UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)
CASE NO. 11-80331-CIV-HURLEY/HOPKINS

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

Plaintiff,

v.

BANK OF AMERICA, N.A

Defendant.
_______________________________________/

RECEIVER'S RESPONSE IN OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION TO DISMISS COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

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"), hereby files this Response in Opposition to Bank of America, N.A.'s ("Bank of America") Motion to Dismiss Plaintiff's Complaint [DE 17] (the "Motion to Dismiss"), and states as follows[1]:

PRELIMINARY STATEMENT

Bank of America's Motion to Dismiss should be denied with respect to each and every one of the Receiver's claims. Bank of America fails to correctly interpret or apply the controlling legal authority in connection with the arguments raised in their Motion to Dismiss.

[1] Concurrently with the filing of this response, the Receiver has filed his Unopposed Motion for Leave to File Response Memorandum in Excess of Twenty Pages. The Parties previously stipulated to allow each other to seek leave to exceed the twenty-page limitation.

Alternatively, their arguments are overcome by the well-pled facts in the Receiver's Complaint. Specifically, Bank of America's arguments in the Motion to Dismiss fail for the following reasons:

(i) The Receiver has standing to pursue his claims. The Complaint sufficiently alleges a distinct and palpable injury to the Receivership Entities in compliance with Article III of the United States Constitution.

(ii) The Receiver's claims arise in the second, so-called, "embezzlement stage" of the Theodule Ponzi scheme and are therefore claims which are owned by the Receivership Entities, and are not claims brought by the Receiver on behalf of the Ponzi scheme investors, whose injuries occurred in the first, so-called, "solicitation stage" of the Theodule Ponzi scheme.

(iii) The Receiver's claims do not rely upon Bank of America's violation of the Bank Secrecy Act for their proof. Instead, the Receiver alleges that Bank of America gained knowledge of the Theodule Ponzi scheme by virtue of fulfilling certain requirements imposed by the Bank Secrecy Act and that such knowledge gave rise to, or contributed to, certain other legal duties owed and breached by Bank of America.

(iv) The Receiver properly states a claim upon which relief may be granted under Fed. R. Civ. Rule 12(b)(6) by fulfilling each and every element of pleading with respect to all Counts in the Complaint.

For the reasons set forth above, as more fully argued by the Receiver in the Memorandum of Law below, Bank of America's Motion to Dismiss should be denied.

MEMORANDUM OF LAW

I. STANDARD OF REVIEW FOR EVALUATING A MOTION TO DISMISS

When ruling on a motion to dismiss, the Court "must accept as true all of the factual allegations in the Complaint." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007). Further, the factual allegations in the Complaint must be "construed in the light most favorable to the Plaintiff." Rivell v. Private Health Care Sys., 520 F.3d 1308, 1309 (11th Cir. 2008). A court's review on a motion to dismiss is "limited to the four corners of the complaint." Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949 (11th Cir.2009); St. George v. Pinellas County, 285 F.3d 1334, 1337 (11th Cir. 2002). A court may consider only the complaint itself and any documents referred to in the complaint which are central to the claims. See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir.1997) (*per curiam*).

A complaint should not be dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957); Castro v. Secretary of Homeland Sec., 472 F.3d 1334, 1336 (11th Cir. 2006); Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 349 (11th Cir. 2006). In order to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) a complaint need only plead "enough facts to state a claim that is plausible on its face." "*Specific facts are not necessary*; the statement need only give the defendant *fair notice* of what the claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 127 S.Ct. 1955, 1974, 164 L.Ed. 2d 929 (2007) (emphasis added).

II. THE RECEIVER'SCOMPLAINT SATISFIES THE REQUIREMENTS OF FED. R. CIV. P. RULE 8 (a)(2).

Bank of America devotes nearly four pages in its Motion to Dismiss suggesting that the

Receiver somehow has failed to meet minimum plausibility standards governing pleadings under Fed. R. Civ. P. Rule 8(a)(2). Bank of America has misinterpreted the requirements of Rule 8(a)(2). The Bank's arguments regarding the plausibility of the Receiver's pleadings simply lack credibility in light of the detailed factual allegations set forth in the Receiver's Complaint.

The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. Instead, Rule 8(a)(2) requires ***a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.*** See Bell Atlantic Corp. v. Twombly, supra, 550 U.S. at 570.

As such, the threshold for survival of a Rule 8(a)(2) challenge regarding plausibility is not difficult to cross. Rule 8 "does not require detailed factual allegations." It merely demands "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). Thus, to survive dismissal, the complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. " Iqbal, supra, 129 S.Ct. at 1949. The rule does not impose a probability requirement at the pleading stage. Rather, the proper test is whether the complaint "succeeds in 'identifying facts that are suggestive enough to render [the claim] plausible.' " See Watts v. Florida Int'l University, 495 F.3d 1289, 1296 (11th Cir.2007) (quoting Twombly, supra, 550 U.S. at 556).

Without further detailed elaboration, the Receiver respectfully refers this Court to the well plead factual allegations in his Complaint, specifically those allegations from Paragraphs 29 through 68 of the Complaint which identify in extensive factual detail Bank of America's involvement in the Ponzi scheme conducted by George Theodule, its banking relationships with both Theodule and the Receivership Entities, and the relevant conduct of these parties which supports the Receiver's claims in Counts I through IX of the Complaint.

III. THE RECEIVER HAS STANDING TO PURSUE ALL CLAIMS IN THE AMENDED COMPLAINT

A. The Receiver's Amended Complaint Meets the Minimum Constitutional Pleading Requirements to Allege Standing

The constitutional core of standing is established under Article III of the United States Constitution and contains three elements: (1) that the plaintiff has suffered some actual or threatened injury as a result of the conduct of the defendant; (2) that the injury can fairly be traced to that conduct; and (3) that a favorable decision is likely to redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed. 2d 700 (1982). Because standing concerns the conduct of the parties and its injurious effect, the Court's inquiry in this regard is necessarily case-specific.

A defendant's challenge to a plaintiff's standing can take two forms: a "facial" challenge based exclusively on plaintiff's pleadings, and a "factual" challenge in which evidence, not pleadings, pertinent to standing are evaluated by the Court. Lawrence v. Dunbar, 919 F.2d 1525, 1528-29 (11th Cir.1990). "Facial" challenges are most often raised in a motion to dismiss, while "factual" challenges are most often raised by a motion for summary judgment. Bank of America's Motion to Dismiss represents a "facial" challenge because it relies exclusively on the allegations of the Receiver's Complaint.

In order to survive Bank of America's standing challenge and to satisfy Constitutional requirements, the Receiver need only state *general* factual allegations of injury resulting from Bank of America's conduct. Bischoff v. Osceola County, 222 F.3d 874, 878 (11th Cir. 2000). In general, the injury to the Receivership Entities in this case with respect to each claim raised by the Receiver arises from the wrongful transfer and dissipation of corporate funds in the Bank of America accounts.

