it would be inequitable and unjust for SunTrust to retain these benefits, Count IV alleges the innocent investors are entitled to the return of these amounts. (Id., ¶¶ 90, 91.)

Count IX of the Amended Complaint alleges that PCOM conferred a benefit upon Wells Fargo by making wire transfers into and out of PCOM's Wells Fargo Accounts, thereby accruing significant fees, which were paid with misappropriated investor funds. (Id., ¶ 118.) It further alleges that Wells Fargo knowingly and voluntarily accepted and retained these benefits with respect to transaction/service fees, and has thus been unjustly enriched at the expense of the innocent investors. (Id., ¶¶ 119, 120.) Because it would be inequitable and unjust for Wells Fargo to retain these benefits, Count IX alleges the innocent investors are entitled to the return of these amounts. (Id., ¶¶ 121, 122.)

"A claim for unjust enrichment has three elements: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendant[ ] to retain it without paying the value thereof." Virgilio v. Ryland Grp., Inc., 680 F.3d 1329, 1337 (11th Cir. 2012)(citations omitted). The benefits alleged to have been conferred were the fees earned by SunTrust and Wells Fargo for the international wire transfers through their respective accounts. The SunTrust Accounts were closed on July 30, 2007, and no wire

transfers are alleged to have been made through the accounts thereafter. The statute of limitations therefore expired prior to the filing of the March 30, 2012 Amended Complaint. The same cannot be determined as to the Wells Fargo Accounts, as discussed above. SunTrust's motion to dismiss is granted as to Count IV and Wells Fargo's motion to dismiss Count IX is denied.

(5) Counts V and X: Bankruptcy Trustee's Claims for Negligence and Wire Transfer Liability

In Count V, the Bankruptcy Trustee for the Debtors Engler, PCO, and PCOM (the alleged Ponzi scheme wrongdoers) seeks damages from SunTrust based upon negligence and wrongful and improper transfer of funds by the wire transfers. Count V alleges that Engler authorized and directed wire transfers from funds in the SunTrust Accounts, and that SunTrust had a duty of care to PCO to "correctly, cautiously, and prudently" process the wire transfers pursuant to commercially reasonable security procedures. (Doc. #24, ¶¶ 94, 95.) The Trustee alleges that SunTrust breached its duty of care by violating prudent and sound banking practices and procedures, or by the lack of good faith in processing, or by effectuating wire transfers based on an actual knowledge of Engler's fraudulent use of the SunTrust Accounts. (Id., ¶ 96.) The Trustee argues that by keeping the SunTrust Accounts open, and processing wire transfers after obtaining knowledge of Engler's fraudulent use of its accounts, SunTrust allowed innocent investors

to make deposits into the accounts, and enabled Engler to convert the funds, resulting in damages to PCO. (Id., ¶¶ 97, 98.)

In Count X, the Bankruptcy Trustee seeks damages from Wells Fargo based upon negligence and wrongful and improper transfer of funds by the wire transfers. Count X alleges that Fuchs authorized and directed wire transfers from funds in the Wells Fargo Accounts, and that Wells Fargo had a duty of care to PCOM to "correctly, cautiously, and prudently" process the wire transfers pursuant to commercially reasonable security procedures. (Id., ¶¶ 125, 126.) The Trustee alleges that Wells Fargo breached its duty of care by violating prudent and sound banking practices and procedures, or by the lack of good faith in processing, or by effectuating wire transfers based on an actual knowledge that Fuchs was utilizing the Wells Fargo Accounts so that Engler could continue his fraudulent scheme. (Id., ¶ 127.) The Trustee argues that by keeping the Wells Fargo Accounts open, and processing wire transfers after obtaining knowledge of the fraudulent use of the accounts, Wells Fargo allowed innocent investors to make deposits into the accounts, and enabled Fuchs, PCOM, and/or Engler to convert the funds, resulting in damages to PCOM. (Id., ¶¶ 128, 129.)

The elements necessary to sustain a negligence claim are:

> 1. A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
>
> 2. A failure on the [defendant's] part to

> conform to the standard required: a breach of the duty....
>
> 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
>
> 4. Actual loss or damage....

Curd v. Mosaic Fertilizer, LLC, 39 So. 3d 1216, 1227 (Fla. 2010)(quoting Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003)).

