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.
_____/

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

DEFENDANT BANK OF AMERICA, N.A.'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT

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PRELIMINARY STATEMENT

The Receiver's Opposition makes three arguments in an attempt to sidestep – rather than directly address – the Eleventh Circuit's decision in *Lawrence v. Bank of America, N.A.*, No. 11-12401, 2012 WL 89904 (11th Cir. Jan. 11, 2012), which directly addresses the central question that is dispositive of the sufficiency of the Receiver's Amended Complaint and shows why it should be dismissed. None of the Receiver's arguments salvage its claims, but instead underscore that dismissal with prejudice is warranted.

First, the Receiver tries to avoid the consequences of *Lawrence* altogether through procedural misdirection. The Receiver wrongly contends that Bank of America's motion to dismiss is actually a motion for reconsideration. It is not. The motion is properly before this Court as a timely motion filed pursuant to Federal Rule of Civil Procedure 12(b)(6) after the Receiver filed an amended complaint. Moreover, Rule 59 – which the Receiver invokes to claim that the motion somehow is "late" – is not applicable here. This Court's prior order is not a final judgment and, in any event, Bank of America is not seeking reconsideration of that order. Thus, the Receiver's procedural arguments should be disregarded, as they are nothing more than a flawed effort to divert the Court's attention from *Lawrence* and its ramifications.

Second, the Receiver again tries to avoid *Lawrence* by noting that the opinion is not binding because it is not published. While it may be true that *Lawrence* is not published, that does not undermine the fact that it is solidly and directly on point. Indeed, *Lawrence* is persuasive authority demonstrating the Eleventh Circuit's understanding of Florida law regarding aiding and abetting liability and confirming the growing body of case law within this Circuit uniformly holding that an aiding and abetting claim cannot survive a motion to dismiss without

allegations of "actual knowledge." Those required allegations are missing here – and thus dismissal is required.

Third, as a final attempt to avoid *Lawrence's* fatal holding, the Receiver contorts its factual allegations in an effort to mislead this Court into concluding that the Amended Complaint [Dkt. 57] contains the required allegations of "actual knowledge" rather than only legally insufficient allegations that the Bank "should have known" of Theodule's misconduct. These efforts at misdirection, too, fail. The Receiver ***admits*** that this Court previously ruled that the Receiver's original allegations were "sufficient to plausibly ***infer*** Bank of America's knowledge of Theodule's misconduct." Opposition to Bank of America's Motion to Dismiss Amended Complaint [Dkt. 76] ("Opposition") at p. 6 (emphasis added). That means that the original complaint did not allege "actual knowledge," but rather only "should have known" facts. *Lawrence* resolves that such allegations are insufficient to state a cognizable aiding and abetting claim. And, because the Amended Complaint's factual allegations are ***word-for-word identical*** to the factual allegations in the original complaint, the Receiver's suggestion that it has somehow sufficiently pled actual knowledge – as required by *Lawrence*, or provided anything beyond mere conclusory statements as to any contention of actual knowledge, are misguided, if not misleading.

In the end, the Receiver's Opposition is nothing more than an attempt to avoid and obfuscate the impact of *Lawrence*. Nothing the Receiver has to say undermines the fact that *Lawrence* directly addresses the legal sufficiency of aiding and abetting allegations like the ones the Receiver makes here – which are premised solely upon allegations that the Bank ***should have known*** about Theodule's misconduct – and holds that such allegations are not legally sufficient. Furthermore, since the Receiver's aiding and abetting claims fail as a matter of law,

the FUFTA claims also should be dismissed because the Amended Complaint provides no basis to conclude that the Bank was anything other than a "mere conduit" for the transfers at issue.

For all these reasons, the Receiver's Amended Complaint should be dismissed in its entirety with prejudice.

ARGUMENT

A. Bank of America's Motion To Dismiss Is Procedurally Proper.

The Receiver claims that Bank of America's motion is procedurally improper because this Court previously ruled that its aiding and abetting claims are legally sufficient to withstand a motion to dismiss. The Receiver then argues that, as a result, the portion of the motion addressing the aiding and abetting claims should be converted to a Rule 59(e) motion for reconsideration – which the Receiver contends is untimely. The Receiver is wrong in all respects. Indeed, this argument is a red herring, attempting to distract this Court from the Eleventh Circuit's decision in *Lawrence* issued ***after*** this Court's prior ruling.