The factual allegations forming the foundation of the financial injury incurred by the Receivership Entities are evident throughout the Complaint. First, the Receiver alleges ownership and control of investor funds by the Receivership Entities, establishing those funds as a corporate asset of the Receivership Entities. (Complaint, ¶¶ 40, 41, and Exhibits, A, B, and C to the Complaint showing Bank transfers and deposits.) Second, the Receiver alleges the banking relationship among Bank of America and the Receivership Entities and the establishment of deposit accounts by the Receivership Entities. (Complaint, ¶¶ 29 through 68.) Third, the Receiver alleges Bank of America's actual knowledge of the Ponzi scheme resulting from information learned through its due diligence prior to establishing customer relationships with Theodule and the Receivership Entities, and through its observations of the banking operations of Theodule and the Receivership Entities. (Complaint ¶¶ 40 through 68.) Fourth and finally, the Receiver alleges that the Receivership Entities were injured by the loss of funds transferred from their accounts occasioned by Bank of America's substantial assistance in the Theodule Ponzi scheme, and the Bank's failure to close the accounts of Theodule and the Receivership Entities despite its awareness of the Ponzi scheme and its illegal operations. (Complaint, ¶¶ 68 through 131.)

B. The Receivership Entities Have Suffered Actual, Cognizable Injury

Despite the Receiver's clear allegations of financial injury to the Receivership Entities, Bank of America nonetheless asserts that the Receiver lacks standing to pursue his claims in this case. In support of its arguments, Bank of America relies largely upon Freeman v. Dean Witter Reynolds, Inc., 865 So.2d 543 (Fla. 2d DCA 2003). In sum, using Freeman as its platform, Bank of America argues that: (1) the injury arising from the Ponzi scheme falls solely upon the investors defrauded by Theodule, and that, therefore, the Receivership Entities have not suffered "actual injury" as required to maintain standing under an Article III analysis; and (2) because the Receivership Entities were vessels of the Theodule Ponzi scheme without an honest business purpose, they are indistinguishable from Theodule himself, and therefore cannot claim any "legally cognizable damages" in support of their claims.

As a preliminary matter, it is important to note that Freeman was decided under Florida state law and involved a receiver appointed by the State of Florida. The holdings in Freeman are inapposite with controlling federal cases, both in terms of substance and policy. In a case factually similar to this case, the United States Supreme Court addressed a receiver's authority to sue on behalf of the creditors of a corporation in receivership. McCandless v. Furlaud, 296 U.S. 140, 56 S.Ct. 41, 80 L.Ed. 121 (1935). In McCandless (which is still good law), a promoter of a corporation used the corporate entity to perpetrate securities fraud on the public. The court found that the effect of the promoter's conduct was to saddle the company with liens beyond the value of its assets. The company became crippled and, indeed, insolvent at the very outset of its business life. The Supreme Court addressed whether an equity receiver which had been appointed for that corporation could sue the directors and promoters of the corporation:

> A ***court of equity has taken hold of the assets of this company***, intangible assets as well as tangible, for administration as a trust in accordance with equitable principles. ***Included in those assets are monies fraudulently diverted to the prejudice of creditors***. . . . As we have striven to make clear, the receiver does not claim to have succeeded to the rights of bondholders or noteholders to recover damages for deceit. ***The wrong that is here redressed is the unlawful depletion of the assets whereby the company was made insolvent and the creditors were defrauded of their lawful rights and remedies.***

McCandless v. Furlaud, 56 S.Ct. at 47-50 (emphasis added).

The McCandless Court recognized that although the creditors of a corporation ultimately suffer losses as a result of fraudulent corporate conduct, the focus with regard to a determination of a receiver's standing is based upon the equitable powers of the court and the receiver's obligation to restore unlawfully diverted assets to the corporation.

(i) The Receivership Entities Have Suffered Injury Separate and Distinct From any Injury to the Ponzi Scheme Investors.

Bank of America's first argument that the loss suffered by investors from the Ponzi scheme, having only "passed through" the Receivership Entities, somehow negates any separate and distinct injury to the Receivership Entities ignores the legal fiction of corporate existence underpinning the McCandless decision. An injury to a corporate body is legally distinct from an injury to another person. The Receivership Entities are "creatures of law conferred with standing to sue and to be sued in their own corporate name. A corporation can suffer an injury unto itself, and any claim it asserts to recover for that injury is independent and separate from the claims of shareholders, creditors, and others. ***[I]t is irrelevant that . . . a successfully prosecuted cause of action leads to an inflow of money to the estate that will immediately flow out again to repay creditors.***" In re: Fuzion Technologies Group, Inc., 32 B.R. 225, 230 (Bankr. S.D. Fla. 2005), citing Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 348-49 (3d Cir. 2001) (emphasis added).

Moreover, even though the individual investors have incurred significant losses arising from the Ponzi scheme along with the Receivership Entities, Bank of America's arguments fail to consider the rights of the numerous other creditors, not involved in the Ponzi scheme, who provided goods, services, and materials to the Receivership Entities.[2] While the most obvious

[2] The Receiver has evidence that, among other things, the Receivership Entities contracted for the purchase of real property, the purchase of personal property, significant travel services and office space, which transactions have created actual and potential claims against the corporate entities.

damages were those sustained by the investors, the possibility of a distinct and separate injury to the Receivership Entities arising from potential claims of third-party creditors not involved in the Ponzi scheme should not be ignored.

(ii) The Receivership Entities Have Suffered Legally Cognizable Damages Arising from the Embezzlement Phase of the Ponzi Scheme.

Bank of America's second argument concerning standing appears to have two prongs. First, Bank of America suggests that the Receivership Entities "had no legitimate business operations" other than operating the Ponzi scheme and therefore cannot have suffered any legitimate or "legally cognizable damages" to satisfy Article III requirements. See Freeman, 865 So.2d 543. However, this argument does not apply to the Receiver's claims, because the holding in Freeman is limited by subsequent federal decisions.

Federal cases, including cases in the Eleventh Circuit,[3] have distinguished Freeman by limiting its application solely to those claims connected with the fraudulent *solicitation* of investor funds occurring in the initial phase of a Ponzi scheme. Prior to being addressed in the Eleventh Circuit, this distinction was emphasized in Knauer v. Jonathon Roberts Fin. Group, Inc., 348 F.3d 230 (7th Cir. 2003):

> For our purposes, it is useful to think of Ponzi schemes as being comprised of ***two phases. First, the schemer solicits and receives money for investment***, guaranteeing high returns while doing little with the money to produce actual profits. While in this first stage, the schemer may generate some income for himself by charging a fee or paying himself a salary with the funds, this 'sales' step is not the source of most of his Ponzi gains. After all, the Ponzi schemer is not content to enrich himself modestly by extracting fees or salaries from the funds he has solicited. Rather, the schemer realizes most of his gains by appropriating large sums of money from the solicited funds, the pace of the withdrawals accelerating as he is ready to disband the Ponzi entity and make off with its assets. ***This "embezzlement" step of the Ponzi scheme depletes the***

[3] O'Halloran v. First Union Nat'l Bank of Fla., 350 F.3d 1197 (11th Cir. 2003).

