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

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

Plaintiffs,

CASE NO.: 12-cv-80486-DMM

v.

REGENCY REALTY GROUP, INC.,

Defendant.

REGENCY REALTY GROUP, INC.'S RESPONSE IN OPPOSITION TO RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT[1]

Defendant Regency Realty Group, Inc. ("Regency Realty"), opposes the Plaintiff Receiver, Jonathan E. Perlman's (the "Receiver" or "Plaintiff"), Motion for Partial Summary Judgment (the "Motion"; Dkt. # 40). Regency Realty submits that the Receiver's Motion should be denied and Regency Realty's own Motion for Summary Judgment (Dkt # 38) should be granted because upon the uncontroverted record evidence and the applicable law, (a) the Receiver's previous settlement and release of prior transferees bars the Receiver's claims against Regency Realty, a subsequent transferee, (b) the subject transfers were simply payments on a longstanding pre-existing mortgage for which Regency Realty plainly gave value, (c) the subject funds were not from the Receivership Entities (as defined at Page 1, footnote 1 of the Motion), but instead came from a third party, Mr. German Cardona and his company, Pacific Atlantic Investments, LLC, and (d) there is no competent evidence that the mortgage payments to

[1] Pursuant to Local Rules 56.1 and 7.1, Regency Realty's Response to the Receiver's Statement of Material Facts (pages 3-9) does not exceed 10 pages and the Response and Memorandum of Law (pages 1-2, 9-28) does not exceed 20 pages. However, for ease of reference Regency Realty has incorporated its Response to the Receiver's Statement of Material Facts into its Response in Opposition to Receiver's Motion for Partial Summary Judgment.

Regency Realty had anything to do with the alleged Ponzi scheme, much less were "in furtherance" of the scheme.

Further, while the Receiver in his motion has recited ad nauseum to the SEC proceedings and general allegations related to the Ponzi scheme, *see* Pages 1-14, these recitations are largely irrelevant to the specific pending claims against Regency Realty. To adjudicate Plaintiff's Motion, the Court's analysis must focus upon the specific claims against Regency Realty and, as the Receiver in his motion at Page 2 concedes, whether "there are no material facts in dispute concerning the Receiver's allegations that [i] the fraudulent transfers at issue in this case were made by the Receivership Entities [and (ii)] in furtherance of the Ponzi scheme." (bracketed material and underline added). On these critical issues, the uncontroverted record evidence -- as well as the Receiver's own pleadings in this case and another ancillary case -- establish that the funds which were used to pay Regency Realty's mortgage were not from the Receivership Entities, but instead came from a third party, Mr. Cardona, were not related to the Ponzi scheme, and certainly not "in furtherance" of the scheme. For these reasons, all as more fully addressed below, Regency Realty submits that Regency Realty's motion for summary judgment should be granted, [2] and that the Receiver's Motion should be denied.

[2] To avoid repetition, Regency Realty does not restate the additional arguments stated in its motion for summary judgment, but instead simply incorporates therein by reference.

I. STATEMENT OF MATERIAL FACTS

In the interest of brevity, Regency Realty incorporates by reference its own Statement of Material Facts (Dkt. #38, pp. 3-11) as if set forth fully herein. Pursuant to Local Rule 56.1, Regency Realty further files this Statement of Material Facts in opposition to Plaintiff's Motion for Partial Summary Judgment and states:[3]

1 – 46. The Receiver's contentions regarding the alleged existence of a Ponzi scheme are not supported by evidence admissible against Regency Realty. These contentions rely nearly exclusively upon pleadings, depositions, and other discovery from disparate cases to which Regency Realty is not and has never been a party, and which Regency Realty has accordingly not been given the opportunity to confront or test. If the Receiver desires to attempt to prove the existence of a Ponzi scheme in this case he bears the burden of adducing evidence -- in a form that would be admissible *against Regency Realty in this proceeding* -- by, for example: noticing the deposition of witnesses on whose testimony or alleged admissions he intends to rely; adducing testimony and evidence to support his contentions; and providing Regency Realty with the opportunity to cross-examine such witnesses. To date, he has wholly failed to do so.

47. The Receiver's statement is not accurate nor supported by admissible evidence. Exhibit 19 states that in August 2008, Mr. Theodule stated that he "had bought two hotels in Orlando" (underlining added). This would be prior in time to the mortgage payments to Regency Realty; also, the Regency Suites I transaction did not involve two hotels. Similarly, Exhibit 20 refers only to the purchase of an unidentified hotel in Orlando, also in August. Nowhere do the cited affidavits state that Theodule planned to use CCC investor funds to purchase real property investments generally as alleged. Further, all statements in the affidavits alleged to have been

[3] The Affidavits, Depositions, and Discovery referenced herein are attached as exhibits to and incorporated in Regency Realty Group, Inc.'s Motion for Summary Final Judgment and Memorandum of Law in Support Thereof.

made by Theodule are pure hearsay and would not be admissible in evidence. Accordingly, the affidavits do not properly support this statement. *See* Fed. R. Civ. P. 56(c)(4).

