IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC03-896

LEWIS B. FREEMAN, as Receiver of Unique Gems Int'l Corp., and LUCY MARTINEZ, individually and on behalf of all others similarly situated,

Appellants,

v.

FIRST UNION NATIONAL BANK, a national banking association, f/k/a First Union National Bank of Florida, and HECTOR PONTE, an individual,

Appellees.

ANSWER BRIEF OF APPELLEE FIRST UNION NATIONAL BANK

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INTRODUCTION

The Eleventh Circuit has certified to this Court the question whether Florida law recognizes a claim for aiding and abetting a fraudulent transfer under Florida's Uniform Fraudulent Transfer Act (UFTA). The appellants, Lewis B. Freeman, as receiver of Unique Gems Int'l Corp. (Unique Gems), and Lucy Martinez, appealed the district court's dismissal of their several claims for failure to state a cause of action. One of those claims purported to allege against First Union National Bank (First Union), that First Union aided and abetted Unique Gems, the perpetrator of a "Ponzi scheme," by acting as a transferee and thus rendering "substantial assistance" to Unique Gems. While appellants also pled fraudulent-transfer claims against First Union, they never challenged the district court's dismissal of those claims.

Under Florida law, a fraudulent-transfer action under Section 726.105 or 726.106, Florida Statutes (2002) is *a creditor's remedy*. The statute neither expressly nor implicitly creates a cause of action in tort. The UFTA creates a right in a creditor to cancel a fraudulent transfer. And, as appellants implicitly concede by their acceptance of the dismissal of their fraudulent-transfer claims, the UFTA only allows a creditor to seek disgorgement from a *transferee*. Their aiding and abetting theory, however, would transform the statutory remedy into a tort action against a *transferor*.

Three recent decisions of the Florida district courts of appeal clearly point the way to the correct resolution of the Eleventh Circuit's certified question. In *Beta Real Corp. v. Graham,* 839 So. 2d 890 (Fla. 3d DCA 2003), the Third District

– adopting the majority view that the UFTA does not create an action in tort – held that a *recipient* of an alleged fraudulent transfer has not committed a tortious act. *Id.* at 891. And both the Fifth District and the Third District recently have held that no cause of action arises under the UFTA against one "who allegedly assists a debtor in a fraudulent conversion or transfer of property, when a person does not come into possession of the property." *Danzas Taiwan, Ltd. v. Freeman,* 2003 WL 21075724 *1 (Fla. 3d DCA 2003) (internal quotations omitted); *Bankfirst v. UBS Paine Webber, Inc.,* 842 So. 2d 155 (Fla. 5th DCA 2003). Because First Union was not a transferee and therefore was not subject to disgorgement under the UFTA, there can be no claim against First Union for aiding and abetting a fraudulent transfer.

STATEMENT OF THE CASE AND FACTS

1. Procedural History.

Plaintiffs Freeman, as receiver of Unique Gems, and Lucy Martinez filed their Second Amended Class Representation Complaint (Second Amended Complaint) on November 27, 2000. (R2:46).[1] The Second Amended Complaint set forth a total of seven claims: civil conspiracy (Count I); liability for late returned checks (Count II); negligent destruction of evidence (Count III);

[1] This action was originally brought in Florida state court and was removed on June 6, 2000, while plaintiffs were proceeding on their amended complaint. (R1:1). The Second Amended Complaint is the operative pleading on which the district court ultimately ruled. (R8:247).

fraudulent transfers (Counts IV and V); negligence (Count VI); and aiding and abetting (Count VII). (R2:46:16-42).[2]

Defendant First Union moved to dismiss Counts III through VII of the Second Amended Complaint. (R2:48).[3] On January 2, 2002, the district court entered its Order Granting Defendants' Motion to Dismiss (the Dismissal Order). (R8:247). The district court dismissed Count III (negligent destruction of evidence) with leave to amend. *Id.* at 2-4. The court dismissed Counts IV and V, alleging fraudulent transfers, upon a holding that plaintiffs could not state a claim for relief under the UFTA. *Id.* at 4-8. The court dismissed Count VII, which alleged a claim for aiding and abetting fraudulent transfers, upon a holding that no common-law aiding and abetting liability attaches to alleged violations of the fraudulent transfer statute. *Id.* at 10-12. The court also dismissed Count VI (negligence) upon a holding that Freeman, as receiver for Unique Gems, did not have standing to bring claims on behalf of Unique Gem's creditors. *Id.* at 8-10.

Thereafter, the district court granted plaintiffs' motion for entry of a final judgment with respect to Counts IV-VII (R9:265; R11:368) and accepted plaintiffs' voluntary dismissal of Count I. (R11:368). The court also stayed Count II. *Id.* at 2.[4]

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[2] Plaintiff Martinez also sought to certify a class action. *Id.* at 43.

[3] Defendants answered Counts I and II of the Second Amended Complaint. (R2:50).

[4] In a subsequent order, the court dismissed Count I with prejudice and amended the order to state that final judgment was being entered on Counts IV-VII "for good cause shown and without just reason for delay." (R11:374). That order allowed Freeman and Martinez to appeal the dismissal of their claims. Fed. R.

(continued...)

The Eleventh Circuit issued its opinion on May 7, 2003. *Freeman v. First Union National [Bank],* No. 02-11559 (11th Cir. May 7, 2003). The court upheld the district court's ruling on Freeman's lack of standing to bring the negligence claim, reversed the district court's denial of plaintiffs' motion to amend the negligence claim, and certified to this Court the question whether Florida law recognizes a claim for aiding and abetting a fraudulent transfer. Appendix ("A") 3-9.[5]

2. Plaintiffs' Allegations.

The Second Amended Complaint alleges that Unique Gems was operated as a "Ponzi scheme." (R2:46:3). Unique Gems solicited "home assemblers" of jewelry, who paid $3,000 for jewelry kits and were promised a payment of $1800 per kit (and return of their deposit). *Id.* According to the Second Amended Complaint, Unique Gems "made little to no effort to distribute and sell the assembled necklaces," but rather solicited funds from new assemblers to repay the initial assemblers, "creat[ing] the illusion of profits needed to continue the scheme and expand the amount of monies taken in." *Id.* at 4. Florida authorities closed the ~~operation in March 1997.~~ (R2:46:4-5).[6]

(...continued)

Civ. P. 54(b).

