

No. 11-3107

(Docket Number in District Court: 2:09-cv-01606-ADS(AKT))

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARILYN WESHNAK, ERICA C. JUNG, Individually and on Behalf of All
Others Similarly Situated, TALIN CONTI, JOSEPHINE DAVI, Individually and

[Caption continued on following page.]

Appeal from the United States District Court
for the Eastern District of New York
The Honorable Arthur D. Spatt

APPELLANTS' OPENING BRIEF

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on Behalf of Any and All Others Similarly Situated, GEORGE SULLIVAN, KAY SULLIVAN, MICHAEL TIRELLI, KATHLEEN TIRELLI, STEVE BONNANO, ROSEANN M. BOLOGNA, All Plaintiffs,

Plaintiffs-Appellants,

vs.

BANK OF AMERICA, N.A.,

Defendant-Appellee,

NICHOLAS COSMO, AGAPE MERCHANT ADVANCE LLC, JOHN DOES 1 THROUGH 12, TRANSACT FUTURES, ALARON TRADING CORPORATION, DBA ALARON FUTURES AND OPTIONS, XYZ CORPS 1 THROUGH 10, AGAPE WORLD, INC., AGAPE WORLD BRIDGES LLC, JOHN DOES 1 THROUGH 20, XYZ CORPORATIONS 1 THROUGH 15, MF GLOBAL INCORPORATED,

Defendants.

Marilyn Weshnak, etc., et al. v. Bank of America, N.A., et al.
Second Circuit No. 11-3107

CORPORATE DISCLOSURE STATEMENT

As indicated in its Rule 7.1 disclosure filed below, defendant-appellee Bank of America, N.A. is an indirect, wholly-owned subsidiary of Bank of America Corporation, and no publicly held corporation owns 10% or more of the stock of Bank of America Corporation. (District Court Docket No. (“Doc.”) 10). Plaintiffs-appellants are individuals, not corporate parties.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-appellants request oral argument. Oral argument will assist the Court in assessing how the district court reversibly erred by imposing unduly heightened standards for pleading the actual knowledge or conscious avoidance element of aiding and abetting of common law fraud, breach of fiduciary duty, and conversion claims. Oral argument will also assist the Court in assessing how the district court reversibly erred by failing to accept certain facts alleged and construing other facts in isolation and in defendants' favor, when properly construed collectively and in plaintiffs' favor, the facts support a strong inference of "actual knowledge," and a plausible allegation of "substantial assistance."

STATEMENT OF REPORTED DECISIONS

The district court's initial order granting leave to amend is reported. *In re Agape Litig.*, 681 F. Supp. 2d 352 (E.D.N.Y. 2010) (“*Agape I*”). The district court's dismissal order under review is also reported. *In re Agape Litig.*, 773 F. Supp. 2d 298 (E.D.N.Y. 2011) (“*Agape II*”). The district court's order to enter a Fed. R. Civ. P. 54(b) partial final judgment is also reported. *In re Agape Litig.*, 274 F.R.D. 453 (E.D.N.Y. 2011) (“*Agape III*”).

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I. JURISDICTION

The district court had original jurisdiction under 28 U.S.C. §1332(d). (Joint Appendix (“A”)131¶6) This Court has jurisdiction under Fed. R. Civ. P. 54(b) to review a partial final judgment certified by the district court, and entered on June 29, 2011. (A237) Plaintiffs timely filed notice of appeal on July 29, 2011. (A238-41)

II. ISSUES PRESENTED

1. Whether the district court reversibly erred in ruling that to plead actual knowledge, plaintiffs must allege with particularity defendant bank’s knowledge of the investors “precise agreement” with Agape, when this Court simply requires that plaintiffs plead a bank’s knowledge of “outright looting of client funds.”

2. Whether the district court reversibly erred in ruling that to plead “conscious avoidance,” plaintiffs must allege that defendant bank acted “to avoid knowledge of the Agape fraud specifically,” when case law only requires that plaintiffs allege the bank “suspected” fraud generally and “realized its probability,” but “refrained from confirming it” to later “be able to deny knowledge.”

3. Whether the court reversibly erred by refusing to accept well-pled allegations of actual knowledge and substantial assistance, and by failing to consider the facts alleged collectively and in plaintiffs’ favor, and instead improperly construed the facts in isolation and in defendants’ favor.

III. STATEMENT OF THE CASE

A. Nature of the Case: Introduction

The district court certified this Fed. R. Civ. P. 54(b) appeal of a partial judgment dismissing plaintiffs' amended complaint ("Complaint") as to defendant Bank of America, N.A. (the "Bank" or "BofA"), alleging common law claims that the Bank knowingly aided and abetted fraud, breach of fiduciary duty, and conversion.

It is undisputed, as the district court recognized (A179), that the remaining defendants, Nicholas Cosmo – previously convicted of felony fraud – and the entities he created – Agape Merchant Advance LLC, and Agape World Bridges LLC (collectively, "Agape") – engaged in a fraudulent Ponzi scheme. (A134-37¶¶19-31) The Complaint alleges that for three years (2006-2009) Cosmo and Agape solicited \$2.7 billion from investors, deposited and promptly withdrew those funds from Agape accounts in a small branch of BofA located within Agape's main accounting office – without investing them as promised. The branch was staffed by a BofA employee, Rebecca Campagnuolo, who substantially assisted Agape's scheme by identifying well-healed Bank customers as investor targets. (A129-30¶1, A140-41¶¶44, A142-44¶¶50-57, A148-49¶¶73-76) BofA literally moved in with Agape.

As the district court further recognized (A184), the Complaint alleges that BofA had actual knowledge that Cosmo had been previously convicted and imprisoned for

fraud in 1999, stripped of his license to deal in securities, and barred from associating with any investment broker-dealer. (A133-34¶18, A138¶¶34-36) Yet, the district court discounted Cosmo's fraud conviction because it "did not involve" the Agape scheme. (A196) In fact, the conviction and suspension were not merely "red flags" indicative of constructive knowledge, they were flashing red lights signaling BofA to stop and closely scrutinize all of Cosmo's and Agape's transactions, as required by the Bank's own internal enhanced due diligence protocols. (A151¶¶84-86)

Instead of close scrutiny, the facts alleged with specificity in the Complaint – including facts found in records plaintiffs obtained from the court-appointed trustee for the Agape entities in bankruptcy and independent investigation – reveal that BofA substantially assisted Cosmo to perpetuate a massive Ponzi scheme. BofA senior manager, Tom Sullivan, who met with Cosmo regularly (A140-42¶¶42-48), actually structured Agape's sub-accounts at the bank to facilitate Cosmo's commingling and withdrawal of millions for his own benefit. (A35¶¶23-24, A38¶48) BofA also extended lines of credit to Agape, and assigned Sullivan to provide Cosmo with personal care, attention and assistance. (A140-42¶¶42-48)

The district court erroneously refused to accept the allegations of Sullivan's knowledge of the fraud, believing they were conclusory assertions from plaintiffs' opposition to the motion to dismiss. (A203) But drawing inferences in plaintiffs'

favor as required by law, *Lerner v. Fleet Bank N.A.*, 459 F.3d 273, 280 (2d Cir. 2006), it is evident that the allegations of Sullivan’s knowledge of Agape’s fraudulent conduct came from one of the participants in the frequent conversations between Cosmo and Sullivan described in the Complaint – not from any conclusory assertion in plaintiffs’ opposition. (A142¶¶47-48)

The Complaint alleges that during the conversations, Sullivan made clear that he knew, understood, tracked, and helped structure the deposits, and the sweeping and commingling of investor funds from Agape broker sub-accounts to its single operating account, which enabled Agape to withdraw and convert hundreds of millions of dollars. (*Id.*) Sullivan also knew that Agape’s escrow account, designed for disbursing investor funds to construction projects, remained dormant and empty for five years. (A136-37¶¶28, A145¶59) No funds were set aside for the promised construction projects. (*Id.*)

The district court reversibly erred by drawing inferences in defendants’ favor and by its unwarranted and improper “disbelief” of the Complaint allegations, which must be accepted “as true.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Further, although the district court acknowledged that actual knowledge could be alleged and proven with evidence of “conscious avoidance,” the court made it

impossible for plaintiffs to plead it by erroneously defining it to require evidence of knowledge of the very facts consciously avoided – including the “Agape fraud specifically.” (A210:2-10) In fact, plaintiffs need only allege defendant’s knowledge of fraud generally and conscious avoidance of the specifics. *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 367-68 (S.D.N.Y. 2007).

