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1. *Hunter v. Citibank, N.A., 2011 U.S. Dist. LEXIS 154102*

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Hunter v. Citibank, N.A.

United States District Court for the Northern District of California, San Jose Division

May 5, 2011, Decided; May 5, 2011, Filed

NO. C 09-02079 JW

Reporter
2011 U.S. Dist. LEXIS 154102 *; 2011 WL 7462143

Anita Hunter, et al., Plaintiffs, v. Citibank, N.A., et al., Defendants.

Subsequent History: Settled by *Hunter v. Citibank, N.A., 2011 U.S. Dist. LEXIS 71153 (N.D. Cal., June 29, 2011)*

Prior History: *Hunter v. Citibank, N.A., 2010 U.S. Dist. LEXIS 61912 (N.D. Cal., Feb. 3, 2010)*

Core Terms

funds, aiding and abetting, motion to dismiss, cause of action, allegations, transfers, loans, Entities, deposition, substantial assistance, conspiracy, actual knowledge, conversion, non-electronic, electronic, misconduct, summary judgment motion, statute of limitations, pertinent part, breach of duty, transactions, perpetuate, testifying, dollars, genuine, lulling, notice, reasonable inference, present evidence, sufficient facts

Counsel: **[*1]** For Anita Hunter, an individual, Johnna Bozza, an individual, Celltex Site Services, LTD, a Texas Limited company, Grande Investment LLC, a Colorado limited liability company, Whitton Michael, an individual, and all others similarly situated, Sadi Suhweil, as Trustee of the Suhweil Revocable Trust, Plaintiffs: Anthony Robert Zelle, Brian P. McDonough, Thomas W. Evans, LEAD ATTORNEYS, Zelle McDonough & Cohen, LLP, Boston, MA; Michael P. Denver, Robert Louis Brace, LEAD ATTORNEYS, Hollister & Brace, Santa Barbara, CA; Robert A. Curtis, Thomas G. Foley, Jr., LEAD ATTORNEYS, Foley Bezek Behle & Curtis, LLP, Santa Barbara, CA.

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For Countrywide Bank, FSB, a Virginia corporation, Bank of America Corporation, a North Carolina corporation, doing business as Bank of America, N.A., Defendants: Madeline Anne Zamoyski, LEAD ATTORNEY, O'Melveny & Myers LLP, Menlo Park, CA; Allen W. Burton, PRO HAC VICE, Bradley J. Butwin, Gary Svirsky, O'Melveny & Myers LLP, New York, NY.

For United Western Bank, A colorado Corporation, formerly known as Matrix Capital Bank, Defendant: William J. Goines, LEAD ATTORNEY, Cindy Hamilton, Karen Rosenthal, Greenberg Traurig LLP, East Palo Alto, CA.

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For Cordell Funding LLLP, a Florida limited liability limited partnership, Cordell Consultants New York, LLC, a New York limited liability company, Robin Rodriguez, an individual, Cordell Consultants Money Purchase Plan, Defendants: Bryan J. Yarnell, PRO HAC VICE,

Gilbert Yarnelll PLLC, Palm Beach Gardens, FL; Eileen Regina Ridley, Patrick T. Wong, Foley & Lardner LLP, San Francisco, CA; Irwin R Gilbert, Gilbert PA Yarnell PLLC, Palm Beach Gardems, FL; Katherine R. Catanese, Olya Petukhova, PRO HAC VICE, Foley & Lardner LLP, New York, NY.

For Cordell Consultants Inc. Money Purchase Plan, a Qualified Retirement Plan Trust, Defendant: Bryan J. Yarnell, PRO HAC VICE, Gilbert Yarnelll PLLC, Palm Beach Gardens, FL; Douglas E. Spelfogel, PRO HAC VICE, Katherine R. Catanese, Olya Petukhova, PRO HAC VICE, Foley & Lardner LLP, New York, NY; Eileen Regina Ridley, Patrick T. Wong, Foley & Lardner LLP, San Francisco, CA; Irwin R Gilbert, Gilbert PA Yarnell PLLC, Palm Beach Gardems, FL.

For Jorden Burt, LLP, a Connecticut limited liability partnership, Defendant: **[*4]** Jonathan Matthew Blute, Timothy J. Halloran, Murphy Pearson Bradley & Feeney, San Francisco, CA; Lawrence A Kellogg, Levine Kellogg Lehman Schneider & Grossman LLP, Miami, FL.

For Kutak Rock, LLP, a Nebraska limited liability partnership, Joseph O. Kavan, an individual, Defendants: Bradley J. Lingo, F. Joseph Warin, PRO HAC VICE, Wayne Allen Schrader, Gibson, Dunn & Crutcher LLP, Washington, DC; Ethan D. Dettmer, Scott A. Fink, Gibson, Dunn & Crutcher, LLP, San Francisco, CA.

For Foley & Lardner, LLP, a Wisconsin limited liability partnership, Stephen I Burr, an individual, Defendants: Allison Lane Cooper, LEAD ATTORNEY, James Carnegie Krieg, Jennifer Robin McGlone, Krieg Keller Sloan Reilley & Roman LLP, San Francisco, CA.

For Silicon Valley Law Group, a California law corporation, Defendant: Jerome Nathan Lerch, LEAD ATTORNEY, Brett Alan Broge, Debra Steel Sturmer, Lerch Sturmer LLP, San Francisco, CA; Christopher Ashworth, Silicon Valley Law Group, San Jose, CA.

Judges: JAMES WARE, Chief United States District Judge.

Opinion by: JAMES WARE

Opinion

ORDER RE. PARTIES' VARIOUS MOTIONS

Presently before the Court are: (1) Cordell Defendants' Motion to Dismiss the Third Amended Complaint; [1] (2) Defendant Silicon Valley **[*5]** Law Group's ("SVLG") Motion for Summary Judgment; [2] and (3) Defendant United Western Bank's ("UWB") [3] Motion to Dismiss the Third Amended Complaint. [4] The Court finds it appropriate to take the Motions under submission without oral argument. See Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS in part and DENIES in part the Cordell Motion, DENIES the SVLG Motion, and GRANTS the UWB Motion.

A. Background

A detailed outline of the factual allegations in this case may be found in the Court's February 3, 2010 Order Granting in part and Denying in part Defendants' Various Motions to Dismiss. [5] The Court reviews the relevant procedural history as it relates to the present Motions.