If the Court gets past the fact that the Trustee stands in the shoes of the Debtors, not the victims, and therefore lacks standing to assert any claims on behalf of the investors, the Trustee is suing SunTrust and Wells Fargo for doing what the Debtors instructed. The only breach of the alleged duty relates to the wire transfers from the SunTrust Accounts, which could not occur after July 30, 2007, when the accounts were closed. Again, the same cannot be determined as to the Wells Fargo Accounts, as discussed above. Additionally, the Court does not find that the Trustee's appointment on April 30, 2008 "in some extraordinary way" prevented the Debtors, or then the Trustee, from asserting the Debtors' rights prior to July 30, 2011. Thus, the Court will not apply the doctrine of equitable tolling. The SunTrust motion to dismiss is granted as to Count V, and the Wells Fargo motion to dismiss is denied as to Count X.

B. Pleading Sufficiency

(1) Count VI: Aiding And Abetting Conversion

Wells Fargo first argues that Count VI must be dismissed because the allegations: (1) fail to establish that Wells Fargo had actual knowledge of the conversion; and (2) fail to demonstrate that Wells Fargo provided substantial assistance in committing the wrongdoing. In support, Wells Fargo relies on the Eleventh Circuit's recent unpublished opinion in Lawrence v. Bank of Am., N.A., 455 F. App'x 904. Plaintiffs respond that Lawrence is distinguishable.

The Court agrees with plaintiffs. The Amended Complaint, in addition to alleging that the transactions were atypical, alleges that Wells Fargo: (1) knew about the relationship between Fuchs and Engler and between PCOM and PCO on May 29, 2007; (2) received SunTrust's 314(b) request and the AMFA Warning Notification Letter on June 8, 2007; (3) conducted its own investigation into the accounts; (4) sent a letter to PCOM on July 10, 2007, requesting that the accounts be closed by August 21, 2007 or would be closed involuntarily by that date; and (5) despite the letter, continued to process thousands of monthly receipts and disbursements of investor funds totaling tens of millions of dollars per month to and from Fuchs/PCOM until in or about January 2008. (Doc. #24, ¶¶ 6, 46, 47, 48, 49, 50, 54.) These allegations are sufficient to plausibly state that Wells Fargo had actual knowledge of the

wrongdoing, Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."), and sufficiently demonstrate that Wells Fargo provided substantial assistance in committing the wrongdoing, Groom v. Bank of Am., No. 8:08-cv-2567-JDW-EAJ, 2012 WL 50250, at *4 (M.D. Fla. Jan. 9, 2012) ("Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.") (citation omitted).

Wells Fargo also argues that Count VI must be dismissed because "[t]he failure to repay a loan, even when the borrower had no intention of repaying the loan at the time of the promise, does not give rise to the underlying tort of conversion." (Doc. #43, p. 15). Plaintiffs, in their response to a similar argument made by SunTrust, respond that an exception applies because the claim goes well beyond the terms of the investment agreement. (Doc. #47, p. 30.)

"The law in Florida is clear—a simple monetary debt generally cannot form the basis of a claim for conversion or civil theft." Walker v. Figarola, 59 So. 3d 188, 190 (Fla. 3d DCA 2011)). See also Rosen v. Marlin, 486 So. 2d 623, 625-26 (Fla. 3rd DCA 1986). To establish conversion when there is a contractual relationship, the conversion "must go beyond, and be independent from, a failure to comply with the terms of a contract." Gasparini v. Pordomingo, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008). Where money is involved,

"there must be an obligation to keep intact or deliver the specific money in question, so that money can be identified." Walker, 59 So. 3d at 190 (quoting Gasparini, 972 So. 2d at 1056)(internal quotation marks omitted). On the other hand, Florida case law has also upheld a verdict of conversion where there was a contractual relationship and evidence of "a classic embezzlement." Masvidal v. Ochoa, 505 So. 2d 555, 556 (Fla. 3d DCA 1987).

The Amended Complaint alleges that the investments were documented by Promissory Notes and Loan Agreements between Engler and PCO, as Borrowers, and the investors, as Lenders. (Doc. #24, ¶ 28.) Plaintiffs also allege that Engler solicited investments for his day trading and investment business and "guaranteed annualized returns of 48% to 72%," and engaged in a classic Ponzi scheme. While there is no allegation that plaintiffs, in their Promissory Notes and Loan Agreements, directed how the money was to be used, the pleading is sufficient to state a plausible claim under Masvidal. Therefore, the motion to dismiss will be denied as to Count VI.

(2) Count VII: Aiding And Abetting Fraud

Wells Fargo does not assert any additional arguments beyond those made as to the actual knowledge and substantial assistance elements of aiding and abetting. For the reasons stated previously as to Count VI, Wells Fargo's arguments as to Count VII fail, and the motion to dismiss is denied as to Count VII.

