IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PARLIN FUND LLC AND THE PARLIN FAMILY FOUNDATION,	:	
Plaintiffs,	:	Case No. 1:13-CV-111
vs.	:	
CITIBANK N.A.,	:	
Defendant.	:	

ORDER

This matter is before the Court on Defendant's motion to dismiss for failure to state a claim upon which relief can be granted. (Doc. 13) Plaintiffs opposed the motion (Doc. 17) and Defendant has filed a reply. (Doc. 20) In their amended complaint, Plaintiffs allege various causes of action stemming from Defendant's alleged role in a fraudulent investment scheme perpetuated by one of its customers, Tyrone Gilliams, Jr. ("Gilliams"), and his company, TL Gilliams LLC ("TLG"). For the reasons that follow, Defendant's motion to dismiss is well-taken and is **GRANTED.**

BACKGROUND

The following facts are taken from the amended complaint and are accepted as true.

Plaintiffs' principal, David Parlin, met Bret Smith through a mutual acquaintance in 2009. (Pl.'s Amend. Compl. ¶ 20) Smith claimed to be a director of a not-for-profit religious foundation known as H.E.A.R.T.T. After learning of Parlin's desire to invest in a manner that

would yield profits for charitable purposes, he offered to put him in contact with New York investment advisor Vassilis Morfopoulos. (Id. ¶ 20)

In early 2010, Parlin traveled to New York and met with Morfopoulos on two occasions to discuss possible investments. Morfopoulos falsely led Parlin to believe he had "considerable experience" in the field of investing. (Id. ¶ 21) On or around February 23, 2010, Morfopoulos proposed an investment contract between Parlin Funds and H.E.A.R.T.T. (Id. ¶ 24) The terms of the document stated that Parlin Funds would invest in a fund managed by Morfopoulos, that these funds would in turn be invested in Treasury STRIPS, Treasury Bills, and U.S. government paper, and that they would yield a return of at least double the original investment. In reliance on this agreement, Parlin transferred $2,000,000 in the name of Parlin Funds to a JP Morgan account designated by Morfopoulos in March 2010. (Id. ¶ 25) At the request of Morfopoulos, Parlin transferred an additional $2,000,000 to the same JP Morgan account in May 2010 for further investment. (Id. ¶ 26) The H.E.A.R.T.T. Fund never existed, and Plaintiffs allege that it was fabricated with the intent to defraud them. (Id. ¶ 27)

Months after gaining control of Plaintiffs' money, Morfopoulos was introduced to Gilliams and his accomplice J.R. Delgado. (Id. ¶ 28) Gilliams and Delgado misled Morfopoulos in regards to Gilliams' experience, qualifications, and legitimacy. Together they convinced Morfopoulos to place Plaintiffs' $4,000,000 at the disposal of Gilliams. On or about July 5, 2010, Morfopoulos committed Plaintiffs' $4,000,000 to a joint venture agreement constructed by Gilliams. (Id. ¶ 29) The intent of the agreement was "to purchase, trade and sell financial instruments, and in particular U.S. Treasury Strips." When Morfopoulos and Gilliams met two

days later, Gilliams stated that his attorneys, Elam & Scott LLP, would act as escrow agent for the account through which Gilliams would gain control of the funds. (Id. ¶ 30)

On July 9, 2010, acting as counsel to Gilliams, Everette Scott (Scott) confirmed with Morfopoulos that his firm would be receiving the funds and sending the money to Gilliams. (Id. ¶ 31) On August 25, 2010, Morfopoulos wire transferred Plaintiffs' $4,000,000 from the JP Morgan Account to an account at Wachovia Bank maintained by Elam & Scott LLP. (Id. ¶ 32) Morfopoulos did this with the understanding that the funds would be transferred to Gilliams and invested according to the joint venture agreement.

