

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

Case No. 09-81225-CIV-HURLEY/HOPKINS

**JONATHAN E. PERLMAN, ESQ., as court
appointed Receiver for Creative Capital
Consortium, LLC, et. al.,**

Plaintiff,

vs.

**FIVE CORNERS INVESTORS I, LLC, FIVE
CORNERS INVESTORS II, LLC, CFD-
REGENCY I, LLC, CFD-REGENCY II, LLC,
and BW ASPIRE, LLC,**

Defendants.

**MOTION OF DEFENDANTS, FIVE CORNERS INVESTORS I, LLC, FIVE CORNERS
INVESTORS II, LLC, AND BW ASPIRE, LLC, TO STAY THIS ACTION PENDING
RESOLUTION OF RELATED LITIGATION AND DEFENDANTS' MOTION TO
DISMISS, AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendants, FIVE CORNERS INVESTORS I, LLC, FIVE CORNERS INVESTORS II, LLC and BW ASPIRE, LLC (together called "Defendants"), by and through their undersigned attorneys, move this Court to stay the prosecution and defense of this action until the conclusion of Case No. 09-81224 (the "Dolce Regency Lawsuit"), or in the alternative, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, to enter an order staying this case pending a ruling upon Defendants' Motion to Dismiss, and in support thereof would state as follows:

REVIEW OF PROCEDURAL HISTORY, ALLEGATIONS AND RELIEF SOUGHT

1. Defendants filed a *Motion to Dismiss Complaint and Memorandum of Law in Support Thereof* (D.E. #4) (the “Motion to Dismiss”). On October 8, 2009, the Court entered an *Order Setting Trial Date & Discovery Deadlines, Referring Case to Mediation & Referring Discovery to United States Magistrate Judge* (D.E. #7) (the “Discovery Order”), which scheduled a trial for the trial period beginning Tuesday, October 5, 2010. The Court has not yet ruled on the Motion to Dismiss.

2. Plaintiff is the receiver for Creative Capital Consortium, LLC (“Creative Capital”). See ¶8.¹ Plaintiff alleges that prior to his appointment as receiver, George Theodule (“Theodule”) was the principal of Creative Capital, and used Creative Capital to acquire more than \$60 Million from investors in connection with a Ponzi scheme. See ¶¶ 14–48.

3. Plaintiff alleges that Creative Capital is the owner of a company by the name of Dolce Regency, LLC (“Dolce Regency”). See ¶¶ 51–52. Plaintiff alleges that Dolce Regency purchased the membership interests of Defendants in Regency Suites I, LLC (“Regency Suites”), and a 325 unit residential and hotel condominium then under construction (“Regency Property”) which was owned by Regency Suites. See ¶54. The aforesaid acquisition by Dolce Regency is called the “Transaction.”

4. Plaintiff alleges that Theodule transferred \$7,000,000.00 of money belonging to Creative Capital to Dolce Regency, which was then used to pay obligations of Regency Suites in connection with the closing of the Transaction. See ¶ 57–59. Plaintiff alleges that the transfer by Creative Capital to Dolce Regency was a fraudulent transfer, and that Defendants are liable for

¹ All paragraph references are to Plaintiff’s Complaint.

that transfer on the theory that they were “subsequent transferees” of the initial transferee, Dolce Regency. See Count 1.

5. Plaintiff sued Dolce Regency in a separate action pending before this Court (Case No. 09-81224-CIV-HURLEY/HOPKINS). In that case, Plaintiff seeks to recover an alleged fraudulent transfer to Dolce Regency, alleging that the \$7,000,000.00 which was transferred to Dolce Regency was Creative Capital’s money. See Complaint in Dolce Regency Lawsuit.

6. An attorney, Bradford A. Patrick, has made an appearance in that action, and has defended the matter on behalf of Dolce Regency. Dolce Regency’s position is that neither Theodule nor Creative Capital own any interest in Dolce Regency, and that the \$7,000,000.00 which Plaintiff seeks to recover for the benefit of the receivership estate was not provided by Creative Capital or by Theodule, but was instead provided by the principal of Dolce Regency, German Cardona Soler (“Cardona”). (See Dolce Regency Suites, LLC Opposition to Receiver's Second Verified Motion to Expand Receivership and Memorandum of Law, document no. 52 in Case No. 08-81565-CIV-HURLEY/HOPKINS, called the “Dolce Regency Response”). The Plaintiff initially sought to expand the receivership estate so that it included Dolce Regency, but withdrew his motion when it became apparent that Mr. Cardona claimed ownership of Dolce Regency. (See document no. 154 in the main receivership action, Case No. 08-81565-CIV-HURLEY/HOPKINS).