On July 20, 2010, the Court issued an Order that denied the Cordell Defendants' Motion for Reconsideration, granted in part and denied in part UWB's Motion to Dismiss, and denied various Defendants' Motions to Strike. [6] On September 10, 2010, Plaintiffs filed a Third Amended Complaint. (hereafter, "TAC," Docket Item No. 381.)

1. Cordell Defendants

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[1] (hereafter, "Cordell Motion," Docket Item No. 401.)

[2] (hereafter, "SVLG Motion," Docket Item No. 402.)

[3] At the February 28, 2011 hearing on Settlement, Plaintiffs' counsel indicated that the FDIC has recently been appointed as receiver for Defendant UWB. "[12 U.S.C.] Section 1821(d)(12)(A) provides that the FDIC as receiver is entitled to a stay for up to 90 days in any judicial action to which it becomes a party." Cipponeri v. FDIC, 2009 U.S. Dist. LEXIS 59554, at *4 (E.D. Cal. Jun. 26, 2009). Here, to date, the FDIC has not moved the Court to stay this action pursuant to Section 1821(d)(12)(A). Further, the Court finds that the disposition of this Motion is not adverse to the interests of the FDIC and, thus, the Court does not find good cause to stay the case *sua sponte.*

[4] (hereafter, **[*6]** "UWB Motion," Docket Item No. 405.)

[5] (hereafter, "February 3 Order," Docket Item No. 264.)

[6] (See Order Re: Defendants' Various Motions, hereafter, "July 20 Order," Docket Item No. 354.)

In its February 3 Order, the Court found that Plaintiffs' claims against the Cordell Defendants were not derivative of claims that could have been asserted by the Debtor Qualified Intermediaries ("QIs") and thus were not barred by the channeling injunction issued by the Bankruptcy Court. (February 3 Order at 10-13.) In its July 20 Order, the Court considered the Cordell Defendants' **[*7]** Motion for Reconsideration of the February 3 Order. (July 20 Order at 4.) The Court found that California law applied in determining whether Plaintiffs' claims against the Cordell Defendants were derivative or direct. (Id. at 6.) In determining that Plaintiffs had a direct claim against the Cordell Defendants for aiding and abetting a breach of fiduciary duty, the Court determined that under California law, the QIs owed a fiduciary duty directly to Plaintiffs. (Id. at 9.) In addition, the Court found that the Cordell Defendants' alleged participation in the breach of the QIs' fiduciary duties to Plaintiffs caused direct harm, as the allegations stated that the Cordell Defendants facilitated the "Ponzi" investment scheme that resulted in Plaintiffs losing large sums of money. (Id. at 10.) Thus, the Court found that Plaintiffs' claims were still not barred by the channeling injunction and denied the Cordell Defendants' Motion for Reconsideration. (Id. at 11.) In addition, the Court declined to certify the issue for interlocutory appeal. (Id.)

2. SVLG

In its February 3 Order, the Court found that California's statute of limitations applied to the claims against Lawyer Defendants, which **[*8]** included SVLG, and that Plaintiffs' claims were not time-barred under California law. (February 3 Order at 14, 16.) In addition, the Court found that Plaintiffs needed to allege that they were intended third-party beneficiaries of the legal service agreements between Lawyer Defendants and the QIs in order to have standing to sue Lawyer Defendants. (Id. at 19.) In analyzing Plaintiffs' allegations against SVLG, the Court found that Plaintiffs did not plead sufficient facts to show that they were intended third-party beneficiaries, but rather, that SVLG knowingly acted directly *adverse* to Plaintiffs' interest. (Id. at 23.) Thus, the Court granted SVLG's Motion to Dismiss as to Plaintiffs' Third, Eighth, Ninth and Tenth Causes of Action with prejudice. (Id. at 24.) However, the Court found that Plaintiffs pleaded sufficient facts to state claims for aiding and abetting intentional torts. (Id. at 27.) Specifically, Plaintiffs' allegations that Lawyer Defendants knew of the activities of Edward Okun [7] and his QIs and that Lawyer Defendants provided substantial assistance to Okun and his QIs were sufficiently pleaded to state claims for aiding and abetting. (Id.)

3. UWB

In its February 3 Order, the Court found that Plaintiffs' common law claims against Defendant UWB based on electronic funds transfers were preempted by U.C.C. Article 4A and that Plaintiffs' allegations were insufficient to state a claim under Article 4A. (February 3 Order at 9-10.) In its July 20 Order, the Court found that Plaintiffs' amended factual allegations, taken as true, affirmatively showed that the transactions at issue were "authorized" within the meaning of U.C.C. Article 4A and thus Plaintiffs could not state a claim under Article 4A as a matter of law. (July 20 Order at 14.) Further, the Court found that Plaintiffs' claims for aiding and abetting were preempted to the extent that they were based on electronic transfers of funds and were insufficiently alleged to the extent that they were based on non-electronic transfers. (Id. at 15.) Thus, the Court granted UWB's Motion to Dismiss with leave to amend for the sole purpose of providing factual support for the common law claims based on non-electronic transfers. (Id. at 16.)

Presently before the Court are various Motions by Defendants.

B. Standards

1. Motion for Summary [*10] Judgment

Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

The moving party "always bears the initial responsibility

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[7] Edward Okun ("Okun") operated **[*9]** the "Ponzi" scheme. (See February 3 Order at 2.)

of informing the district court of the basis for its motion . . . ." Celotex, 477 U.S. at 323. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (a) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (b) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion **[*11]** of fact as required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

When evaluating a motion for summary judgment, the court views the evidence through the prism of the evidentiary standard of proof that would pertain at trial. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court draws all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight that particular evidence is accorded. See, e.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1992). The court determines whether the non-moving party's "specific facts," coupled with disputed background or contextual facts, are such that a reasonable jury might return a verdict for the non-moving party. T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 631 (9th Cir. 1987). In such a case, summary judgment is inappropriate. Anderson, 477 U.S. at 248. However, where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

2. [*12] Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988). The complaint must plead "enough facts to state a claim for relief that is plausible **[*13]** on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000).

