IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

IN RE: LANDAMERICA 1031 EXCHANGE SERVICES, INC. INTERNAL REVENUE SERVICE § 1031 TAX DEFERRED EXCHANGE LITIGATION	
Angela M. Arthur, as Trustee of the Arthur Declaration of Trust, dated December 29, 1988; Vivian R. Hays, an individual; Leapin Eagle, LLC, a limited liability company; Denise J. Wilson, an individual; Ann T. Robins, an individual; and Jane T. Evans, an individual; on their own behalf and on behalf of a class of others similarly situated, Plaintiffs, v. SunTrust Bank; Theodore L. Chandler, Jr.; G. William Evans; Stephen Conner; Ronald B. Ramos; Devon M. Jones; and Brenton J. Allen, Defendants.	Case No.: MDL No. 2054 Southern District of California C.A. No. 3:09-cv-00054 District of South Carolina C.A. No.: 8:09-cv-00415

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT SUNTRUST BANKS, INC.'S MOTION TO DISMISS

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I. INTRODUCTION

This case is a misguided attempt to hold SunTrust Banks, Inc. ("SunTrust") responsible for acts committed by one of its depositors, LandAmerica 1031 Exchange Services, Inc. ("LES"), which filed for bankruptcy in November, 2008. Plaintiffs allege that LES operated a fraudulent scheme involving property owners who used LES to help facilitate like-kind exchanges under Section 1031 of the Internal Revenue Code. Plaintiffs claim that LES failed to return funds belonging to Plaintiffs, as it promised to do, and that LES's conduct amounted to, among other things, a breach of fiduciary duties, fraud, and conversion.

Plaintiffs attempt to state three claims against SunTrust, alleging that SunTrust (1) aided and abetted LES's breach of fiduciary duties; (2) converted and aided and abetted LES's conversion of Plaintiffs' exchange funds; and (3) conspired with LES to (i) misuse, divert, and convert the exchange funds, (ii) operate an unlawful Ponzi scheme, and (iii) defraud Plaintiffs out of their exchange funds. Plaintiffs do not claim that SunTrust owed any duty to Plaintiffs: they were not customers of SunTrust and had no relationship with SunTrust. Indeed, SunTrust was not a party to Plaintiffs' agreements with LES, and Plaintiffs do not allege that SunTrust was ever aware of the terms of Plaintiffs' agreements with LES. SunTrust's only connection to Plaintiffs is that LES deposited funds received from Plaintiffs in a commingled business account LES had with SunTrust.

Each of Plaintiffs' aiding and abetting claims must be dismissed because Plaintiffs fail to plead that LES committed the underlying wrongs. The United States Bankruptcy Court for the Eastern District of Virginia presiding over LES's bankruptcy proceedings has construed the very exchange agreement at issue here on summary judgment with a fully developed factual record and (i) confirmed the absence of any trust or fiduciary relationship between Plaintiffs and LES,

and (ii) ultimately concluded that the exchange funds constituted property of the LES bankruptcy estate. This Court can only find that there is an underlying breach of fiduciary duty or conversion in this case by rejecting the Bankruptcy Court's well-reasoned opinion.

Moreover, even if Plaintiffs could plead that LES committed the underlying tortious acts, Plaintiffs have not alleged facts to support the assertion that SunTrust had the requisite actual knowledge of LES's underlying wrongs or substantially assisted LES in accomplishing those wrongs. Plaintiffs' conclusory allegations of SunTrust's purported knowledge fall far short of what is required to survive a motion to dismiss.

Finally, Plaintiffs' conspiracy claim against SunTrust must be dismissed as a matter of law. First, Plaintiffs have failed to plead anything beyond conclusory allegations of the existence of a conspiracy. In addition, Plaintiffs also have failed to adequately allege the existence of an underlying tort. These deficiencies demand dismissal of Plaintiffs' civil conspiracy claim. For these reasons, and those set forth below, the Court should dismiss each of Plaintiffs' claims against SunTrust with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and Other Relevant Entities

This is a putative class action in which the named Plaintiffs assert claims against SunTrust. SunTrust is a Georgia corporation, which provides an array of banking services, including investment, trading, banking and financial, to its customers. Am. Compl. ¶ 21. None of the named Plaintiffs alleges they were customers of SunTrust.

The four named Plaintiffs were customers of LES. LES is a Maryland corporation which was engaged in the business of serving as a so-called "qualified intermediary" for tax deferred like-kind property exchanges under Section 1031 of the Internal Revenue Code of 1986, as

amended, 26 U.S.C. § 1031 (2008) ("Section 1031"). *Id.* ¶¶ 16-20, 35. Each Plaintiff allegedly entered into an exchange agreement with LES for the purpose of performing a 1031 exchange. *Id.* ¶ 6. LES deposited the funds it received from Plaintiffs in a commingled business account that LES maintained with SunTrust. *Id.* ¶ 21.

While Plaintiffs attempt to conflate LES with its parent, LFG, the entity to which SunTrust made a loan, LFG was a massive holding company, operating through many subsidiaries, including LES. (LandAmerica Financial Group, Inc. 2007 Form 10-K at p. 4 ("2007 10-K") (attached as Ex. 1).)[1] LFG's Form 10-K describes LFG's "core" business as title insurance, which it operated under the well-recognized Lawyers' Title Insurance Corporation brand. (*Id.*) LFG's public filings establish that approximately 90% of its operating revenues came from the core title business, with the remaining 10% coming from a number of small ancillary businesses, including LES. (*Id.* at 34.) It is clear from LFG's public filings that LES was but an extremely small portion of LFG's overall business.

B. 1031 Exchanges

A 1031 exchange is a tax-deferral transaction that permits an individual to avoid paying tax on the sale of property by transferring proceeds from the sale to a "qualified intermediary" until such time as the individual identifies and purchases replacement property. Am. Compl. ¶¶ 30-34. To properly effect an exchange under Section 1031, the seller of the property is prohibited from taking actual or constructive legal title of the proceeds at any time during the

[1] This Court may consider public filings, including filings made with the Securities and Exchange Commission, on a motion to dismiss. *See Suntrust Bank v. Aetna Life Ins. Co.,* 251 F. Supp. 2d 1282, 1287 (E.D. Va. 2003) (stating in the ERISA context that a court may consider on a motion to dismiss "matters of public record whose authenticity is unquestioned"); *see also Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (SEC filings contain "facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") (quoting Fed. R. Evid. 201(b)(2)).

1031 exchange, and, thus, must deposit the sale proceeds from the relinquished property (the "Exchange Funds") with a qualified intermediary which is unaffiliated with the seller. *Id.* ¶ 31. After the sale and depositing of Exchange Funds with the qualified intermediary, the seller has 45 days to identify replacement property and 180 days to acquire the replacement property. Upon notification that the seller has identified replacement property, the qualified intermediary forwards the Exchange Funds to the seller of the replacement property, and the original seller acquires the property. By participating in a 1031 exchange, rather than simply selling and later purchasing replacement property, a seller is able to defer capital gains or losses due upon the sale of the original property. *Id.* ¶¶ 30-34.

C. The Exchange Agreement

Each Plaintiff's relationship with LES was governed by an "Exchange Agreement," pursuant to which each Plaintiff sold its real property and transferred the funds to LES with the expectation that LES would return the funds when the replacement property was acquired within 180 days. Am. Compl. ¶ 6. The five named Plaintiffs collectively transferred more than $2.1 million in funds to LES. *Id.* ¶¶ 16-20. LES, in turn, deposited the funds in the commingled business account that LES maintained with SunTrust in Richmond, Virginia. *Id.* ¶ 21. Plaintiffs attach a sample Exchange Agreement to their Amended Complaint, and assert that the attached agreement is similar to each named Plaintiff's agreement. *Id.* ¶ 19.

