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11
12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA
14

15 ANGELA M. ARTHUR, as Trustee of the
Arthur Declaration of Trust, dated December
16 29, 1988; VIVIAN R. HAYS, an individual;
LEAPIN EAGLE, LLC, a limited liability
17 company; DENISE J. WILSON, an individual;
and all others similarly situated,

18
19 Plaintiffs,

20 vs.

21 SUNTRUST BANKS, INC., G. WILLIAMS
EVANS, and STEPHEN CONNOR,

22 Defendants.
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Case No.: 09 CV 0054 BEN AJB

**DEFENDANT SUNTRUST BANKS,
INC.'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
ITS MOTION TO DISMISS**

Hearing Date: June 22, 2009
Time: 10:30 a.m.
Judge: Hon. Roger T. Benitez

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I. INTRODUCTION

This case is a misguided attempt to hold SunTrust Banks, Inc. (“SunTrust”) responsible for acts committed by one of its depositors, LandAmerica 1031 Exchange Services, Inc. (“LES”), which filed for bankruptcy in November, 2008. Plaintiffs allege that LES operated a fraudulent scheme involving property owners who used LES to help facilitate like-kind exchanges under Section 1031 of the Internal Revenue Code. Plaintiffs claim that LES failed to return funds belonging to Plaintiffs, as it promised to do, and that LES’s conduct amounted to a breach of fiduciary duties, fraud, and conversion.

Plaintiffs attempt to state three claims against SunTrust, alleging that SunTrust aided and abetted LES’s breach of fiduciary duties, fraud, and conversion. Plaintiffs do not claim that SunTrust owed any duty to Plaintiffs: they were not customers of SunTrust and had no relationship with SunTrust. Indeed, SunTrust was not a party to Plaintiffs’ agreements with LES, and Plaintiffs do not allege that SunTrust was ever aware of the terms of Plaintiffs’ agreements with LES. SunTrust’s only connection to Plaintiffs is that LES deposited funds received from Plaintiffs in a commingled business account with SunTrust.

Each of Plaintiffs’ aiding and abetting claims must be dismissed because Plaintiffs fail to plead that LES committed the underlying wrongs. Moreover, even if Plaintiffs could plead that LES committed unlawful acts, Plaintiffs have not alleged facts to support the assertion that SunTrust had actual knowledge of LES’s underlying wrongs or substantially assisted LES in accomplishing those wrongs. For these reasons, and for those set forth below, the Court should dismiss each of Plaintiffs’ claims with prejudice.

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II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

This is a putative class action in which the named Plaintiffs assert claims against SunTrust. SunTrust is a Georgia corporation, which provides an array of banking services, including investment, trading, banking and financial, to its customers. Compl. ¶ 11. None of the named Plaintiffs allege they were customers of SunTrust.

The four named Plaintiffs were customers of LES. LES is a Maryland corporation which was engaged in the business of serving as a so-called “qualified intermediary” for tax deferred like-kind property exchanges under Section 1031 of the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 1031 (2008) (“Section 1031”). Compl. ¶¶ 8, 13-16. Each Plaintiff allegedly entered into an exchange agreement with LES for the purpose of performing a 1031 exchange. Compl. ¶¶ 1, 4-7. LES deposited the funds it received from Plaintiffs in a commingled business account that LES maintained with SunTrust. Compl. ¶¶ 8, 11.

B. 1031 Exchanges

A 1031 exchange is a tax-deferral transaction that permits an individual to avoid paying tax on the sale of property by transferring proceeds from the sale to a “qualified intermediary” until such time as the individual identifies and purchases replacement property. Compl. ¶¶ 13-17. To properly effect a 1031 exchange under Section 1031, the seller of the property is prohibited from taking actual or constructive legal title of the proceeds at any time during the 1031 exchange, and, thus, must deposit the sale proceeds from the relinquished property (the “Exchange Funds”) with a qualified intermediary which is unaffiliated with the seller. Compl. ¶ 14. After the sale and depositing of Exchange Funds with the qualified intermediary, the seller has 45 days to identify replacement property and 180 days to acquire the replacement property. Upon notification that the seller has identified replacement property, the qualified intermediary forwards the Exchange Funds to the seller of the replacement property, and the original seller acquires the property. By participating in a 1031 exchange, rather than simply selling and later purchasing replacement

1 property, a seller is able to defer capital gains or losses due upon the sale of the original property.
2 Compl. ¶ 15.

3 **C. The Exchange Agreement**

4 Each Plaintiff's relationship with LES was governed by an "Exchange Agreement,"
5 pursuant to which each Plaintiff sold its real property and transferred the funds to LES with the
6 expectation that LES would return the funds when the replacement property was acquired within
7 180 days. Compl. ¶¶ 4-7. The four named Plaintiffs collectively transferred nearly \$1.4 million in
8 funds to LES. *Id.* ¶ 18. LES, in turn, deposited the funds in the commingled business account that
9 LES maintained with SunTrust in Richmond, Virginia. *Id.* ¶¶ 8, 11, 19. Plaintiffs attach a sample
10 Exchange Agreement to their Complaint, and assert that the attached agreement is similar to each
11 named Plaintiff's agreement. *Id.* ¶ 7.

12 Under the Exchange Agreement, LES agreed to hold Plaintiffs' funds "in accordance with
13 the terms and conditions of this Exchange Agreement." Compl. Ex. 1 ("Exchange Agreement"), §
14 2(a). The only mention of SunTrust in the Exchange Agreement is that LES was required to
15 deposit the funds "in an account maintained at SunTrust Bank in Richmond, Virginia." Exchange
16 Agreement, § 3(a). The Exchange Agreement provides, in pertinent part:

- 17 • "LES shall have sole and exclusive possession, dominion, control and use of all
18 Exchange Funds, including interest" until the exchange is completed. Exchange
19 Agreement, § 2(c).
- 20
- 21 • Until the exchange is completed, the plaintiff "shall have no right, title, or interest
22 in or to the Exchange Funds or any earnings thereon and Taxpayer shall have no
23 right, power, or option" to receive the funds. *Id.*
- 24
- 25 • Plaintiffs were to receive from LES a guaranteed amount of interest on the funds
26 which accrued while LES possessed the funds. *Id.*, § 3(a).
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1 • LES was obligated only to perform the duties set forth therein, and the parties
2 agreed that “no additional duties or obligations shall be implied hereunder or by
3 operation of law or otherwise.” *Id.*, § 6(c).

