UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIKE COLLINS, FRANK GREENE and NATURE'S DISCOUNT, INC., Individually and on behalf of all others similarly situated, Plaintiffs, v. ADSURFDAILY, INC., *et al.*, Defendants.	Civil Division Case No.: 1:09-cv-00100-RMC Hon. Rosemary M. Collyer

PLAINTIFFS' MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF OPPOSITION TO DEFENDANTBANK OF AMERICA'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Ignoring the fundamental compliance requirements established by longstanding banking regulations, Defendant Bank of America's, N.A. ("Bank of America"), placed itself at the heart of a nationwide Ponzi Scheme victimizing over 100,000 participants. The illegal collection and dissipation of hundreds of millions of dollars was masterminded and operated by Defendants AdSurfDaily, Inc. ("ASD"), Thomas A. Bowdoin ("Bowdoin"), and Robert Garner ("Garner") (collectively referred to as the "RICO Defendants"). [FAC at ¶¶ 1,4].[1] Through branch employees and a branch manager who worked on site at the small office where the Ponzi scheme operated, a regional Vice President who visited and interviewed the masterminds of the scheme, and month after month of suspicious banking activities, Bank of America gained "actual knowledge" of the illegal scheme. [*Id*. at ¶¶73, 88-89]. Despite its knowledge, Bank of America continued providing the illegal scheme with an array of critical financial services that were essential to the scheme's continued existence and phenomenal growth. In so doing, Bank of America knowingly provided substantial assistance to the ongoing Ponzi scheme, thereby aiding and abetting a massive nationwide fraud.

In moving to dismiss this case, Bank of America blithely ignores the Complaint: well-plead allegations establishing Bank of America's knowing assistance to the Ponzi scheme. Bank of America maintains that it merely provided

[1] Plaintiffs' First Amended Complaint will be referred to in the text as the "Complaint" and will be cited to herein as "FAC, ¶ _____."

routine banking services believing that ASD was a legitimate and robust business entity. But the allegations of the Complaint, which are deemed true at this stage, belie Bank of America's assertions. ASD was the brainchild of Thomas Bowdoin a convicted felon with a history of securities fraud violations and failed business ventures. Bowdoin admits that ASD operated on a Ponzi scheme. ASD sold no products or services, held no intellectual property rights, and had no successful business professionals in management or on its Board. ASD had no colorable legitimate means to generate the massive profits (365% per year) Bowdoin and his co-conspirators promised investors nor the tens of millions of dollars a month flooding its tiny office – a former floral shop – in the small town of Quincy, Florida. Bank of America knew all of these facts. Indeed, when Bowdoin began his relationship with Bank of America, the illegal "AutoSurf" schemes which ASD emulated were well known among banks, regulators and law enforcement authorities.

It is no wonder that the two local banks in Quincy refused to even open an account for Bowdoin and ASD. Bank of America, on the other hand, welcomed Bowdoin with open arms, allowing him to open not one but ultimately 10 separate d/b/a accounts. In one month alone, $90 million dollars in cash, cashiers checks and Visa credit card charges were deposited in these accounts. Bank of America made it possible for victims throughout the country to deposit funds with the Ponzi scheme by simply completing a deposit slip and adding the ASD account number. Many of the deposit slips were even pre-printed with ASD's account information.

Bank of America also enabled unsuspecting victims to wire transfer contributions to ASD from anywhere in the world. Bank of America willingly allowed ASD to falsely legitimize its operations using the Bank's good name. Bank of America never once questioned or asked ASD to remove its name from its website or written materials that prominently featured Bank of America.

Bank of America maintains that Plaintiffs' Complaint must be dismissed because the services it provided were "legitimate." That argument misses the mark. The label placed on the Bank's services is irrelevant. The context and value of the services to the illegal scheme is the critical inquiry. Here, Bank of America's services provided "substantial assistance" to the ASD Ponzi scheme. ASD's scheme depended on its ability to collect and quickly recirculate funds from across the country, using bank accounts and electronic transfers. ASD's relationship with Bank of America enabled the scheme to collect and redistribute funds to participants seeking to cash out their positions and returns. Without a legitimate depository, ASD would have been relegated, like other Ponzi schemes, to the back alleys of the financial marketplace – and likely forced to use questionable off-shore facilities that would provoke suspicion and diminish their ability to raise hundreds of millions in funds from unsuspecting victims. The affiliation with Bank of America transformed ASD into a nationwide Ponzi juggernaut. Whether the Bank of America's services were "legitimate" or not, they provided "substantial assistance" to the RICO Defendants. *See In re First*

Alliance, 471 F.3d 977, 994-995 (9th Cir. 2006); *Neilson v. Union Bank of California,* 290 F. Supp. 2d 1101, 1121 (C.D. Cal. 2003).

Finally, there is no doubt that Bank of America had actual knowledge of the Ponzi scheme. "Actual knowledge" does not require Bowdoin tapping Ken Lewis, Bank of America's CEO on the shoulder and saying, "*I'm running a Ponzi scheme*." Actual knowledge can be established through reasonable inferences drawn from known facts. *See Woods v. Barnett Van of Fort Lauderdale,* 765 F.2d 1004, 1009 (11th Cir. 1985) (noting "the surrounding circumstances and expectations of the parties were critical, because knowledge of the existence of a violation must usually be inferred."). Here the facts known to Bank of America include: (1) ASD was taking in up to $90 million a month from rallies; (2) ASD had no revenues from products or services (no plant or equipment); (3) ASD had no business plan or management experience; (4) ASD's founder had a record of securities fraud, failed investment opportunities and no Internet marketing experience; (5) ASD offered returns of up to 365%; and (6) AutoSurfing scams were known throughout the banking industry and high on the list of compliance officers throughout the industry. Most importantly, the Quincy branch manager and branch employees worked after-hours, on-site at ASD's office assisting the RICO Defendants in managing and processing large numbers of financial transactions and a corporate Vice President of Business Banking conducted an on-site visit and investigation on ASD's business model after which Bank of America continued to actively assist ASD in the illegal activities.

I. STATEMENT OF FACTS

A. The Ponzi Scheme

This action arises from the same illegal Internet-based Ponzi scheme that the Court evaluated in the related civil forfeiture proceedings brought by the Government, which seized funds in various Bank of America accounts and other real and personal property constituting proceeds of a fraudulent scheme operated in violation of federal wire fraud laws. *See* Complaint for Forfeiture *In Rem,* Case No. 08-CV-1345-RMC; Civil Complaint for Forfeiture *In Rem*, Case No., 08-CV-2205-RMC. Because the Court is already familiar with the underlying scheme from the forfeiture proceedings Plaintiffs provide only a summary description of the illegal conduct in this response.

