IN THE SUPREME COURT OF FLORIDA

Case No.

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

Appellants,

vs.

FIRST UNION NATIONAL BANK, a national banking association, f/k/a First Union National Bank of Florida,

Appellee.

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

INITIAL BRIEF OF APPELLANTS

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INTRODUCTION

This action arises out of the Pyramid/Ponzi scheme operated by the principals of Unique Gems International Corp. and the substantial assistance which defendants First Union National Bank and Hector Ponte, its branch manager, rendered to both the operation of that scheme and to the looting of Unique Gems by its principals for their own personal benefit. The plaintiffs, Lewis B. Freeman, the court-appointed Receiver for Unique Gems, and Lucy Martinez, one of the assemblers/creditors of Unique Gems, sued First Union and Ponte for, among other things, aiding and abetting the principals of Unique Gems in wire transferring nineteen million ($19,000,000) dollars to a Liechtenstein bank account for the personal benefit of the principals. (R2-46-36-42,45-46).[1] The Receiver, on behalf of and for the ultimate benefit of the creditors of Unique Gems, also sued the defendants for their negligence in facilitating the continued operation of the Ponzi scheme even after they knew that Unique Gems' business was illegal and in allowing the looting. (R2-46-32-36).

The federal district court dismissed these claims with prejudice based on its findings that the aiding and abetting claim did not state a cause of action under Florida law and that the receiver did not have standing to bring the negligence claim. The plaintiffs appealed these rulings to the Eleventh Circuit. That Court reversed the

[1]Plaintiffs have since resolved their claims as to Mr. Ponte and he is no longer involved in this appeal.

dismissal of the negligence claim holding that the lower court should have allowed plaintiffs to amend it to assert that it was brought by the class of assemblers/creditors. The Eleventh Circuit also certified to this Court the question of whether Florida recognizes a cause of action for aiding and abetting a fraudulent transfer.[2]

STATEMENT OF THE CASE AND FACTS

Since this is still an appeal from a dismissal of a complaint for failure to state a cause of action, this Court must accept the facts pled in that complaint as true, construe them in a light favorable to plaintiffs, and limit its consideration to the pleadings and exhibits attached thereto. *Covad Communications Co. v. Bellsouth Corp.*, 299 F.3d 1272, 1279 (11th Cir. 2002); *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000); *Dept. Of Health and Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091, 1094 (Fla. 2003). Accordingly, plaintiffs here set forth the facts as alleged in their Second Amended Complaint.

A. The Ponzi scheme in general

In 1995, the principals/managers of Unique Gems began marketing the company as a manufacturer and distributor of jewelry. (R2-46-3). They solicited principally Dade and Broward County residents to act as home assemblers of the jewelry – i.e.,

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[2]It should be noted that this issue is also currently pending in the case of *Freeman v. Dean Witter Reynolds, Inc.*, Case No. 2D01-4195, 4202, Second District Court of Appeal of Florida.

to string magnetic hematite and other semi-precious stones into necklaces. (R2-46-3). These assemblers entered into "production agreements" with Unique Gems under which they paid a "deposit" of three thousand ($3,000) dollars for each basic jewelry kit[3] and, upon completion and return of the assembled jewelry, were promised the return of their deposit plus an additional one thousand eight hundred ($1,800) dollars per kit. (R2-46-3).

The Unique Gems principals justified these excessive payments by asserting that the hematite beads in the necklaces had magical powers that would cure many of life's ailments. (R2-46-3). These claims were, of course, false. (R2-46-3). In addition, the vast majority of the assembled necklaces did not even have clasps that would allow them to fit over an average person's head. (R2-46-3-4). Thus, the jewelry – for which the assemblers were paid a profit of one thousand eight hundred ($1,800) dollars – was actually worthless in the marketplace. (R2-46-3-4).

The principals of Unique Gems knew this and made little to no effort to distribute and sell the necklaces. (R2-46-4). Rather, once received back from the assemblers, the necklaces were often consigned to barrels at Unique Gems' warehouse, where the pieces simply sat unsorted. (R2-46-4).

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[3]Unique Gems' cost for each of these basic kits was only about one hundred ($100) dollars. (R2-46-3).

The Unique Gems principals made their scheme work by using Multi-Level Marketing – a layered-distribution network of assemblers. (R2-46-4). They promised additional payments to existing assemblers for recruiting other individuals to "deposit" their funds with the company and become new assemblers. (R2-46-3). The funds from these new investors were then used to repay the initial assemblers. (R2-46-3). The illusion of profits so created induced new individuals to invest in the company by becoming assemblers and older assemblers to re-invest. (R2-46-4). Thus, the amount of monies taken in was expanded. (R2-46-4).

Before the Florida state authorities shut the scheme down in early March 1997, approximately fifteen thousand (15,000) individuals and entities, including predominantly the assemblers, had been victimized. (R2-46-4). Unique Gems was taking in over one million ($1,000,000) dollars daily from assemblers who waited hours at the company's office for the opportunity to deposit their monies. (R2-46-4). After state authorities filed a lawsuit and obtained an injunction, including a freeze on further transfers of assets, the Unique Gems principals fled the country, leaving their victims with damages amounting to more than forty million ($40,000,000) dollars. (R2-46-4-5). [4]

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[4]These principals, Harry Abonde, Kazimerez Pac, Enrique Pirela and Carlos Rodiles, have since been indicted – and Mr. Pirella has actually been sentenced to fourteen years in prison – for one count of conspiracy to commit mail and wire fraud, seven counts of mail fraud, two of wire fraud, one of conspiracy to commit

B. First Union's participation in the scheme

Having received over ninety million ($90,000,000) dollars from their victims, Unique Gems' principals were faced with the difficult prospect of finding cooperative bankers to help them launder, divert, and ultimately steal the proceeds of the scheme. (R2-46-5). They found what they needed at defendant First Union. (R2-46-5).

