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 AMENDED 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 Fed. R. Civ. P 12(b)(6) and 12(f) and S. D. Local Rule 7.1, moves the Court for the entry of an Order dismissing the Amended Complaint (ECF No. 19) 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 "had no legitimate business operations." *See* Amended Complaint, ECF No. 19, ¶¶ 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* Amended Complaint, ECF No. 19, ¶¶ 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* Amended Complaint, ECF No. 19, ¶¶ 9, 23.

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 (the "Accounts"). *See* Amended Complaint, ECF No. 19, ¶ 31.

In the Amended Complaint, Perlman is attempting to assert eight (8) causes of action against Wachovia for: (1) Aiding and Abetting Breach of Fiduciary Duty (Count I); (2) Aiding and Abetting Conversion (Count II); (3) Common Law Negligence (Count III); (4) Wire Transfer Liability-Article 4(A) (Count IV); (5) Wire Transfer Liability-Federal Reserve Regulation J (Count V); (6) Avoidance and Recovery of Fraudulent Transfers Pursuant to Chapter 726 of The Florida Statutes (Count VI); (7) Avoidance and Recovery of Fraudulent Transfers Pursuant to Chapter 726 of The Florida Statutes (Count VII); and (8) Aiding and Abetting Fraudulent Transfers (Count VIII).

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) As to all counts of the Amended Complaint, 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) As to all counts of the Amended Complaint, since, by Perlman'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) As to all counts of the Amended Complaint, the Receivership Entities' claims are barred by the doctrine of *in pari delicto* in that they cannot recover for their own wrongdoing;

(4) As to all counts of the Amended Complaint, to the extent Perlman is seeking to impose liability upon Wachovia for alleged violations of the Bank Secrecy Act/Anti-Money Laundering, 31 U.S.C. 5311, et. seq. ("BSA/AML"), Perlman fails to state a cause of action upon which relief can be granted because no private cause of action exists under the BSA/AML.

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[1] Although Nerline Horace-Manasse ("Horace-Manasse") is seeking class action relief, no class has been certified. Wachovia vehemently disputes the ability of any Theodule investor to ever state a cause of action against Wachovia, let alone certify or maintain a class action, 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.

(5) As to Count I of the Amended Complaint, 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 Amended Complaint are that there was no honest person within the Receivership Entities to report Theodule's misconduct to, and (ii) the Amended Complaint fails to sufficiently allege that Wachovia had actual knowledge of or provided substantial assistance to the alleged misconduct. Indeed, the Receiver makes specific reference to actions taken by Wachovia to thwart the alleged misconduct, including, investigating and ultimately closing numerous bank accounts within four months of when they were opened;

(6) As to Count II of the Amended Complaint, 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;

(7) As to Count III of the Amended Complaint, the Receiver fails to state a cause of action against Wachovia for common law negligence because: (i) applicable law does not impose a duty upon Wachovia to investigate the prudency of transactions which the Receiver contends were directed by authorized representative(s) of the Receivership Entities; and (ii) the Receiver's claim against Wachovia for common law negligence is barred by the economic loss rule;

(8) As to Counts IV and V of the Amended Complaint, the Receiver fails to state a cause of action for wire transfer liability under Article 4(A) of the Uniform Commercial Code ("UCC" or the "Code")(Count IV) or Regulation J of the Board of Governors for the Federal Reserve System, 12 C.F.R. 210.25, et. seq. ("Regulation J")(Count V). These laws neither impose a duty upon Wachovia to investigate the prudency of transactions directed by authorized representative(s) of the Receivership Entities nor do they impose liability upon a bank where payment orders were

processed in accordance with the instructions provided by authorized representative(s) of the Receivership Entities;

(9) As to Count VI and VII of the Amended Complaint, the Receiver fails to state a cause of action for avoidance and recovery of fraudulent transfers pursuant to Chapter 726, Fla. Stat. because the allegations demonstrate that Wachovia was not the intended recipient of the allegedly transferred proceeds and never actually controlled the allegedly transferred proceeds. As a matter of law, when banks receive money for the sole purpose of depositing it into a customer's account, the bank never has actual control of the funds.

(10) As to Count VIII of the Amended Complaint, the Receiver fails to state a cause of action for aiding and abetting fraudulent transfer because the Supreme Court of Florida has expressly held that no such cause of action exists in Florida.

