Filing # 183968769 E-Filed 10/13/2023 05:46:16 PM

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

FORTINBRAS ENTERPRISES LP, HT INVESTMENTS, LLC, SILVER ROCK TACTICAL ALLOCATION FUND LP, AND SILVER ROCK CONTINGENT CREDIT FUND LP, PLAINTIFFS, V. ONE FLORIDA BANK, DEFENDANT.	CASE NO.: 2023-CA-014704-O COMPLEX BUSINESS LITIGATION

DEFENDANT ONE FLORIDA BANK'S MOTION TO DISMISS

Defendant One Florida Bank, pursuant to Florida Rules of Civil Procedure 1.140(b)(6) and 1.110(f), respectfully requests that this Court dismiss Plaintiffs' Complaint because Plaintiffs cannot state a claim for fraudulent transfer, whether intentional or constructive. In support, One Florida Bank states:

INTRODUCTION

Plaintiffs allege that they loaned money to a Louisiana LLC, Lighthouse Management (sometimes referred to as "Lighthouse Management" or "Lighthouse"). Then, Plaintiffs say, Lighthouse Management fraudulently transferred that money away, repaying loans previously made to it and to a related entity—Prepared Managers, LLC[1]—by One Florida Bank. Soon after paying off those loans, Lighthouse collapsed, leaving Plaintiffs with worthless notes. Plaintiffs further point to connections between One Florida Bank and Lighthouse, speciously suggesting One Florida Bank knew of Lighthouse's financial state and was somehow complicit in a fraudulent scheme by accepting repayment of its loans.

But the Note Agreement between Plaintiffs and Lighthouse, which the Complaint implicitly incorporates by reference, tells a much different story. Reviewing the Note Agreement, it becomes clear that not only did *Plaintiffs know* about Lighthouse and Prepared's debts to One Florida Bank; and not only did *Plaintiffs approve* of Lighthouse using loan proceeds to repay those debts; but

[1] Sometimes referred to as "Prepared Managers" or "Prepared."

Plaintiffs expressly required that Lighthouse use loan proceeds to pay off its and Prepared's debt to One Florida Bank as a condition of their loan. Yet Plaintiffs now have the temerity to claim those authorized transfers were fraudulent. In doing so, Plaintiffs—who happen to be sophisticated hedge funds—stretch the doctrine of fraudulent transfer beyond all recognition in a shameless effort to have Defendant—a community bank—bail Plaintiffs out of their failed speculation in the Louisiana homeowner's insurance industry.

Indeed, courts across the country recognize that creditors who participate in or ratify an alleged fraudulent transfer cannot then seek to have that transfer avoided. Because Plaintiffs required the transfers they now call fraudulent as a very condition of their loan to Lighthouse, they cannot state any fraudulent transfer claim.

And if this Court disagrees, it should still dismiss the Complaint without prejudice for violating Florida Rule of Civil Procedure 1.110(f), which prohibits comingling discreet claims for relief in a single count. Specifically, Count I of Plaintiffs' Complaint impermissibly alleges two separate fraudulent transfers—made at different times, for different amounts, and under differing circumstances. Plaintiffs' effort to combine these claims is tactical. Indeed, the larger of the two transfers is both weaker on its merits and susceptible to its own set of affirmative defenses. But Plaintiffs' effort to insulate the larger, weaker transaction from individualized scrutiny impermissibly muddles the two transfers, rather than

facilitating a clear presentation of the issues as required. And so, even if this Court is disinclined to dismiss on the merits, it should still dismiss Count I of Plaintiffs' Complaint, requiring Plaintiffs—if they can in good faith do so—to plead their two distinct intentional fraudulent transfer claims in two distinct counts.

BACKGROUND[2]

Plaintiffs—Fortinbras Enterprises LP (Fortinbras), HT Investments, LLC (HT), and Silver Rock Tactical Allocation Fund LP and Silver Rock Contingent Credit Fund LP (together, Silver Rock) (collectively, "Plaintiffs")—are hedge funds and investment advisor entities. *See* Compl. ¶¶ 16–19. Defendant, One Florida Bank, is a Florida-based community bank. *See id.* ¶ 20. Between 2019 and 2021, in three separate transactions, One Florida Bank loaned money to two insurance-related entities: Lighthouse Management and Prepared Managers. *Id.* ¶¶ 44–48. Lighthouse Management later also borrowed money from Plaintiffs, and Lighthouse used some of that money to repay One Florida Bank's loans. *Id.* ¶¶ 11–12. Plaintiffs now claim that the repayment of those loans was fraudulent.