4
5 • In the event of a dispute over the Exchange Funds, LES was “authorized and
6 directed to retain in its possession . . . all or part of the Exchange Funds until such
7 dispute is settled.” *Id.*, § 6(f).

8 Plaintiffs claim, without pointing to a single contractual provision to support their
9 assertion, that “LES was not authorized to: (i) transfer Exchange Funds out of the original deposit
10 account at SunTrust for investment purposes; or (ii) fund exchanges of non-Plaintiff clients at
11 LES.” Compl. ¶ 19. Plaintiffs further claim that “LES was obligated to stop soliciting new clients
12 once there was a deficit balance in the trust account caused by bad investments in ARS sold to
13 LES by SunTrust.” *Id.* No provision in the Plaintiffs’ agreements with LES supports these
14 claims. Regardless, nowhere do Plaintiffs allege that SunTrust was aware of these prohibitions.

15 Plaintiffs do not allege that SunTrust ever received or reviewed the Exchange Agreement,
16 and do not allege that anyone made SunTrust aware of the terms of the Exchange Agreement.
17 Although Plaintiffs claim, again without support from the Exchange Agreement itself, that the
18 Exchange Funds were held by LES in trust for Plaintiffs, (Compl. ¶ 17), they never allege facts to
19 suggest that SunTrust was aware the funds were held by LES in escrow or trust or that the LES
20 account with SunTrust was an escrow or trust account. Instead, Plaintiffs allege that the LES
21 account at SunTrust was a commingled business account. *Id.* ¶ 11.

22 **D. LES’s Bankruptcy**

23 Plaintiffs allege that LES invested the Exchange Funds in investments known as auction
24 rate securities (“ARS”) purchased through SunTrust. Compl. ¶¶ 20-21, 46.¹ ARS are variable-
25 rate equity or debt instruments that pay interest at rates set at periodic auctions. *Id.* ¶ 22.

26
27 ¹ Plaintiffs do not define what they mean by “through SunTrust.” A portion of LES’s holdings of
28 ARS were purchased through SunTrust Robinson Humphrey, Inc. (“STRH”), which is a separate

1 In February 2008, the market for ARS froze and LES's ARS investments became illiquid.
2 Compl. ¶ 26. Plaintiffs assert that LES held more than \$200 million in ARS and that LES
3 sustained substantial losses resulting from the illiquidity of the ARS market. *Id.* ¶ 27. On
4 November 26, 2008, LES filed for bankruptcy. *Id.* ¶¶ 1, 4-7. Plaintiffs allege that at the time LES
5 declared bankruptcy, 1031 exchange participants, including Plaintiffs, collectively had more than
6 \$190 million with LES. *Id.* ¶ 28. Because LES filed for bankruptcy, the 1031 exchange
7 participants have been unable to access the funds they paid to LES.

8 **E. Plaintiffs' Claims**

9 Plaintiffs' complaint is, in essence, directed at LES.² Plaintiffs claim that after the ARS
10 market froze in February 2008, LES should have ceased operations and distributed the remaining
11 proceeds. Compl. ¶ 29. Instead, LES continued to solicit new clients, including Plaintiffs, to
12 deposit Exchange Funds with them. *Id.* Plaintiffs allege that LES misled new investors and,
13 instead of holding their funds to fund their exchanges, used their funds to reimburse old customers
14 whose funds were tied up in the ARS market. *Id.* ¶¶ 29-33.

15 In this action, Plaintiffs seek to hold SunTrust responsible for LES's failure to return the
16 Exchange Funds. Plaintiffs purport to represent a class of persons defined as "All Persons whose
17 1031 Exchange Funds were deposited at SunTrust after February 13, 2008 who have been
18 deprived of the immediate access to those Exchange Funds (the "Class")." Compl. ¶ 35. Plaintiffs
19 assert claims against SunTrust for aiding and abetting breach of fiduciary duties (Count 1),
20 conversion and aiding and abetting conversion (Count 2), and aiding and abetting fraud and
21 intentional nondisclosure (Count 3).³

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24 entity from SunTrust. STRH is a broker-dealer which provides investment banking, research, and
25 debt capital markets services to clients. Compl. ¶ 21. SunTrust did not sell ARS to LES.

26 ² In the separate bankruptcy proceeding in the Eastern District of Virginia, individuals who fall
27 within the class definition proposed by Plaintiffs are asserting claims against LES.

28 ³ Plaintiffs also assert a claim for breach of fiduciary duty against two former LES officers (Count
4). Compl. ¶¶ 9-10, 62-64.

1 **III. LEGAL STANDARD**

2 Courts must dismiss complaints that fail “to state a claim upon which relief can be
3 granted.” Fed. R. Civ. P. 12(b)(6). The Supreme Court has recently restated the district courts’
4 obligation to dismiss claims that lack factual allegations and instead rely on the hope that
5 discovery will later uncover evidence supporting the claims. *Bell Atl. Corp. v. Twombly*, 550 U.S.
6 554, 127 S. Ct. 1955, 1964-69, 1974 (2007) (reversing Circuit Court’s reinstatement of claim
7 because “formulaic recitation” of the elements will not suffice). If, therefore, Plaintiffs have “not
8 nudged [their] claims across the line from conceivable to plausible,” this Court must dismiss those
9 claims. *Id.*

10 **IV. ARGUMENT AND CITATION OF AUTHORITY**

11 **A. Each of Plaintiffs’ Aiding and Abetting Claims Must Be Dismissed**

12
13 Plaintiffs have failed to state a claim against SunTrust for aiding and abetting LES’s
14 breach of fiduciary duties, fraud, or conversion. In order to establish an aiding and abetting claim,
15 a plaintiff must allege (1) the existence of an independent primary wrong, (2) actual knowledge by
16 the defendant of the wrong, and (3) substantial assistance in the wrong. *Impac Warehouse*
17 *Lending Group v. Credit Suisse First Boston LLC*, No. 8:04-cv-01234, at 15 (C.D. Cal. June 20,
18 2006) (opinion attached as Exhibit A).⁴ Plaintiffs cannot satisfy any of these elements.