48. There is no support for this statement. The affidavit of Gabrielle Alexis establishes that she represented Dolce Regency Suites, LLC, originally named Dolce Regency, LLC -- not Creative Capital -- in the purchase of the membership interests in Regency Suites I, LLC. Dkt. # 38, Ex. 3 at ¶ 3. Further, this statement is in direct contradiction to the Receiver's allegations -- upon which he obtained a judgment -- in his action against Gabrielle Alexis and that he is now estopped from changing that "[i]n the fall of 2008, ALEXIS and [her law firm], in breach of their duties owed to Creative Capital, undertook the representation of a limited liability company, Dolce Regency," (Paragraph 39) and that Ms. Alexis was "expressly disclosed . . . as counsel for Dolce Regency in regard to the transactions that were the subject of the Dolce Agreement, " (Paragraph 59). Receiver's Second Amended Complaint, *Perlman v. Alexis*, Case No. 09-20865-CIV, Dkt. 17 (S.D.Fla. Oct. 9, 2009). Also, there is no cited evidence to support the statement that the retainer agreement was for the subject transaction, or "in keeping with CCC's purported real estate investment strategy"; this is simply unsupported argument by the Receiver. Finally, this statement is not supported by admissible evidence as the Receiver has not offered anything to authenticate, identify, or establish the relevance of the document upon which he purports to rely.

49. This statement is pure argument and is unsupported by any admissible evidence. As discussed above, Exhibits 19 and 20 only state that Mr. Theodule allegedly stated that he had bought one or two hotels in August 2008, and say nothing about the "purchase of a stalled uncompleted real estate development in Orlando, Florida which had been approved for a mixed use residential and hotel use units located on Regency Suites Drive," as plainly

embellished by the Receiver. Further, the affidavits make no mention of any investors travelling to view the property with Theodule as alleged by the Receiver. Dkt. # 40, Ex. 19 at ¶6 and Dkt. # 40, Ex. 20 at ¶¶6-7. In addition, the cited affidavits constitute inadmissible rank double-hearsay statements allegedly uttered by George Theodule. *See* Fed. R. Civ. P. 56(c)(4).

50. This statement is pure argument and is unsupported by any admissible evidence. The only cited documentation is a record of the Florida Division of Corporations that makes no mention of Creative Capital. Thus the Receiver's statement that Dolce Regency was founded by George Theodule, "in his capacity as the controlling principal of CCC" consists of nothing more than argument and is not supported by any evidence whatsoever. Further, the evidence adduced to date establishes that Dolce Regency was formed by George Theodule in his individual capacity, and that in conjunction with Mr. Cardona's wire transfer of the $11 Million, the Dolce Regency operating agreement was amended to make Mr. Cardona's company a manager member. Dkt. # 38, Ex. 5 at ¶3; Dkt. # 38, Ex. 4 at ¶3; Dkt. # 38, Ex. 6 at ¶3; Dkt. # 38, Ex. 7 at ¶4.

51. These statement again consist of pure argument unsupported by any admissible evidence. The Receiver cites solely to a Wachovia New Account Record, Dkt. # 40, Ex. 17. This bank document, which itself is not authenticated in any way, simply reflects the creation of a trust account titled "Real Estate Transactions"; it does not evidence that the account was created "in further contemplation of the above referenced real estate purchases and as an adjunct to the Retainer Agreement," or that it was "a CCC client trust account in order to process CCC's funding of its anticipated real estate transactions (the 'Creative Capital Trust Account')," both of which are simply unsupported argument which the Receiver alone promotes from a bank record that says none of this. Further, the uncontroverted evidence adduced to date establishes

instead that Gabrielle Alexis opened this trust account for Dolce Regency in anticipation of German Cardona's funding of the purchase of Regency Suites I. Dkt. # 38, Ex. 4 at ¶¶5-6.

52. Again, this statement consists solely of argument unsupported by any admissible evidence. In support of his characterization that George Theodule "caused" the transactions and that the funds "belong[ed] to CCC investors" the Receiver again cites only to the Wachovia Bank Statement. Dkt. # 40, Ex. 18. Again, however, the bank statements do not evidence that these were "CCC funds," but instead simply reflect the existence of the trust account entitled "Real Estate Transactions" and confirms that $11 million dollars was wire transferred into the account from Mr. Cardona's Crowne Gold Account. The uncontroverted evidence adduced to date establishes that the wire transfer of $11,000,000 from Wells Fargo Bank originated from Mr. Cardona's accounts with Crowne Gold, Inc. and was received into Ms. Alexis's trust account as called for by the operating agreement. Dkt. # 38, Ex. 4 at ¶9 ; Dkt. # 38, Ex. 5 at ¶¶6 and 8.

