App. No. _____

In The

Supreme Court of the United States

Miriam Sutherlin, Jaime Saieh, and Moises Saieh,

Petitioners,

v.

Wells Fargo Bank, N.A.,

Respondent.

PETITIONERS' APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Petitioners Miriam Sutherlin, Jaime Saieh, and Moises Saieh respectfully request that the time to file a Petition for a Writ of Certiorari in this case be extended for sixty days to October 28, 2019. The court of appeals issued its opinion on April 3, 2019. App. A, *infra*. Petitioners timely filed a petition for rehearing on April 24, 2019. App. B, *infra*. The court denied Petitioners' motion for rehearing on May 31, 2019. App. C, *infra*. Absent an extension of time, the petition would be due on August 29, 2019. Petitioners are filing this Application at least ten (10) days before that date. *See* S.Ct. R. 13-5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Background

Petitioners seek review of the decision of the United States Court of Appeals for the Eleventh Circuit based on substantial questions relating to the pleading requirements established by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The decision below deepens a circuit conflict relating to extent to which a trial court may rely on factual contentions—particularly relating to the state of mind and course of dealings of the parties and specific extra-record claims of an innocent state of mind by the defendant—in granting a motion to dismiss an otherwise well-pleaded complaint. Underlying issues pertaining to the banking defendant's conduct as a trustee, and the court of appeals acceptance of proffers regarding innocent mistakes by the trustee, add importance to the case. Briefing in the Eleventh Circuit was extensive and the totality of the district court record is voluminous, and the important issues and collateral impact of the decision are such that substantial legal research and review by counsel is required. Hence, petitioners seek this extension of time.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for sixty days for the following reasons:

1. Due to case-related and other reasons additional time is necessary and warranted for counsel to research the decisional conflicts, and prepare a clear, concise, and comprehensive petition for certiorari for the Court's review.

2. The press of other matters makes the submission of the petition difficult absent

an extension. Counsel begins trial on August 19, 2019, in a complex federal criminal fraud prosecution expected to last at least two weeks (S.D. Fla. No. 18-cr-20668). And counsel presently faces appellate filing deadlines in criminal appeals from August 19, 2019, to October 18, 2019, including in Seventh Circuit No. 19-1367, and Eleventh Circuit Nos. 19-12272, 19-10740, 18-14951, 18-12838, 18-11350, 18-10755, 17-13443, 17-10010, and 16-16505.

3. The forthcoming petition is likely to be granted in light of, among other things, the need to address the important circuit conflict regarding the scope and application of the *Igbal*/*Twombly* issues.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended thirty days to and including October 27, 2019.

Respectfully submitted,

/s/ Richard C. Klugh

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August 2019

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11458
Non-Argument Calendar

D.C. Docket No. 8:17-cv-02740-RAL-AAS

LUIS SUTHERLIN,
individually and as the beneficiaries of the dissolved trust, et al.,

Plaintiffs,

MIRIAM SUTHERLIN,
individually and as the beneficiaries of the dissolved trust,
JAIME SAIEH,
individually and as the beneficiaries of the dissolved trust,
MOISES SAIEH,
individually and as the beneficiaries of the dissolved trust,

Plaintiffs - Appellants,

versus

WELLS FARGO BANK N.A.,
WELLS FARGO & COMPANY,
FIRST UNION BROKERAGE SERVICES, INC.,
FIRST UNION BANK & TRUST COMPANY (CAYMAN) LTD,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 3, 2019)

Before WILLIAM PRYOR, ROSENBAUM, and GRANT, Circuit Judges.

PER CURIAM:

Plaintiffs Miriam Sutherlin, Jaime Saieh, and Moises Saieh ("Plantiffs") were named beneficiaries of a trust—the Jamce Trust (the "Trust")—established by their father, Abdala Saieh ("Saieh"). The Trust dissolved upon Saieh's death in 2007, but none of the more than $800,000 in trust assets were distributed to Plaintiffs. That's because the Office of Foreign Assets Control of the United States Treasury Department ("OFAC") had blocked the assets in 2006, based on its determination that Saieh and the company formed to invest the assets were "specially designated narcotics traffickers" with connections to the Revolutionary Armed Forces of Colombia ("FARC"). By the time Plaintiffs succeeded in reversing OFAC's blocking order, however, victims of the FARC had served a writ of garnishment on Wells Fargo Bank, N.A. (which held the assets as trustee), as part of their efforts to obtain blocked assets in order to collect on a nine-figure judgment obtained against the FARC. The victim plaintiffs eventually obtained a judgment ordering the turnover of the trust assets, and we affirmed that judgment on appeal.

Plaintiffs now bring this lawsuit against Wells Fargo, claiming that its actions and omissions led to the loss of their money based on a jurisdictionally defective writ of garnishment. The district court dismissed the action for failure to state a claim to relief. After careful review, we affirm the district court.

I. Factual Background

We take the relevant facts from Plaintiffs' amended complaint, the operative pleading in this case, as well as court records from the related garnishment proceeding upon which Plaintiffs' claims are based.[1]

A. The Jamce Trust and Blocking of Trust Assets

In 1999, Saieh, as settlor, created the Trust in the Cayman Islands. He selected as trustee First Union Bank and Trust Company (Cayman) Ltd., which was later acquired by Defendant Wells Fargo. Wells Fargo assumes responsibility for the actions of the trustee.

Pursuant to the trust deed, the trustee formed Jamce Investments Ltd. ("Jamce"), a Cayman Islands company, to be the wholly owned investment vehicle of the Trust. In the trust deed, Saieh also selected a U.S. investment advisor, First Union National Bank, and a U.S. broker, First Union Brokerage Service. Saieh authorized the transfer of trust assets to an account with the investment advisor, and

[1] *See United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987) ("A court may take judicial notice of its own records and the records of inferior courts.").

he directed the broker be used for the "custody of assets" and "all orders for the execution of all securities for the trust."

On November 28, 2006, OFAC named Jamce and Saieh as "specially designated narcotics traffickers" connected to the FARC. Accordingly, OFAC "blocked" all of their assets. *Additional Designation of Persons Pursuant to Executive Order 12978*, 2006 WL 3456921, 71 Fed. Reg. 69609-01 (Dec. 1, 2006). That meant "no property or interests in property" of Saieh and Jamce that were "within the United States" or "within the possession or control of U.S. persons, including their overseas branches," could be "transferred, paid, exported, withdrawn or otherwise dealt in." 31 C.F.R. § 536.201(a).

Saieh died the following year, in October 2007. The trust deed provided for the liquidation and distribution of trust assets to beneficiaries upon his death. Plaintiffs allege that they were named beneficiaries and are now the "beneficial owners" of all trust assets.

