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

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

Plaintiff,

vs.

BANK OF AMERICA, N.A.,

Defendant.
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CASE NO. 11-80331-CIV-HURLEY/ HOPKINS

DEFENDANT BANK OF AMERICA, N.A.'S MOTION TO DISMISS AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

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Defendant Bank of America, N.A. ("Bank of America"), pursuant to Federal Rules of Civil Procedure 8(a) and 12(b)(6), moves this Court for an Order dismissing the Receiver's Amended Complaint in its entirety. The Amended Complaint—filed after this Court entered its December 22, 2011 Order, granting in part and denying in part Defendant's Motion to Dismiss ("Dismissal Order"), asserts claims for aiding and abetting breach of fiduciary duty (Count I), aiding and abetting conversion (Count II) and violations of the Florida Uniform Fraudulent Transfer Act ("FUFTA") (Counts III, IV, and V). For the reasons set forth below, each of these counts fail to state a claim upon which relief can be granted and the Amended Complaint should be dismissed in its entirety and with prejudice.

I. INTRODUCTION

After this Court entered its Dismissal Order, the Court of Appeals for the Eleventh Circuit issued its decision in *Lawrence v. Bank of America, N.A.*, No. 11-12401, 2012 WL 89904 (11th Cir. Jan. 11, 2012). *Lawrence* directly addresses the legal question that is dispositive of whether the Receiver's Amended Complaint sufficiently states claims for aiding and abetting—namely, what a plaintiff's complaint must contain in order to meet his or her burden under *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* to plead facts making plausible the inference that a bank had knowledge of its customer's Ponzi scheme.[1] To begin with, *Lawrence* holds that

[1] Bank of America acknowledges that this Court's Dismissal Order expressly ruled on the issue of whether allegations regarding atypical banking transactions can create an inference of "actual knowledge" required to state an aiding and abetting claim. *See* Dismissal Order at pp. 8-17. Since that time, however, (1) the Receiver filed an Amended Complaint, which restarted the pleadings process, and (2) the Eleventh Circuit issued its decision in *Lawrence*, which directly impacts the underlying basis of this Court's Dismissal Order. Bank of America has limited its arguments in this motion to the claims and issues impacted by the Eleventh Circuit's recent decision, as well as those arguments that prompted the dismissal of the Receiver's fraudulent transfer claims without prejudice. To the extent the Receiver argues that Bank of America cannot properly raise any arguments relating to these issues

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the plaintiff's factual allegations must plausibly raise the inference that the bank *actually knew* about the Ponzi scheme—not merely that the bank should have, or could have, known about it. *Lawrence*, 2012 WL 89904, at *3. Next, *Lawrence* holds that bare allegations that the customer engaged in atypical banking transactions are not sufficient to raise a plausible inference that the bank had *actual knowledge* of the Ponzi scheme. *Id.* (allegations that "the [customer's] transactions were atypical and therefore Bank of America should have known of the Ponzi scheme" are "insufficient under Florida law to trigger liability"). Thus, under *Lawrence*, complaints like the Receiver's—which allege only that the customer engaged in atypical transactions and thus the bank should have known about the scheme—fail as a matter of law to state a claim for aiding and abetting. *See also Weshnak v. Bank of America*, No. 11-3107, 2012 WL 233455 (2d Cir. Jan. 26, 2012) (affirming dismissal of claims asserted against the bank for allegedly aiding and abetting a Ponzi scheme). Based on these legal reasons, the Eleventh Circuit in *Lawrence* affirmed the dismissal of the plaintiff's complaint asserting aiding and abetting claims. The Receiver's aiding and abetting claims likewise should be dismissed for the same legal reasons.[2]

Application of the legal principle embodied in *Lawrence*—that allegations regarding atypical banking transactions are insufficient to show that a bank had actual knowledge of its customer's wrongdoing—also shows why the Receiver's fraudulent transfer claims are flawed as a matter of law. In its Dismissal Order, this Court relied on its conclusion that the Receiver's

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because such arguments were already made and ruled upon in connection with the prior motion to dismiss, Bank of America would request and seek leave to convert any necessary portions of this Motion into a motion for reconsideration.