5 A copy of the opinion is attached as an appendix to this brief. Both Freeman and First Union have sought rehearing on different aspects of the Eleventh Circuit's opinion, but neither petition addresses the issue that the Eleventh Circuit has certified to this Court.

6 The principals of Unique Gems "fled offshore" after the Florida Attorney General obtained an injunction against their operation. *Id.* at 4-5. According to the Second Amended Complaint, the victims of the Ponzi scheme suffered

(continued...)

Unique Gems maintained an account at First Union. (R2:46:5). The Second Amended Complaint alleges that First Union "knew or should have known but for willful blindness that [Unique Gems's] 'business' was an illegal ... Ponzi scheme." *Id.* at 6. Unique Gems transferred a total of $19 million, between October 1996 and March 1997, to a bank account in Liechtenstein, which account was maintained in the name of "Pearls & Gems." (R2:46:7).[7] Freeman and Martinez alleged that First Union "knew, or should have known but for willful blindness, that there was no legitimate justification for the wiring of millions of dollars ... out of the United States to a notorious money-laundering center such as Liechtenstein." *Id.* at 8.

Counts IV and V of the Second Amended Complaint allege fraudulent transfer claims under Sections 726.105 and 726.106, Florida Statutes (2002). (R2:46:24-32). Both counts are based on the transfers from the Unique Gems account at First Union to the Pearls & Gems account in Liechtenstein. *Id.* The Second Amended Complaint alleges, in pertinent part:

> The monies that First Union wire transferred for UGI [Unique Gems] to Liechtenstein were composed of the deposits made by the assemblers with UGI pursuant to their "production agreements." Pursuant to the terms of the purported agreements, the assemb[l]ers' money was refundable in installments upon the assemblers' return of completed jewelry to UGI. Further, in addition to having a contract claim under the "production agreements," the assemblers also had tort claims against UGI for damages based upon the deposit amounts

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(...continued)
damages "in excess of $40 million." *Id.* at 5.

[7] During the period between September 1996 and March 1997, Unique Gems's monthly deposits grew from $54,004 to $6,623,337. *Id.* at 9.

> because UGI was being operated by its principals as an illegal ... Ponzi scheme. Accordingly, at the time of the deposits and prior to UGI's deposit of the monies with First Union and the subsequent wire transfer of those funds, the Plaintiff Class, including Lucy Martinez, were present Creditors with Claims against UGI, as a Debtor, for purposes of the UFTA. Further, until the money was sent overseas by First Union, at the direction of UGI, the monies in the UGI account at First Union constituted property applicable by law to the payment of the Claims of UGI's creditors, including the assemblers. However, once the wire transfers were effectuated, it was removed beyond the reach of UGI's creditors to satisfy their Claims through any judicial process against UGI.

Id. at 24-25.

Freeman and Martinez further alleged that the principals of Unique Gems had "actual fraudulent intent," based upon the following factors:

> (A) UGI's principals retained control over the funds. Specifically, UGI's principals ... were able to direct First Union to debit the UGI account and wire transfer the funds for them. Further, UGI's principals controlled Pearls & Gems and its bank account in Liechtenstein such that they were using First Union to secrete the illegal profits from the UGI scheme offshore by transfers essentially to themselves.
>
> (B) The wire transfers to Liechtenstein were not disclosed to any of the assemblers or trade creditors of UGI other than Pearls & Gems.
>
> (C) The wire transfers were a substantial portion of UGI's assets.
>
> (D) The principals of UGI, ... all fled the United States and absconded with the wire transferred funds, through a series of offshore corporate shells.
>
> (E) UGI concealed the reason for the wire transfers as alleged payment to a trade creditor, Pearls & Gems, for the price of gems "sold" by Pearls & Gems to UGI....

> (F) ... [T]he value of the consideration received by UGI for the wire transfers to Pearls & Gems was not reasonably equivalent to the millions of dollars transferred....
>
> (G) Because UGI's principals ran the company so it made essentially no sales of the completed jewelry ... UGI was insolvent at the time of the transfers to and from First Union or, alternately, became insolvent because of the transfers.
>
> (H) Actual intent to defraud is presumed from the fact that UGI's principals were operating the Company as a ... Ponzi scheme.

(R2:46:26-27). Unique Gems "made the transfers to First Union without receiving a reasonably equivalent value either from First Union or from Pearls & Gems." *Id.* at 27.

With respect to First Union, plaintiffs alleged:

> First Union was not a mere conduit of the transfers from UGI to Pearls & Gems who [sic] did nothing more than provide banking services to a normal customer. Rather, First Union was an immediate transferee under the UFTA which dealt directly with UGI's principals .... First Union did not receive the transfers in the form of the UGI deposits and make the wire transfers in good faith given the Bank's knowledge and participation in the UGI scheme.... First Union actually knew of the key facts of the UGI scheme. The Bank either willingly participated in that scheme in order to earn banking fees on a huge account or intentionally ignored the red flags of UGI's illegality such that it cast a blind eye constituting bad faith.

(R2:46:28).

In Count VII, the aiding and abetting count, Freeman and Martinez re-alleged that First Union was either aware or ignored "the red flags of UGI's illegal 'business.'" (R2:46:37). Freeman and Martinez alleged that First Union "knowingly rendered substantial assistance" to Unique Gems by, among other

things, “[a]llowing First Union’s name and reputation to be associated with the UGI scheme,” providing wire transfer services, and providing “oral bank references” for Unique Gems to “trade creditors and other financial institutions.” *Id.* at 40-41.[8]

3. The District Court’s Dismissal Order.

The district court recited the elements of the fraudulent transfer claims: “(1) there was a creditor to be defrauded; (2) a debtor intending fraud; and (3) a conveyance of property which could have been applicable to the payment of the debt due.” (R8:247:4) (citation omitted). The court “recognize[d] the limitations of the UFTA in light of its available remedies,” *i.e.,* avoiding fraudulent transfers made to a transferee, attachment of assets, injunctive relief, and appointment of a receiver. *Id.* at 4-5.