C. Discussion

1. Cordell Defendants' Motion to Dismiss

The Cordell Defendants move to dismiss the seven causes of action alleged against them [8] on the grounds

[8] Specifically, Plaintiffs allege the following causes of action against the Cordell Defendants: (1) Third Cause of Action for Aiding and Abetting a Breach of Fiduciary Duty; (2) Fifth Cause of Action for Aiding and Abetting Fraud; (3) Seventh Cause of Action for Conversion; (4) Eighth Cause of Action for Aiding and Abetting Conversion; (5) Ninth Cause of Action for Conspiracy to **[*15]** Convert Exchange Funds and Commit Fraud; (6) Tenth Cause of Action for Interference with Contract; and (7) Twelfth Cause of Action for Negligence. (See TAC ¶¶ 308-336.)

that: (1) the Cordell Defendants cannot be held liable for aiding and abetting Okun's tortious conduct; (2) Plaintiffs have failed to plead any facts that would establish that the Cordell Defendants conspired with Okun; (3) Plaintiffs have failed to plead any facts that would impose a duty of care upon **[*14]** the Cordell Defendants or a breach of that duty; (4) Plaintiffs' causes of action for conversion and aiding and abetting conversion must be dismissed because Plaintiffs failed to plead any facts that they had legal ownership or an immediate and superior right of possession over the Subject QI funds; (5) Plaintiffs have not sufficiently pleaded that the Cordell Defendants had actual knowledge about each of the Exchange Agreements with Plaintiffs; and (6) some of Plaintiffs' claims are barred by the applicable statutes of limitations. [9] (Cordell Motion at 4-5.) Additionally, the Cordell Defendants move to dismiss certain claims against Defendant Robin Rodriguez on the ground that Plaintiffs do not state a claim against Rodriguez in his individual capacity. (Id. at 34.) The Court addresses each ground in turn.

a. Choice of Law

As a preliminary matter, the parties dispute the appropriate choice of law. [10] The Cordell Defendants contend that Plaintiffs' claims against them are governed by New York and Florida law because those states would suffer the greatest impairment if their laws were not applied. (Cordell Motion at 8.) Plaintiffs respond that California law applies because there is no material difference in law between California, New York and Florida with respect to Plaintiffs' causes of action. [11] (Opp'n to Cordell Motion at 12-13.)

In diversity cases, courts apply the choice-of-law rules of the forum state, in this case, California. *Abogados v. AT&T, Inc., 223 F.3d 932, 934 (9th Cir. 2000)* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*). California courts follow "a three-step 'governmental interest analysis' to address conflict of laws claims and ascertain the most appropriate law applicable to the issues where there is no effective choice-of-law agreement." *Washington Mutual Bank, FA v. Superior Court, 24 Cal. 4th 906, 919, 103 Cal. Rptr. 2d 320, 15 P.3d 1071 (Cal. 2001)*. First, "the foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show that it materially differs from the law of California." Id. Second, a court must determine "what interest, if any, each state has in having its own law applied to the case." *Id. at 920* (citing *Hurtado v. Superior Court, 11 Cal. 3d 574, 580, 114 Cal. Rptr. 106, 522 P.2d 666 (Cal. 1974)*). "If application of a foreign decisional **[*17]** rule will not significantly advance the interests of the foreign state, a California court will conclude that the conflict is 'false' and apply its own law." *Strassberg v. New England Mut. Life Ins. Co., 575 F.2d 1262, 1264 (9th Cir. 1978)*. The third step, which a court only reaches upon the determination that a foreign decisional rule significantly advances the interests of the foreign state, requires a court to examine the "comparative impairment" to each states' interest that would result from the choice of one rule over the other. *Washington Mutual, 24 Cal. 4th at 920*; *Downing v. Abercrombie & Fitch, 265 F.3d 994, 1005 (9th Cir 2004)*. "In making this comparative impairment analysis, the trial court must determine 'the relative commitment of the respective states to the laws involved' and consider 'the history and current status of the states' laws' and the 'function and purpose of those laws.'" *Washington Mutual, 24 Cal. 4th at 920* (quoting *Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 166, 148 Cal. Rptr. 867, 583 P.2d 721 (Cal. 1978)*.)

Here, for all but one of the causes of action at issue, neither party points to any material difference between the laws of California, New York and Florida. Indeed, **[*18]** for many of Plaintiffs' claims, such as negligence and conspiracy to commit fraud, the Cordell Defendants outline the applicable rule and cite to all three jurisdictions for the same legal principle. (See, e.g., Cordell Motion at 25, 30.) Moreover, as the Court previously noted, all of Plaintiffs' claims against the Cordell Defendants arise from common law, and thus there are no claims based on a statute or rule particular to any one state. (July 20 Order at 5.)

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[9] The Cordell Defendants have filed Objections to the Declaration of Michael P. Denver Regarding Plaintiffs' Opposition to the Cordell Defendants' Motion to Dismiss the Third Amended Complaint. (hereafter, "Objections," Docket Item No. 450.) As the Court did not rely on the Denver Declaration in rendering its opinion, the Cordell Defendants' Objections are OVERRULED as moot.

[10] (Cordell Motion at 8-9; Opposition to the Cordell Defendants' Motion to Dismiss the Third Amended Complaint at 12, hereafter, **[*16]** "Opp'n to Cordell Motion," Docket Item No. 436.)

[11] The parties agree, however, that California statutes of limitations apply to all of Plaintiffs' causes of action against the Cordell Defendants. (Cordell Motion at 32-33; Opp'n to Cordell Motion at 19.)

The Court rejects the Cordell Defendants' contention that New York and California law differ as to aiding and abetting liability. (Cordell Motion at 19 n.15.) As both New York and California require substantial assistance to impose aiding and abetting liability, the Court discerns no true conflict between these jurisdictions. [12] Moreover, the fact that New York and California courts have applied the same rule to different fact patterns to reach different results does not amount to a "material difference" in law.

Accordingly, because **[*19]** the Cordell Defendants have failed to meet their preliminary burden to show a material difference with respect to foreign law, the Court applies California law to Plaintiffs' causes of action against the Cordell Defendants.

b. Aiding and Abetting

The Cordell Defendants move to dismiss Plaintiffs' Third and Fifth Causes of Action based on aiding and abetting liability on the grounds that: (1) these claims are an improper circumvention of the discredited "deepening insolvency" theory; [13] (2) lenders are not generally liable for a borrower's misconduct; and (3) Plaintiffs fail to satisfy the actual knowledge and substantial assistance elements required to state a claim for aiding and abetting. (Cordell Motion at 10.)