Beginning in the Fall of 2006, the RICO Defendants and other co-conspirators began operating ASD's internet auto-surf scheme over various Internet websites. [FAC, ¶ 22] In order to attract participants, ASD promised its members that they could earn large profits by (1) paying fees to advertise webpages through purchases of "ad packages"; (2) surfing other members' webpages for only 12-15 minutes per day; and (3) recruiting more members to do the same. ASD claimed that members would earn a rebate of up to 150% of the amount paid to purchase their ad packages and would also be paid commissions for referring new members. [*Id.* at 23] The rebate amount was later reduced to 125% of the amount paid to purchase their ad packages. [*Id.* at ¶¶ 23, 29]

Members who purchased ad packages earned a daily rebate that was credited to the member's cash account. Once a member earned the maximum rebate (i.e., 125%) on a purchased ad package, the particular ad package expired. The RICO Defendants encouraged members to use the daily rebates to purchase additional ad packages. [*Id.* at ¶29] The RICO Defendants also offered bonus opportunities to members in the form of ad packages as well as commissions earned from recruiting additional members. [*Id.* at ¶¶31-32, 36]

Because ASD did not sell any independent products or services, it had no ability to generate income to pay the promised rebates and commissions other than through the continued growth of its membership and continued growth of its members' purchases of ad packages. [*Id.* at ¶52]. As this Court has already held, the RICO Defendants' auto-surf program was not a legitimate business, but rather an illegal Ponzi scheme. In its opinion, following a two-day hearing addressing the legality of ASD's operations, the Court determined that ASD did not offer a legitimate product or service sufficient to sustain the business and thus, could not demonstrate a "cadre of true customers" as distinguished from the member-income-seekers. *Id.* at 18. The Court concluded that "the record strongly suggests that absent continuous membership growth, ASD has no means to generate the returns that it represents it will pay to those who join its program. It thus has failed to demonstrate, on this record, that the ASD business model constitutes a legitimate business." *Id.* at 19.

B. Bank of America Provided the Veneer of Legitimacy Needed to Launch and Perpetrate the RICO Defendants' Illegal Ponzi Scheme

ASD's business model always was intended to operate as a pure Ponzi scheme – a fact which Bowdoin essentially admits in his proffered statements to the Government and in filings with this Court in the civil forfeiture proceedings.[2] The RICO Defendants launched ASD after the collapse in early- to mid-2006 of two other confirmed Ponzi schemes – 12Daily Pro and Phoenix Surf –both targets of investigations and subsequent litigation by the Securities Exchange Commission.

Bowdoin, Garner, and other co-conspirators seized upon the opportunity to fill the void created by the collapse of these schemes and sought to develop the largest internet auto-surf program. (FAC, ¶22). To facilitate their own Ponzi scheme, the RICO Defendants coined new (or slightly revised) terms for old concepts and made a few adjustments to shield the scheme from increased scrutiny by regulators or law enforcement personnel. Bowdoin and his co-conspirators sought to cloak their nascent Ponzi scheme with an appearance of legitimacy by publicizing relationships – whether real or fabricated – between ASD and high-profile well-established companies. [*Id.* at ¶¶ 43, 67]

One of those well-established companies was the Bank of America. From the launch of ASD in late 2006 until its collapse in 2008, Bowdoin and others

[2] (*See* Plaintiff's Opposition to Thomas A. Bowdoin, Jr.'s "Notice of Rescession (sic) and Withdrawal of Release of Claims to Seized Property and Consent to Forfeiture" at 7; Motion to Dismiss for Lack of Fair Notice at 1 (US Doc. no. 50)).

touted ASD's relationship with Bank of America to manufacture the perception of legitimacy. [*Id.* at ¶67] Bank of America, in turn, allowed the RICO Defendants to advertise their relationship with the Bank on ASD's websites. [*Id.* at ¶¶ 67, 69-70] In addition, Bank of America provided ASD and its members with pre-printed deposit slips, to facilitate deposits of large sums of money from members across the United States. [*Id.*]

As alleged in Plaintiffs' Complaint and discussed in more detail below, Bank of America was not merely a passive bystander or even a mere enabler. Rather, the Bank played a knowing and critical role in the RICO Defendants' fraudulent scheme and was an active participant facilitating the scheme. [FAC, ¶¶65-100]

C. Bank of America's Relationship with Defendant Bowdoin and ASD

From the start of its relationship with Bowdoin and ASD, Bank of America eased or ignored its normal compliance procedures and extended atypical banking services to benefit the RICO Defendants. [*Id.* at ¶¶ 66-91] Although ASD was a separately incorporated entity, Bank of America permitted Bowdoin to open at least 10 personal accounts in his own name with a "doing business as" designation for ASD. [*Id.* at ¶ 92] Bank of America permitted Bowdoin to open these personal accounts using an invalid address. [*Id.*]

Bank of America also failed to investigate or chose to overlook Bowdoin's criminal history of securities fraud violations. [*Id.* at ¶¶ 58-61]. This is particularly egregious in light of the nature of ASD's business, which was

essentially an investment scheme. Bank of America also ignored facts showing that despite incorporating at least a dozen corporations over the past twenty years, Bowdoin did not appear to have earned any significant income from lawful employment during that time frame. [*Id.* at ¶¶61-62] Not surprisingly, in light of these facts, the two local banks in Quincy, Florida where ASD maintained its office refused to open accounts for Bowdoin or the ASD enterprise. [*Id.* at ¶1]

Over the course of its relationship with Bowdoin, Bank of America facilitated the deposit and transfer of tens of millions of dollars – sometimes in a single day – through Bowdoin's personal accounts. [*Id.* at ¶¶73-74, 88] The flow of millions of dollars through the Bowdoin accounts and the re-circulation of those funds to the victims were atypical transactions. If that were not enough, the Bank also facilitated the withdrawal of substantial sums from Bowdoin's d/b/a accounts for purchases of personal items, such as jewelry, cars, and recreational equipment. [*Id.* at ¶95]

D. Bank of America was Aware of and Provided Critical Assistance Allowing the RICO Defendants to Perpetuate their Fraudulent Scheme

1. Bank of America's Corporate and Quincy Branch Employees Were Aware of the RICO Defendants' Illegal Ponzi Scheme

Plaintiffs allege that the Bank of America branch manager in Quincy and several of her staff members went to work directly for the RICO Defendants at the office where the Ponzi scheme operated. [*Id.* at ¶¶74, 88] These Bank of America employees worked after-hours, on-site at ASD's office assisting the RICO

Defendants in managing and processing a staggering number of financial transactions – essentially providing on-site banking services augmenting their services as Bank of America employees. [*Id.*] Knowing the critical role that having access to and assistance from Bank-of-America insiders played in its perpetuation of their fraudulent scheme, ASD paid these key players a higher hourly rate than other part-time help Defendants hired. [*Id.*] While on-site, these Bank of America employees had unlimited access to the facilities and witnessed firsthand the ASD's illegal business practices. They also witnessed that ASD's multi-million dollar Ponzi scheme operated from a ramshackle office that formerly housed a florist shop.