The district court erroneously considered the conscious avoidance facts (A209-12) in isolation from the actual knowledge facts (A192-207), and never put two-and-two together. The court purported to address the “totality” of facts alleged (A207-09), but did so summarily only after slicing and dicing the facts in “isolation.” The court never engaged in the collective analysis required by *Tellabs* and *Matrixx Initiatives, Inc. v. Siracusano*, ___ U.S. ___, 131 S. Ct. 1309, 1323-25 (2011). A bank’s ““see no evil, hear no evil”” approach to an ongoing fraud inferred from the “surrounding circumstances” is sufficient to plead actual knowledge. *Oster v. Kirschner*, 905 N.Y.S.2d 69, 70-75 (N.Y. App. Div. 1st Dep’t 2010). Plaintiffs have more than satisfied this standard. The district court reversibly erred in ruling otherwise.

B. Course of Proceedings

Various victimized investors in a Ponzi scheme that Cosmo orchestrated through his Agape entities, sued Cosmo and Agape for fraud. Plaintiffs also sued the Bank as complicit for knowingly aiding and abetting Cosmo's fraudulent scheme and his breach of fiduciary duty to them. (A5-36) The various actions filed were consolidated and co-lead counsel appointed. (Doc. 4) Plaintiffs filed a consolidated complaint. (A37-84) The district court dismissed as to BofA, but afforded plaintiffs an opportunity to amend their aiding and abetting fraud and breach of fiduciary duty claims. (A89-126)

Plaintiffs' amended Complaint alleges that BofA aided and abetted Agape's fraud, breach of fiduciary duty, and conversion of their funds. (A127-65) After full briefing (Docs. 57-58, 61, 64), but no argument, the district court dismissed with prejudice, concluding that the Complaint failed to allege facts sufficient to support a strong inference of actual knowledge or conscious avoidance of the Ponzi scheme, or sufficient facts to plausibly allege substantial assistance, essential elements of all three claims. (A176-224) On plaintiffs' motion (A225-28), with no opposition by BofA (A229-31), the court entered a Fed. R. Civ. P. 54(b) partial final judgment in favor of BofA on all three claims and certified there was no just reason to delay an immediate appeal. (A232-37) Plaintiffs appealed. (A238-41)

C. Statement of Facts

1. It Is Undisputed that Cosmo and Agape Engaged in a Fraudulent Ponzi Scheme

As the district court acknowledged (A179), plaintiffs pled facts that undisputedly alleged that Cosmo and Agape operated a classic Ponzi scheme. (A136¶¶27-28) Agape and Cosmo defrauded investors by falsely and repeatedly reselling the same investment in bridge loans for purported real estate construction projects using identical underlying documentation to trick unsophisticated blue-collar investors and retirees. (A130-31¶¶3, A134-35¶¶19-25) Using Agape and its website as a front, Cosmo falsely told investors he was providing real estate – secured short-term bridge loans to construction projects that could not obtain financing from commercial banks. Cosmo told plaintiffs that their investments would serve as capital for the loans and that they would get 12% - 15% returns. (A134-35¶¶19-22)

Bank records obtained from Agape's bankruptcy trustee show that investor funds were: (i) never segregated by investors or held for their benefit; (ii) never organized by underlying loan or project; and (iii) not held in Agape's "escrow account" which lay dormant and empty for five years. (A136-37¶¶29) Agape only made a handful of loans using investor funds. Instead, it would sell and resell the same interest in a loan using identical documents to trick investors. (A136-37¶¶27-

29) Cosmo would, for example, provide a \$1 million loan to a developer, but collect \$60 million from investors by reselling the loan over and over. (A136¶27)

Thus, Agape never made nearly enough loans to be able to repay the billions in investments it collected and recycled – over \$200 million in bank deposits and immediate withdrawals each month. (*Id.*, A131¶4) The money withdrawn was used to pay early investors from investment deposits received by later investors, and also to: (i) pay BofA fees and commissions to Agape’s brokers; (ii) fund Cosmo and his family’s lavish life style, including a house and automobiles; and (iii) fund Cosmo’s habitual trading in commodities. (A136-37¶¶28-29, A147¶67)

Cosmo paid 12 brokers who worked for Agape more than \$1 million to help his scheme appear legitimate and help solicit investors. (A135¶23) As suggested by BofA manager Sullivan, each of Agape’s brokers had a BofA sub-account that the Bank enabled Cosmo to control, in which investor funds were deposited, and then swept and commingled by Cosmo into Agape’s operating account at BofA. (A135¶¶24-25, A136-37¶29, A137¶33) In reality, as the bank statements of Agape reflect, each month large amounts of money came in to Agape accounts, but a nearly identical amount was withdrawn not only to pay earlier investors and keep them quiet, but also to pay Cosmo and his confederates – and BofA. (A136¶28, A140-41¶44)

The scheme worked until customers complained and government investigations began. (A131¶5, A152¶¶90-93) On January 26, 2009, Cosmo was arrested and charged with bank and mail fraud, among other charges. (A137¶31) Cosmo subsequently pled guilty to 11 counts of mail and wire fraud. (A179)

2. It Is Undisputed that the Bank Had Actual Knowledge of Cosmo’s Prior Felony Fraud Conviction and Lifetime Suspension

When Cosmo first opened his Agape account in 2003 with BofA’s predecessor, BofA learned pursuant to an industry “Know-Your-Customer” background check that Cosmo had a prior felony conviction for fraud, was stripped of his license to sell securities and banned for life from associating with any investment broker-dealer. (A138¶34, A179) Based on the prior felony conviction, the Bank performed an enhanced due diligence investigation of Cosmo and Agape. (*Id.*) The Bank learned that Cosmo purported to operate a financial business in a location that was “high-impact area” for financial crimes. (*Id.*) A confidential witness who formerly worked in the Bank’s High-Risk Compliance Group confirmed that Agape would have been under strict scrutiny from the outset. (A151¶¶85-86)

Despite this information about Cosmo, in 2006, BofA approved both personal and commercial lines of credit for Cosmo and Agape. (A138¶37) Before extending credit and putting its own capital at risk, Bank protocol required it to conduct due

diligence into the source of Cosmo's assets and the nature of Agape's business. (A139¶38) Such due diligence would have revealed not only Cosmo's prior fraud conviction and suspension, but also Agape's lack of any significant construction loan business, including the dormant escrow account, and the likelihood of fraud. (A136¶28, A139¶38) But, despite knowing Cosmo was a convicted, suspended securities dealer, BofA opened a financial firm business account for him (A138¶34), and extended both personal and commercial lines of credit. (A138¶37)

3. The Bank Monitored and Analyzed Agape's Accounts, Which Provided the Bank with Specific Knowledge of the Scheme's Fraudulent Nature, Including Agape's Commingling and Immediate Withdrawal of Multi-Million-Dollar Deposits

In June 2006, the Bank began charging Agape an "*account analysis fee*." (A139¶39)¹ This service and fee is not an ordinary banking charge. (*Id.*) In exchange for these fees, the Bank actively monitored and analyzed Agape's network of accounts. (*Id.*) As the size and magnitude of Agape's operating account's transactions increased, the fee grew to thousands of dollars per month and comprised a steady revenue stream for the Bank, totaling over \$70,000. (*Id.*)

¹ Emphasis added and internal citations omitted unless otherwise stated.

