UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

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.
_____/

PLAINTIFF'S OPPOSITION TO DEFENDANT
GEORGE THEODULE'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

The overwhelming evidence in this case shows George Theodule told trusting investors over and over again he would double their money in the stock market, while at the same time he was diverting millions of their invested dollars to himself and his relatives for a house, a wedding, and luxury cars, among other things. After hearing this evidence, the Court found the Securities and Exchange Commission had demonstrated a *prima facie* case of securities fraud against Theodule, and entered a preliminary injunction against him.

In response to this evidence, which only increases with each week of discovery that goes by, Theodule has filed a summary judgment motion alleging the Commission cannot demonstrate his scienter – even though the Court held in issuing the preliminary injunction that we already had. Theodule's only evidence of his lack of scienter is a series of pre-drafted, form

declarations he sent en masse to investors, which some signed, containing general statements that investors *believed* Theodule acted in good faith and is generally an honest man.

Even if this type of character evidence were admissible – and it is not under Federal Rule of Evidence 404(a) – it would be woefully insufficient to rebut the direct evidence we have already introduced showing Theodule deliberately and repeatedly lied to investors about what he was doing with their money and the exorbitant returns he could achieve. Certainly it falls far short of showing an absence of any genuine issue of material fact – the standard Theodule must meet for the Court to grant his summary judgment motion.

Given the flimsy foundation on which Theodule rests the current motion, the myriad of contradictory evidence, the fact that the Court has already found we have established a *prima facie* case of securities fraud, and the fact that Theodule asserted his Fifth Amendment privilege against self-incrimination 165 times in response to virtually every substantive question about his fraudulent securities offering at his recent deposition, Theodule's motion borders on the frivolous. The Court should summarily deny it.

II. Legal Standard

Under Fed. R. Civ. P. 56(c), the Court should enter summary judgment only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Thus, to prevail on his motion, Theodule has the burden of showing the absence of a genuine issue of any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding whether he has met this heavy burden, the Court must view the evidence and all factual inferences arising from it in the light most favorable to the Commission. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). The Court must draw all justifiable

inferences from the evidence against Theodule. *Anderson*, 477 U.S. at 255. The evidence from Theodule must be so great that he would have to prevail as a matter of law. *Id.* at 251. The record must show that no rational jury could find for the Commission. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If reasonable minds could differ on the inferences arising from the facts, a court should deny summary judgment. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992).

III. Theodule's Motion Ignores The Evidence Already Introduced And The Court's Order Issuing A Preliminary Injunction

Theodule claims the Commission "has no evidence … or hope of establishing" evidence of his scienter in violating the securities laws. D.E. 105 at 2. In fact, this Court has already ruled – twice – that the Commission has demonstrated a *prima facie* violation of the securities laws, including the requisite showing of scienter. First, on December 29, 2008 the Court issued a Temporary Restraining Order against Theodule and his co-defendants. In entering that order, the Court held:

> The Court finds the Commission has made a sufficient and proper showing in support of the relief granted herein by (1) presenting a *prima facie* case of securities laws violations by the Defendants, and (2) showing a reasonable likelihood the Defendants will harm the investing public by continuing to violate the federal securities laws unless they are immediately restrained.

Temporary Restraining Order and Other Emergency Relief (D.E. 7), at 2. Theodule's motion ignores this finding.

Second, after a full evidentiary hearing at which the Commission offered several exhibits and testimony of several witnesses, the Court entered a preliminary injunction against Theodule, and held:

> The evidence supports the SEC's claims that the Defendants solicited investments by guaranteeing prospective investors a 100% return on their investment within 90 days based upon the successful trading of stocks and options. Despite these

> representations to investors, over 97% of the total funds deposited in Defendants' accounts collectively were lost through unsuccessful trading, according to the Declaration and live testimony of Ms. Strandell.

Order Granting Preliminary Injunction and Other Relief Against All Defendants (D.E. 21), at 5. Specifically, the Court ruled the Commission had demonstrated Theodule had acted with scienter in violating the securities laws:

> The SEC has established a prima facie showing of violations of the securities laws as alleged in its Complaint, namely, that Defendants had made (1) a misrepresentation or omission (2) that is material (3) in connection with the purchase or sale of a security (4) *made with scienter* (5) during the use of interstate commerce.

Id. at 4 (emphasis added).

In his motion for summary judgment, Theodule does not address any of the Court's specific findings of the Court. He simply declares the Court was wrong: "Theodule's legitimate activities do not warrant the imposition of the TRO and PI." D.E. 105 at 15. Theodule's declaration, without any evidentiary support, merely reveals again that his summary judgment motion is not based on any evidence, just his hope that the Court will ignore or reverse its recent prior rulings.