Under California law, to state a claim for aiding and abetting the commission of an intentional tort, a plaintiff must allege facts sufficient to show that the defendant: (1) "[knew] the [primary tortfeasor's] conduct constitute[d] a breach of duty and [gave] substantial assistance or encouragement to the other to so act"; or (2) "[gave] substantial assistance to the [primary tortfeasor] in accomplishing a **[*20]** tortious result and the [defendant's] own conduct, separately considered, constitutes a breach of duty to the third person." *Casey, 127 Cal. App. 4th at 1144* (quoting *Saunders v. Superior Court, 27 Cal. App. 4th 832, 846, 33 Cal. Rptr. 2d 438 (Cal. Ct. App. 1994))*. To satisfy the first Casey prong, a plaintiff must allege that "the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." *Id. at 1145*.

Here, Plaintiffs allege in pertinent part:

> Cordell was well aware that the monies were being used to perpetuate Okun's Ponzi scheme. (TAC ¶ 167.) Despite notice that Okun was wrongfully appropriating Exchange Funds, the Cordell Defendants assisted Okun and the Okun Entities by loaning millions of dollars to enable him to continue this misconduct through lulling payments. (Id. ¶ 168.) The Cordell Defendants benefitted significantly from the participation in the scheme, as it generated substantial fees for the Cordell Defendants, increased their loan portfolio to the point where the Okun loans constituted a substantial portion of Cordell's entire loan portfolio, and provided the Cordell Defendants with liens on many properties owned by Okun or Okun Entities. (Id.)

Based **[*21]** on the allegations above, the Court finds that Plaintiffs have adequately alleged that the Cordell Defendants had actual knowledge of Okun's alleged Ponzi scheme, which they assisted by providing Okun with loans. Moreover, Plaintiffs' claims are based on a theory that the Cordell Defendants knew that Okun was stealing money but loaned him money anyway, as opposed to a "deepening insolvency" theory. [14] Finally, contrary to the Cordell Defendants' contention, there is no *per se* rule that lenders cannot be liable for a borrower's misconduct. *Casey, 127 Cal. App. 4th at 1149-50*. Rather, if a lender knows the borrower's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act, a lender may be held liable. See, e.g., *id. at 1144*.

Accordingly, **[*22]** the Court DENIES the Cordell Defendants' Motion to Dismiss Plaintiffs' Third and Fifth Causes of Action for aiding and abetting liability.

c. Conspiracy

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[12] Compare *Casey v. U.S. Bank Nat. Assn., 127 Cal. App. 4th 1138, 1144, 26 Cal. Rptr. 3d 401 (Cal. Ct. App. 2005)* with *Ryan v. Hunton & Williams, No. C 99-5938, 2000 U.S. Dist. LEXIS 13750, at *25 (E.D.N.Y. Sept. 20, 2000)*.

[13] *In re SI Restructuring, Inc., 532 F.3d 355, 362-63 (5th Cir. 2008)*.

[14] A "deepening insolvency" theory is generally a claim by creditors that the value of a company deteriorates as a result of a loan transaction, decreasing the amount of funds available for creditors, and is defined as "prolonging an insolvent corporation's life through bad debt." See *In re SI Restructuring, Inc., 532 F.3d at 362-63*; see also *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 344 (3d Cir. 2001)*.

The Cordell Defendants move to dismiss Plaintiffs' Ninth Cause of Action for conspiracy on the ground that Plaintiffs have failed to plead sufficient facts to show an agreement or overt act. (Cordell Motion at 26-27.)

Civil conspiracy is not itself an independent cause of action. *Rusheen v. Cohen, 37 Cal. 4th 1048, 1062, 39 Cal. Rptr. 3d 516, 128 P.3d 713 (Cal. 2006)*. Rather, to state a claim for civil conspiracy, a plaintiff must plead facts to show that "an independent civil wrong has been committed." Id. "The elements of an action for civil conspiracy are (1) formation and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done in furtherance of the common design." Id.

Here, Plaintiffs allege in pertinent part:

> Over the course of 13 months, Cordell made five separate loans to Okun and/or Okun entities . . . . (TAC ¶ 153.) The Cordell loans to Okun . . . assisted Okun and his co-conspirators in perpetuating Okun's Ponzi scheme. (Id.) Okun's intention was communicated to Cordell, which assisted Okun in effectuating this purpose for **[*23]** Cordell's own individual advantage and significant financial gain. (Id.) The Hard Money Lender Defendants, which include the Cordell Defendants, conspired with Okun to convert the Exchange Funds to Okun's use, and after such conversion, these Defendants conspired to commit fraud through false and misleading Exchange Agreements. (Id. ¶ 326.) For example, the Cordell Defendants assisted Okun and the Okun Entities by loaning them millions of dollars to enable him to continue his misconduct through lulling payments, despite notice that Okun was wrongfully appropriating Exchange Funds. (Id. ¶ 168.) As a result of their conspiracy, Plaintiffs lost not less than $150 million. (Id. ¶ 327.)

Based on the allegations above, the Court finds that Plaintiffs have adequately alleged a cause of action for conspiracy to convert Exchange Funds and to commit fraud. Plaintiffs have alleged both an overt act and an agreement between Okun and the Cordell Defendants. Specifically, Plaintiffs allege that the Cordell Defendants made multiple loans to Okun to enable the "Ponzi" scheme when Okun had communicated his intentions to the Cordell Defendants. Whether Plaintiffs will gather sufficient evidence to prove **[*24]** such conduct is more appropriate for a summary judgment motion.

Accordingly, the Court DENIES the Cordell Defendants' Motion to Dismiss Plaintiffs' Ninth Cause of Action for conspiracy.

d. Negligence

The Cordell Defendants move to dismiss Plaintiffs' Twelfth Cause of Action for negligence on the ground that Plaintiffs have failed to plead facts sufficient to show that the Cordell Defendants owed Plaintiffs a duty of care or proximately caused Plaintiffs' injuries. (Cordell Motion at 30-32.)

To establish a claim for negligence under California law, a plaintiff must plead facts sufficient to show that: (1) the defendant owed the plaintiff a legal duty; (2) the defendant breached the duty; and (3) the breach was a proximate or legal cause of injuries suffered by the plaintiff. *Ann M. v. Pacific Plaza Shopping Ctr., 6 Cal. 4th 666, 673, 25 Cal. Rptr. 2d 137, 863 P.2d 207 (Cal. 1993)*. While the existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide, the elements of breach of that duty and causation are ordinarily questions of fact for the jury's determination. *Barber v. Chang, 151 Cal. App. 4th 1456, 1463, 60 Cal. Rptr. 3d 760 (Cal. Ct. App. 2007)*.

