Hollis et al v. JPMorgan Chase Bank, N.A. Doc. 19

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEOFFREY A. HOLLIS, SHARON R. HOLLIS, EDMUND J. MANSOR, and ROBERTA M. MANSOR,

Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A.,

Defendant.

Civil Action No. 1:12-cv-10544-JGD

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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Defendant JPMorgan Chase Bank, N.A. ("Chase") submits this Memorandum of Law in Support of its Motion to Dismiss Plaintiffs' Class Action Complaint ("Complaint") pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 9(b).

PRELIMINARY STATEMENT

Geoffery A. Hollis, Sharon R. Hollis, Edmund J. Mansor, and Roberta M. Mansor (collectively, "Plaintiffs") were allegedly victims of a Ponzi scheme conceived, created, and perpetrated by William Wise, Jacqueline Hoegel and other associates, who fraudulently induced Plaintiffs and others to invest in bogus certificates of deposit ("CDs") issued by Millennium Bank ("Millennium"), an off-shore banking entity formed in St. Vincent and the Grenadines.

Plaintiffs seek to hold Chase responsible as an aider and abettor for the fraud perpetrated by Wise and his associates on the theory that Chase, as successor to Washington Mutual Bank ("WaMu"), was the bank in which Wise and his confederates deposited their ill-gotten gains and from which they transferred funds for their own use. This is the fourth attempt by investors defrauded in the Millennium Ponzi scheme – and the second by the same law firm suing here – to improperly shift their losses to Chase; but this attempt should be no more successful than the previous three. In addition to the overwhelming case law refusing to impose liability on banks in virtually identical cases, Plaintiffs have resorted to filing allegations that are contradicted by their own admissions here and their allegations in the prior suits, in order to skirt the fatal impact of the dismissal of those three suits.

The Millennium Ponzi scheme stretched over a multi-year period, ending in March 2009, when the SEC filed a complaint against Wise and his associates. *See* Complaint, *SEC v. Millennium Bank*, No. 7:09-cv-00050-O, slip op. (N.D. Tex. Mar. 15, 2011) ("SEC Compl."). Plaintiffs seek to hold Chase liable in two different capacities and for two different roles during this period. Prior to September 25, 2008, the bank accounts at issue were owned by WaMu,

which suffered the largest bank failure in American financial history and went into receivership with the Federal Deposit Insurance Corporation ("FDIC") in September 2008. On September 25, 2008, Chase acquired for $1.9 billion from the FDIC as receiver more than 2,000 WaMu retail branch offices operating in 15 states with more than 43,000 employees.[1] Thereafter, Wise and his associates continued to use the same bank accounts and banking services, which had been provided by WaMu and were now provided by Chase. Plaintiffs first seek to hold Chase responsible for WaMu's acts as an aider and abettor *prior to* September 25, 2008, on the theory that Chase is WaMu's successor in interest, despite the fact that this claim has been definitively rejected by the Ninth Circuit earlier this year. Second, Plaintiffs seek to hold Chase directly responsible for Chase's own alleged acts *after* September 25, 2008.

Plaintiffs' Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 9(b). First, any claim against Chase based on WaMu's actions prior to September 25, 2008 is barred because Plaintiffs failed to exhaust their administrative remedies under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1821(d)(13)(D)(ii) ("FIRREA"), which bars "any claim relating to any act or omission of [a failed bank] or of the [FDIC] as receiver" unless such claim is first presented to the FDIC. Second, to the extent Plaintiffs seek to hold Chase liable for its own independent alleged misconduct after September 25, 2008, Plaintiffs fail to allege with particularity specific facts showing that Chase actually knew about the underlying fraud or conversion and substantially assisted in it. Thus, Plaintiffs fail to state a claim for relief under Fed. R. Civ. P. 9(b) and 12(b)(6).

[1] *See* OFFICE OF THRIFT SUPERVISION, OTS FACT SHEET ON WASHINGTON MUTUAL BANK 1 (2008), *available at* http://files.ots.treas.gov/730021.pdf. These materials, as public records, may be taken on judicial notice by this Court. *See In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 16 (1st Cir. 2003); *see also In re Shirk*, 437 B.R. 592, 596 n.1 (Bankr. S.D. Ohio 2010) (taking judicial notice of WaMu receivership under FDIC). To the extent they are not inconsistent with judicially-noticeable facts, Chase assumes the allegations in the Complaint, if well-pleaded, to be true only for purposes of this Motion.

STATEMENT OF FACTS

The Millennium Ponzi Scheme

In 1999, Wise and his associates created Millennium, which purported to offer high-interest CDs to investors. *See* Compl. ¶ 10. In July 2004, Wise and Hoegel created three Nevada limited liability companies (collectively, "the LLCs"), which all used the Napa Valley, California address of an entity called Global Services. *Id.* ¶ 13. Wise and Hoegel opened bank accounts in the names of these LLCs at WaMu's Las Vegas, Nevada branch. *Id.* ¶ 14. Millennium investors were allegedly directed to wire funds directly to the LLC WaMu accounts in Nevada, or to send checks to Global Services in California, which Hoegel or her staff would bring to the WaMu Napa Valley branches for deposit. *Id.* ¶ 15.

Allegations Against WaMu - Pre-September 25, 2008

Plaintiffs allege WaMu personnel "assisted" Wise and his associates in their fraud by (a) allowing the LLCs' bank accounts to be used to "abscond with . . . investor monies"; (b) recommending, approving and assisting in the establishment of remote deposit and wiring capabilities; and (c) failing to shut down the accounts despite having audited them. *Id.* ¶¶ 49, 55. Plaintiffs also allege WaMu knew the LLCs were not licensed to sell securities but that they were depositing funds obtained from the sale of CDs, and that these funds were then commingled and wired to offshore or other accounts for the personal use of Wise and Hoegel. *Id.*

Plaintiffs focus in particular on WaMu's installation of so-called "Cash Management Transfer" ("CMT") and "Remote Deposit Capture" ("RDC") systems for the LLCs' accounts. *Id.* ¶¶ 21-26. While Plaintiffs allege these systems "effectively established a private bank" within Global Services, *id.* ¶ 26, they simply allowed customers to scan checks remotely from their own business offices and deposit them into their checking accounts, or to wire funds from their own business offices rather than from the bank. There is nothing exceptional about the

technology employed; these systems are merely a convenience for the Bank's institutional customers with large volumes of deposits and transfers. *See infra* Section III.B.iii.