The Eleventh Circuit has expressly stated that "an amended complaint supersedes the initial complaint and becomes the operative pleading in the case." *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007); *Pintando v. Miami-Dade Hous. Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007) ("As a general matter, [a]n amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary.") (internal citations omitted); *see also Harman v. Adjoined Consulting, LLC*, No. 06-22781-CIV, 2007 WL 2377058, at *3 (S.D. Fla. Aug. 16, 2007) ("the contents of the original complaint are of no import as the Amended Complaint is the operative pleading in this case"). Thus, the Receiver's Amended Complaint is the operative pleading for all claims and is the proper subject of a motion to dismiss.

The Receiver also argues that the Bank missed the deadline provided in Rule 59(e) for filing a motion for reconsideration. Opposition at pp. 6-7. However, both Rule 59(e) and the sole case the Receiver cites in support of its argument – *Fred Lurie Associates, Inc. v. Global Alliance Logistics, Inc.*, No. 05-22881, 2006 WL 3626296 (S.D. Fla. Aug. 15, 2006) – are inapplicable here. As an initial matter, the Bank's motion is a ***motion to dismiss*** filed pursuant to ***Rule 12(b)(6)***. Motion to Dismiss Amended Complaint [Dkt. 67]. It is not a Rule 59(e) motion. Rule 59(e) – which refers to a "Motion to Alter or Amend a Judgment" – applies only when there is a judgment. Fed. R. Civ. P. 59(e). There is no judgment here. The sole authority the Receiver relies upon to support his argument regarding an "out of time" motion – like Rule 59(e) itself – is inapposite. In *Fred Lurie*, the court contemplated a ***plaintiff's*** Rule 59(e) motion for reconsideration after the court had ***granted*** the defendant's motion to dismiss. This procedural scenario is readily distinguishable from the circumstances here. This Court ***denied*** the Bank's motion to dismiss as to the aiding and abetting claims in the Receiver's original complaint and thus that order does not constitute a "judgment" for purposes of Rule 59(e).

The Receiver amended his original complaint and asserted again his claims for aiding and abetting and fraudulent transfers. After this Court entered its order on the Bank's motion to dismiss the original complaint [Dkt. 51] ("Dismissal Order"), the Eleventh Circuit issued the *Lawrence* decision, which the Receiver admits is new and persuasive authority holding that a plaintiff must plead "actual knowledge" in order to state an aiding and abetting claim and explaining what is required to meet that pleading standard. Bank of America was entitled to file a motion to dismiss the Amended Complaint, its motion is not a motion for reconsideration, and this Court may and should evaluate the Receiver's aiding and abetting claims under the "actual knowledge" standard established in *Lawrence*.

B. The Eleventh Circuit Held That Actual Knowledge Is Required For Aiding And Abetting Claims To Survive A Motion To Dismiss.

The Eleventh Circuit's decision in *Lawrence* was issued after this Court ruled on Bank of America's motion to dismiss the Receiver's original complaint – and, thus, it is appropriate for this Court to examine the Receiver's aiding and abetting claims guided and informed by this additional, and admittedly persuasive, case law.

In its earlier order, this Court concluded that it could infer "actual knowledge" based on factual allegations that implied that the Bank "should have known" about Theodule's misconduct. *See* Dismissal Order at pp. 8-17; *compare 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), *with Lawrence v. Bank of America, N.A.*, No. 8:09-cv-2162, 2010 WL 3467501 (M.D. Fla. Aug. 30, 2010) and its progeny. In making this ruling, the Court considered the trial court's decision in *Lawrence*, but found it "troubling" because it "appeared to conflict" with case law that permitted courts to infer "actual knowledge" based upon "should have known" factual allegations. Dismissal Order at p. 16.