After Saieh's death, Wells Fargo initiated the process of distributing trust assets. In late 2007 or early 2008, Wells Fargo dissolved Jamce, closed Jamce's accounts, and consolidated the funds in the Cayman Islands bank predecessor of Wells Fargo. Instead of distributing the funds to Plaintiffs, however, Wells Fargo transferred the trust assets to its "compliance branch" in New York. There, the money was held in a general ledger account associated with OFAC blocking. It

appears that Wells Fargo was told by OFAC in mid-2008 that the assets were blocked and could not be distributed to Plaintiffs. Nevertheless, Wells Fargo kept internal documentation showing that the funds were owed to, and would be paid to, the Trust beneficiaries upon lifting of the OFAC blocking order.

B. The Stansell Turnover Litigation

In June 2010, Keith Stansell and several other plaintiffs obtained a $318,030,000 default judgment against the FARC under the Antiterrorism Act. *See Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 722 (11th Cir. 2014). To satisfy that award, the *Stansell* plaintiffs sought the turnover of blocked assets of various "agencies" or "instrumentalities" of the FARC under § 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322. *Id.* at 722–23.

In early September 2011, the district court—finding that Jamce was an agency or instrumentality of the FARC—granted the *Stansell* plaintiffs' *ex parte* request to issue a writ of garnishment against blocked assets held by Wells Fargo for Jamce. The writ directed Wells Fargo to answer by stating whether the garnishee was "indebted to" Jamce and, if so, in what amount. Wells Fargo's answer stated that it was "holding $836,167.75 in its general ledger account (together with accrued interest) as part of a blocked transaction involving" Jamce.

In the meantime, Plaintiffs and others with an interest in Jamce were pressing OFAC to reconsider the blocking order. These efforts eventually succeeded, and OFAC formally removed Jamce from the list of specially designated narcotics traffickers in January 2012.

Richard Klugh, Plaintiffs' current counsel, represented Jamce and Plaintiffs in the turnover litigation. He entered an appearance on behalf of Plaintiff Moises Saieh in November 2011; Plaintiff Jaime Saieh in February 2012; and Plaintiff Miriam Sutherlin and Jamce in February 2013.

On April 4, 2013, the *Stansell* plaintiffs moved for entry of judgment ordering the turnover of the blocked Jamce assets. They asserted that Jamce's delisting as a specially designated narcotics trafficker had "no retroactive effect" and did not undermine the validity of the previously-served writ. The *Stansell* plaintiffs' counsel certified that they had "conferred in good faith with Richard Klugh, Esq., counsel for JAMCE INVESTMENTS, LTD., which opposes this Motion."

No timely response in opposition was filed, however, and on April 25, 2013, the district court granted the motion for a turnover judgment. In doing so, the court noted that Wells Fargo's answer to the writ did not identify any third parties asserting any claim or interest in the blocked assets, and that, since September 2011, "no person or entity has ever appeared in this action to assert any claim to these blocked assets." The court therefore found that "no other person or entity has ownership,

beneficial interest, or rights in the blocked proceeds that are superior to the perfected lien and rights of Plaintiffs." Finding the requirements for a turnover of assets under TRIA § 201 otherwise met, the court ordered Wells Fargo to transfer the funds to the *Stansell* plaintiffs.

Jamce and its "beneficial owners," including Plaintiffs, immediately appealed and simultaneously filed a motion to alter or amend the judgment under Rule 59(e), Fed. R. Civ. P. In the motion, the movants contended that Jamce was an "innocent claimant," that "[n]o member of the Saieh family has ever been convicted of or admitted to commission of a crime," and that the OFAC delisting of Jamce should either be given effect or at least necessitate holding an evidentiary hearing to determine whether Jamce was an agency or instrumentality of the FARC. They also noted that the Trust "consist[ed] of assets that are now owned by the trustee heirs."

The district court denied the Rule 59(e) motion on April 26, 2013. It found that the motion presented "no valid basis" to overturn the turnover judgment and only "raise[d] factual and legal matters that were carefully considered" by the court. Also, the court was "troubled" by the fact that the claimants "never bothered to file a response in opposition as required by Local Rule 3.01(b)."

This Court affirmed the turnover judgment in October 2014. We held that "Jamce waived any opposition to Plaintiffs' motion seeking entry of judgment on the writ of garnishment when, after receiving notice of the motion through counsel,

it failed to timely respond to the motion." *Stansell*, 771 F.3d at 744. And because "a Rule 59(e) motion cannot be used simply as a tool to reopen litigation where a party has failed to take advantage of earlier opportunities to make its case," we affirmed the denial of that motion as well. *Id.* We also held that OFAC's decision to unblock Jamce's assets after service of the writ on the garnishee did not affect the determination of "whether the asset was blocked" for purposes of TRIA § 201. *Id.* at 733 ("Under [31 C.F.R.] § 536.402, any OFAC de-listing after [service of the writ on the garnishee] was ineffectual for determining whether the asset was blocked for TRIA § 201 purposes.").

With regard to the individual claimants, including Plaintiffs, we noted that they had "asserted standing to challenge the writ of garnishment issued to Wells Fargo as to Jamce, claiming that Jamce was a trust and that they were its beneficiaries." *Id.* at 743 n.23. But because the district court found that Jamce was a corporation, not a trust—a finding we saw no "reason[] to disturb"—we concluded that "only Jamce has standing to challenge the issuance of a writ of garnishment against its account." *Id.* at 743 n.23 (noting that shareholders do not have standing to contest injuries to the corporation).

II. Procedural History

Plaintiffs brought this action against Wells Fargo and related entities in state court in October 2016. In essence, Plaintiffs alleged that Wells Fargo wrongfully

kept them in the dark about the location and status of trust assets after Saieh's death, while, at the same time, doing nothing to protect trust assets from the *Stansell* plaintiffs in the turnover litigation, despite the existence of viable defenses.

According to Plaintiffs, the writ of garnishment could have been challenged successfully on two grounds. First, Plaintiffs contended that the Jamce assets were not located in the state of Florida and therefore were outside of the Florida district court's *in rem* jurisdiction. And second, Plaintiffs maintained that, because Wells Fargo dissolved Jamce after Saieh's death, they and not Jamce were the owners of the assets held by Wells Fargo at the time the writ of garnishment was served. But, Plaintiffs alleged, Wells Fargo failed either to raise these two defenses—and in fact led the court to believe that the assets belonged to Jamce and were located in Florida—or to notify Plaintiffs of the information they needed to mount a defense on their own and maintain standing to do so. As a result of these failures, in Plaintiffs' view, the district court entered judgment on a jurisdictionally defective writ of garnishment.

After removal to federal court by the defendants, Plaintiffs filed the operative amended complaint, which contains five counts: (1) breach of fiduciary duty; (2) breach of third-party beneficiary contracts; (3) breach of duty to notify; (4) breach of duty to defend or indemnify; and (5) negligence.

Count 1 alleged that Wells Fargo breached its fiduciary duties to them as trust beneficiaries in a number of ways from the time of Saieh's death to the entry of the turnover judgment.[2] Count II alleged that Wells Fargo, through the same actions, breached "additional" written contracts with Saieh for the benefit of Plaintiffs that, "[o]n information and belief, . . . are in the possession of Wells Fargo." Count III alleged that Wells Fargo breached its duties as "a bank holding the assets at issue" to notify Plaintiffs of material facts regarding the assets and the garnishment. Count IV alleged that Wells Fargo breached its duties as trustee to defend Plaintiffs against the garnishment (by hiring an attorney to represent their interests) or indemnify Plaintiffs for the cost of defense. Finally, Count V alleged that Wells Fargo acted negligently in its management of trust assets and its handling of the turnover litigation.

