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

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

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

Plaintiff,

v.

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

Defendant.
_____/

RECEIVER'S RESPONSE IN OPPOSITION TO WELLS FARGO BANK, N.A.'S MOTION TO DISMISS AMENDED 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 Wells Fargo Bank, N.A.'s ("Wachovia"[1]) Motion to Dismiss Amended Complaint and/or Motion to Strike Immaterial, Impertinent, and Scandalous Matter [DE 23] (the "Motion to Dismiss"), and states as

[1] Wells Fargo Bank, N.A. is the successor-in-interest of Wachovia Bank, N.A. in connection with a December 31, 2008 merger transaction.

follows[2]:

PRELIMINARY STATEMENT

Wachovia's Motion to Dismiss should be denied with respect to each and every one of the Receiver's claims. Wachovia fails to correctly interpret or apply the controlling legal authority in connection with the arguments raised in their Motion to Dismiss, alternatively, their arguments are overcome by the well-pled facts in the Amended Complaint. Specifically, Wachovia's arguments in the Motion to Dismiss fail for the following reasons:

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

(ii) The defense of *in pari delicto* does not apply to the Receiver because his appointment cleanses the Receivership Entities of any alleged wrongdoing. Alternatively, even if *in pari delicto* does apply, its application requires factual proof beyond the confines of the Motion to Dismiss.

(iii) The Receiver's claims do not rely upon Wachovia's violation of the Bank Secrecy Act for their proof.

(iv) The Receiver properly states a claim upon which relief may be granted under Fed. R. Civ. Rule 12(b)(6) with respect to each and every Count of the Amended Complaint.

[2] Simultaneous 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. Accordingly, the Receiver had no objection to the Defendant's request for leave to exceed page limitation for its Motion to Dismiss. [DE 21]. In turn, the Defendant has no objection to the Receiver's similar request for leave to exceed page limitation for his response to the Motion to Dismiss.

For the reasons set forth above, as more fully argued by the Receiver in the Memorandum of Law below, Wachovia'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).

The Eleventh Circuit has interpreted Twombly to require that a complaint need only

specify enough facts "to raise a reasonable expectation that discovery will reveal evidence" of the required element. Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1309 (11th Cir. 2008) (*per curium*) (citing Twombly, 127 S.Ct. at 1965). In other words, the complaint need only identify "facts that are suggestive enough to render [the element] plausible." Id. This is simply all that is required at this stage of the litigation. There is no requirement of probability, or of any detail - just plausibility. A complaint need only plead "enough factual matter (taken as true) to suggest" the required element. Watts v. Florida Int'l. Univ., 495 F.3d 1289, 1296 (11th Cir. 2007) (quoting Twombly, 127 S.Ct. at 1965)).

II. 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. Wachovia's Motion to Dismiss represents a "facial" challenge because it relies exclusively on the allegations of the Amended Complaint.

In order to survive Wachovia's standing challenge and to satisfy Constitutional requirements, the Receiver need only state *general* factual allegations of injury resulting from Wachovia'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 Wachovia Bank accounts.

The factual allegations forming the foundation of the financial injury incurred by the Receivership Entities are evident throughout the Amended 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. (Am. Compl. ¶¶ 42, 43, 64, 95, and 96). Second, the Receiver alleges the banking relationship among Wachovia and the Receivership Entities and the establishment of deposit accounts by the Receivership Entities. (Am. Compl. ¶¶ 31, 35, 39, 42, and 50). Third, the Receiver alleges Wachovia's actual or constructive knowledge of the Ponzi scheme and the resultant failure by Wachovia to close the Receivership Entities' accounts. (Am. Compl. ¶¶ 31 through 56, 61, 65, 80, 90, and 91). Fourth and finally, the Receiver alleges that the Receivership Entities were injured by the loss of funds transferred from their accounts occasioned by Wachovia's failure to act. (Am. Compl. ¶¶ 60, 64, 73, 76, 81, 85, 92, 96, 102, and 108).

B. The Receivership Entities Have Suffered Actual, Cognizable Injury

Despite the Receiver's clear allegations of financial injury to the Receivership Entities,

Wachovia nonetheless asserts that the Receiver lacks standing to pursue his claims in this case. In support of its arguments, Wachovia relies largely upon Freeman v. Dean Witter Reynolds, Inc., 865 So.2d 543 (Fla. 2d DCA 2003).[3] In sum, using Freeman as its platform, Wachovia 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.

