UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BURTON WIAND, as Court-Appointed Receiver for SCOOP REAL ESTATE L.P., et al.,

Plaintiff,

vs. **Case No. 8:12-cv-557-T-27EAJ**

WELLS FARGO BANK, N.A., et al.,

Defendants.
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ORDER

BEFORE THE COURT are Defendants' motions to dismiss (Dkts. 4, 5). Upon consideration, the motions are GRANTED *in part*.

Background

The Complaint alleges that between 1999 and 2009, Arthur Nadel operated a Ponzi scheme and stole millions of dollars from six hedge funds: Valhalla Investment Partners, L.P., Viking IRA Fund, LLC, Viking Fund, LLC, Victory IRA Fund, Ltd., Victory Fund, Ltd., and Scoop Real Estate, L.P. Burton Wiand, who was appointed Receiver for the hedge funds, commenced this action against the successor-in-interest to Wachovia Bank, N.A., alleging that Wachovia is liable for funds that Nadel misappropriated via accounts that he maintained at the bank.[1] Also named as a Defendant is Timothy Best, a vice president of Wachovia's Wealth Management Private Banking Group who acted as a "relationship manager" with Nadel.

According to the complaint, the hedge funds retained Nadel as investment advisor, which meant that he was responsible for directing and executing nearly all investment and trading activities. Although each hedge fund maintained a legitimate account at Northern Trust Bank, Nadel opened separate accounts at Wachovia. These accounts, which the Receiver refers to as "shadow accounts,"

[1] The Receiver has standing to bring this action. He sues on behalf of the hedge funds, not individual investors.

were set up under the names "Arthur Nadel DBA Valhalla Investments," "Arthur Nadel DBA Viking Fund," "Victory Fund Ltd.," and "Scoop Real Estate." Nadel made numerous transfers from the hedge funds' trading accounts to the shadow accounts, which he then used for his own purposes.

Although the real culprit is clearly Nadel, the Receiver alleges that Wachovia and Best are also liable because they allowed Nadel to open the shadow accounts, failed to implement measures that could have detected the fraud, extended mortgage loans to Nadel, allowed Nadel to execute various transactions, and failed to report the fraud or freeze Nadel's accounts. The Receiver also seeks to recover fraudulent transfers consisting of the payments that Nadel made under the mortgages and all funds transferred into and among the shadow accounts. In addition, the Receiver asserts a claim for unjust enrichment based on fees that Wachovia collected. Wachovia and Best moved to dismiss, arguing that the Receiver has not stated a claim upon which relief can be granted.

Discussion

A complaint must allege sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" *Id.* at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

Counts I, II, III: Aiding and abetting

A cause of action for aiding and abetting requires: "(1) an underlying violation on the part of the primary wrongdoer; (2) knowledge of the underlying violation by the alleged aider and abetter; and (3) the rendering of substantial assistance in committing the wrongdoing by the alleged aider and abettor." *Lawrence v. Bank of Am., N.A.*, 455 F. App'x 904, 906 (11th Cir. 2012). In actions involving the liability of a bank for aiding and abetting its customer's Ponzi scheme, the second

element will only be satisfied if the bank had "actual knowledge of [the] fraudulent activities." *Id.* at 907.

Rather than alleging that Defendants had *actual* knowledge of Nadel's Ponzi scheme, the Receiver alleges that "[t]he presence of numerous recognized badges of fraud and the facilitation and execution of numerous improper transactions establishes that [Defendants] knew that Nadel was stealing from and defrauding the Hedge Funds." (Dkt. 2, ¶ 6). Essentially, a close review of the allegations indicates that the Receiver is alleging that Wachovia should have detected the scheme, not that it knew of its existence. Those allegations do not meet the threshold of actual knowledge required by the authorities.