53. Following the $11 Million wire transfer of funds from Mr. Cardona to Ms. Alexis's IOLTA account, the corporate documents for Dolce Regency were amended to change the name to Dolce Regency Suites, LLC and to add Pacific Atlantic Investments, LLC, Mr. Cardona's company, as a manager of Dolce Regency as called for by the operating agreement. Dkt. # 38, Ex. 4 at ¶10; Dkt. # 38, Ex. 5 at ¶9. The only evidence cited to support the statement that Mr. Theodule retained an interest in, and remained a managing member of Dolce Regency is the Secretary of State's corporate records, which are hearsay and not admissible against Regency Realty.

54. Regency Realty agrees that a true copy of the Membership Interest Purchase and Sale Agreement, which speaks for itself, is attached.

55. Regency Realty agrees that a true copy of the Membership Interest Purchase and Sale Agreement, which speaks for itself, is attached. The Receiver's description of the transfer of $7 million dollars is pure argument unsupported by any admissible evidence. The Receiver contends that "CCC transferred Seven Million ($7,000,000) Dollars from the Creative Capital Trust Account to Dolce Regency via an escrow account established by the law offices of Dean, Mead, Egerton, Bloodworth, Capuano, and Bozarth, P.A, ('Dean Mead') which served as escrow agent for the sale of the Regency Property." In support of this contention, the Receiver again cites only to the Wachovia Bank Statement. Dkt. # 40, Ex. 18. As described above at ¶¶ 51 and 52, this bank record does not contain any support for the allegations that this was a Creative Capital account or that CCC transferred the seven million dollars. The uncontroverted record evidence on this point proves instead that Ms. Alexis initiated a transfer of $7,000,000 of the funds that Mr. Cardona had deposited into the Dolce Regency trust account from the Dolce Regency trust account to the escrow account of the law firm of Dean, Mead, Egerton, Bloodworth, Capouano & Boazarth, P.A. which was acting as escrow agent for the closing on the purchase of the membership interest in Regency Suites I, LLC. Dkt. # 38, Ex. 4 at ¶11; Dkt. # 38, Ex. 6 at ¶5; Dkt. # 38, Ex. 7 at ¶6. Further, the Receiver's wholly unsupported attempt to characterize this transaction as a transfer from CCC to Dolce Regency is in direct contradiction to the Receiver's allegation -- upon which he obtained a judgment -- in his action against Gabrielle Alexis, and that he is now estopped from changing, that the transfer from her trust account was not to Dolce Regency, but "to the *attorneys for the seller* under the Dolce Agreement". Second Amended Complaint, *Alexis*, Case No. 09-20865-CIV, Dkt. 17 at ¶61 (emphasis added).

56. As part of the loan modifications that Regency Realty agreed to with Regency Suites I, the Dean Mead law firm, as counsel for Regency Suites I, used a portion of the 7 million dollar Dolce Transfer to make certain payments to Regency Realty on behalf of Regency Suites I, as more specifically described in Paragraphs 10 – 40 of Regency Realty's Statement of Material Facts and the supporting evidence cited therein and attached thereto. *See* Dkt. #38, ¶¶ 10-40 and evidence cited therein; *see also* Complaint (Dkt. # 1), ¶¶38-39.

57. This statement is pure argument. Moreover, the citation to the Receiver's affidavit is a citation to further argument, not factual matters for which the Receiver has personal knowledge or otherwise the foundation to testify. As described above, and as more fully set forth herein, the Receiver has wholly failed to establish an evidentiary basis for any of the contentions set forth in his Statement of Material Facts and they remain mere argument unsupported by any admissible proof that would entitle the Receiver to the entry of partial summary judgment. *See* Fed. R. Civ. P. 56(c)(2). Specifically, the Receiver has failed to demonstrate any connection between Creative Capital and Dolce Regency, has offered no proof that Creative Capital or any Receivership Entity "caused" the transfers at issue, has offered no proof to rebut the uncontroverted record evidence that the funds at issue originated with German Cardona and were not the assets of Creative Capital or any Receivership Entity, has similarly offered no proof that the funds at issue were "illicitly obtained from the Ponzi scheme victims," and has wholly failed to support in any way his allegations that such transfers were made in connection with and in furtherance of a Ponzi scheme. Indeed Plaintiff's allegation that such transfers were made in connection with and in furtherance of the Ponzi scheme is supported *solely* by the conclusory statement in the Receiver's Affidavit making this allegation – which statement itself cites *no* evidence whatsoever from which this conclusion could be drawn, and in

no way describes how the transfers allegedly furthered the Ponzi scheme within the meaning of the applicable law. *See Kapila v. TD Bank, N.A.* (In re *Pearlman*), 440 B.R. 900, 905 (Bankr. M.D.Fla. 2010) (a plaintiff "must come forward with specific facts demonstrating how the transfers . . . were in furtherance of [a] Ponzi scheme."). Each such allegation made by the Receiver is nothing more than a conclusory argument that does not adequately support a motion for summary judgment.