[2] According to Plaintiffs, Wells Fargo breached its fiduciary duty by failing (a) "to notify the beneficiaries that the Trust terminated in 2007, that [Jamce] was dissolved and ceased to exist by 2008, and/or that the assets belonged to and were due to be distributed to the Plaintiffs"; (b) "to distribute or account for the Trust assets and . . . acknowledge that it owed the funds to the Plaintiffs when the Trust was terminated and when the OFAC listing was lifted," and instead transferring the funds in such a way to "conceal[] the status and ownership of the funds"; (c) "to notify the Plaintiffs regarding the writ of garnishment . . . and . . . to notify the Plaintiffs when Wells Fargo received litigation discovery pertaining to the Plaintiffs' funds . . . or at any other time"; (d) "to raise, on behalf of the Trust, [Jamce] or any of the beneficiaries, any of several available valid defenses to the writ of garnishment"; (e) "to defend or indemnify any of the beneficiaries against the writ of garnishment and instead answer[ing] the writ by concealing its funds transfers and account dealings and the true ownership of the funds"; (f) "to maintain the relevant assets under the jurisdiction of the Cayman Islands as contemplated by the trust"; and (g) "to consult with, or obtain approval from, the beneficiaries prior to [transferring the funds][,] [which] it knew would further block and limit access to the funds."

Wells Fargo moved to dismiss the amended complaint for failure to state a claim. The district court granted that motion. With regard to the claims for breach of fiduciary duty and negligence, the court found that Wells Fargo did not owe or breach the duties alleged by Plaintiffs, and that its conduct did not proximately cause the loss of their funds. With regard to the remaining claims, the court found that Plaintiffs failed to allege the existence of contracts separate from the trust deed, and that Florida did not recognize a cause of action for breach of a duty to notify or a duty to indemnify under the facts alleged. Plaintiffs now appeal.

III. Standard of Review

We review *de novo* the dismissal of a complaint for failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P., accepting as true the facts alleged in the complaint and construing them in the light most favorable to the plaintiff. *Hunt v. Aimco Props, L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016). To withstand dismissal, a plaintiff must plead sufficient facts to state a claim for relief that is plausible on its face.[3] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

[3] Plaintiffs' argument that the district court improperly applied a "heightened" plausibility standard is a non-starter because our review is *de novo*.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

IV. Discussion

The parties and the district court all analyzed Plaintiffs' claims under Florida state law, though no specific jurisdiction was pled in the complaint. Because the parties on appeal likewise cite to Florida law, we assume without deciding that Florida law applies.

A. Breach of Fiduciary Duty and Negligence

We first consider Plaintiffs' claims for breach of fiduciary duty and negligence, which are their most comprehensive claims. They contend that, had Wells Fargo not breached various duties owed to them, either they or Wells Fargo could have had the "jurisdictionally-defective" garnishment dismissed and thereby avoided the turnover judgment.

Under Florida law, the elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damages proximately caused by that breach. *Gracey v. Eaker*, 837 So.2d 348, 353 (Fla. 2002). The same basic elements—breach of a duty owed to the plaintiff that results in damages proximately caused by that breach—are required to establish a negligence claim. *See Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1325 (11th Cir. 2012).

Both claims require a plaintiff to establish "proximate cause," which "asks whether and to what extent the defendant's conduct *foreseeably* and *substantially* caused the specific injury that actually occurred." *Chirillo v. Granicz*, 199 So.3d 246, 249 (Fla. 2016) (quotation marks omitted) (emphasis added). "[P]roximate cause is that cause which in natural and continued sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. June 1, 1981) (quotation marks omitted).[4]

Intervening causes may break the causal connection between negligent conduct and an injury. "A negligent act is not the proximate cause of a loss that results from the intervention of a new and independent cause that is not reasonably foreseeable." *Id.*; *Gibson v. Avis Rent-A-Car Sys., Inc.*, 386 So. 2d 520, 522 (Fla. 1980) ("A person who has been negligent . . . is not liable for the damages suffered by another when some separate force or action is 'the active and efficient intervening cause,' the 'sole proximate cause,' or an 'independent' cause."). But "[i]f an intervening cause is foreseeable the original negligent actor may still be held liable." *Gibson*, 386 So. 2d at 522; *see Tallahassee Furniture Co., Inc. v. Harrison*, 583 So. 2d 744, 756 (Fla. Dist. Ct. App. 1991) ("In order for an intervening cause to relieve

[4] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

the negligent party from liability, such intervening cause must be truly independent of and not set in motion by the original negligence.").

We agree with the district court that Plaintiffs failed to state a claim for breach of fiduciary duty or negligence, though at times we offer different reasons than the court. Due to the OFAC blocking order, the writ of garnishment, and the turnover judgment, Wells Fargo was legally prohibited from taking many of the actions Plaintiffs claim it should have. As for the remaining allegations, Plaintiffs have not plausibly established that their damages were proximately caused by Wells Fargo's breach of a duty owed them.

1. Wells Fargo Owed No Duty to Violate the Law or a Court Order

"[I]n deciding whether the complaint states a claim upon which relief can be granted, courts must bear in mind that the duty of prudence, . . . under the common law of trusts, does not require a fiduciary to break the law." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 428 (2014). In other words, "[t]he trustee is not under a duty to the beneficiary to do an act which is criminal or tortious." Restatement (Second) of Trust § 166, Comment *a*.

Yet Plaintiffs appear to assert that Wells Fargo should have done just that. They contend that Wells Fargo, to comply with its fiduciary and other duties, should have (a) kept trust assets under the jurisdiction of the Cayman Islands; (b) distributed trust assets upon Saieh's death; (c) answered the writ of garnishment by denying that

it held any assets belonging to Jamce, which they say had been dissolved or did not exist; and (d) distributed trust assets once OFAC lifted the blocking order. For the reasons explained below, Wells Fargo breached no duty by failing to take these actions.

As noted above, OFAC had listed Jamce as a "specially designated narcotics trafficker" and blocked its assets as of November 2006, before Saieh's death in October 2007. The blocking order applied to any of Jamce's assets that were either "within the United States" or "within the possession or control of U.S. persons, including their overseas branches." 31 C.F.R. § 536.201(a). It prohibited the funds from being "transferred, paid, exported, withdrawn or otherwise dealt in" except as authorized. *Id.* And it required the transfer of the funds to an interest-bearing "blocked account" in a U.S. financial institution. *Id.* § 536.203.