Plaintiffs allege WaMu conducted a customer audit in order to set up the CMT/RDC systems – which audit, "had it been properly and thoroughly conducted, would necessarily have uncovered the true nature of the activities being carried out by Wise and Hoegel." Compl. ¶ 25. Plaintiffs do not, however, allege that the audit led to actual knowledge of the fraud, nor do Plaintiffs describe what such an "audit" entailed or what review was undertaken as part of the audit; even the identity of the staff person who allegedly conducted the audit is based "upon information and belief." *Id.* ¶ 24. And while Plaintiffs claim "[i]t is a practical impossibility" that WaMu staff "did not observe and therefore have specific knowledge of" the improper and illegal activities of Wise and associates, *id.* ¶ 18, Plaintiffs conspicuously fail to provide any further detail whatsoever about these activities. Plaintiffs fail to describe, for example:

- how WaMu knew the LLCs were not licensed to sell securities;
- how the investor funds were supposedly "commingled";
- that WaMu had knowledge of the specifics of the LLCs' businesses;
- that WaMu knew about Millennium[2] or who Millennium's customers were, or the interrelationship between Millennium and the LLCs;
- that WaMu knew the precise scope of the relationship between Millennium and its customers, and the types of activities in which Millennium was engaged; or
- that WaMu ever was aware of any of Millennium's alleged misrepresentations, or saw any of the investment materials or other communications provided by Millennium to Plaintiffs or other investors.

[2] Plaintiffs allege that Millennium was the entity that advertised the sale of the bogus CDs and made the misrepresentations regarding their legitimacy and the supposed association between Millennium and United Trust of Switzerland. *See* Compl. at p. 1; ¶¶ 10-11. Plaintiffs allege that the investors were Millennium investors – *not* the LLCs' investors – and that Millennium instructed its investors to wire funds directly to the LLCs' accounts at WaMu *or* to send checks to Global. *See* Compl. at p. 2; ¶ 15. Importantly, Plaintiffs fail to allege that WaMu or Chase had any awareness of or connection to Millennium. Millennium was not WaMu's customer; the accounts were opened in the names of the LLCs.

Allegations Against Chase - Post-September 25, 2008

According to Plaintiffs, the "assistance" and services previously provided by WaMu "continued unfettered and unchanged" after the Chase acquisition on September 25, 2008. *Id.* ¶ 20. The only affirmative act alleged by Plaintiffs to have been taken at any time by *Chase* was, "upon information and belief," that it "authorized the installation of a[n] [RDC] system" which permitted Wise and Hoegel to scan investor checks from within their Global Services office in Napa, *id.* ¶ 21, and it "approved the installation of the system." *Id.* ¶ 25.

This allegation, however, is contradicted by Plaintiffs' counsel's own statements to this Court and by his allegations in his prior investor suits, *Benson v. JPMorgan Chase Bank, N.A.*, C-09-5272 MEJ (N.D. Cal.). At the scheduling conference held on September 12, 2012, counsel conceded that authorization for the installation of the RDC system was "granted at the beginning of September [2008]," *before* the WaMu asset acquisition. *See* Tr. of Sept. 12, 2012 Conference, at 16:18-17:2 (attached as Exhibit 1 to the Affidavit of Jacqueline S. Delbasty ("Delbasty Aff.")). Equally troubling, in *Benson* the same counsel alleged the RDC system was installed only *after* several audits were conducted by WaMu employees. *See* Class Action Complaint ¶¶ 73-74, *Benson v. JPMorgan Chase Bank, N.A.*, 2010 WL 3168390 (N.D. Cal. Aug. 10, 2010) (C-09-05272 MEJ) ("Benson Compl.") (attached as Exhibit 2 to Delbasty Aff.).[3]

[3] The *Benson* allegation reads in full:

> 74. Authorization for the provision and installation of an RDC system required a further and more in-depth audit of the Nevada LLCs, and such an audit was again conducted by WAMU's Treasury Services Department. The second audit was again supervised by Jennifer Blevins in September of 2008. ***After Blevins completed her audit, WAMU authorized the installation of the RDC system, giving Wise and the Hoegels a complete remote banking platform from their Napa office.*** By authorizing first the CMT system and then the RDC system, WAMU gave Wise and the Hoegels *carte blanche* to execute their Ponzi scheme, in that manner knowingly providing substantial assistance to the fraud.

Benson Compl. ¶ 74. These allegations mirror those contained in the complaints filed by the other Millennium investors. *See, e.g.*, Class Action Complaint ¶¶ 50-51, *Lowell v. JPMorgan Chase Bank, N.A.*, 2010 WL 3168390 (N.D. Cal. Aug. 10, 2010) (C-09-05560-MEJ) ("Lowell Compl.") (using the same language as in *Benson*); Amended Complaint ¶ 5, *Litson-Gruenberg v. JPMorgan Chase & Co.*, 75 Fed. R. Serv. 3d 561 (N.D. Tex. Dec. 16, 2009)

Procedural History

On March 25, 2009 – a mere six months from Chase's acquisition of the WaMu assets from the FDIC – the SEC filed a cease-and-desist action against Millennium in the U.S. District Court for the Northern District of Texas. *See* SEC Compl.; *see also* Compl. ¶¶ 27, 29. While Plaintiffs allege that from 2004 to 2009 over 368 investors paid between $68 to $150 million to Wise and his associates, *see id.* ¶ 29, Plaintiffs fail to specify how many of those investments were made *after* Chase's acquisition of the LLCs' accounts.[4]

Three other investor class action suits have previously been filed – and dismissed – against WaMu/Chase for allegedly aiding and abetting Millennium. *See generally Litson-Gruenberg*, 75 Fed. R. Serv. 3d 561;[5] *Benson*, 2010 WL 3168390 (considering the two related

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(No. 7:09-cv-00056-O) ("Litson-Gruenberg Compl.") ("Defendant [Washington Mutual, now known as JPMorgan Chase] provided UT of S with 'remote deposit machines' to facilitate the depositing of checks directly from UT of S's place of business.").

By letters dated September 27 and October 1, 2012, Chase provided Plaintiffs' counsel with documentation demonstrating approval and installation of the RDC system *before* the WaMu asset acquisition. It is difficult to reconcile counsel's allegations in the Complaint herein with his obligations under Fed. R. Civ. P. 11. *See Top Entm't Inc. v. Ortega*, 285 F.3d 115, 118 (1st Cir. 2002) (holding that false allegations in the plaintiff's complaint warranted sanctions under Rule 11); *Alexander v. Our Lady of Mercy Med. Ctr.*, 99 CIV. 1076 (HB), 2000 WL 254015, at *1-2 (S.D.N.Y. Mar. 7, 2000) (issuing sanctions under Rule 11 where "the plaintiff's attorney has signed a complaint which sets forth very specific factual contentions having no such support").

[4] Claims arising from investments made prior to September 25, 2008, including those of the Hollises, *see* Compl. ¶ 30, must be dismissed in their entirety under FIRREA. *See infra* Section II. And, to the extent that investors were located in states with limitations periods of three years or less for claims of fraud, the claims of such putative class members are also barred. *See* Appendix A (listing states with limitations periods of three years or less).

