STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0677

Richard P. Anderson, LLC, et al.,
Appellants,

vs.

U. S. Bank National Association,
Respondent.

Filed February 10, 2014
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge
Concurring in part and dissenting in part
Larkin, Judge

Hennepin County District Court
File No. 27-CV-12-14784

Jeanette M. Bazis, Erin Sindberg Porter, Greene Espel PLLP, Minneapolis, Minnesota; and

Tom Mayhew (pro hac vice), Farella Braun + Martel LLP, San Francisco, California (for appellants)

Richard G. Wilson, Wayne S. Moskowitz, Maslon Edelman Borman & Brand, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellants challenge the district court's dismissal of their claims, alleging that respondent U.S. Bank National Association aided and abetted a Ponzi scheme and engaged in fraudulent transfers. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

In 2002, after several years of working in the printing business, Gerald Cellette incorporated Minnesota Print Services, Inc. (MPS). By 2004, Cellette was running MPS as a Ponzi scheme. According to the district court:

> [Cellette] told potential investors . . . that the company could make profits by buying bulk paper directly from the mills or a wholesaler, and then providing it to printers in connection with its print brokerage business. This approach was to be used in place of the traditional arrangement where a printer buys paper and applies a mark-up of about eighteen percent to cover the carrying costs.

Cellette induced investors to provide short-term loans to MPS by claiming that MPS "could capture the mark-up, pass some savings on to its corporate clients and still provide investors with a substantial return." At the end of each term, usually 90 days, MPS returned the original investment plus interest to the investor. In reality, MPS had no business income. Cellette misappropriated large sums of money for his personal use as the Ponzi scheme cycled the invested money at a rapidly accelerating rate.

In 2004, Cellette opened both a business account for MPS and a personal account for himself at one of respondent's branches in Coon Rapids. According to appellants,

Cellette made "massive cash withdrawals and deposits . . . that were completely out of proportion with both his stated business and the operations of other businesses in the[] area[]." The branch "eventually had to ask Cellette to call ahead before withdrawing such large sums" so that the branch could ensure that it had enough cash on hand. In 2006, MPS opened an investment "sweep account" at another of respondent's branches. "At the end of each business day, the account balance in the business operating account would be 'swept' into this account and automatically invested overnight in U.S. Bank commercial paper, thereby earning daily-interest income for" MPS.[1] MPS's funds would be returned to its regular business account, with interest, the following morning.

Appellants, both entities and individuals, are investors in MPS who lost money as a result of Cellette's Ponzi scheme. Appellant Center-Point Capital Partners, Inc. (Center-Point) is a California corporation that was formed for the sole purpose of raising funds and investing them in MPS. Center-Point provided short-term loans to MPS from August 2008 until September 2009. Center-Point's 60 investors lost over $16 million in the Ponzi scheme.

Appellant The Family Office, LLC (Family Office) is a Georgia company that began sending money to MPS through an intermediary in February 2007. It began providing short-term loans directly to MPS in August 2008. On April 1, 2009, Family Office assigned its interest in the loans to appellant Cold Smoke Finance, LLC (Cold

[1] According to respondent's sweep account terms, "[i]f Customer chooses the Commercial Paper sweep option, excess funds shall be invested in an unsecured short-term promissory note issued by Bank. At the end of each Business Day, excess funds are automatically transferred from Customer[']s account] into a sweep account that invests in overnight commercial paper."

Smoke), also a Georgia company. Cold Smoke continued investing in MPS and eventually lost over $19 million in the Ponzi scheme.

Appellant Richard P. Anderson, LLC is an Ohio company that invested in MPS from September 2006 to August 2009. It wired $435,000 to MPS's bank account every month and received monthly payments from MPS of $435,000 principal plus over $10,000 in interest. Richard P. Anderson, LLC lost its final $435,000 investment in the Ponzi scheme. Finally, appellant Jeanette Mismash is a Minnesota retiree who invested $100,000 in MPS in August 2009 and was repaid only $6,000.

Appellants claim that respondent's Anti-Money Laundering Intelligence Department was alerted to potential criminal activity in Cellette's and MPS's accounts in June 2007. Cellette had made several cash withdrawals of $9,900, just under the $10,000 level that triggers automatic reporting intended to detect money laundering. *See* 31 C.F.R. § 103.22 (b) (requiring banks to report "each deposit, withdrawal, exchange of currency or other payment or transfer . . . which involves a transaction in currency of more than $10,000"). Appellants claim that, as required by federal law, respondent filed a Suspicious Activity Report (SAR) with the United States Treasury Department's Financial Crimes Enforcement Network (FinCEN).

In August 2009, MPS's investors questioned Cellette regarding irregularities in MPS's bank account statements. In response, one of respondent's employees provided Cellette with a notarized letter that he could present to his investors. According to appellants, the letter explained that the bank-account irregularities were "[d]ue to bank

error" and "recent account maintenance" on the account. The letter further stated that respondent was working to correct MPS's statements.

