

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.

WELLS FARGO BANK, N.A.'S RESPONSE IN OPPOSITION TO RECEIVER'S
MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT
AND INCORPORATED MEMORANDUM OF LAW

Defendant, Wells Fargo Bank, N.A., as successor-in-interest to Wachovia Bank, N.A. ("Wells Fargo"), by and through its undersigned counsel and pursuant to S. D. Local Rule 7.1, hereby responds to the Receiver's Motion for Leave to File Second Amended Complaint (ECF No. 86)(the "Motion for Leave to Amend"). In support hereof, Wells Fargo states as follows:

Introduction

On June 1, 2012, Wells Fargo filed a Motion for Reconsideration of this Court's November 22, 2011 Order Granting in Part Defendants' Motion to Dismiss and Denying Defendants' Motion to Strike (ECF No. 80)(the "Motion for Reconsideration").¹ The Motion for Reconsideration was filed in light of the intervening January 11, 2012 Eleventh Circuit Court of Appeals opinion in *Lawrence v. Bank of America*, 455 Fed. Appx. 904 (11th Cir. 2012)("Lawrence II") and this Court's May 23, 2012 dismissal with prejudice of *Perlman v. Bank of America, N.A.*, Case No. 9:11-cv-

¹ Wells Fargo incorporates the arguments contained in its Motion for Reconsideration (ECF No. 80) herein by reference.

80331-DTKH, formerly pending in the United States District Court for the Southern District of Florida (the "Bank of America Action") in light of *Lawrence II*. The Receiver has never responded to the Motion for Reconsideration.

On June 17, 2012, the Receiver filed a Motion for Extension of Time to the Motion for Reconsideration (the "First Motion for Extension")(ECF No. 81) seeking through July 10, 2012 to serve his response to the Motion for Reconsideration. On June 21, 2012, the Court entered its Order Granting in Part the First Motion for Extension (ECF No. 83) and directing the Receiver to file his response to the Motion for Reconsideration by June 26, 2012. On June 23, 2012, counsel for the Receiver advised counsel for Wells Fargo in an e-mail that "the time the Court gave us is not enough given the matters we are dealing with on other fronts" and inquired whether Wells Fargo would agree to an additional two (2) week extension of time to respond to the Motion for Reconsideration. Under the auspices that other workload commitments of the Receiver's counsel prevented the Receiver from timely completing his Response to the Motion for Reconsideration, Wells Fargo again agreed to the Receiver's requested extension. On June 25, 2012, the Receiver filed his Motion for Extension of Time to the Motion for Reconsideration (the "Second Motion for Extension")(ECF No. 85) again seeking through July 10, 2012 to serve his response to the Motion for Reconsideration. The Second Motion for Extension was not ruled upon by the Court.

Then suddenly, on June 26, 2012, without any advance notice to Wells Fargo and without making any prior attempt to confer with Wells Fargo as required by S.D. Local Rule 7.1(a)(3), the Receiver filed his Motion for Leave to Amend (ECF No. 86). In fact, based upon the face of the Motion for Leave to Amend, it is apparent that the Receiver was hoping to avoid responding to the meritorious arguments raised in Wells Fargo's Motion for Reconsideration (ECF No. 80) altogether by attempting to file a Second Amended Complaint. Specifically, the Motion for Leave to Amend states: "Should this Court grant the Receiver's request for leave to file a Second Amended

Complaint, the Receiver would respectfully request that this Court deny the pending motion for reconsideration as moot”. See Motion for Leave to Amend (ECF No. 86), p.2, fn. 1. The twice-requested extended deadline of July 10, 2012 to respond to the Motion for Reconsideration has now passed, and the Receiver has still failed to respond to the Motion for Reconsideration. At this point, since the Receiver has failed to respond, there is sufficient cause to grant the Motion for Reconsideration by default. See S.D. Local Rule 7.1(3). This Court should grant Wells Fargo’s Motion for Reconsideration (ECF No. 80) at this time and dismiss this action with prejudice.