[5] *Litson-Gruenberg* was filed on behalf of "all those who invested in the Ponzi scheme which is the subject of *Securities and Exchange Commission v. Millennium Bank*", in April 2009 in the Northern District of Texas. *See* Litson-Gruenberg Compl. ¶ 10. In December 2009, the court granted Chase's motion to dismiss on grounds that Plaintiffs had not adequately pled actual knowledge of Millennium's fraud:

> Plaintiff fails to allege that Defendant knew the Ponzi defendants were making false representations or stealing the investors' money based on the Ponzi defendants' representations. In essence, the allegations are an artful manner of stating that Defendant should have known of the Ponzi defendants' actions. Plaintiff's factual narrative is, at best, merely a story of suspicious activity that Plaintiff contends should have provided Defendant notice of the Ponzi scheme. As such, this is not sufficient to satisfy the requirement of actual knowledge for aider and abettor liability.

Litson-Gruenberg, 75 Fed. R. Serv. 3d 561, at *3. The court also held that Plaintiffs' claims of aiding and abetting fraud were subject to the heightened pleading requirements of Rule 9(b). *See id.* at *7.

complaints).[6] On March 20, 2012, the Ninth Circuit Court of Appeals affirmed the dismissal of all claims in the consolidated *Benson/Lowell* action against WaMu and Chase, on grounds that (i) claims based on WaMu's actions prior to September 25, 2008 were barred under FIRREA's jurisdictional requirement that a plaintiff first exhaust its administrative remedies with the FDIC, and (ii) the plaintiffs' conclusory allegations regarding Chase's post-acquisition conduct simply pled continuation of WaMu's activities and, therefore, failed to state a claim free from FIRREA's jurisdictional bar. *Benson v. JPMorgan Chase Bank, N.A.*, 673 F.3d 1207, 1215, 1217 (9th Cir. 2012).

On March 23, 2012, three days after the Ninth Circuit issued its decision in *Benson*, Plaintiffs – represented here by the same counsel who litigated *Benson* – filed this Complaint alleging counts for aiding and abetting common law fraud (Count I); aiding and abetting conversion (Count II); and breach of fiduciary duty (Count III). Compl. ¶¶ 43-62. On the fourth go-around, Plaintiffs here attempt to evade the defects that defeated the other three complaints by trying to allege some independent post-September 25, 2008 conduct by Chase. Plaintiffs' own admissions, however, (1) that the approval of the RDC system occurred prior to the WaMu acquisition, and (2) that Chase's actions were simply an "unfettered and unchanged" *continuation* of those started by WaMu – which fail to constitute aiding and abetting under relevant law in any event – are fatal. Because Plaintiffs here, like the plaintiffs in the three lawsuits before them, fail to plead any facts to support their claims, the Complaint should be dismissed.

[6] While the *Litson-Gruenberg* motion to dismiss was pending, in November 2009, two additional and related putative class actions were filed by other Millennium investors in the Northern District of California. *See generally* Benson Compl.; Lowell Compl. Keith L. Miller, counsel for Plaintiffs in this action, was also plaintiffs' counsel in *Benson*. *See generally Benson*, 2010 WL 3168390.

LEGAL ARGUMENT

I. Legal Standards

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Plaintiffs must plead at least "enough facts to state a claim to relief that is plausible on its face . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The "plausibility" standard requires Plaintiffs to plead facts from which a court may draw an "inference that the defendant is liable for the misconduct alleged" and that establish "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). This Court is not bound to accept legal conclusions unsupported by factual allegations or "threadbare recitals of a cause of action's elements" because such statements "are not entitled to the assumption of truth." *Id.* at 663-64.[7]

Plaintiffs' claims for aiding and abetting Millennium's fraud are also subject to the particularity requirements of Fed. R. Civ. P. 9(b). *McKenna v. Wells Fargo Bank, N.A.*, --- F.3d ---, No. 11-1650, 2012 WL 3553475, at *9 (1st Cir. Aug. 16, 2012) (citing *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 427 (1st Cir. 2007); *see also Bamberg v. SG Cowen*, 236 F. Supp. 2d 79, 91 (D. Mass. 2002) ("A claim of aiding and abetting fraud must meet the heightened pleading requirements of Fed. R. Civ. P. 9(b).") (citations omitted). Plaintiffs must thus describe in detail the circumstances by which they allege Chase learned about the fraudulent scheme. *See Shirokov v. Dunlap, Grubb & Weaver, PLLC*, CIV.A. 10-12043-GAO, 2012 WL 1065578, at *27 (D. Mass. Mar. 27, 2012) (holding that allegations that the defendant acquired

[7] *Accord In re Bos. Scientific Corp. Sec. Litig.*, 686 F.3d 21, 27 (1st Cir. 2012) (holding that legal conclusions asserted in a complaint are not assumed to be true); *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 771 (1st Cir. 2011) ("'[I]f the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal . . . .'").

knowledge of fraudulent scheme through its normal monitoring practices was insufficient to allege knowledge with particularity).

Under Rule 9(b), the First Circuit (unlike the Ninth Circuit) requires that Plaintiffs allege facts giving rise to a "strong inference" of fraudulent intent. *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 195-96 (1st Cir. 1999); *In re Galileo Corp. S'holders Litig.*, 127 F. Supp. 2d 251, 261 (D. Mass. 2001). In particular, "[w]hile actual knowledge of the underlying fraud may be averred generally under Rule 9(b), the plaintiff must accompany the general allegation with allegations of specific facts giving rise to a strong inference of actual knowledge regarding the underlying fraud." *Berman v. Morgan Keegan & Co.*, 10 CIV. 5866 PKC, 2011 WL 1002683, at *10 (S.D.N.Y. Mar. 14, 2011), *aff'd*, 455 F. App'x 92 (2d Cir. 2012) (citation omitted) (internal quotation marks omitted); *see also Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 293 (2d Cir. 2006).[8] To draw a *strong inference* from allegations, those allegations must contain "essential detail[s]" concerning defendants' knowledge or conduct. *In re Galileo*, 127 F. Supp. 2d at 263. A "mere reasonable inference" is insufficient. *Greebel*, 194 F.3d at 196-97. Plaintiffs cannot rest on conclusory allegations to establish the elements of their fraud claim, including the "actual knowledge" requirement for aider and abettor liability. *See Iqbal*, 556 U.S. at 687 ("Rule 8 does not empower [the plaintiff] to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.").

[8] Plaintiffs must also prove knowledge of an aider and abettor "by clear and convincing evidence that was sufficient to support a strong inference of fraudulent intent." *In re WorldCom, Inc. Sec. Litig.*, 382 F. Supp. 2d 549, 561 (S.D.N.Y. 2005) (citation omitted) (internal quotation marks omitted); *see also In re Parametric Tech. Corp.*, 300 F. Supp. 2d 206, 222 (D. Mass. 2001) ("[I]t might be considered that a 'strong' inference stands in relation to a 'reasonable' inference in roughly the same proportion that proof by clear and convincing evidence stands in relation to proof by a preponderance of the evidence. Courts have frequently described the heightened level of proof by 'clear and convincing' evidence as requiring a showing that the fact in question is 'highly probable.'") (citations omitted); *In re Jeweled Objects LLC*, 10-11831 RDD, 2012 WL 3638006, at *9 (Bankr. S.D.N.Y. Aug. 22, 2012) ("Actual knowledge for aiding and abetting purposes may be established by clear and convincing evidence of sufficient facts to support a strong inference of actual knowledge of the underlying wrong.") (citation omitted).