The following month, MPS failed to make certain payments to its investors. On September 11, 2009, representatives of Center-Point and Cold Smoke confronted Cellette, who admitted that he was running a Ponzi scheme. Both Cellette's and MPS's bank accounts were frozen and a receiver was appointed. The receiver filed over 15 lawsuits seeking to recover funds for MPS's creditors. According to appellants, respondent filed a second SAR with FinCEN in November 2009. On March 12, 2010, Cellette pleaded guilty to securities fraud. At the time of the Ponzi scheme's collapse, $10 million was coming into and going out of MPS's bank account each month.

On June 6, 2012, appellants sued respondent to recover their losses. Count one of appellants' complaint alleges that respondent aided and abetted fraud by providing substantial assistance to what it knew was a Ponzi scheme. Specifically, appellants allege that respondent knew that Cellette was operating a Ponzi scheme because his banking activities were inconsistent with any legitimate business activity. Appellants allege that respondent provided essential banking services to MPS, failed to file additional SARs, and failed to close Cellette's accounts.

Appellants also claimed that respondent participated in fraudulent transfers that benefited the bank. Count two alleges that the deposits into and withdrawals from the sweep account amounted to fraudulent transfers because the nightly transactions provided income to Cellette and MPS, and assisted Cellette in perpetuating the fraud. Appellants sought to recover from respondent the money that passed through the sweep account.

Count three alleges that other bank transactions also amounted to fraudulent transfers. Specifically, appellants argue that the account fees that respondent received and all transfers that it made after it was on notice of Cellette's Ponzi scheme were fraudulent.

Respondent moved to strike all references in appellants' complaint to the SARs and to dismiss the complaint under Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted. Appellants moved in turn to compel respondent to respond to interrogatories. These motions were heard by the district court on October 12, 2012.

On January 10, 2013, the district court granted respondent's motion to dismiss the complaint and to strike references in the complaint to the SARs. Because the district court granted these motions, appellants' motion to compel respondent to respond to interrogatories was rendered moot. Observing that allegations of fraud must be stated with particularity, the district court determined that appellants failed to plead with particularity that respondent had actual knowledge of Cellette's fraud or that respondent substantially assisted the fraud. For the fraudulent-transfer claims, the district court determined that the sweep account transactions did not amount to transfers under the Minnesota Uniform Fraudulent Transfer Act (MUFTA) and that appellants had failed to plead that these transactions were made with the intent to defraud MPS's creditors. Finally, the district court determined that the transactions referenced in count three were not fraudulent transfers. This appeal followed.

D E C I S I O N

On appeal, appellants argue that the district court erred by (1) dismissing the count one aiding-and-abetting claim for failure to particularly plead respondent's knowledge of and substantial assistance to Cellette's fraud; (2) dismissing the count two fraudulent-transfer claim after finding that the transfers to the sweep account were not fraudulent transfers within the meaning of the MUFTA; and (3) striking references in the complaint to the SARs filed by respondent. Appellants do not challenge the district court's dismissal of count three.[2]

I.

"When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief. Our review is de novo." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (citation omitted). We "consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Id.* (quotation omitted). "[I]t is immaterial whether or not [the plaintiff] can prove the facts alleged." *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 185 (Minn. 1999). "We have said that a pleading will be dismissed only if it appears to a certainty that no

[2] Appellants' arguments regarding the MUFTA focus solely on the sweep account. Appellants do not identify any disagreement with the district court's dismissal of their claims in count three that all bank fees paid by Cellette and MPS to respondent amounted to fraudulent transfers under the MUFTA. Therefore, appellants have waived any arguments concerning the dismissal of count three. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (explaining that issues not briefed on appeal are waived).

facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted). But "[a] plaintiff must provide more than labels and conclusions." *Id.* Rule 12 is concerned with the adequacy of pleadings, not with the sufficiency of proof.

To establish a claim for aiding and abetting the tortious conduct of another, "(1) the primary tort-feasor must commit a tort that causes an injury to the plaintiff; (2) the defendant must know that the primary tort-feasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach." *Witzman*, 601 N.W.2d at 187. Here, all parties agree that the first element has been established. Therefore, we must determine whether appellants sufficiently pleaded that respondent knew of Cellette's conduct and substantially assisted it. These two elements are evaluated "in tandem." *Id.* at 188. "[W]here there is a minimal showing of substantial assistance, a greater showing of scienter is required." *Id.* (quotation omitted). The district court determined that appellants failed to adequately plead both the knowledge and the substantial assistance elements. We address both in turn.

Knowledge

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Minn. R. Civ. P. 9.02. Despite rule

9.02's standard for pleading knowledge, the district court relied on *Witzman* and required appellants to plead their allegations of knowledge with particularity.