Through this regular and frequent analysis, the Bank gained intimate knowledge of Agape's transactions. (*Id.*) The Bank witnessed multi-million-dollar deposits being withdrawn daily. (A139-41¶¶40-44) There was no money placed in escrow or allocated to operate a construction loan business. (*Id.*) In a typical month, August 2007, for example, Agape took in customer deposits of \$163 million, and had withdrawals of \$162 million, with an average balance of just \$168,500. (*Id.*) No funds were segregated in a dedicated account for a construction project or a group of investors. Agape's escrow account, purportedly set up for this very purpose, lay dormant and empty for over five years while hundreds of millions of dollars flowed in and out of its operating account. (*Id.*)

The Bank's ongoing monitoring of Agape's accounts revealed deposits in an amount akin to a Fortune 1000 company. Deposits during the lifetime of the scheme exceeded \$2.7 billion. (A140-41¶¶44) These enormous revenues were matched, however, with near-equal withdrawals. (A141¶¶45) As shown by the following chart, included in the Complaint, this inflow and precise outflow of cash on a monthly basis, observed by the Bank as part of its close monitoring and analysis (A139-42¶¶39-46), supports BofA's actual knowledge of a fraudulent enterprise:

Date	End Bal.	Avg Bal.	Deposit Amts	Withdrawal Amts	# Deps	# WDs
1/31/2006	\$279,822	\$545,830	\$1,022,173	\$1,476,239	69	218
2/28/2006	\$671,376	\$593,819	\$1,452,375	\$1,060,821	85	214
3/31/2006	\$775,623	\$775,623	\$3,275,575	\$1,713,868	139	301
4/30/2006	\$240,594	\$559,637	\$266,318	\$1,739,592	13	232
5/31/2006	\$183,000	\$905,714	\$3,200,031	\$3,257,624	75	377
6/30/2006	\$318,500	\$117,412	\$11,402,398	\$11,266,898	36	179
7/31/2006	\$100,000	\$383,146	\$23,880,488	\$24,098,988	95	499
8/31/2006	\$1,010,188	\$251,413	\$39,025,866	\$38,115,678	93	157
9/30/2006	\$100,000	\$387,236	\$75,044,361	\$75,954,549	89	544
10/31/2006	\$252,320	\$421,911	\$18,473,341	\$18,321,021	117	300
11/30/2006	\$140,000	\$312,799	\$54,864,676	\$54,976,996	74	486
12/31/2006	\$150,000	\$561,920	\$31,758,671	\$31,748,671	117	402
1/31/2007	\$130,000	\$433,955	\$40,597,370	\$40,617,370	103	497
2/1/2007	\$130,000	\$689,560	\$42,503,662	\$42,503,662	135	490
3/1/2007	\$289,000	\$843,642	\$79,570,206	\$79,411,206	213	499
4/1/2007	\$105,000	\$713,321	\$108,854,543	\$109,038,543	168	589
5/1/2007	\$1,012,425	\$677,516	\$149,698,885	\$148,791,460	195	642
6/1/2007	\$100,000	\$967,372	\$134,896,442	\$135,808,867	199	664
7/1/2007	\$885,962	\$1,103,877	\$103,038,267	\$102,252,305	196	602
8/1/2007	\$168,500	\$441,961	\$162,471,731	\$163,189,193	105	452
9/1/2007	\$1,082,550	\$1,584,997	\$151,517,575	\$150,603,525	320	868
10/1/2007	\$3,110,613	\$926,466	\$286,104,313	\$284,076,250	290	1004
11/1/2007	\$624,858	\$421,359	\$210,758,374	\$213,271,129	177	578
12/1/2007	\$171,400	\$1,027,438	\$213,874,222	\$214,327,680	218	1125
1/31/2008	\$2,063,634	\$1,213,273	\$151,005,380	\$149,113,146	405	1294
2/1/2008	\$338,600	\$519,254	\$45,611,726	\$47,336,760	89	1069
3/1/2008	\$185,000	\$1,810,294	\$86,665,039	\$86,808,639	432	996
4/1/2008	\$1,010,113	\$1,936,251	\$101,697,824	\$100,872,711	230	1284
5/1/2008	\$1,000,000	\$1,330,580	\$93,918,699	\$93,928,812	113	851
6/1/2008	\$1,462,216	\$1,509,591	\$80,021,060	\$59,558,844	145	1108
7/1/2008	\$1,345,000	\$2,391,571	\$94,971,902	\$95,089,118	183	1509
8/1/2008	\$1,719,975	\$1,403,603	\$47,895,063	\$47,520,088	91	860
9/1/2008	\$1,336,593	\$1,815,078	\$84,782,570	\$85,165,952	158	1503
10/1/2008	\$1,809,000	\$1,398,476	\$30,408,427	\$29,936,020	112	769
11/1/2008	\$714,112	\$1,152,841	\$14,758,167	\$15,853,055	94	718
12/1/2008	\$943,620	\$645,140	\$8,435,082	\$8,205,574	82	890
1/1/2009	\$493,577	\$785,199	\$5,475,744	\$5,925,786	43	403

(A140-41¶44) No legitimate business takes in hundreds of millions of dollars per month only to disburse an equal amount the same month. (A141¶45) As the chart shows, the number of withdrawals far exceeded the number of deposits. Between

May 2007 and April 2008, Agape took in \$1.796 billion in deposits. (A140-41¶44) In October 2007 alone, Agape deposited \$286 million – and withdrew \$284 million, with only a \$926,000 average balance. (*Id.*, A146¶64) Such “round-trip” transactions would have been obvious to the Bank’s security professionals had they reviewed Agape’s accounts as required by Bank policy. (A150¶66)

Agape did not segregate investor funds. Instead, those funds were immediately swept from Agape broker sub-accounts to an Agape operating account, allowing them to be commingled and converted. (A140¶41) Bank manager Sullivan admitted that he tracked and knew about the sweeps, commingling and withdrawals. (A142¶¶47-48, A146¶64) Agape paid its bills, brokers and Cosmo’s personal expenses, including payments to the Bank for his personal mortgage and line of credit, from the operating account, using investor money. (*Id.*, A144¶41)

To facilitate the Bank’s monitoring of Agape’s accounts, the Bank used a computer system known as “Connection,” which each morning updated the designated Premier Banker officer for Agape about the major deposits and wires in its accounts. (A140¶42) Client wire transfers over \$10,000 were approved by BofA’s authorized Premier Banker officer. (*Id.*) The approval process, combined with the Connection program, gave the Bank’s Premier Banker officer actual knowledge of the day-to-day transactions in the Agape client accounts. (*Id.*) Agape wired funds greater than

\$10,000 out of its account several times each month. (A140¶43) These transfers to Cosmo personally and to Agape brokers were indications to the Bank of likely fraud. But BofA was paid thousands to look the other way. (A139¶39)

4. Bank Manager Sullivan Had Frequent Meetings with Cosmo and Admitted Tracking and Knowing About Agape's Commingled and Converted Funds

Sullivan, the Bank senior manager responsible for the Agape accounts, maintained an extraordinary relationship with Cosmo, frequently meeting with him for lunch to discuss Agape's business. (A142¶¶47-48) During the course of their relationship, Sullivan provided special attention and assistance to Cosmo by recommending and implementing the structure of the Agape broker sub-accounts at the Bank. (A142¶48)

During his frequent conversations with Cosmo, Sullivan made clear that he understood and tracked the flow of funds in and out of Agape's accounts. (A142¶47) Sullivan also knew that Agape converted investor funds by first depositing them into broker sub-accounts, then sweeping and commingling them into a single Agape operating account. (A136-37¶29, A142¶47) Sullivan knew that Agape emptied its operating account each month, with deposits and withdrawals far beyond the minimal balances it maintained. (*Id.*) Sullivan further knew that Agape had an empty and

dormant escrow account that did not receive any of the hundreds of millions of dollars of investor deposits. (*Id.*)

Sullivan also recommended and implemented the issuance of a remote deposit facility to Agape to simplify its acceptance and processing of investor funds while avoiding inconvenient and potentially troublesome interactions with Bank personnel. (A142¶48) Sullivan knew from his careful monitoring and analysis of Agape's web of accounts – the very structure he recommended – that Agape was not funding construction projects, in direct contradiction of Agape's public statements. (A146-47¶¶64, 67) Sullivan's review of and assistance to Agape's accounts and his regular admissions to Cosmo support a strong inference that and the Bank had actual knowledge that Cosmo, through Agape, was running a fraudulent scheme. (A142¶49)

5. The Bank Had Direct On-Site Access to and Knowledge of Agape's Inner Workings After Placing a Bank Branch and Bank Employee Inside Agape's Main Accounting Office