II. ARGUMENT

1. The Receiver Has Failed To Satisfy His Burden on Summary Judgment That the Uncontroverted Evidence Establishes That the Transferred Funds were From the Receivership Entities and in Furtherance of the Ponzi Scheme.

"Summary judgment is authorized only when the moving party meets its burden of demonstrating . . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Corporate Fin., Inc. v. Principal Life Ins. Co.*, 461 F. Supp. 2d 1274, 1282-1283 (S.D. Fla. 2006); *see also* Fed. R. Civ. P. 56. "The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied[.]" *Id*. at 1283 (citing *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967)). In assessing whether the movant has met this burden, the Court must "view the evidence and all factual inferences in the light most favorable to the party opposing the motion." *Id*. As set forth below, the Receiver plainly has not carried his burden to satisfy this high standard.

A. The Record Evidence Establishes That the Funds Used to Pay Regency Realty's Mortgage Came From the $11 Million Wire Transfer by Mr. Cardona, and Not From the Receivership Entities.

Perhaps recognizing the critical failure in his proof, Plaintiff begins his arguments relating to the source of the funds by wholly misstating the showing required of a FUFTA plaintiff, and improperly attempting to lower his burden of proof in this matter. Plaintiff

contends that in order to void a transfer as fraudulent, he need only show that it is "plausible . . . that the funds transferred were in fact the property of the Receivership Entities." *See* Motion at pp. 25-26. Plaintiff apparently fails to note, however, that the case he cites for this absurd proposition involved the review of the allegations required to survive a motion to dismiss a Complaint -- not what evidence is required to prove a claim. *In re Pearlman*, 472 B.R. 115, 117 (Bankr. M.D.Fla. 2012). Indeed, the portion of the case cited by Plaintiff, when read in full, makes clear that this reference to "plausible" was related to the allegations required by a Plaintiff "*[i]n order to state a* fraudulent transfer *claim*," and results from the simple application of the *Twombly*/*Iqbal* plausibility test to the elements of a fraudulent transfer claim. *Id*. at 121 (emphasis added).

In contrast, to prevail on a fraudulent transfer claim, a plaintiff must as a fundamental element prove the transfer of the debtor's property, not just show that it is "plausible". *See In re Stewart*, 280 B.R. 268, 274 (Bankr. M.D.Fla. 2001) (holding that to prevail on a fraudulent transfer claim, the plaintiff must "prove[] the existence of a transfer of property of the Debtor"); *Nat'l Car Rental Sys. v. Bruce A. Ryals Enters.*, 380 So. 2d 529, 530 (Fla. 5th DCA 1980) (to recover fraudulently transferred property under Florida law a plaintiff "must prove that it is the property of the debtor which was fraudulently transferred"); *In re Damo Corp.*, 101 B.R. 810, 811 (Bankr. S.D.Fla. 1989) (under analogous provision of the Bankruptcy Code a plaintiff "must prove the transfer of an interest in the debtor's property"). In short, to prove his fraudulent transfer claim, the Receiver must adduce evidence that there was a transfer of the debtor's property, not just that his theory is "plausible." Here, as in *Stewart*, the Receiver "has not established the existence of any transfer of the Debtor's interest in property as required by . . . §726.105 of the Florida Statutes, " *Stewart*, 280 B.R. at 274, and his claims therefore fail.

As is more fully set forth in Argument 5 of Regency Realty's own Motion for Summary Judgment, the record evidence is that the transfers at issue did not involve funds obtained from the Receivership Entities. *See* Dkt. #38 at pp. 9-10, 26-28. Instead, the evidence -- from the affidavits of Ms. Gabrielle Alexis, Mr. German Cardona and the relevant bank statements (Dkt. # 38, Ex. 4; Dkt. # 38, Ex. 5; and Dkt. # 40, Ex. 18) -- is that the funds which were later used to pay Regency Realty's mortgage came from a third-party, Mr. Cardona, and his company Pacific Atlantic Investments, LLC, who first transferred the funds to the trust account of an attorney representing Dolce Regency[4], Gabrielle Alexis. The evidence further shows that Mr. Cardona wired these funds to Ms. Alexis' trust account for the specific purpose of Dolce Regency acquiring the membership interests in Regency Suites I, LLC pursuant to the operating agreement of Dolce Regency. *See* Dkt. #38, Ex. 4 at ¶6; Dkt. # 38 Ex. 5 at ¶¶6, 8.