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21 ⁴ California choice of law rules require application of the “governmental interest” approach. *E.g.*,
22 *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1091 (9th Cir. 1999). For the
23 purpose of reviewing the arguments raised in this motion to dismiss, the laws of the individual
24 plaintiff’s home states -- California, New York, Idaho, and Washington -- and Virginia are
25 substantially similar. *See, e.g.*, *Halifax Corp. v. Wachovia Bank*, 604 S.E.2d 403, 411-14 (Va.
26 2004) (applying Virginia law). To the extent the claims survive dismissal, however, and to the
27 extent a nationwide class is certified, it appears the various state laws which may apply may
28 diverge substantially with regard to the availability and viability of certain claims, defenses, and
remedies. *See, e.g.*, *Augusta Mut. Ins. Co. v. Mason*, 645 S.E.2d 290, 293, 295 (Va. 2007)
(holding under Virginia law that there can be no claim for breach of fiduciary duty when the duty
exists between the parties solely by virtue of the contract); *Thompson v. Jiffy Lube Intern., Inc.*,
250 F.R.D. 607, 627 (D. Kan. 2008) (noting difficulties in maintaining nationwide class action
when claims based on various states’ laws and when plaintiff seeks punitive damages; “there
would inevitably be material conflicts [among] the laws of the other states insofar as a claim for
punitive damages is concerned”).

1 LES has undertaken to perform only such duties as are expressly set forth herein, and no
2 additional duties or obligations shall be implied hereunder or by operation of law or
3 otherwise.

4
5 Exchange Agreement, §§ 2(c), 6(d). The United States Bankruptcy Court for the Eastern District
6 of Virginia recently construed this very agreement in considering claims by individual former
7 customers of LES in connection with LES's Chapter 11 bankruptcy case. The Court confirmed
8 the absence of a trust or fiduciary relationship, finding:

9 There is no express language in the Exchange Agreements that creates a trust. . . . [T]here
10 is language in the Exchange Agreements that actually evidences an intent *not* to do so. . . .
11 The parties to the Exchange Agreement acknowledged that LES was not undertaking any
12 duties not expressly set forth in the Exchange Agreements (i.e. the contract duties)
13 including any implied duties or any duties imposed by operation of law. This limitation on
14 the scope of LES' duties eliminates any argument that LES had a duty to act as a fiduciary
15 for [the plaintiff].

16 *In re LandAmerica Fin. Group, Inc.*, Case 08-03147-KRH, at 16-18 (Bankr. E.D. Va. Apr. 15,
17 2009) ("Bankr. Op.") (opinion attached as Exhibit B).⁶

18 Plaintiffs allege no source for the fiduciary duties LES supposedly owed to Plaintiffs other
19 than their allegation that LES held their funds "in trust." Because the Exchange Agreement
20 contains "no express language . . . that creates a trust," (Bankr. Op. at 16), and evidences that the
21 parties to the Exchange Agreement "inten[ded] *not* to" create a trust, (*id.*), Plaintiffs have not
22 adequately alleged that LES owed them fiduciary duties. Plaintiffs cannot state a claim for aiding
23 and abetting breach of fiduciary duties against SunTrust where Plaintiffs have not stated a claim
24 for the underlying breach and, as such, Plaintiffs' claim must be dismissed.

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26 ⁶ The Bankruptcy Court "look[ed] to the law of the Commonwealth of Virginia for its analysis."
27 Bankr. Op. at 15. Application of the laws of California and New York would lead to the same
28 result. *See, e.g., Estate of Berges*, 76 Cal. App. 3d 106, 109 (1977); *In re Fontanella's Estate*, 33
A.D.2d 29, 30-31 (N.Y. App. Div. 1969).

1 b. No underlying fraud claim

2 In order to establish an underlying fraud claim, Plaintiffs must allege with particularity (1)
3 a misrepresentation of material fact, (2) made with knowledge of its falsity, (3) with an intent to
4 defraud, (4) upon which the plaintiffs justifiably relies, and (5) resulting injury. *Vess v. Ciba-*
5 *Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003); Fed. R. Civ. P. 9(b); *see also* Section C,
6 *infra*. Plaintiffs fail to state a viable claim for fraud for two independent reasons.

7 First, Plaintiffs impermissibly attempt to base their fraud claim on alleged broken promises
8 in the Exchange Agreement. Compl. ¶ 59 (“LES promised Plaintiffs . . . in written Exchange
9 Agreements . . .”). “It is well-settled that a fraud claim fails where the fraud alleged merely relates
10 to a party’s claimed intent to breach a contractual obligation.” *Veritas Capital Mgmt. LLC v.*
11 *Campbell*, 875 N.Y.S.2d 824, at *12 (N.Y. Sup. Ct. 2008); *Tom Trading, Inc. v. Better Blue, Inc.*,
12 26 Fed. App’x 733, 736 (9th Cir. 2002). Because Plaintiffs cannot state a claim for fraud that is
13 separate from a breach of contract claim, Count 3 of their Complaint should be dismissed.

14 Second, even if Plaintiffs had pled fraud separate from a breach of contract, they still failed
15 to allege the first element of their fraud claim. Plaintiffs identify only one alleged
16 misrepresentation on which they base their fraud claim: “LES promised Plaintiffs, and each of
17 them, in written Exchange Agreements, that the Exchange Funds that Plaintiffs deposited at
18 SunTrust would be used exclusively to fund the purchase of their own respective replacement
19 property.” Compl. ¶ 59. The problem with Plaintiffs’ argument is that no such provision appears
20 in the Exchange Agreement.

21 In fact, Plaintiffs’ alleged misrepresentation is in direct conflict with the terms of the
22 Exchange Agreement. The Exchange Agreement expressly provides that “LES shall have sole and
23 exclusive possession, dominion, control and *use* of all Exchange Funds, including interest,” until
24 the exchange is completed. Exchange Agreement, § 2(c) (emphasis added). Thus, Plaintiffs ceded
25 exclusive use of the Exchange Funds to LES.

26 Plaintiffs also try to state a fraud claim based on intentional nondisclosure. Plaintiffs claim
27 that LES failed to disclose that LES had lost money on its ARS investment and that Plaintiffs’
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1 Exchange Funds “would be used to fund other people’s escrows.” Compl. ¶ 59. Intentional
2 nondisclosure of a material fact, as opposed to affirmative misrepresentation, can form the basis of
3 a fraud claim, but only when the defendant was under a duty to disclose the fact to the plaintiff.
4 *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 76 Cal. Rptr. 3d 325, 333 (Cal. Ct. App.
5 2008). Even assuming these facts were not disclosed and were material, as noted above, Plaintiffs
6 were required to allege their fraud claim with particularity, and they failed to plead that LES was
7 under a duty to disclose these facts. *See* Compl. ¶¶ 58-61. Because Plaintiffs fail to adequately
8 plead the first element of their underlying fraud claim against LES, their claim against SunTrust
9 for aiding and abetting fraud should be dismissed.