Gilliams never invested Plaintiffs' $4,000,000. (Id. ¶ 33) As soon as Elam & Scott LLP received the money, Scott transferred all but $40,000 to three accounts chosen by Gilliams. (Id. ¶ 34) Specifically, he transferred $510,000 to an account at Citibank, he transferred $3,000,000 to an account held by TLG at Wells Fargo Advisors (WFA), and he transferred $450,000 to an account held by Fieldstone Value Partners at JP Morgan Chase. On August 26, 2010, Morfopoulos received a letter titled "Confirmation of Funds" as verification of receipt for the wire transfer. (Id. ¶ 35)

On February 11, 2010, Gilliams opened a bank account at Citibank (the TLG account) with account officer William Gordon at the Bala Cynwyd, Pennsylvania branch. (Id. ¶ 9) Gilliams stated on official documents that TLG had $500,000 in annual sales and annual net profit of $150,000. This was untrue, and Plaintiffs allege that Citibank could have discovered this had it abided by bank policy and performed an Accurint search on Gilliams. (Id. ¶ 11) By neglecting to follow bank policy, Citibank failed to uncover Gilliams' criminal history and numerous unsatisfied civil judgments against him.

Gilliams advised Citibank that TLG funds would be sent to or received from places outside the United States, so the account was designated as "high risk." (Id. ¶ 12) Gordon prepared a "High Risk Due Diligence" form, but failed to flag the TLG account in Citibank's computer system. (Id. ¶ 15) Under the section of the internal bank form titled "Required Action," Gordon falsely indicated that Citibank had received two types of the required documentation. (Id. ¶ 13) These were violations of Citibank policy. The failure to flag TLG was uncovered in March 2010 during an operational review by the bank's regional director of operations, Cathy Pimpinella, and the branch was cited for the violation. (Id. ¶ 15) The review revealed Gordon's failure to obtain the proper documentation on TLG and the fact that he had stated otherwise. (Id. ¶ 16) Citibank took no action in regards to TLG's lack of documentation. Citibank failed to learn that Gilliams had lied on his account forms. (Id. ¶¶ 18) If Citibank had adhered to its policies, Plaintiffs allege that the TLG account would have been closed by May 2010 - three months before Gilliams used it to receive and misappropriate Plaintiffs' funds. (Id. ¶ 19)

When Gilliams initially opened his TLG account in February of 2010, Jessica Manning was the assistant branch manager of the Bala Cynwyd Citibank branch. (Id. ¶ 36) Manning became aware that Gordon had falsely stated that the bank had received the required documents from TLG after performing an audit of the account in April. (Id. ¶ 37) She also learned that the documents still had not been received.

Citibank pressured its bank officers to generate business and open accounts, even if they were not employed as account officers. (Id. ¶ 38) Citibank demanded that account officers open two new checking accounts per day, and managers were expected to ensure that this happened.

(Id. ¶ 40) These high expectations caused officers and managers to fear loss of compensation or employment if they failed to meet the standard. Through her relationship with Gilliams, Manning was able to open numerous other accounts for Gilliams' employees and associates. (Id. ¶ 41) Due to the volume of business and its importance to job security, Manning and branch employees were incentivized to overlook misrepresentations and disregard internal policies. (Id. ¶ 42) Because Gilliams was such a profitable client, Plaintiffs allege that Manning felt obligated to meet all of his needs regardless of whether his requests required her to violate bank policy. Manning took over as Gilliams' account handler in the summer of 2010. (Id. ¶ 42)

Citibank policy did not require "new due diligence to be performed upon the opening of accounts for customers who have had existing customer relationships with the bank for six months," and Gilliams opened several additional accounts at the Bala Cynwyd branch without new due diligence. (Id. ¶ 43) He used one of the new accounts to receive $50,000 of funds stolen from Plaintiffs. (Id. ¶ 45) Manning acknowledged that she was aware of this policy and that it could be used by customers for fraudulent purposes. (Id. ¶ 44) As of October 2010, Gilliams communicated daily with Manning about his accounts. (Id. ¶ 46) He persuaded Manning to use her authority as assistant branch manager to remove holds on funds up to $25,000.