Specifically, the Complaint alleges "numerous indicia of fraud" which "clearly revealed to Wachovia and Best that Nadel was operating a criminal enterprise." (*Id.*, ¶ 114). For example, the Complaint includes allegations of discrepancies in the opening of 'd/b/a' accounts by Nadel which Wachovia "*would have* identified" if it had performed due diligence (*Id.*, ¶128) (emphasis added). The Receiver alleges that Wachovia "failed to implement and enforce adequate account monitoring programs and guidelines" (¶ 137), "chose to ignore significant funds transfer activity" and "deliberately avoided asking questions about such activities" (¶ 139), invested in and profited from two of Nadel's ventures and "[a]s an experienced financial institution, Wachovia was in a position to know that the Funds' performance statements . . . were too good to be true," and that "[e]ven a cursory examination by Wachovia of the Hedge Funds and shadow accounts *would have revealed* Nadel's illegal and fraudulent activities."(¶¶ 159-61) (emphasis added).

In further support of its aiding and abetting cause of action, the Receiver alleges that activities Wachovia engaged in or account activity it should have detected demonstrates its knowledge of Nadel's scheme. For example, the Receiver alleges that Wachovia funded mortgage loans to Nadel for his benefit under circumstances in which it would have known that Nadel was not

credit worthy (¶¶ 166- 173). Further, the Complaint alleges that Wachovia allowed commingling of funds across various Wachovia accounts (¶¶ 174-177), wire transfers from trading accounts to Wachovia accounts (¶178), transfers between non-profit and business accounts (¶ 179), transfers between personal and business accounts (¶¶ 180-181), and allowed large transfers into, out of, and across various accounts (¶ 182), all of which "would have triggered" Wachovia's fraud detection systems. The Receiver alleges that Wachovia would have known of Nadel's background of disbarment, dishonesty, fraud, and deceit, and that he had numerous adverse money judgments. Essentially, the Receiver alleges that Wachovia had several opportunities to detect the fraud but failed to do so.

The Receiver urges that these allegations "create a strong inference that Wachovia had knowledge of Nadel's illegal transactions underlying the scheme and substantially assisted with each . . ." (Dkt. 16, p. 15). At most, however, these allegations show that Defendants could, and perhaps even should, have uncovered Nadel's scheme, which fails to establish the requisite actual knowledge for liability under an aiding and abetting theory. *See id.*; *Perlman v. Bank of Am., N.A.*, No. 11-80331-CV, 2012 WL 1886617 (S.D. Fla. May 23, 2012).[2]

Count IV: Negligence

"To maintain an action for negligence, a plaintiff must establish that the defendant owed a duty, that the defendant breached that duty, and that this breach caused the plaintiff damages." *Fla. Dep't of Corrs. v. Abril*, 969 So. 2d 201, 204 (Fla. 2007). Focusing on the first element, Defendants argue that they did not owe a duty of care because the hedge funds were not customers of the bank.

Defendants' position is belied by allegations that Nadel opened accounts for Victory Fund,

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[2] Defendants also argue that the UCC displaces Counts I through IV. They cite "generally" three entire chapters of the Florida Statutes without making any effort to identify the specific provisions that are alleged to displace the Receiver's claims. Nor have they shown specifically "how and why the common-law claim[s] that [the Receiver] has asserted might be inconsistent with relief under the Code." *Mut. Serv. Cas. Ins. Co. v. Elizabeth State Bank*, 265 F.3d 601, 621 (7th Cir. 2001).

Ltd. and Scoop Real Estate, L.P. in their own names and that he had authority to do so as president of the general partner of these funds. Contrary to Defendants' argument, these funds were Wachovia customers, to whom a duty was owed. *See 533 Harbor Court, LLC v. Colonial Bancgroup, Inc.*, No. 08-80824-CIV, 2009 WL 455434, at *2 (S.D. Fla. Feb. 23, 2009).