10 c. No underlying conversion claim

11 In order to satisfy the first element of a conversion claim, Plaintiffs must demonstrate that
12 they were “*entitled to immediate possession at the time of conversion.*” *Messerall v. Fulwider*,
13 245 Cal. Rptr. 548, 549 (Cal. Ct. App. 1988) (emphasis original) (citation omitted). Plaintiffs
14 cannot meet this requirement.

15 The Bankruptcy Court for the Eastern District of Virginia recently determined that
16 exchange funds identical to Plaintiffs’ “were under the complete control of LES. Only LES had
17 the ability to disburse or withdraw the funds. As LES maintained the exchange funds in bank
18 accounts in its name and under its control, the money is presumably property of the LES
19 bankruptcy estate.” Bankr. Op. at 13. Because the exchangers disclaimed “all right, title and
20 interest” in the exchange funds and provided LES with exclusive rights of “dominion, control and
21 use” of the exchange funds, the Bankruptcy Court ultimately concluded that the exchange funds
22 constituted property of the LES bankruptcy estate. *Id.* at 1. Plaintiffs thus had no right to
23 immediate possession at the time of the alleged conversion, precluding a determination that LES
24 converted Plaintiffs’ funds. Because Plaintiffs’ underlying conversion claim against LES fails as a
25 matter of law, their claim for aiding and abetting conversion also should be dismissed.

1 2. Plaintiffs failed to allege SunTrust’s “actual knowledge.”

2 Even if Plaintiffs had adequately pled an underlying claim, the aiding and abetting claims
3 against SunTrust must be dismissed because Plaintiffs have failed to plead that SunTrust had
4 “actual knowledge of the specific primary wrong the defendant substantially assisted.” *Casey v.*
5 *U.S. Bank Nat’l Ass’n*, 127 Cal. App. 4th 1138, 1145 (2005); *Impac Warehouse Lending Group*,
6 No. 8:04-cv-01234, at 15; *Resolution Trust Corp. v. Rowe*, No. C 90-20114 BAC, 1993 WL
7 183512, at *5 (N.D. Cal. Feb. 8, 1993); *Renner v. Chase Manhattan Bank*, No. 98 Civ. 926 (CSH),
8 1999 WL 47239, at *12 (S.D.N.Y. Feb. 3, 1999); *Williams v. Bank Leumi Trust Co.*, No. 96 Civ.
9 6695(LMM), 1997 WL 289865, at *5 (S.D.N.Y. May 30, 1997). Mere constructive knowledge is
10 not sufficient. *Impac Warehouse Lending Group*, No. 8:04-cv-01234, at 15; *Cahaly v. Benistar*
11 *Prop. Exch. Trust Co.*, 885 N.E.2d 800, 810 (Mass. 2008).

12 As set forth in more detail below, Plaintiffs fail to allege facts showing that SunTrust had
13 actual knowledge of LES’s underlying torts.

14 a. Aiding and abetting breach of fiduciary duty

15 Plaintiffs allege LES owed fiduciary duties to Plaintiffs, “as trust beneficiaries, to
16 safeguard Exchange Funds, to maintain Exchange Funds in trust, and to use those Exchange Funds
17 solely in a manner consistent with each Exchange Agreement.” Compl. ¶ 46. Plaintiffs claim that
18 LES breached its fiduciary duties to Plaintiffs when it used Plaintiffs’ Exchange Funds “to fund
19 the escrows of earlier 1031 Exchange clients whose funds were lost due to LES’s imprudent
20 investment in ARS.” *Id.*

21 Plaintiffs argue that SunTrust was aware that LES sustained losses from its investment in
22 ARS in February 2008 and continued to operate thereafter, and that SunTrust knew that LES acted
23 as a fiduciary and that Plaintiffs’ Exchange Funds should be held in trust “until such time as the
24 client identified a replacement property to complete their exchange.” Compl. ¶¶ 47-48. Plaintiffs
25 then conclude that SunTrust had actual knowledge of LES’s breach of fiduciary duties because
26 SunTrust knew “that LES was utilizing funds from new exchange clients to fund the escrows of
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1 earlier exchange clients which use was not authorized by Plaintiffs and contrary to the
2 representations contained in each Exchange Agreement.” *Id.* ¶ 48.

3 Plaintiffs’ argument, therefore, that SunTrust was aware of LES’s breach of fiduciary
4 duties is essentially based on two factual assertions: (1) LES’s use of the funds was contrary to
5 the Exchange Agreements, and (2) the individual exchange participant’s funds were held in trust
6 and should only have been used for that participant’s benefit. But Plaintiffs do not allege that
7 SunTrust was aware of either fact. Plaintiffs do not allege that SunTrust (i) was a party to the
8 Exchange Agreement, (ii) ever received a copy of the Exchange Agreement, (iii) was made aware
9 of the obligations or restrictions contained therein, or (iv) had any relationship whatsoever with
10 Plaintiffs. Absent these allegations, there is no factual basis for speculating that SunTrust knew
11 that LES’s use of the funds violated the Exchange Agreements or what Plaintiffs did or did not
12 authorize with regard to use of the funds. *See Impac Warehouse Lending Group*, No. 8:04-cv-
13 01234, at 17 (requiring plaintiff to plead underlying facts supporting defendants’ alleged
14 knowledge for aiding and abetting claim); *Cahaly v. Benistar Prop. Exchange Trust Co.*, 864
15 N.E.2d 548, 561 (Mass. App. Ct. 2007) (finding that Paine Webber did not know about restrictions
16 on the funds deposited in 1031 qualified intermediary’s account, and, accordingly, Paine Webber
17 could not be liable for aiding and abetting breach of fiduciary duty).

18 Moreover, the nature of LES’s account with SunTrust negates any suggestion that
19 SunTrust had actual knowledge of LES’s alleged breach of fiduciary duties. Plaintiffs claim that
20 SunTrust knew that LES was obligated to maintain each Plaintiff’s funds in trust for Plaintiffs’
21 benefit and that LES was impermissibly using new clients’ funds to pay old clients. These
22 assertions are contrary to Plaintiffs’ allegation that the SunTrust account was a commingled
23 business account in LES’s name. LES’s alleged deposits and withdrawals of hundreds of clients’
24 funds into and out of LES’s commingled business account simply does not permit a plausible
25 inference that SunTrust knew that Plaintiffs, who were not bank customers, provided their funds to
26 LES to hold in trust for their benefit only. Moreover, it is similarly unreasonable to suggest that
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1 SunTrust tracked, or was obligated to track, individual non-clients' funds in the commingled
2 SunTrust account.