[2] The time for the plaintiffs to file a petition for reconsideration or re-argument *en banc* in *Lawrence* has passed.

allegations regarding atypical business transactions were sufficient to support the knowledge requirement of an aiding and abetting claim as a basis to conclude that the Receiver's allegations rebutted the good-faith and innocence elements of the mere-conduit defense. Dismissal Order at p. 25. Now that the Eleventh Circuit in *Lawrence* has rejected the proposition that allegations regarding atypical banking transactions can raise an inference of actual knowledge—and thus cannot form the basis of cognizable aiding and abetting claims—there is no doubt that the Amended Complaint's factual allegations fail to provide any basis to refute that Bank of America acted as anything other than a mere conduit for Theodule's banking transactions. For this reason, the Receiver's fraudulent transfer claims also fail as a matter of law and should be dismissed.

Moreover, this Court previously dismissed the Receiver's fraudulent transfer claims without prejudice for failure to plead with sufficient specificity the manner in which the Receivership Entities, the Receiver, and Bank of America fit within the debtor-creditor framework. Dismissal Order at p. 26. The Receiver's Amended Complaint does not cure this pleading deficiency. Therefore, even if this Court should determine that the mere conduit defense does not provide a ground for dismissal, the Receiver's fraudulent transfer claims still must be dismissed for the independently dispositive reasons that (1) the Receiver has not pled the existence of a creditor-debtor relationship with sufficient specificity and (2) because Bank of America was not the intended recipient of the purported fraudulent transfers and never had control over the transferred funds.

For all of these legal reasons—particularly the Eleventh Circuit's recent decision in *Lawrence*—the Receiver's aiding and abetting and FUFTA claims fail and the Receiver's Amended Complaint should be dismissed in its entirety with prejudice.

II. THE RECEIVER'S ALLEGATIONS

On January 9, 2012, the Receiver filed his Amended Complaint. The Receiver did not change any of the factual allegations underlying his claims, but merely added some additional allegations in connection with his fraudulent transfer claims. The Amended Complaint alleges as follows:

Jonathan E. Perlman was appointed as 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. (the "Receivership Entities") in the action styled *The United States Securities and Exchange Commission (the "SEC") v. Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC and George L. Theodule*, Case No. 08-81565-CIV-HURLEY/HOPKINS, formerly pending in the United States District Court, Southern District of Florida (the "SEC Action"). *See* Am. Comp. at ¶¶ 1, 1 n.1, 10-11.

The Receiver seeks to hold Bank of America responsible for the actions of the Receivership Entities and George Theodule ("Theodule"), who is alleged to have been, "[a]t all times material hereto," an "officer, director, managing agent, principal, and/or control person of each of the Receivership Entities." *Id.* at ¶ 6. As the result of a two-year investigation, the Receiver determined that, from November 2007 until the Receiver's appointment in December 2008, Theodule, acting through the Receivership Entities, allegedly operated a Ponzi scheme, which was perpetuated by the Receivership Entities paying out "false 'profits' to initial investors to trick future investors into believing that the promise of outrageous financial returns was a reality." *Id.* at ¶¶ 8-9.

For the short time that Theodule maintained accounts at Bank of America, Bank of America played no role whatsoever in Theodule's alleged scheme. Nor does the Receiver allege that Bank of America did.[3] The Receiver does not—and cannot—claim that Bank of America directly participated in the alleged Ponzi scheme or that Bank of America had any knowledge that the Receivership Entities were being operated as a Ponzi scheme as opposed to legitimate businesses. Instead, the Receiver bases his claims solely on Bank of America's purported failure to "adhere to federal, local and internal regulatory banking procedures and policies," *id.* at ¶ 73, and to identify certain supposed "red flags" that he claims should have alerted Bank of America to the alleged fraud that Theodule and the Receivership Entities perpetrated. As argued below, following *Lawrence*, these allegations are insufficient to state a claim against the Bank as a matter of law.

III. ARGUMENT

A. Standard of Review

A complaint must be dismissed if it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 (11th Cir. 2008) (noting that factual allegations must raise a right to relief above the speculative level and that the Rule 8(a) standard is whether allegations plausibly suggest a violation of law); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir. 2007) (stating that the proper pleading standard is "plausible grounds to

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[3] Nor can the Receiver assert such an allegation. Prior to filing the Amended Complaint, the Receiver conducted extensive discovery of Bank of America. There is not a scintilla of evidence that during the short time that Theodule had accounts at Bank of America (or at any other time), Bank of America had actual knowledge of or substantially assisted Theodule's scheme.

infer" which means that a plaintiff's formulaic recitation of the elements is insufficient; rather the plaintiff must plead factual allegations that raise the right to relief "above the speculative level").