Based on the allegations in the Second Amended Complaint, the court determined that “[t]he only transfer by which First Union may be characterized as a ‘transferee’ occurred when [Unique Gems] deposited funds into its account at the bank,” but that plaintiffs did not allege that this transfer “was intended ‘to hinder,

[8] The negligence claim, which was brought by Freeman only, alleged that First Union “owed a common law duty of care” to Unique Gems’s creditors and that First Union breached that duty as of February 10, 1997, the date that the Florida Attorney General served a subpoena on First Union. (R2:46:32-33). Because First Union did not close the Unique Gems’ account until July 24, 1997, after Unique Gems had been shut down and Freeman had been appointed, Freeman alleged that First Union had failed to exercise due diligence in the conduct of its business with Unique Gems. *Id.* at 33-36. As set forth *infra*, the Eleventh Circuit upheld the dismissal of the negligence claim as pled, but held that Martinez (not Freeman) should be allowed an opportunity to plead a negligence claim.

delay or defraud any creditor of the debtor' or that the debtor failed to receive 'a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer or obligation.'" *Id.* at 6 (quoting §§ 726.105(1), 726.106(1), Fla. Stat. (2002)). While Freeman and Martinez alleged that the $19 million in wire transfers from the Unique Gems account at First Union to the Pearls & Gems account in Liechtenstein was fraudulent, the court ruled that "the bank would be the transferor on this set of facts, not the transferee" and that the transfer to Liechtenstein accordingly could not provide a basis for imposing liability on First Union. (R8:247:6). Because "[a]ll of the allegations offered to substantiate the claim of actual fraudulent intent address[ed] the wire transfers from the account at First Union to Liechtenstein," First Union was, according to the Second Amended Complaint, the transferor in that transaction, and the UFTA is inapplicable. *Id.* at 6-8.

The court concluded:

> [T]he remedy for a fraudulent conveyance would entail the disgorgement of assets from the transferee. Consequently, because First Union was not a transferee under the UFTA, it is not in possession of the fraudulently conveyed assets and, accordingly, cannot be disgorged of them.
>
> ... Plaintiffs maintain First Union was more than a mere conduit permitting liability for its conduct. While this may be true, ... it does not lend credence to Plaintiffs' attempt to characterize the bank as an UFTA transferee.

(R8:247:7-8) (citations omitted).[9]

Addressing the aiding and abetting count, the court found no Florida precedent that recognized a tort claim for aiding and abetting a UFTA violation. (R8:247:11). The court concluded that no such theory of liability could be created because the UFTA only authorizes creditors to set aside fraudulent transfers made to transferees and does not create liability for the consequences of the wrongful act, such that "attaching common law aiding and abetting liability to UFTA violations is inapposite." *Id*. at 11-12.

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[9] Notably, Freeman and Martinez did not appeal the dismissal of their fraudulent-transfer claims.

4. The Eleventh Circuit's Decision.

The Eleventh Circuit observed that "[t]he jointly-filed aiding and abetting claim is problematic because the lower Florida courts have not expressly approved just a cause of action and the Florida Supreme Court has not yet examined this question." (A:3) (footnote omitted). The court recognized that the district court's analysis is supported by the Fourth District's decision in *Yusem v. South Florida Water Management District,* 770 So. 2d 746, 749 (Fla. 4th DCA 2000), but that the Third District had treated a fraudulent transfer claim as a tort in *Invo Florida Inc. v. Somerset Venturer, Inc.,* 751 So. 2d 1263, 1267 (Fla. 3d DCA 2000). (A:5-7). Because the court found it "difficult to predict how the Florida Supreme Court would decide this issue," the court certified the following question to this Court: "Under Florida law, is there a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee?" (A:7).[10]

SUMMARY OF ARGUMENT

Florida's Uniform Fraudulent Transfer Act prohibits transfers that are made to defraud a creditor. The statutory remedies allow a creditor to void the transfer, secure an attachment or injunctive relief, or obtain appointment of a receiver. The UFTA is strictly limited to relief against a "transferee," that is, to the individual or entity that obtains the funds as a result of the fraudulent transfer.

[10] The Eleventh Circuit upheld the district court's ruling that Freeman had no standing to bring a negligence claim but held that the district court had erred in denying Martinez an opportunity to allege a negligence claim. *Id.* at 8-9.

As a matter of Florida law, First Union became the owner of the funds that were deposited into the Unique Gems account. First Union thereafter was the *transferor* when, at the direction of Unique Gems, certain monies were transferred to the Liechtenstein account. While Freeman and Martinez certainly have alleged that *those transfers* were made with actual fraudulent intent on Unique Gems's part, First Union was not the *transferee* in the pertinent transactions. As the federal district court correctly observed, "because First Union was not a transferee under the UFTA, it is not in possession of the fraudulently conveyed assets and, accordingly, cannot be disgorged of them." (R8:247:7).

And, because First Union was not a transferee and therefore not subject to disgorgement under the UFTA, the claim for aiding and abetting a fraudulent transfer necessarily fails. The UFTA does not create liability for fraudulent transfer, but rather may be invoked only to secure disgorgement from a *transferee*. The effect of allowing a purported aiding and abetting claim would be to attach UFTA liability to a *transferor,* in the guise of liability as an aider and abettor.

