

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of January, two thousand twelve.

PRESENT: DENNIS JACOBS,
Chief Judge,
RICHARD C. WESLEY,
SUSAN L. CARNEY,
Circuit Judges.

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MARILYN WESHNAK, et al.,
Plaintiffs-Appellants,

-v.- 11-3107

BANK OF AMERICA, N.A.,
Defendant-Appellee,

NICHOLAS COSMO, et al.,
Defendants.

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1 **FOR APPELLANTS:**

Susan K. Alexander (Sanford
Svetcov, Samuel H. Rudman,
Robert M. Rothman, Edward Y.
Kroub, on the brief), Robbins
Geller Rudman & Dowd LLP,
Melville, NY, San Francisco, CA.

8 **FOR APPELLEE:**

Pamela A. Miller (Michael D.
Schissel, on the brief), Arnold
& Porter LLP, New York, NY.

12 Appeal from a judgment of the United States District
13 Court for the Eastern District of New York (Spatt, J.).

15 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
16 **AND DECREED** that the judgment of the district court be
17 **AFFIRMED.**

20 Plaintiffs, victims in a Ponzi scheme perpetrated by
21 Nicholas Cosmo through Agape World, Inc., and other entities
22 (collectively, "Agape"), appeal the dismissal of their
23 amended consolidated class action complaint against Bank of
24 America ("BOA"), which alleges aiding and abetting fraud,
25 conversion, and breach of fiduciary duty. We assume the
26 parties' familiarity with the underlying facts, the
27 procedural history, and the issues presented for review.

29 "[W]e review the grant of a Rule 12(b)(6) motion to
30 dismiss de novo, construing the complaint liberally,
31 accepting all factual allegations in the complaint as true,
32 and drawing all reasonable inferences in the plaintiff's
33 favor." Chase Grp. Alliance LLC v. City of N.Y. Dep't of
34 Fin., 620 F.3d 146, 150 (2d Cir. 2010) (internal quotation
35 marks omitted). "To survive a motion to dismiss, a
36 complaint must contain sufficient factual matter, accepted
37 as true, to 'state a claim to relief that is plausible on
38 its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949
39 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
40 570 (2007)).

42 "Under New York law, the elements of aiding and
43 abetting a breach of fiduciary duty, aiding and abetting a
44 conversion, and aiding and abetting a fraud are
45 substantially similar. The claims require the existence of
46 a primary violation, actual knowledge of the violation on
47 the part of the aider and abettor, and substantial

1 assistance." Kirschner v. Bennett, 648 F. Supp. 2d 525, 533
2 (S.D.N.Y. 2009); see also Lerner v. Fleet Bank, N.A., 459
3 F.3d 273, 292-95 (2d Cir. 2006). We need not determine
4 whether Plaintiffs adequately pled that BOA had actual
5 knowledge of Cosmo and Agape's violation; Plaintiffs'
6 complaint does not plausibly state a claim that BOA
7 substantially assisted in it.

8
9 Plaintiffs allege that Tom Sullivan, a BOA senior
10 manager, recommended a structure of accounts that allowed
11 Agape to move money from sub-accounts into an operating
12 account and a Remote Depository System that allowed Agape to
13 deposit checks from its headquarters. Plaintiffs allege
14 that Rebecca Campagnuolo, a BOA employee, provided banking
15 services to Agape from within Agape's headquarters,
16 including issuance of a check from an Agape account to an
17 investor. Plaintiffs do not sufficiently allege that these
18 services differed from those BOA provided other large
19 commercial customers. A bank's provision of "its usual
20 banking services to a customer . . . does not in and of
21 itself rise to the level of substantial assistance." Rosner
22 v. Bank of China, 2008 WL 5416380, No. 06-CV-13562, at *12
23 (S.D.N.Y. Dec. 18, 2008) (internal quotation marks omitted);
24 see also e.g., Ryan v. Hunton & Williams, 2000 WL 1375265,
25 No. 99-CV-5938, at *9 (E.D.N.Y. Sept. 20, 2000).

26
27 Plaintiffs allege that when BOA customers received
28 large deposits into their accounts, Campagnuolo tipped off
29 Agape brokers so that they could solicit investments from
30 these potential victims, and that Campagnuolo's husband
31 received three payments totaling more than \$31,000 from
32 Agape. An employer is not vicariously liable for acts
33 committed by employees "for personal motives unrelated to
34 the furtherance of the employer[']s business." Artalyan,
35 Inc. v. Kitridge Realty Co., 52 A.D.3d 405, 407, 860
36 N.Y.S.2d 100, 102 (1st Dep't 2008); see also Swarna v. Al-
37 Awadi, 622 F.3d 123, 144 (2d Cir. 2010). It is implausible
38 that Campagnuolo acted in furtherance of BOA's business by
39 identifying its customers to be defrauded.

1 Finding no merit in Plaintiffs' remaining arguments, we
2 hereby **AFFIRM** the judgment of the district court.
3

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5 FOR THE COURT:
6 CATHERINE O'HAGAN WOLFE, CLERK
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