The parties cite to foreign authority concerning the requirements of rule 12 in the context of a claim against a financial institution for aiding and abetting fraud. Appellants cite caselaw, largely from California, for the general proposition that the pleading standard in such cases should be governed by something resembling the rule 9.02 standard, and that general allegations of knowledge of fraud should suffice to defeat respondent's rule 12 motion to dismiss. *See, e.g., Neilson v. Union Bank of Cal.*, 290 F. Supp. 2d 1101, 1120 (C.D. Cal. 2003) (finding that pleadings are sufficient when they generally allege the element of actual knowledge); *Gonzales v. Lloyds TSB Bank, PLC*, 532 F. Supp. 2d 1200, 1207 (C.D. Cal. 2006) (requiring only general pleading of knowledge under California law). For its part, respondent refers us to a wealth of authority from the other coast, mostly out of New York, setting a very high standard for pleading aiding-and-abetting-fraud claims against a bank. *See, e.g., Musalli Factory for Gold & Jewellry v. JPMorgan Chase Bank, N.A.*, 261 F.R.D. 13, 24 n.11 (S.D.N.Y. 2009) (concluding that a bank's knowledge must be pleaded with particularity under New York law); *In re Agape Litig.*, 681 F. Supp. 2d 352, 362 (E.D.N.Y. 2010) (holding that the plaintiffs failed to adequately plead knowledge even though they pleaded that the bank "established an unofficial branch within Agape headquarters to provide on-site banking services" and had full access to business records). Respondent urges us to apply the New York standard to appellants' complaint.

We think it unnecessary to rely on foreign authorities to resolve the issues under rules 9 and 12 in this appeal. *See Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984) (explaining that foreign caselaw can be persuasive but is not binding on Minnesota courts). The Minnesota Supreme Court has established a heightened-pleading standard applicable to accountants, and has indicated by the language used in the opinion that the pleading standard set forth therein should apply beyond the confines of the accountant-client relationship. *See Witzman*, 601 N.W.2d at 187 (requiring heightened pleading for aiding-and-abetting claims against professionals). We need not decide whether the *Witzman* pleading standard applies to a bank in the circumstances present here because appellants' complaint satisfies even the heightened-pleading standard articulated in *Witzman*, the highest standard set forth by our supreme court against which to test the sufficiency of any professional aiding-and-abetting claim.

In *Witzman*, the plaintiff brought an aiding-and-abetting claim against an accounting firm for its alleged role in a client's fraud. *Id.* at 183. In the typical case, knowledge may be averred generally, Minn. R. Civ. P. 9.02, but the supreme court required that it be pleaded with particularity in this aiding-and-abetting case against an accountant, *id.* at 187. The supreme court explained that "professionals" are not excluded from aiding-and-abetting liability. *Id.* at 186. But a professional defendant must have actual knowledge "that the conduct they are aiding and abetting is a tort" to be held liable for aiding and abetting. *Id.* As a result, the supreme court required the plaintiff to plead facts with particularity. *Id.* at 187. Due to the supreme court's concern regarding undermining the professional-client relationship, it held that, "in cases where aiding and

abetting liability is alleged against professionals, we will narrowly and strictly interpret the elements of the claim and require the plaintiff to plead with particularity facts establishing each of these elements." *Id.* at 186-87.

Witzman's special-policy concerns regarding professionals apply with some force to banks. Depositors expect banks to keep deposits both safe and confidential. As with accountants, trust is essential to the bank-depositor relationship, and this trust could be undermined if banks were to be exposed to liability for the torts or crimes of depositors of which the banks are unaware. *See id.* at 186 (discussing the policy concerns for accountants); *El Camino Res., Ltd. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 908 (W.D. Mich. 2010) (explaining that banks and accountants have close relationships with their clients that expose them to "hindsight accusation[s] that they knew of the client's wrongdoing"), *aff'd*, 712 F.3d 917 (6th Cir. 2013). A depositor reasonably expects that a bank will provide professional services to the depositor without fear of liability to third parties that might cause the bank to elevate its own interests over those of the depositor.[3] In light of *Witzman*, we think it unlikely that our supreme court would hold that the general pleading standard in rule 9.02 applies to banks when sued by a noncustomer for

[3] We acknowledge that the duty owed by a bank to its depositors has not been identified by Minnesota cases as being a "fiduciary" duty in all instances. *See Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. App. 2009) (not listing the bank-depositor relationship as one of the per se fiduciary relationships), *review denied* (Minn. July 22, 2009). Whether a fiduciary relationship exists is a question of fact. *Id.* But we need not determine whether a fiduciary relationship exists here to import the *Witzman* heightened-pleading standard into our analysis of aiding-and-abetting liability of a bank. Because we conclude that appellants' complaint meets the *Witzman* heightened-pleading standard applicable to fiduciaries, the district court erred in granting respondent's motion to dismiss, regardless of whether respondent owed a fiduciary obligation to Cellette and MPS.

aiding-and-abetting liability for the torts of customers. *See El Camino Res.*, 722 F. Supp. 2d at 903 (explaining that Restatement principles must be harmonized "with existing principles of state law or the particular factual context presented by the case"). Some heightened-pleading standard would likely be applied. We need not address the precise standard here, however, because appellants' pleadings meet even the *Witzman* heightened-pleading standard at this early stage.