Under the Exchange Agreement, LES agreed to hold Plaintiffs' funds "in accordance with the terms and conditions of this Exchange Agreement." Am. Compl., Ex. 1 ("Exchange Agreement"), § 2(a) (attached as Ex. 2). The only mention of SunTrust in the Exchange Agreement is that LES was required to deposit the funds "in an account maintained at SunTrust Bank in Richmond, Virginia." *Id.*, § 3(a). The Exchange Agreement provides, in pertinent part:

- "LES shall have sole and exclusive possession, dominion, control and use of all Exchange Funds, including interest" until the exchange is completed. *Id.*, § 2(c).
- Until the exchange is completed, the plaintiff "shall have no right, title, or interest in or to the Exchange Funds or any earnings thereon and Taxpayer shall have no right, power, or option" to receive the funds. *Id.*
- Plaintiffs were to receive from LES a guaranteed amount of interest on the funds which accrued while LES possessed the funds. *Id.*, § 3(a).
- LES was obligated only to perform the duties set forth therein, and the parties agreed that "no additional duties or obligations shall be implied hereunder or by operation of law or otherwise." *Id.*, § 6(c).
- In the event of a dispute over the Exchange Funds, LES was "authorized and directed to retain in its possession . . . all or part of the Exchange Funds until such dispute is settled." *Id.*, § 6(f).

Plaintiffs do not allege that SunTrust ever received or reviewed the Exchange Agreement, and do not allege that anyone made SunTrust aware of the terms of the Exchange Agreement. Plaintiffs suggest that SunTrust had knowledge of LES's 1031 Exchange Agreements because "SunTrust's underwriting guidelines also provide that when loans are made by SunTrust ***involving a 1031 Exchange transaction*** 'a complete copy of the fully executed Exchange Agreement is required to be received by SunTrust prior to making the loan.'" Am. Compl. ¶ 93 (emphasis added). This unspecified "underwriting guideline," however, is inapplicable because the Amended Complaint fails to allege, and could not allege, that SunTrust loaned money to LES, or that the loan SunTrust made to LES's parent, LFG, "involv[ed] a 1031 Exchange transaction." As explained in more detail below, *infra* at pp. 24-26, the line of credit was

extended by SunTrust to LES's parent, LFG; the loan to LFG was not a 1031 Exchange transaction loan and Plaintiffs misleadingly conflate LFG, a sprawling holding company operating through various subsidiaries, with LES, a small subsidiary ancillary to LFG's core title insurance business. Although Plaintiffs claim, again without support from the Exchange Agreement itself, that the Exchange Funds were held by LES in escrow for Plaintiffs and that LES was operating a "trustee service," (*id.* ¶¶ 36, 37), they never allege concrete facts suggesting that SunTrust was aware the funds were held by LES in escrow or trust or that the LES account with SunTrust was designated an escrow or trust account. For these reasons, and others discussed below, the Bankruptcy Court found the funds were not held in escrow and there was no trust arrangement. This finding is consistent with Plaintiffs' own allegation that the LES account at SunTrust was a commingled business account. *Id.* ¶ 21.

D. LES's Bankruptcy

Plaintiffs allege that LES invested the Exchange Funds in investments known as auction rate securities ("ARS ") purchased through SunTrust. Am. Compl. ¶¶ 8, 55. ARS are variable-rate equity or debt instruments that pay interest at rates set at periodic auctions. *Id.* ¶ 56. In February 2008, the market for ARS froze and LES's ARS investments became illiquid. *Id.* ¶¶ 8, 62. Plaintiffs assert that LES held more than $200 million in ARS and that LES sustained substantial losses resulting from the illiquidity of the ARS market. *Id.* ¶¶ 8-9, 61. On November 26, 2008, LES filed for bankruptcy. *Id.* ¶ 81. Plaintiffs allege that at the time LES declared bankruptcy, 1031 exchange participants, including Plaintiffs, collectively had more than $190 million deposited with LES. *Id.* ¶ 83. Because LES filed for bankruptcy, the 1031 exchange participants have been unable to access the funds they paid to LES.

E. Plaintiffs' Claims

Plaintiffs' complaint is, in essence, directed at LES.[2] Plaintiffs claim that after the ARS market froze in February 2008, LES should have ceased operations and distributed the remaining proceeds. Am. Compl. ¶¶ 9-10, 64-65. Instead, LES continued to solicit new clients, including Plaintiffs, to deposit Exchange Funds with it. *Id.* Plaintiffs allege that LES misled new investors and, instead of holding their funds to fund their exchanges, used their funds to reimburse old customers whose funds were tied up in the ARS market. *Id.* ¶ 75.

In this action, Plaintiffs seek to hold SunTrust responsible for LES's failure to return the Exchange Funds. Plaintiffs purport to represent a class of persons defined as "Each and every person whose 1031 Exchange Funds were deposited by LandAmerica 1031 Exchange Services, Inc. with SunTrust Bank and who have been denied their rights in and access to those Exchange Funds." *Id.* ¶ 169. Plaintiffs assert claims against SunTrust for aiding and abetting breach of fiduciary duties (Count 1), conversion and aiding and abetting conversion (Count 2), and civil conspiracy (Count 3).[3]

III. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. ---, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To satisfy this standard, a plaintiff must plead sufficient "factual content" to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

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[2] In the separate bankruptcy proceeding in the Eastern District of Virginia, individuals who fall within the class definition proposed by Plaintiffs are asserting their individual claims against LES.

[3] Plaintiffs also assert claims for negligence, fraud and fraudulent concealment, and constructive fraud against six former officers of LES and LFG (Counts 4-6).

Id. at 1949. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; *Twombly*, 550 U.S. at 555-56 & n.3 (rejecting as insufficient "blanket assertions," "bare averment[s]," and "legal conclusion[s] couched as . . . factual allegations"); *accord Harris v. Option One Mortg. Corp.*, --- F.R.D. ---, No. 2:08-CV-3692-PMD, 2009 WL 2168882, at *4 (D. S.C. July 17, 2009) (unpublished opinions attached as Ex. 8). Therefore, this Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Walker v. Prince George's County, Md.*, 575 F.3d 426, 431 (4th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1949-50). Dismissal is required "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 129 S. Ct. at 1949; *Walker*, 575 F.3d at 431 (affirming trial court's dismissal of appellants' cause of action where allegations did not permit the court to "infer more than the mere possibility of misconduct").

IV. CHOICE OF LAW

Two cases have been consolidated for pretrial proceedings in this action: one was transferred from the Southern District of California and the other originated in this Court. The Court must apply the choice of law principles from the transferor courts. *See, e.g.*, *In re Sunrise Sec. Litig.*, 698 F. Supp. 1256, 1261 (E.D. Pa. 1988) (considering choice of law in case consolidated under § 1407; "[f]or state claims in those suits originally filed in this Court, the conflicts of laws rules of Pennsylvania must be applied. In the Florida suits transferred here under § 1407, Florida's conflicts of laws rules govern." (citations omitted)). Here, the Court must apply California choice of law principles to the claims of the individual plaintiffs from the California action (*i.e.*, Arthur, Hays, Leapin Eagle, LLC, and Wilson), and South Carolina choice

of law principles to the claims of the individual plaintiffs from the South Carolina action (*i.e.*, Terry, Evans, and Robbins).

