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

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

Plaintiff,

v.

BANK OF AMERICA, N.A,

Defendant.
_____/

RECEIVER'S RESPONSE IN OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION TO DISMISS 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 Bank of America, N.A.'s ("Bank of America") Motion to Dismiss Amended Complaint [DE 67] (the "Motion to Dismiss"), and states as follows:

PRELIMINARY STATEMENT

The Receiver's claims in this case arise from allegations that Bank of America was a knowing participant in the Ponzi scheme conducted by George Theodule. More specifically, the Receiver alleges that Theodule, in concert with Bank of America, used his corporate and personal banking relationships with the bank to facilitate his fraudulent business operations. The Receiver's Amended Complaint [DE 57] (the "Amended Complaint") sets forth five separate

causes of action against Bank of America. However, for purposes of argument and analysis related to the Motion to Dismiss, the Receiver's claims are more logically and appropriately grouped into two categories. The first of these two categories is comprised of the Receiver's tort-based claims against the bank, and consists of two counts for aiding and abetting breach of fiduciary duty and aiding and abetting conversion, respectively (the "Aiding and Abetting Claims").[1] The second of these two categories consists of three counts for the avoidance and recovery of alleged fraudulent transfers pursuant to the Florida Uniform Fraudulent Transfer Act (the "FUFTA Claims"). [2]

Bank of America's Motion to Dismiss should be denied with respect to each and every one of the Receiver's pending claims in the Amended Complaint. The Aiding and Abetting Claims, having been already thoroughly scrutinized by this Court,[3] continue to maintain their viability. In seeking dismissal of the Aiding and Abetting Claims, Bank of America relies exclusively upon the recently decided *unpublished* decision in Lawrence v. Bank of Am., N.A., No. 09-CV-2162-T-33TGW, 2012 WL 89904 (11th Cir. Jan. 11, 2012). The Lawrence case,

[1] Counts I and II of the Amended Complaint allege that Bank of America actively assisted Theodule in: (i) breaching his fiduciary duties as an officer of the Receivership Entities; and (ii) converting Receivership Entity funds for his personal use, respectively, by knowingly participating with Theodule and others in the mishandling and misappropriation of funds of the Receivership Entities through use of Bank of America bank accounts.

[2] Counts III, IV and V of the Amended Complaint allege pursuant to the Florida Uniform Fraudulent Transfer Act at Fla. Stat. § 726.101 et seq. ("FUFTA") that Bank of America was the recipient of fraudulent transfers by virtue of deposits and transfers made by the Receivership Entities into Bank of America bank accounts. Count III seeks the avoidance of transfers made by the Receivership Entities as initial deposits in their Bank of America accounts. Count IV seeks the avoidance of inter-account transfers made by the Receivership Entities at Bank of America. Count V seeks the avoidance of transfers made by the Receivership Entities to the personal bank account of George Theodule at Bank of America.

[3] In its December 22, 2011 Order Granting in Part and Denying in Part Defendant's Motion to Dismiss [DE 51] (the "Dismissal Order"), this Court set forth a detailed analysis establishing the viability of the Receiver's aiding and abetting claims. The Motion to Dismiss fails to raise any argument that was not previously disposed of by the Court in the Dismissal Order.

however, simply fails in every respect to provide a legal basis for the Court to retract its well-reasoned denial of Bank of America's first attempt to dismiss the Aiding and Abetting claims as set forth in the Dismissal Order because:

(1) As an unpublished opinion, Lawrence is without binding precedential value and this Court should decline to broadly apply the holding in Lawrence to the facts of this case. While unpublished opinions may be cited as *persuasive* authority, Lawrence is simply *not persuasive.* This Court previously determined, and ultimately rejected, the legal analysis developed in the Lawrence trial court, which was identical to the analysis applied by the Eleventh Circuit on appeal.