Wells Fargo's conduct is consistent with the OFAC blocking order and the relevant regulations. Whether, at the time of the blocking order, the trust assets with within the United States or within the control of an "overseas branch[]" of Wells Fargo's predecessor bank, which appears to be a U.S. person, they were subject to the blocking order and were required to be transferred to a blocked account in a U.S. financial institution.[5] *See id.* §§ 536.201(a), 536.203. Wells Fargo therefore did not

[5] As the district court noted, the trust deed allowed Wells Fargo to open an account with a U.S. investment adviser. So to the extent the assets were moved to the United States for investment purposes before the blocking order, that was no breach of duty.

violate any duty to Plaintiffs by internally transferring trust assets from its Cayman Islands branch to its "compliance branch" in New York. Further, after Saieh's death in 2007, Wells Fargo could not have distributed trust assets to Plaintiffs without breaking the law, so it owed no such duty. *See Dudenhoeffer*, 573 U.S. at 428.

Nor did Wells Fargo breach a duty to deny that it had assets potentially subject to seizure when responding to the writ of garnishment. The OFAC blocking order remained in effect through service of the writ of garnishment on Wells Fargo. As noted above, TRIA § 201 permitted the *Stansell* plaintiffs to satisfy their judgment against the FARC by seizing the "blocked assets" of agencies or instrumentalities of the FARC. *See Stansell*, 771 F.3d at 733. And at the time of service of the writ, Wells Fargo held $836,167.75 in blocked assets that had belonged to Jamce, which the court had found, based on an *ex parte* filing, was an agency or instrumentality of the FARC.

For that reason, Wells Fargo's answer to the writ of garnishment—stating that it was "holding $836,167.75 . . . as part of a blocked transaction involving" Jamce—was accurate and not misleading. While we recognize that Plaintiffs had a claim to ownership of the funds, they have offered nothing to indicate that the dissolution of the Trust or Jamce had any effect on whether the blocked assets were subject to seizure under TRIA § 201. Nor would such a result be consistent with the relevant regulations, which prohibited the assets from being "transferred . . . or otherwise

dealt in." 31 C.F.R. § 536.201(a). Accordingly, Wells Fargo could not lawfully have denied that it had funds potentially subject to seizure.

Finally, Wells Fargo did not owe or breach a duty to distribute trust assets once OFAC delisted Jamce and unblocked its assets. Because the writ of garnishment had been served on Wells Fargo before the delisting, the assets were still considered "blocked" for purposes of the *Stansell* plaintiffs' turnover claim, notwithstanding the delisting decision. *Stansell*, 771 F.3d at 733; *see* 31 C.F.R. § 536.402 (stating that any revocation of an order or ruling issued by OFAC "shall not" affect "any civil . . . proceeding commended or pending prior to such . . . revocation"). And once the turnover judgment was entered and affirmed on appeal, Wells Fargo properly complied with that judgment.

In sum, none of the actions or omissions described above plausibly show that Wells Fargo breached a duty owned to Plaintiffs.

2. Defense of the Turnover Claim

Wells Fargo was, however, freer to act in two interrelated areas: (1) the information it shared with Plaintiffs; and (2) the defense of the turnover claim. Plaintiffs maintain that Wells Fargo owed duties to provide them material information regarding the trust assets, including the location and status of the assets, and to defend against the writ of garnishment on their behalf. By failing either to mount a defense or to provide Plaintiffs with information necessary to do so on their

own, Well Fargo, in Plaintiffs' view, proximately caused the judgment ordering the turnover of trust assets to the *Stansell* plaintiffs.

However, the amended complaint does not plausibly establish that Wells Fargo's "conduct foreseeably and substantially caused the specific injury that actually occurred." *Chirillo*, 199 So.3d at 249. To begin with, Wells Fargo's allegedly deficient information sharing did not deprive Plaintiffs of the opportunity to defend themselves in the garnishment proceeding. By February 12, 2013, more than two months before the *Stansell* plaintiffs filed the turnover motion on which the judgment was based, counsel had appeared on behalf of all Plaintiffs and Jamce. Furthermore, counsel for Plaintiffs and Jamce had notice of the turnover motion at or around the time it was filed in early April 2013. Thus, despite Wells Fargo's conduct, Plaintiffs and Jamce had an opportunity to contest the turnover motion, as well to appeal the adverse judgment.

Plaintiffs respond that Wells Fargo's deficient response to the writ of garnishment and its deficient information sharing deprived them of standing—or the facts necessary to assert standing—to challenge the turnover motion. But the district court did not rest its decision to grant the turnover motion on a lack of standing. Instead, the court granted the motion as "unopposed" because Plaintiffs and Jamce failed to timely respond in opposition despite notice of the motion. The court then denied their Rule 59(e) motion because it raised issues that could have been raised

before judgment was entered. Although this Court subsequently held that Plaintiffs lacked standing to appeal the turnover judgment, *Stansell*, 771 F.3d at 743 n.23, it's not as though they could have prevailed on appeal. Even if they had standing, they would have been in the same position as Jamce, which "waived opposition to the motion seeking entry of judgment" and "failed to take advantage of earlier opportunities to make its case," *id.* at 744.

Nor, in any case, do the amended complaint or Plaintiffs' briefing give any reason to plausibly suggest that Plaintiffs' assertion of ownership of trust assets, if properly raised before the district court, would have mattered to the outcome. As explained above, insofar as the *Stansell* plaintiffs' turnover claim under TRIA § 201 was concerned, Wells Fargo held the "blocked assets" of an OFAC-designated "specially designated narcotics trafficker," notwithstanding Saieh's death and the dissolution of the Trust. And since the writ of garnishment was served on Wells Fargo before Jamce was delisted by OFAC, proceedings on the writ could proceed to entry of a turnover judgment. *See Stansell*, 771 F.3d at 732–33. Plaintiffs offer no adequate explanation in law or fact of how their claims to the trust assets were relevant to the determination of whether the *Stansell* plaintiffs had established their entitlement to seize the blocked assets. *See id.* at 722–23.

Plaintiffs' final argument concerns the location of trust assets when the writ of garnishment was served. They assert that, because trust assets were held outside

of the state of Florida during garnishment proceedings, the district court had no jurisdiction to attach and order turnover of the assets. Indeed, they note that the court, around two years after the events at issue here, dissolved several writs on that exact ground. So, they say, Wells Fargo could have had the writ dissolved and, because OFAC had delisted Jamce in 2012, the *Stansell* plaintiffs would have been unable to bring a new garnishment action in the jurisdiction where the assets were held. At the very least, Plaintiffs contend, Wells Fargo should have provided this information to Plaintiffs so they could raise the issue on their own.

Again, however, the turnover judgment was entered after Plaintiffs and Jamce had appeared in the proceeding but then "failed to take advantage of . . . opportunities" to make their case and "waived opposition to the motion seeking entry of judgment." *Stansell*, 771 F.3d at 744. It would not have been reasonably foreseeable to Wells Fargo that Plaintiffs, after appearing in the proceeding, would fail to respond to the motion for a turnover judgment, nor was Wells Fargo's conduct a substantial cause of that shortcoming.[6] In other words, their own conduct, in conjunction with the OFAC blocking order and the writ of garnishment, was "the

[6] Furthermore, there is nothing in the record to indicate that Plaintiffs themselves believed the location of the assets to be relevant. For instance, they do not allege that they asked Wells Fargo for this information or that they suggested to the Court that it should look into the matter. And the issue of the court's "extraterritorial jurisdiction" was not raised by anyone in the *Stansell* garnishment proceedings until mid-2015, two years after the turnover judgment here. Accordingly, we cannot say that it was reasonably foreseeable to Wells Fargo that the location of the assets might be relevant.

active and efficient intervening cause" of the unopposed turnover judgment. *See Gibson*, 386 So. 2d at 522.