Lighthouse Management, the alleged debtor to Plaintiffs, was a licensed managing general agent under Louisiana law, meaning that it ran all or almost all of various insurance companies' day-to-day activities. *See id.* ¶¶ 7, 23. It was also

[2] The facts recited are those alleged in Plaintiffs' Complaint, which Defendant largely denies but accepts as true for the purposes of this Motion to Dismiss.

related to two companies: Lighthouse Excalibur Insurance Company and Lighthouse Property Insurance Corporation. *Id.* ¶¶ 2–3. The Complaint groups these companies together as the "Lighthouse Entities." *Id.* ¶ 3. The Whites—Patrick White and his father Lawrence White—allegedly "controlled and indirectly held the beneficial interests in all of" the Lighthouse Entities. *Id.*

A related group of entities—but, importantly, not the "debtor" for the purpose of Plaintiffs' claims—are what the Complaint calls the "Prepared Entities." *Id.* These consist of Prepared Holdings LLC, which owned Prepared Managers, LLC. Prepared Managers, in turn, was the managing general agent of Prepared Insurance Company. *Id.* Prepared Insurance Company itself was owned, since June 2020, by Lighthouse Insurance Company. *Id.* ¶ 26. The Whites indirectly owned a 70% interest in the Prepared Entities through Prepared Holdings. *Id.* ¶ 3.

In December 2019, One Florida Bank loaned Lighthouse Management $5,000,000. *Id.* ¶ 44. In September 2020, One Florida Bank loaned Prepared Managers $6,000,000. *Id.* ¶ 45. Sometime later in 2021, "Lighthouse Management established a revolving line of credit at One Florida Bank up to a principal amount of $10,000,000." *Id.* ¶ 46. By December 2021, Lighthouse Management owed One Florida Bank $13,800,000 on its two loans, and Prepared Managers owed One Florida Bank $5,200,000. *Id.* ¶¶ 47–48.

After a Louisiana conservation proceeding against Prepared Managers and the Lighthouse Entities concluded in an August 2021 settlement agreement, it became clear that the Lighthouse Insurance Companies would need additional funding. *See id.* ¶¶ 49–53. In early September 2021, Patrick White, along with Lighthouse Management's re-insurance broker, TigerRisk Partners LLC, contacted Fortinbras with a proposal seeking an investment of between $40 and $60 million, which would be partially used to pay back its lender. *Id.* ¶¶ 61–62. Fortinbras apparently conducted "initial diligence" and sent Lighthouse Management a term sheet that "contemplated that Fortinbras would purchase $60,000,000 in notes from Lighthouse Management" and that "approximately $14,000,000 of that sum would be used to repay existing 'debt.'" *Id.* ¶ 62.

Fortinbras began its due diligence process in September 2021. *Id.* ¶ 65. According to Plaintiffs, they were especially interested in Lighthouse Management's exposure after Hurricane Ida, which had recently ravaged Louisiana. *Id.* ¶ 66. As Plaintiffs tell it, between October and December 2021, TigerRisk and Patrick White repeatedly misled Plaintiffs regarding the Lighthouse Entities' exposure stemming from Hurricane Ida-related claims. *Id.* ¶¶ 68–74. Patrick White also allegedly concealed the existence of the previous conservation proceeding. *Id.* ¶ 5. Eventually, on December 22, 2021, Plaintiffs executed a note agreement (the Note

Agreement) with Lighthouse Management. *Id.* ¶ 78; **Exhibit A**.[3] In the Note Agreement, Plaintiffs agreed to buy $65,000,000 in secured notes from Lighthouse Management. Compl. ¶ 78.

The Note Agreement specifically references both Lighthouse and Prepared Managers' debt to One Florida Bank. Exhibit A at 9 (Section 1.10, defining "Existing

[3] "[W]here the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss." *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) (holding that, when complaint referred to an insurance policy and standing to sue was based on assignment of the policy, trial court did not err by considering policy); *Air Quality Assessors of Fla. v. S.-Owners Ins. Co.*, 354 So. 3d 569, 571 (Fla. 1st DCA 2022) (holding that insurance policy was incorporated by reference when assignee of policy sought compensation under policy); *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246, 1249 (Fla. 2d DCA 2011) (holding that, when complaint referenced a settlement agreement and was based on the terms of that agreement, agreement was incorporated by reference). Here, the Complaint references the Note Agreement throughout and describes its terms in at least seven paragraphs. Compl. ¶¶ 8–9, 12, 78–82. And, as in the cases cited above, Plaintiffs' ability to sue, as well as their theory of liability, relies on the Note Agreement. In that regard, Plaintiffs allege that they (except Fortinbras) were "part[ies] to the Note Agreement," attempting to show their status as a "creditor" (a necessary prerequisite to any fraudulent transfer claim), *see Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1302 (11th Cir. 2020), and further allege that the Note Agreement sets forth the "require[ment] [of] the contribution of Prepared Mangers if . . . proceeds were used to satisfy Prepared Managers' debt to One Florida Bank," Compl. ¶ 12. Indeed, on the last point, Plaintiffs allege that the Prepared Managers "contribution" required under the Loan Agreement "never took place" to argue that "Lighthouse Management received nothing of value in return for th[e] payment." Compl. ¶ 12—an essential element of their claims. *See id.* ¶ 110(iii) (alleging in Count I that "Lighthouse Management received no consideration at all" with regard to transfer on behalf of the Prepared Management); *id.* ¶ 112 (alleging in Count II that the "transfer to satisfy debts owed by Prepared Managers was made . . . without receiving a reasonably equivalent value in exchange"); *id.* ¶ 115 (same in Count III). Thus, the Note Agreement is incorporated by reference in Plaintiffs' Complaint and this Court may consider it in adjudicating this motion to dismiss.