(2) A determination that the Receiver has adequately alleged Bank of America's "actual knowledge" of Theodule's wrongdoing in a manner sufficient to properly and plausibly state the Aiding and Abetting Claims requires a fact-sensitive inquiry. The holding in Lawrence is limited by its underlying facts and does not warrant dismissal of the Aiding and Abetting Claims here. Contrary to the circumstances in Lawrence, the Receiver independently alleges that Bank of America "actually knew" of the Theodule Ponzi scheme as opposed to merely alleging that the bank "should have known" of the Ponzi scheme by virtue of the Receivership Entities' numerous atypical banking transactions. This Court has already determined in the Dismissal Order that the Receiver has plausibly and sufficiently plead that Bank of America had such "actual knowledge."

(3) In violation of Fed. R. Civ. P. 59(e), Bank of America has failed to timely seek reconsideration of the Dismissal Order to provide a procedural mechanism for the Court to consider the Lawrence case and the time for filing a motion for reconsideration has long since expired. Those portions of the Motion to Dismiss which seek reconsideration of the Court's

prior dismissal of the Aiding and Abetting claims should be stricken. Alternatively, the Court should apply the more stringent legal standards associated with a motion for reconsideration.

Finally, Bank of America's arguments for dismissal of the Receiver's FUFTA Claims lack any real substantial merit. In the Dismissal Order the Court dismissed the Receiver's initial FUFTA Claims without prejudice for the specific reason that the Receiver had failed to state his status as a creditor under FUFTA with sufficient clarity. The Receiver has since added detailed factual allegations the Amended Complaint eliminating any doubt or confusion inherent in his initial pleadings.

Also with regard to the FUFTA Claims, Bank of America has, without explanation, resurrected its arguments that the FUFTA Claims should be dismissed because Bank of America claims to be an "innocent conduit" of the alleged transfers as opposed to an actual transferee. However, the conduit defense is an affirmative defense for which Bank of America exclusively bears the burden of proof, and as such, the conduit defense is not appropriately addressed in the context of a motion to dismiss. The Receiver is not required to plead Bank of America's affirmative defenses in order to establish his FUFTA Claims.

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

MEMORANDUM OF LAW

I. STANDARD OF REVIEW FOR EVALUATING A MOTION TO DISMISS

When ruling on a motion to dismiss, the Court "must accept as true all of the factual allegations in the Complaint." Erickson v. Pardus, 551 U.S. 89, 94 (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 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 (1957); Castro v. Sec'y of Homeland Sec., 472 F.3d 1334, 1336 (11th Cir. 2006); Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 349 (11th Cir. 1996).

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." The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. Instead, Fed. R. Civ. P. 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. Bell Atlantic Corp. v. Twombly, 550 U.S. 554 (2007).

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

II. THAT PORTION OF THE MOTION TO DISMISS WHICH ADDRESSES THE RECEIVER'S AIDING AND ABETTING CLAIMS SHOULD BE STRICKEN AS AN UNTIMELY MOTION FOR RECONSIDERATION

Both parties agree that the successful establishment of the Receiver's aiding and abetting claims for breach of fiduciary duty and conversion requires the Receiver to adequately plead that Bank of America had knowledge of the underlying misconduct committed by George Theodule in connection with the operation of his Ponzi scheme. See In re Caribbean K Line, Ltd., 288 B.R. 908 (S.D. Fla. 2002) (for pleading requirements for aiding and abetting breach of fiduciary duty); see also, 18 Am. Jur. 2d Conversion § 59 and the cases cited therein (for pleading requirements for aiding and abetting conversion).

However, pursuant to the Dismissal Order, the Court has *already ruled* that the Receiver has adequately plead facts sufficient to plausibly infer Bank of America's knowledge of Theodule's misconduct, and has otherwise confirmed the viability of the Aiding and Abetting Claims. (See, Dismissal Order [DE 51] at pp. 17-20). Although Bank of America admits and acknowledges the Court's prior ruling in the Dismissal Order, it has not sought reconsideration of the Dismissal Order. Instead, Bank of America asks the Court, as a "fallback" provision, to allow it "leave to convert any necessary portions of [its] Motion into a motion for reconsideration" in the event the Court deems that the bank's filing of the Motion to Dismiss exceeds procedural boundaries. (See Motion to Dismiss [DE 67] at pp. 1, 2, fn. 6).