Recent decisions by the Third and Fifth Districts have paved the way to answering the Eleventh Circuit's question. In *Beta Real Corporation. v. Graham,* 839 So. 2d 890, 891-92 (Fla. 3d DCA 2003), the court held that the UFTA does not create an action in tort against a transferee. Aiding and abetting liability necessarily turns upon the defendant's having provided substantial assistance to *a tortfeasor*.

Moreover, both *Bankfirst UBS v. Paine Webber, Inc.,* 842 So. 2d 155 (Fla. 5th DCA 2003), and *Danzas Taiwan, Ltd. v. Freeman,* 2003 WL 21075724 (Fla.

3d DCA 2003), hold that there is no cause of action against one "who allegedly assists a debtor in a fraudulent conversion or transfer of property, where the person does not come into possession of the property." *Danzas, supra at* *1 (internal quotations omitted); *BankFirst,* 842 So. 2d at 155. Here, Freeman did not attempt to impose liability on First Union as a *transferee*. The question whether, in the Eleventh Circuit's words, there is "a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee" has been answered by the district courts of appeal, and correctly so.

ARGUMENT

Florida's Fraudulent Transfer Statutes.

Freeman and Martinez invoked two provisions of the UFTA, Sections 726.105 and 726.106, Florida Statutes (2002). Section 726.105(1) provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor ... if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> 1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> 2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

§ 726.105(1), Fla. Stat. (2002).

Section 726.106 provides, in pertinent part:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

§ 726.106(1), Fla. Stat. (2002).

The UFTA's remedies are set forth in Section 726.108, Florida Statutes (2002), as follows:

> (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
>
> (b) An attachment or other provisional remedy against the asset transferred or other property of the transferee....;
>
> (c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
>
> 1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
>
> 2. Appointment of a receiver....;
>
> 3. Any other relief the circumstances may require.

§ 726.108(1), Fla. Stat. (2002).

Florida's UFTA is derived from the Uniform Fraudulent Transfer Act (1984). It creates a statutory remedy for creditors:

> A fraudulent conveyance action is simply another creditors' remedy. It is either an action by a creditor against a transferee directed against

> a particular transaction, which, if declared fraudulent, is set aside thus leaving the creditor free to pursue the asset, or it is an action against the transferee who has received an asset by means of a fraudulent conveyance and should be required to either return the asset or pay for the asset (by way of a judgment and execution).

Yusem v. South Fla. Water Mgmt. Dist., 770 So. 2d 746, 749 (Fla. 4th DCA 2000).

1. The Claims for Relief Based on the Alleged Fraudulent Transfers.

a. The fraudulent transfer claims.

Freeman and Martinez attempted to plead claims for "transferee liability" against First Union under the UFTA. (R2:46:24-32). The core allegation in each count was that "[t]he deposits into the [Unique Gems] account and their subsequent wire transfer out of the country constituted transfers from [Unique Gems] to First Union, *as transferee*." *Id.* at 24, 29 (emphasis added). But it has long been established that "[a] bank becomes the absolute owner of money deposited with it to the general credit of a depositor, ... and the relationship between the parties is simply that of debtor and creditor." *Martin v. Meyerheim,* 133 So. 636, 639 (Fla. 1931) (internal quotations and citations omitted). Freeman and Martinez acknowledged as much in their response to the motion to dismiss in the federal district court. (R2:58:13). Taking every allegation in the Second Amended Complaint in a light most favorable to plaintiffs, First Union — acting at the direction of Unique Gems — *transferred* funds to the Pearls & Gems account in Liechtenstein. (R2:46:24-32). First Union was simply not a "transferee" within the meaning of the UFTA with respect to the allegedly fraudulent transfers.

The federal district court accordingly held that Freeman and Martinez had failed to state a claim for relief in Counts IV and V:

> The only transfer by which First Union may be characterized as a "transferee" occurred when UGI deposited funds into its account at the bank. However, Plaintiffs have not alleged that this transfer was intended "to hinder, delay, or defraud any creditor of the debtor," or that the debtor failed to receive "a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at the time or the debtor became insolvent as a result of the transfer or obligation." ...
>
> ... [T]he alleged fraudulent transfer occurred when [First Union], as owner/transferor, transferred the funds to L[ie]chtenstein.
>
> ... Plaintiffs fail to allege that the deposits constituted fraudulent transfers within the meaning of the UFTA. All of the allegations offered to substantiate the claim of actual fraudulent intent address the wire transfers from the account at First Union to L[ie]chtenstein.
>
> ... [A]ll of the transactions upon which Plaintiffs allege bad faith took place *from* the First Union account; whereby First Union only may be characterized as a transferor. Consequently, Plaintiffs fail to allege any fraud surrounding the deposits by UGI into its account with the bank.
>
> ... [T]he remedy for a fraudulent conveyance would entail the disgorgement of assets from the transferee. Consequently, because First Union was not a transferee under the UFTA, it is not in possession of the fraudulently conveyed assets and, accordingly cannot be disgorged of them.

(R8:247:6-7) (citations omitted). Freeman and Martinez did not appeal the district court's dismissal of the fraudulent-transfer counts to the Eleventh Circuit.

b. The aiding and abetting claim.

Count VII of the Second Amended Complaint, the aiding and abetting claim, alleged that "UGI's principals engaged in fraudulent transfers ... by first depositing funds into the company's bank account at First Union and then wire transferring those funds offshore to the Pearls and Gems bank account in Liechtenstein." (R2:46:36). The narrow question identified by the Eleventh Circuit is thus whether Freeman and Martinez may bring an action "for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee[.]" (A:7). The federal district court, reviewing Florida's UFTA, determined that the UFTA's underlying rationale is "*not* the creation of liability for the consequences of a wrongful act," but rather an entitlement to cancel a transfer. (R8:247:12) (emphasis added). And indeed, that is precisely the interpretation of the statute in the Fourth District's *Yusem* decision, as set forth above. 770 So. 2d at 749.

2. There Is No Claim For Aiding and Abetting a Fraudulent Transfer Under the UFTA By a Non-Transferee.

a. Aiding and abetting liability under Florida tort law.