Indebtedness" as outstanding loan agreements "between the Issuer [Lighthouse] and One Florida Bank" and "between Prepared Managers and one Florida Bank").[4] In the Note Agreement, Plaintiffs and Lighthouse agreed that a significant portion of Plaintiffs' loan was to be used to pay off that "Existing Indebtedness" of Lighthouse and Prepared to One Florida Bank. Indeed, the Note Agreement describes the transaction between Plaintiffs and Lighthouse in these terms:

> "**Transaction**" means, collectively, (a) the issuance of the Notes on the Closing Date, (b) *the repayment of Existing Indebtedness*, (c) the creation and perfection of the Liens pursuant to the Security Documents, (d) the issuance of Warrants, (e) the consummation of any other transactions in connection with the foregoing, and (f) the payment of the Transaction Expenses.

[4] In full, the Note Agreement states:

> "**Existing Indebtedness**" means (i) any Indebtedness of the Issuer outstanding on or before the Closing Date under (x) the Loan Agreement between the Issuer and One Florida Bank, a Florida corporation dated December 17, 2019, as amended prior to the date hereof, and the documents, instruments and agreements in connection therewith, in the principal amount not to exceed $5,000,000.00 (which amount is outstanding as of the date hereof), and (y) the Revolving Line of Credit Loan Agreement between the Issuer and One Florida Bank, a Florida corporation, dated 2021, as amended prior to the date hereof, and the documents, instruments and agreements in connection therewith, in the principal amount not to exceed $10,000,000.00 (which amount is outstanding as of the date hereof), and (ii) solely in connection with the Prepared Managers Contribution, any Indebtedness of Prepared Managers under the Loan Agreement between Prepared Managers and One Florida Bank, dated as of September 18, 2020, as amended prior to the date hereof, and the documents, instruments and agreements in connection therewith, in the principal amount not to exceed $6,000,000.00 (which amount is outstanding as of the date hereof).

Exhibit A at 9 (Section 1.01).

Id. at 23 (Section 1.01) (emphasis added).

Repayment of One Florida Bank's loans served Plaintiffs' interests: it ensured Plaintiffs—not One Florida Bank—held a first priority secured interest in Lighthouse's assets. Section 4.01 of the Note Agreement provides that "[t]he obligation of each Initial Purchaser [i.e., Plaintiffs] to purchase the Notes hereunder on the Closing Date is subject to satisfaction of . . . each of the following conditions precedent: . . . all registrations, notices or actions" necessary "to establish a valid and perfected first priority security interest" in Plaintiffs' favor must be "effected, given or made," including "[f]inal unfiled forms of UCC-3 termination statements with respect to the liens securing Existing Indebtedness" as to Lighthouse. *Id.* at 42–43 (Section 4.01(b)); *see also id.* at 45 (Section 4.01(m)) (providing that "[o]n the Closing Date, after giving effect to the Transaction [the repayment of Existing Indebtedness], none of [Lighthouse Holdings], [Lighthouse Management] or any of their Subsidiaries shall have any Indebtedness for borrowed money except (i) the Notes"). In other words, Plaintiffs *required* that Lighthouse Management pay off its loans from One Florida Bank to ensure that Plaintiffs would be in first position by having a priority secured interest in Lighthouse's assets. And if there were any lingering doubt, the Note Agreement later adds the following warranty under the heading "Use of Proceeds": "The proceeds from the sale of the Notes on the Closing

Date ***will be used*** (i) to repay the Issuer's Existing Indebtedness." *Id.* at 58 (Section 6.15) (emphasis added).

Though Plaintiffs make much of the fact that Lighthouse Management paid off Prepared Managers' debt, as noted above, the Note Agreement required that too. *See id.* at 58 (Section 6.15) (providing that the "proceeds from the sale of the Notes on the Closing Date will be used . . . . (iii) solely in connection with and substantially simultaneous to the Prepared Managers Contribution, to repay the Existing Indebtedness of Prepared Managers"). Again, that payment served Plaintiffs' interests: under the Note Agreement, through a series of transactions, Prepared Managers was to be contributed to Lighthouse Management "substantially simultaneous" to the loan payoff. *Id.* at 19 (Section 1.01, defining "Prepared Managers Contribution"); *id.* at 58 (Section 6.15). That way, Plaintiffs would have all their collateral wrapped up in one entity, in which they would have a priority secured interest.