Enrique Pirella, the president of Unique Gems, opened an account at First Union's Stadium branch in June 1996. (R2-46-5). He soon met with defendant Hector Ponte, the branch manager there, and explained Unique Gems' operations – including that the company had only incorporated the previous year; that it did business out of a single location where it had a small showroom, offices and a warehouse; that the depositors were paid an $1,800 return for stringing beads; and, that the beads had healing powers. (R2-46-5). By his own admission, Ponte did not believe, and did not think that even Pirella believed, that the business was legitimate. (R2-46-5).

After opening this account, the Unique Gems principals used it as the company's primary bank account and the small Stadium branch as the place where

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money laundering and six of money laundering. *United States of America v. Harry Abonde, Kazimerez Pac, Enrique Pirela and Carlos Rodiles*, Case No. 02-20498, U.S. District Court, Southern District of Florida. The money laundering counts specifically identify wire transfers by First Union to Liechtenstein as some of the illegal acts.

they chose to physically conduct their banking business. (R2-46-5, 6). Over eighty-one million ($81,000,000) of the ninety million ($90,000,000) dollars that Unique Gems took in flowed through the First Union account. (R2-46-6-7). Virtually all of this account activity consisted of three thousand ($3,000) dollar deposits from assemblers, false profits paid out to certain older assemblers, and the wire transfer of millions of dollars overseas to a known money laundering haven. (R2-46-6-7).[5]

The amount of Unique Gems' deposits at the Stadium branch was extraordinary. (R2-46-7). This branch had less than fifty million ($50,000,000) dollars in deposits from all of its other customers combined. (R2-46-7). Yet, this was less than the sum deposited by Unique Gems alone. (R2-46-7). Further, unlike any other customer, Pirella, Unique Gems' president, regularly showed up in person with bags overflowing with money – he expressly refused to use armored car services. (R2-46-7, 36, 40). The volume of Unique Gems' cash deposits was so high that the bank's vault teller and its other personnel could not handle other accounts. (R2-46-7). They had to devote a great deal of their time to simply counting the Unique Gems cash. (R2-46-5).

[5]The Stadium branch was also swarmed by hordes of investors who came there to cash their checks from Unique Gems. (R2-46-5-6). Ponte spoke to these investors and learned that they were encouraged and rewarded financially for recruiting new assemblers. (R2-46-5-6).

In addition, in a red flag best appreciated by a bank, Unique Gems' deposits grew exponentially. (R2-46-9). Average daily balances in its account in the six-month period between September 1996 and March 1997 grew from fifty-four thousand ($54,000) dollars to in excess of six million ($6,000,000) dollars:

September 1996	-	$ 54,004
October 1996	-	$ 144,101
November 1996	-	$ 445,315
December 1996	-	$ 674,478
January 1997	-	$2,962,189
February 1997	-	$5,206,602
March 1997	-	$6,623,337

(R2-46-9). The volume of these deposits and their exponential growth would have suggested to any reasonable banker the need for further inquiry given *inter alia* Unique Gems' short operating history, single business location, lack of deposits from sales of the jewelry, and the lack of a provided explanation for the sudden increase. (R2-46-9). First Union was also essential in enabling the Unique Gems' principals to secure the company's assets for themselves. From October 1996 through March 1997, First Union processed a series of seventy-four (74) separate wire transfers for these individuals, transferring nineteen million ($19,000,000) dollars to a bank account in Liechtenstein, a well known money-laundering haven with secretive banking laws and

practices. (R2-46-7, 26).[6] This Liechtenstein bank account was in the name of Pearls and Gems. (R2-46-7, 26). It was owned and\or controlled by the Unique Gems principals and was used to skim and divert Unique Gems' money offshore and to effectuate the theft of these funds from Unique Gems by these individuals for their own personal use. (R2-46-7, 26-27).[7]

The wire transfers grew to such a volume that the Unique Gems principals sometimes requested that one million ($1,000,000) dollars or more be sent to Liechtenstein at a time. (R2-46-7). First Union complied even though this was in violation of its own regulations which limited wire transfers to two hundred fifty thousand ($250,000) dollars per day – with the express approval and assistance of Ponte and other First Union personnel, the Unique Gems' deposits were structured into separate wires in order to circumvent this regulation. (R2-46-7-8, 35-36).

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[6]First Union processed thirty-two of these wire transfers totaling approximately seven million six hundred thousand ($7,600,000) dollars before Unique Gems had even signed a standard Funds Transfer Agreement. This was a violation of First Union's own procedures. (R2-46-35).

[7] The transfers to Pearls and Gems were supposedly payment for the purchase of beads. However, these transactions were fraudulent. The Unique Gems principals had Pearls and Gems buy beads at a usual price of one (.01) to three (.03) cents per bead and then resell them to Unique Gems, without adding any additional value or service whatsoever, at the inflated price of thirty-one (.31) cents per bead. (R2-46-26-27).