The circle of Bank of America employees with knowledge regarding ASDs operations was not limited to the Quincy branch employees, but rather extended up Bank of America's corporate ladder to a Bank of America Vice President of Business Banking. This Vice President, who worked at Bank of America's offices in Tallahassee, Florida, was tasked with analyzing Defendants' business operations. [*Id.* at ¶89] The Vice President's made an onsite visit to ASD's office, where she was provided with access to ASD's business model and operations, spoke with ASD management-level employees, and signed-off on the Bank of America branch employees providing onsite services. [*Id.*]

Thus, the Complaint alleges detailed facts establishing that Bank of America management gained actual knowledge of the RICO scheme by providing

active and continuing assistance to the enterprise at ASD's office and through the onsite visit of its Vice President of Business Banking.

2. The Banking Services, including Many Atypical Services, Provided by Bank of America Afforded the RICO Defendants with the Necessary Financial Infrastructure to Carry-out their Illegal Scheme

As noted above, Bank of America provided the infrastructure necessary to facilitate the flow of tens of millions of dollars though Bowdoin's various accounts. Bank of America also provided the expertise, facilities, and personnel necessary for the RICO Defendants to use electronic transfers to facilitate rapid growth in ASD's membership and the exponential expansion of the RICO enterprise. [*Id.* at ¶75] Bank of America allowed ASD to exceed the limit on electronic transfers placed on Bowdoin's accounts. [*Id.* at ¶¶75, 79] In addition, Bank of America provided Bowdoin and ASD with enhanced services in order to accommodate the millions of dollars flowing between accounts. [*Id.*] All of these transactions and arrangements were atypical, suspicious and indicative of an ongoing Ponzi operation.

Because of the substantial sums of money flooding ASD's coffers overwhelmed the limited administrative capabilities of ASD, the RICO Defendants had difficulty tracking the funds collected from unsuspecting victims, which resulted in improper or delayed payouts. [*Id*. at 72] Bank of America was aware ASD's inability to accurately track the torrent of funds and provided personnel to train and assist ASD in handling and tracking the large sums of

money. [*Id.*] These sorts of services not only extended far beyond any ordinary banking relationship, they also provided Bank of America with intimate knowledge of ASD's operations and assisted in the perpetuation of the Ponzi scheme.

By virtue of its active involvement in ASD's business affairs, Bank of America was aware that funds flowed from the RICO Defendants' accounts in a manner inconsistent with a legitimate business. Bowdoin, in particular, used ASD business accounts at Bank of America with impunity to purchase personal luxury items, to pay off mortgages for family members, to buy property, and to otherwise dissipate business funds. [*Id.* at ¶¶ 6, 95]

ASD's transfers of funds from Bank of America accounts also provided Bank of America with information about the suspicious nature of ASD's operations. In a two-week period, the RICO Defendants wired several million dollars from their Bank of America accounts to an internet-operated, Canada-based money transmitting and payment company. [*Id.* at ¶ 81] Such a transaction is not consistent with a legitimate business enterprise. The RICO Defendants additionally used funds from the Bank of America accounts of one scheme, ASD, to seed the Bank of America accounts of another scheme operated by the RICO Defendants, Golden Panda. [*Id.* ¶ 97] These transactions, too, were consistent with a fraudulent scheme, and inconsistent with legitimate business activity.

3. Bank of America Was Aware of and Facilitated Account Activities Bespeaking a Ponzi Scheme

As a prototypical Ponzi scheme, ASD spawned a large and ever-increasing number of small transactions generating millions of dollars of deposits in a short time period. [*Id.* at ¶ 6] ASD received a flood of individual deposits into its accounts using pre-printed deposit slips provided by ASD and Bank of America. [*Id.* at ¶ 69] Bank of America also handled a huge volume of cashiers checks, money orders and/or wire transfers deposited into Bowdoin's accounts. The massive infusions of deposits after the ASD rallies also were funneled into the Bank of America accounts. The sheer size of the bulk deposits and the massive number of transactions were indicative of a Ponzi operation. [*Id.* at ¶¶ 39, 73].

At the same time, Bank of America processed the simultaneous outflow of funds to members as monies were recirculated to support the Ponzi scheme. Bank of America witnessed and, in fact, facilitated the failed promises made by ASD that its members could "cash out" the "cash balances" in members' ASD accounts. Bank of America provided ASD with the means to make "direct deposits" into members' accounts when the members requested a "cash out" from ASD. [*Id.* at ¶¶ 171, 176] Bank of America received instructions from ASD for any such "cash out" transactions. ASD also made withdrawals from its Bank of America accounts to pay to members' rebates and/or commissions. [*Id.* at ¶ 83] Through such withdrawals, Bank of America had information about the number, amount, and timing of the payments ASD actually made to its members.

Bank of America thus processed the account transactions reflecting the inflows, outflows and transfers of funds by ASD. Through the activities in the ASD accounts, Bank of America had direct knowledge of the ever-increasing velocity of funds flowing through the accounts and the recirculation of those funds to the members. This flow of funds was indicative of a Ponzi scheme and inconsistent with the activities of a normal business. The unmistakable trends of operation reflected in these financial transactions are consistent with the fraudulent nature of ASD's scheme.

4. Bank of America Recklessly Disregarded Numerous Red Flags

The RICO Defendants engaged in other types of conduct indicative of suspicious activity in addition to the examples of "red flags" already enumerated above. Even though ASD was operated out of a one-time floral shop by an individual with a criminal past and no history of legitimate income, Bank of America either overlooked or did not investigate these and other serious "red flags" indicating suspicious activity and continued to facilitate the RICO Defendants' illegal conduct. [*Id.* at ¶ 73] Most glaringly, ASD's scheme was practically an exact replica of other well-known online Ponzi schemes, which were the subject of persistent and high profile warnings from regulators. [*Id.* at ¶91]

ASD promoted methods for members to deposit money directly into its Bank of America accounts through wire transfers and deposits. [*see e.g., Id.* at ¶¶ 39, 70, 71, 91, 114(g)) (wire transfers); *Id.* at ¶¶ 39, 65, 68, 69, 73 (deposits)] Wire activity that is unexplained, repetitive, or shows unusual patterns should also

raise suspicions, and it is reasonable to infer that the pattern of ASD's business would be reflected in such wire activity. [*Id.* at ¶ 73] In addition, the large cash deposits allegedly made by ASD following rallies would have triggered Bank of America's attention, if for no reason other than the bank's reporting requirements for large cash transactions. [*Id.* at ¶¶ 39, 73, 86, 88] In addition, as alleged, Bank of America has an obligation to report large currency transactions, and it is therefore a reasonable inference that Bank of America has systems in place to identify such transactions. [*Id.* at ¶ 86]

With similar information available to them, two other local banks refused to do business with Bowdoin and ASD on suspicion of improper conduct. [*Id.* at 1] Bank of America likewise knew of ASD's and Bowdoin's illegal conduct and chose to actively facilitate the fraudulent scheme. [*Id.* at ¶¶65-100]

III. STANDARD OF REVIEW

A. Plaintiffs State Claims for Aiding and Abetting Under *Twombley* and its Progeny

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." To meet this "threshold requirement," the complaint need only provide "enough to give a defendant 'fair notice of the claims against him.'" *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 16 (D.C. Cir. 2008) (citation omitted); *see also Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam); *Muir v. Navy*

Fed. Credit Union, 529 F.3d 1100, 1108 (D.C. Cir. 2008). As will be outlined below, Plaintiffs' Complaint provides such a showing.

