entitled to relief." *Id.* Furthermore, the Court is under no duty to rewrite a plaintiff's complaint to find a claim. *Peterson v. Atlanta Housing Authority*, 998 F.2d 904, 912 (11th Cir 1993). Further, Courts are not "bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

B. The Receiver Lacks Standing Because the Receiver's Claims Properly Belong to the Individual Investors At Least One Of Which Has Separately Filed Suit

Perlman contends that he has been granted the authority in the SEC Action to institute legal proceedings for the benefit of the Receivership Entities and their respective investors and creditors, and to assert all legal and equitable claims available to the Receivership Entities. Based upon his appointment, Perlman has brought common-law tort claims under Florida law against Wachovia, purportedly in the name of and for the benefit of the Receivership Entities, to recover for the fraudulent activity allegedly perpetrated by Theodule.

A receiver obtains the rights of action and remedies that were possessed by the person or corporation in receivership. *See Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543, 553 (Fla. 2d DCA 2003)(citations omitted). "Although a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for the creditors and receives no general assignment of rights from the creditors. Thus, the receiver can bring actions previously owned by the party in receivership for the benefit of the creditors, but he or she cannot pursue claims owned directly by the creditors." *Id.*

The claims raised herein belong to the individual creditors and not the receiver. It is not alleged that any investor assigned their claims to Perlman. In fact, the day after the instant action was filed, an individual investor filed the Horace-Manasse Action seeking class relief for Wachovia's purported involvement in the Ponzi scheme perpetuated by Theodule. Absent an allegation that the investors have assigned their claims to Perlman (and it is evident they are separately seeking their own relief against Wachovia), Perlman's action should be dismissed. As explained by the *Freeman* Court, described in detail *infra*: "In the end, the [alleged] damages suffered in this case were suffered by the individual customers and not by a corporation created and controlled by [the Ponzi scheme perpetrator]. It is those individual customers who may have rights to pursue [claims against third parties] for those [alleged] damages." *Freeman*, 865 So.2d at 553.

Perlman, as Receiver of the Receivership Entities, and Horace-Manasse entered into a Litigation Coordination Agreement which has been filed in the SEC Action. (SEC Action, ECF No. 252-1). The Litigation Coordination Agreement, however, does not enable the Receiver the ability to maintain the instant action. While the Receiver and Horace-Manasse claim to have entered into the Litigation Coordination Agreement in an effort to avoid duplication of efforts and coordinate their respective claims against the "Common Targets", the simultaneous pursuit of both the instant action and the Horace-Manasse Action amounts to nothing more than an attempt by those parties to take two simultaneous bites at the same apple, unnecessarily absorbing the resources of the parties and the Court. Both the instant action and the Horace-Manasse Action seek damages for the benefit of Theodule's investors, who are the only parties who can make any colorable claim for damages herein or for distribution from any assets recovered by the Receivership Entities. Thus, any recovery, whether it be in the instant action or the Horace-Manasse Action, will ultimately be distributed to Theodule's investors.

The United States Supreme Court has previously addressed this issue in the context of a bankruptcy trustee suing an indenture trustee on behalf of debenture holders. In *Caplin v. Marine Midland Grace Trust Co. of New York,* 406 U.S. 416, 434 (1972), the United States Supreme Court held that the bankruptcy trustee lacked standing to sue an indenture trustee on behalf of debenture holders. The *Caplin* Court explained that the debenture holders "are capable of deciding for themselves whether or not it is worthwhile to seek to recoup whatever losses they may have suffered by an action against the indenture trustee." *Id.* at 431. Thus, the *Caplin* Court concluded that the debenture holders as "the persons truly affected"…"should make their own assessment of the respective advantages and disadvantages, not only of litigation, but of various theories of litigation." *Id.* The *Caplin* Court additionally explained "a suit by [the bankruptcy trustee] on behalf

of debenture holders may be inconsistent with any independent actions that they might bring themselves." *Id.* at 431-32.

