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 REPLY TO
PLAINTIFF, SECURITIES AND EXCHANGE COMMISSION'S
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

By and through undersigned counsel and pursuant to Local Rule 7.5, Defendant, GEORGE L. THEODULE ("Theodule"), files his Reply to the Plaintiff's, Securities and Exchange Commission ("SEC"), Response to Theodule's Motion for Summary Judgment, and in support thereof states as follows:

1. The SEC has improperly cited nearly all of its evidence. Counsel for Theodule has been able to locate some of the purported evidence based on its context, however neither Theodule, nor the Court should be forced to guess as to the identity of the evidence being proffered by the SEC. In both its' Opposition to Theodule's Motion for Summary Judgment and its' Response to Theodule's Statement of Facts, the SEC has failed to properly identify its evidence. "D.E. 5-2" and "D.E. 5-4" contain multiple exhibits, yet the citations do not specify which exhibit supports the text. Furthermore, "D.E. 5-6," "D.E. 5-8," "D.E. 5-9" and "D.E. 5-10" simply do not exist. Accordingly, any evidence citing to "D.E. 5-2," "D.E. 5-4,"

"D.E. 5-6," "D.E. 5-8," "D.E. 5-9" and "D.E. 5-10" should not be considered because Theodule and the Court are unable to locate it due to the improper citation form. *See In re World Fashions, Inc.*, 24 B.R. 452, 455 (Bankr. Ga. 1982).

2. The SEC has not produced any evidence that would be admissible at trial that contradicts Theodule's defense of good faith. The SEC's entire opposition can be summarized as consisting of:
   a. five investor statements that do not address the issue of good faith;
   b. the inadmissible hearsay-within-hearsay declaration and testimony of Florida Office of Financial Regulation financial investigator Neptime Dieujuste;
   c. reliance on Theodule's assertions of the Fifth Amendment in an asset deposition taken by counsel for the Receiver;
   d. SEC counsel's non-evidentary arguments and characterizations about "evidence" that it purportedly knows of but did not attach to its opposition in an attempt to create an issue of fact; and
   e. citation to vague or errant references to exhibits that are impossible to follow or that are not exhibits in the Court's docket sheet and fail to meet the requirements for specific references to evidence as required by Local Rule 7.5.C.2.
3. The centerpiece of the SEC's opposition is that the Court has already determined that the SEC has established a *prima facie* case when it succeeded in obtaining an *ex parte* TRO and preliminary injunction. However, this argument is irrelevant to the requirements for proof at trial or proof necessary to oppose a motion for summary judgment. While it is true that the Court granted a preliminary injunction because it found that a *prima facie* case had been established, the Court did not determine that the SEC had evidence sufficient to foreclose

Theodule's complete defense to the Complaint.

The SEC, as it is now clear, does not have evidence to rebut Theodule's complete defense of good faith, as a matter of law. The SEC has failed to establish scienter, an element of its *prima facia* case. Although the SEC indicates that a showing of knowing misconduct or severe recklessness is sufficient to establish scienter, "Proof of recklessness would require a showing that the defendant's conduct was an extreme departure of the standards of ordinary care... 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.,* 681 F.2d 1318, 1324 (11th Cir. 1982). Although the SEC claims a dispute of the material issue of scienter is in issue, it has presented no evidence that Thedoule's purported misconduct, i.e., that the way he operated CCC, was an "extreme departure of the standards of ordinary care." In fact, the SEC has not supported any standard of care; it has merely alleged that Theodule made certain promises. The SEC's own evidence failed to address whether those promises had been fulfilled. Without such information, the SEC does not create a genuine issue of material fact on the required element of its case, namely the scienter element.

Theodule has acted in good faith and by the SEC's own admission, has invested nearly all of the funds entrusted to him. Although much of the funds tendered by the investment clubs to CCC have been lost, that does not prove scienter as the SEC suggests. In the past several years the global economy has taken a spiral turn downward, and it would be ridiculous to hold liable for poor global economic conditions all of those who lost funds despite their good faith efforts.