Defendant wrongly suggests that *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 555 (2007) or the Court's recent decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), establishes a heightened pleading standard. As recognized by the D.C. Circuit, this argument misconstrues the import of *Twombley*. *Twombley* cannot be view in isolation from the context of that case, in which the Court held that to plead a claim under Sherman Act § 1 for unlawful restraint of trade, merely alleging parallel conduct is insufficient to allege a conspiracy. *See In re Rail Freight Fuel Surcharge Antitrust Litig*., 587 F. Supp. 2d 27, 32 (D.D.C. 2008). "*Twombly* leaves the long-standing fundamentals of notice pleading intact." *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc*., 525 F.3d 8, 15 (D.C. Cir. 2008). Even after *Twombley*, a complaint need not plead detailed factual allegations in order to survive a Rule 12(b)(6) motion to dismiss. *Twombley*, 550 U.S. 544, 555; *Aktieselskabet*, 525 F.3d at 16. *Twombley* (and *Iqbal*) require only that the Plaintiffs allege facts, which, deemed true, state a plausible basis for the claims alleged.

In ruling on a defendant's motion to dismiss, a court must accept as true all factual allegations in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2220 (2007); *Twombley*, 550 U.S. at 555-556. In addition, "the court must give the plaintiff 'the benefit of all reasonable inferences derived from the facts alleged.'" *Aktieselskabet*, 525 F.3d at 17 (citations omitted). So long as the

pleadings suggest a "plausible" scenario to "sho[w] that the pleader is entitled to relief," a court may not dismiss the Complaint. *Tooley v. Napolitano*, 556 F.3d 836, 839 (D.C. Cir. 2009).[3]

Here, not only does the Complaint provide allegations of facts to support the elements of the causes of action, the Complaint also provides "information about the circumstances giving rise to the claims." *Aktieselskabet,* 525 F.3d at 16 n.4.

B. The Elements of Plaintiffs' Aiding and Abetting Claims Challenged in Bank of America's Motion are not Subject to the Pleading Requirements under Fed. R. Civ. P. 9(b)

The only element of the Plaintiffs' aiding and abetting fraud claim that is subject to the heightened pleading requirement of Rule 9(b) is the requirement that Plaintiff establish the underlying fraud. Because Bank of America has not challenged the existence of the underlying fraud committed by the RICO Defendants, the remaining elements of Plaintiffs' aiding and abetting fraud claim are not subject to Rule 9(b). *Hobbs v. BH Cars, Inc.*, 2004 WL 1242838 (S.D. Fla. 2004) at * 4 fn. 3 ("Rule 9(b) only requires the '*circumstances* constituting fraud' to be plead with particularity. Thus, it does not require Plaintiffs to plead with particularity the other elements of aiding and abetting fraud.").

[3] Bank of America's suggestion that the Court's decision in *Iqbal* somehow made the *Twombley* standard of review governing the motion to dismiss in this case more stringent is wrong. The D.C. Circuit in *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672 (D.C. Cir. 2009), makes clear that even after *Iqbal* "so long as the pleadings suggest a 'plausible' scenario to 'sho[w] that the pleader is entitled to relief' a court may not dismiss." *Id.* at 681 (citation omitted).

Even if Rule 9(b) heightened pleading standard was applicable, Plaintiffs have met the rules requirements. Rule 9(b) is designed to ensure that defendants are alerted to "the precise misconduct with which they are charged and [to protect] defendants against spurious charges of immoral and fraudulent behavior." *United States v. Morehouse Med. Assoc., Inc.*, 2003 WL 22019936 (11th Cir. 2003). The rule requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). "Rule 9(b) must not be read to abrogate rule 8, however, and *a court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the directives of rule 9(b) with the broader policy of notice pleading."* *Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985) (emphasis added). Moreover, while the fraud allegations must be pled with specificity, "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed.R.Civ.P. 9(b). This provision "obviates the necessity of pleading detailed facts supporting allegations of knowledge, [but] it does not relieve a pleader of the burden of alleging the nature of the knowledge a defendant purportedly possessed." *Neilson v. Union Bank of California*, 290 F.Supp.2d 1101, 1119 (C.D. Cal. 2003). Finally, "Rule 9(b)'s heightened pleading standard may be applied less stringently … when specific "factual information [about the fraud] is peculiarly within the defendant's knowledge or control," *Morehouse Med. Assoc.*, 2003 WL 22019936 at * 3 (citing cases), or when "the fraud allegedly occurred over a period of time" or involved "prolonged multi-act

schemes." *Id.* at * 5 fn. 6. "A complaint satisfies Rule 9(b) if it affords the defendant notice of the claims against him and shows reasonable belief of the plaintiff's part that the complaint has merit." *McCrathy v. Barnett Bank*, 750 F. Supp. 1119, 1123 (M.D. Fla. 1990). Plaintiffs' allegations satisfy the requirements of Rule 9(b).

IV. LEGAL ARGUMENT

A. Plaintiffs Have Sufficiently Alleged Claims for Aiding and Abetting

In order to state a claim for aiding and abetting, Plaintiffs must allege that: (1) the party whom the defendant aids performed a wrongful act causing injury; (2) the defendant was generally aware of his role as part of an overall activity that is improper; and (3) the defendant knowingly and substantially assisted the primary violation. *See Woods v. Barnett Van of Fort Lauderdale*, 765 F.2d 1004, 1009 (11th Cir. 1985); *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *Smith v. First Union Nat'l Bank*, No. 00-4485-CIV, 2002 WL 31056104, at *2 (S.D. Fla. Aug. 23, 2002); *ZP No. 54 Ltd. Partnership v. Fidelity and Deposit Co. of Maryland*, 917 So.2d 368, 372 (Fla. Dist. Ct. App. 2005). The facts alleged in Plaintiffs' complaint together with the reasonable inferences drawn therefrom are more than sufficient to state claims against Bank of America for aiding and abetting both breach of fiduciary duty and fraud.

1. Plaintiffs Have Sufficiently Alleged the Primary Violations[4]

a. Plaintiffs Have Adequately Alleged the Existence and Breach of a Fiduciary Relationship with the RICO Defendants

Under Florida law, a fiduciary duty extends:

> "to every possible case ... in which there is confidence reposed on one side and the resulting superiority and influence on the other. .... The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another."