The Receiver in his motion wholly ignores this direct evidence. Instead, the Receiver offers his self serving conclusions, completely unsupported by any factual basis, as though these conclusions were evidence.[5] For example, in his Statement of Facts in his Motion at Page 16, Paragraph 51, the Receiver self servingly alleges that "[o]n June 16, 2008, and in further contemplation of the above referenced real estate purchases and as an adjunct to the Retainer Agreement, Alexis [and her law firm] opened a CCC client trust account in order to process CCC's funding of its anticipated real estate transactions (the 'Creative Capital Trust Account')." (underlining added). In support for this "fact", the Receiver cites only to the Wachovia New

[4] The Receiver does not contend that Dolce Regency is one of the Receivership Entities. Indeed, by settlement the Receiver waived and released all claims he had to and against Dolce Regency or its assets. *See Perlman v. Dolce Regency Suites, LLC*, Case No. 09-81224-CIV, Dkt. 42 and 44.

[5] Indeed, the Receiver suggests that the Court should *assume* that the transaction at issue involved Receivership Entities' funds and should shift the burden to Regency Realty to disprove this assumption. *See* Motion at p.26, fn.14 (suggesting that the burden lies with Mr. Cardona to prove ownership of his own funds). Here again, the Receiver fundamentally misunderstands his burden of proof under FUFTA. The Receiver must *prove*, as an element of his claim, that the transfers involved the Debtor's property -- as opposed to every third-party he decides to sue having the burden to disprove such allegations. *See In re Stewart*, 280 B.R. at 274.

Account Records, Ex. 17. This bank document, which itself is not authenticated in any way, simply reflects the creation of a trust account titled "Real Estate Transactions"; it does not evidence that the account was created "in further contemplation of the above referenced real estate purchases and as an adjunct to the Retainer Agreement", or that it was "a CCC client trust account in order to process CCC's funding of its anticipated real estate transactions (the 'Creative Capital Trust Account')", both of which are simply unsupported argument which the Receiver alone promotes from the bank record that says none of this. This unsupported characterization is, of course, simply argument and not evidence. Moreover, this argument is completely contradicted by the affidavits of Ms. Alexis and Mr. Cardona who, upon their knowledge, stated that the funds came from Mr. Cardona's Crowne Gold account and were deposited into the trust account Ms. Alexis had created for her client, Dolce Regency. *See* Dkt. #38, Ex. 4 at ¶9; Dkt. #38, Ex. 5 at ¶6. This argument is also contradicted by the Receiver's own Ex. 18, which on its face evidences that the source of the monies was the wire transfer from Mr. Cardona's Crowne Gold account.

Similarly, at Page 16, Paragraph 52 of his Statement of Facts, the Receiver states "[f]rom June through December 2008, Theodule caused Fourteen Million Three Hundred Ninety Thousand Seven Hundred and Seventy Eight ($14,490,778) Dollars belonging to CCC investors to be transferred to the Creative Capital Trust Account." (Underlining added, discrepancy in values in original). To support this self-serving characterization that the funds were "belonging to CCC investors", the Receiver again cites only to the Wachovia Bank Statement attached as Ex. 18. Again, however, the bank statements do not evidence that these were "CCC funds," but instead simply reflect the existence of the bank account entitled "Real Estate Transactions" and

confirms that $11 million dollars was wire transferred into the account from Mr. Cardona's Crowne Gold Account.[6]

These unsupported "statements" by the Receiver are not only contrary to the record evidence, but also contrary to the allegations made by the Receiver in his Complaint in this case, as well as in another ancillary case upon which he had the Court enter judgment. In Paragraph 37 of his Complaint, for example, the Receiver alleges "[o]n or about June 23, 2008, in contemplation of the purchase of the Regency Property, Theodule caused $11 million dollars belonging to Creative Capital investors to be transferred to an existing Creative Capital client trust account formed by Alexis and GAPA for and on behalf of Creative Capital (the 'Creative Capital Trust Account')." Dkt. #1 at ¶37. As discussed above, the uncontroverted evidence is, despite the Receiver's characterization, that this $11 million dollars came from Mr. Cardona's funds.

The Receiver then alleges in his Complaint at Paragraph 38 that " [o]n August 13, 2008, in contemplation of the purchase of the Regency Property, Creative Capital, by and through Alexis and GAPA, transferred $7 million of the $11 million dollars to the Creative Capital Trust Account to an escrow account established by the law offices of Dean, Mead, Edgarton, Bloodworth, Capuano, and Bozarth, P.A, (the 'Dean Mead Law Firm') as escrow agent for the sale of the Regency Property (the 'Dolce Transfer.')" Dkt. #1 at ¶38 (underlining added). At Paragraph 39 of his Complaint, the Receiver then alleges that from the $7 million dollars transferred to the Dean Mead Law Firm, the sum of $2.4 million dollars was paid to Regency Realty. Dkt. #1 at ¶39. Ignoring the Receiver's unsupported characterizations of who the funds

[6] The bank statements also evidence that an additional $3 million was transferred into Ms. Alexis' Trust Account, but as admitted by the Receiver in his pleadings, these funds were transferred to other entities unrelated to the subject real estate transaction.

belonged to, these allegation are consistent with the record evidence that the monies paid to Regency Realty came from the $11 million originally wired by Mr. Cardona to Ms. Alexis' trust account, and did not come from Creative Capital or any of the other Receivership Entities.

