

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 08-81565-CIV-HURLEY/HOPKINS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**CREATIVE CAPITAL CONSORTIUM, LLC,
A CREATIVE CAPITAL CONCEPT\$, LLC, and
GEORGE L. THEODULE,**

Defendants.

**DEFENDANT, GEORGE L. THEODULE'S CORRECTED¹ STATEMENT OF FACTS
AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56(b) and S.D. Fla. L.R. 7.5, defendant, GEORGE L. THEODULE, files this statement of facts and memorandum of law in support of his motion for summary judgment against Plaintiff's one-count Complaint, and states as follows:

I. OVERVIEW

In November 2007, GEORGE L. THEODULE, along with several others created A CREATIVE CAPITAL CONCEPT\$, LLC ("ACCC") which was dissolved in favor of CREATIVE CAPITAL CONSORTIUM, LLC, ("CCC") (collectively referred to as "CREATIVE CAPITAL") in January 2008. CREATIVE CAPITAL was an investment organization formed to take advantage of Mr. THEODULE's experience in options trading and his theory of investment diversification. CCC invested funds for investment clubs but suffered catastrophic losses. 97% of the deposited money was lost in trading activities in the market.

¹ Previously submitted as Docket Entry # 90, this document contains numbered paragraphs as required by S.D. Fla. L.R. 7.5.C.3. All exhibits and attachments filed with D.E. #90 are incorporated herein by reference.

The Securities and Exchange Commission (“SEC”) makes a single claim for relief against Mr. THEODULE – a purported violation Section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5, thereunder. Summary judgment is appropriate because the SEC has no evidence that the purported scheme was done with any intent, and it has no hope of establishing otherwise. The United States Supreme Court in *Ernst & Ernst v. Hochfelder* said:

“There is no indication that Congress intended anyone to be made liable for such practices unless he acted other than in good faith. The catchall provision of section 10(b) should be interpreted no more broadly.”

425 U.S. 185, 206, 96 S.Ct. 1375 (1976).

GEORGE L. THEODULE has never acted other than in good faith. Admittedly, mistakes in operations, in hiring, and in compliance have been made at defendant CREATIVE CAPITAL CONSORTIUM, and some of the investment decisions have been costly to investors. But Mr. THEODULE, at every turn, has only sought to help people, and has conducted his investment activities in good faith. Therefore, Mr. THEODULE cannot possibly be held liable under a 10b-5 theory because he does not possess the requisite scienter. 164 investors have attested to the fact that GEORGE L. THEODULE is an honest man, and at no time, did they believe that something illegal or sinister befell their money. *See Declarations of Investors of CCC and/or investment clubs associated with CCC*, attached hereto as “Exhibit 1”. Indeed, even after having lost their money, they still insist that GEORGE L. THEODULE had their best interests at heart. At the end of the day, it is not a violation of Section 10(b) of the Exchange Act to lose investment money in a declining stock and real estate market or in the global economic recession that faces the entire world.

II. UNDISPUTED FACTS

A. The Parties and Others

1. **Defendant, GEORGE L. THEODULE** is currently unemployed and resides in Snellville, Georgia. Mr. THEODULE has been a car salesman and vehicle finance lender in his career. *Declaration of Paulette Theodule*, at ¶ 4, attached hereto as “Exhibit 2;” *Declaration of Julius Theodule*, at ¶ 5, attached hereto as “Exhibit 3.” Mr. THEODULE originally moved to Palm Beach County, Florida in the summer of 2007 to help his sister, Chantal, with her grocery business. Exhibit 2, at ¶ 4. He learned the practice of trading in stock options and making investments and became a millionaire from successful investments but also lost everything and became homeless when markets turned against him. Exhibit 3, at ¶ 5. He made a fortune again from investment management activities. Exhibit 2, at ¶¶ 8-9; Exhibit 3, at ¶ 5; *Declaration of Dorothy Delisfort*, at ¶ 18, attached hereto as “Exhibit 4;” Exhibit 10, at ¶ 23.