Between August and December of 2010, Gilliams deposited checks totaling $1,255,000, drawn on TLG's WFA and Elam & Scott LLP accounts, into various TLG Citibank accounts. (Id. ¶¶ 47-52) He then dissipated most of these funds. Plaintiffs allege that these checks represented funds fraudulently obtained from them. On December 6, 2010, Gilliams opened an

account for "Joy to the World Foundation," a fraudulent charitable foundation he created. (Id. ¶ 53)

After Gilliams deposited $50,000 on December 7, 2010, John Vizzarri, the regional operations manager, reviewed Gilliams' accounts and became suspicious of his frequent interactions with Manning. (Id. ¶ 55-56) Vizzarri contacted Citibank internal investigator Thomas Marucci to investigate Manning and her connection to Gilliams. Vizzarri informed Marucci that Manning had violated bank policy by repeatedly looking at Gilliams' accounts on her computer screen, even though handling his accounts was not her job as assistant branch manager. This information prompted Marucci to run an Accurint report on Gilliams. (Id. ¶ 57) The report revealed that Gilliams had numerous liens and unsatisfied judgments against him. Marucci, however, did not take action to close Gilliams' accounts. (Id. ¶ 58)

On December 8, 2010, Gilliams deposited another check for $50,000 drawn on the TLG WFA account into the Citibank account. Plaintiffs allege that all of this money had been fraudulently obtained from them. Gilliams was to return to the Bala Cynwyd branch the following day to deposit a large check. (Id. ¶ 59) Although it was Manning's day off, she agreed to come in and facilitate the transaction. Branch Manager Stephanie Thompson was already suspicious of Manning's dealings with Gilliams and questioned Manning as to why she would go out of her way to accommodate Gilliams. Thompson, however, did not forbid her from proceeding with the transaction. Thompson requested paperwork for two questionable transactions involving the TLG account that had been authorized by Manning. (Id. ¶ 60) When Gilliams met Manning, he claimed to have forgotten his checkbook and made plans to meet her at a downtown Philadelphia Citibank branch that afternoon. (Id. ¶ 61)

Gilliams gave Manning a $150,000 check drawn on the TLG WFA account to deposit. After depositing the check, Manning learned that the majority of the funds would not be immediately available to Gilliams. She did not have authority at the Philadelphia branch to lift the hold. Manning returned to the Bala Cynwyd branch after hours and released a portion of the funds. (Id. ¶ 62) Manning's actions were discovered the following day. She was called into an interview with her supervisors and was suspended with pay. (Id. ¶ 63) Manning's supervisors worried that Manning had exposed the bank to the risk of fraudulent losses. (Id. ¶ 64) Citibank took no action to close Gilliams' account, however, and on December 10, Gilliams withdrew $9,900 from the account. (Id. ¶ 65) After his interview with Manning, Marucci became increasingly concerned that Gilliams was attempting to defraud Citibank. (Id. ¶ 66)

On December 15, Manning met with the regional sales director at a neighboring Citibank branch. (Id. ¶ 67) Her superiors were present at the meeting by telephone. Marucci stated that he believed Manning had violated bank policy. On December 16, Gilliams deposited a $100,000 check drawn on the TLG WFA account into the TLG account. (Id. ¶ 68) The Plaintiffs allege that all of this money had been illegally obtained from their original investment with Morfopoulos. On December 17, Manning was fired for "violating bank policy regarding notifying the alarm company about entering the branch after hours and for putting Gilliams' needs above the bank's." (Id. ¶ 69) Gilliams deposited an additional $50,000 check into the TLG account that same day. (Id. ¶ 70) Plaintiffs allege that these funds were fraudulently obtained from them.