Here, Plaintiffs allege in pertinent **[*25]** part:

> Despite notice that Okun was wrongfully appropriating Exchange Funds, the Cordell Defendants assisted Okun and the Okun Entities by loaning millions of dollars to enable him to continue this misconduct through lulling payments. (TAC ¶¶ 151-68.) The Cordell Defendants benefitted significantly from the participation in the scheme, as it generated substantial fees for the Cordell Defendants, increased their loan portfolio to the point where the Okun loans constituted a substantial portion of Cordell's entire loan portfolio, and provided the Cordell Defendants with liens on many properties owned by Okun or Okun Entities. (Id. ¶ 168.) Each of the Defendants owed a legal duty of care to the QI Exchanges, which arose out of their respective affirmative acts in assuming such duty, or which arose by operation of law from the fiduciary nature of their relationship with Okun and the QIs he controlled. (Id. ¶ 335.) Each Defendant breached his/her or its legal duty of due care and each breach was a direct and proximate cause of the resulting economic injury to the Exchangers. (Id. ¶ 336.)

As the Court previously explained, Plaintiffs' claims against the Cordell Defendants are not for breach **[*26]** of a duty owed to the QIs, but breach of any duty owed directly to Plaintiff Exchangers as trust beneficiaries. (July 20 Order at 9.) Plaintiffs further allege that, due to the breach, with the active assistance of the Cordell Defendants, Plaintiffs lost their respective Section 1031 exchange deposits. Assuming that these allegations are true, the Court finds that Plaintiffs have adequately stated a claim against the Cordell Defendants for negligence.

Accordingly, the Court DENIES the Cordell Defendants' Motion to Dismiss Plaintiffs' Twelfth Cause of Action for negligence.

e. Conversion and Aiding and Abetting Conversion

The Cordell Defendants move to dismiss Plaintiffs' two causes of action based on conversion on the ground that Plaintiffs have failed to plead any facts that Plaintiffs have legal ownership or a superior right of possession to the Exchange Funds. (Cordell Motion at 21-25.)

The Court has previously considered and rejected a similar contention in its February 3 Order, specifically finding that "[t]he fact that Plaintiffs were not entitled to the funds until the property exchange was completed or 180 days after deposit, whichever came first, does not preclude a cause of action **[*27]** for conversion." (February 3 Order at 25.)

Accordingly, the Court DENIES the Cordell Defendants' Motion to Dismiss Plaintiffs' conversion claims.

f. Interference with Contract

The Cordell Defendants move to dismiss Plaintiffs' cause of action for interference with contract on the ground that Plaintiffs have not sufficiently pleaded that the Cordell Defendants had actual knowledge about each of the Exchange Agreements with Plaintiffs. (Cordell Motion at 27-30.)

Under California law, to state a claim for intentional interference with contract, a plaintiff must plead facts sufficient to show: (1) "a valid contract between plaintiff and a third party"; (2) "defendant's knowledge of the contract"; (3) "defendant's intentional acts designed to induce a breach or disruption of the contractual relationship"; (4) "actual breach or disruption of the contractual relationship"; and (5) "resulting damage." *Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (Cal. 1998)*.

Here, Plaintiffs allege in pertinent part:

> Each Defendant knew that each Plaintiff had entered such an Exchange Agreement. (TAC ¶ 329.) Each Defendant, wrongfully, willingly and unlawfully committed intentional acts designed **[*28]** to avoid the QIs proper performances, pursuant to the terms of the Exchange Agreements, and actual disruption of performance did occur. (Id.) For example, the Cordell Defendants requested and received information regarding the nature of the QIs, including the AEC Exchange Agreement. (Id. ¶ 155.) The Cordell Defendants, through Gardy Bloomers, investigated the AEC QI thoroughly. (Id.) As a result of its due diligence, the Cordell Defendants knew no later than May 3, 2005 that Okun's QI Exchange funds were required contractually to be used solely to perform Okun's obligations to Exchanges. (Id.) Despite notice that Okun was wrongfully appropriating Exchange Funds, the Cordell Defendants assisted Okun and the Okun Entities by loaning them millions of dollars to enable him to continue his misconduct through lulling payments. (Id. ¶ 168.)

Accepting these allegations as true, the Court finds that Plaintiffs have alleged facts sufficient to state a claim for intentional interference with contract. Contrary to the Cordell Defendants' contention, Plaintiffs specifically allege that the Cordell Defendants were aware of the Exchange Agreements between Okun and Plaintiffs. (See, e.g., TAC ¶ 155.) **[*29]** Plaintiffs further allege that the Cordell Defendants helped Okun and the Okun Entities to breach those contracts by providing a number of "lulling payment" loans in order to continue to support Okun's use of the Exchange funds for improper purposes to perpetuate his "Ponzi" scheme. (See, e.g., id. ¶ 168.)

Accordingly, the Court DENIES the Cordell Defendants' Motion to Dismiss Plaintiffs' claim for intentional interference with contract.

g. Statute of Limitations

The Cordell Defendants move to dismiss all of Plaintiffs' claims asserted against the Cordell Defendants as barred by the applicable statutes of limitations. (Cordell Motion at 32-33.)

Under California law, a plaintiff's causes of action for aiding and abetting, conversion and conspiracy to commit fraud are subject to a three year statute of limitations. *Cal. Civ. Proc. Code § 338*. A plaintiff's causes of action for interference with contract and negligence are barred after two years. Id. *§ 339*. However, a statute of limitations may be equitably tolled if the plaintiff did not have knowledge of the circumstances sufficient to put a reasonable person on inquiry notice, or did not have the opportunity to obtain such information. **[*30]** *McGee v. Weinberg, 97 Cal. App. 3d 798, 803, 159 Cal. Rptr. 86 (Cal. Ct. App. 1979)*. The question of whether a plaintiff discovered, or should have discovered through reasonable diligence, information sufficient to put a reasonable person on notice is generally a question of fact. See *Bank of Am. Nat'l Trust and Sav. Ass'n v. Allstate Ins. Co., 29 F. Supp. 2d 1129, 1135 (C.D. Cal. 1998)* (citing *Prudential-LMI Com. Ins. v. Superior Court, 51 Cal. 3d 674, 687, 274 Cal. Rptr. 387, 798 P.2d 1230 (Cal. 1990)*).