2. THEODULE had a passion for helping people and had a vision of eliminating world poverty through wealth-building education. Exhibit 2, at ¶ 7; Exhibit 3, at ¶¶ 7, 16; *Supplemental Declaration of Dorothy Delisfort*, at ¶¶ 7-8, attached hereto as “Exhibit 5.” Helping people with their finances led to word of mouth referrals of Mr. THEODULE’s acumen and good nature. Exhibit 2, at ¶ 9. Word spread after Mr. THEODULE helped several lower income families pay off their car loans by investing their money for them. Exhibit 2, at ¶ 5. More and more people came to consult Mr. THEODULE and most asked him to invest their money for them. Exhibit 2, at ¶ 9. GEORGE L. THEODULE was successful and so were the investors. Exhibit 2, at ¶ 9. Eventually, Mr. THEODULE began to charge a fee for his investment management service because more people were coming to him than he could handle. Exhibit 2, at ¶ 9. Investors kept on coming without any attempt by Mr. THEODULE to advertise or encourage the developing business, and eventually, with the participation of several others, a group decision was made to formally start a corporation to manage properly investments.

Exhibit 2, at ¶ 9. That is how the how the A CREATIVE CAPTIAL CONCEPT\$ story began in 2007.

3. **Defendant, CREATIVE CAPITAL CONSORTIUM, LLC** is a Florida limited liability company organized in January 2008 with its principal place of business in Lake Worth Florida. *Articles of Organization for Creative Capital Consortium, LLC*, attached hereto as “Exhibit 6.” CCC was Mr. THEODULE’s primary investment management vehicle and is the successor to defendant, A CREATIVE CAPITAL CONCEPT\$, LLC, which was terminated because of similarity of name concerns with an unrelated Florida corporation. Exhibit 3, at ¶¶ 6, 8;” Exhibit 6. By December 2008, CCC owned the following companies: Bliss Travel Management, LLC, a Florida limited liability company; G\$Trade Financial, Inc., a Florida corporation; Good Buy Homes, Inc., a Florida corporation; International Development Entrepreneurs of America, Inc., a Florida corporation; Unity Entertainment Group, Inc., a Florida corporation; Carribbean Airways, LLC, a Florida limited liability company; Elite Luxury Travel, LLC, a Florida limited liability company; The Manna Group, Inc., a Georgia corporation; Divine Alliance, Inc., a Florida corporation; G\$ Trade & Financial Company Limited, a Sierra Leone company; and Good Buy Homes, a Sierra Leone company. *See* Response of George Theodule to Receiver’s Second Motion to Expand Receivership. [D.E. # 54]. Reverse Auto Loan, LLC was a subsidiary of Creative Capital Consortium (“CCC”), but the management of the two companies separated in approximately September 2008. Exhibit 5, at ¶ 5.

4. CCC was an investment company and was created for the purpose of financially educating the public about wealth management and diversification as a method of improving one’s economic and financial status, particularly within the Haitian-American community. Exhibit 3, at ¶ 7; *See Declaration of Fabianne Theodule*, at ¶ 44, attached hereto as

“Exhibit 8.” CCC lost 97% of its investors’ funds through actual trading losses (Complaint at ¶ 28), not from misappropriation or deception on investors by Defendants.

5. GEORGE L. THEODULE would meet with companies and potential investors regarding investment opportunities. Exhibit 3, at ¶ 10;” Exhibit 8, at ¶ 35; *Declaration of Daniel Lavan*, at ¶ 4, attached hereto as “Exhibit 9.” Many of the investors sought to have their assets turned into liquidity and invest the funds in the stock market or in other business ventures. Exhibit 9, at ¶ 4. Mr. THEODULE’S colleagues witnessed Mr. THEODULE inform potential investors that “Nothing is Guaranteed” when investing. *See* Exhibit 1; Exhibit 4, at ¶ 17; *See* Exhibit 8, at ¶ 39; Exhibit 9, at ¶ 4; *Declaration of Yolette T. Williams*, at ¶ 22, attached hereto as “Exhibit 10;” *Declaration of Fritz Nivose*, at ¶ 21, attached hereto as “Exhibit 11.”

6. **United Investment Club** is a Florida limited liability company which was founded just prior to CCC, well after ACCC had already been formed. *Articles of Organization of United Investment Club, LLC*, attached hereto as “Exhibit 12;” *Articles of Organization of Creative Capital Consortium, LLC*, attached hereto as “Exhibit 13.”