> ***Ponzi entity of resources, which are diverted to the entity's principal, the schemer.***

Id. at 233.

By contrast, a receiver's claims arising from the second "embezzlement" phase of a Ponzi scheme, comprised by the transfer of ill-gotten investor funds to insiders or third-parties, do not run afoul of constitutionally mandated standing requirements. O'Halloran v. First Union Nat'l Bank of Fla., 350 F.3d 1197, 1203-1204 (11th Cir. 2003). The Eleventh Circuit Court in O'Halloran, like the Seventh Circuit Court in Knauer, distinguished between Ponzi scheme "solicitation" torts and after-occurring "embezzlement" style claims:

> The Ponzi scheme, however, is not the tort with which we are concerned. ***The complaint alleges that [the Bank] acted wrongly when it permitted [the Ponzi scheme perpetrator] to remove funds from the accounts [the Receivership Entity] maintained at [the Bank]. . . . This is the claim that is at issue here.***
>
> We also find perhaps less significant than did the district court the fact that the funds which the trustee claims to be tortiously deprived of were substantially the fruit of fraud. . . . ***[The Receivership Entity] was responsible, according to the complaint, for the Ponzi scheme, but as the holder of voidable title to the funds (as opposed to void title) was legally injured by the [Ponzi scheme perpetrator's] withdrawals from [the Bank] accounts.*** [The Receivership Entity's] ownership of the Ponzi funds can be legally asserted against parties other than the investors themselves.

O'Halloran, 350 F.3d at 1203-1204 (emphasis added).

Like the claims asserted in O'Halloran, all of the Receiver's claims are so-called "embezzlement" type claims because the damages arising from each claim arise from, and can be calculated by, determining the amounts removed by Theodule and others from the Receivership Entities' bank accounts at Bank of America. A direct examination of the each of the Receiver's claims in the Complaint is revealing in this regard:[4]

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[4] To the extent that the Court determines that the nature of the claims is not clear given the language of the Complaint, the Receiver is seeking leave to amend his pleadings accordingly.

(1) Count I for aiding and abetting breach of fiduciary duty states in sum that Bank of America assisted Theodule in breaching his fiduciary duty to the Receivership Entities by misappropriating the investment funds owned by the Receivership Entities and seeks damages calculated by the total amounts transferred from the Bank of America accounts.

(2) Count II for aiding and abetting conversion is by its very nature an "embezzlement" type claim. The Receiver alleges that the Bank assisted Theodule in converting the funds of the Receivership Entities. Damages are accounted for by calculating the amounts converted from the bank accounts.

(3) Count III for negligence states that Bank of America breached its common law duties to the Receivership Entities by failing to disclose the fraudulent activity in the Receivership Entities' bank accounts. The Receiver pointedly alleges that the negligence includes Bank of America's "knowledge of fraudulent wire transfers."

(4) Counts IV and V directly allege "wire transfer liability" arising from wires initiated by Bank of America from the Receivership Entities' bank accounts.

(5) Counts VI, VII and VIII relate to the avoidance of "fraudulent transfers" to and from the Receivership Entities' bank accounts. Count IX concerns Bank of America's aiding and abetting of fraudulent transfers from the Receivership Entities' Bank accounts

The Receiver's claims do not focus upon the wrongful conduct of the Receivership Entities calculated to deceive investors during the solicitation phase of the Ponzi scheme. Instead, each of the claims arises in the "second stage" of the fraud -- specifically -- the "embezzlement" of funds owned by the Receivership Entities. These claims therefore set forth "legally cognizable" damages sufficient for the Receiver to maintain standing.

(iii) Bank of America's Arguments that the Receivership Entities Are the "Evil Zombies" of Theodule States a Defense of "In Pari Delicto" Which Is Not Ripe For Determination.

The second prong of Bank of America's argument suggests that the Receivership Entities are sham corporations which operated as the "evil zombies" or "robots" of Theodule and his "co-conspirators." Bank of America argues that the Receivership Entities, as vehicles used by Theodule to perpetrate the Ponzi scheme fraud, bear the fault of the fraud and are therefore equitably incapable of having suffered injury therefrom. This argument does not involve standing. Instead, Bank of America has incorrectly dressed its affirmative defense of *in pari delicto* and now masquerades that defense as a standing challenge.

The doctrine of *in pari delicto* provides that a plaintiff may not assert a claim against a defendant if the plaintiff bears fault for the claim. Under the *in pari delicto* doctrine, a party is barred from recovering damages if his losses are substantially caused by activities the law forbade him to engage in. In re: Fuzion Technologies Group, Inc., 32 B.R. 225, 230 (Bankr. S.D. Fla. 2005.) The doctrine of *in pari delicto* is an equitable affirmative defense, which must be analyzed separately from the issue of standing. Id.

More importantly, Bank of America bears the burden of proof in connection with this affirmative defense. Successful invocation of the *in pari delicto* defense requires *factual proof* by Bank of America. It is not an appropriate subject for a motion to dismiss. Banco Industrial de Venezuela, C.A. v. Credit Suisse, 99 F.3d 1045, 1050 (11th Cir. 1996); Court-Appointed Receiver for Lancer Management Group LLC v. Redwood Financial Group, Inc., 2008 WL 906062 (S.D. Fla. 2008); Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 346 (3d Cir. 2001); Goldberg v. Chong, 2007 WL 2028792 (S.D. Fla. 2007).

The resolution of the *in pari delicto* defense requires the Court to examine the relative fault of the parties and engage in "an essentially equitable and necessarily factbound apportionment of responsibility" among Theodule, the Receivership Entities, and other insiders of the Receivership Entities. Perlman v. Alexis, 2009 WL 3161830, 2009 *4 (S.D. Fla. 2009). "A court first determines whether plaintiff's guilt is far less in degree than defendant's, so as to make the doctrine inapplicable. If plaintiff's guilt is not far less, the court inquires if applying the doctrine would be contrary to public policy." Turner v. Anderson, 704 So. 2d 748, 750 (Fla.

4th DCA 1998) (quoting Feld and Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot, 312 Pa. Super. 125, 458 A.2d 545 (1983)). The relative faults of the parties are factual issues that cannot be ascertained at this time on a motion to dismiss.