California choice of law rules require application of the "governmental interest" approach, *see, e.g., Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1091 (9th Cir. 1999), while South Carolina choice of law rules require application of the substantive law of the state where the injury occurred. *See Bannister v. Hertz Corp.*, 450 S.E.2d 629, 630 (S.C. Ct. App. 1994) (applying North Carolina law where South Carolina resident sued for injuries arising from auto accident in North Carolina); *Hester v. New Amsterdam Cas. Co.*, 287 F. Supp. 957, 972 (D. S.C 1967) (applying law of Florida because the transaction at issue and land involved were in Florida, notwithstanding that the plaintiffs were domiciled in Georgia; in fraudulent misrepresentation cases, "[t]he place of the wrong is not where the misrepresentations were made but where the plaintiff as a result of the misrepresentation suffered a loss"). For the purpose of reviewing the arguments raised in this motion to dismiss, the laws of California, Idaho, New York, and Washington -- the individual home states of the plaintiffs in the California case -- and Virginia, the location of the funds at issue and site of any alleged injury, are substantially similar.[4]

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[4] To the extent the claims survive dismissal, however, and to the extent a nationwide class is certified, the various state laws which may apply may diverge substantially with regard to the availability and viability of certain claims, defenses, and remedies. *See, e.g., Augusta Mut. Ins. Co. v. Mason*, 645 S.E.2d 290, 293, 295 (Va. 2007) (holding under Virginia law that there can be no claim for breach of fiduciary duty when the duty exists between the parties solely by virtue of the contract); *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 627 (D. Kan. 2008) (noting difficulties in maintaining nationwide class action when claims based on various state laws and when plaintiff seeks punitive damages; "there would inevitably be material conflicts [among] . . . the laws of the other states insofar as a claim for punitive damages is concerned").

V. ARGUMENT AND CITATION OF AUTHORITY

A. Each of Plaintiffs' Aiding and Abetting Claims Must Be Dismissed

Plaintiffs have failed to state a claim against SunTrust for aiding and abetting LES's breach of fiduciary duties or conversion. In order to establish an aiding and abetting claim, a plaintiff must allege: (1) an independent primary wrong; (2) actual knowledge by the defendant of the wrong; and (3) substantial assistance in the wrong. *Impac Warehouse Lending Group v. Credit Suisse First Boston LLC*, No. 8:04-cv-01234, at *15 (C.D. Cal. June 20, 2006) (opinion attached as Ex. 8); *Halifax Corp. v. Wachovia Bank*, 604 S.E.2d 403, 412 (Va. 2004) (noting it is uncertain that Virginia recognizes a claim for aiding and abetting breach of fiduciary duty, but assuming arguendo that such a claim exists, requiring that a plaintiff plead (1) defendant's knowledge of the breach of fiduciary duty, and (2) defendant's participation in that breach); *see also Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (2008). Plaintiffs cannot satisfy these elements here.

1. Plaintiffs failed to allege the existence of an underlying wrong.

Pleading the first element of an aiding and abetting cause of action -- the existence of an independent primary wrong -- requires that Plaintiffs adequately plead each element of their underlying claims. *Impac Warehouse Lending Group*, No. 8:04-cv-01234, at *15. Because Plaintiffs fail to plead viable claims against LES for breach of fiduciary duty or conversion, Plaintiffs' aiding and abetting claims must be dismissed.

a. *No underlying breach of fiduciary duty claim*

Plaintiffs cannot state a claim against SunTrust for aiding and abetting LES's breach of fiduciary duties because they have not alleged the existence of the underlying wrong. In fact, Plaintiffs cannot even allege that LES had a duty to act as a fiduciary. Plaintiffs allege, in

conclusory fashion, that LES owed a fiduciary duty to Plaintiffs based on LES's status as an "agent and/or broker," and that "LES breached its fiduciary duty when it (1) continued to operate after February 13, 2008, using Plaintiffs' Exchange Funds to fund the escrows of earlier 1031 Exchange clients whose funds were lost due to LES's imprudent investment in ARS; (2) commingled Exchange Funds with its own funds in its operating account; (3) misused and diverted the Exchange Funds for its own purposes; and (4) operated with a trust deficit that nothing short of a miracle could have resolved." Am. Compl. ¶¶ 180, 182. Despite Plaintiffs' conclusory statement that their "Exchange Funds were 'escrow funds,'" (*id.* ¶ 37), the Exchange Agreement clearly shows, and the Bankruptcy Court clearly found, differently.[5]

The Exchange Agreement, attached as Exhibit 1 to Plaintiffs' Amended Complaint, reveals that there was no trust created nor fiduciary duties owed to Plaintiffs by providing, in pertinent part:

> LES shall have sole and exclusive possession, dominion, control and use of all Exchange Funds, including interest, if any, earned on the Exchange Funds.
> . . .
> LES has undertaken to perform only such duties as are expressly set forth herein, and no additional duties or obligations shall be implied hereunder or by operation of law or otherwise.

Exchange Agreement, §§ 2(c), 6(c). The United States Bankruptcy Court for the Eastern District of Virginia recently construed this exact agreement in considering claims by individual former customers of LES -- including members of Plaintiffs' proposed class in this case -- in connection with LES's Chapter 11 bankruptcy case. The Bankruptcy Court confirmed the absence of a trust or fiduciary relationship, finding:

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[5] Plaintiffs attach a copy of the Exchange Agreement to their Amended Complaint and rely on it in bringing their claims. Accordingly, SunTrust may refer to the terms of the Exchange Agreement without converting this motion to dismiss to a summary judgment motion. *See Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).

> There is no express language in the Exchange Agreements that creates a trust. . . . [T]here is language in the Exchange Agreements that actually evidences an intent *not* to do so. . . . The parties to the Exchange Agreement acknowledged that LES was not undertaking any duties not expressly set forth in the Exchange Agreements (i.e. the contract duties) including any implied duties or any duties imposed by operation of law. This limitation on the scope of LES' duties eliminates any argument that LES had a duty to act as a fiduciary for [the plaintiff].

In re LandAmerica Fin. Group, Inc., --- B.R. ----, 2009 WL 1011647, at **8-9 (Bankr. E.D. Va. Apr. 15, 2009) ("Bankr. Op.") (emphasis in original) (opinion attached as Ex. 8).

In this case, Plaintiffs allege no source for the fiduciary duties LES supposedly owed to Plaintiffs other than their allegation that LES held their funds "in escrow."[6] Because the Exchange Agreement contains "no express language . . . that creates a trust," (Bankr. Op. at *8), and evidences that the parties to the Exchange Agreement "inten[ded] *not* to" create a trust, (*id.* (emphasis in original)), Plaintiffs have not adequately alleged that LES owed them fiduciary duties. In fact, Plaintiffs can only establish an underlying fiduciary duty by demonstrating that the Bankruptcy Court's well-reasoned opinion is wrong. Plaintiffs simply cannot do so. Accordingly, Plaintiffs fail to state a claim for aiding and abetting breach of fiduciary duties against SunTrust, and their claim must be dismissed.

b. *No underlying conversion claim*

In order to properly plead a conversion claim, Plaintiffs must show they were entitled to immediate possession of the funds at the time those funds allegedly were converted. *Terry v. Bank of Am., N.A.*, 350 F. Supp. 2d 727, 730 (W.D. Va. 2004) (dismissing conversion claim because plaintiffs' amended complaint failed to allege that plaintiffs were entitled to immediate