In 2007, BofA literally moved in with Agape, by establishing a mini-branch inside Agape's accounting department staffed by BofA employee Campagnuolo. (A142-43¶¶50-52) She had Bank equipment and full access to internal Bank systems and account records, as well as direct access to Agape's computers, accounting systems and files, its Controller, and Cosmo himself. (A143¶52) Campagnuolo

shared office space with Agape's Controller and two of its accounting employees, in an office directly connected to Agape's main boardroom. (A143¶53)

The Complaint alleges based upon records produced by Agape's bankruptcy trustee pursuant to subpoena, and independent investigation, that Campagnuolo helped solicit investors for Agape. (A143¶54) As a Bank employee, she had access to confidential bank-customer data, and assembled and utilized that data to assist in solicitation. (*Id.*) Campagnuolo went so far as to target investors for Agape. When she learned that Bank customers received substantial deposits into their Bank accounts, she passed that confidential information along to Agape so that an Agape "broker" could solicit those potential victims. (*Id.*) And, Bank records show that Campagnuolo's husband received payments from Agape in late 2007 and early 2008, totaling \$32,120.68. (A144¶57)

In late 2008, Agape Controller Elizabeth Steele took maternity leave. (A144¶56) Thereafter, Campagnuolo began spending an even greater amount of time in Agape's back office and became Agape's *de facto* Controller in Steele's absence. (*Id.*, A148-49¶¶71-76) In this role, Campagnuolo had a close-up view of the ramping up of investor withdrawals from Agape's BofA accounts. (A144¶56) She also knew that Cosmo held meetings for investors twice a day to calm and reassure them, and to desperately solicit more investor money to keep Agape's Ponzi scheme afloat. (*Id.*)

Campagnuolo herself helped Agape falsely reassure investors of its legitimacy. (A148¶72) She watched as dozens of anxious investors demanded the return of their money in a “run on the bank.” (A148¶71) When on December 24, 2008, one investor demanded that Cosmo allow him to withdraw \$200,000 of his investment, Cosmo sent a broker to Agape’s accounting office where BofA’s Campagnuolo assisted Agape’s broker in cutting a \$162,500 check from one of Agape’s own bank accounts. She herself took the check to Cosmo for signature, and gave it to the broker, who handed it over to the investor. (A148-49¶¶73-76)

6. The Bank Continued Its Relationship with Agape Even After a Bank Vice President Received a Concrete Customer Report of Agape’s Fraud

In September 2008, the Bank’s Premier Banking Vice President Gregory Bowes received what he himself labeled “highly specific” information from a longtime Bank customer and Agape investor disclosing that Agape was engaged in a fraudulent scheme. (A152¶¶90-95) Bowes lamely responded: “What do you expect me to do with this information?” (A152¶91) Bowes said it was beyond the scope of the Bank’s duties to investigate such a charge. (*Id.*)

The same customer reported Agape to the Office of the Comptroller of the Currency, the Bank’s primary bank regulator. (A152¶92) The Bank learned that the Comptroller launched a criminal investigation of the charges, and the Bank also

became aware that the U.S. Postal Inspector's Office was conducting a criminal investigation of Agape. (*Id.*, A152¶93) Notwithstanding the Bank's actual knowledge of these investigations and its actual knowledge of Agape's fraudulent deposits and withdrawals, the Bank refused to pull banking services from Agape, thereby continuing to serve Agape's fraudulent scheme. (A153¶¶94-95) As a result, investors continued to suffer tens of millions of dollars of losses. (A153¶96) BofA continued to collect fees. (A139¶39)

7. The Bank Substantially Assisted Cosmo and Agape in Executing Their Fraudulent Scheme

a. Bank Manager Sullivan Set up Sub-Accounts from Which Agape Could Sweep and Commingle Investor Funds into One Account

As noted above, senior client manager Sullivan, the Bank's account representative for Cosmo and Agape, personally devised the complex web of broker sub-accounts that enabled Cosmo to feed the main operating account, which functioned as the hub of the scheme. (A145¶59)

This structure facilitated the rapid flow of funds and assisted Cosmo to quickly expand the scheme's revenues. (A145¶60) Sullivan's technical advice and ability to put in place an account structure allowed Cosmo to exercise control over and move money from broker accounts to the Agape operating account. (A145¶61)

b. The Bank Provided Agape with a Remote Deposit Facility to More Easily Process Numerous Deposits with Less Bank Scrutiny

In March 2008, Sullivan approached Cosmo with an idea to help Agape more easily process its hundreds of monthly deposits. (A145¶62) He proposed that Agape apply to receive a Bank Remote Depository System. (*Id.*) A remote depository allows commercial customers to deposit large batches of checks from their own headquarters. (*Id.*) This high-speed processing enabled the more efficient handling of Agape’s high-velocity deposits (*id.*), and sped the clearance of checks so that Cosmo could increase the size and scope of his Ponzi scheme by making funds available more quickly. (A145-46¶63)

The remote depository enabled Agape to avoid face-to-face interaction with Bank personnel. (*Id.*) Cosmo had complained to Sullivan that some of the Bank’s tellers were raising issues that caused delays in the clearance of investor checks. (*Id.*) In recommending the remote depository, Sullivan told Cosmo: “You will never have to see the inside of a bank again.” (*Id.*)

Providing a remote depository to Agape, however, required a searching due-diligence investigation and approval process within the Bank and the sign-off of not only Sullivan, but also of multiple risk-control officials. (A146¶65) After Sullivan nominated Agape to receive the depository, the Bank officials conducted an extensive

internal review and assessed the fraud risk presented by the customer. (*Id.*) This review, conducted by Bank personnel in its Fraud, Security, Compliance and Treasury Departments, carefully examined Cosmo's recent criminal history of financial fraud, the fact that he was again operating a financial firm in an area designated as a "high-impact" area for financial crimes, the volume and velocity of the transactions in his accounts, as well as all the other risk factors routinely assessed since the earliest days of Agape's relationship with the Bank. (*Id.*)

The approval process also revealed other telltale signals of fraud that would have been obvious to the Bank's seasoned security professionals who were trained to sniff out criminality. (A147¶66) Agape had a years-long track record of predominantly "round-trip" transactions, *i.e.*, equivalent amounts of money coming into and out of the account in a short period. (*Id.*) Banks highlight an account for round-trip transactions of three days or less. (*Id.*) Agape had dozens and dozens of such large "even-dollar" transactions each month. (A140-41¶44, A147¶66) These types of transactions require an explanation of their legitimacy, since they suggest a money-laundering scheme. (*Id.*) The low balances – when compared to the massive deposits and withdrawals – would also have spurred a "check-kiting" investigation. (*Id.*) The Bank nevertheless provided Agape a remote depository, and continued to collect fees. (A139¶39, A147¶68)

c. The Bank Elected Not to Conduct an on-Site Audit of Agape and Disbanded Its High-Risk Compliance Group

Having provided a remote depository to Agape, BofA had the right to conduct an on-site audit of Agape's business. (A152¶88) Despite its knowledge of Cosmo's likely fraudulent activities, BofA chose not to conduct an audit of Agape. (A152¶89) And, in early 2006, as Agape's scheme unfolded, the Bank disbanded its High-Risk Compliance Group. (A151¶86)

Until early 2006, the Bank had a specialized compliance group located in Boston, Massachusetts. This group reviewed and supervised the activities of its "Premier Banking & Investments" customers like Agape. (A151¶84) Any BofA customer perceived as a high-risk of money laundering was subject to heightened scrutiny by the Bank's High-Risk Compliance Group. (*Id.*)

A person who formerly worked in BofA's compliance group told plaintiffs that, because of the enhanced due diligence factors used by the Bank (A138¶¶34-36), Cosmo's prior conviction would have been flagged and known to the Bank, and Agape's wire transfers and account transfers would have been continuously subject to strict scrutiny by the High-Risk Compliance Group. (A151¶85) Indeed, the former employee advised plaintiffs that BofA internal procedures should have led to Agape

being turned away, and referred to law enforcement scrutiny. (*Id.*) Instead, the compliance group was disbanded. (A151¶86)

D. Ruling Below

The district court dismissed plaintiffs' aiding and abetting claims against BofA in their entirety. (A179) The court acknowledged that plaintiffs "provide additional factual detail" in the Complaint. (A183-86) The court nevertheless concluded that plaintiffs had not alleged particular facts sufficient to support a strong inference that BofA had "actual knowledge of the Ponzi scheme." (A192-207)

The district court acknowledged that pleading facts showing the Bank's "conscious avoidance" could be sufficient to support a strong inference of actual knowledge of fraud. (A190-91) But the court applied heightened standards of both actual knowledge and conscious avoidance by requiring allegations that BofA acted "to avoid knowledge of the Agape fraud *specifically*, as opposed to account fraud generally." (A210:9; *see also* A191:17-18, A195:1-2, A212:4-6) The court went so far as to require plaintiffs to plausibly allege with particularity that the Bank "had knowledge of the *precise* agreement between Agape and the plaintiffs." (A220:12; *see* A202: "actual knowledge of the *terms* of the agreement")

Applying these heightened but erroneous standards to the individual allegations of the Bank's knowledge, the court found each allegation insufficient standing alone.