As a preliminary matter, this Court should summarily deny the Motion for Leave to Amend because the Plaintiff made absolutely no attempt to confer with Wells Fargo prior to filing the Motion for Leave to Amend and failed to attach a certificate of compliance with S.D. Local Rule 7.1(a)(3). Indeed, S.D. Local Rule 7.1(a)(3) expressly provides: “Failure to comply with the requirements of this Local Rule may be cause for the Court to grant or deny the motion and impose on counsel an appropriate sanction...”

To the extent that the Court considers the Motion for Leave to Amend (ECF No. 86), which was filed in an obvious attempt to avoid addressing Wells Fargo’s Motion for Reconsideration (ECF No. 80), the Motion for Leave to Amend should be denied because the proposed Second Amended Complaint (ECF No. 86-1) is substantially similar to the April 5, 2011 Amended Complaint (ECF No. 19) and does not contain additional allegations sufficient to state a cause of action in accordance with the pleading standard articulated by the Eleventh Circuit on January 11, 2012 in *Lawrence II*.

***The Proposed Amendment Fails to Allege Sufficient Allegations
to Meet the Pleading Standard Articulated In Lawrence***

Leave to amend a complaint is properly denied when the proposed amendment fails to state a cause of action. *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007); *Hall v. United Ins. Co. of America*, 367 F.3d 1255, 1263 (11th Cir. 2004). By failing to respond to Wells Fargo’s Motion

for Reconsideration (ECF No. 80), it is apparent that the Plaintiff recognizes that the April 5, 2011 Amended Complaint (ECF No. 19) fails to meet the current pleading standard articulated by the Eleventh Circuit in *Lawrence II* for asserting causes of action against a bank whose customers allegedly engaged in a Ponzi scheme.

A comparison of the April 5, 2011 Amended Complaint (ECF No. 19) to the proposed Second Amended Complaint (ECF No. 86-1) reveals that the proposed Second Amended Complaint is largely based upon precisely the same conclusory allegations and allegations of suspicious activities and red flags that are contained in the Amended Complaint. *Lawrence II* has made clear that such allegations are insufficient as a matter of law to maintain any cause of action against Wells Fargo.

Indeed, the allegations in paragraph 29 through 55 of the Amended Complaint (ECF No. 19) and proposed Second Amended Complaint (ECF No. 86-1) are essentially verbatim and based upon the same insufficient conclusory allegations that Wells Fargo failed to conduct appropriate “due diligence” in connection with the opening and monitoring of the accounts (the “Accounts”) maintained by the Receivership Entities and that there were “red flags” and suspicious activities that occurred on the Accounts. Compare Amended Complaint (ECF No. 19), ¶¶29 – 55 with proposed Second Amended Complaint (ECF No. 86-1), ¶¶29 – 55. *Lawrence II* has unequivocally reiterated that banks have no duty to investigate even suspicious transactions, and allegations of such transactions do not demonstrate the actual knowledge required for aiding and abetting claims. *Lawrence II*, 455 Fed. Appx. at 907.

The only “new” allegations pertaining to Wells Fargo’s alleged knowledge and participation in the purported Ponzi scheme operated by the Receivership Entities are contained in paragraphs 56 – 60 of the proposed Second Amended Complaint. These allegations are based upon the deposition testimony of Wells Fargo investigator, Joyce Engstrom, and Wells Fargo’s investigation notes

relative to the Receivership Entities.² These “new” allegations unequivocally demonstrate that Wells Fargo was not willing to permit its accounts to be used for any improper purposes and took substantial measures *to thwart*, as opposed to assist any alleged misconduct of the Receivership Entities. Specifically, paragraph 57 of the proposed Second Amended Complaint reveals that within a matter of days after Joyce Engstrom was first contacted to investigate a single check involving one of the Accounts, Joyce Engstrom promptly relayed her concerns regarding the Accounts to the Florida Department of Law Enforcement. In paragraph 58 of the proposed Second Amended Complaint, Plaintiff refers to a call made by another Wells Fargo investigator to George Theodule (“Theodule”) in an attempt to obtain additional information and thwart any improper use of the Accounts. Based upon these allegations, the Receiver summarily concludes that “the admissions by Theodule in his call with Hodges regarding the solicitation of investors, along with the “unusual activity” in the accounts and contacting of the FDLE reflects Wachovia’s knowledge of an ongoing Ponzi scheme...” See proposed Second Amended Complaint, ¶58.