The day the parties executed the Note Agreement, HT and Silver Rock transferred $63,700,000 to Lighthouse Management. Compl. ¶ 79. Lighthouse Management in turn loaned $47,000,000 to Lighthouse Holdings, which then contributed it to Lighthouse Property Insurance Company. *Id.* In exchange, Plaintiffs gained a security interest in, "among other things," "all of the assets and equity interests in Lighthouse Management." *Id.* ¶ 80.

The same day, as directed by the Note Agreement, Lighthouse Management "directed the transfer of" $13,822,665.41 to One Florida Bank to pay its debt. *Id.* ¶ 83. One Florida Bank received the payment the next day. *Id.* On February 2, 2022, Lighthouse transferred $5,200,000 to One Florida Bank to satisfy Prepared Managers' debt. *Id.* ¶ 84. Yet Plaintiffs now claim that these transfers rendered Lighthouse insolvent. *Id.* ¶¶ 87–88.

Eventually, on February 4, 2022, Patrick White disclosed to Plaintiffs that the Lighthouse Entities were in financial distress. *Id.* ¶ 94. On March 29, 2022, the Louisiana Department of Insurance "filed a Petition for Renewed Conservation and Injunctive Relief, and obtained the Renewed Conservation Order, placing" the Lighthouse Entities and Prepared Managers "back into conservation pursuant to provisions of the Louisiana Insurance Code." *Id.* ¶ 97. Eventually the Louisiana Department of Insurance agreed to transfer to HF and Silver Rock all of Lighthouse Management's assets and its claims against Prepared Managers—that agreement was later approved by a Louisiana court. *Id.* ¶¶ 102–03. In October 2022, the court authorized Lighthouse Management's liquidation. *Id.* ¶ 104.

In late August 2023, Plaintiffs filed this action under Florida's Uniform Fraudulent Transfer Act (UFTA). Broadly, the UFTA bars two types of transfers. The first is an intentional fraudulent transfer; in other words, a transfer made "[w]ith

actual intent to hinder, delay, or defraud any creditor[5] of the debtor." § 726.105(1)(a), Fla. Stat. To prove an intentional fraudulent transfer, Plaintiffs must show an intent to defraud by the transferor. Typically, this involves showing the presence of certain "badges of fraud." *Gen. Elec. Co. v. Chuly Int'l, LLC*, 118 So. 3d 325, 327 (Fla. 3d DCA 2013) (citing *Beal Bank, SSB v. Almand Assocs.*, 780 So. 2d 45, 60 (Fla. 2001)); *see also* § 726.105(2)(a)–(k), Fla. Stat. (codifying badges of fraud).

The second prohibited transfer is a constructive fraudulent transfer, which occurs when a debtor transfers all of their assets away without consideration *and* they are insolvent or the transfer renders them insolvent. § 726.106(1), Fla. Stat.; § 726.105(1)(b), Fla. Stat. Constructive fraudulent transfer requires that the plaintiff show (1) that the debtor was insolvent at the time of the transfer or became insolvent through the transfer *and* (2) that the transfer was not for reasonably equivalent value. *See, e.g.*, *United States v. Exec. Auto Haus, Inc.*, 234 F. Supp. 2d 1253, 1257 (M.D. Fla. 2002).

Based on Lighthouse's two transfers to One Florida Bank, Plaintiffs allege three counts. In Count I, Plaintiffs combine Lighthouse's initial payment of its own debt with its payment of Prepared Managers' debt and allege without differentiation

[5] Notably, Plaintiff Fortinbras was neither a party to the Note Agreement nor a purchaser of notes. *See* Exhibit A at PDF pgs. 2, 8. Accordingly, Fortinbras has no apparent right to payment under the Note Agreement and thus is not a creditor who can bring a claim for fraudulent transfer. *See* § 726.102(4)–(5), Fla. Stat. (defining "creditor" to mean a person who has a claim, which includes a right to payment).

that both "Transfers"—a defined term used throughout the Complaint—were intentionally fraudulent. Compl. ¶¶ 107–10. In doing so, Plaintiffs assert that the combined "Transfers" satisfied five of eleven statutory "badges" of fraud. In Counts II and III, Plaintiffs allege that the second transfer (the Prepared Managers transfer) was also constructively fraudulent under § 726.105(1)(b)(2), Fla. Stat. and § 726.106(1), Fla. Stat., respectively. Compl. ¶¶ 111–17.

Because Plaintiffs bargained for and ratified the very transactions they now challenge, and alternatively because Plaintiffs impermissibly plead multiple claims in a single count, One Florida Bank moves to dismiss.