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[6] Plaintiffs specifically reference a letter from LES to SunTrust, dated October 7, 2008, in which LES stated that LES's clients' funds were held in escrow and "implored" SunTrust to provide assistance to LES. Am. Compl. ¶¶ 86-87. This self-serving letter was written less than two months before LES filed for bankruptcy, Plaintiffs do not allege that such representations were made at an earlier time, and the source of LES's "belief" is not identified.

possession of funds in bank account at the time those funds allegedly were converted; "Plaintiffs cannot bring a claim for conversion unless they have a property interest in and are entitled to immediate possession of the converted item." (citation and quotation omitted)); *Wanetick v. Mel's of Modesto, Inc.*, 811 F. Supp. 1402, 1409 (N.D. Cal. 1992) (dismissing conversion claim because plaintiff failed to "establish that he or she had actual possession of the property, or the right to immediate possession of the property at the time the alleged conversion occurred" (citation omitted)); *see also Moore v. Weinberg*, 373 S.C. 209, 227, 644 S.E.2d 740, 749 (S.C. Ct. App. 2007) (citing *Oxford Fin. Cos. v. Burgess*, 303 S.C. 534, 402 S.E.2d 480 (1991)). Plaintiffs cannot meet this requirement.

The Bankruptcy Court for the Eastern District of Virginia recently determined that exchange funds identical to Plaintiffs' "were under the complete control of LES. Only LES had the ability to disburse or withdraw the funds. As LES maintained the exchange funds in bank accounts in its name and under its control, the money is presumably property of the LES bankruptcy estate." Bankr. Op. at *7. Because the exchangers disclaimed "all right, title and interest" in the Exchange Funds and provided LES with exclusive rights of "dominion, control and use" of the Exchange Funds, the Bankruptcy Court ultimately concluded that the Exchange Funds constituted property of the LES bankruptcy estate. *Id.* at *1. Plaintiffs thus had no right to immediate possession at the time of the alleged conversion, precluding a determination that LES converted Plaintiffs' funds. Because Plaintiffs' underlying conversion claim against LES fails as a matter of law, their claim for aiding and abetting conversion also must be dismissed.

2. Plaintiffs failed to allege SunTrust's "actual knowledge."

Even if Plaintiffs had adequately pled an underlying claim against LES for breach of fiduciary duty or conversion, the aiding and abetting claims against SunTrust must be dismissed

because Plaintiffs have failed to plead that SunTrust had "actual knowledge of the specific primary wrong the defendant substantially assisted." *Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal. App. 4th 1138, 1145 (Cal. Ct. App. 2005); *Impac Warehouse Lending Group*, No. 8:04-cv-01234, at *18; *Halifax Corp.*, 604 S.E.2d at 413-14 ("unless [the defendant] actually knows a breach of fiduciary duty is occurring and participates with mens rea in the consummation of the breach, it should not be held liable for aiding and abetting the breach"); *see also Vortex*, 378 S.C. at 204, 662 S.E.2d at 448.

a. *Aiding and abetting breach of fiduciary duty*

Plaintiffs allege LES owed fiduciary duties to Plaintiffs, as "agent and/or broker for Plaintiffs," to "maintain the Exchange Funds in trust, and to use those Exchange Funds solely in a manner consistent with the Exchange Agreements." Am. Compl. ¶¶ 180-81. Plaintiffs claim that LES breached its fiduciary duties to Plaintiffs when it "(1) continued to operate after February 13, 2008, using Plaintiffs' Exchange Funds to fund the escrows of earlier 1031 Exchange clients whose Funds were lost due to LES's imprudent investment in ARS; (2) commingled Exchange Funds with its own funds in its operating account; (3) misused and diverted the Exchange Funds for its own purposes; and (4) operated with a trust deficit that nothing short of a miracle could have resolved." *Id.* ¶ 182. While Plaintiffs' Amended Complaint includes a laundry list of things "SunTrust [allegedly] knew" (*id.* ¶ 111), and concludes that "SunTrust thus had knowledge that LES was a fiduciary breaching its fiduciary duties" (*id.* ¶ 112), it fails to provide any factual basis detailing how or why "SunTrust knew" these things or how they amounted to a breach of fiduciary duty.

Plaintiffs' list of things "SunTrust knew" is nothing but a series of conclusory allegations couched as "facts." Plaintiffs offer no allegations as to how or why SunTrust may have known

these things, let alone known why they were wrongful. For example, Plaintiffs allege SunTrust knew that:

- "LES was to hold other people's money in trust for up to 180 days but no longer";
- "the identity of LES's existing clients changed daily";
- "the Plaintiffs' money was deposited at SunTrust to be held by LES as an agent and fiduciary pursuant to Exchange Agreements it was privy to";
- "the Exchange Agreements included the provision that Exchange Funds were not FDIC protected over the FDIC limit";
- "LES was using the SunTrust 3318 account as an operating account . . ."; and
- "LES was misappropriating the Exchange Funds in the SunTrust 3318 account to pay prior commitments on older Exchange transactions."

Am. Compl. ¶ 111.

Not only is the Amended Complaint devoid of any facts to support these and the many other conclusory allegations in the Amended Complaint, but these conclusions are unreasonable in light of the facts Plaintiffs do allege. For example, LES's alleged deposits and withdrawals of hundreds of clients' funds into and out of LES's commingled business account simply do not permit a plausible inference that SunTrust knew that Plaintiffs, who were not bank customers, provided their funds to LES to hold in trust for their benefit only, or that LES's use of the funds was wrongful. It is similarly unreasonable to suggest that SunTrust tracked, or was obligated to track, individual non-clients' funds in LES's commingled business account. Similarly, Plaintiffs' insinuation that LES's use of the account as an operating account and the commingling of funds were somehow wrongful ignores Plaintiffs' allegation that LES's account with SunTrust was set up from the outset as "a commingled business account." *Id.* ¶ 21.

Perhaps the most glaring omission in the Amended Complaint is the failure to allege that SunTrust was in possession of the Exchange Agreement or otherwise had knowledge of its terms.[7] Without that allegation, SunTrust could not have known key facts necessary to plausibly argue that SunTrust knew that LES was breaching any of its obligations to its customers. This flaw alone is fatal to Plaintiffs' aiding and abetting claims.

A case in Massachusetts state court also involving a 1031 exchange company is illustrative of Plaintiffs' failure to satisfy their pleading burden. In *Cahaly*, the 1031 exchange company engaged in high-risk options trading with client funds and lost millions of dollars. *Cahaly v. Benistar Prop. Exchange Trust Co.*, 864 N.E.2d 548, 552-54 (Mass. App. Ct. 2007). The plaintiffs sued the 1031 exchange company and also brought claims against Paine Webber and Merrill Lynch, which housed the funds and effected the options trading. *Id.*

The state appellate and supreme courts found that the plaintiffs failed to establish claims for aiding and abetting breach of fiduciary duty and conversion because there was no evidence that either Paine Webber or Merrill Lynch had actual knowledge of the alleged wrongdoing. *Id.* at 560-61 (applying New York law). The courts considered whether the following evidence was sufficient to establish actual knowledge of an underlying wrong: the company included the word "Trust" in its corporate name; it was public knowledge that the company was a qualified intermediary; third party names were listed on wire transfers and trade confirmations; the account held third-party funds; and there was a large number of wire transfers from fiduciary