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 Amended Complaint should be dismissed with prejudice.

Furthermore, in the event any portion of Perlman's Amended Complaint survives the instant Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(f), certain portions of the Amended Complaint should be stricken because they are immaterial, impertinent, or scandalous. Specifically, in an apparent attempt to aggrandize 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.[3] Perlman also refers to an entirely unrelated proceeding with the United States and alleges that "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 only conceivable purpose of these scandalous, immaterial, and impertinent allegations is to cause prejudice and inflame the Court against Wachovia. There is no contention that this separate proceeding has any relation to the instant controversy, and it in fact refers to different parties prior to the time period that the Receivership Entities maintained any accounts at Wachovia. Accordingly, pursuant to Fed. R. Civ. P. 12(f), in the event the Amended Complaint is not dismissed in its entirety with prejudice, the allegations characterizing Wachovia as "business friendly" (to Ponzi scheme perpetrators) and the allegations regarding the unrelated proceeding described above should be stricken.

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). 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). "Only a Complaint that states a plausible claim for relief survives a motion

[3] Perlman also states that Wachovia was "business friendly" in the same context in paragraphs 29, 42, 49, and 52 of his Amended Complaint with the same implication and all such allegations should be stricken. *See* Amended Complaint, ECF No. 19, ¶¶29, 42, 49, and 52.

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.* 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).

Moreover, a shotgun pleading practice in which each count of a complaint improperly incorporates all preceding paragraphs of the Complaint is a violation of Fed. R. Civ. P. 10(b) and have been "roundly, repeatedly, and consistently condemn[ed] by the Eleventh Circuit." *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 995, 979 (11th Cir. 2008); *see also Cesnik v. Edgewood Baptist Church*, 88 F.3d 902, 905 (11th Cir. 1996). This is because a shotgun pleading makes it "virtually impossible to know which allegations are intended to support which claim(s) for relief." *Anderson v. Dist. Bd. Of Trustees of Cent. Fla Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996). Shotgun pleadings "water[] down the rights of the parties to have valid claims litigated efficiently" and "wreak havoc on the judicial system" *Bryne v. Nezhat*, 261 F.3d 1075, 1130 (11th Cir. 2001). Perlman's Amended Complaint does precisely this as he has improperly incorporated all prior allegations into each subsequent count of the Amended Complaint. Perlman's Amended Complaint should be dismissed for this reason alone.

Likewise, the allegations of the Amended Complaint are entirely unclear as to the amount of damages Perlman is seeking to recover and the basis therefore. For example, Perlman suggests that Wachovia is liable for "all damages actually and proximately caused to the Receivership Entities through the acts and omissions of Theodule"… "in an amount exceeding $68 million dollars". *See* Amended Complaint, ECF No. 19, ¶¶ 60-61 (which are incorporated in all counts). However, in paragraph 55 of the Amended Complaint, which is incorporated in all counts, Perlman alleges that Wachovia's actions enabled Theodule to transfer $38 million of stolen investment funds. *See*

Amended Complaint, ECF No. 19, ¶ 55. Then, in paragraph 96 of the Amended Complaint, Perlman alleges that the total amount deposited into the Accounts was $19,607,916. *See* Amended Complaint, ECF No. 19, ¶ 96, Exhibit B. Perlman's inconsistent allegations in this regard are in violation of Fed. R. Civ. P. 8(a)(3), and make it impossible for Wachovia to know what relief Perlman is seeking from Wachovia in each of his counts and the basis therefore. The Amended Complaint should also be dismissed for this reason.

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 and statutory claims under Florida and Federal 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.

However, 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 (at least one of whom is separately seeking class action 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 Wachovia and the Court. Both the instant action and the Horace-Manasse Action seek the same 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. Theodule's investors cannot collect twice. There can only be one recovery, if any. 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 recoveries.

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 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.[4] *Freeman*, 865 So.2d at 545.

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 Amended Complaint, ECF No. 19, ¶¶ 8, 9,14, 23, 26. Similarly, Perlman contends that the Receivership Entities "operated as nothing more than a classic Ponzi scheme." *See* Amended Complaint, ECF No. 19, ¶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'

[4] As explained in Section B, *supr*a, 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.