Appellants' complaint generally alleges the knowledge element in multiple paragraphs, including paragraphs 39, 54, 59, 63, 67, 72, 79, and 84. For example, appellants allege that respondent "knew that . . . Cellette was engaged in a Ponzi scheme." The complaint also alleges circumstances strongly indicating knowledge, including: (1) there were incongruities between Cellette's claimed business activities and his actual account activities; (2) an extremely large number of account transactions took place between MPS and the same small group of investors; (3) wire transfers were made in "implausible" whole-dollar amounts;[4] (4) transactions increased exponentially over time; (5) multiple withdrawals of cash by Cellette were in amounts just under the amount triggering mandatory reporting requirements; and (6) Cellette's cash withdrawals were in amounts so large that the branch from which withdrawals were made required advance notice so that it would have enough cash on hand to accommodate Cellette. With these allegations, appellants have pleaded knowledge with the particularity that *Witzman* requires. *See* 601 N.W.2d at 187. Appellants specifically alleged that these

[4] And this characterization of implausibility is not merely conclusory. The complaint specifically identifies numerous whole-dollar transactions of hundreds of thousands of dollars.

circumstances "are only consistent with a Ponzi scheme" and are "inconsistent with any legitimate business activity." And we must, in the context of a rule 12 motion, construe all reasonable inferences in favor of appellant. *Hebert*, 744 N.W.2d at 229.

Appellants' 41-page complaint details the Ponzi transactions, including dates and amounts of deposits and withdrawals, spanning over a period of several years. Given respondent's vigorous denial of having known of the Ponzi scheme, it is hard to envision how knowledge might be pleaded with any more particularity than appellants have pleaded it. They have alleged that respondent knew of the Ponzi scheme and have specified and detailed facts they claim will prove respondent's knowledge of the scheme. It remains to be seen whether appellants can prove these allegations and whether the ultimate finder-of-fact will conclude that appellants have borne their burden of proving the knowledge element. But we are now at the rule 12 stage of the proceeding, not the rule 56 stage.[5] Appellants' pleading satisfies the *Witzman* standard concerning pleading a claim of aiding and abetting fraud. We therefore conclude that the district court erred in concluding that appellants failed to adequately plead the element of knowledge.

Substantial Assistance

Knowledge and substantial assistance must be evaluated "in tandem." *Witzman*, 601 N.W.2d at 188. Examples may be helpful to explain: If a driver agrees to drive a

[5] Based on appellants' complaint, respondent moved to dismiss appellants' claims for failure to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). At the rule 56 stage, respondent can move for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03.

friend to the bank with knowledge that the friend intends to rob it, the driver has substantially assisted the friend's crime and is guilty of aiding and abetting. If, however, the driver agrees to drive the friend to the bank *without* knowledge of the friend's intentions, the driver has assisted a crime but has no aiding-and-abetting liability. In the second example, despite the actions being identical, the awareness of the friend's wrongful conduct is lacking.

Assistance must "further the fraud itself, and not merely constitute general aid to the tortfeasor." *El Camino Res.*, 722 F. Supp. 2d at 910-11. Like attorneys and accountants, banks are "vulnerable to the hindsight accusation that they knew of the client's wrongdoing or were wilfully blind." *Id.* at 908. Therefore, appellants must have adequately pleaded that respondent substantially assisted Cellette's fraud, and we again look to *Witzman* for guidance concerning the adequacy of appellants' complaint.

In *Witzman*, the supreme court determined that "'substantial assistance' means something more than the provision of routine professional services." 601 N.W.2d at 189. Routine accounting duties do not constitute substantial assistance under *Witzman* because, unless something more than routine activities are pleaded, professionals would be "subject to automatic liability" when a client commits a tort. *Id.* When evaluating substantial assistance "in tandem" with the element of knowledge, *id.* at 188, routine professional services constitute substantial assistance when they are performed with knowledge of the client's fraud.

Several of the allegations in appellants' complaint are not helpful to pleading substantial assistance. First, appellants allege that the letter that a branch employee

provided to Cellette explaining that certain bank account irregularities were "[d]ue to bank error" indicates respondent's assistance of Cellette's Ponzi scheme. However, appellants have neither alleged that this letter was false nor pleaded that the individual who wrote the letter was aware of the Ponzi scheme at the time it was written. Second, appellants allege that respondent substantially assisted Cellette by providing a sweep account that increased MPS's account balance. But appellants have not alleged that this sweep account was anything other than an ordinary banking service. More importantly, the effect of the sweep account *increased* Cellette's available resources, to the benefit of his future creditors. Although some of the Ponzi scheme proceeds were invested in the overnight sweep account, appellants have not adequately pleaded how the sweep account substantially assisted the fraud.

The complaint does allege substantial assistance with particularity in several other ways: (1) respondent facilitated huge wire transfers of funds out of proportion to Cellette's stated business; (2) these wire transfers were in specifically identified and "implausible" whole dollar amounts that exponentially increased over time; (3) respondent allowed unusual and large withdrawals of cash and facilitated those withdrawals by setting up a system to ensure that the branch had enough cash on hand when the withdrawal requests became so large as to exceed the amounts of cash the branch would ordinarily have on hand; and (4) respondent facilitated large transfers of money from MPS's business account to Cellette's personal account. Considered in combination, these allegations satisfy the rule 12 pleading standard for substantial assistance in light of appellants having adequately pleaded the knowledge element of

aiding-and-abetting liability. *See id.* ("[W]here there is a minimal showing of substantial assistance, a greater showing of scienter is required." (quotation omitted)). It bears repeating that whether appellants can prove their case remains to be seen. At the pleading stage, and for purposes of rule 12, however, the complaint satisfies even the *Witzman* heightened-pleading standard.