IV. BANK OF AMERICA'S ARGUMENTS THAT VIOLATIONS OF THE BANK SECRECY ACT PROVIDE NO PRIVATE CAUSE OF ACTION ARE MISPLACED. THE RECEIVER'S CLAIMS ARE NOT BASED UPON VIOLATIONS OF THE BANK SECRECY ACT.

A. The Existence of a Duty Owed by Bank of America is not Required for the Receiver's Aiding and Abetting Claims

In Counts I, II, and IX of the Complaint the Receiver alleges separate claims for aiding and abetting breach of fiduciary duty, aiding and abetting conversion, and aiding and abetting fraudulent transfer, respectively (the "Aiding and Abetting Claims"). Bank of America argues that the Aiding and Abetting Claims must fail because (as *Bank of America* interprets the Receiver's Complaint) the Receiver, in support of the Aiding and Abetting Claims, relies upon an alleged failure by Bank of America to comply with the know-your-customer requirements of the Bank Secrecy Act (the "BSA").[5] In formulating this argument, Bank of America relies upon the holdings in a number of federal cases, which generally state that because no private cause of action exists under the BSA, it cannot be used to form the basis for a duty owed to a party.[6]

Bank of America's arguments that the Receiver fails to properly allege the bank's duty to third parties in connection with the Aiding and Abetting Claims are simply misdirected. Bank of America has nowhere explained *why* it should matter to this Court whether such a duty existed.

[5] Bank of America also makes this argument with respect to the Receiver's claim for negligence at Count III of the Amended Complaint. The Receiver admits that the negligence claim pleads reliance upon the BSA. However, for reasons that are addressed in detail herein in another section, the Receiver asserts that the negligence claim is nonetheless viable because it is also supported with factual allegations independent of those referencing the BSA. The Receiver requests leave to amend his pleadings to clarify the negligence claim.

[6] See, James v. Heritage Valley Fed. Credit Union, 197 F.App'x 102 (3d Cir. 2006) and other cases cited by Bank of America in tis Motion to Dismiss.

To the contrary, ***the existence of a duty is not required for aiding and abetting liability***. See Neilson v. Union Bank of California, N.A., 290 F. Supp. 2d 1101, 1135 (C.D. Cal. 2003) (construing California law and rejecting the suggestion that aiding and abetting liability rests on the existence of a duty by the aider and abettor). Unlike a claim for negligence, Bank of America, as the defendant charged with aiding and abetting Theodule, need not owe a duty to the Receivership Entities to be held liable. It is sufficient for the Receiver to merely allege that Theodule owed a duty to the Receivership Entities and has breached it.

B. The Receiver's Wire Transfer Liability Claims Do Not Rely Upon a Duty Owed by Bank of America Pursuant to the Bank Secrecy Act

Bank of America's assertion that the Receiver relies upon a duty arising under the BSA in support of his wire transfer liability claims is simply incorrect. The language used by the Receiver in both counts is quite clear. The Receiver does not allege a duty owed by Bank of America under the BSA. Instead, the Receiver specifically states in the Complaint that Bank of America owed a duty to the Receivership Entities ***"pursuant to Article 4A of the Uniform Commercial Code."*** (See ¶¶ 89 and 100 of the Complaint.)

Article 4A of the Uniform Commercial Code requires that wire transfers be conducted "in good faith" and defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Fla. Stat. § 670.105. "Every contract or duty within [the U.C.C.] imposes an obligation of good faith in its performance or enforcement." Regions Bank v. Provident Bank, Inc., 345 F.3d 1267, 1276 (11th Cir. 2003).

Although the Receiver does not allege any duty owed by Bank of America arising from the BSA, the Complaint does include allegations that certain conduct undertaken by Bank of America in connection with BSA regulations may have contributed to Bank of America's breach of its duties under the Uniform Commercial Code. However, such allegations should not be construed to defeat the Receiver's wire transfer claims. Contrarily, these allegations are germane to the wire transfer claims. Bank of America acquired knowledge of the Ponzi scheme fraud in carrying out its obligations under the BSA, which in turn led to its breach of duty under Article 4A of the Uniform Commercial Code to conduct the wire transfers "in good faith." Indeed, the Receiver's makes such an allegation concerning Bank of America's knowledge of Theodule's illicit operations (and the resulting failure by Bank of America to properly act upon such knowledge) at Paragraph 39 of the Complaint which states:

> Notwithstanding policies and practices it had in place that made it fully aware that the Theodule Receivership Entities and related investment money laundering/Ponzi scheme, BOA, as set forth below, in the interests of its own profits, chose to aid and participate in the fraud. (Complaint ¶ 39.)

Finally, even if the language in the Complaint regarding Bank of America's actions in connection with the BSA are determined by this Court to be improper in the context of the Receiver's wire transfer claims, the Receiver has alleged sufficient additional facts concerning conduct by Bank of America which is outside of the scope of the BSA to support his claims. More specifically, the Receiver makes the following allegations concerning Bank of America's knowledge of the Theodule Ponzi scheme which lead to the presumption that the wire transfers identified by the Receiver were not made in good faith as required by the Uniform Commercial Code[7]:

- In conjunction with Theodule's opening of his personal and Creative Capital Accounts, BOA undertook certain due diligence on its new customers, including discussing with Mr. Theodule his purported occupation as a financial advisor. (Complaint ¶ 43.)

- As part of its due diligence on its new customers, Bank of America would have contacted Theodule's former bankers at Wachovia Bank and

[7] These very same allegations also support the Receiver's claims for common law negligence set forth at Count III of the Complaint. Similar to the wire transfer claims, the Receiver's negligence claims rely upon significant material factual allegations which are outside the scope of the BSA.

Washington Mutual Bank, from which it would have learned that the accounts of Theodule and the Receivership Entities were closed by Wachovia and Washington Mutual due to the suspicious nature of banking activity. (Complaint ¶¶ 29, and 49.)

- An internet search on the Financial Industry Regulatory Authority ("FINRA") website, which Bank of America's employees were trained to do in the case of fiduciary accounts controlled by financial advisors and brokers, confirmed that neither Theodule nor the Receivership Entities had any securities or investment-related licenses. (Complaint ¶ 46.)

- Bank of America knew from its internet search on Sunbiz.org, the Florida Division of Corporations' website, that as of June 25, 2008, G$Trade, one of the Receivership Entities, listed German Cardona as an officer and director. An internet search of the name German Cardona in 2008 identifies Mr. Cardona as the purported perpetrator of a Ponzi scheme that scammed thousands of investors around the world of millions of dollars. The Spanish government issued a public statement in April 2008 warning that Cardona was the subject of an ongoing investigation for running an alleged Ponzi scheme and was not authorized to provide investment services in Spain. Panama had also issued a public statement warning against doing business with Cardona or his company. (Complaint ¶¶ 47 and 48.)