The same concerns that caused the *Caplin* Court to hold that the bankruptcy trustee lacked standing exist in the instant action as well. As a preliminary matter, at this time, Horace-Manasse is the only allegedly "person truly affected" who has even consented to the litigation strategy set forth in the Litigation Coordination Agreement. More importantly, however, is that since any recovery against Wachovia is ultimately for the benefit of Theodule's investors, the maintenance of both the instant action and Horace-Manasse Action can result in inconsistent verdicts or multiple recovery.

Accordingly, as the Receiver's claims for damages belong to the individual investors who have not assigned their claims to the Receiver, the instant action should be dismissed.

C. The Receiver's Claims Are Barred Because The Receivership Entities Had No Legitimate Business Operations and Therefore Suffered No Damages

Irrespective of the separately filed Horace-Manasse Action, under the factual circumstances alleged herein, state and federal courts alike have consistently held that the claims raised by Perlman under Florida common law cannot be maintained. *Freeman*, 865 So.2d at 543; *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1205 (11th Cir. 2003); *Feltman v. Prudential Bache Securities,* 122 B.R. 466 (Bankr.S.D.Fla.1990). In *Freeman*, Peter Graziano and his wife, Tarroll Graziano (collectively, the "Grazianos") incorporated NorthAmerican Financial Services, Inc. ("NorthAmerican") as the centerpiece of a Ponzi scheme perpetuated by the Grazianos. Freeman was appointed receiver for NorthAmerican, and initiated an action on behalf of the receivership and NorthAmerican's customers seeking to recover the economic losses incurred by North American and its customers as a result of the Ponzi scheme.[3] *Freeman*, 865 So.2d at 545.

[3] As explained in Section B, *supra*, the *Freeman* Court held that Freeman was not authorized to bring claims on behalf of NorthAmerican's customers, and that any such claims would need to be brought individually by those customers.

From a substantive standpoint, the operative factual circumstances of the Ponzi scheme perpetuated by NorthAmerican and the Grazianos are the same as those alleged in the instant action. Specifically, NorthAmerican obtained its customers' funds through promises of impressive returns. NorthAmerican did not invest the money as promised. Rather, the Grazianos used NorthAmerican as a front to siphon off funds for their own use. NorthAmerican's earliest customers were paid the promised rate of return from the funds received from later customers, giving credibility to the scheme. Then, like all Ponzi schemes, NorthAmerican collapsed. *Compare Freeman*, 865 So.2d at 545 and Complaint, ECF No. 1, ¶¶ 8, 9, 13 14, 23, 26. Similarly, Perlman contends that the Receivership Entities "operated as nothing more than a classic Ponzi scheme." *See* Complaint, ECF No. 1, ¶14.

In *Freeman*, the Receiver initiated an action against: (1) Dean Witter Reynolds, Inc. ("Dean Witter"), where NorthAmerican maintained its accounts; (2) Dominick Santangelo ("Santangelo"), a Dean Witter employee; and (3) the law firm that represented the Grazianos. Like the instant action, Freeman alleged Florida common law tort theories to recover damages on behalf of NorthAmerican. *Freeman*, 865 So.2d at 547.

Specifically, as it pertains to Dean Witter, Freeman's Amended Complaint asserted the following causes of action seeking to recover corporate assets as the receiver for NorthAmerican: (1) Count I – aiding and abetting fraud; (2) Count II – aiding and abetting the Grazianos' breaches of fiduciary duties owed to NorthAmerican; (3) Count III – aiding and abetting the Grazianos' tortious interference with North American's business relationships with its customers; (4) Count IV – breach of fiduciary duties Dean Witter owed to NorthAmerican; (5) Count V – civil conspiracy to commit fraudulent transfers and aiding and abetting fraudulent transfers by the Grazianos; (6) Count VI – general claim of civil conspiracy; and (7) Count VII – negligent hiring, training, and supervision of Santangelo. *Freeman*, 865 So.2d at 548.