B. Background

The Vision of Building the Community

1. GEORGE THEODULE recognized the income divide between Haitian-American immigrants and other Americans. Exhibit 8, at ¶ 43. His dream was to give Haitian-Americans the same opportunities anyone who is born in American might have had. Exhibit 3, at ¶ 16; *Id.* In order to fulfill his dream, he sought to educate others about investing. Exhibit 5, at ¶ 8; Exhibit 8, at ¶ 44. Education was the whole reason he began a system of investment clubs wherein the clubs could use his investment strategies allow people who would not otherwise normally invest to have the same success in the market that he had. Exhibit 8, at ¶ 44. Although

the Haitian community was close to GEORGE THEODULE's heart, he never discriminated among whom he would educate, and the opportunity to invest with the clubs as far as he was concerned was open to all. Exhibit 5, at ¶ 9; Exhibit 8, at ¶ 42. GEORGE THEODULE thought everyone should take part in the dream he was able to live through his successful investments. *Id.*

2. When his wife Elza died in 2007, GEORGE THEODULE, along with several of his children, founded the Elza Theodule Foundation in her memory. Exhibit 8, at ¶ 45. The Foundation, formally the Elza Theodule Foundation, Inc., a Florida corporation, was established to help aide the poor people of Haiti through monetary donations and other community building efforts. *Articles of Incorporation for Elza Foundation, Inc.*, attached hereto as "Exhibit 17."

3. GEORGE THEODULE has helped many individuals over the years. Exhibit 2, at ¶¶ 5-7; Exhibit 8, at ¶ 45; Exhibit 15, at ¶¶ 8-10; *See, e.g., Declaration of J.C. Richardson*, at ¶¶ 5-10, 12, attached hereto as "Exhibit 18." He helped J.C. Richardson through a knee replacement surgery when he had three children to support and was living on a fixed income. Exhibit 18, at ¶¶ 5-10. GEORGE drove Mr. Richardson to and from the hospital for his surgery and helped him pay his electric and water bills while he was recovering. *Id.* at ¶¶ 6-7. GEORGE THEODULE also provided funds for Patricia Golden, a real estate agent, when she suffered financial difficulties during the real estate market downturn. Exhibit 15, at ¶ 8-9. He provided her with money for food, helped pay her household expenses and gave her funds that enabled her to maintain her real estate license. *Id.* at ¶ 9.

Vision into Action

4. In November of 2007, GEORGE L. THEODULE, founded A Creative

Capital Concept\$, LLC, with the intention of helping others with their investment efforts. Exhibit 3, at ¶ 7; Exhibit 13. A Creative Capital Concept\$, LLC later became Creative Capital Consortium, LLC (“CCC”). Exhibit 3, at ¶ 6. From the beginning, CCC was intended to help investment clubs invest their money. *See* Exhibit 3, at ¶ 7; *See* Exhibit 4, at ¶ 13; *See* Exhibit 10, at ¶ 18; *See* Exhibit 11, at ¶ 17. The mission statement of CCC was:

“To provide a community of investors where people can learn at their own pace while expanding their personal interests. This mission includes the following elements: a) Teamwork, b) Education, c) Socialization, d) Testimony. We offer a positive social environment where people can participate in conversations with others [sic] positive and productive citizen [sic] sharing common dreams and visions of helping those who may not be as fortunate as ourselves. Our only requirement is that you have fun while building a profitable portfolio over time.”

Mission Statement of Creative Capital Consortium, LLC, attached hereto as “Exhibit 14.”

CCC managed money only from investment clubs. Exhibit 3, at ¶ 9. CCC did not offer investors any stock or unit member interest in itself, i.e., it did not issue securities or conduct an offering of securities. Exhibit 5, at ¶ 5.

