IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

CASE NO. 09-20865-CIV-HURLEY/HOPKINS
(Ancillary Proceeding to U.S.D.C. Case No. 08-81565-CIV-HURLEY/HOPKINS)

JONATHAN E. PERLMAN, Esq., as court
appointed Receiver of Creative Capital
Consortium, LLC, et al.,

Plaintiff,

v.

GABRIELLE ALEXIS, et al.,

Defendants.
_____________________________________/

RECEIVER'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

The Plaintiff, Jonathan E. Perlman, Esq., as court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC,[1] United Investment Club, LLC and Reverse Auto Loan, LLC, a Florida limited liability company,[2] hereby files this Response in Opposition to Defendant's Motion to Dismiss Or In The Alternative Motion For More Definite Statement (DE #9; the "Motion to Dismiss"), and states as follows:

PRELIMINARY STATEMENT

On April 3, 2009, the Receiver filed a Complaint for Damages and to Avoid and Recover Fraudulent Transfers and For Other Relief (the "Complaint") against Gabrielle Alexis ("Alexis"),

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[1] Creative Capital Consortium, LLC and A Creative Capital Concept$, LLC shall sometimes collectively be referred to herein as "Creative Capital" or the "Creative Capital Entities."

[2] Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC, United Investment Club, LLC and Reverse Auto Loan, LLC shall sometimes be collectively referred to as the "Receivership Entities."

Law Office of Gabrielle Alexis, P.A. ("GAPA"), and Mondisir & Alexis Title Services, Inc. ("Alexis Title") (collectively, the "Defendants") alleging the following causes of action: (i) the avoidance and recovery of in excess of $3.3 million in fraudulent transfers under Florida's Uniform Fraudulent Transfer Act; (ii) unjust enrichment; (iii) the imposition of a constructive trust, equitable lien or resulting trust; (iv) breach of fiduciary duty; (v) aiding and abetting and/or conspiracy to breach of fiduciary duty; (vi) conversion; and (vii) professional malpractice.

On June 22, 2009, the Defendants filed the Motion to Dismiss, alleging five separate arguments in support of their position: (i) that all of the Receiver's claims against the Defendants are barred by the doctrine of *in pari delicto*; (ii) that the Complaint fails to state a claim for fraudulent transfer because the Receiver lacks standing to pursue such claims; (iii) that the Complaint fails to state a claim for aiding and abetting and/or conspiracy to breach of fiduciary duty; (iv) that the Complaint should be dismissed for failure "to comport with the specificity requirement in Rule 9(b)" of the Federal Rules of Civil Procedure; and (v) that the Receiver's claim for attorney's fees should be stricken.

As set forth in more detail below, the Defendants' arguments are without merit. The Defendants fail to correctly interpret or apply the controlling legal authority in connection with the issues raised in the Complaint. Furthermore, the Defendants' arguments are overcome by the well-pled facts in the Complaint. Therefore the Motion to Dismiss should be denied and the Defendants should be compelled to file an answer to the Complaint.

THE STANDARD OF REVIEW FOR EVALUATING A MOTION TO DISMISS

When ruling on a motion to dismiss, the Court "must accept as true all of the factual allegations in the Complaint." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007). Further, the factual allegations in the Complaint must be "construed in the light most favorable to the

Plaintiff." Rivell v. Private Health Care Sys., 520 F.3d 1308, 1309 (11th Cir.2008). A court's review on a motion to dismiss is "limited to the four corners of the complaint." Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949 (11th Cir.2009); St. George v. Pinellas County, 285 F.3d 1334, 1337 (11th Cir.2002). A court may consider only the complaint itself and any documents referred to in the complaint which are central to the claims. *See* Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir.1997) (per curiam).

Although Rule 12(b)(6) allows a defendant to seek dismissal of a complaint for failure to state a claim upon which relief can be granted, it has been generally held that a complaint should not be dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed. 2d 80 (1957); Castro v. Secretary of Homeland Sec., 472 F.3d 1334, 1336 (11th Cir. 2006); Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 349 (11th Cir. 2006).

In Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 127 S. Ct. 1955, 1974, 164 L.Ed. 2d 929 (2007) the United States Supreme court made clear that in order to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) a complaint need only plead "enough facts to state a claim that is plausible on its face." The Supreme Court further made clear that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. Rather, factual allegations "must be enough to raise the right to relief above the speculative level."[3] Id.

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[3] The Supreme Court did *not* mandate a heightened federal pleading standard in Twombly. Rather, the Court did nothing more than clarify pleading requirements applicable to particular types of allegations. Warning of overly broad interpretations by overzealous advocates, the

In Erickson v. Pardus, 127 S.Ct. 2197, 2200, 167 L.Ed. 2d 1081 (2007), decided just two weeks after Twombly, the United States Supreme Court reiterated that Fed. R. Civ. P. 8(a) requires only a short and plain statement demonstrating plaintiff's entitlement to relief. "*Specific facts are not necessary*; the statement need only give the defendant *fair notice* of what the claim is and the grounds upon which it rests." Id. (quoting Twombly, 127 S.Ct. at 1964). (emphasis added).

Additionally, the Eleventh Circuit has interpreted Twombly to require that a complaint need only specify enough facts "to raise a reasonable expectation that discovery will reveal evidence" of the required elements. Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1309 (11th Cir.2008)(*per curium*)(citing Twombly, 127 S.Ct. at 1965). In other words, the complaint need only identify "facts that are suggestive enough to render [the element] plausible."' Id. (quoting Watts v. Florida Int'l. Univ., 495 F.3d 1289, 1296 (11th Cir. 2007) (quoting Twombly, 127 S.Ct. at 1965)). This is simply "all that is required at this stage of the litigation." Watts, 495 F.3d at 1296. There is no requirement of probability, or of any detail- just plausibility. Id. A complaint need only plead "enough factual matter (taken as true) to suggest"' the required element. Id.

LEGAL ARGUMENTS

I. It Is Premature for the Court to Rule Upon an *In Pari Delicto* Defense on a Motion to Dismiss.

In pari delicto is an affirmative defense requiring factual determinations and is not an appropriate subject for a motion to dismiss. Even if *in pari delicto* did apply, the Adverse

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Court specifically advised that "we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation." Id. at 1973, n. 14 (internal citations omitted).

Interest Exception overcomes the defense. In addition, the *in pari delicto* defense does not apply to receivers.

A. *In Pari Delicto* is an Affirmative Defense Requiring Factual Determinations.

Defendants' request for dismissal under *in pari delicto* is premature, at best, and is improperly raised before the Court at this time. The doctrine of *in pari delicto* is an affirmative defense. Banco Industrial de Venezuela, C.A. v. Credit Suisse, 99 F.3d 1045, 1050 (11th Cir.1996). Further, because *in pari delicto* is an affirmative defense that involves factual issues of proof, such is not an appropriate subject for motions to dismiss. Id.; Court-Appointed Receiver for Lancer Management Group LLC v. Redwood Financial Group, Inc., 2008 WL 906062 (S.D.Fla.,2008); Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 346 (3d Cir.2001); Goldberg v. Chong, 2007 WL 2028792 (S.D.Fla., 2007).

For example, at page 6 in the Motion to Dismiss, the Defendants cite O'Halloran v. Pricewaterhouse Coopers, 969 So.2d 1039 (Fla.2d DCA 2007) in support of the application of the "sole actor doctrine" whereby Florida courts have held, notwithstanding, that when a corporate agent acts in a manner adverse to the corporation, that the acts of that agent must still be imputed to the corporation for purposes of *in pari delicto* if the agent has "sole control' over the transactions in question. However, the Receiver disputes the Defendants' arguments in this regard, and contends that discovery will show that there existed one or more "innocent" managers of the Receivership Entities. If proven, the Receiver will defeat the Defendants' arguments in this regard. In essence, the Defendants' arguments regarding *in pari delicto* require the Court to go beyond the "four corners" of the Receiver's complaint, and as such present factual issues beyond the scope of review for a motion to dismiss. Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007).