On December 20, 2010, $90,000 was deposited in TLG's Citibank account. (Id. ¶ 71) These funds came from a Joseph Giordano in Cincinnati, and represented a book transfer from a

TLG joint venture. When Citibank advised Gilliams and Giordano that it was not possible to transfer the funds to the TLG account for immediate use, Gilliams sent a private plane to Cincinnati to retrieve a $90,000 check and $40,000 in cash. (Id. ¶ 72) On December 22, the $50,000 check that Gilliams had deposited on December 17 was returned for insufficient funds, resulting in an overdraft of $25,881.10 in the TLG account. (Id. ¶ 73) Gilliams' accounts were blocked upon Marucci's recommendation. The following day Marucci drafted a letter to Gilliams demanding payment of the overdraft in ten business days, or else the matter would be turned over to law enforcement. (Id. ¶ 74)

The overdraft issue was resolved on December 27, 2010 when Crown Financial Solutions transferred $163,600 to the TLG account. (Id. ¶ 76) This money consisted entirely of funds previously transferred from Gilliams to Crown, which Plaintiffs allege had been illegally obtained from Plaintiffs' investment. Citibank unblocked Gilliams' accounts. (Id. ¶ 78) After the overdraft fee had been withdrawn, TLG's account had a remaining balance of $137,718.90. Gilliams dissipated all of that money in less than a month. On or about January 10, 2011, Citibank closed TLG's accounts because it concluded that Gilliams had attempted to defraud Citibank. (Id. ¶ 79)

On or about November 14, 2011, the U.S. Securities and Exchange Commission filed a civil action against Gilliams and TLG in connection with their fraudulent conduct. (Id. ¶ 80) A federal jury convicted Gilliams and Scott each of one count of securities fraud and two counts of wire fraud in February of 2013. (Id. ¶ 81)

Plaintiffs' amended complaint alleges six causes of action against Citibank. (Id. ¶¶ 82-129) These claims are negligence, fraud, aiding and abetting fraud, aiding and abetting

conversion, civil conspiracy, and conversion. Plaintiffs' claims stem from Citibank's alleged role in the fraudulent investment scheme perpetuated by Gilliams and TLG. Plaintiffs demand a trial by jury, compensatory damages, consequential damages, punitive damages, and costs and fees incurred in connection with this action.

ANALYSIS

Standard of Review

Citibank moves to dismiss Plaintiffs' amended complaint in its entirety on the grounds that it fails to state any claim upon which relief can be granted. A motion to dismiss for failure to state a claim operates to test the sufficiency of the complaint. The court must construe the complaint in the light most favorable to Plaintiff, and accept as true all well-pleaded factual allegations. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983). The court need not accept as true legal conclusions or unwarranted factual inferences. Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 405 (6th Cir. 1998).

The complaint, however, must contain more than labels, conclusions, and formulaic recitations of the elements of the claim. Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291, 295 (6th Cir. 2008) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The factual allegations of the complaint must be sufficient to raise the right to relief above the speculative level. Id. Nevertheless, the complaint is still only required to contain a short, plain statement of the claim indicating that the pleader is entitled to relief. Id. (citing Erickson v. Pardus, 551 U.S. 89, 93 (2007)). Specific facts are not necessary, and the pleader is only required to give fair notice of the claim and the grounds upon which it rests. Id. To withstand a

motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted). Mere conclusions, however, are not entitled to the assumption of truth. Id. at 1950. A claim is facially plausible if it contains content which allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id. at 1949. Plausibility is not the same as probability, but the complaint must plead more than a possibility that the defendant has acted unlawfully. Id. If the complaint pleads conduct which is only consistent with the defendant's liability, it fails to state a plausible claim for relief. Id.