The plausibility standard established by the United States Supreme Court "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation" or a "sheer possibility that a defendant has acted unlawfully," *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555-56), and "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *see also Iqbal*, 129 S. Ct. at 1954 ("Rule 8 does not empower [a plaintiff] to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."). Instead, for a claim to be facially plausible, a plaintiff must plead "*factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (emphasis added) (citing *Twombly*, 550 U.S. at 556). Consequently, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of [an] entitle[ment] to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Accordingly, under *Twombly* and *Iqbal*, the relevant question is not whether any facts *could be* conjured that would state a claim for relief, but whether sufficient facts *have been* pled in the first instance to support the legal claims asserted. *Iqbal*, 129 S. Ct. at 1949-52 (dismissal is required "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct" because, under these circumstances, "the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief'") (quoting Fed. R. Civ. P. 8(a)(2)); *Twombly*, 550 U.S. at 555-57, 570.

A straightforward application of these controlling pleading standards to the allegations contained in the Amended Complaint shows that dismissal of the Receiver's aiding and abetting claims is warranted. When the Amended Complaint is stripped of its legal conclusions and formulaic recitations of the elements, as required by *Iqbal*, it becomes clear that the remaining factual allegations do not support a reasonable inference that Bank of America had any knowledge or awareness of, or substantially assisted in, Theodule's Ponzi scheme. Indeed, once the conclusory declarations are disregarded (as they must be), all that remains are allegations showing a routine relationship between a bank and its customer, which, under controlling Florida law, creates no basis to impose liability on Bank of America. The same goes for the Receiver's FUFTA claims, which similarly are unsupported by the type of factual allegations needed to show that the Receiver's right to relief under the statute rises above the speculative level.

B. Under *Lawrence,* Which Faithfully Applies Florida Law, The Receiver's Aiding And Abetting Claims Should Be Dismissed Because The Receiver Has Not Pled Sufficient Facts Making Plausible Its Conclusory Contention That Bank Of America Had Actual Knowledge Of Theodule's Ponzi Scheme

In Counts I and II, the Receiver alleges that Bank of America "aided and abetted" Theodule in purportedly harming the Receivership Entities by perpetrating a fraudulent Ponzi scheme. *See* Am. Comp. at Counts I and II. To state an aiding and abetting claim under Florida law, the Receiver must allege (1) an underlying violation on the part of the primary wrongdoer, (2) actual knowledge of the underlying violation by the alleged aider and abettor, and (3) the aider and abettor's substantial assistance or encouragement of the wrongdoing. *See Lawrence*, 2012 WL 89904, at *2 (citing *AmeriFirst Bank v. Bomar*, 757 F. Supp. 1365, 1380 (S.D. Fla. 1991) and *ZP No. 54 Ltd. P'ship v. Fid. & Dep. Co. of Md.*, 917 So. 2d 368, 372 (Fla. Dist. Ct. App. 2005)); Restatement (Second) of Torts § 876 (1979) (a party can be liable for another's

tortious conduct if it "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other").

This Court analyzed the sufficiency of the Receiver's aiding and abetting allegations in connection with Bank of America's motion to dismiss the Receiver's original complaint—and that analysis hinged on the question of whether allegations regarding atypical banking transactions are sufficient to plausibly create an inference that the Bank knew of its customer's Ponzi scheme. *See* Dismissal Order at pp. 8-17. Relying upon *Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975) and *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004 (11th Cir. 1985), this Court concluded that, at the pleadings stage, allegations of atypical banking transactions may permit an inference of the type of knowledge that is necessary for aiding and abetting liability. *See* Dismissal Order at p. 15.