IV. Theodule's Assertion Of The Fifth Amendment

When the Receiver deposed him on April 9, 2009, Theodule invoked his Fifth Amendment privilege against self-incrimination 165 times. He did this in response to virtually every substantive question the Receiver asked him. Exhibit 1 (deposition transcript of George Theodule) at 19, 20, 21, 22, 23, 25, 32, 33, 41, 42, 53, 54, 55, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 84, 87, 88, 94, 95, 98, 99, 100, 101, 102, 103, 104, 108, 109, 110, 122, 124, 125, 127, 128, 135, 152, 164, 165, 166, 167, 168, 169, 170. Specifically, Theodule took the Fifth Amendment when asked about:

- His net worth and sources of income (including outside Creative Capital). Exhibit 1, at 22, 124-25.
- His employment history and his experience with investments, commercial property development, and general professional experience. Exhibit 1, at 19-23.
- Creative Capital Consortium's organization, operations, and control over investment clubs. Exhibit 1, at 21-22, 109-110.
- His solicitation of investors. Exhibit 1, at 19-23.
- The vast amounts of investors' money he diverted for personal use or lost through Creative Capital Consortium. Exhibit 1, at 57-84, 109-110, 127-128, 167.

As a result of Theodule's refusal to testify at his deposition, the Court should draw the adverse inference that had he done so, his testimony would have been adverse to his position. A court may draw an adverse inference against parties to civil actions when they refuse to testify in response to probative evidence offered against them. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Accordingly, courts routinely draw adverse inferences against parties who do not testify. *United States v. A Single Family Residence*, 803 F.2d 625, 629 n.4 (11th Cir. 1986) (trial court properly drew adverse inference from corporate representative's refusal to testify that testimony would not have been favorable to corporation's position); *SEC v. Cherif*, 933 F.2d 403, 412 (7th Cir. 1991) (affirming preliminary injunction where court took adverse inference from assertion of Fifth Amendment); *BankAtlantic v. Coast to Coast Contractors, Inc.*, 22 F. Supp. 2d 1354, 1359 (S.D. Fla. 1998) (granting summary judgment where defendant's mere denials insufficient to overcome evidence, including adverse inference drawn from invocation of Fifth Amendment).

Because of Theodule's refusal to testify, on the topics listed above, the Court should draw the adverse inference that Theodule: (1) had no sources of income outside of funds he diverted from Creative Capital Consortium investors; (2) overstated his past professional experience

when soliciting investors; (3) controlled the investment clubs along with his associates; (4) made specific guarantees of investment success; and (5) took investor money for his own use.

V. The Evidence Belies Theodule's Claim He Lacked Scienter.

To prove a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, the Commission must show: (i) a misrepresentation or omission (ii) that is material (iii) in connection with the purchase or sale of a security (iv) made with scienter (v) during the use of interstate commerce. *SEC v. Kirkland*, 521 F. Supp. 2d 1281, 1297 (M.D. Fla. 2007). Here, Theodule's entire case for summary judgment challenges only one element: scienter. Courts have defined scienter as a state of mind embracing intent to deceive, manipulate, or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). The Eleventh Circuit has concluded scienter may be established by a showing of knowing misconduct or severe recklessness. *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322-24 (11th Cir. 1982). The Eleventh Circuit has defined severe recklessness as involving "highly unreasonable omissions or misrepresentations . . . that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it. *McDonald v. Alan Bush Brokerage Co.*, 863 F.2d 809, 814 (11th Cir. 1989).

Theodule's sole basis for challenging scienter consists of his submission of 175 declarations in support of his motion for summary judgment. The declarations do not address whether Theodule promised to double the investor's money in ninety days, whether Theodule fully disclosed his past professional history, or whether investors were aware if Theodule or his affiliates took their money for their personal use. They instead contain vague descriptions of character: "I know George Theodule to be an honest person;" "I believe that Georges [sic]

Theodule Creative Capital Consortium, LLC managed my money to the best of his ability." D.E. 90-3 through D.E.90-19 (form declarations of 164 investors).

These declarations are inadmissible character evidence under Fed. R. Evid. 404(a). Evidence inadmissible at trial may not be used to support or defeat a summary judgment motion. *See McMillian v. Johnson*, 88 F.3d 1573, 1583-85 (11th Cir. 1996), *aff'd on other grounds*, 520 U.S. 781 (1997); *Pritchard v. S. Co.*, 92 F.3d 1130, 1135 (11th Cir. 1996). The Court should not consider these declarations in ruling on Theodule's motion.