Bank of America's request for leave[4] to file a motion for reconsideration should be denied, and those portions of the Motion to Dismiss which address the adequacy of the Receiver's pleadings in connection with the Aiding and Abetting Claims should be stricken as untimely. Motions for reconsideration are governed by the time limitations set forth in Fed. R.

[4] The Receiver is not aware of any local or federal procedural rule that requires "leave of court" to file a motion for reconsideration.

Civ. P. 59(e), and must be filed within 28 days of the contested order. Fred Lurie Assocs., Inc. v. Global Alliance Logistics, Inc., No. 05-22881-CIV, 2006 WL 3626296 (S.D. Fla. Aug. 15, 2006). The Dismissal Order was entered on December 22, 2011, and the time for Bank of America to seek reconsideration expired on January 19, 2012, nearly an entire month prior to Bank of America's filing of its Motion to Dismiss.

In the event the Court desires to entertain Bank of America's arguments for dismissal of the Aiding and Abetting Claims notwithstanding the aforementioned procedural deficiencies, the Receiver urges the Court to apply the appropriate legal standards for a motion for reconsideration. A motion for reconsideration may only be granted for limited reasons. A motion to reconsider is only available when a party presents the court with evidence of an ***intervening change in controlling law***,[5] the availability of new evidence, or the need to correct clear error or manifest injustice. Eisenberg v. Carnival Corp., No. 07–22058–CIV, 2008 WL 2946029, at *2 (S.D. Fla. July 7, 2008) (emphasis added); see also Z.K. Marine, Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla.1992). In the interests of finality and conservation of scarce resources, reconsideration of an order is an ***extraordinary remedy which is to be employed sparingly***. U.S. v. Bailey, 288 F. Supp. 2d 1261, 1267 (M.D. Fla. 2003), aff'd, 419 F.3d 1208 (11th Cir. 2005) (emphasis added). The applicable standard for a motion for reconsideration is that the moving party "must demonstrate why the court should reconsider its prior decision and ***set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision***. A motion for reconsideration should raise new issues, not merely

[5] Bank of America's arguments for dismissal of the Aiding and Abetting Claims are all exclusively based upon their contentions (however misplaced) that the Lawrence case has somehow changed the controlling law concerning a bank's liability for aiding and abetting claims.

address issues litigated previously." Socialist Workers Party v. Leahy, 957 F. Supp. 1262, 1263 (S.D. Fla. 1997) (emphasis added).

III. THE *LAWRENCE* DECISION DOES NOT WARRANT RECONSIDERATION OF THE DISMISSAL ORDER

The unpublished decision rendered by the Eleventh Circuit in Lawrence v. Bank of Am., N.A., 2012 WL 89904 (11th Cir. Jan. 11, 2012). does nothing to warrant this Court's reconsideration of its ruling in the Dismissal Order regarding the viability of the Aiding and Abetting Claims.[6] The Eleventh Circuit has a rule regarding the lack of precedent established by unpublished cases:

> An opinion shall be unpublished unless a majority of the panel decides to publish it. ***Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.***

U.S.C.A. 11th Cir. Rule 36-2, 28 U.S.C.A.

Thus while it is clear that this Court is not bound to follow the Eleventh Circuit's ruling set forth in Lawrence, the Lawrence decision may nonetheless be duly considered for its persuasive value. Albeit unknowingly at the time, this Court, when fashioning the Order of Dismissal, *did* consider the facts and reasoning underlying the Lawrence decision by virtue of its detailed analysis and discussion of the order of the Lawrence trial court[7] which gave rise to the appeal in the Eleventh Circuit. As a preliminary matter, this Court found that when the reasoning developed by the Lawrence trial court is applied to the facts alleged by the Receiver in the Amended Complaint, the holding in Lawrence (at the trial court level) has little, if any, persuasive value.