In connection with its analysis of the sufficiency of the Receiver's aiding and abetting claims, this Court acknowledged the district court's decision in *Lawrence v. Bank of America, N.A.*, No. 8:09-cv-2162, 2010 WL 3467501 (M.D. Fla. Aug. 30, 2010), where the court dismissed a complaint that sought to hold the Bank responsible for losses allegedly caused by a Ponzi scheme perpetrated by one of the Bank's customers. This Court, however, declined to follow the reasoning of the district court in *Lawrence* and thus reached a contrary conclusion. This Court reasoned that the district court's *Lawrence* decision was "troubling insomuch as it explicitly notes allegations of certain 'atypical business transactions' but nevertheless finds the allegations of actual knowledge insufficient." Dismissal Order at p. 16. This Court also noted that the *Lawrence* decision "appear[ed] to conflict" with the cases relied upon by this Court in its Dismissal Order. *Id.*

The apparent conflict—whether allegations of atypical banking transactions are sufficient to plead the actual knowledge element of an aiding and abetting claim—now has been resolved by the Eleventh Circuit. In affirming the district court's order dismissing the plaintiffs' complaint in *Lawrence*, the Eleventh Circuit pointedly concluded that "[a]lthough Plaintiffs alleged the transactions were atypical and therefore Bank of America should have known of the Ponzi scheme, such allegations are insufficient under Florida law to trigger [aiding and abetting] liability." *Lawrence*, 2012 WL 89904, at *3. Then, the Eleventh Circuit explained why allegations of atypical banking transactions are not enough to plead actual knowledge:

> Florida law does not require banking institutions to investigate transactions. *Home Fed. Sav. & Loan Ass'n of Hollywood v. Emile*, 216 So.2d 443, 446 (Fla. 1968); *cf. O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1205 (11th Cir. 2003) (finding that banks have the "right to assume that individuals who have the legal authority to handle the entity's accounts do not misuse the entity's funds"). Therefore, Bank of America, in providing only routine banking services, was not required to investigate [its customer's] transactions. ***To be liable, the bank would have had to have actual knowledge of [its customer's] fraudulent activities. These allegations [of atypical banking transactions] simply fail to make that "plausible***." *Twombly*, 550 U.S. at 570.

Id. (emphasis added)*; see also Weshnak*, 2012 WL 233455 (affirming dismissal of complaint alleging that the Bank aided and abetted a Ponzi scheme and holding that "[a] bank's provision of its usual banking services to a customer . . . does not in and of itself rise to the level of substantial assistance.") (internal quotations and citations omitted); *Groom v. Bank of America*, No. 8:08-cv-2567, 2012 WL 50250 (M.D. Fla. Jan. 9, 2012) (dismissing complaint seeking to impose liability on bank for aiding and abetting a customer's Ponzi scheme based on allegations regarding "atypical and irregular banking practices" and failure to "adhere to the customary and accepted standard of care and fail[ure] to monitor incoming deposits and wires and other

monies" because such allegations do not create a plausible inference of actual knowledge of a customer's wrongdoing).[4]

Lawrence's rejection of the plaintiffs' "should have or could have known" theory of aiding and abetting liability is based on sound legal and policy reasons—which should be applied with equal force here. The endorsement of such a liability theory would impose upon banks an obligation to scrutinize and investigate the activities underlying their customers' deposits, transfers, and withdrawals to ensure that those activities are legitimate. Florida law, however, imposes no such obligation. To begin with, under Florida law, a bank does not owe duties to individuals who are not its customers. *Carl v. Republic Sec. Bank*, 282 F. Supp. 2d 1358, 1372 (S.D. Fla. 2003); *see also Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 549, 553-54 (Fla. Dist. Ct. App. 2003) (investors in a Ponzi scheme could not state a claim against the bank unless they could "allege that [the bank] made a fraudulent or negligent misrepresentation to them personally"). Nor does a bank have any duty to monitor and investigate its customers' deposits and withdrawals. *In re Meridian Asset Mgmt., Inc.*, 296 B.R. 243, 264 (Bankr. N.D. Fla. 2003) ("[I]n the absence of a special deposit agreement . . . an account is labeled 'general,' and is an arms-length transaction imparting no duty on behalf of the Bank to monitor and investigate."); *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1200, 1205 (11th Cir. 2003) ("The bank is responsible only for making sure that [the corporate representative], at the time of the withdrawal, has the authority to make withdrawals on behalf of the accountholder entity.") (dismissing complaint because bank owed no duty to non-customers who were victims

[4] After the district court dismissed the *Groom* complaint without prejudice, the plaintiffs amended their complaint, but did not amend as to Bank of America, dropping the Bank as a defendant in that case.

of Ponzi scheme).[5] Further, the individual or entity depositing funds with a bank is "the Bank's customer, not the investors, and as such the Bank owe[s] [its customer] a duty of confidentiality." *In re Meridian*, 296 B.R. at 264. Finally, "[a] refusal on the part of the bank to permit a withdrawal by a duly authorized representative of a corporate accountholder would no doubt breach the bank's deposit agreement with that accountholder." *O'Halloran*, 350 F.3d at 1205.