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.[5] 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 an honest

[5] 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) failed 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 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 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 "had no legitimate business operations." "The Receivership Entities operated as nothing more than a classic Ponzi scheme." *See* Amended Complaint, ECF No. 19, ¶¶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 Amended 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 – here it is alleged that there was no legitimate entities) 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). Perlman clearly alleges that the Receivership Entities were controlled by Theodule and that their only existence was to perpetrate Theodule's Ponzi scheme. *See* Amended Complaint, ECF No. 19, ¶¶ 6, 14.

While Wachovia recognizes that the *in pari delicto* defense generally requires a factual inquiry preventing it from being addressed on a motion to dismiss, in this case, the Court need not look any further than the allegations of the Amended Complaint to determine that the *in pari delicto* defense applies. Here, more than two years after his appointment as receiver and conducting

substantial discovery and a thorough investigation of the Receivership Entities, Perlman has determined "that the Receivership Entities had ***no legitimate business operations***" and confirmed that the Receivership Entities "operated as ***nothing more*** than a classic Ponzi scheme." (emphasis added). *See* Amended Complaint, ECF No. 19, ¶14. It is these allegations that permit this Court to address the *in pari delicto* defense at this time and distinguish this case from other cases where the *in pari delicto* defense did not apply or could not be resolved on a motion to dismiss.

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 of the Amended Complaint 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* Amended Complaint, ECF No. 19, ¶¶6, 14.

E. <u>There is No Private Cause of Action For Alleged Violations of the BSA/AML</u>

A number of Perlman's counts against Wachovia appear, in substance, to be seeking recovery for alleged violations of the BSA/AML. Specifically, in his general allegations, Perlman outlines what he contends to be Wachovia's obligations under the BSA/AML and takes the position that Wachovia violated certain BSA/AML provisions. *See generally* Amended Complaint, ECF No. 19, ¶¶ 32-41. Perlman incorporates these allegations into each of his eight (8) attempted causes of action. Additionally, Counts I, II, III, IV, V, and VIII all appear to be based upon Wachovia's alleged violations of BSA/AML. *See* Amended Complaint, ECF No. 19, ¶¶61, 66, 71, 78, 89, 111.[6]

[6] Perlman also makes the vague reference to local and internal regulatory banking procedures and policies. *See* Amended Complaint, ECF No. 19, ¶61. Perlman has not identified or attached any local and internal regulatory banking procedures and policies or described how Wachovia violated any of these purported local and internal regulatory banking procedures and policies. Paragraph 61 of the Amended Complaint is yet another example of Perlman's improper pleading tactic of setting forth a blur of legal theories while failing to identify what laws, policies, and/or duties Wachovia allegedly violated and how. *Cesnik*, 88 F.3d at 905-906.

The law, however, is abundantly clear that no private cause of action exists against Wachovia for alleged violations of BSA/AML. *See e.g.*, *Freeman*, 865 So.2d at 551 (no private cause of action exists for a bank's failure to comply with regulatory statutes); *James v. Heritage Valley Fed. Credit Union*, 197 Fed Appx. 102, 106 (3rd Cir. 2006) (The BSA does not authorize a private cause of action against a financial institution or its employees.); *Hanninen v. Fedoravitch*, 583 F. Supp. 2d 322, 326 (D. Conn 2008) (neither Patriot Act nor Bank Secrecy Act creates private cause of action); *Armstrong v. American Pallet Leasing, Inc.,* 678 F.Supp.2d 827, 875 (N.D. Iowa 2009) (BSA does not permit a private right of action); *Aiken v. Interglobal Mergers and Acquisitions*, 2006 WL 1878323 at *2 (S.D.N.Y. 2006) (Neither the BSA or the Patriot Act affords a private right of action); *Martinez Colon v. Santander National Bank*, 4 F Supp. 2d 53, 58 (D.P.R. 1998) (The BSA provides for civil and criminal penalties, but a defendant's only liability is to the government).