ARGUMENT

I. Motion to Dismiss Standard.

A motion to dismiss tests a pleading's legal sufficiency. *Nationstar Mortg., LLC v. McDaniel*, 288 So. 3d 1235, 1236 (Fla. 5th DCA 2020). And when the facts supporting a defense appear on the complaint's face and documents incorporated by reference,[6] the defense may be raised in a motion to dismiss and the Court must dismiss. *Lewis v. Morgan*, 79 So. 3d 926, 928 (Fla. 1st DCA 2012) (affirming grant of motion to dismiss based on affirmative defense appearing on face of complaint); *Bott v. City of Marathon*, 949 So. 2d 295, 296 (Fla. 3d DCA 2007) (holding that, when defense appears on complaint's face, dismissal with prejudice is proper); *see*

[6] *See supra* footnote 3.

also Wash. State Inv. Bd. v. Odebrecht S.A., 461 F. Supp. 3d 46, 78–79 (S.D.N.Y. 2020) (granting motion to dismiss fraudulent transfer claim based on affirmative defense of ratification); *In re Lyondell Chem. Co.*, 503 B.R. 348, 383–84 (Bankr. S.D.N.Y. 2014), *as corrected* (Jan. 16, 2014) (granting motion to dismiss fraudulent transfer claim because ratification defense "appear[ed] on the face of the complaint"), *abrogated on preemption grounds by In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016).

Further, "[e]ach claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . when a separation facilitates the clear presentation of the matter set forth." Fla. R. Civ. P. 1.110(f). Failure to comply with Rule 1.110(f) "may 'warrant dismissal of a complaint.'" *Taubenfeld v. Lasko*, 324 So. 3d 529, 541 (Fla. 4th DCA 2021) (quoting *Collado v. Baroukh*, 226 So. 3d 924, 927 (Fla. 4th DCA 2017)); *see also Baroukh*, 226 So. 3d at 927 ("[A]n action may be dismissed for failure to comply with the Florida Rules of Civil Procedure." (citing Fla. R. Civ. P. 1.420(b)).

II. This Court must dismiss the Complaint with prejudice because Plaintiffs ratified the transactions they now seek to unwind.

Simply put, because Plaintiffs required Lighthouse Management to repay its and Prepared Managers' debts as an express condition to the Note Agreement, they cannot now claim the payment was fraudulent.

A. Ratification is a Defense to Fraudulent Transfer.

"Because a fraudulent transfer is not void, but voidable, courts have generally held that it can be ratified by a creditor who is then estopped from seeking its avoidance." *First State Bank of Nw. Ark. v. McClelland Qualified Pers. Residence Tr.*, No. 5:14-CV-130 (MTT), 2015 WL 5595566, at *6 (M.D. Ga. Sept. 21, 2015) (quotations omitted).[7] Indeed, courts across the country have recognized "the overwhelming authority that such knowledge can bar claims for both actual and constructively fraudulent transfers." *Id.* at *6 n.16.[8] In line with this authority, "[e]stoppel [or ratification] can be a defense to a fraudulent transfer action under Florida law." *In re Brit. Am. Ins.,* No. 09-31881-EPK, 2013 WL 211314, at *13 (Bankr. S.D. Fla. Jan. 18, 2013), *report and recommendation adopted sub nom. In re Brit. Am. Isle of Venice (BVI) Ltd.*, No. 12-81329-CIV, 2013 WL 1566648 (S.D.

[7] To be sure, the transfers at issue here are not fraudulent, but even assuming they were at the motion to dismiss stage, Plaintiffs could not void them.

[8] Fraudulent transfer law has been around since the Elizabethan Era. Indeed, the UFTA now adopted in Florida is based on a 1571 English law, Statute of 13 Elizabeth. Plus, as its name suggests, Florida's Fraudulent Transfer Act is a Uniform Act. As such, both because these concepts are so old and because they have now been collated in a uniform act, the UFTA is identical or nearly identical to uniform acts from many other states. It is also substantively identical to a federal bankruptcy provision, 11 U.S.C. § 548. Claims under the federal act are "analogous in form and substance to those under" the UFTA and are "frequently analyzed contemporaneously" with UFTA claims. *In re Able Body Temp. Servs., Inc.*, 626 B.R. 643, 656 (Bankr. M.D. Fla. 2020) (quotations omitted); *see also In re PSN USA, Inc.*, No. 02-11913-BKC-AJC, 2011 WL 4031147, at *4 (Bankr. S.D. Fla. Sept. 9, 2011), *aff'd*, 615 F. App'x 925 (11th Cir. 2015) (same). Accordingly, authorities from other jurisdictions interpreting the uniform or federal fraudulent transfer provisions are persuasive.

Fla. Apr. 12, 2013); *see also* § 726.111, Fla. Stat. ("Unless displaced by the provisions of [§§] 726.101-726.112, the principles of law and equity, including . . . estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement those provisions.").