Furthermore, in determining the application of *in pari delicto* to a given case, "a court first determines whether plaintiff's guilt is far less in degree than defendant's, so as to make the doctrine inapplicable. If plaintiff's guilt is not far less, the court inquires if applying the doctrine would be contrary to public policy." Turner v. Anderson, 704 So.2d 748, 750 (Fla. 4th DCA 1998) (quoting Feld and Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot, 312 Pa.Super. 125, 458 A.2d 545 (1983)). Such an analysis requires a detailed review of the facts underlying the conduct of the parties. The relative faults of the parties are factual issues that cannot be ascertained at this time on a motion to dismiss.

B. Even if *In Pari Delicto* Did Apply, the Adverse Interest Exception Overcomes It.

As the Receiver's Complaint alleges, George Theodule ("Theodule"), the controlling principal of the Creative Capital Entities, was a man driven by personal greed, shamelessly abusing the Receivership Entities through the development of a *Ponzi* scheme for his own personal gain.[4] As set forth below, because Theodule's actions as alleged in the Complaint were completely adverse to those of the Receivership Entities, his conduct falls within the "adverse interest exception" to the equitable defense of *in pari delicto,* and his actions cannot be imputed to the Receivership Entities.

In accordance with the doctrine of *in pari delicto,* it is generally true in Florida that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1152 (11th Cir.2006.) However, as correctly cited by the Defendants in their motion to dismiss, the successful application of the *in pari delicto* defense in this case requires ***proof*** that

[4] The Complaint is replete with allegations of Theodule's masterminding an investment fraud to bilk shareholders and members of the Receivership Entities of more than $60 million. The Complaint further alleges that Theodule acted without any consideration for the operation of any legitimate business concerns in connection with the Receivership Entities.

the conduct of the wrongdoer and corporate agent, namely, George Theodule, be imputed to the Receivership Entities such that their imputed acts could be considered and compared to the acts of the Defendants to determine whether both parties have participated in the perpetration of the claims alleged in the Receiver's Complaint. *See*, e.g., Nisselson v. Lernout, 469 F.3d 143, 157 (1st Cir.2006).

However, "if a corporate agent was acting adversely to the corporation's interests," such as the actions undertaken by Theodule as alleged in the Receiver's Complaint, "then the knowledge and misconduct of the agent are not imputed to the corporation." State Dep't of Ins. v. Blackburn, 633 So.2d 521, 524 (Fla. 2d DCA 1994); *see also* Seidman & Seidman v. Gee, 625 So.2d 1, 2-3 (Fla. 3d DCA 1992) (referring to "an exception to the imputation rule [that] exists where an individual is acting adversely to the corporation"). Thus, because Theodule engaged in misconduct calculated to benefit him and, to harm the Receivership Entities, he effectively ceased to function within the course and scope of the agency relationship with the Receivership Entities. In reality, he has forsaken the Receivership Entities and acts as an agent for himself.

This limitation on the general rule that the acts of a corporate agent or representative are imputed to the principal company is commonly known as the "adverse interest exception." *See* Tew v. Chase Manhattan Bank, N.A., 728 F.Supp. 1551, 1560 (S.D.Fla.1990); Nerbonne, N.V. v. Lake Bryan Int'l Props., 685 So.2d 1029, 1031 (Fla. 5th DCA 1997); State Dep't of Ins. v. Blackburn (In re Blackburn), 209 B.R. 4, 11 (Bankr.M.D.Fla.1997).

The Eleventh Circuit has identified the type of conduct which gives rise to the adverse interest exception as being tantamount to an officer's "looting" of the corporate assets for his own benefit. Liquidation Commission of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339 (11th Cir.2008). In Renta, the corporate officers in question diverted funds from the corporation

for their own personal gain and acted outside the scope of their corporate authority and purpose. As a result, the Eleventh Circuit did *not* impute his wrongdoing to the corporation. Id. at 1355.

As averred in the Receiver's Complaint, Theodule, along with certain family members and insiders of the Receivership, acted in concert to loot and raid the coffers of the Receivership Entities for their own personal gain, just like the wrongdoers in the Renta case.[5] Therefore, because Theodule's conduct may ***not*** be imputed to the Receivership Entities by virtue of the adverse interest exception, the equitable defense of *in pari delicto* does not apply to the claims alleged by the Receiver in the Complaint.