In sum, the allegations in Plaintiffs' amended complaint fail to plausibly show that the critical factors that led to the entry of the turnover judgment—the OFAC blocking order, the writ of garnishment, and Plaintiffs' waiver of opposition to the motion for a turnover judgment—were within Wells Fargo's control or were set in motion by negligence on its part. *See Sosa*, 646 F.2d at 993; *Gibson*, 386 So. 2d at 522; *Harrison*, 583 So. 2d at 756. We therefore cannot conclude that Plaintiffs' amended complaint plausibly establishes that Wells Fargo's conduct breached a duty owed to Plaintiffs and thereby "foreseeably and substantially caused the specific injury that actually occurred." *See Chirillo*, 199 So. 3d at 249.

For these reasons, we affirm the dismissal of Plaintiffs' claims for breach of fiduciary duty (Count I) and negligence (Count V).

B. Remaining Claims

Plaintiffs' remaining claims—for breach of contract (Count II), breach of duty to notify (Count III), and breach of duty to defend and indemnify (Count IV)—were likewise properly dismissed.

With regard to Count II, Plaintiffs did not allege sufficient facts to establish the existence or content of any "additional written contacts" between Wells Fargo and Saieh for the benefit of Plaintiffs, nor do the allegations show that Wells Fargo

breached a provision of the trust deed. The allegations supporting this count are little more than threadbare recitals of a cause of action and conclusory allegations of wrongdoing, which are not enough to state a claim. *See Iqbal*, 556 U.S. at 678. Plaintiffs state that they should be given "an opportunity to establish the contract[s'] existence through discovery," Plaintiffs' Br. at 45, but conclusory allegations do not "unlock the doors of discovery," *Iqbal*, 556 U.S. at 678.

With regard to Count III, Plaintiffs have not shown that they have a viable cause of action against Wells Fargo for breach of a "duty to notify" separate from the trust relationship. To the extent Wells Fargo was required to inform Plaintiffs of the garnishment proceeding, Plaintiffs suffered no harm from that breach because, as we have explained above, they had "the opportunity to defend [themselves] against the claim of the person suing out the attachment." *See Harris v. Balk*, 198 U.S. 215, 227–28 (1905).

With regard to Count IV, Plaintiffs do not identify a contractual basis for their assertion that Wells Fargo owed a duty to defend or indemnify Plaintiffs in the garnishment proceeding—by, for instance, hiring an attorney or paying their defense costs. Under Florida law, "a duty to defend is purely contractual and if there is no contract to defend, no such duty exists." *Budget Rent A Car Sys., Inc. v. Taylor*, 626 So.2d 976, 978 (Fla. Dist. Ct. App. 1993). Here, Plaintiffs point to no contract to defend, so no such duty existed. Thus, the only duty to defend that may have arisen

under the facts alleged is from the trust relationship, which is covered by the breach-of-fiduciary-duty claim in Count I.

V. Conclusion

In sum, and for the reasons stated above, we affirm the dismissal of Plaintiffs' amended complaint for failure to claim.

AFFIRMED.

Appeal No. 18-11458-H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MIRIAM SUTHERLIN, JAIME SAIEH, and MOISES SAIEH,

***Plaintiffs/Appellants*,**

v.

WELLS FARGO BANK, N.A., *et al.*,

***Defendants/Appellees*.**

On Appeal from the United States District Court
for the Middle District of Florida

APPELLANTS' PETITION FOR PANEL REHEARING

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Sutherlin v. Wells Fargo Bank N.A.
Case No. 18-11458-H

Appellants file this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

First Union Bank & Trust Company (Cayman) Ltd.

First Union Brokerage Services, Inc.

Gunster Yoakley & Stewart, PA

Guttman, Jorge D.

Hill, William King

Hughes, Paul Whitfield

Jamce Investments, Ltd.

Jamce Trust

Kaskel, Jonathan H.

Klugh, Richard C.

Lakatos, Alex C.

Lazzara, Hon. Richard A.

Levine, Joshua A.

Sutherlin v. Wells Fargo Bank N.A., Case No. 18-11458-H
Certificate of Interested Persons (Continued)

Mayer Brown LLP

Medlock, Stephen M.

Merryday, Hon. Steven D.

Moore, Hon. K. Michael

Saieh, Jaime

Saieh, Moises

Sutherlin, Luis

Sutherlin, Miriam

Wells Fargo & Company (WFC)

Wells Fargo Bank N.A.

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PETITION FOR PANEL REHEARING

THE COURT SHOULD RECONSIDER ITS PROXIMATE/ INTERVENING CAUSE RULING AS TO THE TRUSTEE'S FAILURE TO DEFEND AND ADVISE THE BENEFICIARIES REGARDING A JURISDICTIONALLY VOID GARNISHMENT.

Appellants (Plaintiffs), three individual trust beneficiaries who lost their property due to a jurisdictionally-defective garnishment, request that the Court reconsider its decision—attached as an Appendix—wherein the Court concluded that even if Wells Fargo breached its fiduciary duty by failing to defend the Plaintiffs or failing to tell them their funds were not in Florida, but instead in New York (immune from Florida garnishment writs), that would not have stopped the garnishment, because a lawyer who later appeared for Plaintiffs would not have understood the legal importance of the location of the property and would still not have opposed garnishment and Wells Fargo could not have foreseen the jurisdictional importance of the locus of the res. App:18–20. Specifically, as to Wells Fargo's failure to disclose the jurisdictional defect or defend against it, the Court concludes that "Wells Fargo's conduct [was not] a substantial cause of" of Plaintiffs' failure to effectively oppose the turnover motion, App:20, and "there is nothing in the record to indicate that Plaintiffs themselves believed the location of the assets to be relevant." App:20 n. 6. The Court finds that because no bank raised the jurisdictional defect issue in the garnishment court until mid-2015, "we cannot say that it was reasonably foreseeable

to Wells Fargo that the location of the assets might be relevant." *Id*.