The Receiver's current pleading admission that the monies used to pay Regency Realty's mortgage came from the $11 million wired from Mr. Cardona's Crowne Gold account is not new. Indeed, in a prior ancillary action brought by the Receiver against Ms. Alexis for malpractice related to this same transaction, the Receiver alleged, and obtained a default judgment, upon very much the same allegations -- allegations which the Receiver is now attempting improperly to ignore because such allegations are damaging to the litigation position he now wants to take. For example, in that federal case, the Receiver alleged -- and obtained a judgment upon -- that "[i]n the fall of 2008, ALEXIS and [her law firm], in breach of their duties owed to Creative Capital, undertook the representation of a limited liability company, Dolce Regency," (Paragraph 39), that Ms. Alexis was "expressly disclosed . . . as counsel for Dolce Regency in regard to the transactions that were the subject of the Dolce Agreement, " (Paragraph 59), and that "[o]n August 13, 2008, Alexis and [her law firm] caused $7 million to be wire transferred to the attorneys for the seller [the Dean Mead law firm] under the Dolce Agreement from a trust account entitled 'LAW OFFICES OF GABRIELLE ALEXIS PA – TRUST ACCOUNT – REAL ESTATE TRANSACTIONS' (hereinafter the 'GAPA Trust Account'). The $7 million was part of the $11 million of investor monies that had been wire transferred into the GAPA Trust Account on June 23, 2008 (the 'First Investor Funds Transfer') [from Mr. Cardona's Crown Gold account]" (Paragraph 61). *See* Receiver's Second Amended Complaint, *Perlman v. Alexis*, Case No. 09-20865-CIV, Dkt. 17 (S.D.Fla. Oct. 9, 2009). After pleading the

foregoing allegations, on June 23, 2010, the Receiver sought and obtained a judgment upon this complaint. *Id.* at Dkt. #51.

Upon these pleadings admitting that the monies used to pay Regency Realty's mortgage came from the $11 million wired by Mr. Cardona, the Receiver is now estopped from taking a directly contrary factual position. In short, the Receiver is judicially estopped from now contesting that the payments to Regency Realty did not come from the $11 million wired by Mr. Cardona, or that in opening her law firm's trust account to deposit these monies, Ms. Alexis was representing the Receivership Entities and not Dolce Regency. Indeed, the principle of judicial estoppel is intended to bar just such legal maneuvering in order to preserve the integrity of the judicial process, and plainly bars the Receiver from reversing his current and previously pleaded and adjudicated claims to manipulate the litigation process to gain an advantage in a second case. *See Burnes v. Pemco Aeroplex, Inc.*, 291 F. 3d 1282, 1285 (11th Cir. 2002) (under the doctrine of judicial estoppel, "a party is precluded from 'asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding'") (*quoting* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.30, p. 134-62 (3d ed. 2000)); *see also In re Coastal Plains, Inc.*, 179 F. 3d 197, 205 (5th Cir. 1999) (judicial estoppel is a doctrine "by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position" so as to "prevent[] parties from playing fast and loose with the courts to suit the exigencies of self interest") (internal quotations omitted); *Amer. Nat'l Bank v. Fed. Deposit Ins. Corp.*, 710 F. 2d 1528, 1536 (11th Cir. 1983) (judicial estoppel "is designed to prevent parties from making a mockery of justice by inconsistent pleadings"); *c.f. Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1067 (Fla. 2001) ("The courthouse should not be viewed as an all-you-can-sue buffet . . . after receiving that successful verdict, he did not have the option

of pursuing an entirely inconsistent position in a subsequent suit.")[7]. Indeed, the purpose of the doctrine of judicial estoppel "is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment" as the Receiver attempts to do here. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal quotations omitted). To allow the Receiver now to claim that the subject funds were from the Receivership Entities and not from the $11 million wire from Mr. Cardona (or that Ms. Alexis was not representing Dolce Regency in the transaction) would impugn rather than protect the integrity of this judicial process, and reward the Receiver for his wrongful attempts to recast evidence and argument to suit the moment, the very essence of what the principle of judicial estoppel is intended to prevent.

B. The Receiver's Argument That Creative Capital "Controlled" the Funds Also Fails.

In a fall back argument, the Receiver next contends that it is sufficient simply to prove that monies were deposited into Ms. Alexis's trust account which was controlled by Creative Capital, through Mr. Theodule. This argument also fails as a matter of law upon the instant record.