4. The five investor statements cited by the SEC do nothing more than state that Theodule made

various representations to them or that they heard that Theodule had made representations to others. Nowhere in the declarations or testimonies do these investors state that the representations attributed to Theodule were not true or that they were not made in good faith. For example, while the SEC alleges that Theodule made a representation that an investor's money would double, the SEC also provided account statements that in fact, at least for a time, reflected either that these same investors' funds *were doubled within 90 days as Theodule allegedly promised* or that the investors attempted to withdraw their funds before the 90 day period lapsed. *See* Plaintiff's citations to Docket Entry ("D.E.") 5-3 at 85-86; D.E. 5-4, Ex. 4 ¶ 13; and D.E. 5-4, Ex. 6 ¶¶ 17, 18.

5. Furthermore, the SEC's evidence supports Theodule's statement of material facts that it was not he or his company Creative Capital Consortium, LLC that made funds disappear but rather it was United Investment Fund's officers Magda Dominique and Mureille Victor (also referred to as Rene Victor). The SEC's evidence corroborates Theodule that investor William Sabarese's account was handled by United Investment Club (Plaintiff's D.E. 5-4, Ex. 4 ¶ 15), and it was United Investment Club's officer Ms. Murielle Victor – not CCC's President George Theodule – who failed to reimburse funds to investors Berthrum Brewster and Collin Whitehall. *See* D.E. 5-3 at 91. Exploration Capital Investment Group handled the account for investor Evelyn Metellus. D.E. 5-4, Ex. 6 ¶ 13. Carola Timothee made her investment through Creative Capital Investment Group, not ACCC or CCC. D.E. 5-5, Ex. 10 ¶ 12. Thus, each of the unreturned investments cited by the SEC is inapplicable to this case, as they were not made through Defendants A Creative Capital Concept$, LLC or Creative Capital Consortium, LLC, and have no impact on a case against Theodule, much less his good faith defense.

6. The declaration and testimony of Florida Office of Financial Regulation investigator Neptime Dieujuste is not admissible because he has no first hand knowledge of the case. *See* Fed. R. Evid. 602.

7. The SEC relies extensively and improperly on Theodule's assertions of the Fifth Amendment in his deposition given to the Receiver. The SEC erroneously concludes that if a defendant invokes the Fifth Amendment on any issue, then an adverse inference must automatically be drawn against him as to those issues. That is not the law. In *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976), the Supreme Court held that when a defendant in a civil proceeding asserts his Fifth Amendment rights "in the face of evidence that incriminate[s] him," a negative inference *may* be drawn from his silence. *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 318, 1558 (1976). None of the Receiver's questioning of Theodule during his April 2009 deposition pertained to allegations of the SEC's Complaint. Thus, the SEC's broad citation to his deposition, pages 57-84, 109-101, and 167, for the answer of "What did you do with the money you stole?", is neither an answer to a specific question nor does it call for a truthful answer because the proposition posed by the question is not designed to elicit truthful testimony. It is an argumentative and improper question, if one could conclude that in the 31 pages cited for this question, a single question had been asked and answered. Unlike *Baxter v. Palmigiano*, where evidence of a violation of law was presented to the defendant, there is no negative inference to be drawn adversely against Theodule in this circumstance, nor does it cut against his good faith defense.

Indeed, Theodule's Motion for Summary Judgment is premised on the teaching of *SEC v. Rehtorik*, 135 F.R.D. 204 (S.D. Fla., Jan. 24, 1991), which makes clear that an adverse inference may properly be drawn only where the defendant offers no other evidence on that

issue. *Ibid.*; *see also Graystone Nash, Inc.* 25 F.3d 187, 192-194 (3rd Cir. 1994). In the instant case, Theodule has offered a mountain of evidence on the issue of his good faith defense. No adverse inference can be drawn against him on the issue of this defense. Further, because Theodule's evidence of good faith is unrebutted, he is entitled to summary judgment.

8. The remainder of the SEC's grievances are disposed of on well settled case law:

   a. SEC Counsel's conclusions and argument made in opposition to Theodule's documented material facts do not raise a genuine issue of material fact. *See*, *Peppers v. Coates*, 877 F.2d 1493, 1498 (11th Cir. 1989).

   b. Theodule's mountain of investor and other declarations are admissible at the summary judgment stage because they meet all of the requirements for admissibility, and evidence of character has been held to be admissible in SEC enforcement cases because they are quasi-criminal in nature. *S.E.C. v. Saul*, 1991 WL 218061, at *2 (N.D. Ill., 1991). Any character evidence contained in the declarations is also admissible with respect to *future* violations for which injunctive relief is sought. *S.E.C. v. Drescher*, 2001 WL 1602978, at *1 (S.D.N.Y., 2001). Even if the SEC's singular objection to one paragraph in the declarations is sustained, the remaining content of the declarations would still be admissible in support of the Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56.