The Receiver's aiding and abetting theory—namely, that a plaintiff can state an aiding and abetting claim based solely on allegations that the bank "should have known" of its customer's wrongdoing—is incompatible with these basic and well-settled principles of Florida banking law. Indeed, the Receiver's theory would fundamentally alter the relationship between bank and customer under Florida law. A bank would henceforth have duties to monitor and investigate its customers' activities in order to stand guard against the misuse of deposited funds, because simply performing the normal legitimate transactions associated with a customer's account would give rise to a presumption of "general awareness" of fraudulent activity. Indeed, as Florida's intermediate appellate court explained in rejecting claims in a similar Ponzi scheme case, "[w]e would radically alter the law of banking if we required banks to review . . . accounts to make certain that their customers were spending their money wisely." *Freeman*, 865 So. 2d at 549. The Florida appellate court then went on to explain that the practical effects of such an

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[5] The Receiver's allegations only suggest that Bank of America *should have been* suspicious—not that it *in fact was* suspicious—of Theodule. As the Eleventh Circuit has held, however, even averments that a bank in fact had suspicions of nefarious activity are insufficient to show the actual knowledge that would support a claim for aiding and abetting. *O'Halloran*, 350 F.3d at 1200, 1205 (dismissing aiding and abetting claims against bank even where numerous states investigated the customer's activities, the state of Florida shut down one of the customer's businesses, other banks refused to do business with the customer, and the defendant bank notified the customer that "its accounts were being closed, but continued to service the . . . accounts").

alteration in the law would be unworkable because the bank would be "required to refuse to make payments that were legal on their face." *Id.*

This Court should follow the Eleventh Circuit's decision in *Lawrence*—which is based on settled principles of Florida law and policy—and dismiss the Receiver's aiding and abetting claims. Any contrary conclusion would run afoul of the Eleventh Circuit's determinations, have the potential to impose expansive new duties on banks that would increase customer costs (through increased risk), invite banks to invade customer privacy (in the name of "investigating" "suspected" fraud), and decrease public access to banking services (through higher costs and customer resistance to being cross-examined by their banks about their business transactions).

Not only does *Lawrence* outline the legal principles that should control, there also is no reason for a different outcome under the facts here. As in *Lawrence*, dismissal of the complaint is warranted. Indeed, a comparison of the Receiver's allegations with the allegations in the *Lawrence* complaint further underscores that the Receiver's factual allegations do not state an aiding and abetting claim that is plausible on its face. The factual allegations contained in the *Lawrence* complaint—which the Eleventh Circuit assessed—described a closer bank-customer relationship than the one described in the Receiver's Amended Complaint. Like the Receiver, the *Lawrence* plaintiffs alleged that the purported Ponzi schemer "informed Bank of America of his personal history and the nature of his business, which was an 'investment club,'" and further alleged that Bank of America does not permit investment clubs. *Lawrence*, 2012 WL 89904, at *2; *see* Am. Comp. at ¶¶ 50-51. The *Lawrence* plaintiffs alleged a banking relationship lasting from 2006 to early 2009. *Lawrence*, 2012 WL 89904, at *1. By contrast, Theodule's relatively short-lived relationship with Bank of America lasted less than one year. Am. Comp. at ¶ 66. The plaintiffs in *Lawrence* alleged that the purported Ponzi schemer's accounts were handled by

Bank of America's Premier Banking Division, "known for providing its clients with 'close, personal attention,' by more in-depth review of the clients' accounts" and that "Premier Banking Representatives could access the Diamond Ventures Account and obtain daily updates on major deposits and wire transfers." *Lawrence*, 2012 WL 89904, at *1. By contrast, the Receiver alleges that Theodule and the Receivership Entities maintained only deposit accounts, which would not receive the same level of personal service and increased review. *See* Am. Comp. at ¶¶ 40-42. Since the *Lawrence* allegations could not survive scrutiny under controlling Florida substantive law and the *Twombly/Iqbal* pleading standards, the Receiver's Amended Complaint cannot survive either.