II. All Claims Of Successor Liability For The Pre-September 25, 2008 Acts Of WaMu Must Be Dismissed Under FIRREA.

Claims against Chase based on the conduct of WaMu prior to Chase's acquisition of WaMu's assets from the FDIC in September 2008 are jurisdictionally barred. FIRREA requires that Plaintiffs exhaust their administrative remedies with respect to claims arising out of WaMu's acts by first presenting those claims to the FDIC. *See* 12 U.S.C. § 1821(d)(13)(D)(ii).[9] FIRREA's jurisdictional bar applies to all claims asserted against a purchasing bank (Chase) when the claim is based on the conduct of the failed institution (WaMu). *See Benson*, 673 F.3d at 1214; *Vill. of Oakwood v. State Bank & Trust Co.*, 539 F.3d 373, 386 (6th Cir. 2008); *Am. First Fed., Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259, 1263 n. 3 (11th Cir. 1999).

Plaintiffs did not exhaust, and do not plead that they exhausted, their administrative remedies. Any claims Plaintiffs may have had based on WaMu's conduct prior to September 25, 2008 are therefore barred by FIRREA, and this Court must dismiss all claims based on WaMu's conduct prior to September 25, 2008 for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1). *See Benson*, 673 F.3d at 1215 (dismissing claims based upon WaMu's alleged wrongdoing prior to Chase's acquisition, because "plaintiffs' claims 'plainly' relat[e] to any act or omission' of 'a depository institution for which the [FDIC] has been appointed receiver'").

Although claims based on Chase's independent conduct post-September 25, 2008 would not be governed by the FIRREA exhaustion requirement, no such claim is alleged here. *See Benson*, 673 F.3d at 1209. To maintain an independent claim, Plaintiffs must allege more than that Chase merely *continued* the service for the accounts at issue according to procedures inherited from WaMu. *Id.* at 1217 (dismissing complaint against Chase where plaintiffs only

[9] The First Circuit strictly enforces FIRREA. *See FDIC v. Kane*, 148 F.3d 36, 38 (1st Cir. 1998) ("The failure to participate in the administrative process [required under FIRREA] constitutes a failure to exhaust one's administrative remedies, and thus, is a bar to judicial review.").

alleged that Chase continued the same practices established by WaMu); *see also Aber-Shukofsky v. JPMorgan Chase & Co.*, 755 F. Supp. 2d 441, 447 (E.D.N.Y. 2010) ("[G]iven the plain language of FIRREA, the Court finds that plaintiffs cannot evade FIRREA's mandatory exhaustion requirement simply by asserting claims against defendants . . . ."); *Lazarre v. JPMorgan Chase Bank, N.A.*, 780 F. Supp. 2d 1320, 1326 (S.D. Fla. 2011) (barring post-acquisition bank conduct "related to an initial act" of the predecessor bank, under FIRREA).

III. Plaintiffs' Aiding And Abetting Claims Must Be Dismissed Pursuant To Fed. R. Civ. P. 12(b)(6) And 9(b).

Even if Plaintiffs *could* attempt to hold Chase liable for merely continuing WaMu's maintenance of the accounts in the few short months after its acquisition, the activities Plaintiffs accuse Chase of continuing are simply insufficient to constitute aiding and abetting. Moreover, any knowledge of Millennium's fraud supposedly acquired by WaMu employees did not automatically transfer over to Chase after the acquisition: rather, Plaintiffs must establish an *independent* basis for such knowledge held by officials at Chase in the wake of the purchase – yet no such allegation is included in the Complaint.

Plaintiffs allege that Chase aided and abetted Wise and associates in their fraud and conversion of Plaintiffs' funds. *See* Compl. ¶¶ 43-57.[10] Aiding and abetting liability attaches where a person "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." RESTATEMENT (SECOND) OF

[10] Plaintiffs also assert a claim for breach of fiduciary duty (Count III), which indisputably fails as a matter of law. Chase does not owe a fiduciary duty to its own customers, let alone to the customers of its customers. The relationship between a bank and its depositor is that of borrower and lender, or debtor and creditor, and borrowers and lenders do not stand in a fiduciary relationship. *See Mfrs. Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 318 (2d Cir. 1993) ("[T]he mere fact that a corporation has borrowed money from the same bank for several years is insufficient to transform the relationship into one in which the bank is a fiduciary . . . ."); *see also* OWEN C. PELL & DAVID G. HILLE, CREATION OF A FIDUCIARY RELATIONSHIP, 7 BUS. & COM. LITIG. FED. CTS. § 81:23 (3d ed. 2011) ("At common law the relationship between borrower and lender was that of debtor and creditor. Normally, borrowers and lenders do not stand in a fiduciary relationship."). There was no fiduciary relationship between Chase and the LLCs. There was no relationship at all between Chase and the Plaintiff investors, who were complete strangers to whom Chase owed no duties, and certainly no fiduciary duties. *See Lerner*, 459 F.3d at 286 ("[B]anks do not owe non-customers a duty to protect them from the intentional torts of their customers.").

TORTS § 876(b) (1979). *See, e.g.*, *Cahaly v. Benistar Prop. Exch. Trust Co., Inc.*, 451 Mass. 343, 351 (2008) ("Under New York state law, the plaintiff must show (i) the existence of a violation by the primary wrongdoer; (ii) knowledge of this violation by the aider and abettor; and (iii) proof that the aider and abettor substantially assisted in the primary wrong.") (citations omitted) (internal quotation marks omitted).[11]

A. Plaintiffs Do Not Plead Facts Creating A Strong Inference That Chase Actually Knew about Millennium's Fraud Or Conversion.

Plaintiffs fail to allege Chase *actually knew* about Millennium's securities fraud and conversion. It is well established that "*actual* knowledge is required to impose liability on an aider and abettor." *Lerner*, 459 F.3d at 292 (emphasis added). Because "[a]ctual, not constructive, knowledge, is required to impose liability on an alleged aider and abettor," *Rosner v. Bank of China*, 06 CV 13562, 2008 WL 5416380, at *4 (S.D.N.Y. Dec. 18, 2008), *aff'd*, 349 F. App'x 637 (2d Cir. 2009), Plaintiffs must plead specific facts amounting to clear and convincing evidence that Chase *in fact* knew of Millennium's fraud – and not that Chase "must have known" or that it "would have known" had it properly investigated the purported red flags. *See Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 247-48 (S.D.N.Y. 1996), *aff'd*, 152 F.3d 918 (2d Cir. 1998) ("[I]naction, or a failure to investigate, constitutes actionable participation only when a defendant owes a fiduciary duty directly to the plaintiff; that the primary violator owes a