Masztal v. City of Miami, 971 So.2d 803, 809 (Fla. Ct. App. 2007) (*quoting Quinn v. Phipps*, 113 So. 419, 421 (Fla. 1927)). The law imposes a fiduciary duty where the relationship of the parties and the secondary factual circumstances indicate that "'confidence is reposed by one party and a trust accepted by the other.'" *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.*, 842 So. 2d 204, 207-08 (Fla. Dist. Ct. App. 2003) (citations omitted); *First Nat'l Bank & Trust Co. v. Pack*, 789 So. 2d 411, 414-15 (Fla. Dist. Ct. App. 2001) (same). Due to the fact-intensive nature of the inquiry, the existence of a fiduciary relationship is not suitable for resolution on a motion to dismiss. *Susan Fixel, Inc.*, 842 So. 2d at 207-08 (noting that the existence of a fiduciary duty is "better addressed by a summary judgment motion, or at trial, than on a motion to dismiss"); *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386, 390 (5th Cir. 1982) ("The existence or nonexistence of a fiduciary relationship between parties is a question of fact for the jury.").

[4] With respect to Plaintiffs' claim for aiding and abetting fraud, Bank of America does not claim that Plaintiffs failed to state a claim for the underlying fraud committed by the RICO Defendants. Accordingly, Plaintiffs will only address the RICO Defendants' breach of fiduciary duty in this section.

Bank of America argues that Plaintiffs have not alleged facts to support an express or implied fiduciary relationship. Contrary to the facts and without support in the record, they argue that Plaintiffs have simply entered an "'arms-length' business transaction with ASD by 'purchasing ad packages' over the Internet." Def. Mem. at 12. Bank of America's factual cherry-picking and contention that Plaintiffs' complaint is essentially filled with legal conclusions are insufficient to sustain its motion to dismiss. When viewed in its totality, Plaintiffs' Complaint contains numerous allegations demonstrating the fiduciary relationship between the RICO Defendants and Plaintiffs.

Plaintiffs' Complaint contains several allegations demonstrating that the RICO Defendants affirmatively undertook to gain the confidence and trust in their members, which exceeded an ordinary "arms-length" business transaction. Indeed, Plaintiffs have established the quintessential situation of the RICO Defendants preying on the vulnerabilities of the Plaintiffs and the Class through a barrage of promises of financial independence supported by the advice and counsel of the RICO Defendants all the while knowing of the illegality of their scheme. The following allegations, for example, are sufficient to establish the existence of a fiduciary relationship between the RICO Defendants and the Plaintiffs and the Class:

> The RICO Defendants on ASD's website and through videos posted on the Internet repeatedly stressed the legality of the program and the ability to gain financial independence [FAC, ¶43];

The RICO Defendants counseled members on reinvesting rebates and commissions under the auspices of trying to help members maximize their financial gains [*Id.* at ¶¶43, 53];

- The RICO Defendants touted the knowledge and business acumen of its key players to attract unsuspecting victims [FAC, ¶¶37, 42];

  The RICO Defendants emphasized that participants will have the opportunity to "lock arms" with ASD founder Bowdoin, thereby benefitting from his "impeccable reputation and business acumen" [*Id.*];

- The RICO Defendants also bolstered trust and confidence by touting the relationship with Bank of America, providing participants with the illusion that their financial transactions with ASD were legitimate and secure [*Id.* at ¶67]; and

- Defendants ASD and Bowdoin offered participants weekly conference calls, which included training sessions on profiting through ASD as well as sessions with Defendant Bowdoin describing the business undertakings of ASD in an attempt to garner confidence as to the sustainability of the ASD program. [*Id.* at ¶¶ 41, 43]

The facts alleged by Plaintiffs show a course of conduct undertaken by the RICO Defendants sufficient to impute a fiduciary relationship with Plaintiffs and the Class.[5] Moreover, it is well-recognized that even parties ostensibly dealing at arm's-length can enter into a fiduciary relationship where the customer is relying on the stronger party to counsel and inform him. *See In re Chira*, 353 B.R. 693, 731 (S.D. Fla. Bankr. 2006). Unlike a true "arm's-length" transaction, the RICO Defendants here have voluntarily provided financial, legal and other business

[5] Bank of America's contention that Plaintiffs fail allege when financial advice was given by the RICO Defendants, how it was given, by whom, to whom, or the content of the alleged financial advice is simply false and seeks to impose a heightened standard of pleading not applicable to breach of fiduciary claims. *Compare* Def. Mem. at 12 *with* FAC, ¶¶25-29, 34-37, 41-43, 47-53. *See also Firestone v. Firestone*, 76 F.3d 1205, 1211 (D.C. Cir. 1996) (applying Rule 8 to allegations of a fiduciary relationship); *Hefferman v. Bass*, 467 F.3d 596, 601 (7th Cir. 2006) (noting that Rule 8 governs the issue of whether plaintiff has adequately alleged a claim for aiding and abetting breach of fiduciary duty).

advice and counsel to its participants on numerous occasions, encouraging them to trust in the RICO Defendants' expertise and purported superior knowledge regarding ASD's programs. The cases upon which Defendant relies are easily distinguished on this basis. *See In re Meridian Asset Mgmt., Inc.*, 296 B.R. 243, 262 (Bankr. N.D. Fla. 2003) (plaintiffs failed to allege that defendant chose to advice, counsel or protect plaintiffs or that defendant induced or encouraged plaintiffs to act); *Bankest Imports, Inc. v. ISCA Corp.*, 717 F. Supp. 1537, 1541 (S.D. Fla. 1989) (complaint failed to allege that defendant undertook to advise and counsel plaintiff); *Mac-Gray Servs., Inc. v. DeGeorge*, 913 So. 2d 630, 633 (Fla. Dist. Ct. App. 2005) (contract between parties expressly stated that plaintiff was not relying on any expertise of defendant).[6]

The Complaint alleges ample facts establishing the existence of a fiduciary relationship between the RICO Defendants and the victims of the Ponzi scheme.[7]

[6] The D.C. cases cited by Defendant are also distinguishable from the facts present in this case. *See Paul v. Judicial Watch, Inc.*, 543 F. Supp. 2d 1, 6 (D. D.C. 2008) (no fiduciary relationship between employee and plaintiff because employee acted solely within the scope of his employment rather than in any personal or individual capacity); *Prunte v. Universal Music Group*, 484 F. Supp. 2d 32, 43 (D. D.C. 2007) (defendant only provided advice on two occasions during a four-month period); *Muir v. Navy Fed. Credit Union*, No. 03-1193(RJL), 2005 WL 486034, at *2 (D. D.C. Mar. 1, 2005) (no allegations that defendant offered any advice or counsel); *Regency Commc'ns, Inc. v. Cleartel Commc'ns, Inc.*, 160 F. Supp. 2d 36, 42 (D.D.C. 2001) (no allegations that defendant offered any advice or counsel); *Geiger v. Crestar Bank*, 778 A.2d 1085, 1095 (D.C. 2001) (no evidence of any interaction between plaintiff and alleged fiduciary).

