UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JONATHAN E. PERLMAN,

Plaintiff,

vs.

WELLS FARGO BANK, N.A.,

Defendant.
_____/

ORDER GRANTING IN PART DEFENDANT'S MOTION TO STRIKE JURY DEMAND

THIS CAUSE is before the Court upon Defendant's Motion to Strike Jury Demand [DE # 64]. The motion is fully briefed and ripe for adjudication. Upon review, the Court will grant in part Defendant's motion and strike Plaintiff's jury demand with respect to Counts One and Two of the Amended Complaint. The Court will not strike Plaintiff's jury demand with respect to its claims under Florida's Uniform Fraudulent Transfer Act.

BACKGROUND[1]

Plaintiff is the receiver for certain entities (the "Receivership Entities") that banked with Defendant for approximately four months. George Theodule utilized the Receivership Entities to perpetrate a Ponzi scheme, ultimately resulting in the appointment of the Receiver. The Receiver brings claims against Defendant arising from the banking services it provided during the commission of the scheme. Importantly, the Receiver only brings actions relating to harms suffered by the

[1] The facts of this case as stated in the Amended Complaint are more fully set forth in the Court's Order granting in part Defendant's motion to dismiss. *See Perlman v. Wells Fargo Bank, N.A.*, No. 10-81612-CV-DTKH, 2011 WL 5873054, *1-2 (S.D. Fla. Nov. 22, 2011) [DE # 52].

entities themselves rather than the entities' creditors, including the defrauded investors.

In the instant motion, Defendant seeks to strike Plaintiff's demand for a trial by jury. Defendant bases this request on the provisions in deposit agreements the Receivership Entities signed at the outset of their banking relationship with Defendant. Specifically, prior to opening each account, the Receivership Entities signed "signature cards" by which they agreed to be bound by a separate "Wachovia Deposit Agreement or other applicable deposit agreement." The deposit agreements, in turn, contain the following provisions:

> 47. **ARBITRATION OF DISPUTES/WAIVER OF JURY TRIAL AND PARTICIPATION IN CLASS ACTIONS.**
>
> [. . .]
>
> 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. . . . YOU UNDERSTANDAND [sic] KNOWINGLY AND VOLUNTARILY AGREE THAT YOU AND WE ARE WAIVING THE RIGHT TO A TRIAL BY JURY AND THE RIGHT TO PARTICIPATE OR BEREPRESENTED INANY CLASSACTION [sic] LAWSUIT.

Def.'s Mot. to Strike Jury Demand, Ex. B, ¶ 47, at 11 [DE # 64-3] (emphasis in original) (hereinafter "Deposit Agreement"). Plaintiff disputes that the waiver provisions are enforceable and argues that, even if enforceable, they cover the particular claims asserted in this action.

DISCUSSION

A. The Waiver Is Enforceable

"A party may validly waive its Seventh Amendment right to a jury trial so long as waiver is knowing and voluntary." *Bakrac, Inc. v. Villager Franchise Sys., Inc.*, 164 Fed. Appx. 820, 823 (11th Cir. 2006). "In making this assessment, courts consider the conspicuousness of the waiver provision, the parties' relative bargaining power, the sophistication of the party challenging the

waiver, and whether the terms of the contract were negotiable." *Id.* at 823-24.

Applying these factors to the instant case, the Court finds the waiver of jury trial enforceable. Plaintiff argues that the waiver was inconspicuous and non-negotiable and that Plaintiff was without any bargaining power in the transaction. The Court rejects these concerns. While it is true that Defendant is a large corporation with a deep reservoir of resources, the Receivership Entities themselves were not wholly unsophisticated. According to the Amended Complaint, they effected the embezzlement of and presumably had access to tens of millions of dollars. Additionally, they procured services from two other banks and were clearly aware of their alternatives and ability to walk away from a deal with Defendant. And while it is doubtful that such a large entity as Defendant would be willing to negotiate the waiver provision on an individual basis, Plaintiff has not provided any evidence that it ever attempted such negotiation. Plaintiff "do[es] not explain why [it] could not have negotiated the clause . . . or why [it] could not have simply walked away from the deal if [it] found the terms of the agreement unreasonable." *Collins v. Countrywide Home Loans, Inc.*, 680 F. Supp. 2d 1287, 1296 (M.D. Fla. 2010).