The district court erred in concluding that appellants failed to adequately plead knowledge and substantial assistance. As pleaded, appellants' complaint does not fail to state a claim upon which relief can be granted. Therefore, we reverse the district court's dismissal of appellants' aiding-and-abetting claim and remand for further proceedings.

II.

Courts apply rule 9.02's particularity pleading standard to claims brought under the MUFTA. *See Kranz v. Koenig*, 240 F.R.D. 453, 455 (D. Minn. 2007) ("This Court holds that Rule 9(b) applies to fraudulent conveyance claims under [the] MUFTA."). Under the MUFTA:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation[.]

Minn. Stat. § 513.44(a) (2012). In their complaint, appellants concede that respondent provided reasonably equivalent value in exchange for the sweep transfers. The district

court determined that the sweep account was neither a transfer under the statute nor made with the actual intent to hinder, delay, or defraud MPS's creditors.

The purpose of the MUFTA is to "prevent debtors from putting property which is available for the payment of their debts beyond the reach of their creditors." *In re Butler*, 552 N.W.2d 226, 232 (Minn. 1996) (quotation omitted). Determining whether a transaction is a transfer is a "threshold question" under the MUFTA. *Id.* at 231. A transfer is "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." Minn. Stat. § 513.41(12) (2012). This definition is "comprehensive." *Butler*, 552 N.W.2d at 234.

Here, we conclude that the district court correctly determined that the movement of funds into and out of the sweep account did not constitute a "transfer" as defined in section 513.41(21). The district court determined that the sweep account merely converted MPS's money deposits into commercial paper overnight. The sweep account earned interest for MPS, and both the initial funds and the interest were returned to the business account each day. Unlike *Levine v. Weissing*, which is cited by appellants, the purpose of the sweep account was not to put MPS's funds out of the reach of creditors. *See* 134 F.3d 1046, 1049 (11th Cir. 1998) (explaining that the debtors transferred their property so that it would be exempt from their bankruptcy creditors). Appellants do not allege that the sweep account placed MPS's funds beyond their reach. And the sweep account did not put MPS's funds out of Cellette's reach. *See id.* at 1050 (explaining that

the debtors lost "unfettered access" to their property). Appellants do not allege that the sweep account disposed of or parted with MPS's funds. *See* Minn. Stat. § 513.41(12). Because the funds at all times remained in an account owned by MPS, the use of the sweep account is not a transfer within the statutory definition.

Because we agree with the district court that the sweep account did not create a "transfer" under the MUFTA, we need not reach appellants' argument that the sweep account was used "with actual intent to hinder, delay, or defraud" MPS's creditors.[6] *See* Minn. Stat. § 513.44(a). Accordingly, the district court did not err in dismissing appellants' MUFTA claim.

III.

The district court granted respondent's motion to strike references to the SARs from appellants' complaint because it determined that federal law requires that the existence and contents of a SAR remain confidential. A district court may strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Minn. R. Civ. P. 12.06. We review the district court's grant of a motion to strike material from a pleading for an abuse of discretion. *Haug v. Haugan*, 51 Minn. 558, 561, 53 N.W. 874, 875 (1892).

[6] Appellants argue that the district court erred by failing to apply the Ponzi-scheme presumption. The Ponzi-scheme presumption is a federal doctrine requiring that, "to the extent innocent investors have received payments in excess of the amounts of the principal that they originally invested, those payments are avoidable as fraudulent transfers." *Finn v. Alliance Bank*, 838 N.W.2d 585, 597 (Minn. App. 2013), *review granted* (Minn. Nov. 12, 2013). But because use of the sweep account does not constitute a "transfer," the Ponzi-scheme presumption cannot apply.

The Annunzio-Wylie Anti-Money Laundering Act requires financial institutions "to report any suspicious transaction relevant to a possible violation of law or regulation." 31 U.S.C. § 5318(g)(1) (2006). A bank is required to file a SAR if it "knows, suspects, or has reason to suspect" that a transaction (1) "involves funds derived from illegal activities," (2) "is designed to evade" the Bank Secrecy Act, or (3) "has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage." 31 C.F.R. § 1020.320(a)(2) (2013); 12 C.F.R. § 21.11(c)(4) (2013). A bank is immune from liability for filing a SAR and disclosing a suspicious transaction, except under the United States Constitution. 31 U.S.C. § 5318 (g)(3); 12 C.F.R. § 21.11(l).

A financial institution is prohibited from disclosing whether or not a SAR has been filed. 31 U.S.C. § 5318(g)(2)(A). "A SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed . . . ." 12 C.F.R. § 21.11(k). This prohibition applies to civil litigation. Standards Governing the Release of a Suspicious Activity Report, 75 Fed. Reg. 75,574, 75,575 (Dec. 3, 2010); Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. 75,576, 75,582 (Dec. 3, 2010). The confidentiality requirement extends both to information that reveals the existence of a SAR and to information that reveals that a SAR has not been filed. Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. at 75,579. "Any national bank, and any director, officer, employee, or agent of any national bank that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such

information . . . ." 12 C.F.R. § 21.11(k)(1)(i). But "[t]he underlying facts, transactions, and documents upon which a SAR is based" are not prohibited from disclosure. 12 C.F.R. § 21.11(k)(1)(ii)(A)(2). Importantly, the prohibition against disclosure is not limited to only bank employees. *See* 12 C.F.R. § 21.11(k) ("A SAR, and any information that would reveal the existence of a SAR, are confidential . . . .").