C. *In Pari Delicto* Does Not Apply to Receivers.

Florida law recognizes that *in pari delicto* is improperly invoked where a lawsuit serves important public purposes. The *in pari delicto* defense is not "woodenly applied in every case" because "the principal [behind it] is founded on public policy… [thus] it may give way to a supervening public policy." Kulla v. E.F. Hutton & Co., Inc., 426 So.2d 1055, 1057 n.1 (Fla.3d DCA 1983); *see also* Off. Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1152 (11th Cir. 2006).

Consistent with Florida's adoption of the equitable principles intoned by the Seventh Circuit in Scholes v. Lehman , 56 F.3d 750 (7th Cir.1993), this Court should reject the Defendants' *in pari delicto* arguments. The innocent Receiver should be allowed to pursue its claims against the insiders because to find otherwise would wholly frustrate the statutory scheme

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[5] Additionally, it should be noted that in In re Wiand, 2007 WL 963165 (M.D.Fla. Mar.27, 2007), the court specifically held that "The holding in Renta…is entirely consistent with the result attained in Scholes v. Lehman, in which the Seventh Circuit permitted a receiver to bring a fraudulent transfer claim against a Ponzi scheme perpetrator on the theory that the corporation was 'cleansed' by the appointment of the Receiver and was no longer the perpetrator's 'evil zombie.' It is also consistent with Florida law, which provides that the *in pari delicto* defense is not 'woodenly applied in every case;' and that because 'the principal is founded on public law, it may give way to a supervening public policy." (internal citations omitted).

underlying the Receiver's appointment:

> Now that the corporations created and initially controlled by [the scheme operator] are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by [the scheme operator]. We cannot see any legal objection and we particularly cannot see any practical objection.

Scholes, 56 F.3d at 754.

The Receiver is clearly not tainted by the prior wrongful conduct of George Theodule and others who may have benefitted from his wrongdoings. The Receiver serves an important public purpose by representing those injured by the fraud. *In pari delicto* is improperly invoked where a lawsuit serves important public purposes. *See* Perma Lif Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138-39 (1968) (collecting cases where the Court refused to apply *in pari delicto* to bar plaintiffs' suits in antitrust cases); Bateman, Echler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (denying *in pari delicto* defense in private actions initiated under federal securities laws to promote the laws' primary objectives of protecting the investing public and the national economy). Accordingly, this Court should not bar the Receiver from bringing suit because to do so would undermine the important public policy considerations motivating the appointment of receivers in these types of situations.

II. The Doctrine of *In Pari Delicto* Does Not Apply to the Receiver's Fraudulent Transfer Claims or Unjust Enrichment Claims.

Several courts have declined to apply *in pari delicto* to bar a receiver from asserting the claims of an insolvent corporation on the ground that application of the doctrine to an innocent successor would be "inequitable." In Scholes v. Lehman, 56 F.3d 750 (7th Cir.1993), the Seventh Circuit Court of Appeals observed that the defense of *in pari delicto* "loses its sting" in a fraudulent transfer action brought by a receiver because the entity is "cleansed" by the

appointment of the receiver. Accordingly, in Scholes, the court found that the receiver was not prevented from seeking to set aside fraudulent transfers. Id. at 754; *see also* Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, (11th Cir.2006); Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 357 (3d Cir.2001); FDIC v. O'Melveny & Myers, 61 F.3d 17, 19 (9th Cir.1995) (finding that certain equitable defenses did not bar the FDIC because defenses based on a party's unclean hands or inequitable conduct do not generally apply against the party's receiver.)