5. CCC intended to achieve these goals by being a resource for investment clubs. The investment clubs would and did keep their own independent records, would be and were independently managed, would and did choose their own investments including whether to submit some portion of their funds to CCC to manage, and would be and were responsible for filing their own taxes. Exhibit 4, at ¶¶ 5, 9, 11; Exhibit 5, at ¶ 6; Exhibit 10, at ¶ 6, 8, 11, 13, 15; Exhibit 11, at ¶¶ 7, 10, 12, 14, 15. The decision to invest with CCC was purely the decision of each club, independently. *Id.* Each club had its own independent management and independent list of members. Exhibit 10, at ¶ 8; *Declaration of Carmen Tejada*, at ¶ 6, 11-13, attached hereto as “Exhibit 16.” While GEORGE L. THEODULE through CCC offered investment education from time to time to various investment clubs, there was absolutely no training that club

members would be forced to invest with CREATIVE CAPITAL. Exhibit 4, at ¶¶ 5, 8, 11; Exhibit 5, at ¶ 6; Exhibit 10, at ¶¶ 6, 8, 11, 15; Exhibit 11, at ¶¶ 7, 10, 12, 15. Save for the club investments made with CCC, there was no financial connection between CCC and the investment clubs. See Exhibit 16 at ¶¶ 6, 11-14. There was never any co-mingling of assets between GEORGE L. THEODULE or CCC on the one hand and any other investment clubs on the other hand. Exhibit 4, at ¶ 6; Exhibit 5, at ¶ 6; Exhibit 10, at ¶ 9; Exhibit 11, at ¶ 8.

C. GEORGE L. THEODULE's Good Faith Attempt at Compliance with the Law

1. CCC and its predecessor were collectively in business approximately 18 months before being placed into receivership by this Court. During this time period, CCC grew rapidly in the dollar amount of assets under management. Like most rapidly growing businesses, CCC experienced significant back office administrative growth pains. When these problems were identified and a solution was designed, the solution was implemented. Some issues were still being internally investigated when CCC was shut down. See, e.g., Exhibit 16, at ¶ 10.

2. CCC was created to help build communities, not to steal from them. Exhibit 3, at ¶ 7. CCC was created after it was discovered that A CCC had use-of-name legal issues with another company. Exhibit 3, at ¶ 8. CCC was designed to manage corporate funds, not those of individual investors. Exhibit 3, at ¶ 9. CCC was aware of limits on the number of clients it could have before registration would be required by the SEC. See, e.g., Exhibit 8, at ¶ 24. CCC was a venture capital fund. *Id.*, at ¶ 5.

3. Mr. THEODULE's primary role at CCC was to make investment decisions, market, and network. Exhibit 3, at ¶ 10, 12; Exhibit 8, at ¶¶ 15, 35-36; Exhibit 9, at ¶ 4; *Declaration of Patricia Golden*, at ¶ 5, attached hereto as "Exhibit 15." He was not in the office 90% of the time. Exhibit 8, at ¶ 37. Mr. THEODULE had a group of advisors, comprised

of the heads of the investment clubs, who helped Mr. THEODULE in the investment decision making process at CCC. Exhibit 8, at ¶ 6. CCC did not deal directly with any club members, only with the investment club managers. Exhibit 8, at ¶ 5. Investment club managers may not have dealt with George Theodule at all but perhaps with CCC's staff. Exhibit 10, at ¶ 24(a). CCC did not deal directly with investors and did not have records of the accounts of individual club members. Exhibit 8, at ¶ 5.

4. CCC encouraged investment diversification and began to grow wildly in popularity with investment clubs. *See* Exhibit 9, at ¶ 9. Clubs were seeking out CCC to invest their funds and not the other way around. Exhibit 8, at ¶¶ 35-36. Even though it was true that GEORGE L. THEODULE had successfully doubled investors' money in the past, he made no guarantee of his future ability to do so. Exhibit 4, at ¶¶ 17-18; Exhibit 9, at ¶ 7; Exhibit 10, at ¶¶ 22-23; Exhibit 11, at ¶¶ 21-22. Any actions taken by individual club managers to assure investors that their funds would be doubled were done at at their own volition and not at the behest of GEORGE L. THEODULE. *See* Exhibit 4, at ¶¶ 17-18; *See* Exhibit 10, at ¶¶ 22-23, *See* Exhibit 11, at ¶¶ 21-22. Investment club managers have attested to the fact that GEORGE L. THEODULE and CCC were fully independent of the investment clubs in every aspect including with regard to investment decision making. Exhibit 4, at ¶ 5; Exhibit 10, at ¶ 8; Exhibit 11, at ¶ 7.