Since that time, the Eleventh Circuit directly weighed in on the apparent conflict, holding that allegations that a bank "should have known" about a customer's misconduct are not legally sufficient to state an aiding and abetting claim under Florida law. Instead, to survive a motion to dismiss, Florida law requires allegations that the bank had "actual knowledge" – not merely allegations that the bank would have had knowledge if it had conducted an investigation of its customer's transactions. Indeed, the Eleventh Circuit eradicated any question about the legal significance of allegations regarding a customer's "atypical transactions" and supposed "red flags" – concluding that such allegations, without more, are not sufficient to state an aiding and abetting claim against a bank:

> 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***." *[Bell Atl. v.]Twombly*, 550 U.S. [544, 570 (2007)].

Lawrence, 2012 WL 89904, at *3 (emphasis added). *Lawrence*'s articulation of the "actual knowledge" pleading requirement relates directly to the central question here and, indeed, is dispositive of whether the Receiver has sufficiently pleaded aiding and abetting claims.

What's more, after the Eleventh Circuit issued its decision in *Lawrence*, the Southern District of Florida followed suit when it examined aiding and abetting claims asserted against a bank and concluded that a plaintiff must plead "actual knowledge" to survive a motion to dismiss. In *Platinum Estates, Inc. v. TD Bank, N.A.*, the court first noted that: "[i]n cases where a bank customer has perpetrated a fraudulent scheme, courts have widely held that the bank is not liable for aiding and abetting unless the bank has actual knowledge of its customer's wrongful activity." No. 11-60670, 2012 WL 760791, at *3 (S.D. Fla. Mar. 8, 2012) (citing *Groom v. Bank of America,* No. 8:08-cv-2567, 2012 WL 50250, at *2–3 (M.D. Fla. Jan. 9, 2012) (emphasis supplied) (citing *Lawrence v. Bank of America, N.A.*, No. 8:09-cv-2162, 2010 WL 3467501, at *3 (M.D. Fla. Aug. 30, 2010)); *Hines v. FiServ, Inc.*, No. 8:08-cv-2569, 2010 WL 1249838, at *4 (M.D. Fla. Mar. 25, 2010); *MKSMK Inv. Co. v. JP Morgan Chase & Co.*, 431 F. App'x 17, 19 (2d Cir. 2011); *Rosner v. Bank of China*, 349 F. App'x 637, 638-40 (2d Cir. 2009)). Then, the court explained that "[c]onclusory statements that a defendant actually knew is [sic] insufficient to support and [sic] aiding and abetting claim where the facts in the complaint only suggest that

the defendant should have known that something was amiss." *Id.* at *3 (citing *Groom*, 2012 WL 50250, at *3) (internal quotations omitted).

As shown below, the Amended Complaint does not meet this pleading requirement.

C. The Receiver Does Not Allege That The Bank Had Actual Knowledge of Theodule's Fraud, Thus The Receiver's Aiding and Abetting Claims Should Fail.

The Amended Complaint's factual allegations are word-for-word identical to the factual allegations in the Receiver's original complaint. *Compare* Compl. ¶¶ 1-68 *with* Amended Compl. ¶¶ 1-68. Of course, this Court considered those factual allegations when it addressed Bank of America's motion to dismiss the original complaint. As the Receiver admits, this Court ruled only that the factual allegations were "sufficient to *plausibly infer* Bank of America's knowledge of Theodule's misconduct" – that is, this Court did not rule that the Receiver had pleaded "actual knowledge." Opposition at p. 6 (emphasis added). Consequently, despite the Receiver's best efforts to contort and recast these very same allegations, the Amended Complaint simply does not allege that the Bank had actual knowledge of Theodule's fraud. Instead, the Receiver's Amended Complaint is replete with allegations that – at best – amount to a contention or an inference that the Bank "should have known" of Theodule's fraud. That, under *Lawrence*, is not enough.

The Receiver tries to stave off dismissal through efforts to distinguish *Lawrence*. The Receiver acknowledges that *Lawrence* requires "actual knowledge" allegations and then says that its Amended Complaint contains those allegations, such as "[b]y 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." Opposition at p. 11 (citing Am. Compl. ¶¶ 35-39). The Amended Complaint, however, says nothing of the kind. The paragraphs cited allege only that ***if*** the Bank conducted this purported due diligence, it should have known

that Theodule was running a Ponzi scheme. As explained, such allegations are not sufficient under *Lawrence*.