Here, Plaintiffs allege in pertinent part:

> Plaintiffs have only recently discovered the facts alleged after actively and prudently investigating the causes of their losses. (TAC ¶ 37.) The initial bankruptcies filed by Okun for the QIs were intended by Okun to delay discovery of losses by Plaintiffs. (Id.) Okun fraudulently promised to obtain loans to complete outstanding 1031 Exchange transactions pending at the seven QIs. (Id.) These purported loans did not exist, but caused delay in the appointment of a Trustee. (Id.) Plaintiffs were further hampered in obtaining case information, including accurate and timely account information, due to the pending criminal trial of Okun. (Id.) Despite diligent efforts, Plaintiffs were unable to gain **[*31]** access to the information which allowed them to prepare and file their claims against Defendants until March and April 2009, just one or two months before the action was filed. (Id. ¶ 38.)

Consistent with its February 3 Order, the Court finds that these allegations are sufficient to support equitable tolling. Although the first loan at issue that the Cordell Defendants made to Okun occurred in 2006, Plaintiffs allege that it was not until March 2009 that they finally obtained the information necessary to file their claim. (TAC ¶ 38.) Plaintiffs further allege that two events occurred in March 2009 which finally allowed Plaintiffs to obtain the information they needed to file their Complaint: (1) Plaintiffs began to get access to documents in possession of the bankruptcy trustee; and (2) the criminal trial of Okun occurred in Virginia. (Id. ¶¶ 39-40.)

Accordingly, the Court DENIES the Cordell Defendants' Motion to Dismiss on the ground that Plaintiffs' claims are barred by the applicable statute of limitations.

h. Individual Defendant Robin Rodriguez

The Cordell Defendants move to dismiss Plaintiffs' claims for conspiracy and aiding and abetting, all of which sound in fraud, against Defendant **[*32]** Robin Rodriguez ("Rodriguez"), a principal and founder of the Cordell Defendants, on the ground that Plaintiffs do not state a claim against Rodriguez in his individual capacity. (Cordell Motion at 34.)

"Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done." *United States Liability Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595, 83 Cal. Rptr. 418, 463 P.2d 770 (Cal. 1970)*. However, such officers may be held liable, "under the rules of tort and agency, for tortious acts committed on behalf of the corporation." Id.

Here, Plaintiffs allege in pertinent part:

> Rodriguez personally authorized each of the loans by the "Cordell Entities" to Okun and the fraudulent Okun Entities and was knowledgeable about, approved of and directed each of the activities of the "Cordell Entities." (TAC ¶ 29.) Rodriguez was intimately involved in approving the terms and conditions of each loan Cordell made to Okun and Okun Entities, whose due diligence reviews he personally performed or reviewed for Cordell. (Id. ¶ 152.) [O]ne of Rodriguez's potential investors questioned **[*33]** Rodriguez's estimate of Okun's net worth and the need for continued financing . . . . Ignoring the obvious, Cordell remained committed to assisting Okun to reap the profits generated from patching Okun's escalating financial predicament. (Id. ¶ 160.) In April 2007, Okun's Ponzi scheme was about to collapse, sending Okun to jail. (Id. ¶ 165.) At that time, in an attempt to gain much needed liquidity, Okun and Rodriguez traveled to Columbus, Ohio to meet unsuccessfully with a number of hedge fund owners for a $125 million loan. (Id.) In April 2007, Cordell made one final loan to Okun, days after the failed pitch to the hedge funds. (Id.) Rodriguez [approved] a $7 million loan

> to Okun personally . . . within a few hours. (Id. ¶ 166.) Rodriguez extracted terms very favorable to Cordell on this loan, namely $1 million dollars in fees, an 18% annual interest rate . . . . (Id.) From the proceeds of the $7 million [dollar loan], Cordell immediately transferred $6.7 million to Okun's personal account . . . . (Id. ¶ 167.) Cordell was well aware that the monies were being used to perpetuate Okun's Ponzi scheme. (Id.)

Based on the allegations above, the Court finds that Plaintiffs' allegations **[*34]** of intentional wrongdoing primarily address the actions of the Cordell Defendants, and treat the Cordell Defendants and Defendant Rodriguez interchangeably. While some allegations address conduct specific to Defendant Rodriguez's participation in the Cordell Entities as principal, the allegations fail to state conduct specific to Defendant Rodriguez that would support a claim for aiding and abetting against Defendant Rodriguez individually. Rather, Plaintiffs allege that the Cordell Defendants directly aided and abetted Okun in the alleged commission of fraud by authorizing certain loans to Okun and the Okun entities. Defendant Rodriguez may have allegedly approved loans in the course of his duties as principal, but the allegations do not state that Defendant Rodriguez was personally aware that the monies were being used to perpetuate the "Ponzi" scheme. Thus, the Court finds that Plaintiffs have failed to allege facts sufficient to state a claim against Defendant Rodriguez in his individual capacity.

Accordingly, the Court GRANTS the Cordell Defendants' Motion to Dismiss as to the claims against Defendant Rodriguez.

2. SVLG's Motion for Summary Judgment

Defendant SVLG moves for summary **[*35]** judgment on Plaintiffs' three remaining causes of action against Defendant SVLG, all for aiding and abetting, on the grounds that: (1) there is no proof that Defendant SVLG had actual knowledge of the specific primary wrongdoing; and (2) there is no proof that Defendant SVLG provided substantial assistance. (SVLG Motion at 1.) The Court addresses each ground in turn.

a. Actual Knowledge

At issue is whether Defendant SVLG had actual knowledge of the alleged scheme to fraudulently transfer and eventually convert 1031 trust funds in breach of the Exchange Agreements.

Under the first Casey prong for aiding and abetting liability, a plaintiff must present "proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." *Casey, 127 Cal. App. 4th at 1145*. Further, aiding and abetting "necessarily requires a defendant to *reach a conscious decision to participate in tortious activity* for the purpose of assisting another in performing a wrongful act." *Id. at 1146* (internal quotations omitted) (emphasis in original).