Choice of Law

"Federal courts sitting in diversity must apply the choice-of-law rules of the forum state." Muncie Power Prod., Inc. v. United Tech. Auto., Inc., 328 F.3d 870, 873 (6th Cir. 2003) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941)). Thus, Ohio choice-of-law rules apply in this action. Ohio courts use the balancing test set forth in the Restatement (Second) of Conflict of Laws in determining which state's law to apply. Muncie Power Prod., 328 F.3d at 873; see also Restatement (Second) of Choice of Law §§ 6, 145. The factors to be considered include: "(1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; (5) and any factors under Section 6 which the court may deem relevant to the litigation." Morgan v. Biro Mfg. Co., 474 N.E.2d 286, 289 (Ohio 1984); Restatement (Second) of Choice of Law § 145. Additional factors include:

(a) the needs of the interstate and international system;

(b) the relevant policies of the forum;
(c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue;
(d) the protection of justified expectation;
(e) the basic policies underlying the particular field of law;
(f) certainty, predictability and uniformity of result; and
(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Choice of Law § 6.

Plaintiffs are both organized under Ohio law, and Cincinnati is their principal place of business. Plaintiffs' injuries occurred in Cincinnati. Plaintiffs have alleged that a substantial part of the events giving rise to the claim occurred in this judicial district. Citibank is a national banking association and is conducting business in Ohio. Thus, the section 145 factors favor the application of Ohio law. The interstate and international systems are not substantially affected by this action. The Plaintiffs are organized under Ohio law, thus Ohio has a substantial interest in protecting them. The injuries also occurred in Ohio. It appears no other state has a substantial interest in this dispute. Ease in the determination and application of law also favors Ohio because this Court and Plaintiffs are located in Ohio. Finally, Plaintiffs and Citibank are in agreement that Ohio law should apply. Based on these factors and the other factors listed in sections 6 and 145, Ohio law will be applied to this case.

Plaintiffs' First Cause of Action: Negligence

Plaintiffs claim that Citibank was negligent when the bank failed to follow its own policies in maintaining Gilliams' account and knew or was willfully blind to Gilliams' tortious behavior. Citibank argues that the bank did not owe a duty to Plaintiffs or, alternatively, that Plaintiffs have failed to demonstrate that Citibank was the proximate cause of their injuries. Under Ohio law, the plaintiff must prove the existence of a duty, a breach of the duty, and an

injury resulting proximately therefrom to establish a claim of negligence. Feldman v. Howard, 226 N.E.2d 564, 567 (Ohio 1967). The existence of a duty depends on the foreseeability of the injury. Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1319 (Ohio 1997). Foreseeability is determined by whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. Id.

Ohio follows the prevailing rule that a bank owes no duty of care to a person who is not a customer or account-holder. Driessen v. Woodforest Nat'l Bank, ___F. Supp.2d___, No. 3:12–CV–91, 2013 WL 211350, at *1 (S.D. Ohio Jan. 18, 2013); see Loyd v. Huntington Nat'l Bank, No. 1:08-CV-2301, 2009 WL 1767585, at *1 n. 32 (N.D. Ohio June 8, 2009) ("Generally courts have held that a depositary bank does not owe any duty to a non-customer."); see also Eisenberg v. Wachovia Bank, N.A., 301 F.3d 220, 227 (4th Cir. 2002) (holding that banks do not owe non-customers a duty of care); Chaney v. Dreyfus Serv. Corp., 595 F.3d 219, 232 (5th Cir. 2010) (same); Conder v. Union Planters Bank, N.A., 384 F.3d 397, 399–400 (7th Cir. 2004) (same); David A. Szwak, Update on Identity Theft and Negligent Enablement, 58 Consumer Fin. L.Q. Rep. 66, 69 n. 35 (2004) (collecting cases). "The reasoning behind this rule is simple and sensible—if banks owed duties to non-customers, they would be exposed to unlimited liability for unforeseeable frauds." Driessen, 2013 WL 211350, at 1* (internal quotation marks omitted).