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[6] In support of its arguments that the Court should reverse its prior ruling and dismiss the Receiver's aiding and abetting claims, Bank of America relies *exclusively* upon the Eleventh Circuit's unpublished decision in Lawrence.

[7] See Lawrence v. Bank of Am., N.A., No. 09-CV-2162-T-33TGW, 2010 WL 3467501 (M.D. Fla. Aug. 30, 2010).

In the Dismissal Order, this Court addressed the ruling made by the Lawrence trial court as follows:

> Bank of America also relies heavily on Lawrence. Lawrence is troubling insomuch as it explicitly notes allegations of "certain 'atypical business transactions'" but nevertheless finds the allegations of factual knowledge insufficient. 2010 WL 3467501, at *4. This decision appears to conflict with Woodward and Woods, which this Court has relied upon for the proposition that "if the method or transaction is atypical or lacks business justification it may be possible to infer the knowledge necessary for aiding and abetting liability." Woodward, 522 F.2 at 97; see also Woods, 765 F.2d at 1010. ("For the aidor and abettor who combines silence with affirmative assistance, the degree of knowledge required should depend upon how ordinary the assisting activity is in the involved businesses."). ***Nevertheless, the Court emphasizes that the "exact level [of knowledge] necessary for liability remains flexible and must be decided on a case-by-case basis,"*** Camp, 948 F.2d at 459, and observes that the schemer in Lawrence appeared to engage in at least some legitimate business operations, in contrast to the facts alleged in the instant case.

Lawrence, 2010 WL 3467501, at *1. Dismissal Order [DE 51] at p. 16 (emphasis added).

Notably, the Eleventh Circuit *affirmed* the decision of the Lawrence trial court and did not provide any additional legal analysis or make any additional legal determinations which differed from those made by the Lawrence trial court. In fact, when the written order entered by the Lawrence trial court is compared with the Eleventh Circuit decision in Lawrence, it becomes clear that although the Eleventh Circuit reviewed the trial court's order *de novo*, it fully accepted the facts and evidence developed in the trial court, and took no exception to the trial court's legal analysis, affirming and *mirroring* the ruling of the trial court in all respects. In short, the Eleventh Circuit holding in Lawrence simply fails to provide any "intervening change in controlling law" to invoke this Court to reconsider or stray from its well-reasoned analysis in the Dismissal Order. Eisenberg v. Carnival Corp., 2008 WL 2946029, at *2.

Furthermore, even if this Court were to determine that Lawrence somehow provides a platform for reconsideration of the Dismissal Order, Lawrence can be factually distinguished

from the present case and should not persuade this Court to change its initial determination that dismissal of the Aiding and Abetting Claims is unwarranted. Like the Receiver's case, the Lawrence case involved allegations of Bank of America's facilitation of a Ponzi scheme through the use of Bank of America bank accounts to channel the Ponzi schemer's ill-begotten funds. However, unlike the Receiver, the Plaintiffs in Lawrence relied exclusively upon allegations that the bank ***should have known*** of the schemer's wrongdoings by virtue of atypical banking transactions conducted at Bank of America by the Ponzi scheme perpetrators. Specifically, in reaching its decision, the Eleventh Circuit specifically adopted and exclusively relied upon the following factual allegations identified by the Lawrence trial court:

- Plaintiff maintained bank accounts at Bank of America.
- Plaintiff and others deposited funds, sometimes making "exceptionally large deposits"- into Bank of America accounts.
- Bank of America representatives presumably became familiar with Plaintiff as part of providing Bank of America's Premier Banking and Investment services.
- Plaintiff informed Bank of America that an affiliate was an "investment club."
- Bank of America policy does not permit investment club accounts.
- Bank of America allowed Plaintiff and an affiliate to transfer money to other accounts at Bank of America and elsewhere and to spend money that had been deposited in their accounts.
- Plaintiff was not independently wealthy.
- Plaintiff engaged in other "atypical business transactions."