3 A case in Massachusetts state court also involving a 1031 exchange company is illustrative
4 of Plaintiffs' failure to satisfy their pleading burden. In *Cahaly*, the 1031 exchange company
5 engaged in high-risk options trading with client funds and lost millions of dollars. The plaintiffs
6 sued the 1031 exchange company and also brought claims against Paine Webber and Merrill
7 Lynch, which housed the funds and effected the options trading. *Cahaly*, 864 N.E.2d at 552-54.

8 The state appellate and supreme courts found that the plaintiffs failed to establish claims
9 for aiding and abetting breach of fiduciary duty and conversion because there was no evidence that
10 either Paine Webber or Merrill Lynch had actual knowledge of the alleged wrongdoing. *Id.* at
11 560-61 (applying New York law). The courts considered whether the following evidence was
12 sufficient to establish actual knowledge of an underlying wrong: the company included the word
13 "Trust" in its corporate name; it was public knowledge that the company was a qualified
14 intermediary; third party names were listed on wire transfers and trade confirmations; the account
15 held third-party funds; and there was a large number of wire transfers from fiduciary accounts to
16 the account. *Id.* at 560-61 n.22; *Cahaly*, 885 N.E.2d at 811. The courts found that the plaintiffs'
17 aiding and abetting claims failed because there was no evidence that Paine Webber or Merrill
18 Lynch knew that the exchange accounts consisted of client funds and knew that those funds were
19 subject to restrictions that were being violated. *Cahaly*, 864 N.E.2d at 561. The plaintiffs simply
20 did not connect the defendants' knowledge of the 1031 company's business with knowledge that
21 the company was violating its fiduciary duties to its clients. *Cahaly*, 885 N.E.2d at 814.⁷

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24 ⁷ The state supreme court only found that plaintiffs submitted sufficient evidence of actual
25 knowledge to submit the claims to a jury when plaintiffs submitted evidence that (i) the president
26 of the exchange company specifically told Merrill Lynch that the money was client funds held in
27 escrow which must be made available to clients within forty-eight hours, and (ii) Merrill Lynch
28 was provided copies of the exchange agreements that plainly set forth the restrictions on the funds
which were being violated. *Cahaly*, 864 N.E.2d at 673-76; *Cahaly*, 885 N.E.2d at 818. No such
allegations exist here.

1 In summary, Plaintiffs seem to conflate knowledge of certain financial transactions with
2 knowledge of an underlying wrong. Because Plaintiffs fail to allege that SunTrust had actual
3 knowledge that LES was breaching its fiduciary duties to Plaintiffs, Plaintiffs' aiding and abetting
4 breach of fiduciary duty claim (Count 1) must be dismissed.

5 b. Aiding and abetting fraud

6 Similarly, there is no allegation that SunTrust knew of LES's alleged underlying fraud.
7 Plaintiffs claim that LES's fraud is based on its misrepresentation to Plaintiffs, "in written
8 Exchange Agreements, that the Exchange Funds that Plaintiffs deposited at SunTrust would be
9 used exclusively to fund the purchase of their own respective replacement property." Compl.
10 ¶ 59. Plaintiffs attempt to link SunTrust to this fraud by claiming that SunTrust "accept[ed] the
11 deposit of Plaintiffs' Exchange Funds," that SunTrust knew that LES was not disclosing to
12 Plaintiffs that LES had suffered losses from its investment in ARS, and that SunTrust knew that
13 LES was not disclosing to Plaintiffs how Plaintiffs' funds would be used. Compl. ¶¶ 38(iii), 59.

14 The fraud alleged by Plaintiffs is based on what LES told Plaintiffs, either in the Exchange
15 Agreement or otherwise. Conspicuously absent from Plaintiffs' Complaint is any description of
16 whether and how SunTrust knew what LES represented to Plaintiffs. In fact, Plaintiffs do not
17 allege that SunTrust ever saw the agreements between LES and Plaintiffs, or was present when
18 any conversation between LES and Plaintiffs occurred. Moreover, as discussed above, the nature
19 of LES's account with SunTrust negates an inference that SunTrust should have been aware, let
20 alone had actual knowledge, that LES promised its clients that their Exchange Funds would be
21 used exclusively for their benefit. Plaintiffs and LES could have required separate trust or escrow
22 accounts at SunTrust; instead, LES simply maintained a commingled business account into which
23 all Exchange Funds were deposited. Compl. ¶ 11. Confronted with similar facts, the court in
24 *Scott v. Branch Banking & Trust Co.*, 588 F. Supp. 2d 667 (W.D. Va. 2008), concluded that "it
25 would simply be unworkable for a bank to monitor its customers' accounts, in the absence of an
26 agreement, to determine whether certain conditions precedent in contracts to which the bank was
27 not a party had or had not been met before permitting its customers to transfer or withdraw funds

1 from accounts over which those customers possessed sole control.” *Scott*, 588 F. Supp. 2d at 676;
2 *see also Nigerian Nat’l Petroleum Corp. v. Citibank N.A.*, No. 98 Civ. 4960(MBM), 1999 WL
3 558141, at *8 (S.D.N.Y. July 30, 1999) (dismissing aiding and abetting fraud claims against bank
4 because plaintiff failed to adequately plead actual knowledge of depositor’s fraud).

5 Because there is no alleged factual basis for this Court to find that SunTrust had actual
6 knowledge of LES’s underlying fraud, Plaintiffs’ claim for aiding and abetting fraud and
7 intentional nondisclosure (Count 3) against SunTrust must be dismissed.

8 c. Aiding and abetting conversion

9 Finally, there is no allegation that SunTrust had actual knowledge of any alleged
10 conversion. In fact, Plaintiffs do not even attempt to allege that SunTrust knowingly aided or
11 abetted LES’s conversion. Compl. ¶ 38(iv). The only relevant allegation in this regard is the
12 conclusory assertion that SunTrust “aided and abetted LES’s conversion by using Plaintiffs’
13 Exchange Funds for unauthorized purposes.” Compl. ¶ 57. Because Plaintiffs do not even
14 attempt to plead SunTrust’s actual knowledge of LES’s purported conversion, and for the same
15 reasons discussed above regarding Plaintiffs’ failure to allege SunTrust’s actual knowledge of
16 LES’s conduct, Plaintiffs’ claim for aiding and abetting conversion (Count 2) must be dismissed.

17 3. Plaintiffs failed to allege SunTrust’s “substantial assistance.”