C. First Union knew of the fraud being committed and continued to facilitate it.

First Union and Ponte knew, or should have known but for their willful blindness, that there was no legitimate justification for this wiring of millions of dollars of Unique Gems' funds out of the United States to a notorious money-laundering center such as Liechtenstein. (R2-46-8). In addition, First Union knew that Unique Gems business was illegal and that the company's assemblers were encouraged and rewarded financially for recruiting new assemblers. (R2-46-5-6). Ponte and First Union were also aware, or should have been but for their willful blindness, that the vast majority, if not all, of Unique Gems' income was from assembler deposits and not from the sale of the assembled jewelry or capitalization infused by Unique Gems' owners – Pirella himself deposited Unique Gems' funds in person, much of which was in cash, at the Stadium branch and those deposits did not contain any significant checks (nor were there wire transfers made into the Unique Gems account) from any distributor who was selling Unique Gems jewelry. (R2-46-6). Thus, First Union and Ponte knew, or should have known but for their willful blindness, that Unique Gems' business was an illegal Ponzi/pyramid scheme. (R2-46-6). [8]

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[8] At the very least, First Union and Ponte should have known this. Statutory and regulatory requirements, industry standards and even First Union's own internal rules required that the defendants get to "know your customer." (R2-46-6). These rules required that First Union and Ponte conduct a reasonable inquiry to determine whether their customer's business operations, and the proceeds of those

Notwithstanding this knowledge, First Union and Ponte did not make any disclosure to banking regulators, law enforcement agencies, or even the assemblers who frequented the Stadium branch as to any of the circumstances concerning Unique Gems' "business" that had come to their attention. (R2-46-8). This silence by First Union and Ponte violated federal banking statutes and regulations which required that the defendants timely file Currency Transaction Reports (CTR's) and Suspicious Activity Reports (SAR's) to document Unique Gems' large cash deposits, wire transfers of millions of dollars to a known money-laundering center, and other highly suspicious activities. (R2-46-8-9). First Union, however, did not file any SARs until March 25, 1997 when it filed one "for information purposes only." (R2-46-34). This was not only after the company had been closed down by court order, it was after the Miami Herald had published an article reporting that Unique Gems was an alleged Pyramid/Ponzi scheme. (R2-46-34).

Further, First Union and Ponte *never* stopped providing banking services to Unique Gems, including clearing deposits in its account and sending its wire transfers

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operations, constituted an illegitimate or illegal scheme. (R2-46-6). However, First Union and Ponte completely and utterly failed to follow these regulations and took no steps to investigate Unique Gems or its managers to determine whether the company's business and operations were legitimate. (R2-46-8). Indeed, as shown above, First Union and Ponte either knew about the illegality at Unique Gems and cooperated anyway or, at the very least, cast a blind eye to the red flags raised by the facts that actually came to their attention without their ever conducting an investigation. (R2-46-6).

to Liechtenstein. (R2-46-8). First Union did not even close the Unique Gems account until July 24, 1997 – months after the company itself was closed down by court order on March 5. (R2-46-8, 34).

Rather, First Union willingly lent its name to Unique Gems to add credibility to the Ponzi scheme. (R2-46-8, 41). It provided letters to vendors, prospective vendors, and other banks vouching for Unique Gems. (R2-46-8, 41). These letters facilitated and continued the scheme perpetrated by Unique Gems' managers. (R2-46-8, 41).

First Union's guilt is clearly shown by the actions it took after the State of Florida discovered the fraud. After the State served a subpoena on First Union on February 10 and then filed a lawsuit against Unique Gems, the bank finally considered closing the account. (R2-46-9, 33). But, despite the obvious illegality of Unique Gems' operations by that time, First Union did not act to immediately terminate the relationship; rather, it sent a letter indicating that the company account would be closed in ten days. (R2-46-9, 33-34).

Even then, the account was not closed. (R2-46-34). Rather, Pirella and Ponte agreed that Unique Gems would be allowed to continue using its account and the bank's wiring services so as to not disrupt the company's operations. (R2-46-9-10, 34). True to its word, First Union did nothing to restrict Unique Gems' access to its banking services, including its wire transfer services. (R2-46-10). Between the sending of its "ten day letter" and the freezing of the account by issuance of the court-

ordered injunction on March 5, 1997, First Union wired four million six hundred thousand ($4,600,000) dollars to Liechtenstein for Unique Gems' principals. (R2-46-10). During this same time frame, the victims of the fraud suffered another seventeen million ($17,000,000) dollars in damages by First Union's processing and clearing of additional deposits. (R2-46-10).

On the same day that the injunction was issued, First Union sent another letter to Unique Gems indicating that the account would not be closed for another thirty days. (R2-46-10). Even after the injunction was entered, First Union cooperated with Unique Gems' managers and wire transferred another two million ($2,000,000) dollars to Liechtenstein. (R2-46-10).

In sum, First Union assisted Unique Gems' principals in stealing from thousands of victims, including some of First Union's own customers, and from Unique Gems itself. (R2-46-10). First Union and Ponte were key players in the Unique Gems scheme. (R2-46-10). Without them the Unique Gems principals would not have been able to secure the proceeds of their theft for their own personal benefit and out of the reach of Unique Gems' creditors. (R2-46-10). Accordingly, as a direct result of First Union's and Ponte's conduct, the defrauded assemblers suffered millions of dollars in uncompensated damages. (R2-46-10).