5. Nevertheless, CCC made some poor hiring and entrustment decisions. For example, CCC's human resources person, Monia Emclair, was terminated in the summer of 2008 when it was discovered that she had been paying payroll without withholding income taxes. Exhibit 8, at ¶ 28. Thereafter, all payroll was run through Yollette Williams' employee staffing company, Yopana Staffing, and all CCC employees were placed on its payroll. *Ibid.* Another

major mistake, the effects of which were still being investigated when this civil action was filed, was the outsourcing of redemption and distribution requests to Magda Dominique and Murielle Victor, two of the principals of United Investment Club. Only Magda Dominique and Murielle Victor at United Investment Club knew who had made redemption requests and had the authority to direct CCC's staff to make payouts. Exhibit 8, at ¶ 21. These individuals were suspected of submitting phony redemption requests to CCC and of misappropriating United Investment Club's funds. Exhibit 8, at ¶¶ 14, 16-17, 19-23, 32-33.

6. At about the same time, in August 2008, George Theodule hired his daughter Fabianne to conduct an internal investigation of CCC's relationship with investment clubs, to organize and computerize its files, and to review and organize United Investment Club's files, CCC's largest customer. Exhibit 8, at ¶¶ 4, 10-12. Subsequently, CCC hired accountant Carmen Tajeda to conduct a more formal audit. Exhibit 16, at ¶¶ 6-8. George Theodule told Carmen Tajeda that he had heard that some investment club members had made redemption requests but CCC was not able to verify individual club member's claims because CCC had no records of individual club member accounts. *Id.*, at ¶¶ 6-7. The audit was made difficult and was never completed because CCC had outsourced the function of redemption and distribution request approval to United Investment Club's principals Magda Dominique and Murielle Victor. *Id.*, at ¶¶ 7-6, 1; Exhibit 8, ¶¶ 17, 21. The entire body of knowledge of which individuals got paid what, and whether such payouts were proper or improper, lies with United Investment Club Magda Dominique. Exhibit 16, at ¶ 7; Exhibit 8, at ¶ 21. Tajeda was able to confirm that some investment club's members had made tenders of their funds to their investment clubs but that the clubs did not forward the funds to CCC. Exhibit 16, at ¶ 11. United Investment Club did not comply with repeated requests by George Theodule, Fabianne

Theodule, Mario Theodule (acting as CCC's computerized record database designer), and Carmen Tejada for access to United Investment Club's records. *Id.*, at ¶¶ 8, 10; Exhibit 8, at ¶¶ 16-17, 19-20, 23-25.

7. Likewise, GEORGE L. THEODULE had no accounting experience and in hindsight proved to be a poor judge when hiring employees. Exhibit 8, at ¶ 46. THEODULE never performed reference or background checks on his employees, which resulted in misplaced trust. *Id.* at ¶ 26. THEODULE's past expertise was in the area of personal finance, asset finance, and investments and not in accounting; therefore, he needed others who had expertise in accounting to keep track of funds. *See* Exhibit 2, at ¶ 4. Some of CCC's original employees were originally making up to \$7,000 per month. Exhibit 8, at ¶ 30. Unfortunately, CCC's employees lacked the necessary competence in accounting to handle the massive investor base that it had built up. *See, e.g.*, Exhibit 8, at ¶ 27-28. When the employee staffing company took over employment issues for CCC, payroll was cut in half. Exhibit 8, at ¶ 30.