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

[3] Wachovia also refers to Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 92 S.Ct. 1678, 32 L.Ed. 2d 195 (1972), in support of its standing challenge. In fact, Caplin supports the Receiver's standing. The bankruptcy trustee in Caplin was suing on claims that belonged exclusively to certain bondholders, to the exclusion of all other creditors having an interest in the estate. Caplin holds only that a bankruptcy trustee may not act solely to benefit a distinct group of creditors. See id. at 429. As noted above, the claims that the Receiver is pursuing in the instant matter are brought for the benefit of the Receivership Entities generally; they are not limited to a specific group of investors. Nothing in Caplin undermines the authority of the Receiver to pursue the instant claims.

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).

Wachovia's first argument that the losses to investors arising from the Ponzi scheme, having only "passed through" the Receivership Entities, somehow negates a separate "distinct and palpable" 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, Wachovia'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.[4] While the most obvious 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.

Wachovia's second argument concerning standing appears to have two prongs. First, Wachovia 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,[5] 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***

[4] 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.
[5] 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 Wachovia. A direct examination of the each of the Receiver's claims in the Amended Complaint is revealing in this regard:[6]

[6] To the extent that the Court determines that the nature of the claims is not clear given the language of the Amended 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 Wachovia 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 Wachovia 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 Wachovia 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 Wachovia's "knowledge of fraudulent wire transfers."

(4) Counts IV and V directly allege "wire transfer liability" arising from wires initiated by Wachovia 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.

The Receiver's claims do not focus upon the wrongful deeds imposed upon the investors during the operation of the Ponzi scheme. 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.

The second prong of Wachovia's argument regarding the Receivership Entities alleged lack of "legally cognizable damages" suggests that the Receivership Entities are sham corporations indistinguishable from Theodule himself. Wachovia 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, Wachovia 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, as argued below, Wachovia bears the burden of proof in connection with this affirmative defense. It is premature at this stage of the pleading for this Court to rule on the issue of *in pari delicto*. The Receiver anticipates presenting evidence that Wachovia's *in pari delicto* defense is insufficient based upon the facts underlying the Receiver's claims.

III. THE RECEIVER'S CLAIMS ARE NOT DEFEATED BY *IN PARI DELICTO*

A. *In Pari Delicto* Does Not Apply to Receivers

The equitable doctrine of *in pari delicto* provides that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1152 (11th Cir. 2006). However, Florida law recognizes that *in pari delicto* is improperly invoked where a lawsuit serves important public purposes. The *in pari delicto* defense is not "woodenly applied in every case" because "the principal [behind it] is founded on public policy . . . [thus] it may give way to a supervening public policy." Kulla v. E.F. Hutton & Co., Inc., 426 So.2d 1055, 1057 n.1 (Fla. 3d DCA 1983); see also Off. Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1152 (11th Cir. 2006).

Recognition of public policy concerns underlying the equitable principles of the *in pari delicto* as it applies to equity receivers was intoned by the Seventh Circuit in Scholes v. Lehman,

56 F.3d 750 (7th Cir.1993). The Scholes court concluded that an innocent receiver should be allowed to pursue its claims against insiders because to find otherwise would wholly frustrate the statutory scheme underlying the Receiver's appointment:

> [A] wrongdoer must not be allowed to profit from his wrong by recovering property that he had parted with in order to thwart his creditors. That reason falls out now that [the wrongdoer] has been ousted from control of and beneficial interest in the corporations. The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the wrongdoer's] evil zombies. Freed from his spell they became entitled to the return of the moneys -- for the benefit not of [the wrongdoer] but of innocent investors -- that the [wrongdoer] had made the corporations divert to unauthorized purposes. ***Put differently, the defense of in pari delicto loses its sting when the person who is in pari delicto is eliminated.*** Now that the corporations created and initially controlled by [the wrongdoer] are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by [the wrongdoer].

Scholes, 56 F.3d at 754 (citations omitted) (emphasis added).