The baseless and conclusory suggestion that Wells Fargo’s investigators knew a Ponzi scheme was occurring and permitted it to continue is simply not plausible and is an insult to Wells Fargo’s investigators. Moreover, these allegations show nothing more than that Wells Fargo’s investigators had concerns regarding the Accounts, and that those concerns were immediately acted upon by contacting law enforcement in an attempt to thwart any improper conduct on the Accounts.

Further, to the extent that the Court believes that the new allegations in the proposed Second Amended Complaint against Bank of America (Bank of America Action, ECF No. 85, 101) may have otherwise been sufficient to state a claim in the Bank of America Action, no such new

² Wells Fargo’s investigation notes were attached to the Complaint (ECF No. 1, Exhibit B) filed in the related action styled *Nerline-Horace Manasse v. Wells Fargo Bank, N.A.*, Case No. 9:10-cv-81623-Hurley/Hopkins, formerly pending in United States District Court, Southern District of Florida (the “Horace-Manasse Action”). On April 12, 2012, this Court in the Horace-Manasse Action entered its Order Granting Defendant’s Motion to Dismiss with Prejudice (ECF No. 47).

allegations exist in the proposed Second Amended Complaint against Wells Fargo. Specifically, in the proposed Second Amended Complaint in the Bank of America Action, it was alleged that a Bank of America branch manager had an outside business relationship with an officer/director of one of the Receivership Entities that maintained accounts at Bank of America. It was further alleged that the Bank of America branch manager personally opened accounts for Theodule, even though that branch manager never opened accounts for any other customer before or since. It was also alleged that the Bank of America branch manager specifically failed to conduct and actively disabled certain security features in order to avoid detection of improper activity, and that he instructed others to do so as well. *See* Bank of America Action (ECF No. 85, 101), ¶¶67-83.

In this action, there is no similar type of allegation that any Wells Fargo employee had any outside business relationship with Theodule or any officer/director of any Receivership Entity that maintained any of the Accounts at Wells Fargo. There is no allegation that Theodule or any Receivership Entity sought out any particular employee to open bank accounts, who did not otherwise open accounts for customers. Furthermore, there is no allegation that that any Wells Fargo employee (with ties to the Receivership Entities) purposefully disabled or failed to conduct normal security controls or directed others to do so in order to permit Theodule and/or the Receivership Entities to conduct suspicious transactions and to conceal those transactions.

Indeed, in the proposed Second Amended Complaint against Bank of America, the Receiver expressly states: “At BOA, *unlike at the banks where he had previously operated*, Theodule dropped any pretense that investors’ monies were going to the supposedly legitimate financial services firm, Creative Capital, for profitable investing.” (emphasis added). *See* Bank of America Action, ECF No. 85-1, 101, ¶63. Wells Fargo is alleged to be the bank where some of the Receivership Entities maintained accounts prior to the accounts the Receivership Entities maintained at Bank of America. The proposed Second Amended Complaint against Bank of

America also apparently recognizes that by July 2008, the Receivership Entities were “no longer welcome” at Wells Fargo and Wells Fargo closed the accounts of the Receivership Entities, *on its own volition*, because Wells Fargo *would not permit* its accounts to be used for suspected improper purposes. See Bank of America Action, ECF No. 85-1, ¶¶29, 30. In sum, like the April 5, 2011 Amended Complaint (ECF No. 19) against Wells Fargo, the proposed Second Amended Complaint (ECF No. 86-1) adds nothing substantively against Wells Fargo and is entirely based upon nothing more than the same conclusory allegations and allegations of suspicious activities and red flags, which the Eleventh Circuit has now made clear are insufficient to sustain a cause of action. *Lawrence II*, 455 Fed. Appx. at 907.