[11] Because Chase may be potentially held liable, if at all, only for its independent acts taken after September 25, 2008, for choice of law purposes, the focus must therefore be on New York, the site of Chase's principal place of banking operations and the place where its banking policies and procedures would have been developed and overseen, *i.e.*, the locus of the alleged wrongful conduct. To the extent the court focuses on the place of injury, Chase notes that Millennium investors reside throughout the United States, including in Massachusetts. The elements of aiding and abetting liability under Massachusetts, California, or Nevada law do not appear markedly differently than those under New York law. By contrast, Ohio, Chase's place of incorporation, may not even *recognize* the tort of aiding and abetting. *See Jones v. Petland, Inc.*, 2:08-CV-1128, 2010 WL 597503, at *3 (S.D. Ohio Feb. 12, 2010) ("It is unclear whether Ohio recognizes a common law cause of action for aiding and abetting tortious conduct.") (citations omitted); *Whelan v. Vanderwist of Cincinnati*, No. 2010–G–2999, 2011 WL 6938600, at *4 (Ohio Ct. App. Dec. 30, 2011) ("[I]t remains unclear whether the Supreme Court of Ohio would adopt the doctrine of liability for civil aiding and abetting."). Based on New York's center of gravity to Chase's post-WaMu acquisition conduct, Chase will generally cite herein to cases decided under New York law, supplemented by cases from other relevant jurisdictions.

fiduciary duty to the plaintiff is not enough."); *Litson-Gruenberg*, 75 Fed. R. Serv. 3d 561, at *4 (holding that suspicion or knowledge of general wrongdoing or "skullduggery" is not enough); *Rosner* 2008 WL 5416380, at *6 (holding that a bank's "suspicions or ignoring obvious 'red flags' or warning signs indicating the fraud's existence" were insufficient to establish actual knowledge).

"Actual knowledge" is not shown by, *e.g.*,

- installation of a remote deposit system, *see In re Agape Litig.*, 681 F. Supp. 2d 352 (E.D.N.Y. 2010) ("*Agape I*"), *further proceedings*, 773 F. Supp. 2d 298 (E.D.N.Y. 2011) ("*Agape II*"), *aff'd sub nom. Weshnak v. Bank of Am., N.A.*, 451 F. App'x 61 (2d Cir. 2012);
- the size of major deposits to and wire transfers from customer accounts, *see id.*; *Rosner*, 2008 WL 5416380, at *6, *Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d 381, 388 (S.D.N.Y. 2007); *Cahaly*, 451 Mass. at 351-57;
- the destination of wire transfers, *Rosner*, 2008 WL 5416380, at *6; *Casey v. U.S. Bank Nat'l Ass'n*, 26 Cal. Rptr. 3d 401, 403 (Ct. App. 2005); *Lerner*, 459 F.3d at 294;
- the presence of a bank representative at the customer's offices, *Agape I*, 681 F. Supp. 2d 352;
- suspicions of fraudulent activity, *Ryan v. Hunton & Williams*, 99-CV-5938 (JG), 2000 WL 1375265, at *9 (E.D.N.Y. Sept. 20, 2000); *Casey*, 26 Cal. Rptr. 3d at 403;
- restrictions on the faces of checks, *Casey*, 26 Cal. Rptr. 3d at 403;
- frequent wire transfers, *Rosner*, 2008 WL 5416380, at *6; *Ryan*, 2000 WL 1375265, at *9; *Go-Best Assets Ltd. v. Citizens Bank of Mass.*, 463 Mass. 50, 55-59, (2012);
- audits which failed to discover the fraudulent activity, *Agape I*, 681 F. Supp. 2d 352; *Cahaly*, 451 Mass. at 351-57; or
- low amounts of funds in the accounts, *Cahaly*, 451 Mass. at 351-57; *Go-Best Assets*, 463 Mass. at 55-59.

Agape I and *Agape II* are particularly instructive on this point. In *Agape*, plaintiffs alleged that Bank of America had actual knowledge of a Ponzi scheme perpetrated by a customer because of the bank's close monitoring of account activity and its installation of a remote deposit system, similar to the RDC system used by the LLCs here. *See Agape II*, 773 F. Supp. 2d at 309-10. The court dismissed the original (*Agape I*) and amended complaints (*Agape II*) for failure to

state a claim for aiding and abetting liability, holding that the allegations of installation of a remote deposit system, notifications of major deposits to and wire transfers from the customer accounts, charging of fees for actively monitoring and analyzing the customer's network of accounts, and the presence of a bank representative at the customer's offices raised, at most, an inference of *constructive*, rather than *actual*, knowledge. *See id.* at 310.[12]

Plaintiffs' general accusation that WaMu must have known about Millennium's fraud because "it is a practical impossibility" that it did not, Compl. ¶ 18, is legally insufficient to demonstrate a strong inference of actual knowledge on the part of *WaMu*, to say nothing of Chase. That conclusory statement contains no factual information from which any inference whatsoever may be drawn. Notably, Plaintiffs utterly fail to allege any facts showing knowledge by either Chase or WaMu of the Millennium scheme. It is undisputed that the fraud was perpetrated through Millennium, the misrepresentations were made by Millennium, and the theft of Plaintiffs' money was made by Millennium. Plaintiffs make no allegation whatsoever that Chase had any knowledge about Millennium, its business, its misrepresentations, or the Ponzi scheme. Plaintiffs do not allege that Chase or WaMu ever knew that these checks were coming from "investors," or that Chase knew the checks were for the purchase of CDs or any other investment. There is no allegation that Chase was ever aware of Millennium, or that Millennium was supposedly selling CDs, or the relationship between Wise and Millennium or between Millennium and the LLCs.

Plaintiffs state baldly that "none of the deposits moved to legitimate banking or investment entities." Compl. ¶ 18. Even if true, the fact that some of the money in the accounts may have subsequently been wired offshore does not, however, demonstrate by clear and

[12] The dismissal was affirmed by the Second Circuit on the basis of lack of substantial assistance, without reaching the lack of actual knowledge issue. *Weshnak* , 451 F. App'x at 62.

convincing evidence that Chase somehow actually *knew* Millennium was perpetuating a fraud upon its customers. Again, what Plaintiffs *fail* to allege is telling. Plaintiffs fail to allege that Chase had any knowledge that the deposits were *supposed* to be directed elsewhere. Plaintiffs also do not allege that Chase was aware of Plaintiffs' investment agreements or saw Millennium's marketing materials. Plaintiffs similarly do not allege that Chase was privy to some contract between Plaintiffs, Millennium, and the LLCs about the use of the funds. The checking accounts belonged to the LLCs. They were general deposit accounts, able to accept deposits without restriction, and subject to withdrawal of funds at the owner's discretion. The LLCs owned the accounts and could do with them what they willed.

Plaintiffs' allegation that the checks vaguely referred to CDs is likewise insufficient to show actual knowledge. Any notation on the checks was meaningless to Chase in the absence of any knowledge about Millennium, its business, its customers, the relationship between Millennium and the LLCs, and the underlying investment agreements between Millennium and its customers. Such notations could indicate, for example, the purchase and sale of CDs in the secondary market, or be a notation showing that the LLC had accepted funds for which it would act as investment manager or for which it would make off-shore investments.