Freeman and Martinez assert that Florida tort law has recognized liability for aiding and abetting a tortfeasor. Initial Brief at 22-24. That is correct, so far as it goes. That is, the Florida courts have, on occasion, allowed claims to go forward based on an aiding and abetting theory of liability. *Nerbonne, N.V. v. Lake Bryan Int'l Props.,* 689 So. 2d 322, 325 (Fla. 5th DCA 1997) ("[p]arties concurring with promoters in defrauding a corporation are liable for the resulting loss" because "those who knowingly participate as an aider and abettor are liable to [the plaintiff]") (citations omitted); *Central Fla. Invs., Inc. v. Levin,* 659 So. 2d 492, 493 (Fla. 5th DCA 1995) (because court could not "definitely state that [plaintiff] could not bring a count for injunctive relief ... seeking to prevent [defendant] from aiding and abetting certain codefendants from disseminating alleged false and fraudulent information to [plaintiff's] prospective customers," dismissal for failure to state a claim was reversed) (citations omitted); *Williamson v. Answer Phone of Jacksonville, Inc.,* 118 So. 2d 248, 252 (Fla. 1st DCA 1960) (allegations that defendant telephone company "changed its classification titles in its directory ... for the purpose of aiding and abetting the other defendants in the accomplishment of their intention and purpose to defraud the public and injure plaintiff ... state a claim upon which relief could be granted against the telephone company"). *See also TransPetrol Ltd. v. Radulovic*, 764 So. 2d 878, 880-81 (Fla. 4th DCA 2000) (disallowing aiding and abetting theory of liability in fraud and RICO counts

because plaintiff did not rely on actions or words of alleged aiders and abettors); *Allerton v. State Dep't of Ins.,* 635 So. 2d 36, 39 (Fla. 1st DCA) (corporate employee could be subjected to jurisdiction in Florida because "corporate shield" doctrine did not apply to bar counts for fraud, breach of fiduciary duty, or aiding and abetting a breach of fiduciary duty), *review denied,* 639 So. 2d 975 (Fla. 1994); *Kilgus v. Kilgus,* 495 So. 2d 1230, 1231 (Fla. 5th DCA 1986) ("[a] mere suggestion to another to take action that may be done negligently or non-negligently does not amount to a 'concert of action' between the suggestor and the actor even if that theory of liability is viable in Florida") (citation omitted), *review denied,* 504 So. 2d 767 (Fla. 1987).[11] The Southern District of Florida — the same district court that dismissed the aiding and abetting claim brought by Freeman and Martinez for failure to state a cause of action — has recognized a claim, under

[11] Florida's aiding and abetting theory of liability appears to have its roots in *Ft. Myers Dev. Corp. v. J.W. McWilliams Co.*, 122 So. 264 (Fla. 1929), which arose from a foreclosure action in which the defendant brought a counterclaim to rescind the contract. The court held:

> The rule generally respecting liability of aiders and abettors of fraudulent promoters of corporations is that, if with knowledge of the fraud they concur with the promoter in carrying out his fraudulent scheme, they are liable to the corporation for what it has lost as a result of the fraud. The test is participation, not motive or degree of culpability. And liability may attach to such participants, although they do not share in the profits of the fraud.

122 So. at 268 (citations omitted). The court accordingly held that "a corporation may sue in equity to rescind and set aside a fraudulent contract with its promoters or third persons who were parties to the fraud and breach of trust. . . ." *Id.* at 269.

Florida law, for aiding and abetting a breach of fiduciary duty. *Arwood v. Dunn (In re Caribbean K Line, Ltd.),* 288 B.R. 908, 918-19 (S.D. Fla. 2002).

While the precedent is somewhat scattered, it is fair to say that the Florida courts have allowed claims for aiding and abetting a tortfeasor to proceed. But that ultimately begs the Eleventh Circuit's certified question. Because a fraudulent-transfer action under the UFTA is *not* a tort, but is merely a creditor's remedy *against a transferee,* the answer to the Eleventh Circuit's question requires a closer look at how it is that one may be liable for aiding and abetting in the context of a statutory action that does not create a claim in tort.

b. A non-transferee cannot be liable for aiding and abetting a fraudulent transfer.

In the Eleventh Circuit, and again before this Court, Freeman and Martinez have relied on Florida cases that have allowed claims of conspiracy to effect fraudulent transfers to go forward. Initial Brief at 24-26. The Eleventh Circuit did not find this analogy to be persuasive — perhaps because Freeman and Martinez pled a conspiracy claim in the Second Amended Complaint (R2:46:16-17), but thereafter *voluntarily dismissed* that claim. (R9:265; R11:368).[12] The precedent on which Freeman and Martinez rely to support their argument that liability may attach for conspiracy to commit a fraudulent transfer is somewhat thin.

[12] Moreover, even if the conspiracy analogy could work, Florida law requires dismissal of a conspiracy count when the underlying tort claim fails. *Ovadia v. Bloom,* 756 So. 2d 137, 140 (Fla. 3d DCA 2000). The unchallenged dismissal of the fraudulent-transfer claims in the Second Amended Complaint would thus bar the aiding and abetting count, even under the theory that Freeman and Martinez present.