18 Plaintiffs’ aiding and abetting claims also fail because, even if Plaintiffs could plead that
19 SunTrust had actual knowledge of LES’s underlying wrongs, “the complaint does not assert that
20 [SunTrust] substantially assisted the underlying wrongs.” *Impac Warehouse Lending Group v.*
21 *Credit Suisse First Boston LLC*, 270 Fed. App’x 570, 572 (9th Cir. Mar. 17, 2008) (affirming
22 dismissal of aiding and abetting claims against bank and denying leave to amend complaint).
23 Substantial assistance requires a “significant and active, as well as a knowing participation in the
24 wrong.” *Impac Warehouse Lending Group*, No. 8:04-cv-01234, at 18 (quoting *Alfus v. Pyramid*
25 *Tech. Corp.*, 745 F. Supp. 1511, 1520 (N.D. Cal. 1990)); *Nigerian Nat’l Petroleum Corp.*, 1999
26 WL 558141, at *8. The failure to act cannot constitute substantial assistance unless the defendant
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1 had a duty to act. *Impac Warehouse Lending Group*, No. 8:04-cv-01234, at 18; *In re Am. Cont'l*
2 *Corp./Lincoln Sav. and Loan Sec. Litig.*, 794 F. Supp. 1424, 1435 (D. Ariz. 1992).

3 Moreover, to satisfy the “substantial assistance” element, Plaintiffs also must allege that
4 “the acts of the aider and abettor proximately caused the harm to the [Plaintiffs] on which the
5 primary liability is predicated.” *Filler v. Hanvit Bank*, 2003 WL 22110773, at *2 (S.D.N.Y. Sept.
6 12, 2003) (quotation omitted); *In re Am. Principals Holding, Inc. Sec. Litig.*, M.D.L. No. 653,
7 1987 WL 39746, at *8 (S.D. Cal. July 9, 1987); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452,
8 470 (S.D.N.Y. 2001); *Impac*, 270 Fed. App’x at 572; *In re Am. Cont’l Corp.*, 794 F. Supp. at
9 1435. “Allegations of a ‘but for’ causal relationship are insufficient.” *Filler*, 2003 WL 22110773,
10 at *2 (quoting *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir.
11 1985)).

12 Plaintiffs do not allege that SunTrust took a significant and active role in LES’s breach of
13 fiduciary duty, fraud, or conversion. Plaintiffs merely allege SunTrust “did not terminate its
14 business relationship with LES, . . . accept[ed] the deposits of Plaintiffs’ Exchange Funds and
15 physically transferr[ed] these funds in breach of trust to pay older exchanges.” Compl. ¶¶ 47, 60.⁸
16 These allegations are insufficient for at least three reasons.

17 First, in asserting their claims against SunTrust, Plaintiffs necessarily ignore that the harm
18 to Plaintiffs was caused by LES’s solicitation of, and failure to return, Plaintiffs’ funds. This
19 failure can be placed only on LES. SunTrust’s only connection to the alleged misconduct is that
20 LES deposited and withdrew the funds from a commingled business account at SunTrust. Simply
21 put, SunTrust’s acts do not constitute a “significant and active” role in LES’s underlying torts.
22 *Impac Warehouse Lending Group*, No. 8:04-cv-01234, at 18 (dismissing aiding and abetting
23 claims because “passive endorsement” of alleged fraud is not sufficient to establish substantial
24 assistance); *Cahaly*, 864 N.E.2d at 561 n.23 (holding that plaintiffs failed to establish substantial
25 assistance where record demonstrated that Paine Webber merely held accounts for and
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27 ⁸ Plaintiffs do not appear to even attempt to plead SunTrust’s participation in LES’s alleged
28 conversion. Compl. ¶¶ 53-57.

1 implemented certain transactions in accordance with the primary wrongdoer's instructions and
2 responded to inquiries for investment advice); *Nigerian Nat'l Petroleum Corp.*, 1999 WL 558141,
3 at *8 (dismissing aiding and abetting claims and noting "the mere fact that participants in a
4 fraudulent scheme use accounts at [a bank] to perpetrate it, without more, does not rise to the level
5 of substantial assistance" (quotations omitted)).

6 Second, SunTrust's alleged inaction in failing to terminate its banking relationship with
7 LES does not constitute substantial assistance. "[I]naction, or a failure to investigate," can only
8 constitute substantial assistance when the defendant owes a fiduciary duty to the plaintiff.
9 *Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 247 (S.D.N.Y. 1996); *Ryan v. Hunton & Williams*,
10 No. 99-CV-5938 (JG), 2000 WL 1375265, at *10 (E.D.N.Y. Sept. 20, 2000); *Fiol v. Doellstedt*, 50
11 Cal. App. 4th 1318, 1326, 58 Cal. Rptr. 2d 308, 313 (1996). Here, SunTrust cannot be liable for
12 its inaction because it did not owe a duty to the non-customer Plaintiffs. *See Scott*, 588 F. Supp.
13 2d at 673 ("a bank owes a duty of care only to its customer, not to non-customers such as the
14 plaintiffs, even if the non-customers provided funds to the account"); *Software Design &*
15 *Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 478-81, 56 Cal. Rptr. 2d 756
16 (1996) (noting that plaintiffs were not customers and were "strangers to the contractual
17 relationships between the [defendants] and the thieves"); *Renner*, 1999 WL 47239, at *13 (bank
18 had no duty to prevent customer from defrauding third party); *Tzares v. Evergreen Int'l Spot*
19 *Trading, Inc.*, No. 01 Civ. 107261 (LAP), 2003 WL 470611, at *6 (S.D.N.Y. Feb. 25, 2003)
20 (same); *Kolbeck*, 939 F. Supp. at 248 (securities brokers do not owe a general duty of care to the
21 public).