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[7] Plaintiffs misleadingly suggest that SunTrust had knowledge of LES's 1031 Exchange Agreements because "SunTrust's underwriting guidelines also provide that when loans are made by SunTrust involving a 1031 Exchange transaction 'a complete copy of the fully executed Exchange Agreement is required to be received by SunTrust prior to making the loan.'" Am. Compl. ¶ 93. This unspecified "underwriting guideline," however, is inapplicable because SunTrust's credit line with LES's parent, LFG, was not a 1031 Exchange transaction loan, and thus would not have triggered this purported underwriting guideline.

accounts to the account. *Id.* at 560-61 n.22; *Cahaly v. Benistar Prop. Exch. Trust Co.*, 885 N.E.2d 800, 811 (Mass. 2008). The courts found that the plaintiffs' aiding and abetting claims failed because there was no evidence that Paine Webber or Merrill Lynch knew that the exchange accounts consisted of client funds and knew that those funds were subject to restrictions that were being violated. *Cahaly*, 864 N.E.2d at 561. The plaintiffs simply did not connect the defendants' knowledge of the 1031 company's business with knowledge that the company was violating its fiduciary duties to its clients. *Cahaly*, 885 N.E.2d at 814.[8] Similarly, in the case before this Court, it "takes a leap in speculation" to tie Plaintiffs' allegations of "actual knowledge" to "the underlying tortious behavior." *Id.* at 812; *see also Iqbal*, 129 S. Ct. at 1949.

Plaintiffs' Amended Complaint, stripped of conclusory and speculative allegations, relies almost entirely on a purported $200 million line of credit that SunTrust loaned to LES's parent, LFG, to establish the required element of knowledge for an aiding and abetting claim. Am. Compl. ¶ 3.[9] In short, Plaintiffs claim the loan to LFG evidences that SunTrust knew about the dire financial condition and poorly performing investments of LES, a completely illogical and unsupportable inference given that LES was but a small and ancillary piece of the overall LFG enterprise. Even if it were not, Plaintiffs fail to plead how knowledge of LES' financial condition translates into knowledge that LES was breaching some duty to its clients.

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[8] The state supreme court only found that plaintiffs submitted sufficient evidence of actual knowledge to submit the claims to a jury when plaintiffs submitted evidence that (i) the president of the exchange company specifically told Merrill Lynch that the money was client funds held in escrow which must be made available to clients within forty-eight hours, and (ii) Merrill Lynch was provided copies of the exchange agreements that plainly set forth the restrictions on the funds which were being violated. *Cahaly*, 864 N.E.2d at 673-76; *Cahaly*, 885 N.E.2d at 818. No such allegations exist here.

[9] As discussed below, *infra* at pp. 24-26, Plaintiffs vastly overstate the size of this loan.

Plaintiffs argue that SunTrust had knowledge of LES's financial condition and investments, including in ARS, because it would have performed due diligence when entering the loan with LFG. *Id.* ¶ 11 ("SunTrust knew that the ARS purchased by LES had declined in value because LFG had borrowed $100 million from SunTrust, which required underwriting."); *id.* ¶ 93 ("SunTrust, as a $100 million lender to LFG, received and reviewed the LFG financial disclosures and SEC filings as part of its underwriting."). Plaintiffs ignore the fact that LES was a small part of the overall LFG enterprise. Moreover, LFG reported consolidated financial statements, and did not separate out the financials for any single subsidiary, including LES. Indeed, reviewing LFG's 2007 10-K reveals very few mentions of LES's business, in contrast to the "core" business of title insurance, and further states: "Our predominant business operation continues to be our Title Operations segment which accounted for 88.1 percent of our operating revenue in 2007 and 90.3 percent of our operating revenue in 2006 and 2005." LFG's 2007 10-K at 4, 34.

In summary, Plaintiffs confuse knowledge of certain financial transactions with knowledge of an underlying wrong and treat LFG, a massive holding company, the same as one of its minor subsidiaries. Because Plaintiffs fail to allege that SunTrust had actual knowledge that LES was breaching its fiduciary duties to Plaintiffs, Plaintiffs' aiding and abetting breach of fiduciary duty claim (Count 1) must be dismissed.

b. *Aiding and abetting conversion*

Finally, there is no allegation that SunTrust had actual knowledge of any alleged conversion. In fact, Plaintiffs do not even attempt to allege that SunTrust knowingly aided or abetted LES's conversion. The only relevant allegation in this regard is the conclusory assertion that SunTrust "aided and abetted LES's conversion by using Plaintiffs' Exchange Funds for

unauthorized purposes and destroying Plaintiffs' intangible property rights." Am. Compl. ¶ 193. Because Plaintiffs do not even attempt to plead SunTrust's actual knowledge of LES's purported conversion, and for the same reasons discussed above regarding Plaintiffs' failure to allege SunTrust's actual knowledge of LES's conduct, Plaintiffs' claim for aiding and abetting conversion (Count 2) must be dismissed. *Iqbal*, 129 S. Ct. at 1949 (requiring dismissal when plaintiff pleads "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements").

3. Plaintiffs failed to allege SunTrust's "substantial assistance."

Plaintiffs' aiding and abetting claims also fail because, even if Plaintiffs could plead that SunTrust had actual knowledge of LES's underlying wrongs, "the complaint does not assert that [SunTrust] substantially assisted the underlying wrongs." *Impac Warehouse Lending Group v. Credit Suisse First Boston LLC*, 270 Fed. App'x 570, 572 (9th Cir. Mar. 17, 2008) (affirming dismissal of aiding and abetting claims against bank and denying leave to amend complaint). Substantial assistance requires a "significant and active, as well as a knowing participation in the wrong." *Impac Warehouse Lending Group*, No. 8:04-cv-01234, at *18 (quoting *Alfus v. Pyramid Tech. Corp.*, 745 F. Supp. 1511, 1520 (N.D. Cal. 1990)); *Nigerian Nat'l Petroleum Corp. v. Citibank N.A.*, No. 98 Civ. 4960(MBM), 1999 WL 558141, at *8 (S.D.N.Y. July 30, 1999) (opinion attached as Ex. 8). The failure to act cannot constitute substantial assistance unless the defendant had a duty to act. *Impac Warehouse Lending Group*, No. 8:04-cv-01234, at *18; *In re Am. Cont'l Corp./Lincoln Sav. and Loan Sec. Litig.*, 794 F. Supp. 1424, 1435 (D. Ariz. 1992).

Moreover, to satisfy the "substantial assistance" element, Plaintiffs also must allege that "the acts of the aider and abettor proximately caused the harm to the [Plaintiffs] on which the

primary liability is predicated." *Filler v. Hanvit Bank*, No. 01 Civ. 9510(MGC), 2003 WL 22110773, at *2 (S.D.N.Y. Sept. 12, 2003) (quotation omitted) (opinion attached as Ex. 8); *In re Am. Principals Holding, Inc. Sec. Litig.*, M.D.L. No. 653, 1987 WL 39746, at *8 (S.D. Cal. July 9, 1987) (opinion attached as Ex. 8); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001); *Impac*, 270 Fed. App'x at 572; *In re Am. Cont'l Corp.*, 794 F. Supp. at 1435. "Allegations of a 'but for' causal relationship are insufficient." *Filler*, 2003 WL 22110773, at *2 (quoting *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985)).

Plaintiffs do not allege that SunTrust took a significant and active role in LES's breach of fiduciary duty or conversion. Plaintiffs merely allege that SunTrust "actively continued to encourage and assist LES in breaching its fiduciary duties by accepting the deposits of Plaintiffs' Exchange Funds and physically transferring these Funds in breach of trust to pay older exchanges for the purpose of artificially prolonging LES's existence" and "encouraged LES to continue the Ponzi scheme by holding out the possibility that it would redeem the ARS." Am. Compl. ¶¶ 186-87.[10] These allegations are insufficient for at least three reasons.