The Receiver is clearly not tainted by the prior wrongful conduct of Theodule and others who may have benefitted from his wrongdoings. The Receiver serves an important public purpose by his appointment to recover funds for the benefit of those injured by the fraud. *In pari delicto* is improperly invoked where a lawsuit serves important public purposes. See Perma Lif Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138-39 (1968) (collecting cases where the Court refused to apply *in pari delicto* to bar plaintiffs' suits in antitrust cases); Bateman, Echler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (denying *in pari delicto* defense in private actions initiated under federal securities laws to promote the laws' primary objectives of protecting the investing public and the national economy).

Accordingly, *in pari delicto* should not bar the Receiver from bringing suit. "The appointment of a receiver displaces the managers who had engaged in the wrongful conduct, and

thus ensures that any recovery would go to the receiver and ultimately the innocent creditors, rather than the wrongdoers. Perlman v. Alexis, 2009 WL 3161830, *4 (S.D. Fla. 2009).

B. *In Pari Delicto* is Not a Proper Subject for a Motion to Dismiss

Wachovia's request for dismissal under *in pari delicto* is premature, at best, and is improperly raised before the Court at this time. The doctrine of *in pari delicto* is an affirmative defense requiring *factual proof* by Wachovia. 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).

Wachovia admits in its Motion to Dismiss that "the *in pari delicto* defense generally requires a factual inquiry" precluding its application at this stage. Nonetheless, Wachovia argues that the allegations in the Amended Complaint are somehow irrefutable proof that Theodule's actions in the Ponzi scheme should be imputed to the Receivership Entities. The Receiver disputes this argument. Even if the allegations in the Amended Complaint *did* determine conclusively that the Receivership Entities acted in concert with Theodule in perpetrating the Ponzi scheme, Wachovia still has not proven its *in pari delicto* defense. Further factual inquiry is still required.

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.

C. Wachovia's *In Pari Delicto* Defense is Overcome by the Adverse Interest Exception

A pleadings-based determination of *in pari delicto* in this case would deprive the Receiver of the opportunity to present facts in evidence which give rise to the adverse interest exception to *in pari delicto*. The adverse interest exception provides that the misconduct of an agent of a corporation may not be imputed to the corporation when the agent acts adversely to the corporation's interests. Beck v. Deloitte & Touche, 144 F.3d 732, 736 (11th Cir. 1998); Seidman & Seidman v. Gee, 625 So. 2d 1, 2-3 (Fla. 3d DCA 1992); O'Halloran v. PricewaterhouseCoopers LLP, 969 So. 2d 1039, 1045 (Fla. 2d DCA 2007).

The Eleventh Circuit has identified the type of conduct which gives rise to the adverse interest exception as being tantamount to an officer's "looting" of the corporate assets for his own benefit. Liquidation Commission of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339 (11th Cir. 2008). In Renta, the corporate officers in question diverted funds from the corporation for their own personal gain and acted outside the scope of their corporate authority and purpose. As a result, the Eleventh Circuit did not impute their wrongdoing to the corporation. Id. at 1355.

As averred in the Receiver's Amended Complaint, Theodule was driven by personal greed, shamelessly abusing the Receivership Entities through the development of a Ponzi scheme. Similar to the wrongdoers in the Renta case, Theodule acted in concert with certain

family members and insiders of the Receivership to loot and raid the coffers of the Receivership Entities for personal gain. Through his misconduct, Theodule has forsaken the Receivership Entities for his self-interest and ceased to function within the scope of his corporate agency. His conduct falls within the "adverse interest exception" to *in pari delicto*, and his actions cannot be imputed to the Receivership Entities.

Nonetheless, while recognizing the adverse interest exception in its Motion to Dismiss, Wachovia argues, under the "sole actor" doctrine, that the exception to imputation does not apply because Theodule and his insiders "wholly dominated" the Receivership Entities. The "sole actor" doctrine provides that the adverse interest exception to the imputation rule is inapplicable when the corporate officer committing malfeasance is the sole representative of that corporation. There simply is no one to whom to impart his knowledge and no one from whom he may conceal it. When a corporation has multiple officers and directors, the sole actor rule may apply when all relevant shareholders and decision-makers are involved in the fraud. In re Phoenix Diversified Inv. Corp., 439 B.R. 231, 242 (Bankr. S.D. Fla. 2010) (citations and internal quotes omitted).