As detailed above, the basis for Perlman's claims against Wachovia (at least in Counts I, II, III, IV, V, and VIII) are the alleged violations of his interpretation of various banking laws, including BSA/AML, for which no private cause of action exists. As a preliminary matter, where a statute does not provide for a private cause of action, it cannot be used to form the basis for a duty owed to a party. *Aiken*, 2006 WL 1878323 at *2. In dismissing the Plaintiff's Complaint, the *Aiken* Court held that it could not impose a duty of care based upon a statute that does not permit a private right of action. *Id. citing to New York Univ. v. Continental Ins. Co.,* 87 N.Y.2d 308, 318 (1995) (observing that "[i]f the statute does not permit a private right of action in favor of an insured ... it cannot be construed to impose a tort duty of care flowing to the insured").

Moreover, Perlman cannot maintain a claim where none exists by labeling it under a host of different legal theories. Courts must look beyond the label placed on a claim to the substance of the claim. *Premix-Marbletite Mfg. Corp. v. SKW Chems., Inc.,* 145 F.Supp.2d 1348, 1358

(S.D.Fla.2001). Any other outcome would result in permitting a plaintiff to make an end run around the economic loss rule by simply labeling a claim under a different legal theory. *Tyco Safety Products Canada, Ltd. v. Abracon Corp.*, 2008 WL 4753728 at *3 (S.D. Fla. 2008); *Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So.2d 74, 77 (Fla. 3d DCA 1977)("where the only alleged misrepresentation concerns the heart of the parties' agreement, simply applying the label of "fraudulent inducement" to a cause of action will not suffice to subvert the sound policy rationales underlying the economic loss doctrine."); *Puff 'N Stuff of Winter Park, Inc. v. Bell,* 683 So.2d 1176, 1178-1180 (Fla. 5th DCA 1996)(Judge Harris, concurring specially)("almost any contract claim can be framed as a fraud in the inducement action…Therefore it seems more appropriate, if the economic loss rule has any real substance, to look not at the label placed on the claim by the attorney but rather at the substance of the claim.").

Perlman may not maintain causes of action for alleged BSA/AML violations or other unspecified banking rules and regulations simply by his counsel labeling those alleged violations as causes of action for aiding and abetting (Counts I, II, and VIII), negligence (Count III), or wire transfer liability (Counts IV and V). In other words, allowing Perlman to maintain claims against Wachovia based upon alleged BSA/AML violations or other unspecified banking rules and regulations, would amount to judicially creating a private cause of action for those alleged violations and allowing personal liability where Congress has expressly declined to do so. Accordingly, Perlman's Amended Complaint against Wachovia must be dismissed with prejudice.

F. 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 Amended Complaint Fail to Show That Wachovia Had Actual Knowledge of or Provided Substantial Aid to the Alleged Breaches of Fiduciary Duty

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* Amended Complaint, ECF No. 19, ¶59. Perlman contends that Wachovia had actual and constructive knowledge and rendered substantial assistance to Theodule's breaches of his fiduciary duties by: "affording Theodule special privileges, by allowing continuous, suspicious, and obviously fraudulent banking activity, and by failing to adhere to federal, local and internal regulatory banking procedures and policies…" *See* Amended Complaint, ECF No. 19, ¶61.

1. <u>There Was No Honest Person Within The Receivership Entities To Report Any Alleged Breaches of Fiduciary Duty</u>

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 the allegations of the Amended Complaint are that 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.

2. <u>The Allegations of the Amended Complaint Fail to Establish That Wachovia Had Actual Knowledge of Theodule's Alleged Breaches of His Fiduciary Duties</u>

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 Ct. Appointed Receiver of Lancer Management Group LLC v. Lauer*, 2008 WL 906274 at *5 (S.D.Fla. 2008). "**<u>Actual</u>**, **<u>not constructive</u>**, knowledge is

required to impose liability on an alleged aider and abettor." *Lawrence v. Bank of America, N.A.*, 2010 WL 3467501 at *3, (M.D. Fla. 2010) *citing to Rosner v. Bank of China,* 2008 WL 5416380 at *4 (S.D.N.Y. 2008)(emphasis added). "Red flags or aroused suspicions do not constitute actual awareness of one's role in a fraudulent scheme." *Ct. Appointed Receiver of Lancer Offshore, Inc. v. Citco Group Ltd.*, 2008 WL 926513 at *6 (S.D.Fla. 2008).

When the conclusory and sensationalized statements are removed from the Amended 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* Amended Complaint, ECF No. 19, ¶¶34-55.