The *Freeman* Court held that none of the above causes of action could be brought by the Receiver. Aside from the causes of action which were summarily dismissed on other grounds, the *Freeman* Court held that the remaining claims could not be brought by the Receiver because those claims, if at all, belonged to the individual customers of NorthAmerican.[4] Thus, the *Freeman* Court affirmed the trial Court's dismissal of every one of the Receiver's claims with prejudice. *Freeman*, 865 So.2d at 553. As noted above, the *Freeman* Court's rationale for its holdings is simply that: "In the end, the damages suffered in this case were suffered by the individual customers and not by a corporation created and controlled by the Grazianos." *Id.*

Likewise, in *Feltman*, the Court was unwilling to permit a bankruptcy trustee to pursue claims like those brought herein for aiding and abetting civil theft, negligence, and participation in a breach of fiduciary duty because the sham corporation created for the Ponzi scheme was an "alter ego with no corporate identity separate from the [principal]." *Feltman*, 122 B.R. 469, 473, 475. In *O'Halloran*, the Eleventh Circuit also agreed that the "trustee is not the right party to pursue any damages resulting from the Ponzi scheme itself." *O'Halloran,* 350 F.3d at 1202.

There are instances where the appointment of a receiver and the ouster of rogue employees can "cleanse" a corporation, opening the door for a receiver to bring claims on behalf of the corporation in receivership. However, "the distinction between an honest corporation with rogue employees, which can pursue claims for the fraud or intentional torts of third parties while in receivership, and a sham corporation created as the centerpiece of a Ponzi scheme, which cannot pursue such claims, is both a legal and a practical distinction." *Freeman*, 865 So.2d at 552. "A

[4] The *Freeman* Plaintiffs conceded that Count III and Count VI failed to state a cause of action. *Freeman*, 865 So.2d at 545. The Freeman Court also held that Count IV (breach of fiduciary duties Dean Witter owed to NorthAmerican) fails to state a cause of action regardless of the Receiver's standing in this lawsuit. *Id.* at 548. Accordingly, the Freeman opinion did not include an analysis of the Receiver's standing to bring these causes of action.

corporation, "whose primary existence was as a perpetrator of the Ponzi scheme, cannot be said to have suffered injury from the scheme it perpetrated." *O'Halloran,* 350 F.3d at 1203.

As the *Freeman* Court explained: "Although the receivership may "cleanse" the corporation, it cannot alter historical facts. In this case, NorthAmerican was controlled exclusively by persons engaging in its fraudulent scheme and benefitting from it. NorthAmerican was not a large corporation with an honest board of directors and multiple shareholders, suffering from the criminal acts of a few rogue employees in a regional office. It is clear from the allegations of the amended complaint that it was created by the Grazianos to dupe the customers. This corporation was entirely the robot or the evil zombie of the corporate insiders." *Freeman*, 865 So.2d at 551.

The historical facts alleged by Perlman herein are no different substantively than those alleged in *Freeman*. "Theodule was an officer, director, managing agent, principal, and/or control person of each of the Receivership Entities." "The Receivership Entities herein had no legitimate business operations." "The Receivership Entities operated as nothing more than a classic Ponzi scheme." *See* Complaint, ECF No. 1, ¶¶6, 14.

Thus, the Receivership Entities, which "had no legitimate business operations" and "operated as nothing more than a classic Ponzi scheme" have not suffered any legally cognizable damages, and the Receiver's claims against Wachovia should be dismissed with prejudice.

D. <u>The Receiver's Claims Are Barred By The Equitable Doctrine of In Pari Delicto</u>

"Broadly speaking, the [in pari delicto] defense prohibits plaintiffs from recovering damages resulting from their own wrongdoing...The universal rule of our law is that one in a court of justice cannot complain...of another's wrong whereof he was a partaker...The *in pari delicto* doctrine is a corollary of the doctrine of unclean hands which requires that no one shall be permitted to profit from his own fraud or wrongdoing, and that one who seeks the aid of equity must do so with clean hands." *O'Halloran v. PricewaterhouseCoopers LLP*, 969 So.2d 1039, 1044 (Fla. 2d DCA

2007)(internal quoting and citation references omitted).