"[T]he general principle [is] that a creditor who knowingly authorized or sanctioned a transaction cannot then claim to have been defrauded by the transaction . . . ." *SL EC, LLC v. Ashley Energy, LLC*, No. 4:18-CV-01377-JAR, 2020 WL 7181580, at *8 (E.D. Mo. Dec. 7, 2020); *see also In re Adelphia Recovery Tr.*, 634 F.3d 678, 691 (2d Cir. 2011) ("A fraudulent transfer . . . can be ratified by a creditor who is then estopped from seeking its avoidance." (quoting *In re Best Prod. Co.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y. 1994)); *Lane v. Eggleston*, 284 F. 743, 745 (5th Cir. 1922) (stating that a creditor cannot "avoid [a transfer], after he has voluntarily assented to it"); *Lincoln Nat'l Life Ins. Co. v. Inzlicht-Sprei*, 16CV5171PKCRML, 2020 WL 1536346, at *12 (E.D.N.Y. Mar. 31, 2020), *aff'd,* 847 F. App'x. 97 (2d Cir. 2021) (holding that, when representative of allegedly defrauded party signed sale documents, the plaintiff could not state a fraudulent transfer claim based on sale); *First State Bank of Nw. Ark.*, 2015 WL 5595566, at *6 n.16 (holding that "a creditor with knowledge of a transfer at the time credit was advanced can be barred from attacking the transfer."); *In re Lyondell*, 503 B.R. at 383–84 (Bankr. S.D.N.Y. 2014) (holding that "[c]reditors who authorized or sanctioned the transaction, or, indeed,

participated in it themselves, can hardly claim to have been defrauded by it, or otherwise to be victims of it."); *Rozan v. Rozan*, 129 N.W.2d 694, 705 (N.D. 1964) ("The creditor must not have participated in or assented to the conveyance of which he complains, for if he has he cannot afterwards be heard to assert that the transfer was fraudulent per se as to him." (internal citation omitted)).

In turn, "[r]atification is the act of knowingly giving sanction or affirmance to an act which would otherwise be unauthorized and not binding" and may be "express or implied, or may result from silence or inaction." *Adelphia*, 634 F.3d at 691 (quotation omitted); *see also ABC Salvage, Inc. v. Bank of Am., N.A.*, 305 So. 3d 725, 729 (Fla. 3d DCA 2020) ("Under Florida law, [r]atification of an agreement occurs where a person expressly or impliedly adopts an act or contract entered into in his or her behalf by another without authority." (quotation omitted)).

B. Plaintiffs ratified the challenged transactions because they not only knowingly approved of the transactions but required them.

Plaintiffs plainly ratified the transactions of which they now complain because the Note Agreement between Plaintiffs and Lighthouse Management not only acknowledged the transactions Plaintiffs now wish to void, but it also *required* them. As courts have explained in analogous situations, lenders cannot bring claims for fraudulent transfer when they "not only *knew* that their loans would be used to pay [the defendant]; they not only *consented* that their loans be used to pay [the defendant]; they *required* that their loans be used to pay [the defendant]." *U.S. Bank*

Nat. Ass'n v. Verizon Commc'ns Inc., 479 B.R. 405, 411 (N.D. Tex. 2012) (emphasis in original) (holding that, when bank lent money to alleged fraudulent transferor for the express purposes of purchasing Verizon's yellow pages business, the transfer of funds to realize that purchase could not constitute fraudulent transfer).[9] So too here. Plaintiffs *knew* their loans would be used to pay One Florida Bank; they *consented* to their loans being used to pay One Florida Bank; and they *required* their loans be used to pay One Florida Bank.[10] *See also In re Refco, Inc. Sec. Litig.*, No. 07 MDL 1902 GEL, 2009 WL 7242548, at *11 (S.D.N.Y. Nov. 13, 2009) (recommending granting motion to dismiss because "[t]he Credit Agreement provides that the funds from Refco could be used only for the purchase of PlusFunds shares, and could only be disbursed with the permission of Refco. Refco was thus intimately involved with and voluntarily participated in what the Plaintiff [standing in Refco's shoes] readily asserts was a fraudulent transaction."), *report and recommendation adopted sub nom. In re Refco Sec. Litig.*, No. 07 MDL 1902 JSR, 2010 WL 5129072 (S.D.N.Y.

[9] *U.S. Bank* addressed fraudulent transfer claims brought by a bankruptcy trustee under 11 U.S.C. § 548. 479 B.R. at 409; *In re Able Body*, 626 B.R. at 656 (§ 548 claims are analogous to Florida fraudulent transfer claims); *see also* 11 U.S.C. § 544(b)(1) (stating that a bankruptcy trustee "may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable"). The issue was thus whether banks that had loaned money to the transferor had a valid fraudulent transfer claim that the bankruptcy trustee could assume and prosecute. *U.S. Bank*, 479 B.R. at 411.