The Receiver asserts that there exist one or more innocent principals of the Receivership Entities who were not involved in Theodule's fraudulent scheme, and that any argument regarding the sole actor doctrine will be overcome by the evidence presented at trial. Like other aspects of the *in pari delicto* defense, a determination of whether or not there exist innocent principals to negate Wachovia's sole actor allegation requires a review of the evidence. Consequently, the Court should not apply the sole actor rule at the motion to dismiss stage in this case.

IV. WACHOVIA'S ARGUMENTS THAT VIOLATIONS OF THE BANK SECRECY ACT PROVIDE NO PRIVATE CAUSE OF ACTION ARE MISPLACED

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

In Counts I, II, and VIII of the Amended 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"). Wachovia argues that the Aiding and Abetting Claims must fail because (as *Wachovia* interprets the Receiver's Amended Complaint) the Receiver, in support of the Aiding and Abetting Claims, relies upon an alleged failure by Wachovia to comply with the know-your-customer requirements of the Bank Secrecy Act (the "BSA").[7] Wachovia relies upon Aiken v. Interglobal Mergers and Acquisitions, 2006 WL 1878323 (S.D.N.Y 2006), which states 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, and that therefore the Receiver has somehow failed to state any claims upon which relief may be granted in connection with the Aiding and Abetting claims.

Wachovia'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. Wachovia has nowhere explained *why* it should matter to this Court whether such a duty existed. 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 (CD Cal. 2003) (construing California law and rejecting the suggestion that aiding and abetting liability rests on the existence

[7] Wachovia 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 viable and further supported with other factual allegations independent of those referencing the BSA. The Receiver requests leave to amend his pleadings to clarify the negligence claim.

of a duty by the aider and abettor). Unlike a claim for negligence, Wachovia, 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 Wachovia's Breach of the Bank Secrecy Act

Counts IV and V of the Amended Complaint allege Wire Transfer Liability on behalf of Wachovia. However, Wachovia's assertion that the Receiver relies upon Wachovia's breach of the BSA in support of these claims is simply incorrect. The language used by the Receiver in both counts is quite clear. The Receiver specifically states that Wachovia owed a duty to the Receivership Entities ***"pursuant to Article 4A of the Uniform Commercial Code."*** Nowhere in either of these claims does the Receiver allege duty or breach under the BSA. (See ¶¶ 78 and 87 of the Am. Compl.).[8]

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, Wachovia attacks each of the Counts in the Amended 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 Wachovia's arguments in this regard as addressed separately below.

[8] While the Receiver, in the very first paragraph of Counts IV and V (as well as in all other Counts of the Amended Complaint), as is common in federal pleadings, re-alleges all prior facts, this should not be construed, and is not meant by the Receiver to be construed, as somehow alleging a breach of duty based upon the BSA. Moreover, such "re-allegations" are germane to the wire transfer claims, as Wachovia certainly could have acquired knowledge of the Ponzi scheme fraud in carrying out its obligations under the BSA, which in turn could have led to its breach of duty under Article 4A of the Uniform Commercial Code. (See ¶¶ 80 and 91 of the Am. Comp.).

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 elements one and two above (regarding duty and breach of duty) are uncontested by Wachovia, 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.[9] 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. (See Am. Compl. ¶ 59).

Thus the remaining analysis required to determine whether the Receiver has adequately

[9] The distinction between the "solicitation phase" and the "embezzlement phase" of a Ponzi scheme is referred to by the Receiver in his arguments herein regarding standing. See Knauer v. Jonathon Roberts Fin. Group, Inc., 348 F.3d 230 (7th Cir. 2003).

alleged a claim for breach of fiduciary duty is: (1) whether the Receiver adequately alleges that Wachovia 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 Wachovia deposit accounts; and (2) whether the Receiver adequately alleges that Wachovia rendered substantial assistance to Theodule in connection with those transfers.

Wachovia's argument that the Receiver fails to adequately allege knowledge of Theodule's breach of fiduciary duty relies **exclusively** upon Lawrence v. Bank of America, N.A., 2010 WL 3467501 (M.D. Fla. 2010). 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.

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.[10] 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." 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

[10] 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.

> 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, 2002 WL 31056104 *3 (citations omitted) (emphasis added).