"Where the defense of *in pari delicto* is asserted against a corporate entity based on the misconduct of the corporation's agents, it must be determined whether the misconduct of those agents is properly imputed to the corporation." *O'Halloran*, 969 So.2d at 1044. Clearly, Theodule's misconduct is imputed to the Receivership Entities which, based upon the allegations of the Complaint, "had no legitimate business operations" and operated only as an engine of theft. *Id. citing Cenco, Inc. v. Seidman & Seidman,* 686 F.2d 449, 454 (7th Cir.1982). Any attempted claim that the "adverse interest exception" (where rogue officers/employees act adversely to an otherwise legitimate entity) limits the imputation of Theodule's activities to the Receivership Entities fails. "Where a corporation is wholly dominated by persons engaged in wrongdoing, the corporation has itself become the instrument of wrongdoing. Thus, a corporation whose primary existence was to perpetrate a Ponzi scheme is in no position to invoke the adverse interest exception." *Id.* (citing and quotation references omitted).

As noted in section C *supra*, while there are times where the appointment of a receiver can "cleanse" a corporation, this is clearly not one of them. *Freeman*, 865 So.2d at 552l; *O'Halloran,* 350 F.3d at 1203. As the allegations demonstrate that the Receivership Entities were nothing more than "alter egos" wholly dominated by Theodule as an "engine of theft", the Receiver's claims are barred by the doctrine of *in pari delicto* and must be dismissed. *See* Complaint, ECF No. 1, ¶¶6, 14.

E. <u>Count I -The Receiver's Claim for Aiding And Abetting Breach of Fiduciary Duty Fails Because There Is No Allegation Of Any Honest Person Within The Receivership Entities and Because The Allegations of the Complaint Fail to Show That Wachovia Had Actual Knowledge Of Or Provided Substantial Aid To The Alleged Fraud</u>

In Count I, Perlman alleges that Theodule "breached his fiduciary duty owed to the Receivership Entities by exhibiting a willful, fraudulent, reckless and/or negligent disregard for the best financial interests of the Receivership Entities by engaging in the above described fraudulent Ponzi scheme with no legitimate or justifiable business purpose". *See* Complaint, ECF No. 1, ¶59.

Perlman contends that Wachovia rendered substantial assistance to Theodule by: "affording Theodule special privileges, allowing continuous and suspicious obviously fraudulent banking activity, failing to adhere to federal, local and internal regulatory banking procedures and policies..." *See* Complaint, ECF No. 1, ¶61.

As a baseline matter, Perlman's claim for aiding and abetting Theodule's breach of fiduciary hinges on a duty by Wachovia to disclose matters to the Receivership Entities. *Freeman*, 865 So.2d at 551. However, Perlman asserts that the Receivership Entities never had any legitimate business operations, but rather were used by Theodule for the sole purpose of effectuating his Ponzi scheme. Thus, any legal theory based upon a failure to disclose Theodule's misconduct during the time that the Receivership Entities' maintained accounts at Wachovia (which Perlman does not and cannot allege) simply cannot stand because there was no honest person within the Receivership Entities to whom such conduct could be reported, so that action could be taken against the malfeasance perpetuated by Theodule. *Id.* at 552.

Moreover, the allegations of the Complaint simply do not support a cause of action for aiding and abetting a breach of fiduciary duty. A claim for aiding and abetting a breach of fiduciary duty in Florida requires: (1) a fiduciary duty on the part of the primary wrongdoer; (2) a breach of this fiduciary duty; (3) knowledge of the breach by the alleged aider and abettor; and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing. *See Court-Appointed Receiver of Lancer Management Group LLC v. Lauer*, 2008 WL 906274 at *5 (S.D.Fla. 2008).