In *Woodell v. TransFlorida Bank,* 717 So. 2d 108 (Fla. 4th DCA 1998), the Fourth District reversed a dismissal of a fraudulent-transfer conspiracy claim, but without any discussion, much less an analysis of how conspiracy liability could attach to a non-transferee, such as First Union. *Id.* at 110. The Fourth District's decision in *Elie v. TFB Properties, Inc.,* 652 So. 2d 1194 (Fla. 4th DCA 1995), was an earlier decision in the same litigation, in which the court reversed a dismissal of a conspiracy claim without any analysis.[13]

In *Huntsman Packaging Corporation v. Kerry Packaging Corporation,* 992 F. Supp. 1439 (M.D. Fla. 1998), *aff'd,* 172 F.3d 882 (11th Cir. 1999), upon which Freeman and Martinez also rely, Initial Brief at 24-25, the plaintiff brought an action on a contract and also asserted that the defendant corporation, together with certain individuals, had transferred the corporation's assets in an effort to defraud the plaintiff. *Huntsman,* 992 F. Supp. at 1441. The court ruled for the plaintiff on its fraudulent-transfer claims, *id.* at 1445-46, and also sustained the claim for conspiracy, finding that the individual and corporate defendants had "combined to facilitate and effectuate the lawful goals of eradicating the debt owed" to the plaintiff by transferring the corporate defendant's assets. *Id.* at 1447. Contrary to

[13] The third Florida decision on which Freeman and Martinez rely, Initial Brief at 25, does not even address whether a conspiracy claim may be brought. *Invo Fla., Inc.,* 751 So. 2d at 1266. The former Fifth Circuit's decision in *Brunswick Corp. v. Vineberg,* 370 F.2d 605 (5th Cir. 1967), addressing a pre-UFTA fraudulent conveyance statute, merely holds that allegations of a scheme to divest a corporate entity of "all of its valuable assets" was sufficient to state a claim and that summary judgment should not have been granted where the "transfer in fraud of creditors" was "not even mentioned in the depositions" submitted in support of the motion. *Id.* at 608-13.

the impression created by Freeman and Martinez when they characterize the decision as upholding a conspiracy claim "against parties who were not transferees," Initial Brief at 25, the opinion *nowhere* addresses the question whether a non-transferee can be held liable in connection with a fraudulent transfer. 992 F. Supp. at 1447. It appears that the question simply was not raised.

But, as Freeman and Martinez candidly acknowledge, three recent district court of appeal decisions have spoken directly to the core issue in this case. Initial Brief at 26-27. First, in *Beta Real Corporation v. Graham,* 839 So. 2d 890 (Fla. 3d DCA 2003), the Third District addressed a personal-jurisdiction issue arising from an action against a corporation to recover monies that fraudulently had been transferred by a British lawyer after the lawyer allegedly stole the monies from his law firm. *Id.* at 891. The law firm, seeking to recover the stolen monies, claimed that it could assert jurisdiction over the defendant corporation, which was domiciled in the British Virgin Islands, because the defendant corporation "committed a tortious act within this state" when it received the fraudulent conveyances in Florida. *Id.*

The Third District adopted the majority view, as exemplified in *Federal Deposit Insurance Corporation v. S. Prawer & Company,* 829 F. Supp. 453 (D. Me. 1993), and held that a transferee has not "committed a 'tortious act'" in Florida so as to subject itself to substituted service under Section 48.193(1)(b), Florida Statutes (2002). 839 So. 2d at 891. The *S. Prawer* decision, in passing on a similar jurisdictional question, explicitly addressed the FDIC's attempt to plead claims for conspiracy to commit a fraudulent transfer, and aiding and abetting a

fraudulent transfer. 829 F. Supp. at 455-57. Addressing the conspiracy count, the court determined that "the fraudulent conveyance claim alleged in this complaint is not a tort," and that "civil conspiracy to commit a fraudulent transfer cannot stand as an independent basis of civil liability." *Id.* at 456 (footnote omitted). Because "claims alleging violation of the Uniform Fraudulent Transfers Act ... are not tort claims, ... the claim for conspiracy ... must fail as the basis for the imposition of civil liability." *Id.* at 457. The same rationale led the court to reject the applicability of aiding and abetting under the RESTATEMENT (SECOND) OF TORTS, § 876(b),[14] upon which Freeman and Martinez have relied as the theoretical basis for imposing aiding and abetting liability, Initial Brief at 24, because:

> In Maine the tort of aiding and abetting a tortious action is drawn from section 876 of the Restatement of Torts. It is plain under that section that, as with a claim for civil conspiracy, there must be alleged tortious conduct by another before aiding and abetting liability can be imposed.... [T]he FDIC has not alleged an independent tort here to which the aiding and abetting liability can attach.

829 F. Supp. at 457 (citations omitted).

The Third District also adopted the explication set forth by the Eastern District of New York in *United States v. Franklin National Bank,* 376 F. Supp. 378 (E.D. N.Y. 1973):

[14] Section 876 allows the imposition of liability on one who either "gives substantial assistance or encouragement" to another whose conduct "constitutes a breach of duty" or who "gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." RESTATEMENT (SECOND) OF TORTS, § 876(b), (c) (1979).

> [T]he Uniform Fraudulent Conveyance Act[] does not confer upon the creditor a right of action in tort against the grantee.... [T]he gravamen … [is] an action in equity to set aside a fraudulent conveyance. The fact that the complaint alleged actual intent on the part of the debtor to evade the creditor did not transform the complaint into an action to recover on the ground of actual fraud. Surely, ... the action is not one for actual fraud where a complete cause of action may be stated by a showing of the bare facts of a voluntary conveyance resulting in insolvency. Such a conveyance is but one of the two kinds which are deemed fraudulent by the operation of the statute. Both kinds are simply acts which are voidable at the behest of a creditor as a result of the statutory declaration. Whichever pattern the debtor may choose, the relief sought by the creditor is the same; to undo the transfer of title so as to bring within the ambit of execution those assets upon which the creditor is rightly to entitle to levy. The fraud, such as it is, is only incidental to the right of the creditor to follow the assets of the debtor and obtain satisfaction of the debt. The gravamen of the cause of action in the case at bar is the ordinary right of a creditor to receive payment; this right has been implemented by the protection of legislation concerning the circumstances under which the creditor may avail himself of assets which the debtor has transferred to others.