- Despite knowing that "investment club" accounts are well-known vehicles for carrying out Ponzi scheme operations, and despite Bank of America's own policy prohibiting the opening of such accounts, Bank of America nonetheless allowed at least 20 such investment club accounts to be opened in conjunction with the Theodule Ponzi scheme and facilitated millions of dollars in transfers from the investment club accounts and into the Theodule personal accounts and the Receivership Accounts. (Complaint ¶¶ 49 through 54.)

- Bank of America facilitated the transfer of more than $7 million to Theodule's personal bank accounts from one single investment club account held by Wealth Builders Circle, LLC. Bank of America was aware that there was no legitimate investment purpose these taransfers and was aware that Theodule's wife was an officer and director of Wealth Builders. (Complaint ¶¶ 61 and 62.)

V. THE RECEIVER HAS PROPERLY STATED CLAIMS UPON WHICH RELIEF MAY BE GRANTED WITH RESPECT TO EACH AND EVERY COUNT IN THE AMENDED COMPLAINT

In addition to the foregoing general legal arguments, Bank of America attacks each Count in the Complaint as being factually or structurally deficient for purposes of stating a claim upon which relief may be granted under Fed. R. Civ. P. Rule 12 (b)(6). The Receiver disputes each of Bank of America's arguments in this regard as addressed separately below.

A. The Receiver Properly States a Claim for Aiding and Abetting Breach of Fiduciary Duty

There are four elements for a claim of aiding and abetting a breach of fiduciary duty: (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. In re Caribbean K Line, Ltd., 288 B.R. 908 (S.D. Fla. 2002); In re Meridian Asset Mgmt., Inc., 296 B.R. 243 (Bankr. N.D. Fla. 2003).

Although the first two elements regarding *duty* and *breach of duty* are not contested by Bank of America in its Motion to Dismiss, it is important to note (for purposes of the Receiver's arguments going forward) that the fiduciary duty which the Receiver asserts is owed to the Receivership Entities by Theodule in support of the aiding and abetting breach of fiduciary duty claims arises in the second, so-called "embezzlement phase" of the Ponzi scheme. Theodule, as a corporate officer of the Receivership Entities, owes a fiduciary obligation to the Receivership Entities and must act in good faith and in the best interest of the Receivership Entities. Tillis v. United Parts, Inc., 395 So. 2d 618 (Fla. 5th DCA 1981). Specifically, Theodule's fiduciary duty to the Receivership Entities was to administer and care for the funds of the Receivership Entities in a prudent manner. Theodule's breach of that fiduciary duty occurred when Theodule wrongfully, and in bad faith, transferred the funds of Receivership Entities to himself and to third parties without legitimate consideration and without any valid business purpose.

Having established the elements of *duty* and *breach of duty*, the remaining analysis required to determine whether the Receiver has adequately alleged a claim for breach of fiduciary duty is: (1) whether the Receiver adequately alleges that Bank of America had knowledge of Theodule's failure to act in good faith in connection with the transfers he wrongfully made or directed with the Receivership Entities' funds in the Bank of America deposit accounts; and (2) whether the Receiver adequately alleges that Bank of America rendered substantial assistance to Theodule in connection with those transfers.

(i) The Receiver Adequately Alleges Bank of America's Knowledge of Theodule's Wrongdoing and the Rendering of Substantial Assistance.

Bank of America's argument that the Receiver fails to adequately allege knowledge of Theodule's breach of fiduciary duty relies upon Lawrence v. Bank of America, N.A., 2010 WL 3467501 (M.D. Fla. 2010)[8]. The court in Lawrence concluded that *actual knowledge* of wrongdoing is required in connection with a claim for aiding and abetting breach of fiduciary duty. However, this Court should view the Lawrence decision with skepticism because it fails to establish a foundation based upon Florida law to support its conclusion.

[8] In its Motion to Dismiss, Bank of America *cites* cases other than Lawrence in support of the proposition that allegations of *actual* knowledge are required to support adding and abetting claims. Specifically, Bank of America cites Bruhl v PricewaterhouseCoopers, 2007 WL 98263 (S.D. Fla. 2007); Amerifirst Bank v. Bomar, 757 F.Supp. 1365 (S.D. Fla. 1991); and Tew v. Chase Manhattan Bank, 728 F. Supp. 1551 (S.D. Fla. 1990.) However, none of these cases address the requirement of *actual* knowledge in the context of an aiding and abetting claim. Bank of America also cites the New York decision of Rosner v Bank of China, 2008 WL 5416380 (S.D.N.Y. 2008.) The Rosner case holds that actual knowledge is required in a claim for aiding and abetting *fraud*. The Receiver does not assert a claim for aiding and abetting fraud.

Lawrence expressly relies upon Hines v. Fiserv, Inc., 2010 WL 1249838 (M.D. Fla. 2010) to determine that actual notice of wrongdoing by a defendant is *strictly required* to support aiding and abetting breach of fiduciary duty. However, a close reading of Hines reveals that the Hines court dismissed the aiding and abetting breach of fiduciary claims before it *on other grounds*. The requirement of actual notice mandated by Hines was directed toward claims for *aiding and abetting fraud*, not breach of fiduciary duty. Hines at 2010 WL 1249838 *4 ("Under Florida law, liability for aiding or abetting *fraud* requires a showing that an underlying *fraud* existed, the defendant had knowledge of the *fraud*, and the Defendant substantially assisted the commission of the *fraud*.").

By contrast, this Court, in Smith v. First Union Nat. Bank, 2002 WL 31056104 (S.D. Fla. 2002), embarked upon a detailed analysis concerning the issue of a defendant's knowledge in connection with claims for aiding and abetting breach of fiduciary duty. The Honorable Judge Ungaro-Benages reconciled cases decided by the Eleventh Circuit and other federal circuits addressing the issues of "knowledge" and the "rendering of substantial assistance" in relation to aiding and abetting claims.[9] The conclusions reached in Smith indicate that the "level" of knowledge required to prove a claim for aiding and abetting varies depending upon the factual circumstances of each case, and in certain circumstances the knowledge of an aiding and abetting party may even be "inferred." Smith v. First Union Nat. Bank, 2002 WL 31056104 *3 (S.D. Fla. 2002).

The Eleventh Circuit has determined that "a person may be held as an aider and abettor . . if the accused party has a ***general awareness*** that his role was a part of an overall activity that is improper, and if the accused aider-abettor knowingly and substantially assisted the violation."

[9] As explained further by the Receiver in discussing the Smith v First Union decision, the Eleventh Circuit sees the elements of "knowledge" and "substantial assistance" as being intertwined.

Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1009 (11th Cir. 1985) (quoting Woodward v. Metro Bank of Dallas, 522 F.2d 84, 94-95 (5th Cir. 1975)). See also Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793 (3rd Cir.), cert. denied, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed. 2d 323 (1978) (involvement "may be demonstrated by proof that the aider-abettor had ***general awareness*** that his role was part of an overall activity that is improper") (citations omitted).