   c. The SEC's opposition demonstrates that it cannot compute simple arithmetic in estimating the dollars purportedly taken in and paid out by the Defendants including Theodule. The SEC bears the burden of proof to establish its so-called "Ponzi" scheme. The SEC alleges that Theodule raised $23.4 million. Of the $23.4 million

allegedly raised, the SEC contends that $18.3 million was invested and 97% of the invested funds were lost in the market. According to these calculations, Theodule would have had $5.1 million of uninvested money, plus $549,000 (3% of the money invested) remaining of invested funds, totaling $5,649,000. The SEC then contends that Theodule paid out $15.2 million to early investors, using funds derived from later investors, and misappropriated $3.8 million to himself personally. By its own representations to the Court, the SEC's calculations overstate the amount of funds Theodule raised by approximately $13,351,000. Additionally, the SEC's calculations fail to account for legitimate payments to Theodule for his investment services, to CCC's employee payroll, and the costs of operating CCC. The allegations presented are very serious and yet the SEC has been unable to provide meaningful estimates of the funds raised, invested, and paid out. Merely, the SEC has focused on how Theodule spent his income, and has baselessly concluded that all of it is ill-gotten gain.

d. Summary judgment is not premature because the SEC and the State of Florida have been conducting discovery in support of this case since at least *October 2008* (*See testimony of Berthrum Brewster taken in October 2008* (D.E. 5-3)), while Theodule has only had since January 2009. Furthermore, courts need not wait until the completion of discovery to rule on a motion for summary judgment. *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1219 (11th Cir. 2000). The SEC has not satisfied its burden of proving substantial harm to its case from a denial of additional time for discovery. *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1219 (11th Cir. 2000). Accordingly, since the SEC cannot produce any evidence to rebut Theodule's

defenses, summary judgment is appropriate.

Based upon the foregoing, Theodule has established that the SEC has failed to prove the element of scienter, or, in the alternative, that the SEC cannot negate Theodule's complete defense of good faith, and accordingly Theodule's Motion for Summary Judgment should be granted.

REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF FACTS

All denials to immaterial facts are invalid because only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986).

Each SEC denial citing the Fifth Amendment is improper. The denials based on Theodule's assertion of the Fifth Amendment with respect to questions the Receiver asked him "about the vast amounts of investors' money he stole or lost through Creative Capital Consortium; Creative Capital organization, operations, and control over investment clubs" are improper as it is a blanket statement that covers more than 30 pages of deposition transcript including questions that were answered by Theodule and questions that were objected to by Theodule's counsel. This includes the SEC denials to Theodule's Part A., ¶ 4; Part B., ¶¶ 1, 4 and 5; Part C., ¶¶ 1-4, 6, 7 and 9.

The SEC's denials to Theodule's Part C., ¶¶ 5 and 9, that are based on the Fifth Amendment are improper because the SEC cannot draw a negative inference against Theodule for assertions of the Fifth Amendment by his sister Yollette Williams or CCC's attorney, Gabrielle Alexis, Esq. Indeed, Theodule's sister Yollette Williams *did not assert the Fifth Amendment*. *See* her deposition attached to Plaintiff's opposition as Exhibit 3. No vicarious inference can properly be drawn against Theodule from CCC's attorney's claim of privilege.

Indeed, claiming an adverse inference from a non-party's assertion of the Fifth Amendment and attributing it to Theodule is improper because there has been no showing by the SEC what topics the Fifth Amendment or other privilege was asserted to. Furthermore, the privilege was claimed in depositions taken by the Receiver and not by the SEC in support of any allegations in the Complaint. All other SEC denials to Theodule's Part A., ¶¶ 1, 2, and 4; Part B., ¶¶ 1, 4, and 5; Part C., ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, and 10 that are based on his Fifth Amendment are improper because Theodule provided independent affirmative evidence on those matters in the form of the 20 exhibits attached to his Motion for Summary Judgment.

Denials to Theodule's Part A., ¶¶ 1, 2, 4; Part B., ¶¶ 1, 2 and 3 that are based on character evidence are improper, based on paragraph 6.b. *supra*.