Beta Real Corporation, 839 So. 2d at 892 n.3 (quoting *Franklin Nat'l Bank,* 376 F. Supp. at 381).[15]

The Fifth District also has held that there is no cause of action under Chapter 726 "against a party who allegedly assists a debtor in a fraudulent conversion or transfer of property, where the person does not come into possession of the property." *Bankfirst v. UBS Paine Webber, Inc.,* 842 So. 2d 155 (Fla. 5th DCA

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[15] It is thus seen that the attempt by Freeman and Martinez to brush aside the case law holding that no inchoate tort connected with a fraudulent transfer under the UFTA arises under Florida law as the misguided application of *bankruptcy* law, Initial Brief at 26-28, is wholly insubstantial. *Beta Real Corporation* is based entirely on the fundamental question whether such a tort exists in the first instance under Florida law.

2003) (citations omitted).[16] In *Danzas Taiwan, Ltd. v. Freeman,* 2003 WL 21075724 (Fla. 3d DCA May 14, 2003), the Third District, applying both *Bankfirst* and *Beta Real Corporation,* rejected an attempt by Freeman, as the Unique Gems receiver, to bring an action against a Taiwanese freight forwarder for conspiracy to commit fraudulent transfers. *Id*. at *1. Because "[t]he alleged fraudulent transfers in this case were between Unique Gems International Corporation and a related

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[16] Freeman and Martinez seek comfort in Judge Harris's dissenting opinion in *Bankfirst.* Initial Brief at 32-33. The central thesis of Judge Harris's dissent is: "If it is *fraud* for a debtor to convey assets to avoid creditors, what possible policy reason is there to immunize a lawyer who knowingly and willingly makes possible for his client to commit this fraud?" 842 So. 2d at 157 (Harris, J., dissenting). The critical flaw in this analysis is, as noted earlier, that a "fraudulent transfer" is *not* a common-law fraud in the first instance. The *Bankfirst* dissent also cites *Hansard Constr. Co. v. Rite Aid of Florida., Inc.,* 783 So. 2d 307 (Fla. 4th DCA 2001), *Bankfirst*, 842 So. 2d at 157 (Harris, J., dissenting), in which decision, as Freeman and Martinez note, the court held that money damages may be awarded under the UFTA, and specifically under Section 726.108(1)(c)(3), Florida Statutes (2002), which provision allows "[a]ny other relief the circumstances may require." 783 So. 2d at 308-09. But the issue addressed in *Hansard* was merely whether the trial court had erred in submitting a counterclaim under the UFTA to a jury, where the plaintiffs had sought money damages. *Id.* at 308. The court noted that, while "the other remedies set forth in the Act are equitable in nature," the "catchall provision [is] sufficiently broad to encompass the monetary judgment sought by appellants," which were held to be entitled to a jury trial. *Id.* at 308-09. Nothing in that decision even remotely suggests that fraudulent-transfer actions, even those in which a money judgment is sought, are anything other than mere creditor's remedies. The Third District's decision in *Mansolillo v. Parties by Lynn, Inc.,* 753 So. 2d 637 (Fla. 3d DCA 2000), on which Freeman and Martinez also rely, Initial Brief at 28, simply does not address the question whether a non-transferee may be held liable — under *any* theory — for a fraudulent transfer. And any intimation in *Mansolillo* has been discounted by the Third District's decision in *Beta Real Corporation,* as well as by that court's most recent decision on this issue, as will be set forth in the text.

company, Pearls and Gems," and the defendant was not alleged to have been "a recipient of fraudulently conveyed assets," the Third District, applying *Bankfirst*, *Beta Real Corporation* — and the district court's dismissal order in this case — held both that the foreign defendant was not subject to Florida jurisdiction *and* that Freeman's action had to be dismissed:

> It follows that there can be no jurisdiction over Danzas Taiwan for commission of a tortious act in Florida because there is no cause of action against Danzas Taiwan for conspiracy to engage in fraudulent transfers. As there is no cause of action, it is apparent that on remand there must be a dismissal....

Id. (citations omitted).[17]

As noted in *Danzas Taiwan,* the decisions of the Third and Fifth Districts on this issue are completely in accord with established precedent in other jurisdictions. Following the rationale of the *Franklin National Bank* decision, upon which the Third District relied in *Beta Real Corporation,* the Southern District of New York,

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[17] This precedent actually undoes the argument that there exists a claim for conspiracy to commit a fraudulent transfer under Florida law. "[A] cause of action for civil conspiracy exists ... only if 'the basis for conspiracy is an independent wrong or tort which would constitute a cause of action if the wrong were done by one person.'" *Blatt v. Green, Rose, Kahn & Piotrkowski*, 456 So. 2d 949, 951 (Fla. 3d DCA 1984) (citation and footnote omitted); *accord, e.g., Rivers v. Dillards Dept. Store, Inc.,* 698 So. 2d 1328, 1333 (Fla. 1st DCA 1997). "The general rule is that 'the gist of a civil action for conspiracy is not conspiracy itself but the civil wrong which is done pursuant to the conspiracy and which results in damage to the plaintiff.'" *Balcor Prop. Mgmt., Inc. v. Ahronovitz,* 634 So. 2d 277, 279 (Fla. 4th DCA 1994) (citation omitted). Thus, "[a]n act which does not constitute the basis for an action against one person cannot be the basis for a civil action for conspiracy." *Kent v. Kent,* 431 So. 2d 279, 182 (Fla. 5th DCA 1983) (citations omitted). Because a non-transferee has no "liability" in connection with a fraudulent transfer, there can be no claim for conspiracy to commit a fraudulent transfer.

in addressing a claim identical to that advanced by Freeman and Martinez, *i.e.,* one seeking to impose liability on a bank for a fraudulent transfer by another, refused to recognize the claim under New York law:

> The fourth cause of action contains a claim against [the bank] for aiding and abetting a fraudulent conveyance. We do not believe it possible to state such a claim. In a fraudulent conveyance action, the plaintiff attacks the conveyance seeking to reclaim the property conveyed. The appropriate relief is to void the conveyance. An aiding and abetting claim against someone other than a transferee is meaningless in these circumstances.