Even if the Court deemed the declarations admissible, the Commission has the right to test these affidavits and conduct further discovery to determine the witnesses' credibility and knowledge. This is particularly important in this case, where the vast majority (164 of 175) of the declarations are "fill in the blank" forms. Indeed, Theodule's own sister testified the defense counsel asked her to sign a declaration outside the presence of her lawyer. Exhibit 3, at 101-03 (deposition transcript of Yolette T. Williams). Theodule's wife admitted she circulated affidavits to potential investors en masse with requests to sign. Exhibit 4, at 88-89 (deposition transcript of Dorothy Delisfort). Even more compelling is the fact that Theodule's own declarations reveal any number of investors who pointedly refused to declare Theodule a person of good character, intentions, or ability. D.E. 90-2 through 90-19 (form declarations of investors).[1]

Further, even if the declarations are admissible, the indirect statements therein cannot defeat the Commission's direct evidence of Theodule's scienter.

Theodule repeatedly and willfully made promises to investors that he knew or should have known were false, and even as he continued to lose more money, Theodule continued to

[1] *See* Declarations 3 (Juery Joseph); 6 (Woodwynn Fidele); 17 (Fenol Forestal); 20 (Francieuse F. Duclair); 23 (Ketlene Joseph); 25 (Elitane Joslin); 26 (Yolette Dort); 27 (Yronce Dieujoste); 30 (Jackues Janthier); 50 (Serena Tally-Davis); 51 (Marie Baptiste); 52 (Sandra Fovestal); 53 (Rose Bazile); 54 (Paul Antoine; 58 (Steve Barrette); 59 (Henoc Ulysse); 62 (Alex L. Lafond); 664 Louine Loukens); 69 (Kettia Tally); 80 (Dormil Gomez); 123 (Marjorie Janvier); 162 (Renette N. Ancene); and 163 (Emanise Ulysse).

make the same false promises to continue to lure in additional investors. These false promises are direct and powerful evidence of scienter.

The record is replete with the specific false promises Theodule made to investors.

> Question: How did you know he would double the money?
> Answer: He told me directly several times.
> Question: When did he first tell you that?
> Answer: He told me the first time I met him on the Saturday afternoon prior to the formal meeting we had in his room.
> Question: What did he say to you, as best you recall?
> Answer: That he can double money every 90 days. I said, "Okay. Let me see how you can do it."

D.E. 5-3 (investigative testimony of investor Berthrum Brewster), at 64.

> Question: So Mr. Theodule represented to Mr. Fontil's investment club that he could double their money in 90 days?
> Answer: That's correct.

Exhibit 2 (transcript of Show Cause Hearing), at 31 (testimony of Florida Office of Financial Regulation financial investigator Neptime Dieujuste).

> Question: In discussing investing with Mr. Theodule, what did he tell you about risk of loss of any of your investment?
> Answer: Well, from my understanding, after 90 days -- your initial investment, you could never lose it after 90 days.

Exhibit 2, at 61 (testimony of investor William Sabarese). Investors cited Theodule's promises as the reason they decided to invest with him. D.E. 5-4 (declaration of investor William P. Sabarese), at 1-2 ("Theodule told me that we were guaranteed never to lose our initial investment after 90 days. . . . Based on what Theodule told me about his investment program, I decided to invest $1,000."); D.E. 5-6 (declaration of investor Evelyn Metellus), at 2 ("I decided to invest with Creative Capital based on Theodule's promises of high returns and no risk to my investment."); D.E. 5-8 (declaration of investor Collin Whitehall), at 2.

Theodule promised to double investors' money in ninety days by investing it in the stock market, and he told investors there was no risk to the money they invested with him. Theodule knew this was a lie. As his own motion notes, the truth was Theodule lost 97% of the money he invested in the market; Theodule never made a net profit. D.E. 5-2 (declaration of SEC accountant Kathleen E. Strandell), at 2-3; D.E. 5-3, at 52, 62-64; D.E. 5-4, at 1; D.E. 5-6 at 1; D.E. 5-8, at 1; D.E. 5-9 (declaration of Florida Office of Financial Regulation financial investigator Neptime Dieujuste), at 1, 5; D.E. 21, at 5. Theodule's lie that that he could double investors' money in ninety days is direct evidence of scienter.