**ACTION AGAINST DEFENDANTS SHOULD BE STAYED UNTIL THE
CONCLUSION OF THE DOLCE REGENCY LAWSUIT (Case No. 09-81224)**

7. The Affidavit of Dolce Regency’s attorney, Gabrielle Alexis, filed with the Dolce Regency Response, document no. 52-1 in the main receivership action and attached hereto as Exhibit “A,” shows that the \$7,000,000.00 was part of \$11,000,000 that came from Mr. Cardona, rather than Creative Capital. (See the attached Affidavit of Gabrielle Alexis, Esq.). The Plaintiff

has as not yet produced any evidence that the money came from Creative Capital or Theodule, as he alleges in his Complaint. Plaintiff's proof of that allegation is an essential part of his cause of action against Defendants in this case, because it is Plaintiff's contention that Theodule fraudulently transferred the money to Dolce Regency, and that Defendants are liable because they allegedly received a subsequent transfer or benefit from that alleged transfer by Theodule to Dolce Regency.

8. The issue of whether the \$7,000,000.00 came from Creative Capital, or instead from Cardona (and if it came from Creative Capital, whether it was a fraudulent transfer), is one which must be litigated in the Dolce Regency Lawsuit. Obviously, that is an issue which Plaintiff and Dolce Regency are in a better position to litigate than Defendants, since Defendants were not a party to that transfer. Moreover, if that issue is not litigated in the Dolce Regency Lawsuit before this lawsuit proceeds to trial, then there is a danger of inconsistent verdicts.

9. Plaintiff's initial disclosures include a potential witness list of twenty three (23) specifically named individuals, several classes of individuals, and a huge volume of relevant documentary evidence in this case. See Plaintiff's Initial Disclosures (D.E. # 19). Plaintiff has advised Defendants that the "documentation with respect to the Rule 26 disclosures is extremely voluminous, involving records of the Receivership Entities as well [sic] over 100 investment clubs and their bank statements, operations, members, etc.," and that it will be necessary for Defendants' counsel to examine the evidence in Plaintiff's offices. In addition, Plaintiff has indicated that it has not yet decided who its expert witnesses will be.

10. Significant, expensive, and burdensome discovery efforts will be required to prepare this matter for trial. However, such efforts may be moot if Plaintiff does not prevail

against Dolce Regency in the Dolce Regency Lawsuit, as the issues in the Dolce Regency Lawsuit are requisites to the Plaintiff's recovery against Defendants in this case.

11. Accordingly, Defendants would request that the Court stay this action until resolution of the Dolce Regency Lawsuit.

12. Additionally, the Court has not yet ruled on the Motion to Dismiss.

13. The case law firmly establishes that the trial court should rule on pending motions to dismiss before requiring discovery to proceed. Accordingly, Defendants respectfully request that this Court enter an order staying this action pending a ruling on the Motion to Dismiss.

MEMORANDUM OF LAW

In *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997), the Eleventh Circuit Court of Appeal held that the lower court abused its discretion where it entered a default against the Defendant for failure to comply with a court order compelling discovery. The Eleventh Circuit reasoned that the lower court's "failure to consider and rule on significant pretrial motions before issuing dispositive orders can be an abuse of discretion." *Id.* at 1367. More particularly, the Court stated "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should, however, be resolved before discovery begins. Such a dispute always presents a purely legal question." *Ibid.* Additionally, because the pertinent issues in a motion to dismiss involve no factual matters, "neither the parties nor the court have any need for discovery before the court rules on the motion." *Ibid.*

The Motion to Dismiss filed by Defendants establishes that the Plaintiff's Complaint fails to state a cause of action, and thus should be dismissed in its entirety. Pursuant to the binding

precedent of *Chudasama*, Defendants' Motion to Dismiss broaches "purely legal questions" and should "be resolved before discovery begins."

In the case at bar, Plaintiff's initial disclosures include a list of twenty three (23) specifically named individuals and several classes of people (i.e. past or present employees, partners, etc. of the Defendants, Creative Capital Entities or the Receivership entities) that are likely to have discoverable information. Additionally, Plaintiff's disclosures list approximately sixty-one (61) individuals or entities which may possess documents containing discoverable information. See Plaintiff's Initial Disclosures (D.E. # 19). Further, as the case against Defendants is related to, and dependant upon, the SEC Receivership Action and the Dolce Regency Lawsuit, and has some overlap with other ancillary actions, a review of the testimony and transcripts from those actions will also be necessary.