The court considered and rejected in isolation the allegations of BofA manager Sullivan's review of Agape's account activity as conclusory by improperly disbelieving the Sullivan-Cosmo conversations. (A192-95, A203-05) The court discounted the Bank's knowledge that Cosmo was a disbarred convicted felon who was operating Agape as a "financial firm" because the prior conviction was for a different fraud, not the Agape Ponzi scheme. (A196-98) The court also ruled that the Bank's close relationship with Agape, evidenced by BofA's insertion of a branch office and Bank employee in Agape's central accounting office, was indicative only of constructive knowledge – "cause for concern" (A206-07) – but insufficient to show BofA's actual knowledge of Agape's "precise agreement" with investors or that it involved "bridge loan" investments specifically. (A195:2, A220:12)

The court then stated it would consider the "totality" of the allegations, but ruled summarily, without actual collective analysis, that the "red flags" and "suspicious circumstances" did not plausibly allege actual knowledge of the Agape Ponzi scheme. (A207-09) Further contradicting its professed totality analysis, the court then separately addressed the conscious avoidance allegations and concluded that each in isolation did not plead actual knowledge. (A209-12) The court considered separately the Bank's decision not to conduct an on-site audit of Agape (A210-11), the Bank's disbanding of its High-Risk Compliance Group (A210), and

the Bank Vice President's failure to investigate a customer complaint about Agape that led to government investigations. (A211-12) To the court, the Bank "cannot be charged with knowledge" of fraud just "because they have knowledge of accusations." (A212) But the court never considered these "conscious avoidance" allegations collectively, let alone together with Sullivan's admissions, Campagnuolo's activities, or the other "red flags" alleged, including the Bank's knowledge of Cosmo's fraud conviction and disbarment.

On the breach of fiduciary duty claim, the district court summarily ruled, citing *Lerner*, 459 F.3d at 287, that plaintiffs have not plausibly alleged that BofA "had knowledge of the *precise agreement* between Agape and the plaintiffs, and the scope of Agape's authority to invest under that agreement." (A220) The court overlooked that *Lerner* held that when "confronted with clear evidence" that deposits "are being mishandled," a bank cannot urge it is "ignorant" or "close its eyes" to "the clear implications of such facts." *Lerner*, 459 F.3d at 295, citing *Grace v. Corn Exch. Bank Trust Co.*, 38 N.E.2d 449, 454 (N.Y. 1941).

The court also ruled summarily on the conversion claim that the Complaint did not allege enough facts to support a plausible inference that BofA had "actual knowledge of the scope of Agape's authority to invest the Plaintiffs['] funds, or that Agape and Cosmo were committing the underlying alleged fraud." (A222)

The court then ruled that plaintiffs failed to allege that BofA provided substantial assistance to the Agape fraud. (A215-19) The court separately considered BofA Campagnuolo's assistance to Agape in acting as its *de facto* Controller and discounted it for lack of specificity, ignoring specific allegations that she provided confidential customer information to target investors for Agape, and even cut a \$162,500 check from Agape's own account to silence a disgruntled investor. (A217-18) The court also considered in isolation BofA manager Sullivan's work in setting up the Agape account structure and providing the remote depository, yet found those allegations insufficient to constitute substantial assistance. (A218-19)

IV. STANDARD OF REVIEW

This Court reviews *de novo* both the district court's interpretation of state law and its grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Lerner*, 459 F.3d at 283. This Court takes all of plaintiffs' allegations to be true and draws "all reasonable inferences in the plaintiffs' favor." *Id.* at 280. Under *Twombly*, 550 U.S. 544, a district court is not free to dismiss based on its "disbelief" of the complaint's factual allegations. *Id.* at 556.

The complaint must plead particular facts, not conclusory assertions, that "plausibly" support a strong inference of actual knowledge or conscious avoidance, not merely a "suspicion" thereof. *Id.* at 555, 569-70. But, the facts alleged need not

support a “probability” of actual knowledge. *Id.* at 556. A “preponderance of the evidence” is the standard at a civil trial. *Tellabs*, 551 U.S. at 328-29.

V. SUMMARY OF ARGUMENT

The district court’s judgment should be reversed on several grounds. First, the court applied an erroneously heightened standard of actual knowledge, by requiring plaintiffs to plead the Bank’s actual knowledge of the “precise agreement” between Agape and plaintiffs. (A220) Stated differently, the court appeared to at least recognize the Complaint alleged facts sufficient to show BofA’s actual knowledge of Agape’s “account fraud generally,” but concluded that was not sufficient to plead actual knowledge of the Agape fraud specifically. (A210) Respectfully, pleading actual knowledge of *a* fraud is enough. In fact, as the Court held in *Lerner*, to plead actual knowledge of fraud, plaintiffs must simply allege a bank’s knowledge of the primary actor’s “outright looting of client funds” (459 F.3d at 293), but *Lerner* does not require “precise” knowledge of what the looting scheme was or how it worked.

Second, the court applied an unduly heightened standard of conscious avoidance, by requiring plaintiffs to plead that the Bank acted “to avoid knowledge of the Agape fraud specifically, as opposed to account fraud generally.” (A210) Rather, the case law requires that plaintiffs plead generally that a bank “suspected” a fact and the “probability” it is fraud, but “consciously avoids confirming” the precise

“fraudulent nature” of the conduct. *Fraternity Fund*, 479 F. Supp. 2d at 368. With respect to breach of fiduciary duty, *Lerner* held that pleading aiding and abetting “does not depend on [actual] knowledge of outright theft,” as required for pleading fraud. 459 F.3d at 294. Instead, it suffices that plaintiffs allege that “when confronted with clear evidence” that bank deposits “are being mishandled,” no bank may “close its eyes to the clear implications of such facts.” *Id.* at 295.

Third, the district court reversibly erred by disbelieving well-pled allegations of actual knowledge and substantial assistance, by construing the facts in defendants’ rather than plaintiffs’ favor, by making passing reference to “totality” review, and by failing to actually engage in the collective analysis required by *Tellabs* and *Matrixx*. Instead, the court erroneously assessed the facts in isolation and disbelieved Sullivan’s admissions, ignoring they were made in direct conversations with Cosmo.

Rather, given the scope and audacity of the services provided by BofA, the size of the scheme, its years of duration, and the direct involvement of BofA officers and employees, it is *plausible* that BofA knew and provided substantial assistance to the Agape – Cosmo fraud.

VI. ARGUMENT

A. **The District Court Reversibly Erred in Dismissing All Claims by Applying Incorrect Definitions of “Conscious Avoidance” and “Actual Knowledge” in Determining Whether Actual Knowledge Was Sufficiently Alleged**

District courts in this Circuit have recognized that the elements of the common law causes of action for aiding and abetting fraud, breach of fiduciary duty, and conversion “are parallel” to each other. *See, e.g., Fraternity Fund*, 479 F. Supp. 2d at 360; *see also Bischoff v. Yorkville Bank*, 112 N.E. 759, 761 (N.Y. 1916) (conversion). To plead these claims, plaintiffs must allege that (1) a primary violation by another (here Agape) has occurred, (2) the defendant (here the Bank) had actual knowledge of the primary violation, and (3) the defendant provided substantial assistance to or participated in the primary violation. *Fraternity Fund*, 479 F. Supp. 2d at 360, 367.