First, in asserting their claims against SunTrust, Plaintiffs necessarily ignore that the harm to Plaintiffs was caused by LES's solicitation of, and failure to return, Plaintiffs' funds. This failure can be placed only on LES. SunTrust's only connection to the alleged misconduct is that LES deposited and withdrew the funds from a commingled business account at SunTrust. Simply put, SunTrust's acts do not constitute a "significant and active" role in LES's underlying torts. *Impac Warehouse Lending Group*, No. 8:04-cv-01234, at *18 (dismissing aiding and abetting claims because "passive endorsement" of alleged fraud is not sufficient to establish

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[10] Plaintiffs do not appear to even attempt to plead SunTrust's participation in LES's alleged conversion. Am. Compl. ¶¶ 190-194.

substantial assistance); *Cahaly*, 864 N.E.2d at 561 n.23 (holding that plaintiffs failed to establish substantial assistance where record demonstrated that Paine Webber merely held accounts for and implemented certain transactions in accordance with the primary wrongdoer's instructions and responded to inquiries for investment advice); *Nigerian Nat'l Petroleum Corp.*, 1999 WL 558141, at *8 (dismissing aiding and abetting claims and noting "the mere fact that participants in a fraudulent scheme use accounts at [a bank] to perpetrate it, without more, does not rise to the level of substantial assistance" (quotations omitted)).

Second, SunTrust's alleged inaction in failing to terminate its banking relationship with LES does not constitute substantial assistance. "[I]naction, or a failure to investigate," can only constitute substantial assistance when the defendant owes a fiduciary duty to the plaintiff. *Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 247 (S.D.N.Y. 1996); *Ryan v. Hunton & Williams*, No. 99-CV-5938 (JG), 2000 WL 1375265, at *10 (E.D.N.Y. Sept. 20, 2000) (opinion attached as Ex. 8); *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1326 (Cal. Ct. App. 1996). Here, SunTrust cannot be liable for its inaction because it did not owe a duty to the non-customer Plaintiffs. *See Scott v. Branch Banking & Trust Co.*, 588 F. Supp. 2d 667, 673 (W.D. Va. 2008) ("a bank owes a duty of care only to its customer, not to non-customers such as the plaintiffs, even if the non-customers provided funds to the account"); *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 478-81 (Cal. Ct. App. 1996) (noting that plaintiffs were not customers and were "strangers to the contractual relationships between [the defendants] and the thieves"); *Renner v. Chase Manhattan Bank*, No. 98 Civ. 926(CSH), 1999 WL 47239, at *13 (S.D.N.Y. Feb. 3, 1999) (bank had no duty to prevent customer from defrauding third party) (opinion attached as Ex. 8); *Tzares v. Evergreen Int'l Spot Trading, Inc.*, No. 01 Civ. 107261(LAP), 2003 WL 470611, at *6 (S.D.N.Y. Feb. 25, 2003) (same) (opinion attached as Ex.

8); *Kolbeck*, 939 F. Supp. at 248 (securities brokers do not owe a general duty of care to the public).

In *Renner*, the plaintiff invested money with three individuals who purported to be closely connected with the Vatican, but who actually served as a front for complicated fraudulent transactions. 1999 WL 47239, at **1-2. The group represented that the plaintiff's investment would be kept in a sub-account at Chase Manhattan Bank and that the funds "were secure because no money would leave the Chase account unless a bank note or treasury bill of higher value was substituted as collateral." *Id.* at *2. The group failed to return the plaintiff's funds after he demanded their return. *Id.* at *3. The plaintiff filed suit and alleged, among other things, that Chase Manhattan Bank was liable to him for negligence for "failing to protect [his] funds from fraudulent diversion." *Id.* at *13. The court dismissed this claim against the bank, holding that "a bank owes no . . . duty" to prevent a customer from defrauding "a non-customer third-party." *Id.* Similarly, SunTrust has no duty to protect Plaintiffs, "non-customer third-part[ies]," from any of LES's allegedly fraudulent conduct. *Id.*

Finally, Plaintiffs must also allege that SunTrust's substantial assistance was a "substantial factor," or proximately caused, the harm suffered by Plaintiffs. *See Filler*, 2003 WL 22110773, at *2. The harm to Plaintiffs was caused by LES's failure to repay funds paid by Plaintiffs to LES. SunTrust merely accepted deposits and transferred funds per its customer's (LES's) request. The relationship of bank and depositor is founded on contract, and SunTrust owes no contractual obligation to persons other than the account holder (LES). *Dodd v. Citizens Bank of Costa Mesa*, 272 Cal. Rptr. 623 (Cal. Ct. App. 1990); *see also Impac Warehouse Lending Group*, No. 8:04-cv-01234, at *19 (finding defendants did not substantially assist fraud and that defendants were contractually obligated to the alleged wrongdoer, not the plaintiff).

Facts such as those alleged by Plaintiffs have been found insufficient to establish that the defendant's acts proximately caused the plaintiff's harm. *See, e.g.*, *Impac Warehouse Lending Group*, 270 Fed. App'x at 572 (affirming dismissal of aiding and abetting claims because defendants' actions were not a "substantial factor" in causing plaintiffs' injury); *Cromer Fin. Ltd.*, 137 F. Supp. 2d at 472 (noting that although the Ponzi scheme may only have been possible because of clearing broker's actions, or inaction, clearing broker was not liable for aiding and abetting a breach of fiduciary duty under New York law since its conduct was not a proximate cause of the Ponzi scheme). The same result is required here.

The case of *Nigerian National Petroleum Corp. v. Citibank, N.A.*, is particularly instructive. 1999 WL 558141. In *Nigerian National Petroleum Corp.*, the plaintiff sought to recover from Citibank approximately $15 million that the plaintiff lost as a result of fraud by a third-party depositor who used Citibank accounts. *Id.* at *1. During a two-month period, the third-party depositor effected several transfers of funds using transfer documents which were allegedly "riddled with inconsistencies and other badges of fraud." *Id.* Notwithstanding these alleged indices of fraud, Citibank "swiftly processed" the transfers. *Id.* Several months later, the plaintiff discovered the alleged fraud, and "received certain documents revealing Citibank's role in . . . permitting [the third-party depositor] to perpetrate his fraudulent activities." *Id.* at *3. The plaintiff subsequently commenced its lawsuit against Citibank asserting several claims, including aiding and abetting fraud. *Id.* at *3.

In granting Citibank's motion to dismiss, the court noted that "[t]he mere fact that participants in a fraudulent scheme use accounts at a bank to perpetrate it, without more, does not rise to the level of substantial assistance necessary to state a claim for aiding and abetting liability." *Id.* at *8 (quotations omitted). Accordingly, the court held that "Citibank did not

provide 'substantial assistance' in the achievement of the fraud, within the meaning of aiding and abetting jurisprudence," and dismissed the claim. *Id.*

Similarly, Plaintiffs here have alleged, at best, that SunTrust's depositor "mere[ly] . . . use[d] accounts at [SunTrust] to perpetrate [the fraud]," and that SunTrust simply "accept[ed] the deposits of Plaintiffs' Exchange Funds [in the LES commingled business account] and physically transferr[ed] these Funds . . . to pay older exchanges." Am. Compl. ¶ 186. Just as in *Nigerian National Petroleum Corp.*, Plaintiffs have not alleged that SunTrust affirmatively assisted, helped conceal, or enabled the fraud to proceed and, therefore, their aiding and abetting claims must be dismissed.