Expanding upon the reasoning developed by the Eleventh Circuit, the United Sates District Court in Smith v First Union Bank declared:

> ***In discussing the "general awareness" requirement, courts have noted that the surrounding circumstances and expectations of the parties were critical, because knowledge of the existence of a violation must usually be inferred. Moreover, courts have observed that knowledge could be shown by circumstantial evidence, or by reckless conduct***, but cautioned that the proof must demonstrate actual awareness of the party's role in the fraudulent scheme. Importantly, however, for liability to attach merely for reckless conduct, a defendant must have been under a duty to disclose. Further, a defendant who is not under a duty to disclose can be found liable as an aider and abettor only if he acts with a high degree of scienter, that is, with a conscious intent to aid the fraud.
>
> In a case involving silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business involved. If the evidence shows no more than a transaction constituting the daily grist of the mill, we would be loathe to find liability without clear proof of intent to violate the laws. ***Conversely, if the method or transaction is atypical or lacks business justification, it may be possible to infer knowledge necessary for aiding and abetting liability.***

Smith v. First Union Nat. Bank, supra, 2002 WL 31056104 *3 (citations omitted) (emphasis added).

Applying the standard set forth in Smith v First Union, Bank of America's knowledge of Theodule's misconduct may be pleaded and proved ***circumstantially***. In the Complaint, the Receiver alleges a detailed account of actions undertaken by Theodule and insiders of the Ponzi scheme which if proven would certainly point to constructive knowledge by Bank of America of a wayward misappropriation by Theodule of the Receivership Entities' funds.

Even if this Court is inclined to impose a more stringent standard and require allegations that Bank of America had actual knowledge of Theodule's breach of fiduciary duties, the Receiver's Complaint still survives Bank of America's Motion to Dismiss. The Receiver's allegations of Bank of America's actual knowledge of the Theodule Ponzi scheme include, within a six-month span: (1) knowledge that Theodule and the Receivership Entities were operating an "investment" business without an appropriate brokers license; (2) knowledge that the source of the Receivership Entities' funds came from individual investors, including multi-million dollar inter-bank transfers from an investment club accounts some of which were controlled by Theodule's wife and by known Ponzi-schemer German Cardona; (3) knowledge that Wachovia Bank and Washington Mutual Bank had closed the Theodule accounts and the Receivership Entities accounts due to suspicious banking activity which included a determination that no legitimate business activity was being conducted; (4) over the counter cash withdrawals by Theodule in an amount exceeding $300,000 in the first three months of the banking relationship; (5) direct transfers to third-party accounts unrelated to investing exceeding $19 million dollars; (6) an actual complaint by an individual banking customer that the Receivership Entities had actually cashed her check in the amount of $80,000 meant for investment purposes; (7) multi-million dollar transfers to Theodule's personal accounts: and (8) knowledge that Thoedule was purportedly conducting an investment business and was thus under a fiduciary duty to protect the investment funds of his alleged "clients." (See ¶¶ 40 through 68 of the Complaint.)

Consistent with the holding in Smith v. First Union, in alleging Bank of America's "knowledge" of Theodule's wrongdoing, the Receiver identifies a series of "atypical" banking transactions, including significant cash transfers and withdrawals which are outside the scope of the "daily grist of the mill", and which lack any form of "business justification." These unusual transactions, in combination with Bank of America's active assistance in transferring the investment funds to third-parties and insiders for non-investment purposes; their unexplained failure to immediately close the Receivership Entities' bank accounts, and their understanding to a certain degree of malfeasance by Theodule based upon the past closures of bank accounts by Wachovia and Washington Mutual, all point to Bank of America's "general awareness" and "affirmative assistance" in furthering Theodule's breaches of fiduciary duty. (See Smith v. First Union Nat. Bank, 2002 WL 31056104 *5 (denying First Union's motion for summary judgment on similar grounds)).

(ii) The Receiver's Claim for Aiding and Abetting Breach of Fiduciary Duty Is Not Dependent Upon Any Duty to Disclose by Bank of America.

In its Motion to Dismiss, Bank of America argues, without justification, that the Receiver's aiding and abetting claims are somehow defeated because the Receiver has not and cannot allege that Bank of America had a duty to disclose Theodule's wrongdoings to the Receivership Entities.[10] However, as previously argued herein by the Receiver, unlike a claim for negligence, a claim for aiding and abetting does not require the existence of a duty by Bank of America as the aider and abettor to establish liability. See Neilson v. Union Bank of California, N.A., 290 F. Supp. 2d 1101, 1135 (C.D. Cal. 2003) (construing California law and

[10] Bank of America cites Freeman v. Dean Witter Reynolds, Inc., supra, 865 So.2d 543, for the proposition that a bank owes no duty to disclose the manner in which its customers use and spend their funds so long as withdrawals and transfers are made by authorized account users.

rejecting the suggestion that aiding and abetting liability rests on the existence of a duty by the aider and abettor). It is sufficient for the Receiver to merely allege that Theodule owed a duty to the Receivership Entities and has breached it with the knowledge and substantial assistance of Bank of America. See, In re Caribbean K Line, Ltd., 288 B.R. 908 (S.D. Fla. 2002); In re Meridian Asset Mgmt., Inc., 296 B.R. 243 (Bankr. N.D. Fla. 2003).

At best, Bank of America's contention that it had no duty to disclose Theodule's fiduciary breach is an affirmative defense under Fed. R. Civ. P. Rule 8(c) to be asserted in conjunction with its Answer to be filed in this case. An affirmative defense is defined as an "avoidance", or more specifically, as a "pleading that admits the allegations of the complaint but suggests some other reason why there is no right of recovery." See, Evergreen Media Corp. v. Radio & Television Broadcast Engineers, Local Union No. 1220 of Bhd. of Elec. Workers, 983 F.Supp. 731, 737 (D.C. Ill. 1997.) Bank of America's argument that it cannot be held liable because it had no duty to disclose Theodule's wrongdoings the Receivership Entities fits squarely within the definition of an affirmative defense.[11] The burden of proof for this affirmative defense rests with Bank of America, requires the presentation of factual evidence, and is not an appropriate subject for determination upon a motion to dismiss. Perlman v. Alexis, 2009 WL 3161830, 2009 *4 (S.D. Fla. 2009.)

However, even if this Court were to consider Bank of America's arguments concerning disclosure at this juncture, it would discover that the "disclosure defense" is fatally flawed. Bank of America proceeds as if disclosure was a necessary consequence of preventing Theodule from

[11] Indeed, part of Bank of America's "disclosure defense" incorporates arguments that the Receivership Entities were indistinguishable from Theodule himself and that there "was no honest person within the Receivership Entities to whom Bank of America could inform of Theodule's breach of fiduciary duty." As previously argued herein by the Receiver, this argument is merely the affirmative defense of *"in pari delicto"* clothed in this instance as a Rule 12(b)(6) argument for failure to appropriately state a claim upon which relief may be granted.

continuing to plunder the Receivership Entities' banking accounts. Such a presumption is simply untrue. Bank of America could simply have closed the bank accounts and refused to further accommodate Theodule and Receivership Entities. Disclosure was not a necessary part of the solution.