The Complaint alleges that Cosmo and Agape converted plaintiffs’ funds. (A159¶122) A conversion occurs when a person intentionally and without authority takes control and interferes with another person’s right to possess property. (A221-22) The Complaint also alleges that Cosmo and Agape owed a fiduciary duty to plaintiffs as investors, and breached that duty by false representations to obtain investor funds for non-existent bridge loan investments, and converted those funds to Cosmo’s own use. (A158-59¶¶117-120, A159-60¶125, A161¶132) A bank is liable

when it has knowledge that “a diversion” of funds is “being executed.” *Lerner*, 459 F.3d at 287-88.

Here, it is not disputed that the Complaint sufficiently alleges that Cosmo and Agape committed the primary violations charged. Defendants also do not dispute that a bank can be liable to third parties for aiding and abetting the fraud of another. Only the sufficiency of pleading actual knowledge and substantial assistance are challenged. Plaintiffs acknowledge that, where, as here, the conduct underlying the primary violations alleged sound in fraud, the circumstances raising a strong inference of actual knowledge (or conscious avoidance) must be alleged with particularity. Fed. R. Civ. P. 9(b); *Lerner*, 459 F.3d at 293; *Fraternity Fund*, 479 F. Supp. 2d at 367. But plaintiffs need simply plead plausible facts supporting substantial assistance. *Twombly*, 550 U.S. at 556.

1. The District Court Erred by Demanding that Plaintiffs Plead the Bank’s Knowledge of the Investors’ “Precise Agreement” with Agape and the “Scope of Agape’s Authority” When This Court Holds that Plaintiffs Must Simply Plead Knowledge of “Outright Looting of Client Funds”

The district court demanded an erroneously high level of specificity for pleading actual knowledge. The district court held that “Plaintiffs have not stated with any particularity that any BofA employees knew that Agape was *limited to providing bridge loans*.” (A195:1-2) The court went so far as to hold: “Plaintiffs have not

plausibly alleged that [BofA] had knowledge of the *precise agreement* between Agape and the Plaintiffs, and the *scope of Agape's authority* to invest under that agreement.” (A220:11-13; *see* A202) “Plaintiffs have not alleged facts that support a plausible inference that [BofA] had actual knowledge of the *scope of Agape's authority* to invest the Plaintiffs' funds, or that Agape and Cosmo were committing *the underlying alleged fraud.*” (A222:5-7)

By requiring actual knowledge of the “precise” Agape scheme “specifically” rather than of fraud “generally,” the district court makes it almost impossible to plead actual knowledge. As noted above, actual knowledge of *a* fraud is enough.

In *Lerner*, this Court held that plaintiffs must allege sufficient facts to support a strong inference of a bank's actual knowledge of the primary actor's “outright looting of client funds” in accounts at the bank. 459 F.3d at 293. Thus, to aid and abet fraud, the bank must know of “outright theft” generally. (*Id.* at 294) But *Lerner* says nothing about pleading the “precise” fraudulent “bridge loan” practices, or the “scope” of Agape Ponzi scheme, as the district court went too far in demanding here. The Complaint here satisfies *Lerner* and pleads actual knowledge of a fraud.

Like *Lerner*, New York courts hold that “actual knowledge” may be “divined from surrounding circumstances.” *Oster*, 905 N.Y.S.2d at 70-75; *accord Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 443 (S.D.N.Y. 2010). “If the bank

chooses to ignore completely the facts which indicate that the debtor is using moneys which may not belong to him, and accepts payment careless of whether or not the moneys paid belong to him, it becomes morally and legally a participant in the debtor's wrong." *Grace*, 38 N.E.2d at 453. Accordingly, reversal is required because, contrary to *Lerner* and *Oster*, the district court imposed erroneously heightened standards for pleading actual knowledge.

2. The District Court Erroneously Demanded that Plaintiffs Plead the Bank Acted "to Avoid Knowledge of the Agape Fraud Specifically" When Case Law Only Requires Plaintiffs to Allege a Suspicion of Probable Fraud and Acts in Conscious Avoidance

The district court acknowledged that allegations of "conscious avoidance" can suffice to plead actual knowledge in civil cases, citing *Fraternity Fund*, 479 F. Supp. 2d at 367-68. (A190-91) In *Fraternity Fund*, Judge Kaplan defined conscious avoidance and explained why it is "not equivalent" to constructive knowledge. "Constructive knowledge is '[k]nowledge that one using reasonable care or diligence should have'" – a negligence standard. "Conscious avoidance, on the other hand, occurs when 'it can almost be said that the defendant actually knew' because he or she suspected a fact and realized its probability, but refrained from confirming it in order later to be able to deny knowledge" – a culpable state of mind. *Fraternity Fund*, 479

F. Supp. 2d at 368; *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 544 (S.D.N.Y. 2009); *Anwar*, 728 F. Supp. 2d at 442-43.

The district court here demanded much more than knowledge of probable fraud and imposed an erroneously heightened pleading requirement for “conscious avoidance” at odds with the law of the Circuit, and the law of New York. The court required that plaintiffs allege facts sufficient to show that BofA acted “to avoid knowledge of the Agape fraud specifically, as opposed to account fraud generally.” (A210:9-10, *see* A191:16-18) This distinction makes no sense.

Under the district court’s erroneous standard, conscious avoidance would be swallowed up entirely by the demand for actual knowledge of the Agape fraud specifically. The whole point of conscious avoidance is that there is evidence that defendant has a strong suspicion of fraud generally and knowledge of its probability, but consciously avoids learning more specifics about the fraud it suspects. Here, the district court essentially demanded direct evidence of actual knowledge – when circumstantial evidence suffices. *Oster*, 905 N.Y.S.2d at 70-75 (actual knowledge is “divined from surrounding circumstances”); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983) (“proof of scienter . . . is often a matter of inference from circumstantial evidence”).

In *Lerner*, this Court stated that to plead aiding and abetting breach of fiduciary duty, plaintiffs need simply plead generally that when a bank is “confronted with clear evidence . . . funds are being mishandled,” it cannot “close its eyes to the clear implications of such facts.” 459 F.3d at 295 (quoting *Grace*, 38 N.E.2d at 454). Nothing in *Lerner* demands conscious avoidance of the precise fraud alleged. The level of precision demanded by the district court here makes it impossible to plead conscious avoidance.

Indeed, evidence of “conscious avoidance” has long been recognized by this Court as proof of actual knowledge in criminal cases. *See, e.g., United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1195-96 (2d Cir. 1989). A jury may infer knowledge of a particular fact in a criminal case if a defendant is aware of a “high probability” of its existence, and engages in conduct that may be construed as “deliberate ignorance,” by consciously closing his eyes to confirming the existence of the fact. *United States v. Samaria*, 239 F.3d 228, 239-40 (2d Cir. 2001); *United States v. Kaiser*, 609 F.3d 556, 564-66 (2d Cir. 2010).

A “high probability” is required in criminal cases reflecting the heightened reasonable doubt burden of proof. By contrast, the lower simple “probability” standard described in *Fraternity Fund*, 479 F. Supp. 2d at 368, applies in civil cases,

reflecting the preponderance of evidence standard-of-proof applicable to scienter in civil cases. *Huddleston*, 459 U.S. at 390; *accord Tellabs*, 551 U.S. at 328-29.

For all of these reasons, the district court's demand for conscious avoidance "of the Agape fraud specifically" (A210), violates the very concept of conscious avoidance, which simply contemplates knowledge of fraud generally and acts to avoid specific knowledge.

B. The District Court Reversibly Erred by Disbelieving Well-Pled Allegations of Actual Knowledge, by Construing the Facts Alleged in Defendants' Rather than in Plaintiffs' Favor, and by Paying Lip-Service to Totality Review, but by Not Actually Engaging in Collective Analysis

The Supreme Court has held that state of mind allegations must be accepted as true and construed collectively and in plaintiffs' favor. *Tellabs*, 551 U.S. at 322-23; *Matrixx*, 131 S. Ct. at 1323-25. Here, the district court violated *Tellabs* by refusing to accept well-pled factual allegations, and mistakenly labeling them conclusory, and by construing the facts alleged individually and in defendant's favor rather than collectively and in plaintiffs' favor.