8. GEORGE THEODULE hired Carmen Tejada to perform an internal audit of all customers' deposits of investment clubs that had been tendered to CCC. Exhibit 16, at ¶ 6. Prior to engaging Tejada, internal accounting functions at CCC were outsourced to Magda Dominique and/or Mureille Victor who were the principles of Lake Worth, Florida-based United Investment Club. Exhibit 16, at ¶ 7. Ms. Tejada was specifically engaged to verify all customers' deposits of investments clubs had been tendered to CCC and which customer's deposits had been refunded and the characteristics of these deposits (principal and/or gain). *See* Exhibit 16, at ¶ 6. Because CCC had no direct relationship with most of the members of investment clubs, by design the names and addresses of the investment club customers were not submitted to CCC. *See* Exhibit 16, at ¶¶ 7, 12-13. Ms. Tejada recommended an audit of all

investment clubs records to accomplish the objective of account reconciliation between CCC's records and the records of all investment clubs claiming to have placed funds with CCC to manage. *See* Exhibit 16, at ¶ 6. Approximately three months after Ms. Tejada was retained, the SEC filed suit and caused a receiver to be appointed over CCC. *See* Court Docket Sheet.

9. All of GEORGE's THEODULE's actions were made in good faith and to the best of his ability. *See* Exhibit 1; Exhibit 5, at ¶ 11. GEORGE L. THEODULE was attempting to securitize all CCC holdings in an attempt to obtain backing for all deposits. *See Alliance Asset Management, Term Sheet for Debt and Equity Financing*, attached hereto as Exhibit 19. GEORGE L. THEODULE had been retained to acquire financing for Dolce Regency Suites, LLC, in order for Dolce Regency to construct a new hotel. He had even flown to Switzerland with the intent of securing these funds; however, he was prevented from entering the country given he was traveling with a Haitian passport without a visa. *See Switzerland Denial of Entry Form*, attached hereto as Exhibit 20. The purpose of his visit was to sign papers establishing financing for Dolce Regency Suites at the First Bank of London, so that he might realize his commission, and securitize the clubs' investments. *See* Exhibit 20. Perhaps the last initiative underway to ensure CCC's compliance with the securities laws was that it had begun the process of outsourcing its securities transactions to a licensed securities broker dealer. Exhibit 8, at ¶ 41.

GEORGE L. THEODULE Did Not Profit from the Alleged Scheme

10. By the SEC's accountant's own admission, 97% of GEORGE L. THEODULE's funds deposited into the brokerage accounts collectively were used for investment purposes and were lost in trading. Complaint at ¶ 28. GEORGE L. THEODULE has opened his complete books to let the entire world see that he did not profit from the demise of

CCC nor did he hide money away. Indeed, he is destitute. *See, e.g.*, Theodule's Response to Plaintiff's Application for an Order to Show Cause; Exhibit 8, at ¶ 42; Exhibit 2, at ¶ 3. Moreover, GEORGE THEODULE did not engage in a "Ponzi" scheme. Exhibit 16, at ¶¶ 14, 18.

III. MEMORANDUM OF LAW

Pursuant to Federal Rule of Civil Procedure 56(b), George L. Theodule moves for summary judgment on Count I of Plaintiff's Complaint because Plaintiff is unable to substantiate its claim of a violation of Section 10(b) of the Securities Exchange Act of 1934, as amended or of Rule 10b-5 thereunder. "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986).

For the SEC, as distinguished from private securities plaintiffs, to state a claim for liability under Section 10(b) of the Exchange Act and SEC Rule 10b-5, the SEC must allege that a defendant (1) made a material misrepresentation, or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities. *SEC v. Monarch Funding Corp.*, 192 F.3d 295 (2d Cir. 1999); *Ziamba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1206 (11th Cir. 2001).

Because there are no genuine issues of material fact as to at least one element of Plaintiff's claim, summary judgment is appropriate.²

A. Plaintiff is Unable to Show that George Theodule Acted with Scienter

² "An issue is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. An issue is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986).

The minimum required to prove the scienter element is evidence that the defendant acted with reckless disregard for the consequences of his actions. *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982). Recklessness within the meaning of SEC Rule 10b-5 means a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it. *SEC v. Carriba Air, Inc.; Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678 (11th Cir. 1988); *SEC v. Southwest Coal & Energy Co.*, 624 F.2d 1312, 1321 n. 17 (5th Cir. 1980). The defendant's "mere knowledge of the omitted facts would not suffice as scienter under this formulation. Rather, the 'danger of misleading buyers' from these known omissions must have been actually known or so obvious that [the defendant] 'must have been aware of it.'" *Southwest Coal*, citing *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d at 1045. *See also Hirsch v. duPont*, 553 F.2d 750, 759 (2d Cir. 1977) ("knowledge of the fraud, and not merely of the undisclosed facts, is indispensable" to proving aiding and abetting securities fraud by nondisclosure).