Lawrence, 2010 WL 3467501, at *4; see also Lawrence, 2012 WL 89904, at *1 (where the Eleventh Circuit recasts the factual allegations relied upon by the trial court).

Using the above factual allegations to support its decision, the Lawrence appellate court found that "although the 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 liability. Florida law does not require banking institutions to investigate transactions." Lawrence, 2012 WL 89904, at *3.

In contrast to the Plaintiffs in Lawrence, the Receiver does not rely exclusively upon allegations of "atypical banking transactions" to support the Aiding and Abetting Claims, nor does the Receiver rest upon allegations that Bank of America *should have known* about the Theodule Ponzi scheme. Instead, the Receiver sets forth the following multiple allegations independently establishing that Bank of America *actually knew* of Theodule's misdeeds:

- By virtue of the Bank Secrecy Act the Bank of America conducted extensive due diligence upon Theodule and the Receivership Entities and was thus fully aware of Theodule's Ponzi scheme. (Amended Complaint [DE 57] ¶¶ 35 - 39).

- Bank of America's due diligence of Theodule involved review of his past banking activity with Wachovia Bank where Theodule's account history was riddled with suspicious activity, including Wachovia's determinations that Theodule conducted "no transactions consistent with the operation of a business," and that his accounts were closed for money laundering activities. (Id. ¶¶ 40, 49).

- Bank of America conducted research into Theodule's purported occupation as a financial advisor. (Id. ¶ 43).

- Bank of America was aware of Creative Capital's written "nonsensical" business plan which was not a legitimate investment plan for investors. (Id. ¶ 44).

- Despite openly admitting that they were handling investor funds through their accounts at Bank of America, a FINRA search conducted by Bank of America revealed that neither Theodule nor any of his acolytes at Creative Capital was licensed in any way for investments or securities. (Id. ¶¶ 44 - 46).

- Bank of America's research revealed that one of the officers of the Receivership Entities, German Cardona, was the perpetrator of massive European based Ponzi scheme involving civil thefts exceeding $77 million. (Id. ¶¶ 48, 60).

- Bank of America received direct reports from one its banking customers that Theodule had bilked her out of $80,000 in mortgage funds. (Id. ¶¶ 55 - 59).

- Bank of America knew that Dorothy Delisfort, Theodule's wife, was an officer in one of the Receivership Entities along with European Ponzi-schemer, German Cardonas. (Id. ¶ 62).

- Theodule and the Receivership Entities transferred tens of millions of dollars through Bank of America accounts using funds which Bank of America knew were alleged investor funds. The transfers had no apparent legitimate investment business purpose. These transfers were reported regularly to Bank of America's officers by virtue of Bank Secrecy Act reporting requirements. (Id. ¶¶ 63 - 68).

Clearly, the Receiver alleges actual knowledge by Bank of America's of Theodule's thievery. When the Receiver's allegations are accepted as true, this case, unlike the Lawrence case, is not a case where the Bank of America can plausibly claim that its participation in the Ponzi scheme was unknowing, or somehow undertaken in good faith. The Receiver has alleged that Bank of America possessed all pieces of the puzzle and directly observed and facilitated Theodule's nefarious conduct.[8]

IV. THE RECEIVER SUFFICIENTLY PLEADS HIS STATUS AS A CREDITOR OF THE RECEIVERSHIP ENTITIES FOR PURPOSES OF THE FUFTA CLAIMS

By virtue of the Dismissal Order, the Court initially dismissed the Receiver's FUFTA Claims without prejudice, stating that the Receiver had failed to "adequately allege his status as a FUFTA creditor. (Dismissal Order [DE 51] at p. 25). The Court reasoned that the Receiver's allegation that through "numerous and ongoing transfers among the Receivership Entities" he acquired claims as creditor of Receivership Entities, was insufficient to establish creditor status under FUFTA. The Court specifically stated that the Receiver's pleadings were deficient because "from the pleadings it is impossible to determine which receivership entity is the creditor into whose shoes the Receiver steps for the purposes of asserting these claims,"

[8] The Receiver notes that recent discovery in the case has yielded even more facts supporting his allegations that Bank of America actually knew about the Theodule Ponzi scheme. To the extent that the Court finds the allegations in the Amended Complaint somehow insufficient to establish actual knowledge, the Receiver requests that he be granted leave to amend his pleadings accordingly.

requiring the Receiver to "explicate more clearly the transfers that form the basis of a receivership entities' status as a creditor." (Id. at p. 26).