B. The Receiver Properly States a Claim for Aiding and Abetting Conversion.

In order to state a claim against Bank of America for aiding and abetting common law conversion committed by Theodule, the Receiver must allege: (1) the existence of a primary violation; (2) knowledge of this violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation. See 18 Am. Jur. 2d Conversion § 59 and the cases cited therein. The Receiver specifically pleads each and every one of these elements in his Complaint. (See Count II of the Complaint at ¶¶ 74 through 78.)

Reiterating it arguments regarding the issue of the Receiver's standing, Bank of America argues that the Receiver's claims for aiding and abetting conversion are "illusory" because the Receivership Entities and Theodule are in essence one and the same entity, and that therefore the Receivership Entities cannot have suffered any real injury[12]. The Receiver reiterates here those prior arguments establishing his standing, noting (with regard to the issue of standing) that the Receivership Entities themselves have suffered a separate "distinct and palpable" injury. In re: Fuzion Technologies Group, Inc., 32 B.R. 225 (Bankr. S.D. Fla. 2005); O'Halloran v. First Union Nat'l Bank of Fla., 350 F.3d 1197 (11th Cir. 2003).

[12] In opposing the Receiver's claims for aiding and abetting conversion, Bank of America also argues that the Receiver fails to adequately allege the elements of "actual knowledge" and "substantial assistance" by Bank of America. These arguments are set forth by in the Motion to Dismiss together with the Bank's arguments of purported lack of actual knowledge and substantial assistance concerning the Receiver's claims for aiding and abetting breach of fiduciary duty and rely upon the very same legal authorities. Thus, in response, the Receiver respectfully refers the Court to his prior arguments concerning the validity of his claims for aiding and abetting breach of fiduciary duty.

C. The Receiver Properly States a Claim for Negligence

For the Receiver to succeed on a negligence claim, he must "show that the defendant owed a duty of care to the plaintiff, that the defendant breached the duty, that the breach caused the plaintiff's injury, and that damages are owed." Miles v. Naval Aviation Museum Found., Inc., 289 F.3d 715, 722 (11th Cir. 2002) (citing Ewing v. Sellinger, 758 So. 2d 1196, 1197 (Fla. 4th DCA 2000)). In Florida, general bank deposits are merely arms-length transactions in which the bank owes no fiduciary responsibilities. First Nat'l Bank and Trust Co. of the Treasurer Coast v. Pack, 789 So. 2d 411, 414 (Fla. 4th DCA 2001); Maxwell v. First United Bank, 782 So. 2d 931, 934 (Fla. 4th DCA 2001). Thus, the general rule is that a bank has a duty to use ordinary care, presumptively in all its dealings. See Fla. Stat. §674.103.

A bank's duty of ordinary care may include a duty of disclosure under certain special circumstances. Such 'special circumstances' may be found where a bank, "***having actual knowledge of fraud being perpetrated upon a customer***, enters into a transaction with that customer in furtherance of the fraud." Barnett Bank of West Florida v. Hooper, 498 So. 2d 923, 925 (Fla. 1986) (emphasis added). In this regard, the Receiver has alleged that Bank of America had actual knowledge of fraud committed by Theodule in connection with Receivership Entity funds. Specifically the Receiver alleges (in myriad ways as previously stated herein) that Bank of America was aware that Theodule was in fact fraudulently stealing the funds of the Receivership Entities for his personal benefit. Such knowledge by the Bank of America gives rise to a duty to disclose facts underlying the fraud to prevent it from continuing. Id. Bank of America's failure to disclose Theodule's fraud constitutes a breach of duty sufficient to support the Receiver's common law negligence claims. Id.

With regard to its assertions that the Receiver's negligence claims are barred by the economic loss rule, Bank of America correctly argues that a contractual relationship existed among itself and the Receivership Entities. Deposit accounts generally give rise to an implied debtor/creditor agreement. MJZ Corp. v. Gulfstream First Bank & Trust, N. A., 420 So. 2d 396, 397 (Fla. 4th DCA 1982). However, the scope of such an implied agreement is limited and simply requires "on the part of the bank that the deposit will be paid out on the order of the depositor or returned to him upon demand." Id. Bank of America's duty to disclose the fraud being committed by Theodule in connection with his transactions at the bank is *not* a duty which arises under the alleged implied debtor/creditor contract among Bank of America and the Receivership Entities. Instead, the duty to disclose arises from "special circumstances" created by Bank of America's knowledge of the fraud being committed by Theodule. Barnett Bank of West Florida v. Hooper, supra, 498 So. 2d 923.

An exception to the economic loss rule has been carved out for tort actions which are independent of a contractual breach. PK Ventures, Inc. v. Raymond James & Assocs., 690 So.2d 1296, 1297 n. 3 (Fla.1997); HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238, 1239 (Fla.1996). Thus, the economic loss rule does not bar the Receiver's negligence action because Bank of America's legal duty to disclose Theodule's fraud is entirely independent of the implied contract among Bank of America and the Receivership Entities.

D. The Receiver Properly States Claims for Wire Transfer Liability

Bank of America argues that the Receiver's wire transfer liability claims must fail because the bank was simply fulfilling its legal obligations by processing wire transfers as directed by Theodule and other authorized persons of the Receivership Entities. Bank of America cites Freeman, supra at 865 So. 2d 549, as standing for the proposition that requiring the bank to "refuse to make payments that are legal on their face" would "radically alter the law of banking."

Bank of America's interpretation of the holding in Freeman contravenes the specific language of the Uniform Commercial Code as well as the underlying policy embodied therein. Article 4A requires that wire transfers be conducted "in good faith" and defines good faith as "***honesty in fact*** and the observance of reasonable commercial standards of fair dealing." Fla. Stat. § 670.105. (Emphasis added.) "Every contract or duty within [the U.C.C.] imposes an obligation of good faith in its performance or enforcement." Regions Bank v. Provident Bank, Inc., 345 F.3d 1267, 1276 (11th Cir. 2003). In his wire transfer claims the Receiver specifically alleges that Bank of America has violated its statutory duty of good faith under the U.C.C. because when it processed wire transfers directed by Theodule, the Bank concurrently had knowledge of Theodule's fraud. ***"It could hardly have been the intent of the drafters to enable a party to succeed in engaging in fraudulent activity, so long as it complied with the provisions of Article 4A."*** Id. (commenting upon identical provisions in the Georgia Uniform Commercial Code.) Emphasis added.