Atlanta Shipping Corp., Inc. v. Chemical Bank, 631 F. Supp. 335, 348 (S.D.N.Y. 1986) (citation omitted), *aff'd,* 818 F.2d 240 (2d Cir. 1987). The New York Court of Appeals also has rejected an effort to use that state's fraudulent-transfer statute against non-transferees. *Federal Deposit Ins. Corp. v. Porco,* 75 N.Y.2d 840, 552 N.E.2d 158, 159 (N.Y. 1990) (fraudulent-transfer statute allows no application of the conveyance only and "did not, either explicitly or implicitly, create a creditor's remedy for money damages against parties who, like defendants here, were neither transferees of the assets nor beneficiaries of the conveyance"; "[i]t is not for us to write such a remedy into the statute by judicial construction"). *See also Nastro v. D'Onofrio,* 2003 WL 21212215 *10-11 (D.Conn. May 16, 2003) (no cause of action against an attorney for aiding and abetting a fraudulent transfer under UFTA).[18]

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[18] *See also Morganroth & Morganroth v. Norris, McClaughlin & Marcus, P.C.,* 2003 WL 21246438 *7-8 & n.4 (3d Cir. May 30, 2003) (allowing plaintiff to plead claim of aiding and abetting tort of "creditor fraud" against law firm that assisted client in unlawful efforts to avoid execution, but noting that law firm could not be sued under UFTA).

Freeman and Martinez fault the Fifth District's reliance in *Bankfirst* on *Mack v. Newton,* 737 F.2d 1343 (5th Cir. 1984), and *Forum Ins. Co. v. Devere Ltd.,* 151 F. Supp. 2d 1145 (C.D. Cal. 2001), 2003 WL 1793377 (9th Cir. Apr. 2, 2003), because the state fraudulent-transfer statute addressed in those decisions does not authorize money damages as a remedy. Initial Brief at 29-30. This is an illusory distinction. In *Mack,* the Fifth Circuit flatly held that the Texas fraudulent-transfer statute "does not provide for recovery other than recovery of the property transferred or its value from one who is, directly or indirectly, a transferee or recipient thereof." 737 F.2d at 1361. The court's analysis did not turn on whether money damages might theoretically be available in a given case to accomplish that end:

> The Texas statute does not purport to do anything other than render the transfer "void" with respect to designated persons. It operates against the title of an "innocent" transferee who was not paid value just as fully as against the title of a transferee who has participated in a fraud. It does not purport to vary its operation on the basis of participation in wrongdoing or the lack thereof. Nowhere does it purport to prohibit any transfers or to render the making or receiving of them illegal or wrongful. The statute contains no words such as "damages" or "liability" or "actionable."

Id.; *accord, e.g., Federal Deposit Ins. Corp. v. White,* 1998 WL 120298 *2 (N.D. Tex. 1998). The district court in *Forum Insurance Company* followed the same analytical approach:

> [B]y its terms, UFTA allows only equitable remedies such as avoidance, attachment, an injunction, or appointment of a receiver. Upon finding an UFTA violation, the court may cancel the transfer or impose a lien against the transferred property, but it may not award damages….

> ... The legislative theory is cancellation, not the creation of liability for the consequences of a wrongful act.

151 F. Supp. 2d at 1148-49 (citations omitted).[19]

Indeed, the federal district court's ruling is completely consistent with the United States Supreme Court's definitive precedent on aiding and abetting liability. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164 (1994), the Court addressed whether aiding and abetting liability can attach under Section 10(b) of the Securities Exchange Act to "those who do not engage in the manipulative or deceptive practice, but who aid and abet the violation." *Id.* at 166-167. After concluding that the statutory text does not create a cause of action for aiding and abetting, *id.* at 171-77, the court declined "to extend liability beyond the scope of conduct prohibited by the statutory text." *Id.* at 177. As the court succinctly stated:

> To be sure, aiding and abetting a wrongdoer ought to be actionable in certain instances. The issue, however, is *not whether imposing private*

[19] Both the federal district court (R8:247:5-6) and *Bankfirst* analogized the issue to cases arising under the fraudulent-transfer provisions of the Bankruptcy Code, 11 U.S.C. § 550. In *Elliott v. Glushon,* 390 F.2d 514 (9th Cir. 1967), which was cited by the district court, the court held that the fraudulent-transfer provisions of the Bankruptcy Code were "not intended to render civilly liable all persons who may have contributed in some way to the dissipation of those assets." *Id.* at 516. In *Mack v. Newton,* the Fifth Circuit followed *Elliott* in construing the fraudulent-transfer provisions of *both* the Bankruptcy Code and Texas law. 737 F.2d at 1357-61. The *Forum Insurance Company* decision rejected the precise argument that Freeman and Martinez make with respect to the *Elliott* decision. 151 F. Supp.2d at 1149 & n.9. As the court noted in *Mack,* "the Texas statute, like the Bankruptcy Act, does not provide for recovery other than recovery of the property transferred or its value from one who is, directly or indirectly, a transferee or recipient thereof." 737 F.2d at 1361.

> *civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute.*

Id. (citation omitted; emphasis added).[20]

The UFTA is yet more pellucid. The very purpose of the statute and its very nature counsel against creating "liability" for aiders and abettors, when the statute does not create a tort cause of action in the first instance. Freeman and Martinez, who concede that they cannot bring a fraudulent-transfer action against First Union, should not be heard to ask for the creation of aiding and abetting liability against First Union — because to do that would be to rewrite the statute by creating a hitherto-unknown cause of action that would attach liability to one who allegedly assists in the perpetration of a non-tortious act.

[20] The Court cited, with approval, the *S. Prawer* decision upon which the Third District relied in *Beta Real Corporation.* 511 U.S. at 181-82.

CONCLUSION

Based on the foregoing, First Union requests the Court to answer the Eleventh Circuit's question in the negative, *i.e.,* that there is no cause of action under Florida law for purportedly aiding and abetting a fraudulent transfer when the alleged aider and abettor is not a transferee.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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