The other hedge funds were not customers. No Wachovia account was opened in the name of Victory IRA Fund, Ltd. or Viking IRA Fund, LLC. And while Nadel did open DBA accounts with names mirroring Valhalla Investment Partners, L.P. and Viking Fund, LLC, an entity does not become a bank customer simply because a DBA account was fraudulently created in its name. *See, e.g., VIP Mortg. Corp. v. Bank of Am., N.A.*, 769 F. Supp. 2d 20 (D. Mass. 2011); *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 56 Cal Rptr. 2d 756 (Cal. Ct. App. 1996); *Smith v. AmSouth Bank, Inc.*, 892 So. 2d 905 (Ala. 2004).[3]

That does not end the matter, however, as the Receiver contends that Defendants nonetheless owed duties to the non-customer hedge funds. He concedes that "[g]enerally, 'banks do not owe non-customers a duty to protect them from the intentional torts of their customers.'" (Dkt. 16, p. 4) (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 285-86 (2d Cir. 2006)). But he seeks an exception due to Wachovia's "knowledge/notice of the Funds' fiduciary relationship with Nadel, his opening and using accounts on their behalf, and his misappropriation of their monies through those accounts." (*Id.*, p. 5).[4]

Some courts have indeed recognized such an exception where: "(1) there is a fiduciary relationship between the customer and the non-customer, (2) the bank knows or ought to know of

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[3] Although the Receiver relies on *Patrick v. Union State Bank*, 681 So. 2d 1364 (Ala. 1996), the allegations in the complaint are much closer to the facts of *Smith v. AmSouth Bank, Inc.*, 892 So. 2d 905 (Ala. 2004).

[4] The Receiver relies on *dicta* from *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220 (4th Cir. 2002). *Eisenberg* did not hold that banks owe duties to non-customers. Rather, the Fourth Circuit simply noted that if there was such a duty, it would not benefit Eisenberg but the one in whose name the account was opened, Bear Stearns. However, the court's prior discussion of *Software Design* belies any suggestion that such a duty was owed to Bear Stearns.

the fiduciary relationship, and (3) the bank has actual knowledge or notice that a diversion is to occur or is ongoing." *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 232 (5th Cir. 2010) (applying New York law). To the extent this exception exists under Florida law, it is only available for one of the non-customer hedge funds.

Although the Receiver has alleged sufficient facts to show that Nadel had a fiduciary relationship with the hedge funds, his claim that Defendants owed a duty to the non-customer funds falters at the second requirement. This requirement does not simply examine the bank's knowledge that its customer may have been in some sort of fiduciary relationship. Rather, it focuses on the funds deposited in the bank, asking whether the bank "knew or ought to have known" that "a fiduciary relationship underlies the funds." *Chaney*, 595 F.3d at 233. To satisfy this standard, "the facts [must] support the 'sole inference' that the funds being deposited are held in a fiduciary capacity." *Id.*

The Receiver relies on *In re Meridian Asset Management, Inc.*, which held that "the Bank had no notice that any of the accounts were of a fiduciary nature," because there were "no special trigger words in the name of the bank account to inspire an inquiry." 296 B.R. 243, 261 (Bankr. N.D. Fla. 2003). These "trigger words," which include "trustee," "guardian," "executor," and "escrow account," are similarly absent from the names of the Wachovia accounts opened by Nadel. *Id.*

Equally unhelpful are *Go-Best Assets Ltd. v. Citizens Bank of Massachusetts*, 947 N.E. 2d 581 (Mass. App. Ct. 2011) and *Home Savings of America, FSB v. Amoros*, 661 N.Y.S.2d 635 (N.Y. App. Div. 1997). Both cases involved attorney trust accounts, which are plainly fiduciary in nature.

The Receiver argues that Defendants should have known of the fiduciary nature of the accounts because of statements that Nadel made in the account-opening documents regarding his authority to act for the funds. But it is not enough that Nadel identified himself as the "owner" or "principal." Otherwise, every corporate account would become a fiduciary account that the bank is charged with monitoring. The Receiver has not cited any case supporting such a proposition.