[7] While earlier Eleventh Circuit cases could be read as suggesting that a prior statement needed to be sworn or made under oath, the Supreme Court's opinion in *New Hampshire v. Maine* emphasized that the circumstances under which judicial estoppel is proper are "*not reducible to any general formulation of principle*" and focused on three main considerations: (1) whether a party's asserted position was "'clearly inconsistent' with its earlier position," (2) whether the party "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled,'" and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). In light of this holding, the Eleventh Circuit in *Burnes* recognized that its historical consideration of whether a statement was sworn was "n[either] inflexible [nor] exhaustive," but that courts were instead required to "give due consideration to all of the circumstances of a particular case when considering the applicability" of judicial estoppel. *Burnes*, 291 F. 3d at 1285-86. Considering all of the circumstances of this case, there is no reasonable conclusion but that the Receiver has intentionally changed factual positions to gain a litigation advantage and is "playing fast and loose with the courts to suit the exigencies of self interest."

To prove control over the funds, the Receiver begins by asserting that Dolce Regency was formed by Mr. Theodule "in his capacity as the controlling principal of CCC" (Motion at ¶50). In support of this argument, however, he cites only to a record of the Florida Division of Corporations that makes no mention of Creative Capital. Dkt. # 40, Ex. 16. Thus, this document provides *no* evidence connecting Creative Capital to Dolce Regency. In addition, this argument is wholly contradicted by the affidavits of Ms. Alexis and Mr. Cardona who state that Dolce Regency was a separate entity and not the alter ego of Creative Capital. Finally, the record evidence also establishes that in conjunction with Mr. Cardona's wiring of the $11 million, Ms. Alexis amended Dolce Regency's Operating Agreement to reflect his membership status, and that the $7 million transfer to the Dean Mead Law Firm was pursuant to the Amended Operating Agreement to pay for the Regency Suites I acquisition. Dkt. #38, Ex. 4 at ¶¶6, 10; Dkt. #38, Ex. 5 at ¶¶6, 9.

The Receiver also states as "fact" that Creative Capital controlled the Dolce Regency transaction, and cites to a retainer agreement between Creative Capital and Gabrielle Alexis (Motion at ¶48), apparently under the assumption that Ms. Alexis' retainer agreement is definitive proof that she represented Creative Capital and *not* Dolce Regency in connection with the transaction.[8] The retainer agreement, however, is largely a "vanilla" engagement letter and does not reference the Regency Suites I acquisition or otherwise link this engagement to the subject transaction. Further, the Receiver's current argument is directly contrary to the "fact" he successfully prosecuted in his malpractice action against Ms. Alexis where again, the Receiver asserted – and obtained a judgment– that "[i]n the fall of 2008, ALEXIS and GAPA, in breach of their duties owed to Creative Capital, undertook the representation of a limited liability

[8] As is the case for much of the purported evidence offered by the Receiver, this document is presented without any verification of its authenticity necessary to establish admissibility.

company, Dolce Regency," and that Ms. Alexis was "expressly disclosed . . . as counsel for Dolce Regency in regard to the transactions that were the subject of the Dolce Agreement." Second Amended Complaint, *Perlman v. Alexis*, Case No. 09-20865-CIV, Dkt. 17 at ¶¶ 53, 59 (S.D.Fla. Oct. 9, 2009). Also, in Paragraph 55 of his Complaint against Ms. Alexis, the Receiver alleged that the transfer from her trust account was "to the attorneys for the seller under the Dolce Agreement". Second Amended Complaint, *Alexis*, Case No. 09-20865-CIV, Dkt. 17 at ¶61 (underline added). Here again, the only explanation for the Receiver's factual flip-flop is that he believes that recasting the facts now better suits his response to Regency Realty's arguments regarding the source of the funds, and thus he has "deliberately chang[ed] positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749-50.

The Receiver's interpretation of the law on the control doctrine is equally unfounded. The Eleventh Circuit has indeed adopted a "control doctrine" for determining whether property obtained from a third party like Mr. Cardona can constitute property of the Debtor for purposes of a fraudulent transfer claim. *Nordberg v. Sanchez* (In re *Chase & Sanborn Corp.*), 813 F. 2d 1177, 1181–82 (11th Cir. 1987). However, the *Nordberg* Court held that "more is necessary to establish the debtor's control over the funds than the simple fact that a third party placed the funds in an account of the debtor with no express restrictions on their use." *Id*. at 1181. Rather, the *Nordberg* Court held that the Court "must look beyond the particular transfers in question to the entire circumstance of the transactions" including among other things, whether the funds were transferred for a specific purpose as opposed to being generally available for the debtor's use. *Id*.