In sum, as in *Lawrence*, the Amended Complaint's allegations do not state cognizable aiding and abetting claims. The Receiver's conclusory declaration that Bank of America "knew" of the fraudulent nature of Theodule's and the Receivership Entities' activities is unsupported by any factual allegations making plausible the conclusion that Bank of America had actual knowledge of Theodule's fraud. The Receiver's aiding and abetting claims (Counts I and II), accordingly, should be dismissed with prejudice. *See also Weshnak*, 2012 WL 233455 (affirming dismissal of claims that the bank aided and abetted a Ponzi scheme).

C. The Receiver's Florida Uniform Fraudulent Transfers Act Claims Should Be Dismissed Because The Receiver Has Not Pled Sufficient Facts To State A Legally Cognizable Claim

Invoking FUFTA, the Receiver alleges that he is entitled to recover monies deposited by six of the eight Receivership Entities—defined by the Receiver as "Receivership Bank Customers"—into their accounts with Bank of America (Count III), monies transferred by the Receivership Bank Customers to their accounts with Bank of America through "inter-company transfers" (Count IV), and monies deposited into Theodule's accounts with Bank of America (Count V). These claims fail for multiple reasons.

1. Bank Of America Was Not The Intended Recipient Of The Purported Transfers And Never Had Control Over The Transferred Funds

In ruling on Bank of America's motion to dismiss the Receiver's original complaint, this Court rejected Bank of America's "mere conduit" defense to the fraudulent transfer claims, concluding that the Receiver's allegations regarding atypical banking transactions provided a sufficient basis to infer that Bank of America knew of Theodule's scheme—a conclusion this Court directly linked to its analysis of the Receiver's aiding and abetting claims. *See* Dismissal Order at p. 25 ("Because the allegations of the Complaint set forth facts sufficient to support the knowledge requirement of aiding and abetting liability discussed above, they also sufficiently defeat the good-faith and innocence aspect of a mere-conduit defense for the purposes of a motion to dismiss.") As explained, the Eleventh Circuit has held that such an inference is not warranted under substantive Florida law or the *Twombly/Iqbal* pleading standards. Accordingly, Bank of America's mere conduit defense warrants dismissal of the Receiver's FUFTA claims, asserted in Counts III, IV, and V.

While the Receiver conclusorily asserts that Bank of America is the "initial transferee" and "not a conduit" of the purportedly fraudulent transfers, *see* Am. Comp. at ¶¶ 85, 94, 102, he alleges *no facts* showing that Bank of America was the intended recipient of the purported transfers or that Bank of America controlled the transferred funds. Indeed, the facts alleged—including that the purported transfers were deposited into accounts controlled by the Receivership Bank Customers or Theodule—indicate otherwise.

As the Eleventh Circuit has explained, "[w]hen trustees seek recovery of allegedly fraudulent conveyances from banks, the outcome of the cases turn on whether the banks actually controlled the funds or merely served as conduits, holding money that was in fact controlled by either the transferor or the real transferee." *In re Chase & Sanborn Corp.*, 848 F.2d 1196, 1200

(11th Cir. 1988). Where, as here, a bank "receive[s] money for the sole purpose of depositing it into a customer's account, . . . the bank never has actual control of the funds." *Id.* (where defendants "simply held the property as agents or conduits for one of the real parties to the transaction," they "technically . . . had received the funds from the debtors and could be termed 'initial transferees,' [but] the defendants had never actually controlled the funds and therefore it would be inequitable to allow recovery against them."). Because the Receiver pleads no facts that Bank of America controlled the funds, this Court should disregard the Receiver's conclusory allegation that Bank of America is the "initial transferee" of the purportedly fraudulent transfers. *See Iqbal*, 129 S. Ct. at 1949-51.

Applying these legal principles to circumstances similar to those here, the district court in *Super Vision International, Inc. v. Mega International Commercial Bank Co., Ltd.*, found that Super Vision—the purported creditor—failed to state a claim for fraudulent transfer against Mega—the purported transferee bank—because "at best, Mega was the conduit, not the transferee, and because Mega is not alleged to have controlled the funds at issue." 534 F. Supp. 2d 1326, 1344 (S.D. Fla. 2008). The *Super Vision* analysis applies equally here.