4. Plaintiffs misleadingly describe SunTrust's loan to LFG.

Plaintiffs' Amended Complaint is replete with allegations that SunTrust participated in the alleged LES Ponzi scheme in an effort to prop up LES so that SunTrust ultimately could be repaid the $100 million that LFG owed to SunTrust. Am. Compl. ¶ 13 ("SunTrust participated in the Ponzi scheme because it wanted to be repaid the $100 million it had loaned to LFG."); *see also id.* ¶¶ 112, 186, 187. As an initial matter, motive is not an element in any of Plaintiffs' claims and, as noted above, in light of LES's minor role in the large LFG holding company, this argument is, on its face, implausible. Moreover, Plaintiffs' allegations regarding the amount of the loan -- which forms the basis for the alleged motive -- are vastly overstated and contradicted by publicly available documents referenced in their Amended Complaint.

Plaintiffs misleadingly tell the Court that LFG established a $200 million line of credit with SunTrust. *Id.* ¶ 3. As is evident from even a cursory review of LFG's publicly filed documents, the $200 million line of credit was provided by SunTrust *and eight other lenders*, including: Wachovia Bank, National Association; Union Bank of California, N.A.; US Bank,

National Association; JP Morgan Chase Bank, National Association; Comerica Bank; Bank of America, N.A.; PNC Bank, N.A.; and Wells Fargo Bank Arizona, N.A. (*See* "Revolving Credit Agreement," Signature pages, attached as Ex. 10.1 to LFG's June 30, 2006 Form 10-Q (attached as Ex. 3).)[11]

SunTrust was the Administrative Agent for the loan, but SunTrust was only responsible for approximately $31 million of the $200 million.[12] (Revolving Credit Agreement, Annex I (attached as Ex. 4).) The other eight lenders' commitments comprised the remaining $169 million. (*Id.*)

In the Second Amendment to the Revolving Credit Agreement, dated June 30, 2008, the lenders reduced the total line of credit from $200 million to $150 million on a pro rata basis.[13] (Second Amendment to Revolving Credit Agreement, Annex I, attached to LFG's June 30, 2008 Form 8-K (attached as Ex. 6).) Furthermore, as Plaintiffs allege in their Amended Complaint, at the time the ARS market froze, LFG only had drawn down $100 million of its available $150 million line of credit, and could no longer access the remaining $50 million. *See* Am. Compl. ¶ 72 (quoting LFG's public filings: "[w]e do not have access to the undrawn $50.0 million commitment amount remaining under the Credit Agreement"); *see also id.* ¶ 83 ("LES's parent

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[11] This Court may consider the Revolving Credit Agreement because it was "integral to and explicitly relied on in the complaint and because the plaintiffs [can] not challenge its authenticity." *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999); *see also Philips v. Pitt County Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (holding that a court can consider publicly filed documents on a motion to dismiss).

[12] Plaintiffs allege that "SunTrust has filed a Proof of Claim against LFG in bankruptcy for over $100 million. SunTrust is seeking to be repaid its loan to LFG ...." Am. Compl. ¶ 94. Plaintiffs, again, fail to inform the Court that SunTrust made this filing in its capacity as Administrative Agent for the group of nine lenders listed above. (Proof of Claim, filed March 30, 2009 (listing SunTrust "as Administrative Agent") (attached as Ex. 5).)

[13] Plaintiffs claim that the line of credit was reduced "[d]ue to financial concerns." Am. Compl. ¶ 93.

owed SunTrust $100 million"). Thus, the amount LFG owed SunTrust when the ARS market froze was $15.575 million -- a far cry from the $100 million alleged by Plaintiffs.[14] In light of these facts, even if SunTrust's motives were an element of any claim, the alleged cause of that motivation does not withstand scrutiny.

For the reasons set forth above, Plaintiffs' claims for aiding and abetting breach of fiduciary duty (Count 1) and aiding and abetting conversion (Count 2) must be dismissed.

B. Plaintiffs' Conversion of Trust Funds Claim Must Be Dismissed

Plaintiffs' allegations regarding SunTrust's alleged conversion are woefully inadequate. "Conversion is the wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another in denial of or inconsistent with the owner's rights." *Terry*, 350 F. Supp. 2d at 729; *see also Moore*, 373 S.C. at 226-27, 644 S.E.2d at 749. To adequately state a claim for conversion, Plaintiffs must allege "they have a property interest in and are entitled to immediate possession of the converted item." *Terry*, 350 F. Supp. 2d at 730; *Wanetick*, 811 F. Supp. at 1409; *see also Moore*, 373 S.C. at 226-27, 644 S.E.2d at 749. Plaintiffs have alleged nothing of the sort.

The Exchange Agreement between LES and Plaintiffs confirms that Plaintiffs did not have a right to immediate possession at the time of conversion. The Exchange Agreement states, in relevant part, that "LES shall have sole and exclusive possession, dominion, control and use of all Exchange Funds, including interest" until the exchange is completed. Exchange Agreement, § 2(c). The Exchange Agreement also unambiguously recites that until the exchange is concluded, Plaintiffs "shall have no right, title, or interest in or to the Exchange Funds or any earnings thereon and [] shall have no right, power, or option" to receive the funds. *Id.*

[14] SunTrust's outstanding loans in 2008 totaled more than $126 billion. (*See* SunTrust Banks, Inc.'s 2008 Form 10-K, at p. 17 (attached as Ex. 7).)

Therefore, Plaintiffs had no right to immediate possession, and their conversion claim should be dismissed as a matter of law. *See* Bankr. Op. at *7.

Moreover, even if Plaintiffs could demonstrate that they had a right to possession of the Exchange Funds, Plaintiffs merely assert that "SunTrust converted . . . by using Plaintiffs' Exchange Funds for unauthorized purposes." Am. Compl. ¶ 193. Plaintiffs fail to identify and plead any conduct suggesting SunTrust, rather than LES, converted Plaintiffs' Exchange Funds, and what funds SunTrust, rather than LES, converted. In fact, the Amended Complaint is devoid of any factual allegations to support the claim that SunTrust converted Exchange Funds. Plaintiffs' cursory legal conclusions are unsupported by factual allegations, and, accordingly, the Court must dismiss Plaintiffs' claim for conversion (Count 2). *See Twombly*, 127 S. Ct. at 1964-69, 1974 (holding that "formulaic recitation" of the elements will not suffice).

C. Plaintiffs' Conspiracy Claim Must Be Dismissed

Plaintiffs also fail to state a claim against SunTrust for Common Law Civil Conspiracy (Count 3). To adequately plead a cause of action for civil conspiracy, Plaintiffs must allege "(1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts." *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (quoting *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1236 (Cal. Ct. App. 1993)); *see also Firestone v. Wiley*, 485 F. Supp. 2d 694, 703 (E.D. Va. 2007) (citing *Glass v. Glass*, 321 S.E.2d 69 (Va. 1984) (listing analogous civil conspiracy elements under Virginia law)). Plaintiffs' civil conspiracy allegations have two fatal flaws.