E. The Receiver Properly States Claims for Fraudulent Transfer

Other than reasserting its position that the Receiver *generally* lacks standing to pursue his claims[13], Bank of America's arguments that the Receiver fails to adequately allege his fraudulent transfer claims are two-fold. In the first of these two arguments, Bank of America sets forth a separate and discreet standing challenge specific to the Receiver's fraudulent transfer claims. In this regard, Bank of America asserts that the Receiver has failed to allege that the Receivership Entities are creditors with standing to pursue avoidance of the transfers. A review of the

[13] Issues regarding general standing have been previously addressed by the Receiver herein.

Complaint suggests otherwise. At paragraphs 107, 113, and 120 of the Complaint, respectively, the Receiver alleges:

> Since the inception of the Ponzi scheme by Theodule, numerous and ongoing transfers - disguised as legitimate investments and business transactions - were conducted among and between the Receivership Entities, including the Receivership Bank Customers. As a result of the claims arising among the Receivership Entities from those inter-company transfers, ***the Receiver standing in the shoes of the Receivership Entities is a "creditor" of the Receivership Bank Customers as defined by FUFTA***. Conversely, the receivership Bank Customers are 'debtors' with respect to the Receivership Entities as defined by FUFTA.

The term "creditor" as defined by FUFTA is broadly interpreted to give meaning to the statutory purpose of FUFTA. To utilize the protections of chapter 726, however, a plaintiff must show that he or she has a "claim" which qualifies the party as a "creditor." <u>See</u> § 726.102(4), Fla. Stat. (2002). As defined in § 726.102, a "claim" is broadly constructed and "means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 726.102(3), Fla. Stat. (2002). Thus, as settled in Florida and universally accepted, "[a] 'claim' under the Act may be maintained even though 'contingent' and not yet reduced to judgment." <u>Cook v. Pompano Shopper, Inc.</u>, 582 So. 2d 37, 40 (Fla. 4th DCA 1991); <u>see also</u> <u>Money v. Powell</u>, 139 So. 2d 702, 703 (Fla. 2d DCA 1962) ("In this state contingent creditors and tort claimants are as fully protected against fraudulent transfers as holders of absolute claims.")

Here, the Receiver has a "claim" under FUFTA (thus qualifying him as a "creditor" under FUFTA) by virtue of the fact that the Receiver alleges that the transfers among the Receivership Entities have created debts and/or claims among and between each of those entities. Thus, the Receiver, standing in the shoes of the Receivership Entities, succeeds to each of these inter-company debts and has a "claim" as a "creditor" against each one of the Receivership

Entities identified as a "debtor" in the Complaint. These allegations are sufficient to establish creditor status on behalf of the Receiver under FUFTA. See Perlman v. Five Corners Investors I, 2010 WL 962953 (S.D. Fla. 2010.)

Secondly with respect to the Receiver's fraudulent transfer claims, Bank of America argues that it is a "mere conduit" in connection with the transfers alleged by the Receiver, and that their lack of dominion and control over the transferred funds acts as an absolute bar to the Receiver's avoidance of the transfers. As a preliminary matter, the "mere conduit" defense is an *affirmative defense* which must be pleaded and proven by Bank of America at trial. It is not an issue to be considered in connection with a motion to dismiss. Dept. of Ins. v. Blackburn, 633 So. 2d 521, 524 (Fla. 2d DCA 1994).

Moreover, Bank of America's assertion that it never had control over the transferred funds, standing alone, is not sufficient to avoid potential liability as an initial transferee. The conduit defense is an equitable defense, and as part of the mere conduit or control test, this Court must consider whether Bank of America as an alleged intermediary "acts without bad faith, and is simply an innocent participant" to the fraudulent transfer. In re Harwell, 628 F.3d 1312, 1323 (11th Cir. 2010). Thus, initial recipients of the fraudulently transferred funds who seek to take advantage of the conduit defense must establish, *both* that they did not have control over the assets received, *and* that they acted in good faith and as an innocent participant in the fraudulent transfer. Id.

F. The Receiver Properly States a Claim for Aiding and Abetting Fraudulent Transfer

Bank of America argues that Freeman v. First Union Nat'l Bank, 865 So. 2d 1272 (Fla. 2004) precludes the Receiver's claim for aiding and abetting fraudulent transfer. However, Wachovia's interpretation of Freeman is over-reaching. Freeman holds only that there is no cause of action for aiding and abetting a fraudulent transfer against a ***non-transferee***. Freeman, 865 So. 2d at 1276 (emphasis added). A recent decision from the Bankruptcy Court, Southern District of Florida, emphasized that Freeman's holding is ***limited to aiding and abetting claims against non-transferees.*** 8699 Biscayne, LLC v. Indigo Real Estate, LLC, 2010 WL 1375558 at *3 (Bankr. S.D. Fla. 2010).

Indeed, nearly every case citing Freeman in connection with claims for aiding and abetting a fraudulent transfer limits its holding to ***non-transferees***. See ZP No. 54 Ltd. P'ship v. Fidelity and Deposit Co. of Maryland, 917 So. 2d 368, 372 (Fla. 5th DCA 2005) (FUFTA "does not provide a vehicle by which a person could bring a suit against a non-transferee party" for aiding and abetting a fraudulent transfer) (emphasis added); In re Ridley Owens, Inc., 391 B.R. 867, 869 (Bankr. N.D. Fla. 2008) ("non-transferees or individuals that merely assisted in the transacting of a fraudulent transfer could not be held liable under FUFTA"); Walker v. Hallmark Bank & Trust, Ltd., 2010 WL 1226141 at *4 (Bankr. S.D. Fla. 2010) (there is no language in FUFTA that suggests the creation of a cause of action "for aiding and abetting claims against non-transferees"); Paloian v. Greenfield (In re Restaurant Dev. Group, Inc.), 397 B.R. 891, 898 (Bankr. N.D. Ill. 2008) (same).

In his fraudulent transfer claims at Counts VI, VII, and VIII of the Complaint, the Receiver alleges that Bank of America is an initial transferee of the proposed avoidable transfers. Bank of America has the burden of proof in connection with asserting the conduit defense as an affirmative defense to the fraudulent transfer claims. Unless and until Bank of America is able to prove that it is not an initial transferee, the Receiver should not be precluded from pursuing his claims for aiding and abetting fraudulent transfer.

CONCLUSION

For the reasons set forth above, the Receiver respectfully requests that Bank of America's Motion to Dismiss be denied in its entirety. Alternatively, should this Court dismiss any of the claims in the Receiver's Complaint, the Receiver requests that such dismissal be ordered without prejudice and the Receiver be granted leave to amend the Complaint as necessary.

Dated: July 8, 2011
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2011, 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 below 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/David P. Lemoie
Attorney

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CASE NO. 11-80331-CIV-HURLEY/HOPKINS
United States District Court, Southern District of Florida

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