Here, Plaintiffs present evidence in support of their claim that Defendant SVLG had actual knowledge of the alleged scheme to defraud in **[*36]** the form of: (1) a deposition from Defendant Chapman, an employee of Defendant SVLG, testifying that he pushed Defendant Dashiell to conduct due diligence on the financial health of any buyer, and particularly Defendant Okun, in order to protect the business and the exchange funds post-closing; [15] (2) a deposition from Defendant Dashiell, co-founder of 1031 Advance, testifying that SVLG was told that Okun refused to provide his financials and that SVLG advised Defendant Dashiell that the financials were not needed for due diligence approval of an all-cash transaction; [16] (3) a deposition from Defendant Dashiell testifying that Defendant SVLG approved the sale of 1031 Advance to Okun despite Okun's refusal to submit financials; [17] (4) a deposition from Defendant Allred testifying that Defendant SVLG approved the transfer of 1031 funds from an account held in trust by 1031 Advance to an account held by 1031 Tax Group, and that he would not have made the transfer without Defendant SVLG's knowledge and consent; [18] (5) a deposition from Defendant Chapman testifying that he knew it was possible that the 1031 funds could be transferred out of the trust account and into an account held by **[*37]** the 1031 Tax Group; [19] and (6) a

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[15] (Second Declaration in Support of Plaintiffs' Opposition to Silicon Valley Law Group's Motion for Summary Judgment, Ex. 1, Chapman Deposition at 203:16-212:1, hereafter, "Chapman Depo.," Docket Item No. 443.)

[16] (Amended First Declaration of Robert L. Brace in Support of Plaintiffs' Opposition to Silicon Valley Law Group's Motion for Summary Judgment, hereafter, "Brace Decl.," Ex. D, Dashiell Deposition at 414:23-418:19, 479:15-19, 520:11-18, hereafter, "Dashiell Depo.," Docket Item No. 444.)

[17] (Dashiell Depo. at 415:17-20.)

[18] (Brace Decl., Ex. A, Allred Deposition at 172:9-173:1.)

[19] (Chapman Depo. at 293:13-21.)

deposition from Defendant Coleman, Okun's employee, testifying that she had participated in conference calls discussing the transfer of 1031 funds out of the trust account into an account held by 1031 Tax Group where Defendant SVLG also participated in the call. [20]

Based on the evidence presented, **[*38]** the Court finds that material issues of fact exist as to whether Defendant SVLG had actual knowledge of Okun's alleged scheme to defraud the 1031 investors. In particular, Plaintiffs' evidence casts into dispute whether Defendant SVLG knew that the intent behind the purchase of 1031 Advance was the appropriation of 1031 funds, as inferred from Defendant Okun's refusal to release financials and insistence on transfer of the 1031 funds out of the trust account held by 1031 Advance and into an account that may or may not have been held in trust by 1031 Tax Exchange.

Further, Defendant SVLG's contention that it could not have had knowledge that the conduct at issue constituted a breach of duty, as they were unaware that the relationship of a qualified intermediary to the 1031 investors was a trustee relationship, is called into question by Plaintiffs' evidence. [21] First, Plaintiffs present deposition testimony of Defendant Chapman that Defendant SVLG was aware of its own duty, as well as an obligation on the part of Defendant Dashiell, to perform sufficient due diligence prior to the transaction to ensure the future security of the exchange funds. [22] Second, Plaintiffs present evidence **[*39]** in the form of an email from Defendant Schachter to Defendant Dashiell inquiring into the security of a 1031 account in regard to 1031 funds belonging to another of Defendant SVLG clients. [23] In the email, Defendant Schachter requests evidence regarding the security of the exchange proceeds as held by Defendant Dashiell, thus raising an issue of material fact as to whether Defendant Schachter knew of the trust obligations of a 1031 qualified intermediary. (Id.) Further, Plaintiffs present testimony from Defendant Chapman that he was aware that certain fiduciary rules governed the actions of qualified intermediaries of 1031 exchange funds. [24] Thus, the Court finds that there exists a genuine factual dispute as to whether Defendant SVLG had knowledge of Defendant Okun's alleged scheme, and aided the transaction despite that knowledge.

b. Substantial Assistance

At issue is whether Defendant SVLG provided substantial assistance to the alleged scheme to fraudulently transfer 1031 funds.

Under the first Casey **[*40]** prong, "ordinary business transactions" may satisfy the substantial assistance element of an aiding and abetting claim, if the defendant "actually knew those transactions were assisting the customer in committing a specific tort." *Casey, 127 Cal. App. 4th at 1145*.

Here, Plaintiffs present evidence in support of their claims that Defendant SVLG substantially assisted in the commission of a tort as follows: (1) 1031 Advance's retention letter of Defendant SVLG; [25] and (2) the closing documents of the sale of 1031 Advance to 1031 Tax Group, including a wire transfer receipt documenting the sale proceeds deposited into Defendant SVLG's client trust account. [26] Further, Defendant SVLG does not dispute that it represented 1031 Advance throughout its purchase by 1031 Tax Group. [27]

Based on the evidence presented, the Court finds that material issues of fact predominate as to whether Defendant SVLG provided substantial assistance in the course of representing the sale of 1031 Advance. While is it clear that Defendant SVLG conducted ordinary business transactions in the representation of a customer that allegedly resulted **[*41]** in the commission of a specific tort, a dispute exists over whether Defendant SVLG knew those ordinary business transactions were assisting the primary tortfeasor. Thus, the Court finds that there exists a genuine factual dispute as to whether Defendant SVLG provided substantial assistance.

Accordingly, the Court DENIES Defendant SVLG's

[20] (Brace Decl., Ex. L, Coleman Deposition at 205:3-209:17.) It is significant to the Court that there is a dispute in the evidence over whether Defendant SVLG had knowledge that the funds would not be as protected by the purchasing company, 1031 Tax Exchange.

[21] (SVLG's Reply Brief in Support of Motion for Summary Judgment at 5-7, Docket Item No. 447.)

[22] (Chapman Depo. at 203:16-211:22.)

[23] (Brace Decl., Ex. 421.)

[24] (Chapman Depo. at 274:3-275:19.)

[25] (Brace Decl., Ex. 425.)

[26] (Brace Decl., Ex. 254.)

[27] (SVLG Motion at 4-13.)

Motion for Summary Judgment as to Plaintiffs' remaining claims for aiding and abetting.

3. UWB's Motion to Dismiss

Defendant UWB moves to dismiss Plaintiffs' remaining causes of action [28] against it on the ground that Plaintiffs have failed to plead sufficient facts to state claims for aiding and abetting breach of fiduciary duty, aiding and abetting fraud, and aiding and abetting conversion based on non-electronic transfers of funds that are plausible on the face of the Complaint. (UWB Motion at 1, 8-10.)