First, Plaintiffs have failed to plead anything beyond conclusory allegations of the existence of the conspiracy. *See Wasco Prods., Inc.*, 435 F.3d at 992 (affirming trial court's

dismissal of civil conspiracy claim where plaintiff failed to allege the formation of an agreement) (applying California law); *Firestone*, 485 F. Supp. 2d at 703 (affirming trial court's dismissal of civil conspiracy claim where plaintiff's complaint "contain[ed] only conclusory or general allegations of conspiracy, which are insufficient to withstand a motion to dismiss") (applying Virginia law). Merely alleging that a conspiracy existed is insufficient as a matter of law. *Johnson v. Kaugars*, No. LM-152-3, 1988 WL 619378, at *3 (Va. Cir. Oct. 31, 1988) ("[I]t is not enough merely to state that a conspiracy took place.") (opinion attached as Ex. 8). Here, Plaintiffs have alleged only that "SunTrust conspired with agents and representatives of LES." Am. Compl. ¶ 196. Because Plaintiffs have merely stated in conclusory terms that a conspiracy existed, Plaintiffs do not state a claim upon which relief can be granted and, therefore, their claim must be dismissed. *See Firestone*, 485 F. Supp. 2d at 704 ("Where, as here, there are only vague, conclusory allegations of conspiracy, the claims fails at the threshold."); *Bay Tobacco, LLC v. Bell Quality Tobacco Prods., LLC*, 261 F. Supp. 2d 483, 499-500 (E.D. Va. 2003) (asserting that pleading the existence of an agreement in conclusory language is insufficient to withstand a motion to dismiss on a conspiracy claim).

Plaintiffs also have failed to adequately allege the existence of an underlying tort. This pleading deficiency, too, demands dismissal of Plaintiffs' civil conspiracy claim. *See Yulaeva v. Greenpoint Mortgage Funding, Inc.*, No. CIV. S-09-1504 LKK/KJM, 2009 WL 2880393, at *5 (E.D. Cal. Sept. 3, 2009) (dismissing civil conspiracy claim where plaintiff failed to adequately plead the underlying tort) (applying California law) (opinion attached as Ex. 8); *see also Almy v. Grisham*, 639 S.E.2d 182, 189 (Va. 2007) ("[I]n Virginia, a common law claim for civil conspiracy generally requires proof that the underlying tort was committed."). As demonstrated above, because Plaintiffs had no right to immediate possession at the time of the alleged

conversion, their conversion claim fails. Thus, Plaintiffs' common law conspiracy claim should also be dismissed as a matter of law because Plaintiffs have failed to allege an essential element of their underlying cause of action for conversion. *Citizens of Fauquier County v. SPR Corp.*, No. CL 94-40, 1995 WL 1055819, at *5 (Va. Cir. Mar. 27, 1995) ("Where there is no actionable claim for the underlying alleged wrong, there can be no action for civil conspiracy based on that wrong.") (opinion attached as Ex. 8); *see also Okun v. Super. Ct.*, 629 P.2d 1369, 1376 (Cal. 1981) (dismissing claim for civil conspiracy where plaintiff failed to sufficiently allege the underlying torts).

For the reasons set forth above, Plaintiffs' civil conspiracy claim (Count 3) must be dismissed for failure to state a claim upon which relief can be granted.

D. Plaintiffs Failed to Plead Their Fraud Claims With the Particularity Required by Rule 9(b)

Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). That is, to satisfy Rule 9(b), "the circumstances constituting the alleged fraud [must] be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong. Averments of fraud must be accompanied by 'the who, what, when, where and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citations and quotations omitted). Here, Plaintiffs' allegations fall short of complying with Rule 9(b).

Plaintiffs' entire Amended Complaint sounds in fraud. *See, e.g.*, Am. Compl. ¶¶ 3 ("SunTrust assisted LES in operating the Ponzi scheme hoping the scheme would go undetected long enough for the ARS market to unfreeze or for LFG to sell its 'good assets' to raise the funds needed to repay SunTrust"); 193 ("SunTrust converted and aided and abetted LES's conversion

by using Plaintiffs' Exchange Funds for unauthorized purposes."). For this reason, Plaintiffs were required to state "with particularity" the "circumstances constituting fraud." *See* Fed. R. Civ. P. 9(b); *see also Vess*, 317 F.3d at 1103-04 ("In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. . . . In that event, the claim is said to be 'grounded in fraud' or to 'sound in fraud.'") (citations omitted); *Armstrong v. McAlpin*, 699 F.2d 79, 93 (2d Cir. 1983) (affirming the dismissal of aiding and abetting claims and holding that Rule 9(b) applied to the plaintiffs' aiding and abetting claims where "[t]he complaint alleges that the fraudulent scheme was intended 'to loosen the control of Fiduciary over the assets and to enable certain of the defendants to loot those assets at a later date', and that this scheme was hidden by means of undescribed false statements and omissions"); *Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 245 (S.D.N.Y. 1996) ("To the extent the underlying primary violations are based on fraud, the allegations of aiding and abetting liability must meet the particularity requirements of Fed. R. Civ. P. 9(b)."). Where a claim is grounded in fraud, "the pleading of that claim *as a whole* must satisfy the particularity requirement of Rule 9(b)." *Vess*, 317 F.3d at 1103-04 (citations omitted) (emphasis added).

Plaintiffs merely allege, in conclusory fashion, that SunTrust "knew" what LES was doing (*see, e.g.*, Am. Compl. ¶¶ 12, 111-12, 183-84, 187), and that SunTrust "assisted LES" in the underlying wrong. *See, e.g., id.* ¶¶ 3, 12, 21, 171, 189. Plaintiffs' allegations as to SunTrust's conduct fall far short of what is required: "the circumstances constituting the alleged fraud [must] be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.

Averments of fraud must be accompanied by 'the who, what, when, where and how' of the misconduct charged." *Vess*, 317 F.3d at 1106 (citations and quotations omitted).

More fundamentally, however, not only have Plaintiffs failed to plead with particularity "the who, what, when, where and how" of SunTrust's assistance with LES's alleged misconduct, but Plaintiffs also fail to plead with any particularity "the who, what, when, where and how" of LES's alleged misconduct. Rather, Plaintiffs merely allege, again in conclusory fashion, that LES operated a Ponzi scheme. As to Plaintiffs' claims against SunTrust -- that SunTrust *aided and abetted* LES in the commission of its fraud -- SunTrust can do nothing other than "deny that [it has] done anything wrong," without the particular allegations regarding LES's wrongdoing required by the federal rules. Because each of Plaintiffs' claims against SunTrust is "grounded in fraud," and because Plaintiffs fail to plead these claims with particularity, Plaintiffs' claims must be dismissed. *See, e.g.*, *Armstrong*, 699 F.2d at 93 (affirming dismissal of aiding and abetting claims and stating that "[c]onclusory allegations that the bank aided and abetted are not enough").

VI. CONCLUSION

For the foregoing reasons, SunTrust respectfully requests that the Court grant its motion to dismiss Plaintiffs' Amended Consolidated Complaint in its entirety with prejudice. Plaintiffs have failed to state a claim as a matter of law, despite having the benefit of reviewing SunTrust's motion to dismiss the original Complaint. A third amendment of Plaintiffs' claims would be futile, and thus the Amended Complaint should be dismissed with prejudice. *See Iron Workers Local 16 Pension Fund v. Hilb Rogal & Hobbs Co.*, 432 F. Supp. 2d 571, 595 (E.D. Va. 2006) ("an amendment may be considered futile where Plaintiffs have previously had two full opportunities to plead their claim").

Respectfully submitted, this 19th day of October, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SUNTRUST BANKS, INC.'S MOTION TO DISMISS was electronically filed with the Clerk of Court using the CM/ECF system, which serves notification of such filing to all counsel of record.

This 19th day of October, 2009.

/s/ *Cory Hohnbaum*
Cory Hohnbaum