When the conclusory and sensationalized statements are removed from the Complaint, the specific factual allegations against Wachovia simply do not show that Wachovia had actual knowledge of Theodule's alleged fraud or provided substantial assistance thereto during the four-month period that the Receivership Entities maintained their accounts at Wachovia. In essence, Perlman alleges that Wachovia failed to conduct certain alleged due diligence requirements before

allowing Theodule to open his accounts at Wachovia, failed to investigate the deposits and withdrawals in those accounts, and failed to stop the alleged fraudulent activity until it was "too late." *See* Complaint, ECF No. 1, ¶¶35-55. Indeed, Perlman has gone as far as to suggest that the Ponzi scheme would have been "self-evident" had Wachovia simply obtained documentation from its customer, googled the customer's business, reviewed the customer's website, or checked the business on state corporate registration websites. *See* Complaint, ECF No. 1, ¶37. According to Perlman's logic, the Ponzi scheme would have also been "self-evident" to each of Theodule's investors had they taken these easily available steps before they turned over their savings based upon a too-good-to-be-true promise that they would be able to double their investment in ninety days with little or no financial risk.

The factual basis for Perlman's conclusory allegation that Wachovia had actual knowledge of the fraud is insufficient to support the actual knowledge requirement. Perlman surmises that: "Wachovia knew from its access to all transactions amongst the accounts, that no investment was occurring, and that Theodule was using Creative Capital as a personal piggy bank..." *See* Complaint, ECF No. 1, ¶50. However, "[r]ed flags or aroused suspicions do not constitute actual awareness of one's role in a fraudulent scheme." *Lancer*, 2008 WL 926513 at *6 (citation omitted). In *Lawrence v. Bank of America, N.A.*, 2010 WL 3467501 at *3, (M.D. Fla. 2010), Plaintiffs made the similar allegation that Bank of America had actual knowledge of its customer's Ponzi scheme because they: "conducted atypical transactions involving unusually large amounts of money and BofA representatives assigned to the DV Account were generally aware of these transactions and other red flags that should have alerted them to the true nature of Dimond and DV's activities". In granting Bank of America's Motion to Dismiss, the *Lawrence* Court explained: "These allegations do not adequately allege that BoA had actual knowledge of Diamond or DV's alleged fraud, conversion, or breach of fiduciary duty. Although Plaintiffs have alleged that BoA representatives

had a "general awareness" of certain pieces of the Diamond and DV puzzle, the facts alleged are not sufficient to give rise to a plausible inference that BoA had put the puzzle together, or even that it had enough of the pieces to do so." *Id. citing to Rosner v. Bank of China,* 2008 WL 5416380 at *5-7 (S.D.N.Y. 2008)(holding that bank's knowledge of "red flags" or unusual banking activity did not equate to actual knowledge of the underlying fraud where the representative of investors who were defrauded of more than $25 million by a bank's client alleged the bank aided and abetted the fraud). Accordingly, as a matter of law, Perlman's allegations are insufficient to support a claim that Wachovia had actual knowledge of Theodule's alleged breaches.

Furthermore, Perlman's allegations fail to show that Wachovia knowingly provided substantial assistance or encouragement of the wrongdoing. "In order for an aiding and abetting cause of action to survive a motion to dismiss, the plaintiff must also plead that the defendant knowingly rendered substantial assistance in the commission of the wrongdoing." *Lawrence*, 2010 3467501 at *4. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so ...." *Id.* The *Lawrence* Court disregarded as conclusory allegations that: "BoA permitted Diamond and DV to "engage in atypical" or "dubious and suspicious" transactions without reporting them to the proper authorities." Thus, in reviewing the "real factual allegations related to BoA's alleged knowing rendition of substantial assistance" the *Lawrence* Court held: "These allegations do not adequately allege that BoA affirmatively assisted, concealed, or otherwise knowingly rendered substantial assistance in Diamond and DV's alleged commission of fraud, conversion, or breach of fiduciary duty. These allegations simply support that BoA provided Diamond and DV with basic banking services available to BoA customers." *Id.*