(3) Count VIII: Aiding and Abetting Breach of Fiduciary Duties

Wells Fargo's actual knowledge and substantial assistance arguments similarly fail as to Count VIII as they did for Counts VI and VII. However, Wells Fargo also argues that Count VIII must be dismissed because there are no allegations supporting a fiduciary relationship between Fuchs and the Wells Fargo plaintiffs.

A Florida court has summarized the contours of a fiduciary relationship as follows:

> If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief. Fiduciary relationships may be implied in law and such relationships are premised upon the specific factual situation surrounding the transaction and the relationship of the parties. Courts have found a fiduciary relation implied in law when confidence is reposed by one party and a trust accepted by the other. To establish a fiduciary relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel and protect the weaker party.

Bingham v. Bingham, 11 So. 3d 374, 387 (Fla. 3d DCA 2009)(internal citations and quotations omitted). Fiduciary relationships are either expressly or impliedly created. Capital Bank v. MVB, Inc., 644 So. 2d 515, 518-19 (Fla. 3d DCA 1994). When a fiduciary relationship has not been created by an express agreement, the question of whether the relationship exists generally depends "upon the specific facts and circumstances surrounding the relationship

of the parties in a transaction in which they are involved." Collins v. Countrywide Home Loans, 680 F. Supp. 2d 1287, 1297 (M.D. Fla. 2010)(quoting Taylor Woodrow Homes Fla., Inc. v. 4/46-A Corp., 850 So. 2d 536, 540 (Fla. 5th DCA 2003)).

Here, plaintiffs simply allege that "Fuchs owed a fiduciary duty to [PCOM's] creditors/innocent investors because it continually operated in the zone of insolvency since in or about January 2005." (Doc. #24, ¶ 110.) Plaintiffs do not, however, allege sufficient facts to support this conclusory allegation. The Court finds that the allegations, standing alone, are insufficient to plausibly suggest that Fuchs was acting as a fiduciary to PCOM's creditors/innocent investors. Therefore, the motion to dismiss will be granted as to Count VIII, and Count VIII will be dismissed without prejudice.

(4) Count IX: Unjust Enrichment

Wells Fargo asserts that Count IX should be dismissed because there is no allegation that plaintiffs have directly conferred a benefit on defendant. Plaintiffs respond, citing Williams v. Wells Fargo Bank N.A., No. 11-21233-CIV, 2011 WL 4368980 (S.D. Fla. Sept. 19, 2011), that the lack of direct contact does not preclude an unjust enrichment claim. Here, plaintiffs allege: (1) PCOM conferred a benefit upon Wells Fargo by making wire transfers into and out of the Wells Fargo Accounts, thereby accruing significant transaction/service fees; (2) PCOM paid the fees with investor

funds; (3) Wells Fargo knowingly accepted and retained the benefits; and (4) the circumstances are such that it would be inequitable for Wells Fargo to retain the benefits. (Doc. #24, ¶¶ 118-121.) At this stage in the litigation, the Court finds that plaintiffs have adequately pled a plausible cause of action for unjust enrichment.

(5) Count X: Bankruptcy Trustee's Claims for Negligence and Wire Transfer Liability

As alluded to above, the Trustee lacks standing to assert any claims of the investors, Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972), and cannot set forth a plausible negligence claim or wire liability claim on behalf of the Debtors for doing what the Debtors instructed, see, e.g., O'Halloran v. First Union Nat'l Bank of Fla., 350 F.3d 1197 (11th Cir. 2003). Accordingly, the motion to dismiss will be granted as to Count X.

Accordingly, it is now

ORDERED:

1. SunTrust Bank's Motion to Dismiss Plaintiffs' Amended Class Action Complaint (Doc. #35) is **GRANTED**, and Counts I, II, III, IV, and V of the Amended Complaint (Doc. #24) are dismissed with prejudice.

2. Wells Fargo Bank, N.A.'s Motion to Dismiss Amended Class Action Complaint (Doc. #43) is **GRANTED in part and DENIED in part**, and Counts VIII and X of the Amended Complaint are dismissed without prejudice.

3. SunTrust's Motion to Strike Paragraphs 42, 43, 70(v), 75(v), 83(v), and Exhibit 4 of Plaintiffs' Amended Class Action Complaint (Doc. #36) is **DENIED as moot.**

4. Plaintiffs' Motion and Incorporated Memorandum of Law in Support of Class Certification (Doc. #54) is **DENIED** without prejudice for plaintiffs to file an amended motion in light of this Opinion and Order.

5. Plaintiffs shall comply with the Order (Doc. #65) dated August 2, 2012.

DONE AND ORDERED at Fort Myers, Florida, this 19th day of March, 2013.

JOHN E. STEELE
United States District Judge

Copies: Counsel of record