

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

CASE NO. 9:10-CV-81612  
(Ancillary Pro. No. 08-81565-CIV-Hurley/Hopkins)

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

Plaintiff,

vs.

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

Defendant.

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**REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO  
WELLS FARGO BANK, N.A.'S MOTION TO STRIKE  
JURY DEMAND AND INCORPORATED MEMORANDUM OF LAW**

Defendant, Wells Fargo Bank, N.A. as successor-in-interest to Wachovia Bank ("Wells Fargo"), hereby files this Reply to Jonathan E. Perlman, Esq.'s ("Plaintiff" or "Receiver") Response in Opposition to Wells Fargo Bank, N.A.'s Motion to Strike Jury Demand (ECF No. 75)(the "Response"), and states as follows:

***A. The Jury Trial Waiver in Wells Fargo's Deposit Agreement Has Been Enforced by this District***

***1. Conspicuousness***

Contrary to Plaintiff's position, the Receivership Entities did, in fact, knowingly, voluntarily and intelligently waive any right to a trial by jury on any claim or dispute relative to the Accounts they maintained at Wells Fargo. Indeed, on November 16, 2011, United States Magistrate Judge Jonathan Goodman entered an Order Granting Motion to Strike Demand for Jury Trial in *Lascoutx*

*v. Wells Fargo Bank, N.A.*, 2011 WL 5825655 (S.D. Fla. 2011), striking the Plaintiff's jury demand based upon a **verbatim** provision contained in a Wells Fargo Deposit Agreement.

While ignoring the *Lascoux* opinion, Plaintiff argues that the jury trial waiver provision "when juxtaposed against the remainder of the agreement can hardly be described as conspicuous". See Response (ECF No. 75), p.5. In holding that the jury waiver provision in the Wells Fargo Deposit Agreement is, indeed, conspicuous, the *Lascoux* Court observed:

"As to the remaining consideration, the Court finds that the jury trial waiver is conspicuous. The waiver is not buried inside a lengthy paragraph. It is instead primarily positioned at the top of a page, is written in all uppercase letters, and is preceded on the same page with a bolded title, "**Arbitration of Disputes/Waiver of Jury Trial and Participation in Class Actions.**" In particular, the all uppercase letter format makes the provision relatively more noticeable in the agreement because the majority of the agreement is in small font and written using a standard combination of lower and uppercase letters."

*Lascoux*, 2011 WL 5825655 at \*4.

The same analysis and result, of course, apply here. Plaintiff's apparent attempt to characterize the jury waiver provision as "fine print" or "buried" within the Deposit Agreement is simply without merit, as this District has already recognized.

## **2. *The Receivership Entities Agreed to Be Bound By the Deposit Agreement***

The Deposit Agreement and jury waiver provision contained therein are enforceable despite the fact that the Deposit Agreement is a separate document from the Signature Cards signed by each of the Receivership Entities who maintained the Accounts at Wells Fargo. It is well established in the Eleventh Circuit, this District, and the Florida Supreme Court that "where a writing expressly refers to and sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." *Eli Lilly and Co. v. Air Exp. Intern. USA, Inc.*, 615 F.3d 1305, 1316 (11<sup>th</sup> Cir. 2011); *Microsoft Corp. v. Big Boy Distribution LLC*, 589

F.Supp.2d 1308, 1319 (S.D. Fla. 2008); *OBS Co., Inc. v. Pace Const. Corp.*, 558 So.2d 404, 406 (Fla. 1990). Accordingly, as a matter of law, the Deposit Agreement is binding upon Wells Fargo and the Receivership Entities for all purposes, and governs the relationship between Wells Fargo and the Receivership Entities regarding the Accounts.

In an effort to avoid the jury waiver provision (and presumably the entire Deposit Agreement), Plaintiff appears to question whether the Receivership Entities received the Deposit Agreement to which they agreed to be bound. *See* Response (ECF No. 75), p. 5. As a preliminary matter, Plaintiff must come forward with *proof* that calls into question whether the waiver was knowingly and voluntarily given. *Belin v. Litton Loan Servicing, LP*, 2006 WL 2061340 at \*2 (M.D. Fla. 2006). The unverified, unsubstantiated, and speculative statements of Plaintiff's counsel in the Response are not proof that calls into question whether the waiver was knowingly and voluntarily given. There is absolutely nothing in the record to suggest that the Receivership Entities did not receive the Deposit Agreement. Moreover, the Seventh Circuit Court of Appeals has expressly held that the argument that a party did not receive a document upon which it agreed to be bound is "irrelevant", adding that "if it had not received the document, it should not have promised to comply with its terms." *Chicago Pacific Corp. v. Canada Life Assur. Co.*, 850 F.2d 334, 338 (7th Cir. 1988).

The same analysis and result, apply here. The Signature Cards attached to Wells Fargo's Motion to Strike Jury Demand (ECF No. 64-2) contain thirty-one (31) separate signatures by the authorized signatories to the Accounts, all agreeing to be bound by the terms of the Deposit Agreement. The authorized signatories to the Accounts should not have affixed their signatures agreeing thirty-one (31) separate times to be bound by the Deposit Agreement if they had not received it. *Chicago Pacific Corp.*, 850 F.2d at 338.