22 Finally, Plaintiffs must also allege that SunTrust's substantial assistance was a "substantial
23 factor," or proximately caused, the harm suffered by Plaintiffs. *See Filler*, 2003 WL 22110773, at
24 *2. The harm to Plaintiffs was caused by LES's failure to repay funds paid by Plaintiffs to LES.
25 SunTrust merely accepted deposits and transferred funds per its customer's (LES's) request. The
26 relationship of bank and depositor is founded on contract, and SunTrust owes no contractual
27 obligation to persons other than the account holder (LES). *Dodd v. Citizens Bank of Costa Mesa*,

1 272 Cal. Rptr. 623 (Cal. App. Ct. 1990); *see also Impac Warehouse Lending Group*, No. 8:04-cv-
2 01234, at 19 (finding defendants did not substantially assist fraud and that defendants were
3 contractually obligated to the alleged wrongdoer, not the plaintiff). Facts such as those alleged by
4 Plaintiffs have been found insufficient to establish that the defendant's acts proximately caused the
5 plaintiff's harm. *See, e.g., Impac Warehouse Lending Group*, 270 Fed. App'x at 572 (affirming
6 dismissal of aiding and abetting claims because defendants' actions were not a "substantial factor"
7 in causing plaintiffs' injury); *Cromer Fin. Ltd.*, 137 F. Supp. 2d at 472 (noting that although the
8 Ponzi scheme may only have been possible because of clearing broker's actions, or inaction,
9 clearing broker was not liable for aiding and abetting a breach of fiduciary duty under New York
10 law since its conduct was not a proximate cause of the Ponzi scheme). The same result is required
11 here.

12 The case of *Nigerian National Petroleum Corp. v. Citibank, N.A.*, is particularly
13 instructive. 1999 WL 558141. In *Nigerian National Petroleum Corp.*, the plaintiff sought to
14 recover from Citibank approximately \$15 million that the plaintiff lost as a result of fraud by a
15 third-party depositor who used Citibank accounts. *Id.* at *1. During a two-month period, the
16 third-party depositor effected several transfers of funds using transfer documents which were
17 allegedly "riddled with inconsistencies and other badges of fraud." *Id.* Notwithstanding these
18 alleged indices of fraud, Citibank "swiftly processed" the transfers. *Id.* Several months later, the
19 plaintiff discovered the alleged fraud, and "received certain documents revealing Citibank's role in
20 . . . permitting [the third-party depositor] to perpetrate his fraudulent activities." *Id.* at *3. The
21 plaintiff subsequently commenced its lawsuit against Citibank asserting several claims, including
22 aiding and abetting fraud. *Id.* at *3.

23 In granting Citibank's motion to dismiss, the court noted that "[t]he mere fact that
24 participants in a fraudulent scheme use accounts at a bank to perpetrate it, without more, does not
25 rise to the level of substantial assistance necessary to state a claim for aiding and abetting
26 liability." *Id.* at *8 (quotations omitted). Accordingly, the court held that "Citibank did
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1 not provide ‘substantial assistance’ in the achievement of the fraud, within the meaning of aiding
2 and abetting jurisprudence,” and dismissed the claim. *Id.*

3 Similarly, Plaintiffs here have alleged, at best, that SunTrust’s depositor “mere[ly] . . .
4 use[d] accounts at [SunTrust] to perpetrate [the fraud],” and that SunTrust simply “accept[ed]
5 Plaintiffs’ Exchange Funds, deposit[ed] said funds in the LES account at SunTrust, and
6 transferr[ed] these same funds out of the account to fund the escrows of non-Plaintiff clients of
7 LES.” Compl. ¶ 60. Just as in *Nigerian National Petroleum Corp.*, Plaintiffs have not alleged that
8 SunTrust affirmatively assisted, helped conceal, or enabled the fraud to proceed and their aiding
9 and abetting claims must be dismissed.

10 For the reasons set forth above, Plaintiffs’ claims for aiding and abetting breach of
11 fiduciary duty (Count 1), aiding and abetting conversion (Count 2), and aiding and abetting fraud
12 and intentional nondisclosure (Count 3) must be dismissed.

13 **B. Plaintiffs’ Conversion of Trust Funds Claim Must Be Dismissed**

14 Plaintiffs’ conversion claim against SunTrust is misdirected and must be dismissed.
15 Indeed, it is not clear whether Plaintiffs even intended to bring a claim for conversion against
16 SunTrust, as opposed to a claim for aiding and abetting LES’s conversion. As stated succinctly by
17 Plaintiffs in the opening paragraph of their Complaint: “This action is brought against certain
18 non-debtor defendants who *knowingly assisted LES* in committing fraud, converting trust funds
19 and breaching fiduciary duties owed to Plaintiffs.” Compl. ¶ 1 (emphasis added); *see also* Compl.
20 ¶ 55 (alleging that “[t]he unauthorized use of the Exchange Funds *by LES* as alleged was a
21 conversion and as a result each class member has not been able to obtain possession of their
22 funds” (emphasis added)). In fact, it is logically impossible for SunTrust and LES to convert the
23 same Exchange Funds.

24 Even if Plaintiffs meant to assert a claim for conversion directly against SunTrust, their
25 allegations are woefully inadequate. To adequately state a claim for conversion, Plaintiffs must
26 allege (1) that they had a right to possession of the Exchange Funds at the time of any alleged
27 conversion; (2) SunTrust converted the Exchange Funds by a wrongful act or disposition of

1 Plaintiffs' property rights; and (3) damage arose from such conduct. *Oakdale Vill. Group v. Fong*,
2 50 Cal. Rptr. 2d 810, 812 (Cal. App. 4th 1996). Plaintiffs fail to satisfy the first or second
3 element.

4 In order to satisfy the first element of a conversion claim, Plaintiffs must demonstrate that
5 they were "*entitled to immediate possession at the time of conversion.*" *Messerall*, 245 Cal. Rptr.
6 at 549 (emphasis original) (citation omitted). Plaintiffs do not -- because they cannot -- plead they
7 were entitled to immediate possession of the Exchange Funds at the time of any alleged
8 conversion. Plaintiffs' Complaint admits this fatal shortcoming -- "Plaintiffs[] retained all
9 equitable rights in the proceeds *except for the use and benefit of the money during the 180-day*
10 *exchange period.*" Compl. ¶ 16 (emphasis added).

11 Further, the Exchange Agreement between LES and Plaintiffs confirms that Plaintiffs did
12 not have a right to immediate possession at the time of conversion. The Exchange Agreement
13 states, in relevant part, that "LES shall have sole and exclusive possession, dominion, control and
14 use of all Exchange Funds, including interest" until the exchange is completed. Exchange
15 Agreement, § 2(c). The Exchange Agreement also unambiguously recites that until the exchange
16 is concluded, Plaintiffs "shall have no right, title, or interest in or to the Exchange Funds or any
17 earnings thereon and [] shall have no right, power, or option" to receive the funds. *Id.* Therefore,
18 Plaintiffs had no right to immediate possession, and their conversion claim should be dismissed as
19 a matter of law.