The SAR confidentiality requirements are intended to ensure that the person involved in the suspicious transaction is not notified of the investigation and to encourage banks to file detailed reports. Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. at 75,578. Disclosure "could adversely affect the timely, appropriate, and candid reporting of suspicious transactions." *Id.* To encourage banks to report suspicious activity, confidentiality must sometimes be extended to documents prepared during the bank's "process to detect and report suspicious activity, regardless of whether a SAR ultimately was filed or not." *Id.* at 75,579. If information generally shows suspicious activity, it can be disclosed. *Id.* But if information goes further and suggests the existence of a SAR, it must remain confidential. *Id.*

Here, federal law prohibits disclosure of a SAR or of any information that would reveal a SAR's existence. 12 C.F.R. § 21.11(k). Because this prohibition extends to civil litigation and is not expressly limited to disclosures by bank employees, appellants' complaint cannot disclose the information in the SARs or even refer to them. As the district court explained, no federal provision "allow[s] a court order exception to the unqualified privilege." Because the confidentiality of the SARs cannot be waived, the district court properly granted respondent's motion to strike all references to the SARs

from appellants' complaint. Furthermore, the district court properly granted respondent's motion to strike all references in appellants' complaint to alleged failures to file additional SARs. The confidentiality requirement extends to information that reveals whether a SAR exists or has been filed. Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. at 75,579. Because respondent cannot disclose whether a SAR was filed, it would be unable to defend itself against even untruthful or inaccurate claims of nonfiling. Therefore, the district court did not abuse its discretion in granting respondent's motion to strike references to either the filing or the nonfiling of any SARs from appellants' complaint.[7]

However, the district court's order granting respondent's motion "to strike certain portions of the [c]omplaint" does not specify the precise portions of appellants' complaint to be stricken. Appellants contend that, because respondent's motion to strike and proposed order referred to banking regulations that are unrelated to the filing or nonfiling of SARs, the district court's broad grant of the motion was erroneous.[8] On remand, the

[7] The SAR regulations require compliance with federal law by banks, parties, and courts. *See* 12 C.F.R. § 21.11(k) ("A SAR, and any information that would reveal the existence of a SAR, are confidential . . . ."); Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. at 75,582 (explaining that the purpose of the confidentiality requirement "would be undermined by the disclosure of SAR information to a private litigant for use in a civil lawsuit"). In the final analysis, any "suspicious" activity report that may or may not have been filed does little or nothing to prove the knowledge element of appellants' aiding-and-abetting claim discussed in Section I of this opinion. The words "suspicious" and "knowledge" are distinctly different. As discussed above, appellants need to plead and prove knowledge, not suspicion, to prevail.

[8] Appellants' initial complaint contained improper references to the filing and nonfiling of SARs by respondent. After respondent objected to the inclusion of allegations related to SARs, appellants withdrew their complaint and proposed to refile it under seal. The parties attempted to agree on redactions, intending that a redacted version of the

district court should clarify what material (beyond the use of the term "SAR") it intended to strike from appellants' complaint, being guided by our analysis of this issue as set forth above.

In sum, we reverse the district court's dismissal of count one of appellants' complaint for failure to state a claim upon which relief can be granted, and we remand for further proceedings. We affirm the district court's dismissal of counts two and three of appellants' complaint, and we affirm the district court's grant of respondent's motion to strike all references in appellants' complaint to the filing or nonfiling of one or more SAR. On remand for proceedings related to count one, the district court is directed to clarify what material was stricken from appellants' complaint.

Affirmed in part, reversed in part, and remanded.

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complaint could then be filed. But they were unable to reach agreement. Appellants filed a redacted complaint, with the redactions requested by respondent, even though appellants did not agree that all of the redacted material was improper. Respondent's eventual motion to strike asked the district court to strike "all references to alleged SARs," but respondent submitted a proposed order which would have incorporated all of the redactions requested by respondent in the unsuccessful negotiations with appellant. The district court's grant of the "motion to strike certain portions of the [c]omplaint as requested" did not use the language of respondent's proposed order. Because respondent's motion failed to clearly define what material it requested be stricken, the resulting district court order is similarly unclear.

LARKIN, Judge (concurring in part, dissenting in part)

I respectfully dissent from section I of the majority's decision. For the reasons that follow, I would affirm the district court's dismissal of appellants' aiding-and-abetting fraud claim for failure to state a claim on which relief may be granted.

This case presents an issue of first impression regarding the level of specificity necessary to maintain a claim against a bank for allegedly aiding and abetting the tortious conduct of one of its customers. Under Minn. R. Civ. P. 12.02(e), a defendant may move to dismiss a pleading for "failure to state a claim upon which relief can be granted." A pleading must "contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought." Minn. R. Civ. P. 8.01.