Like *Lawrence*, other than Wachovia's processing of transactions on the subject accounts in the ordinary course of course of business, Perlman has not made any "real factual allegations" establishing any "special privilege" that Wachovia provided to Theodule or any manner in which

Wachovia knowingly substantially assisted Theodule's breaches. Accordingly, "[b]ecause Plaintiff's allegations "do not permit the court to infer more than the mere possibility of misconduct," the Complaint stops short of plausibility and does not show Plaintiffs are entitled to relief." *Lawrence*, 2010 WL 3467501 at *4 quoting *Iqbal,* 129 S.Ct. at 1950. The *Freeman* Court, when analyzing similar allegations against Dean Witter, likewise held: "Merely conducting normal, lawful banking operations for the corporation is not enough to establish aiding and abetting an intentional tort against the corporation." *Freeman*, 865 So.2d at 551.

Additionally, Perlman has actually identified a number of actions taken by Wachovia to thwart, as opposed to assist, the Theodule's alleged breaches. Specifically, Perlman alleges that when Wachovia noted suspicious activity in one investment club account, Wachovia placed a freeze on that account and reviewed a business plan Creative Capital faxed to Wachovia prior to removing the restraint. *See* Complaint, ECF No. 1, ¶¶47-49. Perlman also acknowledges that it was Wachovia who closed accounts when Wachovia could not find any evidence of investing occurring. *See* Complaint, ECF No. 1, ¶54. Thus, Perlman's own allegations establish that Wachovia took actions to thwart, not assist, the alleged Ponzi scheme.

Accordingly, as a matter of law, Perlman fails to state a cause of action upon which relief can be granted against Wachovia for aiding and abetting breach of fiduciary duty and Count I of Perlman's Complaint should be dismissed with prejudice.

F. Count II – The Receiver Fails to State A Cause of Action Against Wachovia for Aiding And Abetting Conversion Because Any Alleged Conversion Is Illusory

In Count II of the his Complaint, Perlman seeks damages allegedly incurred by the Receivership Entities for Wachovia allegedly aiding and abetting Theodule's conversion of monies from the Receivership Entities. However, Perlman contends that the Receivership Entities had no legitimate business operations, and were used by Theodule solely to perpetuate his Ponzi scheme.

In *Feltman*, a bankruptcy trustee for two sham corporations attempted to bring an action in the name of the corporations against the solvent brokers, bankers, and accountants that allegedly furthered the fraud perpetuated by the principal of the sham companies. Among the causes of action alleged against the defendants was a claim for aiding and abetting civil theft. *Feltman*, 122 B.R. at 468, 469. In reviewing the claims raised by the Trustee on behalf of the debtor corporations, the *Feltman* Court expressly held: "All corporations are legal fictions. In this case, however, FIP and FFP were simply fictitious. The complaint alleges that FIP and FFP were sham corporations, alter egos with no corporate identity separate from Henry Gherman. As the corporations were essentially only conduits for stolen money, any injury to the debtors in this case must be substantially coterminous with the injury to the defrauded creditors. Everything Gherman stole from the debtor corporations, the debtors had stolen from the creditors. Thus, any alleged injury to the debtors is as illusory as was their corporate identity." *Feltman*, 122 B.R. at 468, 473-474.

Like the *Feltman* corporations, based upon Perlman's allegations, the Receivership Entities had no separate identity from Theodule and his alleged Ponzi scheme, and were simply fictitious. Accordingly, any money that Theodule converted from the Receivership Entities, the Receivership Entities converted from Theodule's investors. Thus, any alleged damages to the Receivership Entities is illusory. Stated another way, since the Receivership Entities are alter egos of Theodule with no corporate identity separate from Theodule (and Perlman stands in those shoes), Perlman is, in essence, arguing that Wachovia assisted Theodule in stealing from himself.

Based upon the foregoing, and for the reasons outlined in the sections above, Perlman fails to state a cause of action against Wachovia for aiding and abetting conversion for which relief can be granted. Accordingly, Count II of Perlman's Complaint should be dismissed with prejudice.