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* Amended Complaint, ECF No. 19, ¶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 delivered their proceeds to an alleged con-artist 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.

Likewise, 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* Amended Complaint, ECF No. 19, ¶51.

In *Lawrence* 2010 WL 3467501 at *3, 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* at *5-7 (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).

Moreover, in the Amended Complaint, the only specific fact which Perlman alleges to support his claim that Wachovia had actual knowledge of fraudulent activity in the Accounts is that "Wachovia made special accommodations for Theodule's extraordinary cash withdrawals by agreeing to deliver large amounts of cash through the drive-thru window in order to reduce the risk of theft from having Theodule or a Creative capital employee walk out of the branch carrying the large bags of cash Wachovia was providing." *See* Amended Complaint, ECF No. 19, ¶46. Even if true, an allegation that Wachovia provided security assistance to a customer to "reduce the risk of theft" in no way justifies the conclusory leap that Wachovia knew that Theodule and the

Receivership Entities were defrauding their investors and is wholly insufficient to establish actual knowledge of any improper activity of Theodule and the Receivership Entities.

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.

3. The Allegations of the Amended Complaint Fail to Demonstrate That Wachovia Provided Substantial Assistance to 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 and providing security assistance to a customer to reduce the risk of theft, 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 Amended 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* Amended Complaint, ECF No. 19, ¶¶47-49. Perlman also acknowledges that it was Wachovia who closed accounts when Wachovia could not find any evidence of investing occurring. *See* Amended Complaint, ECF No. 19, ¶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 Amended Complaint should be dismissed with prejudice.

G. 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 Amended 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 only used by to perpetuate Theodule's 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 own 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 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 and Count II of Perlman's Amended Complaint should be dismissed with prejudice.

H. Count III – The Receiver's Common-Law Negligence Claim Fails Because: (1) Wachovia Had No Obligation To Ensure that Proceeds In the Accounts Maintained by the Receivership Entities Were Not Diverted or Looted and (2) The Receiver's Common-Law Negligence Claim is Barred by the Economic Loss Rule

1. 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 in Count III of his Amended Complaint, Perlman is in substance arguing that Wachovia owed a fiduciary duty of care to verify that the wire transfers directed by the Receivership Bank Customers (as defined in paragraph 68 of the Amended Complaint were for proper purposes, and not for purposes of converting or dissipating those proceeds. *See* Amended Complaint, ECF No. 19, ¶¶67-73. 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 the same allegations herein and does not allege that any transaction was

initiated on the Accounts by an individual who was not authorized by Theodule or the Receivership Bank Customers to conduct those transactions. 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.

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

2. The Common-Law Negligence Claim Is Barred By The Economic Loss Rule

In Count III, Perlman is seeking to allege a claim against Wachovia for Florida common-law negligence. Any such claim is clearly barred by the economic loss rule because 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 delivery of money to a bank implies an agreement 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.* (internal citations omitted).

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 in Count III pertain only to wire transfers conducted on the Accounts by authorized representatives of the Receivership Bank Customers. As noted above, Perlman cannot subvert the economic loss rule by simply labeling a claim under a different legal theory. *Puff 'N Stuff,* 683 So.2d at 1177-1180. Thus, Perlman's common-law negligence claim is barred by the economic loss rule and Count III of the Amended Complaint should be dismissed with prejudice.

I. Counts IV and V – The Receiver's Claims for Violations of U.C.C. Article 4(A) and Regulation J Fail To State A Cause of Action Because Plaintiff Alleges That Wachovia Processed/Effectuated the Payment Orders As Directed By Authorized Representatives of the Receivership Entities

In Counts IV and V, Perlman seeks to impose liability upon Wachovia for the wire transfers processed at the direction of Theodule or others appointed by him. *See* Amended Complaint, ECF No. 19, ¶¶76, 84. Specifically, Perlman alleges that Wachovia owed a duty of care to the Receivership Entities and that Wachovia violated UCC Article 4(A) and Regulation J "by violating banking regulations, including the KYC requirements of the Bank Secrecy Act and other prudent and sound banking practices and procedures as more fully identified in paragraphs 29 through 56 herein and/or lacked good faith in processing or effectuating the Wire Transfers based upon its knowledge of suspicious activities relating to the accounts of the Receivership Bank Customers." *See* Amended Complaint, ECF No. 19, ¶¶77, 78, 88, 89.