[10] Though Plaintiffs indeed required the transfers, One Florida Bank need only show that Plaintiffs ratified the transactions through participation or affirmance. *Adelphia*, 634 F.3d at 691.

Jan. 12, 2010); *Odebrecht S.A.*, 461 F. Supp. 3d at 78–79 (granting motion to dismiss fraudulent transfer claim under New York law because the debtor's offering memoranda disclosed to the lender that the loan proceeds would be transferred and how they would be used).

No doubt Plaintiffs will argue ratification requires knowledge of "all material matters." *Ashley Energy*, 2020 WL 7181580, at *9; *see also Flaherty v. Flaherty*, 128 So. 3d 920, 923 (Fla. 2d DCA 2013) ("Ratification occurs when a party entitled to rescind a voidable contract fails to do so after the discovery of facts that warrant a rescission."). And fair enough, the Complaint alleges that Patrick White concealed information about *Lighthouse's* finances.

But that deception "is irrelevant." *U.S. Bank*, 479 B.R. at 411. "[P]laintiff[s'] claims are for fraudulent transfers, not for fraud." *Id.* The question on a fraudulent transfer claim is not whether Plaintiffs were fraudulently induced into loaning money to Lighthouse Management; the question is whether Lighthouse's transfers to One Florida Bank are voidable. In other words, the question is not whether the debtor used fraud to obtain the funds transferred—that's a *fraud* claim against the debtor (not the recipient of a later transfer). Instead, the relevant question is whether the debtor transferred the funds in a way that was either intended to evade a debt *or* rendered the debtor unable to pay the debt *and* the transfer was not for equal value. *Gulf Coast Produce, Inc. v. Am. Growers, Inc.*, No. 07-80633-CIV, 2008 WL 660100,

at *6 (S.D. Fla. Mar. 7, 2008) (explaining that "[t]he fraudulent act" in a fraudulent transfer claim is "the clandestine act of hiding money"). How the money came into the debtor's hands in the first place is irrelevant. *Id.* ("[A] fraudulent transfer claim is significantly different from other fraud claims . . . ."); *U.S. Bank*, 479 B.R. at 411 ("As the court has already explained, fraud is simply not an aspect of a fraudulent transfer claim." (quotations omitted)).

The point is that it does not matter when it comes to suing One Florida Bank whether Plaintiffs were somehow "'duped' or 'tricked'" into loaning money to Lighthouse. *U.S. Bank*, 479 B.R. at 411. "Because [Lighthouse's] lenders . . . had full knowledge of the transfers from [Lighthouse to One Florida Bank], they" cannot bring "fraudulent transfer claims." *Id.*

So too, even if Plaintiffs are correct (as they allege) that Prepared Managers was never contributed to Lighthouse per the terms of the Note Agreement, such a failure would be a simple breach of the Note Agreement.[11] Indeed, if Lighthouse had breached this requirement, Plaintiffs' remedies were set out in the Note Agreement: acceleration, specific performance, or "any available remedy to collect the payment of principal, premium (including Yield Protection Premium), and interest on the Notes." Exhibit A at 70 (Section 8.03(a)). In other words, the appropriate relief for

[11] Perhaps Lighthouse would also have a claim against Prepared for unjust enrichment. That may explain why the Louisiana Insurance Commissioner agreed to transfer Lighthouse's claims against Prepared to Plaintiffs. Compl. ¶¶ 102–03.

Lighthouse's breach was a suit against *Lighthouse* for breach of the Note Agreement. And Plaintiffs' articulated theory of fraudulent transfer—where the debtor transferred funds to the expressly approved party, but failed to satisfy every contractual condition in the process—would turn virtually every breach of contract claim involving uses of funds into a fraudulent transfer.

Plaintiffs' claims concern the flow of money between Lighthouse and Plaintiffs—they have *nothing* to do with One Florida Bank factually or legally. To the contrary, Plaintiffs knew *exactly* what Lighthouse would do with the money Plaintiffs lent—repay One Florida Bank—because that's what Plaintiffs *required* Lighthouse to do. Indeed, Plaintiffs structured the entire transaction around such payments. *See id.* at 23 (Section 1.01, defining the "Transaction" to include "repayment of Existing Indebtedness," which was defined to include both Lighthouse and Prepared's debt with One Florida Bank). Accordingly, Plaintiffs cannot void those transfers, and this Court should dismiss with prejudice. *Odebrecht S.A.*, 461 F. Supp. 3d at 78–79 (granting motion to dismiss noting that creditor's awareness of debtor's use of proceeds was "fatal" to fraudulent transfer claim); *In re Lyondell*, 503 B.R. at 383–84, 392 (dismissing fraudulent transfer claim noting that claim cannot survive in light of creditor's knowledge of use of funds).

III. In the alternative, this Court should dismiss Count I with leave to amend because Plaintiffs impermissibly comingle claims.