Accordingly, the Receiver's FUFTA claims (Counts III, IV, and V) should be dismissed with prejudice.

2. The Receiver Has Not Alleged That He Is A FUFTA Creditor

In its Dismissal Order, this Court dismissed without prejudice the Receiver's FUFTA claims for failure to plead with sufficient specificity the creditor-debtor relationship required under FUFTA. Even if the FUFTA claims are not dismissed based on the mere conduit defense, these claims must still be dismissed for failure to plead with sufficient factual specificity to support the claims asserted.

FUFTA "was promulgated to prevent an insolvent debtor from transferring its assets out of the reach of its creditors when the debtor's intent is to hinder, delay, or defraud any of its creditors." *Steinberg v. Barclay's Nominees (Branches) Ltd*, No. 04-60897, 2008 WL 4601042, at *10 (S.D. Fla. Sept. 30, 2008) (citing Fla. Stat. § 726.105(1)). Accordingly, "for a cause of action to exist, the creditor-plaintiff must allege (1) there was a creditor sought to be defrauded, (2) a debtor intending fraud, or [a] debtor which did not receive reasonably equivalent value in exchange for a transfer, and (3) a conveyance of property which could have been available to satisfy the debt due." *Id.* (citing *Nationsbank, N.A. v. Coastal Utils., Inc.*, 814 So. 2d 1227, 1229 (Fla. Dist. Ct. App. 2002)). "'FUFTA claims are only permissible when the *factual allegations* in the complaint meet the elements of the statute.'" *Id.* at *11 (quoting *In re Burton Wiand Receivership Cases*, No. 05-1856, 2008 WL 818509, at *7 (M.D. Fla. Jan. 28, 2008)) (emphasis in original).

Here, the Receiver alleges that the Receivership Entities were sham entities that had "no legitimate business operations" and "operated as nothing more than a classic Ponzi scheme." Am. Comp. at ¶ 14. Thus, the only possible "creditors" are the investors who were defrauded by Theodule and the Receivership Entities. It is well settled that a receiver may not pursue claims owned by the creditors of the Receivership Entities. *See Freeman*, 865 So. 2d at 550 ("Although a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for 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.") (citation omitted). The Receiver, therefore, must allege facts showing that the Receivership Entities themselves were creditors.

In an effort to re-plead his FUFTA claims with the necessary specificity, the Receiver conclusorily alleges that, "standing in the shoes of the Receivership Entities," he is a "'creditor' of [the] Receivership Bank Customers" and that "[c]onversely, the Receivership Bank Customers [or Theodule] are 'debtors' with respect to the Receivership Entities." Am. Comp. at ¶¶ 83, 92, 100. The Receiver then inserts into the Amended Complaint charts showing the alleged dollar amounts of the banking transactions applicable to each FUFTA claim. *Id.* at ¶¶ 81, 90, 98. However, as in *Steinberg*, such allegations, without more, still are insufficient to support the existence of a creditor-debtor relationship. The Amended Complaint is devoid of any factual allegations that any of the eight Receivership Entities was a creditor to any of the six Receivership Bank Customers—all of which are also Receivership Entities.

Moreover, with respect to Counts III and IV, it cannot be disputed that the Receiver has access to this money. The Receiver alleges that the money was deposited and/or transferred into the accounts of the Receivership Bank Customers—or into the accounts of six of the eight Receivership Entities. Finally, with respect to Count V, while the Receiver alleges that Theodule and the Receivership Bank Customers deposited funds into Theodule's accounts, there is no allegation that any of these funds actually came from accounts maintained by any of the Receivership Entities. Rather, the Receiver specifically alleges that funds transferred to Theodule came directly from the investment clubs—not the Receivership Entities—and that this money belonged to the investors, not the Receivership Entities. *See* Am. Comp. at ¶¶ 63-64, 68.

For all the above reasons, the Receiver's FUFTA claims (Counts III, IV and V) should be dismissed in their entirety.

IV. CONCLUSION

As demonstrated above, the Receiver's Amended Complaint is deficient on its face and should be dismissed. Accordingly, Defendant Bank of America, N.A. respectfully requests that this Court dismiss the Receiver's Amended Complaint in its entirety and with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically caused the foregoing document to be filed with the Clerk of the Court using CM/ECF on the 16th day of February, 2012. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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