Because memorandum entries on checks are for the convenience of the maker of the check, a depository bank is not required to examine such memorandum entries, much less be expected to ensure that a noncustomer's funds are applied as directed in the memorandum entry. *See* 5A ANDERSON U.C.C. § 3-105:31 (3d. ed.) ("Generally memoranda on checks describing the funds and the source from which they come, or the payment intended by the checks, do not act as notifications to a bank or other person receiving, paying, or cashing such checks, of any facts which it is bound to investigate."). A bank cannot be expected to decipher and interpret cryptic entries and notations made by noncustomers on memorandum entries for their own personal

reference, and the law imposes no such duty. *See U.S. Bank Nat'l Ass'n v. Whitney*, 81 P.3d 135, 141 (Wash. Ct. App. 2003) ("[The information] on the memo line was the only clue from which the [depositors] expected [the bank] to divine their subjective intent as to the destination of these checks. This is not the function of the memo line."). Further, the very fact that such an undertaking would necessarily involve subjective interpretation, surmise, and conjecture – all in the absence of direct communication with the Plaintiff investors or without reference to the underlying investment documents – is at most rank speculation, and proof that neither WaMu nor, later, Chase could have had *actual* knowledge.[13]

Plaintiffs next allege Chase should have more carefully conducted an audit of the LLCs' accounts, which if performed correctly would have revealed the fraud. *See* Compl. at 4-5, ¶ 25. Put another way, this is simply an accusation that Chase should have or could have obtained knowledge of the fraud. This also fails: speculation of acquired actual knowledge gained during assumed investigations or audits conducted prior to action by a business are insufficient to state a claim. *See Holtkamp v. Parklex Assocs.*, No. 14514/2006, 2011 WL 621122 (N.Y. Sup. Ct. Feb. 22, 2011), *aff'd*, 941 N.Y.S.2d 874 (App. Div., 2d Dep't 2012).

Nor can Plaintiffs impute the purported pre-September 2008 knowledge of WaMu employees to Chase after its September 25, 2008 acquisition. First, to the extent Plaintiffs' aiding and abetting claims rely on the prior knowledge of the WaMu employees, those claims necessarily "relate to" an act or omission by WaMu, *i.e.*, either WaMu's act of observing and acquiring knowledge or WaMu's failure to acquire knowledge in circumstances when it should

[13] Indeed, many banks do not process checks manually, and have not done so for years. *See infra* Section III.B.iii. Deposited checks are processed automatically, the only important digitized information being amounts and account routing numbers. At no point in the check collection process do banks examine, digitize, or use in any fashion the customer's memorandum entry on a check. Given the mechanized way in which deposited checks are processed, a human being may never have looked at the memorandum entry.

have. Because a claim based on such imputed knowledge "relates to"[14] an "act or omission" by WaMu, it necessarily comes within the language of 12 U.S.C. § 1821(d)(13(D)(ii),[15] and is jurisdictionally barred. *See supra* Section II.

In particular, FIRREA's requirement that plaintiffs resolve their claims against the failed bank through the FDIC's mandatory claims process is designed to insulate purchasing banks from latent claims based on the acts of the failed bank. *See Aber-Shukofsky*, 755 F. Supp. 2d at 449-450 ("[F]ew banks would enter purchase and assumption agreements if successor banks had to assume latent claims of unknown magnitude.") (quoting *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990)) (internal quotation marks omitted); *Vill. of Oakwood v. State Bank & Trust Co.*, 519 F. Supp. 2d 730, 739 (N.D. Ohio 2007) (rejecting successor liability and holding purchase and assumption agreements are intended to "transfer[] distinct assets or liabilities" and not to "make every failed bank resolution a merger"), *aff'd*, 539 F.3d 373 (6th Cir. 2008). "Purchase and assumption" transactions, like the one here, "must be consummated with great speed" (which can prevent a purchasing bank from fully evaluating its risks), yet must be designed to avoid the significant liability issues inherent in liquidation of a failed bank. *Gunter v. Hutcheson*, 674 F.2d 862, 865-66 (11th Cir. 1982), *cert. denied*, 459 U.S. 826 (1982), *and overruled on other grounds*, *Langley v. FDIC*, 484 U.S. 86 (1987). In order to encourage the purchase of such failed institutions, the law shields both the purchasing bank and the FDIC from certain liabilities of the failed institution. *Id.* at 870. The exhaustion of remedies

[14] "Relating to" has a deliberately broad and sweeping meaning when used by Congress in a statute. *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374, 383-84 (1992).

[15] The language of section 1821(d)(13)(D) makes clear that its jurisdictional bar applies broadly to "any claim relating to any act or omission of such [failed] institution . . . ." 12 U.S.C. § 1821(d)(13(D). The statute "distinguishes between claims on their factual bases – not the identity of the defendant." *Brabant v. JPMorgan Chase Bank*, No. CV11-00848-TUC-JCZ, 2012 WL 2572281, at *5 (D. Ariz. July 2, 2012) (citing *Benson*, 673 F.3d at 1212); *Schettler v. Ralron Capital Corp.*, 275 P.3d 933, 937-38 (Nev. 2012) (holding that a successor bank benefits from FIRREA jurisdictional bar where claim relates to act of the failed institution).

requirement is one such shield; yet another is the rule that fraud claims based on conduct of the failed institution cannot be asserted against the FDIC unless the FDIC had actual knowledge of the fraud. *Id.* at 872-73 (recognizing complete holder-in-due-course defense for FDIC to fraud claims on a note acquired by FDIC from failed institution where FDIC took note for value, in good faith, and without actual knowledge of the fraud); *FDIC v. Wood*, 758 F.2d 156, 160 (6th Cir. 1985) (same).

In short, the transition between WaMu and Chase was not merely a matter of WaMu's employees "putting on a different hat" as Plaintiffs suggest, Compl. ¶ 23, but rather involved a critical intermediate step: the placement of WaMu's assets into receivership under the control of the FDIC. This intermediate step broke the chain of knowledge that could possibly be imputed to the FDIC, which in turn could not then be imputed to Chase upon the purchase of certain assets formerly held by WaMu from the agency.

Even absent the FDIC receivership, "[t]he knowledge of a purchased corporation's employees cannot properly be imputed to the purchasing corporation just because they went to work for the purchasing corporation." 18B AM. JUR. 2D CORPORATIONS § 1454 (2d ed.). Rather, Plaintiffs must allege - *which they do not* - that Chase became aware in some official capacity of the alleged knowledge possessed by the former WaMu employees. *See generally* 9 N.Y. JURIS. 2D BANKS § 176 (2d ed.) ("[I]t is essential that knowledge to be attributed to the bank should have been acquired by its officer . . . in an official capacity . . . .").