[7] Bank of America does not contest Plaintiffs' allegations that ASD, Bowdoin and the other primary wrongdoers breached their fiduciary duties. Nor could it. The factual allegations detailing the RICO Defendants' misrepresentations and omissions regarding the legality of ASD, the opportunity for financial gain, the sustainability of the program, the business acumen of Defendant Bowdoin and Defendants' many other misrepresentations regarding the operation of ASD are more than sufficient to state a claim for breach of fiduciary duty. [FAC, ¶¶40, 48, 55-64]

2. Plaintiffs Have Adequately Pled Bank of America's Knowledge of the Primary Violations

In purporting to address the "actual knowledge" prong of Plaintiffs' aiding and abetting claims, Bank of America conflates the "knowledge" prong of an aiding and abetting claim with the "substantial assistance" prong. Instead of focusing on the applicable standard for what constitutes "knowledge" of the underlying violation, Bank of America focuses instead on the standard for establishing "knowing assistance," which relates to the third prong of an aiding and abetting claim. Def. Mem. at 13-15. While the "substantial assistance" prong does require a degree of intent (i.e., "knowing assistance"), the knowledge element for an aiding and abetting claim simply requires that a defendant have a ***general awareness*** of his role in an overall activity that is improper. *Smith*, 2002 WL 31056104, at *2 (citations omitted); *accord Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp. 2d 86, 96 (D. D.C. 2009) ("A general awareness of wrongdoing on the part of the one being aided or abetted is sufficient to show knowledge on the part of an aider and abettor . . . ."). "[C]ourts have found pleadings sufficient if they allege generally that defendants had actual knowledge of the specific primary violation." *Neilson v. Union Bank of California,* 290 F. Supp. 2d 1101, 1120 (C.D. Cal. 2003). Plaintiffs' Complaint provides specific allegations establishing Bank of America's knowledge of the RICO Defendants' illegal conduct.

Plaintiffs allege facts constituting direct evidence that Bank of America had knowledge of the RICO Defendants' illegal scheme. Specifically, Plaintiffs allege:

> Bank of America management from outside of the Quincy, Florida branch also knew from its own investigation the fraudulent nature of ASD's business. A Bank of America Vice President of Business Banking visited the office of ASD in Quincy, Florida, met with ASD employees to learn more about ASD's business model, and was told that Bank of America employees from the Quincy branch were working for ASD. Despite the knowledge gained through this investigation by Bank of America management, Bank of America continued to do business with the RICO Defendants . . . .

[FAC, ¶89]. Plaintiffs further allege facts showing the actual knowledge of the Quincy Branch Manager and other employees of the RICO Defendants' wrongful conduct:

> Bank of America employees and management of the Quincy, Florida branch had specific knowledge of the financial transactions of the RICO Defendants and the ASD scheme. As the amount of money coming into ASD increased, particularly following rallies in which the scheme took in a reported $29-39 million over the course of single day-long or weekend events, the banking needs of the RICO Defendants increased. Bank of America made the ASD scheme grow by supplying critical infrastructure for the scheme's financial transactions. The substantial assistance provided by Bank of America included both services provided at Bank of America related to management of deposits and electronic transactions, and assistance provided at ASD's business location by Bank of America employees, including the branch manager. In fact, the Quincy, Florida branch manager and a majority of the branch's employees also worked for ASD at ASD's office and were paid directly by ASD for doing so. These Bank of America employees provided the sort of experience in financial transactions ASD needed to effectuate its scheme. The Bank of America employees who worked at ASD earned a higher hourly wage than other ASD employees, and worked side by side with them to process financial transactions at the heart of the fraudulent scheme.

[*Id.* at ¶ 88].

These factual allegations in the Complaint, which Bank of America barely acknowledges, sufficiently plead the knowledge element of Plaintiffs' aiding and abetting claims against the Bank.[8] Similar allegations have been found sufficient to satisfy the requirement of pleading "knowledge" in connection with an aiding and abetting claim. In *Dubai Islamic Bank v. Citibank*, 256 F. Supp. 2d 158 (S.D.N.Y. 2003), plaintiff in support of its aiding and abetting claim alleged: "Citibank, through its officers and employees, . . . actually knew of and participated in the unlawful scheme to steal from DIB and launder the money stolen from DIB." *Id.* at 167. In reviewing these allegations, the court found that plaintiff "sufficiently alleges that Citibank had actual knowledge." *Id.* Here, Plaintiffs allege that the Vice President of Business Banking, acting within the scope of her employment, knew of the RICO Defendants' illegal scheme, or recklessly disregarded it, when she conducted an onsite visit to ASD, investigated ASD's business model, and learned that Quincy branch employees (including the Branch Manager) were working after-hours at ASD performing essentially banking-type functions. In addition, while the Quincy branch employees were being paid by ASD, they were performing duties requiring their expertise as Bank

[8] Bank of America conveniently fails to mention Plaintiffs' allegation relating to the investigation by the Vice President of Business Banking and dismisses the allegations relating to the Quincy branch employees involvement in the ASD scheme as mere "moonlighting" outside the scope of the employment. Bank of America does not address the allegations that these Quincy branch employees were essentially performing banking functions on ASD premises. *Compare* Def. Mem. at 16-17 *with* FAC, ¶¶88-89. Moreover, it is without dispute that the Vice President's onsite visit to ASD was acting within the scope of her employment with Bank of America.

of America employees. The Bank Vice President essentially endorsed these activities during her on-site visit. These are not legal conclusions, but specific factual allegations entitled to a presumption of truth sufficient to satisfy the "knowledge" requirement of Plaintiffs' aiding and abetting claims. *Citibank,* 256 F. Supp. 2d at 167.