Notice pleading took effect in Minnesota following the adoption of rule 8.01. *Kelly v. Ellefson*, 712 N.W.2d 759, 767 (Minn. 2006). "Notice pleading replaced code pleading, which required a complaint to include a specific statement of ultimate facts sufficient to constitute a cause of action." *Id.*

> No longer is a pleader required to allege facts and every element of a cause of action. A claim is sufficient against a motion to dismiss based on Rule [12.02(e)] if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded.

N. States Power Co. v. Franklin, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963).

But there are exceptions to the notice-pleading standard. For example, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Minn. R. Civ. P. 9.02. In addition, the supreme court adopted

a heightened pleading standard in *Witzman v. Lehrman, Lehrman & Flom*, holding that "in cases where aiding and abetting liability is alleged against professionals, we will narrowly and strictly interpret the elements of the claim and require the plaintiff to plead with particularity facts establishing each of these elements." 601 N.W.2d 179, 187 (Minn. 1999).

The *Witzman* standard was adopted in response to potential policy concerns related to aiding-and-abetting claims against professionals. *Id*. In *Witzman*, the supreme court recognized that it had "never before applied section 876 [of *Restatement (Second) of Torts* (i.e., aiding-and-abetting liability)] in a case involving the liability of professionals for aiding and abetting the torts of their clients." *Id*. at 186. In *Witzman*, the defendants argued that accountants should be immune from aiding-and-abetting liability for the torts of their clients, "for reasons of law and public policy." *Id*. But the supreme court was "not convinced that public policy require[d] a wholesale exclusion of professionals from aiding and abetting liability." *Id*. at 187. The supreme court reasoned that "aiding and abetting liability is based on proof of a scienter—the defendants must *know* that the conduct they are aiding and abetting is a tort" and that generally, the supreme court "ha[d] not excluded professionals from liability to nonclients for knowing or intentional torts." *Id*. at 186 (emphasis in original). But the supreme court was also "mindful of the policy concerns raised by subjecting professionals to aiding and abetting liability." *Id*. at 187.

The supreme court resolved the competing concerns by adopting a heightened pleading standard that requires a plaintiff "to plead with particularity" facts establishing

each element of an aiding-and-abetting claim against a professional, describing it as "a new pleading standard." *Id*. at 187, 189 n.4. The supreme court noted that its approach was consistent with that of most courts that had addressed the issue: "Rather than refuse to recognize such claims, these courts have relied on strict interpretation of the elements of aiding and abetting to preclude meritless claims." *Id*. at 186-87.

In adopting the new pleading standard, the supreme court did not define "professionals." Although the professionals in *Witzman* were accountants and the supreme court discussed only one other group of professionals in its analysis—attorneys—the opinion does not suggest that the supreme court intended to limit the new pleading standard to claims against accountants. Instead, the opinion broadly describes the potential policy concerns that prompted the new standard.

> If professionals have reason to believe that they may be held liable for their clients' torts merely by providing routine professional services to their clients, the professionals may face a conflict between serving their clients and protecting their own interests. Thus, applying aiding and abetting liability to professionals has the potential to undermine the trust essential to *any* professional-client relationship.

Id. at 186 (emphasis added).

The policy concern that prompted adoption of the new pleading standard in *Witzman* is present in this case. Trust is essential to the relationship between a bank and its clients. Banking clients routinely disclose personal and financial information to a bank when opening accounts, applying for loans, engaging in financial planning, and making decisions regarding the bank's products and services. And the "bank is generally under a duty not to disclose the financial condition of its depositors." *Richfield Bank and*

Trust Co. v. Sjogren, 309 Minn. 362, 366, 244 N.W.2d 648, 651 (1976). Subjecting a bank to aiding-and-abetting liability for the torts of its clients has the potential to undermine the trust essential to the bank's relationship with its clients. Because the potential policy concern that prompted the supreme court's adoption of the heightened pleading standard in *Witzman* is present here, I would apply the *Witzman* standard in this case and ask whether appellant has particularly pleaded facts establishing each element of their aiding-and-abetting claim against U.S. Bank.

A claim for aiding and abetting the tortious conduct of another has three basic elements:

> (1) the primary tort-feasor must commit a tort that cause an injury to the plaintiff;[1]
> (2) the defendant must know that the primary tort-feasor's conduct constitutes a breach of duty; and
> (3) the defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach.

Witzman, 601 N.W.2d at 187.

The supreme court has stated that, "[i]n the tort field, the doctrine of section 876 appears to be reserved for application to facts which manifest a common plan to commit a tortious act where the participants *know* of the plan and its purpose and take affirmative steps to encourage the achievement of the result." *Olson v. Ische*, 343 N.W.2d 284, 289 (Minn. 1984) (emphasis added) (quotation omitted). Although the general rule is that "knowledge . . . may be averred generally," Minn. R. Civ. P. 9.02, under the *Witzman*

[1] The adequacy of appellants' allegations regarding this element is undisputed.

standard, appellants must plead the knowledge element of their aiding-and-abetting claim "with particularity." *Witzman*, 601 N.W.2d at 187.