Theodule told investors there was no risk to the money they invested with him. Theodule knew this was a lie. The truth was Theodule misappropriated $3.8 million to his personal use, making massive counter withdrawals from Creative Capital accounts and funneling money and property to himself and his associates that he knew belonged to Creative Capital Consortium. Exhibit 1-4, Exhibit 1-5. Theodule transferred at least $1.7 million to his personal bank accounts; withdrew at least $1.5 million in cash; and spent $600,000 for apparent personal expenses including two luxury vehicles, credit card bills, a wedding payment, and a house down payment. D.E. 5-2, at 2-3; D.E. 5-4, at 4; D.E. 5-6, at 3; D.E. 5-8, at 4; D.E. 5-10 (declaration of investor Carola Timothee), at 5. He also bought his sister a condominium. Exhibit 3, at 25-26.[2] Theodule's lie that that he did not place investor funds at risk is direct evidence of scienter.

Theodule told investors that an entity titled the Smart Investment Management Services, LLC ("SIMS"), protected his investors by independently verifying their deposits. Theodule knew this was a lie. The truth was SIMS was not a regulatory entity. SIMS was a private company run by a former Creative Capital employee, Kathryn Parker. D.E. 5-2, at 4; D.E. 5-3,

[2] Theodule failed to document any legitimate source of income on his court-ordered accounting which could support these grand purchases. D.E. 20, D.E. 47.

at 36-42; D.E. 5-8, at 2-3. Theodule's lie that SIMS protected investor funds is direct evidence of scienter.

Theodule told investors he was an experienced and savvy businessman to whom they could entrust their money. Theodule knew this was a lie. The truth was Theodule was an inexperienced and fraudulent operator who controlled a vast Ponzi scheme, using the funds of newer investors to "repay" earlier investors. At least $15.2 million of newer investor funds were used to repay earlier investors to fraudulently depict a successful investment strategy where none in fact existed. D.E. 5-2, at 2-3. Theodule's lies about his professional background and the actual operations of Creative Capital Consortium are direct evidence of scienter.

The evidence shows that Theodule knew or was severely reckless in not knowing he made material misrepresentations in operating a fraudulent Ponzi scheme. In the face of the facts demonstrating Theodule's scienter in lying about a ninety day guarantee to double investor funds, misappropriation of investor funds, the security of investor funds, and his professional background, Theodule's assertion that the SEC "has no evidence … or hope of establishing" scienter is wrong as a matter of fact and a matter of law. *See SEC v. Utsick*, 2009 WL 1404726 (S.D. Fla. May 19, 2009) (scienter established in Ponzi scheme case where defendant falsely promised inflated returns, commingled and misappropriated investor funds, and lost massive amounts of funds); *Gustin v. Hoffman*, 2009 WL 604957, at *4 (M.D. Fla. Mar. 9, 2009) (scienter established in Ponzi scheme case where defendants who "could not deliver on the promises they made to their investors" showed intent to deceive); *SEC v. Lauer*, 2008 WL 4372896, at *23 (S.D. Fla. Sept. 24, 2008) (scienter established in 10(b) case where defendant knew or was extremely reckless in not knowing of "pattern of deception" in making false promises to investors, using associates to perpetuate scheme). Theodule's motion for summary

judgment, which wholly depends on the false premise that the Commission has not and cannot prove the essential element of scienter, should be denied.

VI. Theodule's Motion is Procedurally Premature.

Summary judgment motions are highly disfavored when, as here, they come before the parties have had the opportunity to engage in meaningful discovery. *WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988). In the interests of both fairness and a full record upon which a court could make a meaningful decision, summary judgment should not "ordinarily be granted before discovery has been completed." *Snook v. Trust Co. of Ga. Bank of Savannah*, 859 F.2d 865, 870 (11th Cir. 1988). "The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits." *Id.*

The fact that discovery has only just commenced underscores the importance of the Court's initial findings in this case that the Commission had demonstrated a *prima facie* case that Theodule had violated the securities laws. Theodule points to no admissible evidence gleaned since the Court's initial two orders that would disturb these findings against him. Indeed, the weight of the evidence garnered since the Court's evidence has been in the Commission's favor. Theodule's motion is premature and should be denied.

VII. Conclusion

This Court has already ruled the Commission has made a *prima facie* case that Theodule violated the federal securities laws. The evidence obtained since the Court's rulings further supports the Court's initial determination: numerous witnesses and documents show a path of deceit and fraud leading directly to Theodule, and Theodule invoked the Fifth Amendment 165

times when the Receiver deposed him about any substantive question. Theodule cannot overcome the evidence against him by submitting inadmissible general character evidence declarations, and by asking this Court to make credibility determinations at the summary judgment stage. This Court should deny Theodule's premature and deficient motion for summary judgment.

Respectfully submitted,

May 22, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 22, 2009, 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 on this day on all counsel of record or pro se parties identified on the attached 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.

s/Rachel K. Paulose
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SERVICE LIST

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United States District Court, Southern District of Florida

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