If there is no question the defendant was acting wholeheartedly in good faith, there can be no liability under Section 10(b) of the Exchange Act. *Ernst & Ernst v. Hochfelder*, 425 U.S. at 206. Even if the Plaintiff, Securities and Exchange Commission, is able to show that George Theodule's actions represented departures from some standard of care regarding his investors, George Theodule's actions were always in good faith out of a need to help others. 164 individual investors have attested to the fact that George Theodule is an honest man who managed their clubs' money to the best of his ability. *See Exhibit 1*. Many of these investors are people who lost money with George Theodule; however, they are still willing to step forward

and attest to his honesty and good character. *Id.* Further, there is nothing inherently illegal about investing the money of an investment club in stock options, private enterprises, or real estate. Indeed, such legitimate activities do not warrant the imposition of an *ex parte* temporary restraining order and preliminary injunction on a legitimate business enterprise such as CCC, nor a charge of securities fraud against CCC or Mr. Theodule.

Plaintiff has no evidence that George Theodule acted with scienter. To the contrary, the entirety of the evidence is that George Theodule did the best he could to make investment decisions and to help others. Not only had George Theodule acted in good faith, but he was in the process of taking steps to correct administrative deficiencies within CCC. Also, he fired CCC's human resources manager and hired his daughter Fabianne Theodule to conduct an internal investigation into mismanagement at CCC. Based on Fabianne's reports, George Theodule hired an accountant, Carmen Tejada, to conduct a full internal audit of CCC. Theodule also hired his software savvy brother Mario to design software and computer systems to better control CCC's recordkeeping. But George Theodule was the solution to CCC's problems. He was not the cause. Indeed, he did everything in his power to fix CCC's problems.

B. George Theodule Was Not Engaged in a "Ponzi" Type Scheme

The SEC alleged in its Complaint and in press releases to the news media that George Theodule was engaged in a "Ponzi" scheme. A "Ponzi Scheme" is defined as:

"A 'Ponzi scheme' typically describes a pyramid scheme where earlier investors are paid from the investments of more recent investors, rather than from any underlying business concern, until the scheme ceases to attract new investors and the pyramid collapses."

Eberhard v. Marcu, 530 F.3d 122,132 (2d Cir. 2008); *See, e.g., Orlack v. Kozyak (In re: Fin. Federated Title & Trust, Inc.)*, 309 F.3d 1325, 1327 n. 2 (11th Cir.2002); *see generally In re Ponzi*, 15 F.2d 113 (D.Mass. 1926). Plaintiff also admits that George Theodule's CCC was

engaged in legitimate business activities and that 97% of the funds deposited were lost in trading. Complaint at ¶ 28. This fact is also established in the Court's Preliminary Injunction. Also, at no time did the initial members of CCC or any club receive their returns from the principal invested by subsequent investors. There was real investment activity going on at CCC. Capital returns and capital gains were paid out upon request. Therefore, any allegation that George Theodule engaged in a "Ponzi" scheme is both recklessly stated, unfounded, and should be stricken from the Complaint.

IV. CONCLUSION

Given that Plaintiff, the Securities and Exchange Commission, has alleged 97% of George Theodule's funds deposited in his brokerage accounts were lost in trading activities, it is clear that George Theodule was the leader of a functioning, non-fictitious business entity which could not, by definition be a Ponzi scheme. It is not illegal to lose money when investors have made investment decisions after being advised of the risk of potential loss. As long as George Theodule acted at all times in good faith, he cannot be held liable for Plaintiff's securities fraud claim as a matter of law. Therefore, under Federal Rule of Civil Procedure 56(b), because there exists no genuine issues as to any material fact in Plaintiff's Complaint, George Theodule is entitled to summary judgment.

Respectfully submitted,

Dated: May 1, 2009

By: s/ Russell C. Weigel, III

Russell C. Weigel, III
Fla. Bar No. 822159

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the service list below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically

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