Plaintiffs urge the Court's to reconsider its rulings concerning what Plaintiffs or their counsel (if given sufficient information about the status and location of the assets) would have done, and what Wells Fargo (and its counsel, Akerman Senterfitt and Mayer Brown LLP) knew or should have known, about the jurisdictionally-defective garnishment. Plaintiffs submit that the allegations of the complaint, directly contradict the Court's assertions about the record.[1] And in terms of objective plausibility, under *Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007), contrary to the Court's focus on counsel's failure to file a turnover opposition (when counsel lacked access to the jurisdictional defect information that was the only defense that would have worked given the district court's refusal even to consider claims of foreign persons or entities),[2] disclosure of the asset's location in New York would most likely have prompted counsel to first review Second Circuit law (which is more

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[1] DE:58:17–18 (complaint, ¶ 85: "At the time of its material breaches, *Wells Fargo had actual knowledge of the wrongfulness of its conduct and the high probability that injury or damage to the Plaintiffs would result* and, despite that knowledge, intentionally pursued the course of conduct, resulting in injury or damage." (emphasis added); ¶ 78: "Timely notification of the ... location of the garnished property ... would have enabled the Plaintiffs ... to successfully defend against the enforcement proceedings and to timely and successfully appeal any adverse decision.").

[2] *See* Garnishment-DE:725:5 (ruling that Jamce "*has no right to challenge* this Court's determination" that Jamce was subject to TRIA garnishment; making *no mention* of failure by Jamce to oppose turnover) (emphasis added).

favorable on TRIA garnishment issues), then review Florida garnishment law in relation to property outside the state to determine whether choice-of-law doctrine could help. At that point, undersigned counsel would have learned that there is no choice-of-law doctrine under Florida garnishment law *because* the garnished property must be in Florida, This plausible 1-2-3 process, particularly given that counsel was already looking for any way to apply precedents from Circuits that are more favorable to debtors' rights, satisfies *Twombly*.

Particularly given the presumed-true allegations of the complaint that the undersigned was not the only counsel who had been representing Plaintiffs in the 2012–13 period—Holland & Knight was also trying to help, *see* DE:58:22 (complaint, ¶ 102: "Wells Fargo caused counsel retained by one of the beneficiaries to be conflicted from representation ... when it wrongly notified ... Holland and Knight that it would deem representation of the beneficiaries' interests ... to conflict with the interests of Wells Fargo.")—and given the context of the entire pre-turnover garnishment litigation involving Plaintiffs and their family members, in which undersigned counsel filed numerous motions asserting grounds to stop or stay the garnishments, it is plausible that learning the jurisdictional facts would have caused Plaintiffs's counsel to seek relief on that ground in 2012 or 2013. *See*, *e.g.*, Garnishment-DE:596 (pre-turnover-motion request on behalf of Plaintiffs and Jamce that the district court "to avoid the manifest injustice that would result from

foreclosure of full merits review of the ... garnishment[,] request an evidentiary hearing at which they can more fully present the relevant facts and their innocent ownership interests"); Garnishment-DE:635:4 n. 2 (district court notes pendency of numerous motions, Garnishment-DE:482, 523, 551, 558, filed by undersigned challenging TRIA garnishment writs for Plaintiffs' assets, all in Florida).

Moreover, the contrary supposition—that counsel would not have realized the jurisdictional defect even if Wells Fargo had complied with its fiduciary duties—is implausible and speculative, resting on two misreadings of the record by the Court: first, the reason why none of the other banks that had garnished the assets of Plaintiffs and their family members—Ocean Bank (of Miami), Terrabank (of Miami), HSBC (Miami branch), Bank of America (Miami branch), Merrill Lynch (Miami office), USB AG (Miami branch), *see* Garnishment-DE:331–34, 337, 346–48, 350–57, 371, 392, 404)—had raised the jurisdictional issue was that *all* of those bank accounts were in *Miami*. The only exception is Wells Fargo, but Wells Fargo never told Plaintiffs anything to make them believe the assets were outside the jurisdiction, and Plaintiffs reasonably believed WF's account was just like all of the other garnished bank accounts. If Wells Fargo had let the cat out of the bag at any time after January 2012 when the OFAC blocking was completely over, its revelation of having moved the funds to New York would have stood out to Plaintiffs and called for special attention by the undersigned or Holland & Knight, and would have precipitated

special action *long before any turnover motion was ever filed by the garnishors*.

Second, the Court contends that it was not "reasonably foreseeable," App:20 n. 6, to Wells Fargo (and their highly-regarded garnishment counsel, Akerman and Mayer Brown), and asserts that the territorial limits of a Florida garnishment court may have been unknown and unforeseeable to that group, including Wells Fargo, one of the largest, most garnished banks in the world. For two reasons, the Court should reconsider its reasonable foreseeability analysis. First, even if Wells Fargo did not reasonably foresee which defense might be successful against the garnishment, that does not mean that there was no reasonable foreseeability of harm in failing to afford Plaintiffs or their self-help counsel a complete *opportunity* to defend against the garnishment. *See Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. June 1, 1981). Second, given that Wells Fargo's concealment of the location of the assets persisted well past the mid-2015 filing of such motions in the garnishment court (when Plaintiffs' garnishment case was still pending in the Supreme Court, S.Ct. No. 14-1336, certiorari denied Oct. 5, 2015), that continued concealment after Wells Fargo clearly knew the importance of the issue indicates hiding or evading, both of which suggest prior actual knowledge of the jurisdictional question. Wells Fargo did not admit until three years later, in 2018—more than a year after Plaintiffs' complaint in this case was originally filed—that it had moved the assets to New York (apparently from Florida, although that is still not clear on this record). Thus, the

complaint's allegations that Wells Fargo deliberately concealed this critical information from Plaintiffs,[3] are not implausible, and given the unusual persistence of Wells Fargo's actual concealment, it is more likely than not that Wells Fargo knew that there was at least potentially a jurisdictional defect based on its moving the assets out of Florida before the garnishment writ was ever issued.

Retaining counsel to mitigate the harm from Wells Fargo's violation of the duty to defend does not constitute an intervening cause of the harm suffered by an inadequate defense, even where—indeed *especially* where—mitigation fails because self-help counsel failed to raise dispositive claims that Wells Fargo had special knowledge of, but concealed. Plaintiffs' complaint allegations explain that they proceeded with counsel in order to mitigate damages from Wells Fargo's abandonment of them. *See, e.g.*, *Rector, Wardens & Vestrymen of St. Peter's Church in City of Philadelphia v. Am. Nat. Fire Ins. Co.*, 97 Fed.Appx. 374, 377 (3d Cir. 2004) (recognizing "right to mitigate [insured's] damages by going forward with its own counsel"); *Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604, 612 (5th Cir.

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[3] DE:58:4, ¶ 19 ("decisions made and actions taken by Wells Fargo to fail to defend ... Plaintiffs, to interfere with Plaintiffs' ability to obtain legal representation, and to make false and misleading representations regarding the status of JIL or Trust assets"); DE:58:6, ¶ 36 ("Wells Fargo has never notified the Plaintiffs of its provision of confidential banking information, nor has it provided Plaintiffs with a copy... ."); DE:58:10, ¶ 60 ("Wells Fargo chose not to be forthright with the garnishment court so that it would not have to answer to any of the Plaintiffs or any regulatory authorities concerning any of its actions concerning JIL or Trust assets and could avoid meeting any trust or custodial responsibilities regarding the funds.")