As noted earlier, here the district court first analyzed in isolation the component allegations supporting the Bank's actual knowledge of fraud. (A192-207) The court erroneously disbelieved and refused to accept Sullivan's admissions in his conversations with Cosmo. The court erroneously discounted in defendant Bank's

favor its undisputed knowledge of Cosmo's prior fraud conviction and expulsion from the securities business. The court ignored the reasonable inference drawn in the Complaint that the Bank knew from its account monitoring and analysis that Agape's single account with investor money was nothing more than a slush fund run as if it were Cosmo's personal bank account. (A140¶¶41-43) It never put these facts together in a collective analysis drawing inferences favorable to plaintiffs. Instead, the court considered the "totality" in defendants' favor only after dismissing each component separately. (A207-09)

The following facts, taken collectively and in plaintiffs' favor, plausibly support a strong inference that BofA had actual knowledge of the Agape fraud scheme:

- When Cosmo first opened his Agape account with BofA, the Bank learned that Cosmo had a prior felony conviction for securities fraud and a lifetime ban from the securities industry. (A138¶34)
- The Bank senior manager Sullivan, responsible for the Agape accounts, maintained an extraordinary relationship with Cosmo, frequently meeting with him for lunch to discuss Agape's business, where Sullivan acknowledged he was aware of Agape's fraudulent commingling and withdrawal of deposits. (A142¶¶47-48)

- BofA senior manager Sullivan set up a system of sub-accounts for Agape to sweep up and commingle investor funds in a single account. (A145¶¶59-60) The Bank and Sullivan provided Agape with a remote deposit facility to conceal deposits and withdrawals. (A145-46¶¶62-63)
- The Bank was paid \$70,000 to look the other way. (A139¶39)
- The Bank had its employee Campagnuolo set up an office within Agape’s accounting department – with the Bank’s equipment, full access to Bank systems and account records, as well as full access to ex-felon Cosmo, Agape’s Controller, and Agape’s accounting systems and files. (A143-44¶¶51-56)
- Campagnuolo also provided confidential Bank information to Agape about Bank customers who received large deposits and could be lured into investing. (A144¶56) Coincidentally, her husband received payments from Agape, totaling \$32,120.68. (A144¶57)
- The Bank’s Premier Banking Vice President Bowes received a complaint – which he characterized as “highly specific” – from an Agape investor that Agape was engaged in a fraudulent scheme. (A152¶¶90-91)

The district court never put these facts together using true collective, holistic analysis. It dismantled them separately and never saw the cumulative impact that

cogently supports a strong inference of actual knowledge. “[E]verything [Sullivan/Campagnuolo/Bowes] know or do is imputed to [BofA].” *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950-51 (N.Y. 2010). There is much more. The Complaint alleges specific acts of “conscious avoidance” which further supports actual knowledge:

- The Bank was aware that both the Comptroller of the Currency and the U.S. Postal Inspector’s Office were investigating Agape – but did nothing. (A152¶¶92-93)
- BofA disbanded its High-Risk Compliance Group and elected not to conduct an on-site audit of Agape. (A151¶¶84-86, A152¶¶88-89)
- BofA Vice President Bowes did nothing despite a direct “specific” complaint of looting. (A152¶¶90-91)

These facts, analyzed collectively with the allegations of Sullivan’s admissions and the Bank’s knowledge of Cosmo’s prior conviction, cogently support a strong inference of actual knowledge of fraud, breach of fiduciary duty and conversion.

By contrast, in *Lerner*, the primary actor, Schick, ““was an attorney in good standing”” and this Court concluded that “plaintiffs allege in detail that the banks knew that Schick engaged in improper conduct that would warrant discipline” by the bar, but only conclusory allegations of actual knowledge of “outright looting of client

funds” – *i.e.*, fraud. 459 F.3d at 279, 292-93. At most, as *Lerner* held, the allegations plead that the bank “suspected fraudulent activity.” *Id.* at 293.

Here, unlike *Lerner*, specific facts alleged – not conclusory assertions – support knowledge of fraud. The Bank knew Cosmo was a convicted felon (not a lawyer in good standing). Bank manager Sullivan admitted knowledge of the account commingling in frequent meetings with Cosmo. A BofA Vice President was alerted to the fraud by an investor, and knew of the government investigation, but failed to act. Campagnuolo helped Agape target victims using confidential bank customer information and cut a \$162,500 check from Agape’s account which Cosmo signed, and Campagnuolo used to pay off a complaining investor. (A144¶56, A148-49¶¶73-76) And, BofA was paid \$70,000 in “account fees” to turn a blind-eye. (A139¶39) As discussed below, the district court reversibly erred by discounting these specifics and never assessing their collective impact.

1. The District Court Erroneously Discounted the Bank’s Actual Knowledge of Cosmo’s Prior Fraud Conviction and Suspension from Investments

The undisputed allegations that BofA had actual knowledge of Cosmo’s prior felony fraud conviction and suspension from investment broker activities are, to say the least, stunning. Even more startling, the Bank not only opened business bank accounts for Agape, but also structured those accounts to facilitate commingling, and

extended personal and commercial lines of credit, and a remote depository to reduce Bank scrutiny. (A138-39¶¶37-38, A145¶62)

The district court, however, isolated and discounted these allegations, without taking account of the fact that the Bank knew Agape was a financial business, without placing the conviction in context with the magnitude of the investor deposits and Agape's withdrawals within short periods of time. At the same time, the Agape escrow account remained empty and dormant, and BofA manager Sullivan not only structured the Agape accounts to facilitate Agape's withdrawals, but also admitted in conversations with Cosmo that he tracked and understood Agape's commingling transactions. (A142¶¶47-48, A145-46¶¶59-63)

The district court reasoned that “[b]ecause Cosmo’s previous conviction did not involve the Plaintiffs or Agape, [BofA]’s knowledge of Cosmo’s previous fraud conviction ‘do[es] not constitute actual knowledge of a fraud perpetrated years later merely because [Cosmo] was involved.’” (A196) The district court cited *Renner v. Chase*, 85 F. App’x 782 (2d Cir. 2004), but *Renner* is inapposite. There were ***no prior felony fraud convictions*** in that case. *Renner v. Chase Manhattan Bank*, No. 98 Civ. 926 (CSH), 2000 U.S. Dist. LEXIS 8552 (S.D.N.Y. June 16, 2000).

Rather than prior felony fraud convictions, *Renner* involved “irregularities” resulting in closing “older accounts and transactions” involving different defendants

as well as different plaintiffs a few years earlier. *Id.* at *22-*23. Even so, *Renner* held that standing alone under such facts, plaintiffs were entitled to the inference that defendants should have known there was a possibility of fraud. *Id.* at *23. Here too, the district court acknowledged the conviction supported constructive knowledge standing alone, but never analyzed the conviction collectively with the other facts alleged to assess whether, in combination, they plead actual knowledge. (A196)

Closer to this case is the 2010 New York appellate court opinion in *Oster* holding that “actual knowledge” of fraud by the lawyer defendants may be inferred from the accumulation of surrounding circumstances, including the fact that the primary violators (Shapiro and Stitsky) were previously convicted of felony fraud and banned from the securities industry – exactly like Cosmo here. *Oster*, 905 N.Y.S.2d at 71-72. In *Oster*, the law firm defendants claimed that they did nothing more than draft private placement memoranda for investor clients, and that they had no knowledge of any Ponzi scheme. *Id.* at 72.

In holding that actual knowledge and substantial assistance were sufficiently alleged, *Oster* emphasized that the law firm “had knowledge of Stitsky[’s] and Shapiro’s criminal backgrounds,” including the fact that they were “banned from the securities industry,” and also knew of misrepresentations in the memoranda, including the failure to disclose the felony or their disbarment to the management team. *Id.* at

70-72. Similarly here, BofA had actual knowledge that Cosmo was a suspended convicted felon and Sullivan helped Cosmo structure the Agape bank accounts to facilitate the looting and commingling of investor funds.