The facts alleged show that Plaintiffs had no direct relationship with Citibank, contractual or otherwise. They were not Citibank customers, did not have an account at the bank, and did not communicate with the bank. Plaintiffs instead transacted business with

Morfopoulos who then gave money to Gilliams, a Citibank customer. Thus, Citibank did not owe Plaintiffs a duty of care because they were not customers of the bank. Accordingly, Plaintiffs' negligence claim fails as a matter of law.

Plaintiffs' Second Cause of Action: Fraud

Plaintiffs claim Citibank was aware, should have been aware, or was willfully blind to the fact that Gilliams and TLG were engaged in fraudulent behavior. Plaintiffs allege that, because of this knowledge or willful blindness, Citibank owed a duty to discover and protect the victims of the fraud. Citibank argues that Plaintiffs have failed to allege facts with the specificity required to state a claim for fraud, that Plaintiffs did not plead the five requisite elements of fraud, and that it owed no duty to Plaintiffs.

"Rule 9(b) states that '[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.'" Heinrich v. Waiting Angels Adoption Serv., Inc., 668 F.3d 393, 403 (6th Cir. 2012) (quoting Fed. R. Civ. P. 9(b)). This includes alleging the time, place, and content of the fraudulent acts, the existence of a fraudulent scheme, the intent of the participants in the scheme, and the injury resulting from the fraud. Id. Here, Plaintiffs fail to allege that Citibank made any fraudulent statements. Rather, they claim Citibank committed fraud when it then failed to disclose Gilliams' fraudulent behavior. Under Ohio law, a fraud claim based on an omission is viable only when the defendant has a duty to disclose the concealed fact. A duty to disclose generally arises only when there is a fiduciary or other relationship of trust and confidence. Federated Mgmt. Co. v. Coopers & Lybrand, 738 N.E.2d 842, 855 (Ohio Ct. App. 2000).

Here, Plaintiffs fail to allege facts which show there was a fiduciary or other special relationship between them and Citibank giving rise to a duty to disclose Gilliams' fraud. While Plaintiffs may have alleged facts showing that Citibank was generally aware that Gilliams was using his account to perpetrate a fraud, they have not shown through their allegations the existence of a special relationship between them and Citibank. Indeed, the facts alleged show that Citibank and Plaintiffs were complete strangers to one another. As Citibank correctly argues, Plaintiffs have failed to cite any controlling authority for their position that the bank owed them a duty to discover and protect third-party victims of fraud. Childs v. Charske, 822 N.E.2d 853 (Ohio Ct. Com. Pl. 2004), a decision from the Montgomery County court of common pleas, comes closest but involved a title company, not a bank, that was allegedly willfully indifferent to facts demonstrating that others were running a fraudulent house flipping scheme with its services. As discussed above, however, the clear weight of authority is that Citibank owed no duty to Plaintiffs since they were not customers of the bank. Therefore, Citibank had no duty to protect Plaintiffs from Gilliams' fraud. Moreover, they have not satisfied the requirement to plead a claim of fraud with particularity.

Accordingly, the amended complaint fails to state a claim for fraud against Citibank.

Plaintiffs' Third and Fourth Causes of Action: Aiding and Abetting

Plaintiffs allege that Citibank aided and abetted fraud and conversion. Plaintiffs rely on Restatement (Second) of Torts section 876(b) and Aetna Casualty & Surety Co. v. Leahey Construction Co., 219 F.3d 519 (6th Cir. 2000), in support of their claims of aiding and abetting. However, in DeVries Dairy, L.L.C. v. White Eagle Coop. Ass'n, Inc., 974 N.E.2d 1194, 1194 (Ohio 2012), the Ohio Supreme Court expressly stated that it "had never recognized a claim

under Restatement 2d of Torts, Section 876 (1979)." DeVries Dairy declined to recognize such a tort in Ohio; therefore Plaintiffs' claims of aiding and abetting fraud and conversion fail as a matter of law. See, e.g., Blake v. Wells Fargo Bank, N.A., ___F. Supp.2d___, No. 2:12–CV–467, 2013 WL 65439, at **2-3 (S.D. Ohio Jan. 4, 2013) ("With the Devries decision, there is now conclusive authority from Ohio's highest court that a claim for civil aiding and abetting under Section 876 of the Restatement of Torts is *not* cognizable under Ohio law.").