The time has come for this Court to affirmatively state that Wells Fargo should no longer continue to be forced to defend baseless claims seeking to impose tens of millions of dollars in liability upon Wells Fargo, based upon the Receiver’s hindsight-driven analysis that Wells Fargo failed to do enough to prevent suspicious transactions in the Accounts. Indeed, the law is now clear Wells Fargo owed no duty to the Plaintiffs to investigate the activity in the Accounts in the first place. *Lawrence II*, 455 Fed. Appx. at 907. Moreover, there is absolutely nothing in the proposed Second Amended Complaint that sets forth a plausible claim in accordance with the pleading standard in *Lawrence II* that Wells Fargo had actual knowledge that the Receivership Entities were operating a Ponzi scheme and knowingly provided substantial assistance to the Receivership Entities in the commission of any Ponzi scheme.

III. CONCLUSION

The proposed Second Amended Complaint (ECF No. 86-1) fails to meet the pleading standard set forth by the Eleventh Circuit in *Lawrence II*. Since the proposed Second Amended Complaint contains insufficient allegations to sustain a cause of action against Wells Fargo, the proposed amendment is futile and the Motion for Leave to Amend (ECF No. 86) should properly be

denied. Accordingly, Wells Fargo requests that the Motion for Leave to Amend (ECF No. 86) be denied, and for such other relief that this Court deems just and proper.

FOX ROTHSCHILD LLP
222 Lakeview Avenue, Suite 700
West Palm Beach, FL 33401
Telephone: (561) 835-9600
Facsimile: (561) 835-9602

By: /s/ Elliot A. Hallak

Amy S. Rubin
Florida Bar No. 476048
arubin@foxrothschild.com
Elliot A. Hallak
Florida Bar No. 762741
ehallak@foxrothschild.com

*Counsel for Defendant Wells Fargo Bank, N.A. as
successor-in-interest to Wachovia Bank, N.A.*

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 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.

FOX ROTHSCHILD LLP
222 Lakeview Avenue, Suite 700
West Palm Beach, FL 33401
Telephone: (561) 835-9600
Facsimile: (561) 835-9602

By: /s/ Elliot A. Hallak

Amy S. Rubin
Florida Bar No. 476048
arubin@foxrothschild.com
Elliot A. Hallak
Florida Bar No. 762741
ehallak@foxrothschild.com

Counsel for Defendant Wells Fargo Bank, N.A.

SERVICE LIST

*United States District Court
Southern District of Florida*

CASE NO: 10-CV-81612

Amy S. Rubin
Florida Bar Number: 476048
arubin@foxrothschild.com
Elliot A. Hallak
Florida Bar No. 762741
ehallak@foxrothschild.com
Fox Rothschild LLP
222 Lakeview Avenue, Suite 700
West Palm Beach, FL 33401
Telephone: (561) 835-9600
Facsimile: (561) 835-9602

*Attorneys for Defendant
Wells Fargo Bank, N.A.*

David C. Cimo
Florida Bar Number 775400
dcimo@gjb-law.com
David P. Lemoie
Florida Bar Number 188311
dlemoie@gjb-law.com
Carmen Contreras-Martinez
Florida Bar Number 093445
ccontreras@gjb-law.com
Genovese Joblove & Battista, P.A.
100 Southeast Second Street
44th Floor
Miami, FL 33131
Telephone: (305) 349-2300
Facsimile: (305) 349-2310

Attorney for Plaintiff, SEC Receiver Perlman

Michael R. Josephs
Florida Bar Number 119242
mrj@josephsjack.com
Josephs Jack, P.A.
2950 SW 27th Avenue
Suite 100
Miami, FL 33133
Telephone: (305) 445-3800
Facsimile: (305) 448-5800

*Co-Attorney for Plaintiff, SEC Receiver
Perlman*