Applying the standard set forth in Smith v First Union, Wachovia's knowledge of Theodule's misconduct may be pleaded and proved ***circumstantially***. In the Amended 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 Wachovia of a wayward misappropriation of the Receivership Entities' funds. These allegations include, within a five-month span, among other things: (1) knowledge that Theodule and the Receivership Entities were operating an "investment" business; (2) knowledge that the source of the Receivership Entities' funds came from individual investors, including multi-million dollar inter-bank transfers from investment accounts; (3) over the counter cash withdrawals exceeding $1 million dollars; (4) transfers to third-parties unrelated to investing exceeding $38 million dollars; (5) and transfers in excess of $40 million dollars to Theodule's personal accounts and personal brokerage accounts. (See ¶¶ 31 through 55 of the Am. Compl.).

Moreover, even if this Court is inclined to impose a more stringent standard and require allegations that Wachovia had actual knowledge of Theodule's breach of fiduciary duties, the Amended Complaint should still survive Wachovia's Motion to Dismiss. The Receiver adequately and alternatively pleads that Wachovia in fact ***knew*** about Theodule's fleecing of the

Receivership Entities' accounts. In this regard the Receiver alleges: (1) Wachovia ***knew*** Theodule and the Receivership Entities were in the investment business and classified their bank accounts under the heading "Securities/Commodities" (Am. Compl. ¶ 38); (2) Wachovia ***knew*** that Theodule was an "investment adviser" and that the Receivership Entities' accounts contained investor funds for which Theodule had a fiduciary duty to protect (Am. Compl. ¶¶ 39, 50); (3) as opposed to merely failing to conduct due diligence concerning Theodule's past banking relationships and lack of qualifications and licensing as an investment profession, Wachovia alternatively ***knew*** of these issues and chose to ignore them (Am. Comp. ¶ 40); (4) Wachovia ***knew*** that a multitude of "Investment Clubs" opened accounts at Wachovia nearly simultaneously with the Receivership Entities and began transferring funds to the Receivership Entities accounts at Wachovia (Am. Compl. ¶¶ 43, 45, 47); and (5) Wachovia admitted in writing that it ***knew*** that "there was no evidence of any investing going on and that money was merely washing through the account from hand to hand." (Am. Compl. ¶ 54).

The Receiver's allegations of Wachovia's "knowledge" of Theodule's wrongdoing based on the series of "atypical" banking transactions detailed above, combined with allegations regarding Wachovia's active assistance in transferring the investment funds to third-parties and insiders for non-investment purposes; their unexplained failure to report the suspicious banking activity; and their acknowledging a degree of malfeasance by stating in writing that they were aware that "there was no evidence of any investing going on" all point to Wachovia'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)).

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

In order to state a claim against Wachovia 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 adequately pleads his claims for aiding and abetting conversion.[11] (Am. Compl. ¶¶ 62 through 66).

Repeating its arguments with regard to the issues of standing and *in pari delicto*, Wachovia argues in its Motion to Dismiss 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. 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); and noting (with regard to issues of *in pari delicto*) that "the appointment of a receiver displaces the managers who had engaged in the wrongful conduct, and thus ensures that any recovery would go to the receiver and ultimately the innocent creditors, rather than the wrongdoers." (Perlman v. Alexis, 2009 WL 3161830 *4 (S.D. Fla. 2009)).

C. The Receiver Properly States a Claim for Negligence

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). However, contrary to Wachovia's assertions, the Receiver does not allege

[11] Wachovia does not take issue with the ultimate facts pleaded by the Receiver in support of his claims for aiding and abetting conversion.

(in his negligence claim) that Wachovia breached fiduciary duties owed to the Receivership Entities in connection with the Wachovia bank deposits. The Receiver's claims in the Amended Complaint instead sound in general common-law negligence.

In Florida, for a plaintiff 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)). The general rule is that a bank has a duty to use ordinary care, presumptively in all its dealings. See Fla. Stat. §674.103.

Wachovia's actual knowledge of fraud committed by Theodule in connection with Receivership Entity funds may have given rise to a duty upon Wachovia to disclose facts underlying the fraud to prevent it from continuing. A bank has "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).

Furthermore Wachovia's duty to disclose the fraud being committed by Theodule in connection with his transactions at the bank is *not* a duty governed by the alleged implied debtor/creditor contract among Wachovia and the Receivership Entities. Under Florida law, the scope of such an implied agreement 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." MJZ Corp. v. Gulfstream First Bank & Trust, N. A., 420 So. 2d 396, 397 (Fla. 4th DCA 1982). The Receiver's negligence claim is therefore not barred by the economic loss rule as suggested by Wachovia,

because the claim sounds in tort entirely independent of the implied agreement. "Where a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from acts that breached the contract." Moransais v. Heathman, 744 So. 2d 973, 981 (Fla. 1999).