Whether the necessary degree of knowledge exists depends on the particular facts and circumstances of the case. *Id.* at 188. "Factors such as the relationship between the defendant and the primary tortfeasor, the nature of the primary tortfeasor's activity, the nature of the assistance provided by the defendant, and the defendant's state of mind all come into play." *Id*. In *Witzman*, the supreme court observed:

> In cases where the primary tortfeasor's conduct is clearly tortious or illegal, some courts have held that a defendant with a long-term or in-depth relationship with that tortfeasor may be deemed to have constructive knowledge that the conduct was indeed tortious. However, where the conduct is not a facial breach of duty, courts have been reluctant to impose liability on an alleged aider and abettor for anything less than actual knowledge that the primary tortfeasor's conduct was wrongful.

Id. (citation omitted).

A comparison of the facts here to those in *Witzman* is instructive. In *Witzman*, the primary tortfeasor was the trustee of several trusts, and the plaintiff was the beneficiary of those trusts. *Id*. at 182. The plaintiff sued the trustee's accounting firm and one of its accountants (the firm) for allegedly aiding and abetting the trustee's breach of fiduciary duty. *Id*. The supreme court stated that because the firm had served as the trustee's accountant for over three decades, it was arguably permissible to infer that the firm knew of the trustee's dealing with the trust assets. *Id*. at 188. However, the supreme court stated that "[t]o state a cognizable claim against [the firm] for aiding and abetting," the plaintiff "also must allege specific facts showing that [the firm] knew the tortious nature

of [the trustee's] dealings." *Id*. The supreme court noted that the only "facial breach of duty" was the trustee's alleged failure to provide the probate court with annual accountings as required by statute. *Id.* The supreme court concluded that,

> even assuming that, as certified accountants, [the firm] should have known that [the trustee] had a duty to provide such accountings, it does not necessarily follow that [the firm] also should have known that [the trustee's] underlying dealing with trust assets were themselves tortious. Under these alleged facts, we cannot infer that [the firm] had actual knowledge that [the trustee] was engaging in tortious conduct damaging to [the plaintiff].

Id.

Like the circumstances in *Witzman*, U.S. Bank knew of Cellette's dealings with appellants' funds: the bank knew about the wire transfers between Cellette and appellants. But appellants do not assert that those transfers were illegal or clearly tortious on their face. Instead, appellants essentially allege that those transactions, along with Cellette's increased deposits and significant cash withdrawals, were suspicious and that the suspicious nature of the transactions establishes that "U.S. Bank knew that Cellette . . . was perpetrating a Ponzi scheme on his investors."

Appellants' assertions regarding U.S. Bank's knowledge of Cellette's fraud are no more sufficient than the plaintiff's assertions in *Witzman*. To state a cognizable claim of aiding and abetting, appellants must allege specific facts showing that U.S. Bank knew the tortious nature of Cellette's dealings. Even though U.S. Bank was aware of Cellette's banking transactions, it does not necessarily follow that U.S. Bank knew that Cellette's underlying dealings with appellants were themselves tortious. Like the circumstances in *Witzman*, appellants' factual assertions do not show that U.S. Bank had actual knowledge

that Cellette was engaged in tortious conduct damaging to plaintiffs. *See id*. ("Under these alleged facts, we cannot infer that [the firm] had actual knowledge that [the trustee] was engaging in tortious conduct damaging to [the plaintiff]").

Appellants' allegations are also inadequate regarding the element of substantial assistance. "In addressing aiding and abetting liability in cases involving professionals, most courts have recognized that 'substantial assistance' means something more than the provision of routine professional services." *Id*. at 188-89. In *Witzman*, the supreme court concluded that the plaintiff's allegations were "insufficient as a matter of law to state a cognizable claim that [the firm] provided substantial assistance to [the trustee] in the commission of any tortious activity." *Id*. at 189. The supreme court reasoned, in part, that

> [t]he only "assistance" alleged in [the] complaints and supported by allegations of specific fact is [the firm's] performance of routine accounting duties—i.e., preparing financial statements, setting up draw accounts, recording conveyances, and providing tax advice—without disclosing [the trustee's] dealings to [the plaintiff]. If we were to recognize that such routine services constitute substantial assistance, then it would be the rare accountant indeed who would not be subject to automatic liability merely because his client happened to be a tortfeasor.

Id.

Like the plaintiff in *Witzman*, appellants allege the performance of routine banking services as factual support for the substantial-assistance element of their aiding-and-abetting claim (e.g., the provision of personal, business, and sweep accounts; transfers between those accounts; wire transfer services; and cash withdrawals). The fact that the

banking services involved large dollar amounts does not change the routine nature of the services. Much more is necessary to state a claim of aiding and abetting. *See id.*

In sum, although U.S. Bank had knowledge of Cellette's banking transactions, that knowledge does not establish that U.S. Bank knew that Cellette had borrowed funds from appellants under false pretenses. *See Cunningham v. Merchants' Nat. Bank of Manchester, N.H.*, 4 F.2d 25, 29 (1925) ("Facts which warrant suspicion would not necessarily cause the bank to know, or have reasonable cause to know, that Ponzi was bankrupt, or that he was a swindler."). Because appellants have not alleged specific facts supporting their assertion that U.S. Bank had actual knowledge of Cellette's Ponzi scheme or showing that U.S. Bank provided anything other than routine banking services to Cellette, I would affirm the district court's dismissal of appellant's aiding-and-abetting fraud claim.