D. Course of proceedings.

1. Litigation begins.

After the State closed down Unique Gems' operation, Lewis B. Freeman was appointed by the Miami-Dade County Circuit Court as the Receiver of the company. (R2-46-1). Mr. Freeman, as Receiver, and Lucy Martinez, an assembler, individually and on behalf of all those who had purchased jewelry assembly kits and had a claim for uncompensated damages, sued First Union and Ponte in Florida state court. (R1-1-Ex. A-27-48). Their three count complaint alleged claims sounding in RICO, conspiracy and liability for late returned checks. (R1-1-Ex. A-42-47).

Before defendants were served, plaintiffs amended their complaint. (R1-1-Ex. A-1-4, 5-26). The amendments corrected First Union's name, dropped the RICO count, and changed the conspiracy claim to one for civil conspiracy to commit fraudulent transfers. (R1-1-Ex. A-5, 19-22). Once served, defendants removed the action to the federal district court on the basis of federal question jurisdiction (the Edge Act), moved to dismiss Count I of the amended complaint and filed an answer. (R1-1-1-5; R1-2,4). The court denied the motion to dismiss. (R-1-23).

2. The Second Amended Complaint.

Thereafter, plaintiffs were granted leave to amend and filed a Second Amended Complaint. (R2-46). This complaint added five additional counts, including one for negligence and another for aiding and abetting fraudulent transfers. (R2-46-32-42).

Count VI, the negligence count, which was brought by only the Receiver against First Union, alleged that First Union owed common law duties of care to the creditors of Unique Gems, including the duty to withhold the provision of banking services to any customer that it knew either from actual knowledge or by virtue of willful blindness was engaged in illegal conduct and to not engage in fraudulent transfers with bank customers. (R2-46-32-33). It then alleged that First Union negligently breached these duties by keeping the Unique Gems account open and making wire transfers for the company's principals even after it had actual knowledge that Unique Gems' business constituted an illegal Ponzi/pyramid scheme. (R2-46-33-34). The Receiver also specified the following acts of negligence:

> (A) Failing to exercise due diligence in investigating the legality of the business of UGI, the bank's customer, including visiting the UGI premises, requiring financial statements, and confirming the representations made by UGI's President rather than relying solely on him;
>
> (B) Failing to complete a reasonable investigation of UGI's legitimacy after facts came to First Union's attention that put it on inquiry notice of illegal conduct;
>
> (C) Failing to timely file Suspicious Activity Reports;

> (D) Failing to refer UGI to law enforcement authorities and/or banking regulatory authorities;
>
> (E) Failing to establish and maintain an effective Bank Secrecy Act compliance program, including the conduct of adequate audits, supervision by First Union's BSA compliance officer(s), the preparation of written training materials available for reference in the branches, detection of branch irregularities, and especially, the lack of adequate training of First Union's personnel, including both Ponte and Joan Anderson, in the following subjects: compliance with the BSA, the duty to file SAR's, a bank's duty to know its customer, the need for monitoring of account activity, and the duty to immediately terminate banking services to a customer engaged in criminal conduct;
>
> (F) Failing to follow internal First Union banking policies and practices, including: (1) execution of a standard Funds Transfer Agreement prior to providing wire transfer services, when UGI did not sign such an agreement until January 24, 1997, after First Union had already processed 32 wire transfers totaling approximately $7.6 million; (2) assisting UGI's principals in the structuring of wire transfers to circumvent limitations of authorization authority of bank officers, where First Union employees at the Stadium Branch circumvented internal verification limits of $250,000 on 18 different dates; and (3) not migrating UGI to First Union's centralized management services and instead, providing services directly at the branch level, including acceptance of large deposits rather than requiring the use of armored car services and performing wire transfers at the branch rather than through the bank's central wire service.

(R2-46-34-36). Finally, the Receiver alleged that these negligent acts proximately caused damages to the creditors in that Unique Gems' principals were able to wire

transfer six million six hundred thousand ($6,600,000) dollars to Liechtenstein between February 10 and March 5, 1997. (R2-46-36).

Count VII, on the other hand, alleged that First Union and Ponte, knowing that Unique Gem's principals were engaging in illegal activities, provided substantial assistance to the Unique Gems principals in, among other things, making fraudulent transfers. (R2-46-36-42). These fraudulent transfers were specifically identified as the wire transfers of monies to Liechtenstein which looted Unique Gems. (See R2-46-36, 37).

3. The court dismisses the claims with prejudice.

Defendants moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the added counts, including VI and VII, for failure to state a claim upon which relief could be granted. (R2-48). The lower court granted this motion over one year after it had been filed. (R8-247). The court dismissed Count VI with prejudice on the sole basis that the receiver did not have standing to bring the claim for negligence on behalf of the creditors. (R8-247-8-10, 13). It dismissed Count VII with prejudice on the sole basis that Florida law did not recognize a cause of action for aiding and abetting fraudulent transfers. (R8-247-10-12, 13). In so ruling as to Count VII, the lower court relied on two major premises: (1) that the Uniform Fraudulent Transfer Act (UFTA) limits its available remedies, only permitting creditors to set aside fraudulent transfers; and (2)

the fact that no Florida case had yet recognized aiding and abetting liability for a violation of the UFTA. (R8-247-11-12).

Plaintiffs moved for reconsideration and for leave to amend their complaint. (R9-255). They expressly pointed out that the lack of standing identified by the court could be corrected by, among other things, allowing Ms. Martinez and the assembler/creditor class to themselves assert the negligence claim which the Receiver had originally pled. (R9-255-6). The lower court denied this motion finding, without explanation, that no amendment would cure the defects noted. (R-258-1-2).