On top of its fatal, substantive flaws, Plaintiffs' Complaint suffers from pleading defects. "Each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count . . . when a separation facilitates the clear presentation of the matter set forth." Fla. R. Civ. P. 1.110(f). Failure to comply with Rule 1.110(f) "may 'warrant dismissal of a complaint.'" *Taubenfeld*, 324 So. 3d at 541 (quoting *Collado*, 226 So. 3d at 927).

Count I is an impermissible chimera of two independent fraudulent transfer claims and thus subject to dismissal under Rule 1.110(f). In Count I, Plaintiffs challenge both the December 2021 and February 2022 transfers. Blending the transfers together, Plaintiffs allege that the "[t]he value of the consideration received by the debtor was not reasonably equivalent to the value of the assets transferred or the amount of the obligation incurred." Compl. ¶ 110. This was so, Plaintiffs say, because "Lighthouse Management received no consideration at all in return for the approximately $5,200,000 transferred [in February] to One Florida Bank to extinguish a debt owed by Prepared Managers." *Id.* But the December transfer of $13,800,000 was *undisputedly* for equivalent value—it completely extinguished Lighthouse Management's antecedent debt. § 726.104(1), Fla. Stat. (providing that "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or

obligation, property is transferred *or an antecedent debt is secured or satisfied*" (emphasis added)).

Whether a transfer was for less than equivalent value is itself a key consideration when deciding whether fraud occurred. *See* § 726.105(2)(h), Fla. Stat (codifying that the lack of value is a badge of fraud and presence of value cuts against finding of fraud). The complete defense of good faith also requires reasonably equivalent value. § 726.109(1), Fla. Stat. By bundling the two transfers together in one claim, Plaintiffs impermissibly attempt to assign the alleged lack of equivalent value from the February Prepared transfer to the December Lighthouse transfer (which Plaintiffs do not allege lacked equivalent value).

Indeed, the Court need look no further than Plaintiffs' other claims to see the issue. Counts II and III both concern only the Prepared transfer, and both counts allege constructive fraudulent transfer. If Plaintiffs truly believed that the December Lighthouse and February Prepared transfers can be aggregated into one transfer for less than equivalent value, why do Plaintiffs risk leaving $13,800,000 on the table by not including the Lighthouse transfer in Counts II and III?[12] Moreover, though

[12] Plaintiffs want it both ways: they want to treat the two transfers as one when the exchange of reasonably equivalent value is only a factor to consider and must be proven by Defendant (along with good faith) in support of its affirmative defense, but they want to treat the two transfers as separate when *Plaintiffs* bear the burden to disprove the presence of reasonably equivalent value. *See Mane FL Corp. v. Beckman*, 355 So. 3d 418, 428 (Fla. 4th DCA 2023) (noting that reasonably equivalent value need not be "dollar-for-dollar" (quotation omitted)).

Counts II and III allege nearly identical theories about the same transfer, Plaintiffs still separate them into two counts. So too Plaintiffs should be required to separate Count I into two counts, one for each distinct loan payoff transaction.

In sum, because the two transfers alleged in Count I must be evaluated on their own distinct merits, pleading them in separate counts "facilitates the clear presentation of the matter[s] set forth" in Plaintiffs' complaint. Fla. R. Civ. P. 1.110(f). And because Plaintiffs have intentionally failed to do that here, this Court must dismiss. *See Collado*, 226 So. 3d at 928 (dismissal proper where Plaintiff violates Florida Rules).

CONCLUSION

Plaintiffs rolled the dice: they made a risky bet by investing in struggling insurance entities in the wake of a major hurricane. As part of that bet (to secure their first position as a creditor) Plaintiffs required Lighthouse Management to repay its and Prepared Managers' debts to One Florida Bank. Now, out of their money and feeling burned, Plaintiffs set their sights on the only solvent target—One Florida Bank. But the *transactions* were not fraudulent, nor were they made to evade an impending debt or judgment. Rather, Plaintiffs themselves required that the transactions be made. Having done so, they cannot now cry foul. For these reasons, this Court must dismiss.

CERTIFICATE OF GOOD FAITH CONFERENCE PURSUANT TO BCP 5.3

Counsel for Defendant, Thomas A. Zehnder, hereby certifies that on October 10, 2023 he conferred by telephone with counsel for Plaintiffs, Ben Curtis, Kelly Shami, and Brian Glueckstein, in a good faith effort to resolve the issues raised in this motion, and they notified undersigned counsel that Plaintiffs oppose the relief requested.

Respectfully submitted this 13th day of October, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 13, 2023, I filed the foregoing using the State of Florida ePortal Filing System, which will serve a copy by email on all counsel listed on the Service List below. I further certify that I have served a true and correct copy on Brian D. Glueckstein, Esq. (gluecksteinb@sullcrom.com) with Sullivan & Cromwell LLP, via email, who is out-of-state counsel for Plaintiffs and has not yet filed his motion for pro hac vice.

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