In the Amended Complaint, the Receiver has addressed the Court's concerns by including within the FUFTA Claims detailed charts of the transfers among the Receivership Entities identified by the Receiver as forming the basis for his creditor status under FUFTA. Each chart identifies the total amount of the outgoing transfers from each Receivership Entity for which the Receiver claims his respective creditor status. Each chart further identifies the Receivership Entity to which the transfers establishing creditor status were made (the "Creditor Transfers"). (See Amended Complaint [DE 57] at ¶¶ 82, 90, and 98).

In the two paragraphs following each creditor chart, the Receiver makes the following allegations establishing his creditor status:

> "The Creditor Transfers were made by the Receivership Entities to the Receivership Bank Customers as business transactions for alleged investment purposes. The Receivership Entities fully expected an accounting and return of the Creditor Transfers, and a profit upon the invested funds. However the funds were not returned, but were instead misused by Theodule and others in connection with the ongoing Ponzi scheme."
>
> "The Receivership Entities have claims against the Receivership Bank Customers for repayment of the funds comprising the Creditor Transfers. Thus, the Receiver standing in the shoes of the Receivership Entities is a "creditor" of Receivership Bank Customers as defined by FUFTA. Conversely, the Receivership Bank Customers are "debtors" with respect to the Receivership Entities as defined by FUFTA."

(See id. at ¶¶ 83, 84, 91, 92, 99, and 100).

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. Dist. Ct. App. 1991); see also Money v. Powell, 139 So. 2d 702, 703 (Fla. Dist. Ct. App. 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 Creditor Transfers among the Receivership Entities have created debts and/or claims among and between each of those entities. Thus, the Receiver, standing in the shoes of the Receivership Entities, succeeds to each of these inter-company debts and has a "claim" as a "creditor" against each one of the Receivership Entities identified as a "debtor" in the Complaint. These allegations are sufficient to establish creditor status on behalf of the Receiver under FUFTA. See Perlman v. Five Corners Investors I, No. 09-81225-CIV-HURLEY, 2010 WL 962953 (S.D. Fla. Mar. 15, 2010).

V. BANK OF AMERICA MUST AFFIRMATIVELY PROVE ITS ALLEGED CONDUIT DEFENSE

With respect to the Receiver's FUFTA Claims, Bank of America argues that it is a "mere conduit" in connection with the transfers alleged by the Receiver, and that their lack of dominion and control over the transferred funds acts as an absolute bar to the Receiver's avoidance of the transfers.[9] As a preliminary matter, the "mere conduit" defense is an *affirmative defense* which must be pleaded and proven by Bank of America at trial. It is not an issue to be considered in

[9] Bank of America made this very same argument in its motion to dismiss the Receiver's initial complaint. The argument was defeated by virtue of the Dismissal Order. Bank of America fails to articulate why it attempts to resurrect the argument in the Motion to Dismiss for a second bite at the apple.

connection with a motion to dismiss. Dep't of Ins. v. Blackburn, 633 So. 2d 521, 524 (Fla. Dist. Ct. App. 1994).

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

CONCLUSION

For the reasons set forth above, the Receiver respectfully requests that Bank of America's Motion to Dismiss be denied in its entirety. Alternatively, should this Court dismiss any of the claims in the Receiver's 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.

Dated: March 23, 2012
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2012, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/David P. Lemoie
Attorney

SERVICE LIST

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