The Receiver also suggests that the bank should have known that the accounts held fiduciary funds because "Nadel positioned himself as a hedge fund manager and investment advisor." The allegations in the complaint support a plausible inference that Wachovia knew or should have known of Nadel's role and relationship with the Viking Fund, based on its investment.[5] Likewise, a plausible inference can be drawn that Wachovia knew or should have known that Nadel had deposited fiduciary funds that he held on behalf of Viking Fund in the DBA account bearing its name. On the other hand, the Receiver has not pointed to facts showing that the bank was aware that Nadel stood in a fiduciary relationship with Victory IRA Fund, Ltd., Valhalla Investment Partners, L.P., and Viking IRA Fund, LLC or, more importantly, that he deposited funds which he held in a fiduciary capacity on their behalf. "[T]he mere transfer of trust funds between accounts at the depositary bank and/or disbursement of funds by authorized signatories of accounts at the depositary bank, are not, without more, sufficient grounds for bank liability." *Home Savings*, 661 N.Y.S.2d at 638. Accordingly, under the facts alleged in the complaint, Defendants owed no duty of care to Victory IRA Fund, Ltd., Valhalla Investment Partners, L.P., or Viking IRA Fund, LLC.[6]

Count V: Florida Uniform Fraudulent Transfer Act

Defendants argue that the Receiver's fraudulent transfer claim fails because Wachovia acted as a mere conduit and never had actual control of funds transferred into and among the accounts. The conduit rule is an affirmative defense to fraudulent transfer liability, which requires a defendant to "establish (1) that [it] did not have control over the assets received, i.e., that [it] merely served as a conduit for the assets that were under the actual control of the [transferor] and (2) that [it] acted in good faith and as an innocent participant in the fraudulent transfer." *In re Harwell*, 628 F.3d 1312,

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[5] Wachovia also invested in Scoop Real Estate, L.P. As discussed, Scoop Real Estate was a Wachovia customer.

[6] The remaining cases the Receiver relies on are unpersuasive. *Barnett Bank of West Florida v. Hooper*, 498 So. 2d 923 (Fla. 1986) involved a bank customer. *Patrick v. Union State Bank*, 681 So. 2d 1364, 1371 (Ala.1996) is distinguishable for the reasons stated in *Smith v. AmSouth Bank, Inc.*, 892 So. 2d 905 (Ala. 2004).

1323 (11th Cir. 2010). It could be argued that Wachovia acted in good faith under the circumstances. *See Perlman*, 2012 WL 1886617, at *2. But Defendants neither made such an argument nor attempted to show how the complaint "affirmatively and clearly" shows that Wachovia acted in good faith. *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1277 (11th Cir. 2004). Defendants also raise the statute of limitations defense, but this argument is better suited for summary judgment.[7]

Count VI: Unjust enrichment

The Receiver's unjust enrichment claim is based, at least in part, on the contention that it would be inequitable for Wachovia to retain fees associated with fraudulent transfers. To the extent Wachovia is liable for the fraudulent transfers, the Receiver has made a plausible argument that Wachovia is likewise not entitled to retain fees collected for executing those transfers.

Personal liability of Best

"A corporate officer or employee is not liable for the torts of the company simply because of the person's position with the company." *Vesta Constr. & Design, L.L.C. v. Lotspeich & Assocs., Inc.*, 974 So. 2d 1176 (Fla. 5th DCA 2008). "However, officers or agents of corporations may be individually liable in tort if they commit or participate in a tort, even if their acts are within the course and scope of their employment." *Id.* (quotation omitted). The Receiver has alleged sufficient facts to state plausible claims against Best, individually.

Conclusion

Accordingly, the motions to dismiss (Dkts. 4, 5) are GRANTED *in part*, to the extent that Counts I, II, and III are dismissed without prejudice. Count IV, as it pertains to Victory IRA Fund, Ltd., Valhalla Investment Partners, L.P., and Viking IRA Fund, LLC is dismissed without prejudice. Plaintiff is granted leave to file an amended complaint within 14 days. The motions are denied in all

[7] There are some concerns that the Receiver's fraudulent transfer claim is at odds with *Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004), which held that a bank was not liable for aiding and abetting the fraudulent transfers that its customer made in conjunction with a Ponzi scheme. On the present record, it is not entirely clear whether the Receiver's fraudulent transfer claim is barred by *Freeman*.

other respects.

DONE AND ORDERED this 2nd day of August, 2012.

JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record