Plaintiffs argue that DeVries Dairy does not apply to the instant case because the holding was limited to the facts of that case and does not stand for the proposition that Ohio would never recognize a tort claim for aiding and abetting. Plaintiffs focus on the certified question, which was qualified with the phrase, "[u]nder the applicable circumstances." DeVries Dairy, 974 N.E.2d at 1194. There is no indication in DeVries Dairy, however, that the opinion is limited to its facts. Indeed, the Ohio Supreme Court rather emphatically rejected the notion that it should adopt an aiding and abetting torts theory of liability. See id. ("This court has never recognized a claim under 4 Restatement 2d of Torts, Section 876 (1979) and we decline to do so under the circumstances of this case."). The Court's use of the phrase "under the circumstances of this case" is best understood as indicating that there was nothing about the case before it that was compelling enough to deviate from its long-held position that Ohio does not recognize aiding and abetting tort claims rather than as a signal that its holding was limited to the facts of the case. Moreover, the Supreme Court did not provide a statement of the facts of the case in its decision; therefore, one would be hard-pressed to conclude that the Court's holding was limited to the facts of the case. Additionally, since the DeVries Dairy decision, other Ohio state and federal courts have rejected aiding and abetting claims in factual circumstances similar to those

presented in this case. See, e.g., Antioch C. Litigation Trust v. Morgan, No. 3:10–CV–156, 2012 WL 6738676, **2-3 (S.D. Ohio Dec. 31, 2012), Sacksteder v. Senney, No. 24993, 2012 WL 4480695 (Ohio Ct. App. Sept. 28, 2012). Accordingly, as a result of the decision in DeVries Dairy, it is clear that the claims against Citibank for aiding and abetting fraud and conversion do not state claims for relief.

Plaintiffs' Sixth Cause of Action: Conversion

Plaintiffs allege conversion when Citibank repaid itself the balance of an overdraft from the TLG account. Conversion is the exercise of dominion or control wrongfully exerted over property in denial of or under a claim inconsistent with the rights of another. Joyce v. Gen. Motors Corp., 551 N.E.2d 172, 175 (Ohio 1990). The elements of conversion are (1) plaintiff has ownership or right to possession of the property at the time of the conversion, (2) defendant's conversion was by a wrongful act or disposition of plaintiff's property rights, and (3) damages. See Dice v. White Family Cos., 878 N.E.2d 1105, 1110 (Ohio Ct. App. 2007). A claim for conversion of monies "will only lie if identification is possible and there is an obligation to deliver the specific money in question." Id.; Haul Trans. of Va., Inc. v. Morgan, No. CA 14859, 1995 WL 328995, *4 (Ohio Ct. App. June 2, 1995) ("An action alleging conversion of cash lies only where the money involved is "earmarked" or is specific money capable of identification").

Citibank argues that Plaintiffs have failed to establish ownership or a right to possession of the money at the time of the alleged conversion. It maintains that when money is deposited, like the deposit made by Gilliams into the TLG account, it becomes the property of the bank, under Ohio law.

> A general deposit is the payment of money into a bank to be repaid upon demand; the deposit creates between the bank and the defendant [depositor] the relation of debtor and creditor; the relation is legal; the money passes from the depositor to the bank and is mingled with other money, the entire amount forming a general fund from which depositors are paid. Deposits of this character are free from any 'trust quality,' and the depositor in the event of the bank's insolvency has no right of preference, but must share pro rata with general creditors.