Thereafter, plaintiffs moved, pursuant to Fed. R. Civ. P. 54 and 58, for entry of a final judgment as to the dismissed counts. (R9-261). The lower court granted this motion and, entered final judgment in favor of defendants as to Counts IV, V, VI and VII. (R11-368). It later amended its Order to expressly provide that:

> Pursuant to Fed. R. Civ. P. 54 and 58, this Court's Order granting Defendants' Motion to Dismiss, issued January 2, 2002, for good cause shown and without just reason for delay, the Court enters FINAL JUDGMENT in favor of Defendants, and against Plaintiffs, as to Counts IV, V, VI and VII of the Second Amended Complaint herein.

(R11-374). Plaintiffs appealed these orders to the Eleventh Circuit Court of Appeals. (R11-376).

4. The Eleventh Circuit reverses and certifies the aiding and abetting issue to this Court.

After full briefing and argument, the Eleventh Circuit issued its opinion on this appeal. That opinion states, in pertinent part, "[b]ecause we are unsure of whether Florida law contemplates a cause of action for aiding and abetting a fraudulent transfer, we certify the question to the Florida Supreme Court." (Opinion, p. 2). The Court reached this conclusion based on the conflicting guidance from the district courts of appeal on the nature of Florida's Uniform Fraudulent Transfer Act (FUFTA), its remedies, and its relationship to the Bankruptcy Code. (Opinion, pp. 3-7). As the Court explained:

> The district court concluded that the Florida Supreme Court would not recognize a cause of action for aiding and abetting fraudulent transfers, noting . . . that Florida's Uniform Fraudulent Transfer Act ("FUFTA"), Fla. Stat. §§ 726.101 *et seq.* (2002), provisions defining fraudulent transfers are similar to 11 U.S.C. §548 of the Bankruptcy Code. . . . Based on this similarity, the district court surmised that FUFTA, like the fraudulent transfer provision of the Bankruptcy Code, is not a source of liability; rather, it only allows creditors to set aside fraudulent transfers made to transferees under a theory of cancellation. This interpretation has received some support from Florida's Fourth District Court of Appeals, which has explained that: "[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 a 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." *Yusem v. South Florida Water Mgmt. Dist.*, 770 So.2d 746, 749 (Fla. Dist. Ct. App. 4th Dist. 2000).
>
> However, despite the similarities noted by the district court, FUFTA differs from the bankruptcy model in several important respects. While the Bankruptcy Code limits remedies to the recovery of the transferred property or its value, 11 U.S.C. § 550(a) (2001), FUFTA clearly provides additionally for "any other relief the circumstances may require." Fla. Stat. § 726.108 (2002). This catchall phrase grants the court broad equitable powers. *See Invo Florida, Inc. v. Somerset Venturer, Inc.*, 751 So. 2d 1263, 1267 (Fla. Dist. Ct. App. 3d Dist. 2000). Remedies under FUFTA are, therefore, not limited to setting aside a transfer or forcing disgorgement. *See Hansard Constr. Corp. v. Rite Aid of Florida, Inc.*, 783 So.2d 307, 308 (Fla. Dist. Ct. App. 4th Dist. 2001) (holding that FUFTA's catchall phrase allows plaintiffs to seek money damages). In addition, FUFTA unambiguously states that all common law remedies supplement its application. *See Invo*, 751 So.2d at 1267 (citing Fla. Stat. §726.111 (2002)). Together these provisions suggest that Florida's fraudulent transfer laws are much less circumscribed outside the bankruptcy context. And in contrast to the district court's interpretation, Florida's Third District Court of Appeals has treated an action for fraudulent transfer as a tort. *See id.* at 1265.

(Opinion, pp. 4-7) (parentheticals and footnotes omitted). Accordingly, the Court concluded:

> Because of the conflicting guidance from the intermediate appellate courts on the nature of FUFTA, its remedies, and its relationship to the Bankruptcy Code, we find it difficult to predict how the Florida Supreme Court would decide this issue. *We, therefore, conclude that this case involves unanswered questions of state law that are determinative*

> *of this appeal* and, having found no clear, controlling precedent in the decisions of the state's highest court, *we certify the following question of law to the Supreme Court of Florida for instructions: 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?*

(Opinion, p. 7).

The Eleventh Circuit also ruled that:

> the Creditor Plaintiffs . . .should have been given the opportunity to cure the standing defect as to any claim they may have on behalf of Ms. Martinez and the class of creditors harmed by Unique Gems' Ponzi scheme. Accordingly, we conclude that the district court erred in denying as futile the Creditor Plaintiffs' motion to amend the complaint. *See St. Charles Foods,* 198 F.3d at 822. We, therefore, REVERSE with instructions that the Creditor Plaintiffs be granted leave to amend Count VI of the complaint. We AFFIRM the district court's denial with regard to Freeman.

(Opinion, p. 9).

SUMMARY OF ARGUMENT

Florida has recognized aider and abettor liability since 1939. The courts of this state have also expressly recognized conspiracy to commit fraudulent transfers as a valid cause of action. Conspiracy and aider and abettor liability are very similar. Since the courts accept one, it is only reasonable that this Court accept the other.

Further, there is no reason why one who is not a transferee cannot be liable for either a conspiracy to effect a fraudulent transfer or for aiding and abetting such a transfer. Damages are available as remedy under Florida's UFTA and the UFTA accepts all common law principles as supplementing it. Further, the UFTA is itself a declaration of the public policy of this state that transfers in derogation of its terms are wrongful. This Court should not immunize from liability those individuals and entities who make such transfers possible.