In *Oster*, 905 N.Y.S.2d at 74, the New York court expressly disagreed with the district court decision in *Hightower v. Cohen*, No. CV08-3229 (RJD) (RM), 2009 U.S. Dist. LEXIS 130847, at *3-*4, *14 (E.D.N.Y. Sept. 30, 2009), also involving Shapiro and Stitsky, which was relied on by the district court in this case. (A207-08) This Court should follow *Oster* – not *Hightower* or the district court – because just as in *Oster*, plaintiffs here have sufficiently alleged actual knowledge and substantial assistance. As in *Oster*, the Bank “was aware of [Cosmo’s] criminal backgrounds, yet chose to look the other way.” 905 N.Y.S.2d at 74. As in *Oster*, the Bank accounts were the proximate cause and “the very mechanism by which investments” were looted by Cosmo’s Ponzi scheme. *Id.* at 73. As in *Oster*, where five judges agreed unanimously, this Court should not endorse the Bank’s ““see no evil, hear no evil”” assertions. *Id.* at 73-75.

2. The District Court Improperly Refused to Accept Well-Pled Facts Based on Cosmo’s Frequent Conversations with Bank Manager Sullivan

The district court reversibly erred by totally discounting plaintiffs’ allegations that BofA manager Sullivan had actual knowledge of the Agape scheme, believing

that plaintiffs “fail to provide a basis” that Sullivan was aware that no bridge loans were being made. (A202-03) The court found that plaintiffs “were not present” at meetings between Cosmo and Sullivan, and did not allege “on what basis” they were “aware of the substance of [their] conversations.” (A203)

The court also addressed and discounted plaintiffs’ argument in opposition to the motion to dismiss that the allegations of Sullivan’s knowledge were confirmed by “first-hand accounts.” (A174) The court incorrectly found that this argument was not alleged in the Complaint. (A203) In fact, plaintiffs’ opposition cited ¶¶47-48 of the Complaint (A172, A174), which paragraphs detail the content of “frequent meetings” and conversations between Sullivan and Cosmo, as follows:

Fact: “***Frequently*** Tom Sullivan, a Bank of America senior manager responsible for the Agape accounts, ***met*** with Cosmo over lunch.” (A142¶47)

Fact: “They discussed the business of Agape and ***Sullivan made clear he understood and tracked the flow of funds, in and out of the business.***” (*Id.*)

Fact: “***Sullivan had knowledge that Agape converted and commingled investor funds*** by depositing them into a single account from which Agape also paid its bills, payroll and expenses.” (*Id.*)

Fact: “***Sullivan knew that Agape had an empty escrow account*** that did not receive any of the millions upon millions of investor deposits.” (*Id.*)

Fact: “Sullivan also knew that Agape emptied its own account each month, with deposits and withdrawals far beyond the minimal balances it maintained.” (Id.)

Fact: “Sullivan recommended the structure of the Agape accounts and sub-accounts.” (A142¶48)

The district court treated all of these facts as conclusory allegations by erroneously overlooking that they all flowed from the frequent conversations between Cosmo and BofA senior manager Sullivan. The court’s disbelief or failure to accept these facts is reversible error. *Twombly*, 550 U.S. at 556; *Tellabs*, 551 U.S. at 322.

Properly viewed in plaintiffs’ favor as required by law, rather than in BofA’s favor as the district court erroneously did, the most plausible, indeed inescapable, inference from these facts is that either Cosmo or Sullivan provided plaintiffs with the facts that form the “substance of these conversations.” (A203) Thus, the argument in the opposition that these were “first-hand accounts” (A174) is a compelling inference drawn from the above facts alleged.

The district court here alternatively ruled that the facts alleged were “vague” and required “too great a logical leap” that Cosmo explained and Sullivan understood the “exact nature” of Agape’s fraud. (A204) The above facts are not vague. Sullivan and Cosmo met “frequently” – not just once “at a meeting” as the court wrongly stated (A203) – and “[t]hey discussed the *business of Agape and Sullivan made clear he*

understood and tracked the flow of funds, in and out of the business” – that “Agape converted and commingled investor funds” – and “had an empty escrow account.” (A142¶47) Instead of accepting those allegations as true, the court erred by disbelieving all of it. Although plaintiffs’ Complaint does not use the words “first-hand accounts,” the Complaint pleads the facts that, together with reasonable inferences drawn in plaintiffs’ favor, provide the basis for information and belief allegations that Sullivan told Cosmo he knew Agape was commingling and looting the broker sub-accounts that Sullivan created for Agape. (A142¶¶47-48)

In demanding that plaintiffs expressly and directly plead the source of the Sullivan-Cosmo conversations, the district court inserted the heightened standards of the Private Securities Litigation Reform Act of 1995 (“PSLRA”), which provides that, for allegations made on information and belief (rather than plaintiffs’ own personal knowledge), the complaint must “state with particularity all facts on which that belief is formed.” 15 U.S.C. §78u-4(b)(1) Some circuits construe that provision to require plaintiff to plead the sources of his information and belief. *See Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1100-01 (10th Cir. 2003).

But this is not a PSLRA case. This case is controlled by Fed. R. Civ. P. 9(b), which simply requires that plaintiffs must “state with particularity the circumstances constituting fraud.” Rule 9(b) does not require plaintiffs to plead the sources for those

facts. See *Novak v. Kasaks*, 216 F.3d 300, 313-14 (2d Cir. 2000); *Wight v. BankAmerica Corp.*, 219 F.3d 79, 91 (2d Cir. 2000).

3. Viewed Collectively and in Plaintiffs' Favor, Rather than in Isolation and Defendants' Favor as the District Court Erroneously Did, the Facts Plausibly Allege that the Bank Substantially Assisted Cosmo and Agape in Executing Their Fraudulent Scheme

Although a depository bank has no duty to monitor fiduciary accounts maintained at its branches by other fiduciaries to safeguard those accounts from fiduciary misappropriations, “a bank may be liable for participation in [such a] diversion” by “knowledge that a diversion is intended or being executed.” *Lerner*, 459 F.3d at 287. Thus, substantial assistance includes concealment or failure to act when required, as well as affirmative assistance. *Id.* at 295. With such knowledge, a bank is “under the duty to make reasonable inquiry and endeavor to prevent a diversion.” *Id.* at 288.

The district court found that the Complaint did not sufficiently plead BofA's substantial assistance. The court erroneously viewed the facts in defendants' favor. When taken collectively, and construed in plaintiffs' favor, the facts alleged cogently support a plausible inference of substantial assistance, as follows:

- The Bank’s senior manager Sullivan recommended the structure of the Agape accounts and sub-accounts that would be most beneficial for the business. (A145¶¶59-60)
- The Bank, through Sullivan, actively monitored and analyzed Agape’s accounts, for which it charged Agape over \$70,000. (A139¶39)
- On Sullivan’s recommendation, the Bank provided Agape a remote depository system to simplify the processing of investor funds without having to interact with Bank branch personnel. (A145-47¶¶62-68)
- In addition to providing banking services, the Bank’s employee, Campagnuolo, also assisted Agape in soliciting new “investors,” by providing Agape confidential Bank customer information about Bank customers who received substantial deposits into their bank accounts. (A143-44¶¶51-56)
- On a particular occasion, Campagnuolo personally issued a \$162,500 check from one of Agape’s accounts, obtained Cosmo’s signature, and paid off an angry investor. (A148-49¶¶73-75)

Taken together, these services by BofA employees constitute substantial assistance, and are imputed to the Bank itself under New York agency law. *Kirschner*, 938 N.E.2d at 950-51; *Citibank, N.A. v. Nyland (CF8) Ltd.*, 878 F.2d 620,

624 (2d Cir. 1989); *accord Meisel v. Grunberg*, 651 F. Supp. 2d 98, 110 (S.D.N.Y. 2009). Indeed, either Sullivan's or Campagnuolo's assistance alone was substantial. The district court reversibly drew inferences in defendant's favor to conclude otherwise.

VII. CONCLUSION

For the foregoing reasons, the Court should reverse the judgment and reinstate all aiding and abetting claims against the Bank alleged in the Complaint.

DATED: September 19, 2011

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RULE 32(a)(7)(C) CERTIFICATE

The undersigned counsel certified that Appellants' Opening Brief uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 9,599 words according to the word count provided by Microsoft Word 2002 (or 2003) word processing software.

s/Sanford Svetcov

SANFORD SVETCOV

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is Post Montgomery Center, One Montgomery Street, Suite 1800, San Francisco, California 94104.

2. I hereby certify that on September 29, 2011, I electronically filed the foregoing document: **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

3. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on September 19, 2011, at San Francisco, California.

s/Tamara J. Love

TAMARA J. LOVE