D. The Receiver Properly States Claims for Wire Transfer Liability

Wachovia's arguments that the Receiver's wire transfer liability claims are without "legal support within U.C.C. Article 4" contravene the specific language of the Uniform Commercial Code. 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. "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). "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).

In his wire transfer claims the Receiver properly alleges that Wachovia has violated its statutory duty of good faith under the U.C.C. in connection with processing wire transfers directed by Theodule. The basis of the Receiver's allegations of lack of good faith are grounded in Wachovia's alleged knowledge of Theodule's fraud.

E. The Receiver Properly States Claims for Fraudulent Transfer

Wachovia's assertions that the Receiver fails to adequately allege his fraudulent transfer claims are two-fold. In the first of these two assertions, Wachovia 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 Wachovia 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, Wachovia'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 Wachovia as the 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.

Wachovia's second argument seeking to dismiss the Receiver's fraudulent transfer claims states 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 Amended Complaint suggests otherwise. At paragraphs 95 and 101 of the Amended 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." See § 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." Cook v. Pompano Shopper, Inc., 582 So. 2d 37, 40 (Fla. 4th DCA 1991); see also Money v. Powell, 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 Amended 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).

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

Wachovia 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 and VII of the Amended Complaint, the Receiver alleges that Wachovia is an initial transferee of the proposed avoidable transfers. Wachovia has the burden of proof in connection with asserting the conduit defense as an affirmative defense to the fraudulent transfer claims. Unless and until Wachovia 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.

VI. OTHER ISSUES RAISED IN THE MOTION TO DISMISS

A. The Amended Complaint Does Not Constitute a "Shotgun Pleading"

Wachovia's spurious accusations that the Amended Complaint constitutes a "shotgun pleading" are patently false. The Receiver's claims are set forth in an orderly fashion and supported by a chronological and subject organized factual recitation leaving little doubt of the Reciever's meaning, direction, and intent. Each count, where applicable, provides a description and approximate amount of damages sought. In no fashion does the Amended Complaint resemble the "shotgun pleading" described in Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955 (11th Cir. 2008) cited in Wachovia's Motion to Dismiss. Obfuscation is not the Receiver's goal.[12]

Moreover, Wachovia implies that the incorporation of preceding paragraphs by the Receiver into each successive count is somehow a violation of federal pleading requirements. It is not. Nor do the cases cited by Wachovia support such a proposition. The message conveyed by those cases instead is that each count in a complaint should contain discrete and separate claims -- which the Amended Complaint clearly does. To the extent Wachovia is truly confused by the Amended Complaint it could (and should) have filed a Motion for More Definite Statement to outline what it perceived to be unclear.[13]

B. The Allegations Concerning Wachovia's Past Transgressions Are Not Immaterial, Nor Are They Intended to be Impertinent or Scandalous

In the Amended Complaint at ¶ 30, the Receiver alleges facts concerning past

[12] It is telling that in the more than 17 ancillary proceedings filed by the Receiver using the same set of operative facts, no other Defendant has ever raised an issue concerning the clarity of the Receiver's pleadings.

[13] The Receiver's counsel have been nothing short of professional in dealing with Wachovia's counsel. Alternatively to filing a motion for a more definite statement, they could have simply called and asked for clarification and an agreed amendment.

transgressions by Wachovia for violations of the Bank Secrecy Act, including Wachovia's failure to file Suspicious Activity Reports and Currency Transaction Reports. These are substantive allegations and not intended as scandalous. The allegations are supportive of the Receiver's claims that Wachovia, through, among other things, its failure to comply with banking regulations, acts in a reckless fashion and fails to implement internal controls and procedures to acquire necessary information about its customers and to curb resulting fraud. The facts were gained from available public sources and are true and accurate to the best of the Receiver's knowledge. Wachovia's potentially reckless conduct is certainly an issue in this case, particularly with regard to the aspect of good faith as it relates to the fraudulent transfer and aiding and abetting claims. The allegations should remain in the Amended Complaint as pled by the Receiver.

CONCLUSION

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

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Dated: May 23, 2011
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 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
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