All of these factors, singly and in combination, establish that this Court should recognize a cause of action for aiding and abetting a fraudulent transfer, even when the alleged aider-abettor is not a transferee.

ARGUMENT

Based on the reasons and authorities set forth below, it is respectfully submitted that this Court should answer the certified question in the affirmative and hold that, under Florida law, there is a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee.

This Court should recognize a cause of action for aiding and abetting a fraudulent transfer.

A. Florida recognizes aider and abettor liability.

This Court first recognized civil liability for aiding and abetting in 1929 in *Ft. Meyers Development Corp. v. J.W. McWilliams Co.,* 122 So. 264 (Fla. 1929). In that case, a promoter of a corporation had represented to investors in the corporation that the property the corporation was to purchase was priced at $2,128,704.30, whereas it was actually priced at $1,773,920.25. The promoter did this so he could realize a secret profit. After the corporation was formed and the property purchased, the seller of the property sued the corporation to foreclose his purchase money mortgage. The corporation raised as an affirmative defense and counterclaim its assertion that the seller had aided and abetted the promoter in committing fraud upon them. The Florida Supreme Court held that these allegations were sufficient to state a cause of action:

> 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.

Ft. Meyers Development Corp., 122 So. at 268.

Since 1939, the Courts of this State have repeatedly recognized and approved the concept of aider and abettor liability. *See, e.g.,Williamson v. Answer Phone of Jacksonville, Inc.*, 118 So. 2d 248 (Fla. 1st DCA 1960); *Kilgus v. Kilgus*, 495 So. 2d 1230 (Fla. 5th DCA 1986), *review denied*, 504 So. 2d 767 (Fla. 1987); *Allerton v. State, Dept. of Insurance*, 635 So. 2d 36 (Fla. 1st DCA 1994), *review denied*, 639 So. 2d 975 (Fla. 1994); *Central Florida Investments, Inc. v. Levin*, 659 So. 2d 492 (Fla. 5th DCA 1995); *Nerbonne, N.V. v. Lake Bryan International Properties*, 689 So. 2d 322 (Fla. 5th DCA 1997). *See also, e.g., In re Caribbean K Line, Ltd.*, 16 Fla. L. Weekly Fed. D115 (S.D. Fla. 2002) (affirming a judgment against the defendant for aiding and abetting the breach of fiduciary duty owed to a corporation which occurred when the corporation's funds were improperly used, leaving the corporation insolvent).

In *Kilgus*, 495 So. 2d at 1231, the Court cited Section 876(b) of the *Restatement (Second) of Torts* as setting the standard for aiding and abetting liability. Section 876 states in full:

> s 876. PERSONS ACTING IN CONCERT
>
> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
> (c) 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.

Thus, the same Restatement section defines both conspiracy and aider and abettor liability. It is clear that the two concepts are very closely related.

B. Florida law recognizes a cause of action for conspiracy to effect fraudulent transfers.

The Florida Courts have in the past expressly allowed suits for conspiracy to effect fraudulent transfers. *See, e.g., Elie v. TFB Properties, Inc.*, 652 So. 2d 1194 (Fla. 4th DCA 1995); *Woodell v. TransFlorida Bank*, 717 So. 2d 108 (Fla. 4th DCA 1998); *Invo Florida, Inc. v. Somerset Venturer, Inc.*, 751 So. 2d 1263 (Fla. 3d DCA 2000). *See also Brunswick Corp. v. Vineberg*, 370 F.2d 605 (5th Cir. 1967); *Huntsman Packaging v. Kerry Packaging Corp.*, 992 F. Supp. 1439 (M.D. Fla. 1998).

For example, the Court held in *Elie*, 652 So. 2d at 1194, that "[t]he order dismissing Appellants' counterclaim for a failure to state a cause of action is reversed

in part insofar as it applies to allegations of a conspiracy to engage in a fraudulent scheme. See §§726.105-.107, Fla. Stat. (1993)." The Court reiterated this holding in *Woodell,* 707 So. 2d at 110. Then in *Invo Florida, Inc.*,751 So. 2d at 1266, the Court held that the elements required to prove a claim for conspiracy to effect fraudulent transfers were different from the breach of contract elements and, therefore, this count was not barred by the economic loss rule. In *Brunswick Corp. v. Vineberg,* 370 F.2d 605 (5th Cir. 1967), the Court held that officers of a transferor corporation sued for conspiracy to commit fraudulent transfer under §726.01, Fla. Stat., were not entitled to summary judgment in their favor; and, in *Huntsman Packaging,* the Court actually entered a money judgment against the president of the debtor/transferor corporation for civil conspiracy to execute a fraudulent transfer.

Further, as expressly shown by *Huntsman Packaging* and *Brunswick,* these conspiracy claims were allowed against parties who were not transferees of the property. This only makes sense. Certainly, a defendant may be liable for aiding and abetting a breach of fiduciary duty or conspiring to accomplish such a breach, even though that defendant is not himself the fiduciary. *See, e.g., Nerbonne,* 689 So. 2d at 325. Similarly, a defendant may be liable for aiding and abetting a corporate promoter in breaching the duties the promoter owes the corporation (or conspiring to do so) even though the defendant is not himself a promoter and does not even share in the profits gained. *Ft. Meyers Development Corp.,* 122 So. at 268. There is no

reason why a different rule should apply when the conspiracy or aiding and abetting claim is based on a fraudulent transfer.