Finally, the Receiver also contends that "recent discovery" yielded more facts supporting alleged actual knowledge by the Bank. Opposition at p. 12 n.8. This statement is simply false, as confirmed by the Amended Complaint itself. Indeed, the only discovery that occurred after the filing of the Amended Complaint were Rule 30(b)(6) depositions of Bank employees. Those deponents had no direct knowledge of Theodule or his account, but rather testified in the abstract regarding policies and hypothetical scenarios. Thus, any Theodule-specific fact discovery was completed *prior to* the filing of the Amended Complaint. To the extent that any "new" facts regarding the Bank's alleged actual knowledge were revealed, the Receiver presumably would have included them in the Amended Complaint. It did not, and the absence of any such allegations only confirms that no such facts emerged or exist.

For these reasons, the Receiver's aiding and abetting claims fail as a matter of law.

D. <u>The Receiver's FUFTA Claims Still Fail To State A Legally Cognizable Claim.</u>

This Court also should dismiss the Receiver's FUFTA claims because (1) the Bank was no more than a "mere conduit" for any allegedly fraudulent transfers; and (2) the Receiver still has not, and cannot, delineate the specific transactions between and among the Receivership Entities that form the basis for the Receiver's creditor status.

As an initial matter, the Receiver's aiding and abetting claims fail as a matter of law. If the Receiver's aiding and abetting claims are dismissed, the remaining allegations provide no basis whatsoever to conclude that Bank of America acted as anything other than a "mere conduit" for any allegedly fraudulent transfers. Thus, because the aiding and abetting claims fail, the FUFTA claims fail as well.

Moreover, in its earlier order, this Court expressly stated that the Receiver failed to plead his FUFTA claims with the requisite specificity. *See* Dismissal Order at p. 26 (dismissing the Receiver's FUFTA claims because the allegations do not adequately plead the creditor relationship). This Court granted the Receiver leave to amend his FUFTA claims, but cautioned that "[i]n order to sufficiently state these claims, the Receiver must explicate more clearly the transfers that form the basis of a receivership entity's status as a creditor." *Id.* And this Court instructed the Receiver precisely how to plead with the requisite specificity, by: "making reference to the ***specific transactions*** that identify the debtor, creditor, and transferees that form the fraudulent transfer framework." *Id.* (emphasis added). Yet, the Amended Complaint still fails to refer to the specific transactions that form the basis for the Receiver's fraudulent transfer claims.

The Receiver claims, in vain, that his inclusion of "detailed charts of the transfers among the Receivership Entities" satisfies the pleading standard for his fraudulent transfer claims. Opposition at p. 13. But the Receiver's charts simply aggregate transactions for the Receivership Entity transferor, and the receivership bank customer transferee. Am. Compl. ¶¶ 81, 90, 98. The Receiver's charts further confound the fraudulent transfers for several reasons. First, the charts that apparently support the Receiver's allegations for Counts III and IV are identical. Second, the total amount of the transfers in the charts is contradicted by the Receiver's allegations in subsequent allegations. Certain inconsistencies include:

- The Receiver's companion chart for Count III shows the total amount transferred was $5,405,550.61. Am. Compl. ¶ 81. However, paragraph 84 states that "the Receivership Bank Customers collectively transferred . . . $9,283,916." *Id.*

- The Receiver's companion chart for Count IV shows the total amount transferred was $5,405,550.61. Am. Compl. ¶ 90. However, paragraph 93 states that "the Receivership Bank Customers collectively transferred . . . $4,473,718." *Id.*

- The Receiver's companion chart for Count V shows the total amount transferred between the Receivership Entities and Theodule was $3,917,609.90. Am. Compl. ¶ 98. However, paragraph 101 states that "Theodule transferred . . . $5,419,824." *Id.*

Finally, the Receiver's charts do not include any reference to specific transactions, as prescribed by this Court. For this additional reason, the FUFTA claims should be dismissed with prejudice.

CONCLUSION

As demonstrated in its Motion to Dismiss the Receiver's Amended Complaint, and as set forth 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.

Date: April 9, 2012

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 9th day of April, 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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