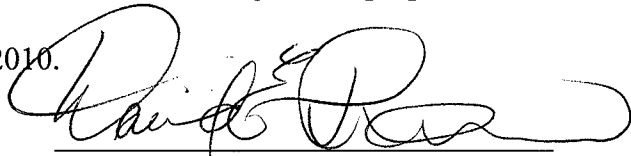
Without reciting in great detail the contents of Defendants' Motion to Dismiss, said motion clearly outlines that the entire Complaint should be dismissed because Plaintiff failed to allege that Defendants participated in *any* fraud or received *any* transfer of fraudulent money. Rather, the sole allegation made against Defendants is that when Defendants sold their interests in Regency Suites to Dolce Regency, money that Theodule misappropriated from Creative Capital was allegedly used to pay expenses of Regency Suites. However, paying the expenses of Regency Suites would not benefit Defendants, as the *prior* owner, in any way. Rather, those payments would benefit the new owners of Regency Suites. Thus, as a matter of law, no cause of action arises against Defendants pursuant to Chapter 726, Florida Statutes, and the matter should be stayed pending disposition of the Motion to Dismiss.

Additionally, Defendants do hereby certify that they have, in good faith, conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court

action. On or about February 22, 2010 counsel for Defendants sent a letter to Plaintiff's counsel requesting Plaintiff's consent to this Motion. However, no response was received.

WHEREFORE, Defendants, FIVE CORNERS INVESTORS I, LLC, FIVE CORNERS INVESTORS II, LLC and BW ASPIRE, LLC, respectfully request that the Court enter an appropriate order staying this action pending a decision in the Dolce Regency Lawsuit, or in the alternative, staying this action pending a ruling upon said Defendants' Motion to Dismiss, together with such other and further relief as this Court deems just and proper.

DATED this 4 day of March 2010.



Michael V. Elsberry

Florida Bar No.: 0191861

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David E. Peterson

Florida Bar No.: 0373230

david.peterson@lowndes-law.com

Lowndes, Drosdick, Doster, Kantor & Reed, P.A.

215 North Eola Drive

Post Office Box 2809

Orlando, Florida 32802

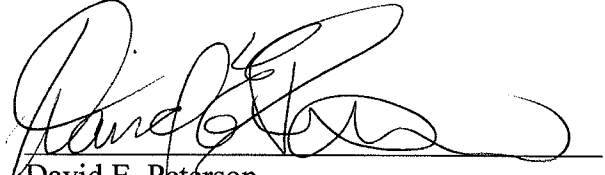
Telephone: (407) 843-4600

Telecopier: (407) 843-4444

*Attorneys for Defendants Investors I, LLC,
and Defendants Investors II, LLC, and BW
Aspire, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that the foregoing document is being served on all counsel of record or pro se parties as listed on the attached service list below, via transmission of Notices of Electronic Filing generated by CM/ECF.



David E. Peterson

SERVICE LIST

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PLAM 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.

_____ /

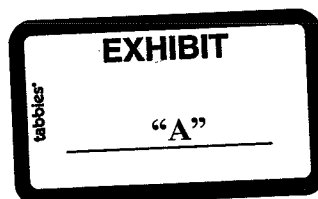
AFFIDAVIT OF GABRIELLE ALEXIS, ESQ.

STATE OF FLORIDA

COUNTY OF PALM BEACH

BEFORE ME, the undersigned authority, personally appeared GABRIELLE ALEXIS, ESQ., who, after being first duly sworn, deposes and says:

1. I am a member in good standing of the Florida Bar Association.
2. I represent Dolce Regency Suites, LLC, originally named Dolce Regency, LLC. The initial corporate filing to create the entity was made in May, 2008. Copies of the Dolce Regency, LLC and Dolce Regency Suites, LLC initial documents are attached to the Receiver's Motion.
3. In June, 2008, both Pacific Atlantic Investment, LLC, of which German Cardona is a MGR and George Theodule, individually, entered into an Operating Agreement.



4. I personally had telephonic communication with both Mr. Theodule and Mr. German Cardona about this entity and its plans for purchase of a membership interest in the Regency Suites development project in Orlando, FL.

5. I opened an IOLTA account with Wachovia Bank on the afternoon of June 16, 2008. The account owner is indicated as "LAW OFFICES OF GABRIELLE ALEXIS PA".

6. I opened the account because I anticipated a wire transfer from Mr. German Cardona in the amount of Eleven Million Dollars (USD\$11,000,000) to fund acquisition of membership interests in the Regency Suites projects in Orlando, Florida, as called for in the Operating Agreement for Dolce Regency Suites, LLC.

7. Because the account was intended to be used for acquisition of the full membership interest in the Regency Suites projects in Orlando, Florida, I included the designation "REAL ESTATE TRANSACTIONS" on the description of the account.

8. I did not receive the wire transfer as I expected on June 17, 2008, and sent email to Mr. Cardona accordingly on June, 17, and received a message from him on June 18, 2008. True and correct copies of those emails are attached as Composite Exhibit B.