G. Count III Fails Because Wachovia Had No Obligation To Ensure that Proceeds In the Accounts Maintained by the Receivership Entities Were Not Diverted or Looted

While Perlman is seeking relief for common-law negligence and wire transfer liability in Count III of his Complaint, Perlman is in substance arguing that Wachovia owed a fiduciary duty of care to make certain that the wire transfers directed by the Receivership Entities were for proper purposes, and not for purposes of converting or dissipating those proceeds. *See* Complaint, ECF No. 1, ¶¶67-74. Such claims have universally failed because the relationship between an bank and its customer is generally that of debtor and creditor, and not one involving fiduciary duties. *See Freeman, 865 So.2d at 549.* As explained by the *Freeman* Court, to hold otherwise "would radically alter the law of banking" if banks were required to review accounts to make certain that their customers were spending their money wisely and to refuse to make payments that were legal on their face in order to fulfill some "fiduciary duty." *Freeman*, 865 So.2d at 553.

Based upon this rationale, the *Freeman* Court summarily dismissed with prejudice Count IV (breach of fiduciary duty) of Freeman's Amended Complaint, wherein Freeman similarly argued that Dean Witter and Santangelo had an obligation to investigate the circumstances and prevent the losses suffered by NorthAmerican and its customers. *Freeman*, 865 So.2d at 547-548. In the same vein, in *O'Halloran,*, the Eleventh Circuit held that trustee could not prevail against a bank when a representative of a Ponzi scheme "embezzled" some of the scheme's proceeds, stating, "[t]he bank is responsible only for making sure that the employee, at the time of the withdrawal, has the authority to make withdrawals on behalf of the account holder entity." *O'Halloran,* 350 F.3d at 1203. Perlman makes no dissimilar allegation herein.

Indeed, the *Freeman* Court could not locate a single case anywhere holding that a bank breached a fiduciary duty owed to its client by failing to investigate or disclose the manner in which the client or its authorized agents used their money. *Freeman*, 865 So.2d at 549. Similarly, there is no authority supporting a private cause of action against a bank for allegedly failing to postpone a

wire transfer *directed by an authorized signor on an account*, "pending, among other things, full notification and disclosure to law enforcement." *See* Complaint, ECF No. 1, ¶72.

Based upon the foregoing, Count III of the Complaint fails to set forth a legally cognizable cause of action for negligence and wire transfer liability and should be dismissed with prejudice.

H. The Receiver's Common-Law Negligence and Wire Transfer Liability Claims in Count III Are Barred By The Economic Loss Rule

To the extent that Perlman is seeking to allege Florida common-law causes of action against Wachovia for negligence or wire transfer liability, any such claims would clearly be barred by the economic loss rule. Under Florida law, the relationship between a bank and its customer is contractual. *MJZ Corp. v. Gulfstream First Bank & Trust, N.A.*, 420 So.2d 396, 397 (Fla. 4th DCA 1982). The economic loss rule provides that a plaintiff may not sue a defendant under tort theories for purely economic losses when the basis of the parties' relationship is contractual unless there are allegations of ultimate fact to establish a personal injury, property damage or an independent tort involving circumstances outside the scope of the parties' contract. *Moransais v. Heathman*, 744 So.2d 973, 979-980 (Fla. 1999). A purchaser of services cannot recover purely economic damages due to negligence arising from the breach of a contract where the purchaser cannot show the commission of a tort independent of the breach itself. *AMF Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So.2d 180, 181 (Fla. 1987). Indeed, the Middle District of Florida has recently re-affirmed that: "The contractual privity economic loss rule applies to contracts involving financial services." D.*H.G. Properties, LLC v. Ginn Companies, LLC*, 2010 WL 5584464 at *10 (M.D.Fla. 2010).

Perlman does not allege any personal injury, property damage, or an independent tort outside of the scope of the contract. Rather, Perlman's claims against Wachovia pertain only to wire transfers conducted on the Receivership Entities' accounts at the direction of the Receivership Entities. *See* Complaint, ECF No. 1, ¶68. Accordingly, Perlman's claims in Count III of the Complaint are barred by the economic loss rule and should be dismissed with prejudice.