Here, **[*42]** Plaintiffs allege in pertinent part:

> After August 2006, IXG stayed in business by operating a Ponzi scheme, using newly deposited exchange funds to pay for older escrows. (TAC ¶ 96.) As set out in Exhibit 6, $5.5 million of these Ponzi scheme lulling payment transfers were **by check.** (Id. (emphasis added).) [UWB] knew that the IXG Exchange Funds had been transferred . . . because [UWB] made the transfers while monitoring the account as a high-risk account. (Id.)
>
> [UWB] knowingly continued to assist the QIs' breaches by, *inter alia*, assisting in the misuse of newer QI clients' funds to close older clients' escrows through **non-electronic (and electronic)** transfers of Exchange Funds on deposit with them, thereby concealing and perpetuating the Ponzi scheme. (TAC ¶ 307 (emphasis added).) [UWB] aided and abetted the QIs' breaches of fiduciary duties through **non-electronic (and electronic)** transfers of Exchange Funds for their own personal advantage and economic gain. (Id. (emphasis added).) [UWB] substantially assisted [Defendant] Okun's fraud by providing depository services and through **non-electronic (and electronic)** transfers of Exchange Funds for their own personal advantage and economic **[*43]** gain. (Id. ¶ 313 (emphasis added).)

As an initial matter, the Court had previously found that Plaintiffs' common law claims predicated on electronic transfers are preempted by U.C.C. Article 4A. (See February 3 Order at 9.) In addition, the Court previously dismissed Plaintiffs' claims for aiding and abetting against UWB because Plaintiffs failed to provide factual details of any non-electronic transfers, such as "even basic details as to when such transfers occurred." (July 20 Order at 15.) The Court granted leave to amend, allowing Plaintiffs to cure the defect of the factual disparity as to the non-electronic transfers, but dismissed Plaintiffs' claims with prejudice to the extent that the claims were based on electronic transfers. (Id. at 16.)

Based on the allegations above, the Court finds that Plaintiffs' Third Amended Complaint suffers from the same infirmities that caused the Court to dismiss Plaintiffs' claims against Defendant UWB in the first instance. [29] While Plaintiffs do provide details such as "the dates on which the electronic transfers occurred" and "the amount of each such transfer" that the Court previously found lacking, still absent from Plaintiffs' Third Amended **[*44]** Complaint are any allegations which connect the transfers by check to any wrongful activity on the part of Defendant UWB. Rather, Plaintiffs' Third Amended Complaint repeats the same conclusory language without any further detail as to how the alleged non-electronic transfers establish liability against Defendant UWB for aiding and abetting. [30] Thus, Plaintiffs have again failed to provide "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949*.

Plaintiffs respond that they "have followed the **[*45]** Court's instructions and included allegations in the Third Amended Complaint that support aiding and abetting claims which are not dependent upon [UWB's] electronic transfers of exchange funds." [31] However,

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[28] Plaintiffs' Second, Fourth and Sixth Causes of action remain. The Court previously dismissed Plaintiffs' Fourteenth Cause of Action for Violation of U.C.C. Article 4A as a matter of law and Plaintiffs' Third, Fifth, Seventh, Eighth, Tenth and Twelfth Causes of Action as preempted by U.C.C. Article 4A. (July 20 Order at 14; February 3 Order at 9.)

[29] The Court previously dismissed Plaintiffs' allegations that "[UWB] knowingly continued to assist the QIs' breaches by, *inter alia*, assisting in the misuse of newer QI clients' funds to close out older clients' escrows through non-electronic (and electronic) transfers of Exchange Funds," and "[t]he majority of these transfers were electronic, but some of the transfers, including at least $7 million in transfers after Okun acquired IXG, were accomplished by non-electronic (*e.g.*, paper check) means." (July 20 Order at 15-16.)

[30] (Compare Second Amended Complaint ¶¶ 306, 312, 317 with TAC ¶¶ 307, 313.)

[31] (Opposition to UWB's Motion to Dismiss the Third Amended Complaint at 5, hereafter, "Opp'n to UWB Motion," Docket

devoid from Plaintiffs' Opposition are any arguments relating to the alleged $5.5 million in transfers by check or any further discussion whatsoever of non-electronic transfers of funds. Instead, Plaintiffs seemingly dedicate the entirety of their Opposition to arguments that the Court's prior Orders finding preemption were incorrect. [32]

Accordingly, the Court GRANTS UWB's Motion to Dismiss Plaintiffs' Second, Fourth and Sixth Causes **[*46]** of Action for aiding and abetting. Since Plaintiffs have failed to sufficiently amend their allegations to correct the deficiencies identified in the Court's previous Orders, the Court finds that further amendment would be futile. Thus, Plaintiffs' Second, Fourth, and Sixth Causes of Action against Defendant UWB are dismissed with prejudice.

D. Conclusion

The Court orders as follows:

(1) The Court DENIES the Cordell Defendants' Motion to Dismiss as to the Third, Eighth and Ninth Causes of Action, as well as to the claims for negligence, conversion and intentional interference with contract;

(2) The Court GRANTS the Cordell Defendants' Motion to Dismiss as to the claims against Defendant Rodriguez;

(3) The Court DENIES Defendant SVLG's Motion for Summary Judgment as to Plaintiffs' remaining claims for aiding and abetting; and

(4) The Court GRANTS UWB's Motion to Dismiss Plaintiffs' Second, Fourth and Sixth Causes of Action for aiding and abetting with prejudice.

The parties shall appear for a Preliminary Pretrial Conference, previously set for **June 27 at 11 a.m.** On or before **June 17, 2011**, the parties shall file a Joint Preliminary Pretrial Statement including an update on any settlement efforts **[*47]** and a good faith proposed schedule on how this case should proceed.

Dated: May 5, 2011

/s/ James Ware

JAMES WARE

United States District Chief Judge

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Item No. 438.)

[32] (See Opp'n to UWB Motion at 7 ("The Exchangers are able to recover the improperly wired Exchange Funds under the Uniform Fiduciaries Act"); at 10 ("U.C.C. Article 4A is not to be read in a manner which contradicts the plain language of the UFA"); and at 12 ("the TAC allegations support common law claims to recover other damages, such as the $14 million in Exchange Funds deposited due to IXG's fraud, assisted by [UWB]").)