9. The account records from Wachovia Bank indicate that the funds (USD\$11,000,000) received on June 23, 2008, were from Wells Fargo Bank, and originated with Crowne Gold, Inc. I understood this wire transfer to be initiated by Mr. German Cardona on behalf of Pacific Atlantic Investments, LLC.

10. Once the funds were received, the corporate documents for Dolce Regency, LLC were adjusted to reflect the name change to Dolce Regency Suites, LLC

and to add Mr. Cardona's company, Pacific Atlantic Investment, LLC as a MGR. The paperwork was filed with the State of Florida on or about July 23, 2008.

11. On August 13, 2008, I initiated a wire transfer in the amount of Seven Million Dollars (\$7,000,000) to the law firm of Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A. to act as escrow agent for the closing on the purchase of the membership interest in Regency Suites I, LLC.

12. The transaction closed out of escrow in September, 2008, and has been operating independently since that time.

13. Dolce Regency Suites, LLC is in no way engaged in any attempt to defraud, or used for any improper purpose, such as defrauding creditors, evading obligations, circumventing a statute, achieving or perpetuating a monopoly, or furthering criminal enterprises. To the contrary, it is a company engaged in legitimate business.

14. Dolce Regency Suites, LLC is simply not an alter ego of Creative Capital.

<SIGNATURE AND JURAT FOLLOW ON NEXT PAGE>

Gabrielle Alexis
Gabrielle Alexis

STATE OF FLORIDA
COUNTY OF PALM BEACH

Sworn to and subscribed before me this 15th day of February, 2009, by Gabrielle Alexis, who is personally known to me or who produced as verification of identity.

[SEAL]

Sandra Ducheine Baker
Notary public: Signature
Sandra Ducheine Baker
Notary's name: Type/print

Commission/serial number

6/5/2011
My commission expires





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From: "Law Offices of Gabrielle Alexis" <alexislaw@bellsouth.net>
To: German Cardona <gcardona2020@Gmail.com>
Cc: Theodule George <georgetheodule@yahoo.com>,
Subject: Wire for Regency hotel
Date: Monday, June 16, 2008 3:51:53 PM

Dear Mr. Cardona

As a follow up to our conversation, here is the bank information for the wire. Wachovia Bank, ABA # 063000021, Account No. 2000029402027 to the order of the Law Offices of Gabrielle Alexis, P.A.

As requested, find below my contact information. Please feel free to contact the undersigned if you have any questions.

Very truly yours,

--

Gabrielle Alexis, Esq.
Law Offices of Gabrielle Alexis
1325 Congress Avenue
Suite 100
Boynton Beach, FL 33426
561-375-8866 Phone
561-375-8990 Fax



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From: "Law Offices of Gabrielle Alexis" <alexislaw@bellsouth.net>
To: Cardona German <gcardona2020@Gmail.com>,
Cc: Theodore George <georgetheodule@yahoo.com>,
Subject: Wire for Regency
Date: Tuesday, June 17, 2008 2:18:29 PM

Dear Mr. Cardona

I have been expecting your wire; however, my bank has stated that it has not been received. Has the wire been sent yet? If yes, is it coming from the States and do you have confirmation? Please feel free to contact the undersigned with any questions that you may have.

Very truly yours,

--

Gabrielle Alexis, Esq.
Law Offices of Gabrielle Alexis
1325 Congress Avenue
Suite 100
Boynton Beach, FL 33426
561-375-8866 Phone
561-375-8990 Fax



[Print] [Close]

From: "Law Offices of Gabrielle Alexis" <alexislaw@bellsouth.net>
To: "German Cardona" <gcardona2020@gmail.com>
Cc: Theodule George <georgetheodule@yahoo.com>
Subject: Wire not received
Date: Wednesday, June 18, 2008 5:44:42 PM

Dear Mr. Cardona

Thank you for your email; however, my financial institution has not yet received the wire. I will check on it again tomorrow morning and hopefully, I would have received it by then.

Best regards,

Gabrielle

--
Law Offices of Gabrielle Alexis
1325 Congress Avenue
Suite 100
Boynton Beach, FL 33426
561-375-8866 Phone
561-375-8990 Fax

----- Original message from "German Cardona" <gcardona2020@gmail.com>: -

Hola Gabrielle,
La tranferencia esta ordenada al Banco, espero que le llegue lo mas rapido posible.

Saludos,
German

2008/6/17 Law Offices of Gabrielle Alexis <alexislaw@bellsouth.net>:

Dear Mr. Cardona

I have been expecting your wire; however, my bank has stated that it has not been received. Has the wire been sent yet? If yes, is it coming from the States and do you have confirmation? Please feel free to contact the undersigned with any questions that you may have.

Very truly yours,

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Saludos,

Germán Cardona
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+ 50766703130

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