There is simply no legal support within U.C.C. Article 4(A) and Regulation J for Perlman's attempted causes of action. As noted above, as a matter of law, Wachovia "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 allegation that any wire transfer was initiated by an unauthorized person. Rather, Perlman contends that the wire transfers were processed at Theodule's direction. *See* Amended Complaint, ECF No.

19, ¶¶76, 84. There is also no allegation that Wachovia failed to process a wire transfer in accordance with the instructions provided to Wachovia. As noted above, Perlman's contentions "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…" *Freeman*, 865 So.2d at 553.

Moreover, as described in Section E supra, to the extent Perlman is seeking to assert a private cause of action against Wachovia for alleged BSA/AML violations simply by his counsel labeling it as causes of action for wire transfer liability, such claims cannot stand. 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* Amended Complaint, ECF No. 19, ¶¶79, 90.

Accordingly, Perlman has not and cannot state a cause of action against Wachovia for alleged violations of U.C.C. Article 4(A) or Regulation J and Counts IV and V of the Amended Complaint should be dismissed with prejudice.

J. Count VI and VII - The Receiver's Fraudulent Transfer Claims Fail Because the Allegations of the Amended Complaint Demonstrate that Wachovia Was Not the Intended Recipient of the Transferred Proceeds and Never Actually Controlled the Transferred Proceeds

In Counts VI and VII, Perlman is seeking to recover pursuant to Chapter 726, Fla. Stat. for all amounts the Receivership Bank Customers allegedly deposited into the Accounts (Count VI) and all amounts allegedly transferred between the Accounts during the four month period that they maintained the Accounts at Wachovia (Count VII). *See* Amended Complaint, ECF No. 19, ¶¶93-104.

In *Super Vision Int'l, Inc. v. Mega Int'l Commercial Bank, Co. Ltd.*, 534 F. Supp. 2d 1326, 1337 (S.D. Fla. 2008), Plaintiff/Judgment-Creditor, Super Vision International, Inc. ("Super Vision"), sought to recover for fraudulent transfers from Mega International Commercial Bank

("Mega") claiming that transfers were allegedly made to accounts held by Judgment-Debtor, Sampson Wu ("Wu"), Wu-controlled entities, or other insiders, in an effort to hinder, delay, or defraud Wu's creditors and that Mega accepted such transfers. The *Super Vision* Court dismissed Super Vision's fraudulent transfer claim against Mega, because Mega was the conduit, not the transferee, and Mega was not alleged to have controlled the funds at issue. *Id.* at 1344. The *Super Vision* Court expressly observed that: "where defendants simply held the property as agents or conduits for one of the real parties to the transaction ... Defendants never actually *controlled* the funds and therefore it would be inequitable to allow recovery against them.. Although a bank can gain control of funds that are transferred to it, such as when a bank receives a transfer to pay a debt owed to the bank, when banks receive money for the sole purpose of depositing it into a customer's account, on the other hand, the bank never has actual control of the funds." *Id.* (internal quotations omitted) *citing to Chase & Sanborn Corp. v. Societe Generale,* 848 F.2d 1196, 1200, (11th Cir.1988).

Like in *Super Vision*, Perlman is seeking to impose fraudulent transfer liability upon Wachovia for the amounts allegedly transferred into and between the Accounts. While Perlman labels Wachovia a transferee and not a conduit (*see* Amended Complaint, ECF No. 19, ¶¶97, 103), the allegations of the Amended Complaint clearly show otherwise. Wachovia recognizes that the "mere conduit" defense is, at times, premature for a motion to dismiss. However, the allegations of the Amended Complaint make it clear that the Court can dispose of Perlman's fraudulent transfer claims at this stage of the proceedings. The allegations of the Amended Complaint evidence that transfers allegedly made were not for the benefit of Wachovia, but rather were deposited into the Accounts for the benefit of the Receivership Bank Customers. *See* Amended Complaint, ECF No. 19, ¶¶96, 102. Specifically, it is not alleged that the allegedly transferred proceeds were ever held in accounts titled in Wachovia's name or controlled by Wachovia. Rather, the allegations of the

Amended Complaint make it clear that the allegedly transferred proceeds were at all times held in the names of the Receivership Bank Customers, which Wachovia did not control as a matter of law. In other words, the allegations of the Amended Complaint show that Wachovia was merely the bank used by the Receivership Bank Customers to transfer their funds into and between their Accounts. Accordingly, as a matter of law, Wachovia was, at most, a conduit, and not a transferee, and never had actual control of the proceeds allegedly transferred into and between the Accounts.