In reconciling these decisions, Florida courts have followed the reasoning in Scholes, dictating that the defense of *in pari delicto* applies against a receiver only in regard to the assertion of "common law tort claims." Freeman v. Dean Witter Reynolds, Inc., 865 So.2d 543, 550 (Fla.2d DCA 2003); *see also* In re Wiand, 2007 WL 963165 (M.D.Fla. Mar.27, 2007). "We are inclined to believe that the receiver may also pursue certain claims that would be barred by the defense of in pari delicto if pursued by the corporation that was placed in receivership." Id. (citing Scholes, 56 F.3d at 754). The Dean Witter court further explained that:

> [W]e believe it is helpful to differentiate between two types of claims that may arise in this context, First, there are actions that the corporation, which has been 'cleansed' through receivership, may bring directly against the principals or the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation and taken prior to the receivership. This was the case in *Scholes* and *Schact.* Distinct from these claims, however, are ***common law tort claims*** against third parties to recover damages in the name or shoes of the corporation for the fraud perpetrated by the corporation's insiders.

Id. (Emphasis supplied.)

On the basis of these authorities, other arguments notwithstanding, the defense of *in pari delicto* does not bar the receiver's statutory fraudulent transfer claims asserted under the Florida Uniform Fraudulent Transfert Act ("FUFTA".) These claims are "cleansed" through the Receivership.

By contrast, the Receiver's claim for unjust enrichment does not fall squarely into either of the two categories delineated by Dean Witter. However, the Dean Witter court did not limit a receiver's methods of recovery to FUFTA actions. Furthermore, an unjust enrichment claim may be properly categorized as an action "directly against the principals or the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation." Dean Witter, 865 So.2d at 551. Therefore, the defense of *in pari delicto* also does not bar the receiver's unjust enrichment claims against the Defendants. In re Wiand, 2007 WL 963165 (M.D.Fla. Mar.27, 2007) at p. 7.

III. The Receiver Is a Creditor Under FUFTA With Standing to Pursue Fraudulent Transfer Claims Against the Defendants.

In their Motion to Dismiss, the Defendants correctly cite the standard under which the Receiver may pursue his claims under FUFTA. Namely, the Receiver must show that: (1) there is a creditor with a claim against a debtor; (2) that the debtor made a transfer to a third party rendering the debtor unable to pay the creditor's claim; and (3) that a third party received the transfer from the debtor/transferor. See, paragraph 19 of the Defendants' Motion to Dismiss and the cases cited therein. The Defendants argue that the Receiver is not a "creditor" within the meaning of FUFTA, and thus lack standing to pursue their fraudulent transfer claims.

The initial inquiry concerning standing involves jurisdictional questions based upon constitutional concerns. In re Wiand, 2007 WL 963165 (M.D.Fla. Mar.27, 2007). To fulfill the constitutional requirements for standing, the Receiver must show that: (1) it suffered or is immediately likely to suffer an injury in fact; (2) a causal connection exists between the injury and the alleged conduct; and (3) there is a likelihood that a favorable judicial decision will redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The seminal case on the question of whether a court-appointed receiver has standing to set aside allegedly fraudulent transfers by a perpetrator of a Ponzi scheme is Scholes v. Lehman, 56 F.3d 750 (7th Cir.1993). In addressing standing, the Seventh Circuit Court of Appeals held that the transfers made by the perpetrator of the Ponzi scheme "removed assets from the corporations for an unauthorized purpose and by doing so injured the corporations." Scholes, 56 F.3d at 754. Because the corporation was injured by the diversion of its assets, the receiver, standing in the shoes of the corporation, had standing to set aside the fraudulent transfers. *See also*, In re Wiand, 2007 WL 963165 (M.D.Fla. Mar.27, 2007).[6] Likewise, employing a similar analysis, the Receivership Entities were injured by the diversion of their assets, and the Receiver, standing in the shoes of the Receivership Entities, has standing to set aside those transfers under FUFTA.

The Defendants further argue that the Receiver lacks standing to pursue the fraudulent transfer claims because he is not a "creditor" within the meaning of FUFTA. However, the term "creditor" as defined by FUFTA is broadly interpreted to give meaning to the statutory purpose of FUFTA. To utilize the protections of chapter 726, however, a plaintiff must show that he or she has a "claim" which qualifies the party as a "creditor." *See* § 726.102(4), Fla. Stat. (2002). As defined in section 726.102, a "claim" is broadly constructed and "means a right to payment,