Busher v. Fulton, 191 N.E. 752, 754 (Ohio 1934); see also 8 Ohio Jur. 3d Banks § 220 ("Money deposited in a bank becomes the property of the bank and is available by the bank for use in its business"). Here, Plaintiffs allege that Gilliams deposited the money at Citibank. Under Ohio law, the money became Citibank's property at this time. Thus, when Citibank debited Gilliams' account to cover the overdraft, it was deemed to have done so with its own funds. Druso v. Bank One of Columbus, 705 N.E.2d 717, 723 (Ohio Ct. App. 1997). Plaintiffs, therefore, have failed to allege facts showing that Citibank exercised unlawful dominion over the money.

Accordingly, Plaintiffs have failed to state a claim of conversion for which relief can be granted. Plaintiffs' sixth cause of action is dismissed.

Plaintiffs' Fifth Cause of Action: Civil Conspiracy

Plaintiffs allege that Citibank conspired or engaged in a malicious combination whereby it knew or was willfully blind to the fact that Gilliams and TLG were engaged in tortious behavior. Citibank argues that this claim fails because Plaintiffs have not identified a viable underlying tortious act or any agreement between Citibank and another party. A claim for civil conspiracy requires (1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself. Universal Coach, Inc. v. NYC Transit Auth., Inc., 629 N.E.2d 28, 33 (Ohio Ct.

App. 1993). For this tort, malice is defined as the "state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse to the injury of another." Pickle v. Swinehart, 166 N.E.2d 227, 229 (Ohio 1960); FV 1 Inc. v. Goodspeed, 974 N.E.2d 664, 667 (Ohio Ct. App. 2012). A malicious combination does not require proof of an express agreement among the parties. Pumphrey v. Quillen, 141 N.E.2d 675, 680 (Ohio Ct. App. 1955). "It is sufficient that the parties in any manner come to a mutual understanding that they will accomplish the unlawful design." Id. at 178. There must also be the existence of an underlying unlawful act before a civil conspiracy claim can succeed. Williams v. Aetna Fin. Co., 700 N.E.2d 859, 868 (Ohio 1998).

While Plaintiffs' amended complaint may show that Citibank was aware that Gilliams was using his Citibank account in furtherance of fraudulent activities, it fails to allege facts showing that Citibank agreed with Gilliams, tacitly or otherwise, to defraud *the Plaintiffs*. A legally sufficient civil conspiracy claim based on fraud requires more than just an agreement between two parties to participate in fraudulent activities generally. Rather, such a claim requires an agreement to defraud the *plaintiffs in the case*. See, e.g., Goodspeed, 974 N.E.2d at 677 ("While there is evidence that Petrich and Root were long-time acquaintances, and . . . there is some evidence of unlawful acts by Petrich, there is no evidence that Keyrock and Root conspired with Petrich to harm the Goodspeeds."); *id.* ("[T]here is no evidence that Keyrock and Root formed an agreement or understanding with Petrich to harm the Goodspeeds.").

Plaintiffs argue that Citibank agreed to facilitate Gilliams' tortious behavior by maintaining the TLG account and that there was a tacit understanding that Gilliams could use the account to commit fraud so long as it was not against the bank. Plaintiffs, however, do not allege

facts showing that Citibank wrongfully and purposely agreed with Gillaims to injure *them*. Plaintiffs were not customers of Citibank, and there are no facts alleged to support that Citibank knew who the Plaintiffs were or intended to harm them. Indeed, as mentioned above, Citibank and Plaintiffs were complete strangers to each other.

Because the amended complaint does not allege facts showing that Citibank and Gilliams conspired to defraud the Plaintiffs, their civil conspiracy claim fails to state a claim for relief.

CONCLUSION

For the reasons stated, the Court concludes that Plaintiffs have failed to state claims upon which relief can be granted. Accordingly, Defendant's motion to dismiss is well-taken and is **GRANTED.** The amended complaint is **DISMISSED WITH PREJUDICE. THIS CASE IS CLOSED.**

IT IS SO ORDERED

Date July 30, 2013

s/Sandra S. Beckwith
Sandra S. Beckwith
Senior United States District Judge