1989) ("First General wrongfully refused to defend Custom and Canal did not 'volunteer' by providing Custom a defense."), *modified on other grounds*, 901 F.2d 45 (5th Cir. 1990); *Avalon Care Ctr.-Fed. Way, LLC v. Brighton Rehab., LLC*, 595 Fed.Appx. 794, 801 (10th Cir. 2014) (recognizing "common law duty to mitigate damages" given breach of "duty to defend").

Thus, if there was a breach of fiduciary duty to defend, then the mere fact that Plaintiffs retained counsel who failed to effectively litigate the case does not constitute an intervening cause of the harm, *because* competent counsel would have changed the outcome. And because both relevant breaches of duty—duty to notify of critically important facts and duty to defend—caused the failure to effectively litigate the single issue that would have stopped garnishment, Plaintiffs' mitigation effort, retaining counsel who inadequately litigated the case, is not an intervening cause.

The combined record of garnishment and subsequent proceedings pertaining to Plaintiffs' claim is complicated. But certain things clearly call for reconsideration of the Court's decision and opinion. The Court is respectfully requested to correct factual errors deriving principally from inaccurate record assertions by Wells Fargo:

- undersigned counsel became involved with the Jamce garnishment writ at issue only on February 12, 2013, at the deadline for responding to the garnishors' January 29, 2013 motion to permit execution on garnishment writs

(Garnishment-DE:576) (and when the garnishors' motion was granted, DE:635, denying Plaintiffs' request for an evidentiary hearing and a meaningful opportunity to be heard, turnover was a fait accompli, so long as Wells Fargo hid the jurisdictional defect);

- Wells Fargo deliberately failed to respond with any kind of help or information when it was requested of them in 2012 and early 2013 by Holland & Knight, *see* DE:58:14, ¶ 76 ("By declining to notify the Plaintiffs about or defend the Plaintiffs against the writ and discovery demands, *even after requests were made by counsel for one of the beneficiaries*, Wells Fargo prevented the Plaintiffs from timely retaining counsel or otherwise defending against the enforcement proceedings and from obtaining standing to litigate their individual interests.") (emphasis added); Holland & Knight acted as counsel for the principal beneficiary *prior* to the undersigned's very belated (*see* DE:58:77) agreement to take on any part of the writ at issue (contrary to the Court's supposition that no demands for trust asset information were made upon Wells Fargo, App:20, and that undersigned had appeared as *to this writ* prior to February 2013, App. 6);
- the Court errs in asserting that relief from the turnover motion was denied to the Plaintiffs on the basis of waiver or failing to oppose the turnover motion; instead, the district court noted merely: "*In denying the stay* [pending appeal

requested by *Jamce*], this Court reasoned that, *among other considerations*, no objections were made before the TRIA turnover judgment was entered." DE:62:5 (emphasis added) (citing this Court's *merits* ruling as indicating the actual affirmed basis of the district court's reasoning). Instead, as to the Plaintiffs, the garnishment court made it clear that their positions were reviewed on the merits: Garnishment-DE:826:1–2 (garnishment court, in denying beneficiary Luis Sutherlin's Fed. R. Civ. P. 59 motion as to Jamce *on the merits*, states: "The Motion is denied for the same reasons the Court denied a virtually identical motion (Dkt. 730) filed by other third party claimants as the *alleged beneficial owners of the same entity, Jamce* Investments, Ltd. in an order entered April 26, 2013 (Dkt. 732) ... . The Court has carefully considered the merits of all of these Claimants' claims.") (emphasis added). The absence of a futile opposing document *as to Jamce itself* arose as a factor only *after* the turnover judgment was entered, and then became a basis for *affirmance*, but it had nothing to do with the granting of the turnover motions which were *all* granted in lengthy merits orders denying relief to Plaintiffs. Importantly, the Jamce turnover judgment was identical to the judgments in the Bank of America, HSBC, and UBS matters in which the undersigned did file oppositions (of the exact same variety that the undersigned would have filed as to Jamce, but for a notice glitch, *see* Garnishment-DE:733);

- the OFAC blocking order was not extended past its expiration as to Jamce on January 10, 2012, and as to trustor Abdala Saieh on October 5, 2011 (before Wells Fargo filed its answer, Garnishment-DE:435, to the writ); therefore, OFAC compliance could not be the basis for any action taken by Wells Fargo *after* that date, because at that point, the funds were like any other garnished asset, and the law merely requires that they not be released of without court order, not that the truth about their ownership be concealed indefinitely;
- OFAC *never* determined—or even hinted—that Jamce had "connections" or was "connected" to the FARC (and in fact made no such findings as to deceasesd trustor Abdala Saieh), so correcting that error is important, no matter how the case is decided; instead, as to Jamce, the most that can be said about the OFAC designation was that OFAC found Jamce "to be owned or controlled by ... persons designated pursuant to this Order," but not designated as having any connection to FARC or otherwise involved in anything untoward, *see* Additional Designation of Persons Pursuant to Executive Order 12978, 71 FR 69609-01 (Dec. 1, 2006). As Plaintiffs explained in their reply brief, OFAC'S blocking order did not find any misconduct by Jamce Investments, Ltd. (an independent bank-owned entity until its dissolution prior to garnishment).

The reason why undersigned counsel appeared "belatedly" in regard to the Jamce garnishment, *see* DE:58:14 (complaint, ¶ 77), was that beneficiary Miriam Sutherlin (who controlled the largest share of the trust assets) had been represented

by Holland & Knight (through April 10, 2013) and Holland & Knight had been trying (unsuccessfully) to obtain assistance and information from Wells Fargo; only when it was clear on February 12, 2013, that Wells Fargo was never going to help the beneficiaries or appear for its own company, Jamce, and would not oppose the garnishors' motion to proceed with execution on the garnishment writs, did undersigned counsel consent to file a motion for Jamce seeking an evidentiary hearing (Garnishment-DE:596). In that sole pre-turnover filing for Jamce, undersigned counsel asserted that Jamce was a trust, not a company, so as to justify being able to appear as counsel in some way for Jamce, Garnishment-DE:596:1; but the garnishment court rejected treatment of Jamce as a trust.

Even if the district court had granted the turnover motion on the grounds that it was unopposed—and any fair reading of the turnover order, Garnishment-DE:725, shows that is not true—it may nevertheless be more efficient to look at the case as if Jamce (the company) opposed the motion, but did not raise the only ground that would have barred the garnishment: jurisdiction. The question of who was at fault for that failure is one that cannot reliably be answered without discovery, given the context of an unusual garnishment answer by Wells Fargo, the bank's refusals to cooperate with the beneficiaries, persistent refusal to admit the location of the funds by Wells Fargo, the 2013 timing of Wells Fargo's successful effort to conflict out Holland & Knight as counsel for a beneficiary, Wells Fargo's admission that it sought to control the Jamce garnishment by giving up the assets, DE:59:4 (Wells Fargo

motion to dismiss: "Wells Fargo's answer to the writ of garnishment and its compliance with the turnover order were *merely an exercise of its authority to settle all claims* against the JAMCE assets.") (emphasis added), and the logic that highly-competent garnishment counsel for Wells Fargo would likely know about the jurisdiction of garnishment courts. Jamce, the company—to the extent the record shows it was ever actually formed—was wholly owned *by Wells Fargo alone*, never by any trustor or beneficiary; thus Wells Fargo independently dissolved Jamce company *years* before any garnishment and believed it could assume full control of (and abandon) Jamce's assets in its garnishment answer.