[6] Numerous other courts have found that an equity receiver has standing to maintain fraudulent transfer claims against the recipients of money acquired in a Ponzi scheme under various states' uniform Fraudulent Transfter Acts. *See* Obermaier v. Arnett, 2002 WL 31654535 (M.D. Fla. Nov.20, 2002) (citing Scholes and finding the receiver had standing under FUFTA); Quilling v. Cristell, 2006 WL 316981 (W.D.N.C. Feb.9, 2006) (citing Scholes and finding that the receiver had standing under either North Carolina or Florida's UFTA); *see also* Marwil v. Farah, 2003 WL 23095657 (S.D.Ind. Dec.11 2003) (citing Scholes and finding the receiver had standing to pursue equitable disgorgement claims); O'Halloran v. First Union Nat'l. Bank of Florida, 350 F.3d 1197, 1203-04 (11th Cir.2003) (bankruptcy trustee had standing to bring tort claims against bank in which Ponzi scheme funds were deposited because the corporation was legally injured by the withdrawal of funds from its accounts).

whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 726.102(3), Fla. Stat. (2002). Thus, as settled in Florida and universally accepted, "A 'claim' under the Act may be maintained even though 'contingent' and not yet reduced to judgment." Cook v. Pompano Shopper, Inc., 582 So.2d 37, 40 (Fla. 4th DCA 1991); *see also* Money v. Powell, 139 So.2d 702, 703 (Fla. 2d DCA 1962) ("In this state contingent creditors and tort claimants are as fully protected against fraudulent transfers as holders of absolute claims.").

Here, the Receiver has a "claim" under FUFTA (thus qualifying him as a "creditor" under FUFTA) by virtue of the fact that Creative Capital (as one of the four Receivership Entities the Receiver represents), made transfers to the Defendants. And, since the remaining three Receivership Entities had invested in Creative Capital (*see* Complaint, ¶¶ 2-4; 30-37), they are therefore creditors of Creative Capital. Thus, the Receiver, standing in the shoes of the other three Receivership Entities, as creditors of Creative Capital (the fourth Receivership entity), clearly has a "claim" as a "creditor" against the Defendants under the requirements of FUFTA.

Furthermore, the Receivership Entities (and therefore the Receiver, standing in the "shoes" of the Receivership Entities) have standing as a creditor with a claim, because both the Florida Statutes and related case law specifically provide so. As previously stated in paragraph 4 of the Receiver's Complaint, pursuant to the Receivership Order appointing him as Receiver, and in conjunction with Florida Statutes §671.201(13) and 679.1021(1)(zz), the Receiver has automatic standing in this matter, as he is a de facto ***judgment lien creditor*** (one with priority over the assets of the Receivership Estate, no less). Zirot v. Gilmer, 336 So.2d 680 (Fla. 4th DCA 1976); Fla. Stat. §§671.201(13) ("Creditor" includes a receiver in equity); Fla. Stat. §679.1021(1)(zz). Upon his appointment as Receiver, and therefore a judgment lien creditor, the

Receiver himself now holds "claims" (as defined by FUFTA) against the assets of the receivership entities by virtue of his ability to file an action exercising his priority rights over other claimants.

Therefore, pursuant to the Receivership Order appointing him as Receiver, in conjunction with the Florida Statutes and related case law, the Receiver is a creditor under FUFTA with standing to pursue fraudulent transfer claims against the Defendants.

IV. The Receiver Sufficiently Alleges Claims of Aiding and Abetting Breach of Fiduciary Duty.

The Defendants arguments that Florida fails to recognize claims for aiding and abetting breach of fiduciary duty are simply misplaced. Florida clearly recognizes causes of action for aiding and abetting a breach of fiduciary duty. The four elements for a claim of aiding and abetting a breach of fiduciary duty are: "(1) a fiduciary duty on the part of the primary wrongdoer; (2) a breach of this fiduciary duty; (3) knowledge of the breach by the alleged aider and abettor; and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing." AmeriFirst Bank v. Bomar, 757 F.Supp. 1365, 1380 (S.D.Fla.1991); *See also*, Moecker v. Honeywell Int'l, Inc., 2000 WL 33996192 at *14 (M.D. Fla. Jan.10, 2000); Caribbean K. Line, Ltd. v. Dunn, 288 B.R. 908, 920 (S.D. Fla.2002); Bruhl v. Conroy, 2007 WL 983228, at *10 (S.D.Fla. Mar.27, 2007); Bruhl v. Waterhousecoopers Int'l, 1007 WL 983228, at *10 (S.D. Fla. Mar.27, 2007).