Bank of America's motion to dismiss should be denied because Plaintiffs have adequately plead "knowledge" of the RICO Defendants' underlying violations through both direct and circumstantial evidence of Bank of America's knowledge. *Smith*, 2002 WL 31056104, at *3-*5. Notably, in addition to the allegations establishing that Bank of America management employees gained knowledge of the RICO Defendants' illegal activities by working on site at the Ponzi scheme operations and from the Vice President's on site visit, Plaintiffs allege many other facts supporting an inference of knowledge, including:

- Bank of America was aware of the daily transactions involving millions of dollars moving in, out and between Bowdoin's various accounts relating to his business operating out of a small floral shop, which should have triggered Bank of America's duty to investigate and report suspicious activities. [FAC at ¶ 86];

  Bank of America facilitated the electronic transactions by allowing Bowdoin to exceed the limit on electronic transmissions associated with his accounts and by providing Bowdoin with enhanced services to accomplish the RICO Defendants' illegal activities [*Id.* at ¶79];

- Bank of America provided training to ASD employees relating to tracking financial transactions [*Id.* at ¶77];

  Bank of America ignored Defendant Bowdoin's criminal history, including securities violations, and allowed Bowdoin to open ten (10) d/b/a accounts through which millions of dollars flowed [*Id.* at ¶91];

Defendant Bowdoin's withdrawal of funds in d/b/a to purchase personal items, such as jewelry and cars [*Id.* at ¶¶91, 95];

- Bank of America allowed Defendant Bowdoin to open accounts using an invalid address [*Id.* at ¶¶92]; and

Two other banks refused to do business to Defendant Bowdoin under the suspicion that he was operating an illegal Ponzi scheme. [*Id.* at ¶1]

In *Neilson v. Union Bank of California*, 290 F. Supp. 2d 1101 (C.D. Cal. 2003), the Court found that similar factual allegations sufficiently pled the knowledge element of plaintiffs' aiding and abetting claims. In *Neilson*, plaintiffs brought a class action seeking damages from various banks for, among other things, aiding and abetting an investment advisor "in effecting a Ponzi scheme that defrauded hundreds of investors out of hundreds of millions of dollars." *Id.* at 1108. Plaintiffs alleged that the investment scheme depended upon the involvement of the defendant banks and alleged that the defendant banks were aware of the wrongful conduct. Specifically, plaintiffs alleged that the defendant banks allowed Slatkin, the alleged operator of the Ponzi scheme, to overdraw his checking account and to receive an extension of a $4 million line of credit. *Id.* at 1110. In addition, plaintiffs alleged that the defendant banks "rubber-stamped" false information provided by Slatkin. *Id.*

Defendants moved to dismiss plaintiffs' aiding and abetting claims arguing that plaintiffs failed to sufficiently plead knowledge of the underlying violation. Similar to the Complaint in this case, the court noted that the *Neilson* complaint detailed the "manner in which the Ponzi scheme operated," described the

perpetrator's "fraudulent transactions, and outlin[ed] the Banks' involvement in these activities." *Id.* at 1120. Additionally, the complaint alleged that "the Banks utilized atypical banking procedures to service [the] accounts, raising an inference that they knew of the Ponzi scheme and sought to accommodate it by altering their normal ways of doing business." *Id.* The Court found this sufficient to support the general allegations of knowledge. Importantly, the Court continued:

> While it is true the complaint does not directly state that the Banks knew Slatkin was running a Ponzi scheme and stealing investor funds, this is the net effect of allegations that the Banks knew of Slatkin's "fraud," "actively participated" in the Ponzi scheme with knowledge of his "crimes," and accommodated him by using atypical banking procedures to service his accounts.

Id. at 1121; *see also Woods v. Barnett Bank*, 765 F.2d 1004, 1010 (11th Cir. 1985) ("if the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability").

Here, like *Neilson*, Plaintiffs have alleged a number of atypical services provided by Bank of America, which support an inference of knowledge, including allowing Bowdoin to exceed the limit of electronic transfers on his account, failing to follow procedures relating to certain "red flags" that should have triggered an investigation and reporting by Bank of America, and ignoring or overlooking Bowdoin's past criminal history, especially in light of the tens of millions of dollars flowing through his accounts. These allegations of atypical procedures in conjunction with the allegations of the knowledge gained by Bank of America employees in the course of their relationship with the RICO

Defendants is sufficient to satisfy the pleading requirement for the knowledge prong of Plaintiffs' aiding and abetting claims. *See Smith*, 2002 WL 31056104, at *5 (finding disputed fact sufficient to withstand summary judgment as to whether defendant bank had knowledge of wrongful purpose in alleged Ponzi scheme based on atypical banking transactions and failure to report suspicious activity); *Aberbach v. Wekiva Assoc., Ltd.*, 735 F. Supp. 1032, 1037 (S.D. Fla. 1990).[9]

3. Plaintiffs Have Sufficiently Alleged that Bank of America Provided Substantial Assistance to the RICO Defendants

Under the third element of an aiding and abetting claim, to survive a motion to dismiss, Plaintiffs must allege that the "accused aider-abettor knowingly and substantially assisted the violation." *Woods v. Barnett Bank*, 765 F.2d 1004, 1009 (11th Cir. 1985). In carefully analyzing this requirement, the *Woods* Court drew on its prior decision in *Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975). As set forth in *Woodward*, "[m]ost problematic in this area is the issue whether, or to what extent, silence and inaction can fulfill the requirement." 522 F.2d at 96. When silence and inaction are involved, the required role the aider and abettor plays depends upon whether a duty to disclose existed. As further explained in *Woods*:

> A defendant who is not under any duty to disclose can be found liable as an aider and abettor only if he acts with a high degree of scienter, that is, with a

[9] The main case relied upon by Bank of America in its discussion of the knowledge prong is distinguishable. Unlike the complaint in the present case, in *Silverman v. Weil*, 662 F. Supp. 1195 (D.C. Cir. 1987), the court was concerned about the accused defendant's inability to prepare a defense based on the plaintiff's vague and conclusory allegations. *Id.* at 1200 ("the failure to specify any particular transaction makes it difficult for the defendants to identify which fraudulent transactions they were allegedly involved in, so that they could, in turn, prepare their defense.").

> "conscious intent." On the other hand, liability could be imposed upon and aider and abettor who is under a duty to disclose if he acts with a lesser degree of scienter. For an aider and abettor who combines silence with affirmative assistance, the degree of knowledge required should depend upon how ordinary the assisting activity is in the involved businesses. …[I]f the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability.[10]

Wood, 765 F.2d at 1010. "Whether the assistance was 'substantial' depends on the totality of the circumstances." *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1046 (11th Cir. 1986) (citing *Woodward*, 522 F.2d at 97).

Bank of America again ignores most of Plaintiffs' factual allegations in arguing that Plaintiffs have failed to adequately allege "substantial assistance." Bank of America contends that Plaintiffs' claims must fail because "the only facts pled against Bank of America in this case are facts which show that it engaged in legitimate banking activities." Def. Mem. at 16. Even if this contention was true – which it is not – the allegations of direct evidence of Bank of America's actual knowledge of the illegal scheme operated by the RICO Defendants are still sufficient to withstand Bank of America's motion to dismiss.

In *In re First Alliance*, 471 F.3d 977 (9th Cir. 2006), plaintiffs brought a class action alleging, among other things, that defendant aided and abetted First Alliance's fraud arising out of its subprime mortgage lending business. At trial, the jury returned a verdict in favor of plaintiff on their aiding and abetting claim and defendant appealed challenging the jury's finding that it had actual knowledge

[10] Although both *Woods* and *Woodward* address aiding and abetting under Section 10(b) of the Securities and Exchange Act, "courts addressing aiding and abetting liability under section 10(b) apply the same analysis as those addressing common law aiding and abetting liability." *Smith*, 2002 WL 31056104 at * 2 fn. 2.

of First Alliance's fraud and that it substantially assisted in the commission of the fraud. The Ninth Circuit upheld the jury's finding of actual knowledge based upon the evidence that defendant received reports detailing First Alliance's fraudulent activities and that defendant officials had commented in writing that First Alliance needed to change its business practices or it would not survive scrutiny. *Id.* at 994.