Denials to Theodule's Part A., ¶¶ 1, 2, 4; Part B., ¶¶ 1, 3, 4; Part C., ¶¶ 1, 2, 3, 4, 5 and 9 that are argumentative questions are improper because argumentative questions do not prompt the declarant to provide truthful testimony and therefore no adverse inference can be drawn therefrom to create a dispute as to a material fact.

Denials to Theodule's Part A., ¶ 6; Part B., ¶ 2; Part C., ¶¶ 5, 6, 7 and 8 that are unauthenticated documents are improper because documents supporting a motion for summary judgment need not be authenticated. *Reed v. Ford Motor Company*, 679 F. Supp. 873, 875 (S.D.Ind., 1988).

As for the SEC's opposition to Theodule's Part A, paragraph 6, that Theodule failed to attach the correct exhibit, attached hereto as Exhibit 1 to this Reply, i.e., the Articles of Organization of Creative Capital Consortium, LLC.

REPLY TO PLAINTIFF'S MATERIAL FACTS SUBMITTED PURSUANT TO S.D. FLA. L.R. 7.5.C.

Taken individually or collectively, none of the SEC's purportedly material facts, if true,

dissipate Theodule's defense that he acted in good faith at all times. The SEC has produced no evidence to establish that Theodule did not act in good faith. Paragraphs 11, 12, 13, 14, 17 and 18, in particular, have no bearing on Theodule's good faith.

Paragraphs 11, 12, 13, 14, 15, 16, 18 and 19 of the SEC's supplemental facts all rely on improperly cited evidence and therefore must not be considered. *See* paragraph 1 *supra.*

Paragraph 11 of the SEC's supplemental facts indicates that Theodule told investors he could double their funds in 90 days, however Berthrum Brewster, testified "he didn't formally say to the whole group he can double money every three months or any of that." D.E. 5-3 at 48-49.

Paragraph 14's statement that Theodule "used trading profits" is not supported by evidence.

Paragraph 15 contains conclusory statements and is not based on direct evidence.

Paragraph's 18 and 19, Theodule's use of the term "regulatory" is not material.

Paragraph's 16 and 19 contain the SEC's conclusions such as "commingling," "misappropriation," "making of false statements" and being "severely reckless" and these statements are improper argument, and are not supported by their cited evidence.

Accordingly, the SEC has not shown that there is a genuine issue of material fact as to Theodule's complete defense that he acted at all times in good faith.

WHEREFORE, defendant, George Theodule prays that this Court grant his motion for summary judgment.

Respectfully submitted,

Dated: June 4, 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 Notices of Electronic Filing:

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Securities and Exchange Commission
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100 Southeast Second Street
Miami, FL 33131
Counsel for the Receiver

Dated: June 4, 2009 s/: Russell C. Weigel
Russell C. Weigel

Electronic Articles of Organization For Florida Limited Liability Company

L07000119128
FILED 8:00 AM
November 29, 2007
Sec. Of State
dcurry

Article I

The name of the Limited Liability Company is:

A CREATIVE CAPITAL CONCEPT$ LLC

Article II

The street address of the principal office of the Limited Liability Company is:

10176 SHEILA CT.
WELLINGTON, FL. 33414

The mailing address of the Limited Liability Company is:

10176 SHEILA CT.
WELLINGTON, FL. 33414

Article III

The purpose for which this Limited Liability Company is organized is:

CAPITAL INVESTMENTS

Article IV

The name and Florida street address of the registered agent is:

GEORGE THEODULE
10176 SHEILA CT.
WELLINGTON, FL. 33414

Having been named as registered agent and to accept service of process for the above stated limited liability company at the place designated in this certificate, I hereby accept the appointment as registered agent and agree to act in this capacity. I further agree to comply with the provisions of all statutes relating to the proper and complete performance of my duties, and I am familiar with and accept the obligations of my position as registered agent.

Registered Agent Signature: GEORGE THEODULE

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FILED 8:00 AM
November 29, 2007
Sec. Of State
dcurry

Article V

The name and address of managing members/managers are:

Title: MGRM
GEORGE THEODULE
10176 SHEILA CT
WELLINGTON, FL. 33414

Title: MGR
DEBRA PASBY
10176 SHEILA CT
WELLINGTON, FL. 33414

Title: MGR
GEORGE THEODULE JR.
10176 SHEILA CT
WELLINGTON, FL. 33414

Article VI

The effective date for this Limited Liability Company shall be:

11/26/2007

Signature of member or an authorized representative of a member

Signature: GEORGE THEODULE