20 Moreover, even if Plaintiffs could plead the first element required for a conversion claim,
21 Plaintiffs merely assert that "SunTrust converted . . . by using Plaintiffs' Exchange Funds for
22 unauthorized purposes." Compl. ¶ 57. Plaintiffs fail to identify and plead any conduct suggesting
23 SunTrust, rather than LES, converted Plaintiffs' Exchange Funds, and what funds SunTrust, rather
24 than LES, converted. In fact, the Complaint is devoid of any factual allegations to support the
25 claim that SunTrust converted Exchange Funds. Plaintiffs' cursory legal conclusions are
26 unsupported by factual allegations, and, accordingly, the Court must dismiss Plaintiffs' claim for
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1 conversion (Count 2). *See Bell Atl. Corp.*, 127 S. Ct. at 1964-69, 1974 (holding that “formulaic
2 recitation” of the elements will not suffice).

3 **C. Plaintiffs Failed to Plead Their Fraud Claims With the Particularity Required by**
4 **Rule 9(b)**

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6 Plaintiffs expressly acknowledge their obligation to comply with the heightened pleading
7 requirements of Federal Rule of Civil Procedure 9(b): “Plaintiffs for themselves individually and
8 as Class representatives of the Class as defined herein *allege with particularity pursuant to*
9 *Federal Rule of Civil Procedure 9(b).*” Compl. at 2 (emphasis added). Rule 9(b) requires that
10 “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting
11 fraud or mistake.” Fed. R. Civ. P. 9(b). That is, to satisfy Rule 9(b), “the circumstances
12 constituting the alleged fraud [must] be specific enough to give defendants notice of the particular
13 misconduct . . . so that they can defend against the charge and not just deny that they have done
14 anything wrong. Averments of fraud must be accompanied by ‘the who, what, when, where and
15 how’ of the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.
16 2003) (citations and quotations omitted). Here, despite their express recognition of their pleading
17 obligations, Plaintiffs’ allegations fall short of complying with Rule 9(b).

18 Plaintiffs’ entire Complaint sounds in fraud. *See, e.g.*, Compl. ¶¶ 34 (“SunTrust assisted
19 LES in operating the Ponzi scheme because, in part, LFG owed SunTrust \$100 million.”); 49
20 (“SunTrust agreed to assist LES in this fraud.”); 57 (“SunTrust converted and aided and abetted
21 LES’s conversion by using Plaintiffs’ Exchange Funds for unauthorized purposes.”); 59
22 (“SunTrust knew that LES was making this false representation to Plaintiffs. SunTrust also knew
23 that LES was not disclosing to Plaintiffs that . . . LES had lost a fortune in Exchange Funds used
24 to purchase ARS sold to LES by SunTrust. SunTrust also knew that LES was not disclosing to
25 Plaintiffs that their funds would be used to fund other people’s escrows and Plaintiffs’ escrows
26 would be funded, if at all, from the operation of LES’s Ponzi scheme . . .”). For this reason,
27 Plaintiffs were required to state “with particularity” the “circumstances constituting fraud.” *See*

1 Fed. R. Civ. P. 9(b); *see also Vess*, 317 F.3d at 1103-04 (“In cases where fraud is not a necessary
2 element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant
3 has engaged in fraudulent conduct. . . . In that event, the claim is said to be ‘grounded in fraud’ or
4 to ‘sound in fraud.’”) (citations omitted); *Armstrong v. McAlpin*, 699 F.2d 79, 93 (2d Cir. 1983)
5 (affirming the dismissal of aiding and abetting claims and holding that Rule 9(b) applied to the
6 plaintiffs’ aiding and abetting claims where “[t]he complaint alleges that the fraudulent scheme
7 was intended ‘to loosen the control of Fiduciary over the assets and to enable certain of the
8 defendants to loot those assets at a later date’, and that this scheme was hidden by means of
9 undescribed false statements and omissions”); *Kolbeck v. LIT America, Inc.*, 939 F. Supp. 240,
10 245 (S.D.N.Y. 1996) (“To the extent the underlying primary violations are based on fraud, the
11 allegations of aiding and abetting liability must meet the particularity requirements of Fed. R. Civ.
12 P. 9(b).”). Where a claim is grounded in fraud, “the pleading of that claim *as a whole* must satisfy
13 the particularity requirement of Rule 9(b).” *Vess*, 317 F.3d at 1103-04 (citations omitted)
14 (emphasis added).

15 Plaintiffs merely allege, in conclusory fashion, that SunTrust “knew” or “was aware” of
16 what LES was doing (*see, e.g.*, Compl. ¶¶ 34, 47, 48, 59), and that SunTrust “assisted LES” in the
17 underlying wrong. *See, e.g., id.* ¶¶ 49, 60. Plaintiffs’ allegations as to SunTrust’s conduct fall far
18 short of what is required: “the circumstances constituting the alleged fraud [must] be specific
19 enough to give defendants notice of the particular misconduct . . . so that they can defend against
20 the charge and not just deny that they have done anything wrong. Averments of fraud must be
21 accompanied by ‘the who, what, when, where and how’ of the misconduct charged.” *Vess*, 317
22 F.3d at 1106 (citations and quotations omitted).

23 More fundamentally, however, not only have Plaintiffs failed to plead with particularity
24 “the who, what, when, where and how” of SunTrust’s assistance with LES’s alleged fraud, but
25 Plaintiffs also fail to plead with any particularity “the who, what, when, where and how” of LES’s
26 allegedly fraudulent conduct. Rather, Plaintiffs merely allege, again in conclusory fashion, that
27 LES made various misstatements and omissions to the putative class, (*see, e.g.*, Compl. ¶¶ 33, 59),
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1 and that LES operated a Ponzi scheme. *See, e.g., id.* ¶¶ 30, 47, 59. As to Plaintiffs’ claims against
2 SunTrust -- that SunTrust *aided and abetted* LES in the commission of its fraud -- SunTrust can
3 do nothing other than “deny that they have done anything wrong” without the particular
4 allegations regarding LES’s wrongdoing required by the federal rules. Because each of Plaintiffs’
5 claims against SunTrust is “grounded in fraud,” and because Plaintiffs fail to plead these claims
6 with particularity, Plaintiffs’ claims must be dismissed. *See, e.g., Armstrong*, 699 F.2d at 93
7 (affirming dismissal of aiding and abetting claims and stating that “[c]onclusory allegations that
8 the bank aided and abetting are not enough”).

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V. CONCLUSION

For the foregoing reasons, SunTrust respectfully requests that the Court grants its motion to dismiss Plaintiffs' Complaint in its entirety with prejudice.

Respectfully submitted, this 1st day of May, 2009.

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