Recently, however, the Fifth District held in *Bankfirst v. UBS Paine Webber, Inc.*, 842 So. 2d 155 (Fla. 5th DCA 2003), that there is no "cause of action 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."[9] The Court based

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[9]The Third District then followed this decision in *Danzas Taiwan, Ltd. v. Freeman,* 28 Fla. L. Weekly D 1163 (Fla. 3d DCA May 14, 2003). This decision is not yet final. Appellee will be moving for rehearing. The Third District also indicated in *Danzas Taiwan,* that the conclusion that there is no cause of action for conspiracy to engage in fraudulent transfers is supported by its decision in *Beta Real Corp. v. Graham,* 839 So. 2d 890(Fla. 3d DCA 2003). However, the Court held in *Beta Real Corp.*, only that a fraudulent conveyance is not a tort. 839 So. 2d at 891-892. That an act be classified as a "tort" is not a necessary predicate for a conspiracy. The Florida Courts clearly hold that a cause of action for civil conspiracy exists if "the basis for the conspiracy is an independent wrong *or* tort which would constitute a cause of action if the wrong were done by one person." *Liappas v. Augoustis,* 47 So. 2d 582 (Fla.1950); *Blatt v. Green, Rose Kahn & Piotrkowski*, 456 So. 2d 949, 951 (Fla. 3d DCA 1984); *Rivers v. Dillards Dept. Store*, 698 So. 2d 1328, 1333 (Fla. 1st DCA 1997). *See also Balcor Property Mgmt., Inc. v. Ahronovitz,* 634 So. 2d 277, 279 (Fla. 4th DCA 1994) (holding that "the gist of a civil action is not the conspiracy itself but the *civil wrong* which is done pursuant to the conspiracy and which results in damage to the plaintiff.*")*; *Kent v. Kent,* 431 So. 2d 279, 281 (Fla. 5th DCA 1983). Certainly, it must be admitted that under §§726.101 et seq., Fla. Stat., a fraudulent transfer is an independent wrong which constitutes a cause of action. The Florida legislature has so declared it. Section 726.105 provides in pertinent part that "a transfer made . . . is fraudulent as to a creditor . . . if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor of the debtor." Section 726.108 then provides a creditor the right to seek relief in court based on such a fraudulent transfer.

this conclusion primarily on federal cases, such as *Elliott v. Glushon,* 390 F.2d 514 (9th Cir.1967), *Klein v. Tabatchnick*, 610 F.2d 1043 (2d Cir.1979), and *Jackson v. Star Sprinkler Corp. of Florida*, 575 F.2d 1223 (8th Cir.1978), which interpret bankruptcy law. The bankruptcy statute applicable to avoidable transfers, 11 U.S.C. §550, however, expressly limits the remedies available to a bankruptcy trustee to recovery of the property or its value from the transferee:

> 550. Liability of transferee of avoided transfer
>
> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

By contrast, there is no such limiting language in the Florida UFTA. Rather, §726.108, Fla. Stat., expressly provides that the Court may grant *any* relief the circumstances may require:

> (1) In an action for relief against a transfer or obligation under ss. 726.101-726.112, a creditor, subject to the limitations in s. 726.109 may obtain:
>
> (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 in accordance with applicable law;
>
> (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 transferee, or both, of the asset transferred or of other property;
>
> 2. Appointment of a receiver to take charge of the asset transferred of or other property of the transferee; or
>
> *3. Any other relief the circumstances may require.*

Section 726.111 then expressly provides that:

> the principles of law and equity, including the law relating to principal and agent . . . supplement these provisions.

The Florida courts have held that these sections, and particularly §726.108, allow a claim for money damages, rather than simply an avoiding of the transfer. *Hansard Constr. Corp. v. Rite Aid of Fla., Inc.*, 783 So. 2d 307 (Fla. 4th DCA 2001); *Mansolillo v. Parties by Lynn, Inc.*, 753 So. 2d 637 (Fla. 3d DCA 2000). For example, the Court in *Hansard Construction Corp*. held that:

> Section 726.108(1)(c)(3) provides that a movant may, in addition to the remedies specifically enumerated, be entitled to "[a]ny other relief the circumstances may require." Despite the fact that the other remedies set forth in the [Uniform Fraudulent Transfer] Act are equitable in nature, we find this catchall provision sufficiently broad to encompass the monetary judgment sought by appellants. Section 726.112 provides that Florida's Uniform Fraudulent

> Transfer Act "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the law among states enacting it." At least one other jurisdiction which has considered the issue head-on concluded, as we have, that *a plaintiff may recover money damages against the* ***transferor*** *under the so-called catchall provision*, section 726.108(1)(c)(3), of the Uniform Fraudulent Transfer Act. *See Profeta v. Lombardo*, 75 Ohio App. 3d 621, 600 N.E.2d 360 (1991).

783 So. 2d at 308-309 (emphasis in original).

This Court held money damages were proper in an action based on a fraudulent transfer even before the adoption of the Uniform Fraudulent Transfer Act. *Winn & Lovett Grocery Co. v. Saffold Brothers Produce Co.*, 164 So. 681 (Fla. 1936). Further, as shown by *Hansard*, the creditor is not limited to seeking this relief from the transferee.