Turning to the conspicuousness factor, the Court shares some of Plaintiff's concerns. The practice of having the other party agree in one document to provisions set out in another is not ideal and can only reduce the likelihood that the other party will actually read the provisions of the agreement. However, the Court is reluctant to find a clause inconspicuous on the theory that a party elected not to read the provisions of the agreement. "If [Plaintiff] had not received the document, it should not have promised to comply with its terms." *Chi. Pac. Corp v. Canada Life Assurance Co.*, 850 F.2d 334, 338 (7th Cir. 1988). Under the circumstances of this case, the Court thinks it fair to charge Plaintiff with the duty to read the provisions of the agreement, and assuming it did so, the

Court finds the waiver provision reasonably conspicuous. Although the provision is the forty-seventh of seventy-eight total paragraphs, the paragraphs themselves are generally short and contain descriptive headings alerting the parties to the nature of the provisions therein. The agreement itself is only eleven pages long. Moreover, the waiver provision is set out in its own paragraph and is one of a relative few paragraphs with portions set in all capital letters. It is not, therefore, buried within unrelated text. *Compare Lascoutx v. Wells Fargo Bank, N.A.*, No. 11-21619-CIV, 2011 WL 5825655, *4 (S.D. Fla. Nov. 16, 2011).

In light of the foregoing, the Court finds the waiver provisions sufficiently conspicuous and otherwise satisfactory under the test for a knowing and voluntary waiver of the right to a trial by jury.

B. Applicability of the Waiver to Plaintiff's Claims

Having found the waiver provisions enforceable generally, the Court must now determine their applicability to the claims asserted in this action. Plaintiff argues that the provisions are too ambiguous to apply to the tort claims for aiding and abetting breach of fiduciary duty and aiding and abetting conversion. Plaintiff also argues that the waiver does not apply to the claims under Florida's Uniform Fraudulent Transfer Act ("FUFTA"), Fla. Stat. § 726.101, because in those claims the Receiver stands in the shoes of a Receivership Entity as a third-party creditor of another Receivership Entity that transferred money into its accounts with Defendant.[2]

With respect to Plaintiff's first argument, the Court finds that the waiver provisions are not ambiguous merely because they fail to list specific examples of claims that would fall within their terms. The waiver states that it applies to "any dispute or claim [that] results in a lawsuit." Deposit

[2] The Court has already stated its concern that the mere conduit defense will likely apply to at least some of the alleged fraudulent transfers. *See* Order Granting in Part Def.'s Mot. to Dismiss, 28-30 [DE # 52].

Agreement at 11, ¶ 47 [DE # 64-3]. Earlier in the paragraph, the agreement refers to "any dispute or claim concerning your account or your relationship to us." *Id.* Clearly, Plaintiff's claims for aiding and abetting conversion and aiding and abetting breach of fiduciary duty are "dispute[s] or claim[s] concerning [Plaintiff's] account or . . . relationship to [Defendant]" that "result[ed] in a lawsuit." *Id.* Terms that are intentionally very broad are not ambiguous for that reason, and requiring a party to list specific examples rather than rely on the word *any* would only add more confusing verbiage without any corresponding benefit to comprehension. The Court is wary of encouraging even more repetition and verbosity in documents whose prolixity already causes concerns regarding the conspicuousness of their provisions.

Regarding Plaintiff's FUFTA claims, the Receiver asserts these claims standing in the shoes of Receivership Entities that were creditors of other Receivership Entities that transferred money to accounts with Defendant. As such, with respect to these claims, the Receiver is not a party to the deposit agreements and cannot be bound by their terms. *See, e.g.*, *Hulsey v. West*, 966 F.2d 579, 581 (10th Cir. 1992) ("Generally, a jury waiver provision in a contract . . . affects only the rights of the parties to that contract . . . ."). While it is true that in many cases the Receiverships Entities that serve as the third-party creditors will have signed their own deposit agreements with Defendant, the agreements state that they apply only to claims "concerning *your* account" with Defendant. Deposit Agreement at 11, ¶ 47 [DE # 64-3] (emphasis added). The FUFTA claims concern only the accounts of *other* Receivership Entities and therefore do not fall within the ambit of the waivers.

CONCLUSION

In light of the foregoing, the Court concludes that the Receivership Entities knowingly and voluntarily waived their right to a jury trial with respect to Counts One and Two of the Amended

Complaint and that the waivers do not cover Plaintiff's FUFTA claims. Because the right to a jury trial is evaluated claim by claim rather than for a case in its entirety, *see, e.g.*, *Bleecker v. Standard Fire Inc. Co.*, 130 F. Supp. 2d 726, 737 (E.D.N.C. 2000), the Court will grant Defendant's motion to strike with respect to Counts One and Two only.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant's motion [DE # 64] is **GRANTED IN PART**.

2. Plaintiff demand for trial by jury is **STRICKEN** as to Counts One and Two.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 3rd day of April, 2012.

Daniel T. K. Hurley
United States District Judge

Copies provided to counsel of record