The disputed fact questions that remain in this very complicated and unique case, in which unfortunately a garnishment occurred that should never have been permitted,[4] remain so substantial that resolution on a motion to dismiss without any discovery at all having taken place should be reconsidered. Factual questions that remain include:

- whether Wells Fargo and its garnishment attorneys, Mayer Brown LLP & Akerman Senterfitt, knew prior to turnover that there was no jurisdiction for the unlawful garnishment or, alternatively, whether the

[4] *See Stansell v. FARC*, 149 F.Supp.3d 1337, 1339 (M.D. Fla. 2015) (Lazzara, J.) ("[T]he Court concludes that it lacks subject matter jurisdiction to garnish any funds in any bank accounts located outside the State of Florida. All of the funds at issue in the motions, memoranda, and writs now before the Court are held outside the State of Florida and, thus, are beyond the reach of a Florida writ of garnishment.").

garnishment's jurisdictional defect was foreseeable to them, DE:58:17–18;[5]

- whether the Court's decision recognizes that until February 2013, the only counsel any of the beneficiaries had *in relation to Wells Fargo's actions and the Jamce writ* was Holland & Knight, and whether Holland & Knight relied on the appearance that only Florida assets were involved, before they were conflicted out of the case by Wells Fargo;
- whether Plaintiffs sought to obtain information to present at a hearing on the garnishment and Wells Fargo's answer (where garnishment docket-entry 596 shows Plaintiffs did seek an evidentiary hearing, and their evidentiary hearing request denied, less than 30 days before the turnover order);
- whether Wells Fargo's admission in its motion to dismiss that from 2011 to 2013, in failing to represent or assist in any way its trust beneficiaries for that more than one-year period, "Wells Fargo's answer to the writ of garnishment and its compliance with the turnover order were *merely an*

[5] Notably, the district court order cites other pre-2011 district court decisions adhering to Florida garnishment law as controlling the jurisdictional reach of the court to the State of Florida. *See APR Energy, LLC v. Pakistan Power Resources, LLC*, 2009 WL 425975, at * 2 (M.D. Fla. 2009); *Skulas v. Loiselle*, 2010 WL 1790433 (S.D. Fla. 2010). The district court's jurisdictional decision and dismissal order were so indisputably correct that the garnishors abandoned their appeal to this Court from the dismissal order. *See* Order, *Stansell v. FARC*, 11th Cir. No. 15-13774 (Oct. 29, 2015).

exercise of its authority to settle all claims against the JAMCE assets," DE:59:4, can be reconciled with the Court's ruling that Wells Fargo's reliance on the beneficiaries's hiring of counsel after more than 16 months Wells Fargo's failure to advise them the funds were not in Florida and the garnishment was jurisdictionally defective, *see* App. 20;

- whether Wells Fargo rebuffed Plaintiffs' contacts during garnishment proceedings—where prior counsel for plaintiffs, Holland & Knight, failed to obtain Wells Fargo's cooperation, and was forced out of case by Wells Fargo after turnover motion was filed, DE:58:22; and
- whether plaintiffs' failure to respond to the turnover motion was an intervening cause of Wells Fargo's failure to disabuse plaintiffs of their belief that the funds were in Miami, where the trust was entered into, or can reasonably excuses Wells Fargo from its failure for 18 months prior to turnover to provide relevant information to plaintiffs and where garnishment docket-entries 731 and 733 show any turnover response by plaintiffs, deprived of key jurisdictional information, would have been futile—as Wells Fargo conceded in its dismissal motion).

Given that the attorney who appeared for Jamce (mistakenly seeking to have Jamce deemed a trust) for only the last two months of the garnishment proceedings did not know that the funds were outside the State of Florida and Wells Fargo, who admitted in their motion to dismiss that making a decision to "settle" Jamce's claims

by abandoning them (DE:59:4), for the first sixteen (16) months of the garnishment proceedings from 2011–2013, *did* know about the extra-jurisdictional locus of the property, but failed to advise anyone until seven years after answering the garnishment writ, it was not unforeseeable to Wells Fargo that something would go wrong and a hidden ball would be dropped. *See* DE:58:13, ¶ 69 ("[I]n its [turnover] order, the [district] court determined that the assets referred to in Wells Fargo's garnishment response were funds owed to JIL, and specifically noted reliance on Well Fargo's 'Answer DE 435 [that] does not identify any third parties asserting any claim or interest in the blocked proceeds.'") (citing Garnishment-DE:725:6). Unlike *Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007), where the complaint failed to set forth *any* fact suggestive of the unlawful agreement alleged, *id.* at 561-62, Plaintiffs set forth specific facts establishing the elements of claims and "raise a reasonable expectation that discovery will reveal evidence" of such claims. *Id.* at 556; *see id*. at 570 (requiring only enough facts to state a claim "that moves from conceivable to plausible").

CONCLUSION

The Court should grant rehearing because of the significance of the jurisdictionally-defective garnishment and Wells Fargo's course of conduct leading to that result.

Respectfully submitted,

s/ Richard C. Klugh
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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7). According to the WordPerfect program on which it is written, the numbered pages of this brief contain 3,725 words.

s/ Richard C. Klugh
Richard C. Klugh, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing petition for rehearing was sent on April 24, 2019, by U.S. mail to appellee's counsel, Paul W. Hughes, Esq., and Alex Lakatos, Esq., Mayer Brown LLP, 1999 K Street NW, Washington, DC 20006.

s/ Richard C. Klugh
Richard C. Klugh, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11458-HH

LUIS SUTHERLIN,
individually and as the beneficiaries of the dissolved trust, et al.,

Plaintiffs,

MIRIAM SUTHERLIN,
individually and as the beneficiaries of the dissolved trust,
JAIME SAIEH,
individually and as the beneficiaries of the dissolved trust,
MOISES SAIEH,
individually and as the beneficiaries of the dissolved trust,

Plaintiffs - Appellants,

versus

WELLS FARGO BANK N.A.,
WELLS FARGO & COMPANY,
FIRST UNION BROKERAGE SERVICES, INC.,
FIRST UNION BANK & TRUST COMPANY (CAYMAN) LTD,

Defendants - Appellees.

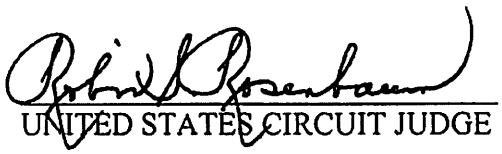
Appeal from the United States District Court
for the Middle District of Florida

BEFORE: WILLIAM PRYOR, ROSENBAUM, and GRANT, Circuit Judges

PER CURIAM:

The petition for panel rehearing filed by Miriam Sutherlin, Jaime Saeih, and Moises Saieh is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-41