I. Allegations Regarding the Unrelated Criminal Proceeding Should Be Stricken

Rule 12(f) of the Federal Rules of Civil Procedure provides that: "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Although motions to strike on the grounds of insufficiency, immateriality, irrelevancy and redundancy are often considered "time wasters," courts will grant such motions where "the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *Williams v. Eckerd Family Youth Alternative*, 908 F.Supp. 908, 910 (M.D.Fla. 1995).

In an apparent attempt to dramatize his allegations against Wachovia, Perlman refers to Wachovia as being "business friendly", with the connotation that Wachovia was "willing to overlook compliance and anti-money laundering regulations." Specifically, Perlman states that after Washington Mutual advised Theodule that it was closing Theodule's accounts, "Theodule decided to move his operations to a bank that would be more "business friendly" to the Ponzi scheme business he was running." "Wachovia was a natural choice as it is well-known for being very friendly to such businesses, including willing to overlook compliance and anti-money laundering regulations." *See* Complaint, ECF No. 1, ¶¶30, 31.[5]

Perlman then makes reference to a totally unrelated proceeding against Wachovia which largely pertained to certain transfers between accounts at Wachovia and Mexican currency exchange houses which occurred prior to the time period that the Receivership Entities maintained accounts at Wachovia. Specifically, Perlman states: "Indeed, in March 2009, the United States charged Wachovia for criminal violations of the Bank Secrecy Act, including willfully failing to establish an anti-money laundering program, as well as failing to file Suspicious Activity Reports ("SARs") and Currency Transaction Reports ("CTRs"). To avoid further prosecution, Wachovia

[5] Perlman also states that Wachovia was "business friendly" in the same context in paragraphs 29, 42, 49, and 52 of his Complaint with the same implication. *See* Complaint, ECF No. 1, ¶¶29, 42, 49, and 52.

Bank and Wells Fargo Corporation entered into a deferred prosecution agreement, agreed to cease such criminal conduct in the future, and paid $160 million in fines. Wachovia is the **only** large U.S. bank that has ever been prosecuted for such violations." *See* Complaint, ECF No. 1, ¶31.

Aside from Perlman's allegations not even being factually accurate, the simple fact is that there is no legitimate purpose for these allegations to be included in the instant action, which only serve to prejudice Wachovia. There is no contention that the other proceeding has any relation to the instant controversy, and it in fact refers to conduct that occurred prior to the time period that the Receivership Entities maintained accounts at Wachovia. They are additionally immaterial to any claims herein, as Perlman has not and cannot allege any cause of action against Wachovia for failing to comply with various regulations because no such private cause of action exists. *Freeman*, 865 So.2d at 551; *Williams*, 908 F.Supp. at 910 (M.D. Fla. 1995). Thus, the only conceivable purpose of these scandalous, immaterial, and impertinent allegations is to cause prejudice and inflame the Court against Wachovia.

Accordingly, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, in the event the Complaint is not dismissed in its entirety with prejudice, the allegations in paragraphs 29, 30, 31, 42, 49, and 52 of the Complaint should be stricken because they have no possible legitimate relation to the controversy and may cause prejudice to Wachovia.

III. CONCLUSION

Perlman's Complaint is deficient as a matter of law, and should be dismissed with prejudice. If the Complaint is not dismissed in its entirety, paragraphs 29, 30, 31, 42, 49, and 52 of the Complaint should be stricken. Accordingly, Wachovia moves the Court for an entry of an Order dismissing, with prejudice, Perlman's Complaint, striking paragraphs 29, 30, 31, 42, 49, and 52 of the Complaint, and for such other and further relief as the Court deems necessary and proper.

Dated: March 16, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2011, I electronically filed the foregoing document 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 or pro se parties identified on the attached Service List in the manner specified, 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.

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United States District Court
Southern District of Florida

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