Although the *Bankfirst* Court does cite two cases that also interpret state fraudulent conveyance law – *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) – the Courts in those states have held that damages are not available as a remedy under their fraudulent transfer laws. As is shown above, this is materially different than the law in Florida. Therefore, these cases do not support the conclusion that Florida law does not – or should not – recognize a cause of action for conspiracy to commit a fraudulent transfer.

Rather, the recognition by the Florida Courts that damages are available as a remedy under Florida's version of the UFTA supports exactly the opposite conclusion – since damages are allowed as a remedy for fraudulent transfer, there is no reason such remedy cannot be imposed against a conspirator or an aider-abettor. Indeed, as a matter of public policy, damages are a needed, if not essential, remedy for effectuating Florida's policy as declared by the legislature's adoption of the Uniform Fraudulent Transfer Act.

The only Florida case *Bankfirst* cites in support of its conclusion is *Yusem v. South Florida Water Management Dist.*, 770 So. 2d 746 (Fla. 4th DCA 2000). However, that case also provides no support for the Fifth District's decision. In *Yusem*, the Court held that the debtor's wife, Mrs. Yusem, was not liable for a fraudulent transfer because she was not the debtor or a transferee, she did not benefit from the transfer, *and* there was no evidence that she conspired with her husband:

> The debtor in this case is Henry Yusem. The transferee is Henry Yusem's offshore trust account. Judith Yusem was not a debtor, because SFWMD had a judgment against Henry Yusem only; nor was she a transferee, because the money was only momentarily transferred into the joint account without her knowledge and there was no evidence that she benefitted from the transfer. *Additionally, there is a total absence of evidence that she conspired with Henry Yusem to defraud SFWMD.* Therefore, there is no basis to hold Judith Yusem liable.

770 So. 2d at 748. If the Court had believed that the only fact necessary to insulate Mrs. Yusem from liability was that she was not a transferee, it would not have held that the other facts, including that there was no evidence to establish a conspiracy, were necessary to show that there was "no basis to hold [her] liable." 770 So. 2d at 748.

Thus, once again it is clear that past Florida case law supports a cause of action for conspiracy to effect a fraudulent transfer, even against one who is not a transferee. Since it does and also allows suits based on aider and abettor liability, Florida courts should also allow an action for aiding and abetting a fraudulent transfer against one who is not a transferee. *See Halberstam v. Welch,* 705 F. 2d 472, 479 (D.C. Cir. 1983) (holding that fact that courts of District of Columbia had recognized civil conspiracy action suggested high probability that said courts would also recognize the tort of aiding and abetting).

C. Public policy supports the recognition of actions for conspiracy to effect and aiding and abetting fraudulent transfers.

In addition, this conclusion is supported by the public policy of this State. Section 726.105, Fla. Stat, declares that certain transfers made by debtors, including transfers made with the "actual intent to hinder, delay or defraud any creditor of the debtor," are *fraudulent* as their creditors. This is a declaration of the public policy of this State. *See May v. State,* 96 So. 2d 126, 127 (Fla. 1957); *Local No. 234 of United Ass'n of Journeymen v. Beckwith,* 66 So. 2d 818, 821 (Fla. 1953); *In re Adams'*

Estate, 185 So. 153, 157 (Fla. 1938); *Noble v. State,* 66 So. 153, 155 (Fla. 1914). *See also McElhanon v. Hing,* 728 P. 2d 256, 263 (Ariz. App. 1985), *aff'd in part, vacated in part on other grounds,* 728 P.2d 273 (Ariz. 1986); *Dalton v. Meister,* 239 N.W.2d 9 (Wis. 1976).

Since such transfers are contrary to the public policy of this State, one must ask why this Court would wish to encourage them by granting absolute immunity from liability to those who play an essential role in their effectuation. This was the very point Senior Judge Harris made in his dissent in *Bankfirst*:

> The issue in this case is whether lawyers and financial advisors who knowingly conspire with a client to defraud the client's creditors by intentionally hindering, delaying, or defrauding creditors of the debtor may be held liable in damages for the loss resulting to the creditors.
>
> * * *
>
> 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 it possible for his client to commit this fraud? Is it because one who wishes to defraud his creditors has a right to competent legal assistance to do so or is it merely a way of protecting the species? If it is only through the efforts of a lawyer that this fraud can be committed, such conduct should not go unrewarded.

842 So. 2d at 156.

As Judge Harris pointed out, there is no reason to reward such behavior and every reason to attempt to deter it by allowing an injured party to obtain full and

adequate relief. Thus, the circumstances require that an award of damages be allowed against such a party. Accordingly, this Court should recognize a cause of action for aiding and abetting a fraudulent transfer (and conspiracy to effect such) even where the defendant is not a transferee.

CONCLUSION

Based on the reasons and authorities set forth above, it is respectfully submitted that this Court should answer the certified question in the affirmative and hold that, under Florida law, there is a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 27th day of May, 2003 to: Elliot Scherker, Esq., Greenberg, Traurig, et al., 1221 Brickell Avenue, Miami, Florida 33131, Stephen B. Gillman, Esq., Gallway Gillman Curtis Vento & Horn, P.A., Suite 1100, Ocean Bank Building, 200 S.E. First Street, Miami, Florida 33131 and Stanley H. Wakshlag, Esq., Akerman, Senterfitt & Eidson, P.A., One S.E. Third Avenue, 28th Floor, Miami, Florida 33131.

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CERTIFICATE OF FONT SIZE

I hereby certify that the size and style of type used in this Brief is: Times New

Roman Font in 14 Point Type.

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