With respect to the substantial assistance prong, defendant argued on appeal that while it provided significant assistance to First Alliance, the assistance provided was in the ordinary course of business not in furtherance of the fraud. *Id.* at 995. The Ninth Circuit rejected defendant's argument and affirmed the jury's finding, holding:

> . . . [Defendant] satisfied all of First Alliance's financing needs and, after other investment banks stopped doing business with First Alliance, kept First Alliance in business, knowing that its financial difficulties stemmed directly and indirectly from litigation over its dubious lending practices. That was enough to conclude that [Defendant] was providing the requisite substantial assistance. [Defendant] admits that it knowingly provided "significant assistance" to First Alliance's *business*, but distinguishes that from providing substantial assistance to *fraud*. In a situation where a company's whole business is built like a house of cards on a fraudulent enterprise, this is a distinction without a difference.

Id. at 995 (emphasis in original).

As Bowdoin has admitted ASD was never a legitimate business, but rather an illegal Ponzi scheme. Essentially ASD was a sham from the start designed to defraud its members and make its owners and operators rich. Plaintiffs' allegations of the intimate involvement of Bank of America employees both at the

branch level and up the corporate latter to the Vice President of Business Banking sufficiently allege actual knowledge of the RICO Defendants' sham operation making any assistance provided by Bank of America – even ordinary banking services – substantial assistance in furtherance of the RICO Defendants' fraud and breach of fiduciary duty.

In the alternative, Plaintiffs have also sufficiently alleged circumstantial facts – demonstrating the provision of services exceeding ordinary banking services – supporting the inference that Bank of America substantially assisted the RICO Defendants in defrauding hundreds of thousands of individuals. Bank of America facilitated and assisted the RICO Defendants in the commission of their fraudulent scheme by, among other things:

- Allowing the RICO Defendants to include Bank of America's address and account numbers on recruitment and contractual materials;
- Allowing the RICO Defendants to tout the relationship with Bank of America to convey an air of legitimacy to the RICO Defendants' illegal scheme;
- Conducing onsite training to improve ASD's tracking of funds;
- Removing or relaxing maximum electronic transactional limits on ASD's accounts;
- Providing enhanced services to Bowdoin's accounts;
- Accepting tens of millions of dollars in deposits specifically directed to a single Bank of America branch in the small town of Quincy, Florida;
- Processing numerous wire transfers from members directly into ASD accounts;

- Providing "cashouts" in the form of direct deposits into members' accounts; and

- Ignoring or avoiding certain "red flags" triggering investigation and reporting requirements under federal laws and regulations.

(*See, e.g.*, FAC, ¶¶ 65-91)

By permitting the RICO Defendants to market and solicit members using Bank of America's name, reputation and services, Bank of America provided an "aura of legitimacy" to ASD's scheme. Such allegations are more than adequate to satisfy the element of substantial assistance. *See Neilson*, 290 F. Supp. 2d at 1109 (denying motion to dismiss aiding and abetting claims where plaintiffs alleged that bank substantially assisted the scheme by providing steady flow of new funds, a mechanism for managing accounts, and "an aura of legitimacy that allowed the scheme to flourish"). Similarly, Plaintiffs' allegations of atypical and unusual banking procedures, coupled with obvious red flags of impropriety deserving of investigation, are also sufficient to adequately allege substantial assistance under the test set forth above. Bank of America's attempt to categorize Plaintiffs' allegations as nothing more than legitimate business activities is utterly unavailing.[11] As shown, the facts are quite to the contrary and establish substantially more than "the daily grist of the mill" at the bank. *Woodward*, 522 F.2d at 97. As such, Plaintiffs have adequately informed Bank of America of what alleged conduct constituted substantial assistance, consistent with Rule 9(b),

[11] Plaintiffs do not allege that Bank of America owed any duty to protect them from ASD's fraud. Rather, the Complaint alleges that Bank of America knew about ASD's fraud and breach of fiduciary duty and substantially assisted and encouraged the wrongful conduct.

to enable it to respond to the Complaint, and accordingly, Defendant's Motion to Dismiss should be denied.[12]

B. Count Six Cannot Be Dismissed

Bank of America's final argument is that Count Six, seeking declaratory and injunctive relief, must be dismissed because this claim is derivative of Plaintiffs' underlying aiding and abetting claims, and therefore, dismissal of those claims mandates dismissal of Count Six. However, as shown above, dismissal of Counts Four and Five is not appropriate, and accordingly, this argument fails systematically.

V. REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request that the Court set this matter for oral argument.

VI. CONCLUSION

Based upon the foregoing, Bank of America's Motion to Dismiss should be denied.[13]

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[12] Defendant's reliance on *Overseas Private Inv. Corp. v. Industria de Pesca, N.A., Inc.*, 920 F. Supp. 207 (D. D.C. 1996), is misplaced. In *Overseas*, the actions taken by defendants were entirely typical and expected behavior from a lender. In contrast, the banking practices utilized by Bank of America are highly irregular and conducted with actual knowledge of Bank of America employees, as set forth in detail above. The Florida cases cited by Defendant are also distinguishable on this basis. *See Bruhl v. Price WaterhouseCoopers Int'l*, No. 03-23044-Civ., 2007 WL 983263, at *10 (S.D. Fla. Mar. 27, 2007) (plaintiffs made no clear allegations that defendant engaged in atypical practices or substantially assisted breach of fiduciary duty in any way); *In re Meridian.*, 296 B.R. at 264 (no allegations of atypical practices by defendant bank). *Rosner v. Bank of China*, 2008 WL 5416380 (S.D.N.Y. 2008) is also distinguishable in that, unlike the present case, plaintiff did not allege the direct involvement of bank employees and corporate officers with actual knowledge of the illegal conduct, failed to allege facts supporting defendant's knowledge with sufficient particularity and employed the wrong standard for establishing substantial assistance. *Id.* at *5 & *12.

[13] Alternatively, if the Court finds Plaintiffs' pleadings deficient in any respect, Plaintiffs respectfully request that they be granted leave to amend their pleadings.

Date: July 10, 2009

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CERTIFICATE OF SERVICE

I certify that on this the 10th day of July, 2009, a true and correct copy of the foregoing Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Bank of America's Motion to Dismiss Plaintiffs' First Amended Class Action Complaint was electronically filed with, and is available for viewing on, the Court's electronic filing system (ECF) and was served on the following counsel of record in the manner indicated below:

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