Moreover, Perlman fails to adequately plead any cause of action for avoidance of fraudulent transfer. To establish such a cause of action, Perlman must allege that: (1) there was a creditor sought to be defrauded; (2) a debtor intending to defraud; and (3) a conveyance of property which could have been available to satisfy the debt. *Nationsbank, N.A. v. Coastal Utils., Inc.*, 814 So.2d 1227, 1229 (Fla. 4th DCA 2002). An equity receiver may not pursue fraudulent transfer claims owned by the creditors of the Receivership Entities, but rather can only pursue claims on behalf of Receivership Entities that qualify as creditors. *Freeman*, 865 So.2d at 550. A noted above, the only parties who can possibly qualify as creditors are Theodule's investors since the allegations of the Amended Complaint are that the Receivership Entities are sham entities that "had no legitimate business operations", but rather were simply the alter egos of Theodule that existed solely to perpetuate Theodule's Ponzi scheme. *See* Amended Complaint, ECF No. 19, ¶¶ 6, 14.

Furthermore, the Amended Complaint does not adequately plead that any of the eight Receivership Entities (as identified in fn. 1 of the Amended Complaint) are creditors of the four Receivership Bank Customers (as defined in paragraph 68 of the Amended Complaint). In fact, each of the Receivership Bank Customers are Receivership Entities themselves. Thus, Perlman's Amended Complaint does not allege and cannot establish a debtor-creditor relationship or the other requirements needed to state a fraudulent transfer claim.

Accordingly, as a matter of law, Perlman has not and cannot state a cause of action against Wachovia for avoidance of fraudulent transfer pursuant to Chapter 726, Fla. Stat. and Counts VI and VII of Perlman's Amended Complaint should be dismissed with prejudice.

K. Count VIII – The Receiver's Claim for Aiding and Abetting Fraudulent Transfer Fails Because No Such Cause of Action Exists in Florida

In Count VIII, Perlman is seeking to impose liability upon Wachovia for allegedly aiding and abetting the fraudulent transfers of the Receivership Entities. *See* Amended Complaint, ECF No. 19, ¶¶105-111. However, the Florida Supreme Court has expressly ruled that there is no cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee. *Freeman v. First Union Nat'l Bank,* 865 So.2d 1272, 1275- 1277 (Fla.2004). In reaching this conclusion, the Florida Supreme Court expressly stated: "To adopt the appellants' position in this case would be to expand the FUFTA beyond its facial application and in a manner that is outside the purpose and plain language of the statute. Consistent with this analysis we conclude that FUFTA was not intended to serve as a vehicle by which a creditor may bring a suit against a non-transferee party (like First Union in this case) for monetary damages arising from the non-transferee party's alleged aiding-abetting of a fraudulent money transfer." *Id.* at 1277.

As noted in Section J, supra, the allegations of the Amended Complaint demonstrate, as a matter of law, that Wachovia is not a transferee and never actually controlled the proceeds allegedly transferred into and between the Accounts. Accordingly, the Florida Supreme Court has expressly determined that no cause of action exists against Wachovia for aiding and abetting fraudulent transfer and Court VIII of the Complaint must be dismissed with prejudice.

L. 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* Amended Complaint, ECF No. 19, ¶¶30, 31.

Perlman then makes reference to a totally unrelated proceeding against Wachovia which largely pertained to certain transfers between accounts 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 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* Amended Complaint, ECF No. 19, ¶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 Amended Complaint is not dismissed in its entirety with prejudice, the allegations in paragraphs 29, 30, 31, 42, 49, and 52 of the Amended Complaint should be stricken because they have no possible legitimate relation to the controversy and may cause prejudice to Wachovia.

III. CONCLUSION

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

Dated: April 21, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 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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Southern District of Florida

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