In his Complaint, the Receiver specifically alleges each and every element for aiding and abetting a breach of fiduciary duty. The Receiver sets forth in detail the relationship among the Defendants and George Theodule and the complicity of the parties with respect to Theodule's breach of fiduciary duties with regard to Creative Capital. (See Paragraphs 47-73, 98-105, of the Receiver's Complaint.)

V. The Heightened Pleading Requirements of Rule 9(b) Do Not Apply to FUFTA Claims.

Contrary to Defendants' assertions, this Court has previously concluded that the heightened pleading standard of Fed. R. Civ. P. Rule 9(b) does not apply to claims brought under FUFTA. Special Purpose Accounts Receivable Co-op. Corp. v. Prime One Capital Co., L.L.C. No. 00-cv-06410, 2007 WL 4482611, *4 (S.D.Fla. Dec.19, 2007). Unlike common law fraud claims, fraudulent transfer claims are asserted against a person or entity that did not deal directly with the plaintiff in the challenged transaction. Therefore, the plaintiff generally possesses little or no information about the alleged fraudulent transfer other than the fact that it occurred.[7] The fraudulent act, the clandestine act of hiding money, is allegedly committed by a defendant and another, to the exclusion of the plaintiff. Id.

This is in stark contrast to a common law fraud claim where a plaintiff alleges that a defendant made a material false statement or omission directly to the plaintiff. Under such circumstances, the plaintiff is in a position to plead with the specificity required by Rule 9(b). This Court has concluded that despite the use of the word "fraud," a fraudulent transfer claim is significantly different from other fraud claims to which Rule 9(b) is directed. Id.; Nesco Inc. v. Cisco, No. Civ.A. CV205-142, 2005 WL 2493353, * 3 (S.D.Ga. Oct.7, 2005) (finding common law fraud and fraudulent transfer "bear very little relation to each other" since the element of false representation need not be proven in fraudulent transfer cases). *See also*, Official Committee of Unsecured Creditors of Verestar, Inc., v. American Tower Corp. (In re Verestar,

[7] As discussed by Wright and Miller, a common reason identified by courts to require heightened pleading for fraud claims rests on the idea that without this information, a defendant would be unable to formulate a responsive pleading. C. Wright & A. Miller, 5A Federal Practice & Procedure § 1296 (2004). In the fraudulent transfer context, however, the defendant, as opposed to the plaintiff, is more likely to possess the particularized information about the complained-of conduct.

Inc.), 343 B.R. 444 (Bankr. S.D.N.Y. 2006); Miller v. Greenwich Capital Fin. Products, Inc., 362 B.R. 135 (Bankr. D. Del. 2007); Brandt v. Trivest II, Inc. (In re Plassein Int'l Corp.), 352 B.R. 36 (Bankr. D. Del. 2006); Giulano v. U.S. Nursing Corp., (In re Lexington HealthCare Group, Inc.), 339 B.R. 570 (Bankr. Del. 2006). Thus, the application of a heightened pleading standard is inappropriate with respect to the Receiver's FUFTA claims.

CONCLUSION

Based on the foregoing, the Receiver respectfully requests that Defendants' Motion to Dismiss be denied that the Defendants be required to file an answer to the Complaint within ten (10) days. Alternatively, to the extent that this Court grants any part of the relief requested by the Defendants in their Motion to Dismiss, the Receiver requests leave to amend the Complaint accordingly.

Dated: July 10, 2009
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2009, the foregoing document was electronically filed 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 identified on the below Service List 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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SERVICE LIST
JONATHAN E. PERLMAN, ESQ., as court appointed Receiver of Creative Capital Consortium, LLC, et al. v. Gabrielle Alexis, et al.
CASE NO. 09-20865-CIV-HURLEY/HOPKINS
United States District Court, Southern District of Florida

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