Plaintiff's reliance on *Lapenna v. SunTrust*, United States District Court, Middle District of Florida, Case No. 3:09-cv-1213-J-25-TEM (ECF No. 23) is misplaced. As a preliminary matter, in *Lapenna*, the page of SunTrust's Rules and Regulations which contained the jury waiver was not included within SunTrust's motion to strike jury demand. *Lapenna*, Case No. 3:09-cv-1213-J-25-TEM (ECF No. 23), p.3. Moreover, in *Lapenna*, the customer opened her account in the early 1990's with a predecessor bank and SunTrust was relying on its 2009 Rules and Regulations in seeking to enforce the jury waiver. *Lapenna*, Case No. 3:09-cv-1213-J-25-TEM (ECF No. 23), p.2-3. In *Lapenna*, it was also unknown what rules and regulations were in place when the signature card was signed by the customer. *Lapenna*, Case No. 3:09-cv-1213-J-25-TEM (ECF No. 23), p.5. Contrary to *Lapenna*, the governing Deposit Agreement in this action is the same Deposit Agreement that was in effect (and that the authorized signatories to the Accounts agreed to be bound by) at the time the Accounts were opened. The same Deposit Agreement remained in effect for the entire four (4) month period that the Accounts were maintained at Wells Fargo. See Affidavit of Benita Sheffield, (ECF No. 64-1), ¶5.

***B. Bargaining Power/Opportunity to Negotiate***

The allegations of the Amended Complaint (ECF No. 19) and relevant case law demonstrate, as both a matter of fact and law, that the Receivership Entities had more than sufficient bargaining power and the opportunity to negotiate the terms of their relationship with Wells Fargo relative to the Accounts. There is absolutely nothing in the record to suggest otherwise. In enforcing the same jury trial waiver in a Wells Fargo Deposit Agreement, the *Lascoux* Court cited with approval United States District Judge Kenneth Marra's ruling in *Milsap*. *Lascoux*, 2011 WL 5825655 at \*4 citing to *Milsap v. Cornerstone Residential Management, Inc.*, 2007 WL 965590 at \* 2 (S.D.Fla. March 28, 2007). The *Milsap* Court enforced a jury trial waiver

in favor of a multimillion dollar residential management company against a cosmetologist single mother in need of housing, noting that she could have simply walked away if she found the deal unreasonable. *Lascoutx*, 2011 WL 5825655 at \*4 citing to *Milsap*, 2007 WL 965590 at \*2.

Certainly, if a single mother is not at an extreme bargaining disadvantage with a multimillion dollar residential management company relative to her housing, then clearly as a matter of fact and law, neither were the Receivership Entities. Based upon the face of the Amended Complaint, the Receivership Entities had tens of millions of dollars at their disposal. *See e.g.* Amended Complaint (ECF No. 19) ¶ 9. Moreover, they were under absolutely no obligation to enter into any relationship with Wells Fargo, and the Amended Complaint demonstrates that the Receivership entities could have, and did, maintain accounts at other financial institutions. *See e.g.* Amended Complaint (ECF No. 19) ¶ 29. Like *Collins* (which involved a mortgage signed by a “tile guy” which he first saw at the closing), in the Response, the Plaintiff “do[es] not explain why they could not have negotiated the clause at that time, or why they could not have simply walked away from the deal if they found the terms of the agreement unreasonable.” *Collins v. Countrywide Home Loans, Inc.*, 680 F.Supp.2d 1287, 1296 (M.D.Fla.2010).

**C. The Jury Trial Waiver Applies to All Claims Raised Herein**

There is no ambiguity in the Deposit Agreement and the jury waiver provision is applicable to all claims in this action. The Deposit Agreement unambiguously provides:

“To the extent permitted by law, *if any dispute or claim results in a lawsuit*, and neither you nor we have elected or requested arbitration, you and we knowingly and voluntarily agree that a judge, without a jury, will decide the case.” *See* Deposit Agreement, (ECF No. 64-3), p. 11 (emphasis added).

Accordingly, the Deposit Agreement makes perfectly clear that the jury waiver provision applies to “*any dispute or claim [that] results in a lawsuit.*” Indeed, in *Lascoutx*, the jury trial

waiver in Wells Fargo's Deposit Agreement was enforced as to all claims for which a jury was sought, including, tort claims for civil theft and negligent supervision. *Lascoux*, 2011 WL 5825655 at \*1. In fact, the claims at issue in *Lascoux* are similar to those raised herein. In *Lascoux*, a plaintiff bank depositor alleged that a former employee of the defendant bank stole proceeds from his account. *Lascoux*, 2011 WL 5825655 at \*1. In this action, the Court has determined that the only claims that the Receiver has standing to pursue are "embezzlement" claims to the extent that "Theodule and others embezzled the funds deposited into the receivership entities." See Order on Motion to Dismiss (ECF No. 52), p. 5. As to Plaintiff's fraudulent transfer claims, Plaintiff is not a third-party stranger to the bank-customer relationship governed by the Deposit Agreement. Rather, as a matter of law, Plaintiff stands in the shoes of the accountholders which conducted the deposits and transfers on the Accounts and repeatedly agreed to be bound by the Deposit Agreement in connection with those transactions. See e.g. *Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543, 553 (Fla. 2d DCA 2003).

Likewise, on September 3, 2010, the Eleventh Circuit enforced a jury trial waiver on tort claims against Bank of America, N.A. for negligent representation, breach of fiduciary duty, and civil conspiracy to defraud based upon security and collateral agreements signed in connection with a letter of credit. See *Jaffe v. Bank of America, N.A.*, 395 Fed. Appx. 583, 585-587 (11<sup>th</sup> Cir. 2010).

Based upon the foregoing, as a matter of law, the jury trial waiver in the Deposit Agreement applies to *any dispute or lawsuit* between the Receivership Entities and Wells Fargo relative to the Accounts, irrespective of the legal theory upon which those claims were brought.

### *Conclusion*

The jury trial waiver in Wells Fargo's Deposit Agreement is enforceable as to all claims raised by Plaintiff in this action. Wherefore, Wells Fargo respectfully requests that this Court grant

its Motion to Strike Jury Demand (ECF No. 64), place this matter on a non-jury trial setting, and grant such other and further relief as this Court deems just and proper.

Dated: March 26, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 26, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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