Finally, to the extent any imputation of knowledge of former WaMu, *i.e.*, former FDIC, employees could ever be made to Chase, it could not occur instantly upon the September 25, 2008 acquisition. Chase could only be held responsible for acquiring such knowledge after it had established its control over the branches at issue and had actual interactions with the former WaMu employees and the accounts at issue. Without any interactions with the former WaMu

employees, Chase itself acquired no independent knowledge as to the "suspicious" acts of Wise and his associates. This is particularly true where, as here, the accounts were but three of myriads of accounts held in over 2,200 former WaMu branches acquired by Chase from the FDIC in the course of three days in the midst of this country's most serious financial meltdown in almost a century. In order for such knowledge to attach, Chase must have been given sufficient opportunity to have independently acquired such knowledge.

B. Plaintiffs Fail To Show Chase Provided Anything Other Than Normal Banking Services, Or That Millennium's Investors Would Not Have Invested In The Absence Of Such Services.

Plaintiffs also fail to show Chase substantially assisted Millennium in its fraud. Substantial assistance exists where (1) a defendant "'affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed'" *and* (2) "'the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.'" *Rosner*, 2008 WL 5416380, at *5 (quoting *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001)); *see also Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1135 (C.D. Cal. 2003) (holding that an aider/abettor must have proximately caused the harm on which the primary liability is predicated.) (citation omitted). Plaintiffs fail both tests.

1. Chase's Alleged Inaction Does Not Constitute Substantial Assistance.

As an initial matter, Plaintiffs fail adequately to plead substantial assistance for the same reason they fail to allege actual knowledge: "one cannot affirmatively help conceal or fail to stop the commission of a tort that one knows nothing about." *In re Jeweled Objects*, 2012 WL 3638006, at *11. Plaintiffs here fail adequately to allege that Chase had actual knowledge of Wise's fraudulent conduct and the conversion of Plaintiffs' money. Therefore, Chase could not, as a matter of law and logic, have affirmatively assisted in the commission of the very fraud and conversion that it did not know was occurring.

Fatally for Plaintiffs' claims, none of the acts identified by Plaintiffs satisfies the substantial assistance requirement. At most, taken together in the light most favorable to Plaintiffs, their allegations support an argument that Chase stood idly by, ignoring red flags, and allowed Millennium to defraud Plaintiffs. Indeed, the gravamen of Plaintiffs' complaint is that Chase failed to prevent itself from being used to defraud Plaintiffs. Even if true, such inaction is legally insufficient to constitute substantial assistance. *See Ryan*, 2000 WL 1375265, at *10 ("Absent a confidential or fiduciary relationship between the plaintiff and the aider and abettor, the inaction of the latter does not constitute substantial assistance warranting aider and abettor liability.") (citations omitted); *Kolbeck*, 939 F. Supp. at 247 (holding that inaction is not assistance); *In re Sharp Int'l Corp.*, 403 F.3d 43, 50-51 (2d Cir. 2005) (holding that the defendant's failure to act by foreclosure and failure to expose customer's fraud and shut down account does not state an aiding and abetting claim); *Nat'l Westminster Bank USA v. Weksel*, 511 N.Y.S.2d 626, 629 (App. Div., 1st Dep't 1987) ("We know of no case where mere inaction by a defendant has been held sufficient to support aider and abettor liability for fraud.").

2. The Provision Of Ordinary Banking Services Does Not Constitute Substantial Assistance.

Courts have consistently held that "the provision of banking services, without more," to a wrongdoer does not constitute substantial assistance. *See, e.g.*, *Rosner*, 2008 WL 5416380, at *13 (holding that opening accounts, transferring funds between accounts, and allowing customers to withdraw funds in cash do not constitute substantial assistance); *accord El Camino Resources, Ltd. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 928 (W.D. Mich. 2010) ("If the law were otherwise, every bank would be an aider and abettor of every fraudulent customer, merely on the theory that the customer needed access to bank accounts to accomplish the fraud."). Plaintiffs identify three services on which they rest their "substantial assistance" hat: (i) the intermingling of the Plaintiffs' and other investor funds in the LLCs accounts; (ii) wire

transfers out of the accounts; and (iii) the use of the RDC system. None of these services satisfies the substantial assistance standard as a matter of law.

(i) Intermingling

Plaintiffs allege that their monies were "commingled" with the monies of other investors in the accounts held by the LLCs, Compl. ¶¶ 48(c), 54(c), implying that this "commingling" was somehow improper. Plaintiffs apparently rely on aiding and abetting breach of fiduciary duty cases – which this case is not – without understanding that such principles are simply inapplicable here to a general deposit account, such as the accounts held by the LLCs. The prohibition against intermingling applies only where a fiduciary has agreed with his customer to maintain the customer's funds in a segregated account, such as an escrow or special deposit account: "'a deposit made in the ordinary course of business is presumed to be general, and the burden of proof is on the depositor to overcome such presumption.'" *Renner v. Chase Manhattan Bank*, 98 CIV. 926 (CSH), 2000 WL 781081, at *13 (S.D.N.Y. June 16, 2000), *aff'd*, 85 F. App'x 782 (2d Cir. 2004) (quoting *Peoples Westchester Savings Bank v. F.D.I.C.*, 961 F.2d 327, 330 (2d Cir. 1992)). Indeed, under New York law depository institutions have no responsibility for undertakings their customers may have made with a third party, and have "no duty to monitor fiduciary accounts . . . in order to safeguard funds in those accounts from fiduciary misappropriation." *Norwest Mortg., Inc. v. Dime Sav. Bank of N.Y.*, 721 N.Y.S.2d 94, 95 (App. Div., 2d Dep't 2001). A financial institution has "the right to presume that the fiduciary will apply the funds to their proper purpose under the trust." *Bischoff ex. rel. Schneider v. Yorkville Bank*, 218 N.Y. 106, 111 (1916); *Peoples Westchester Savings Bank*, 961 F.2d at 332 ("In maintaining an IOLA account, the lawyer, not the bank, is charged with a fiduciary duty to the client.").

Plaintiffs do not allege they had a fiduciary relationship with Millennium, Wise, or any of the LLCs. Plaintiffs do not allege that the accounts of the LLCs were special deposit accounts or somehow designated as fiduciary accounts. Plaintiffs do not allege that there was any agreement, express or implied, between them and any entity that their investment funds would be placed in a segregated deposit account at Chase. To the contrary, Plaintiffs allege their funds would be deposited and used to purchase a CD. As such, Chase was free to intermingle the account funds, and therefore any "assistance" in allowing the intermingling is non-actionable.

(ii) Wire Transfers

Plaintiffs' allegations that wire transfers were made out of the checking accounts are likewise insufficient. Every court to have considered the issue has held, as a matter of law, that neither the knowledge of a client's use of wire transfers nor the execution of wire transfers constitutes substantial assistance for aiding and abetting liability. *See, e.g., Williams v. Bank Leumi Trust Co.*, 96 CIV. 6695 (LMM), 1997 WL 289865, at *5 (S.D.N.Y. May 30, 1997) ("[E]ven if the [bank] participated in all the money transfers, this fact, without more, does not raise an inference that the bank had knowledge of the alleged scheme."); *Ryan*, 2000 WL 1375265, at *9 (holding that the bank's approval of wire transfers, even combined with its awareness of "red flags" and its suspicion of fraud, does not constitute actual knowledge or substantial assistance); *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, 98 CIV. 4960 (MBM), 1999 WL 558141, at *7-8 (S.D.N.Y. July 30, 1999) (holding that the bank's execution of repeated wire transfers for millions of dollars does not constitute substantial assistance). Plaintiffs' wire transfer theory fails.

(iii) RDC System

Plaintiffs also allege in conclusory fashion that Chase substantially assisted Millennium's fraud by "[r]ecommending, approving and assisting the establishment of remote deposit and

wiring capabilities . . . ." Compl. ¶¶ 49(b), 55(b). Plaintiffs apparently have no idea what an RDC system is. RDC is simply a way for a business to make remote deposits. Just as an ordinary deposit does not constitute substantial assistance, neither does a remote deposit. The fact that the deposit was made by digital rather than hard copy means does not change its essential character.[16] RDC technology is routinely offered to banks' commercial customers,[17] and routine banking services do not constitute substantial assistance.

Again, the *Agape II* decision is directly on point and instructive. The *Agape II* court found that the provision of a remote deposit system, similar to the RDC used by the LCCs, is not an unusual or unique banking service, and is simply a customer convenience whose installation could not constitute substantial assistance as a matter of law. *See Agape II*, 773 F. Supp. 2d at 325 ("Ultimately, while the Plaintiffs have alleged that BOA's banking activities, structuring of the accounts, and *issuance of the RDS* made it easier for Cosmo to effectuate the scheme, *these conventional banking transactions* were not the proximate cause of the Plaintiffs' damages and therefore do not constitute substantial assistance.") (emphasis added). Even assuming Plaintiffs can overcome their admission that it was *WaMu* – not Chase – which actually approved and installed the RDC system, their RDC allegations fail to show substantial assistance.

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[16] Remote deposit capture or RDC is simply a technology that allows for the deposit of checks without a physical trip to the bank by allowing a customer to scan a check and send its digital image to the bank as the deposit. *See Remote Deposit*, WIKIPEDIA, http://en.wikipedia.org/wiki/Remote_deposit (last visited Sept. 29, 2012). With the enactment of the Check 21 Act in 2004, customers began to use RDC technology to effect their own deposits from their own business offices. *Id.* The technology is pervasive throughout the U.S. banking industry. *See Remote Deposit - How Remote Deposit Capture Works*, ABOUT.COM, http://banking.about.com/od/businessbanking/a/remotedeposit.htm (last visited Sept. 29, 2012).

[17] *See, e.g., Business Remote Deposit*, CONESTOGABANK.COM, http://conestogabank.com/ways-to-bank/remote-deposit/ (last visited Sept. 29, 2012); *Remote Deposit FAQs*, COMMERCEBANK.COM http://www.commercebank.com/smallbusiness/online-services/remote-deposit/faqs.asp (last visited Sept. 29, 2012); *Rapid Remote Deposit*, FIRSTNATIONALNORTHFIELD.COM, http://firstnationalnorthfield.com/business/rapid-remote-deposit/ (last visited Sept. 29, 2012); *Cash Management*, CALIFORNIAUNITEDBANK.COM, https://www.californiaunitedbank.com/index.cfm/services/cash-management/ (last visited Sept. 29, 2012); *Business Banking*, BROOKLINEBANK.COM, https://www.brooklinebank.com/home/business (last visited Sept. 29, 2012).

3. Plaintiffs Fail To Suggest, Let Alone Adequately Allege, That Chase's Actions Were The Proximate Cause Of Plaintiffs' Decision To Invest With Millennium.

Plaintiffs also fail to plead the required proximate cause. "Allegations of 'but for' causation are insufficient; an alleged aider and abettor will be liable only where the plaintiff's injury is a direct or reasonably foreseeable result of the defendant's conduct." *Rosner*, 2008 WL 5416380, at *5, *12; *see also In re Sharp Int'l Corp.*, 281 B.R. 506, 516-17 (Bankr. E.D.N.Y. 2002) (holding that the provision of ordinary service cannot constitute substantial assistance because use of account to perpetrate a wrong is only but-for causation). Merely "furnishing the condition" which the perpetrator exploited to injure Plaintiffs is not a proximate cause. *See Santodonato v. Char Channel Broad, Inc.*, 809 N.Y.S.2d 608, 610 (App. Div., 3d Dep't 2006); *Escalet ex rel. Quinonez v. N.Y.C. Hous. Auth.,* 867 N.Y.S.2d 62, 63 (App. Div., 1st Dep't 2008).

At best, Plaintiffs allege mere "but-for" causation. Proximate causation would require Plaintiffs to allege that Chase's services were a "substantial factor in the sequence of responsible causation," and that Plaintiff's injury was "a reasonably foreseeable consequence of that conduct." *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123-24 (2d Cir. 2003). Nowhere in the Complaint do Plaintiffs suggest, let alone plead, that the Hollises, the Mansors or any other potential class member would *not* have invested in Millennium's CDs (i) had the LLCs not held accounts with WaMu and then Chase, or (ii) absent the LLC's use of the RDC and CMT systems. Indeed, the fact that the CMT and RDC systems were not installed until late in the life of the Ponzi scheme is proof that they were *not* a cause of the fraud, which had successfully been in operation for over four years.

Plaintiffs also fail to allege that the proximate cause of their losses was Chase's actions rather than the fraud of Wise and his associates. The underlying fraud here was the misrepresentation by Wise and his associates that Millennium was a subsidiary of a Swiss bank

which was able to sell CDs to Plaintiffs and similarly-situated investors, Compl. ¶ 11, and their theft of Plaintiffs' money when Millennium issued bogus CDs to fund the personal expenses of Wise and his associates. *Id.* at 3, ¶¶ 17, 53. In short, *Millennium's* fraudulent acts – not Chase's provision of banking services – were the proximate cause of Plaintiffs' losses. *See Cromer*, 137 F. Supp. 2d at 472 ("[W]hile the Ponzi scheme may only have been possible because of Bear Stearns' actions, or inactions, Bear Stearns' conduct was not a proximate cause of the Ponzi scheme."); *Edwards & Hanley v. Wells Fargo Sec. Clearance Corp.*, 602 F.2d 478, 484 (2d Cir. 1979) (finding that proximate cause of plaintiff's loss was primary violator's deception of the plaintiff regarding the transaction at issue rather than the alleged aider and abettor's active assistance in making those transactions possible). As such, Plaintiffs fail adequately to plead both prongs of the substantial assistance requirement, and their claims should be dismissed.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that Plaintiffs' Complaint be dismissed in its entirety.

Respectfully submitted,
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Date: October 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that the above document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on October 1, 2012.

/s/ Jacqueline S. Delbasty
Jacqueline S. Delbasty