In so ruling, the *Nordberg* Court stated that "[n]o Court, so far as we have discovered, has established a framework for determining when funds provided to a debtor by a third party

become property of the debtor so that an allegedly fraudulent transfer to a non-creditor is subject to avoidance . . . ." *Nordberg*, 813 F. 2d at 1180. The *Nordberg* Court's analysis then considered whether the third party provided the funds for a purpose or for the debtor to use as it desired, whether the funds were generally available for distribution to all of the debtor's creditors, whether the distribution diminished the funds of the debtor, and whether the debtor's account simply served as a conduit through which the third party's funds passed. *Id*. at 1181-82.

Applying these factors to the case before it, the *Nordberg* Court held that the monies which had been transferred into the debtor's account by a third party for a specific purpose, and whose only connection to the debtor's account was the routing through the debtor's account, did not evidence sufficient control over the funds to transform them into the debtor's property supporting a fraudulent transfer claim. *Nordberg*, 813 F. 2d at 1182. The *Nordberg* Court reached this decision upon facts much more suggestive of the debtor's control than are present in this case, as in *Nordberg* the funds obtained from the third-party were deposited into the debtor's operating account – an account the debtor used to pay its bills – portions of the funds were used to pay the debtor's various creditors, and the president of the debtor *actually ordered the subject transfer on the stationery of the debtor*. *Id*. at 1180-82. Upon these facts, the Eleventh Circuit concluded that "neither the use by the debtor of some of the funds for its own purposes nor the fact that the debtor's president ordered the transfer can overcome the overwhelming evidence that [the third-party], not [the debtor], controlled the transfer at issue." *Id*. at 1182. In short, the *Nordberg* Court held that the debtor's account was at most a conduit for the transfer, and did not make the funds those of the debtor. *Id*.

When similarly looking "to the entire circumstance of the transactions in this case," it is apparent that after Cardona wired the $11 million to Ms. Alexis' trust account for the Dolce

Regency purchase, there is no evidence that Creative Capital exercised the type of control -- if any -- over the funds to transform them into Creative Capital's property for which a fraudulent transfer claim can be made. Again, all of the record evidence in this case confirms that Mr. Cardona transferred funds from his Crowne Gold account into Ms. Alexis's trust account to satisfy his obligation under the Dolce Regency operating agreement to make a capital contribution to be used to fund the purchase of Regency Suites I.[9] Also, as discussed above, the Receiver himself admits though his pleadings and by operation of judicial estoppel that Mr. Cardona's wire transfer was in fact used to fund the $7 million purchase of Regency Suites I.

Thus, even if the Receiver could establish as he now argues that Ms. Alexis' trust account was for Creative Capital alone, that George Theodule authorized the Dolce Transfer, and that Creative Capital actually used some of the funds for its own purposes, under the *Nordberg* control analysis, these funds should not properly be considered the property of Creative Capital. The funds did not belong to Creative Capital prior to being placed into the trust account, the funds were deposited into the account in accordance with the operating agreement calling for Mr. Cardona to finance the purchase of Regency Suites I, and the funds, by the Plaintiff's own admission, *actually were used to purchase Regency Suites I*. Just as in *Nordberg*, in light of these facts, the use of Ms. Alexis' trust account simply constituted a conduit and does not make the funds "belonging to Creative Capital" and subject to a fraudulent transfer claim. Considered a different way, the Receiver certainly would have no argument to these same funds if Mr. Cardona had instead wired the funds directly to the Dean Mead Law Firm. Therefore, the routing of the funds through Ms. Alexis' trust account must be considered simply a conduit which does not alter who controlled the funds.

[9] Here, of course, the Plaintiff has failed even to establish that the funds were deposited in an account of the debtor, Creative Capital.

Plaintiff's reliance on *In re Safe–T–Brake of South Florida, Inc.* is entirely misplaced, as the *Safe-T-Break* analysis is inapplicable to a fraudulent transfer claim such as this one. The *Safe-T-Brake* decision analyzed control in the context of *voidable preferences* under Section 547(b) of the Bankruptcy Code -- not in the context of fraudulent transfers. *In re Safe–T–Brake of South Florida, Inc.*, 162 B.R. 359, 365 (Bankr. S.D.Fla. 1993). These contexts are different and, as the *Nordberg* decision emphasized, "[d]ue to critical differences between the two types of transfers, however, the standards for establishing control by the debtor in the context of avoidable preferences are not entirely apposite" to those in the fraudulent transfer context. *Nordberg*, 813 F. 2d at 1181. Indeed, the voidable preference test applied by the Bankruptcy Court in *Safe-T-Break* is more than just "not entirely apposite"; it is directly contrary to the standard and analysis applicable to fraudulent transfers as set forth by the Eleventh Circuit in *Nordberg*, where similar facts existed but which Nordberg held to be insufficient.[10]

Finally, it is particularly clear that Creative Capital did not exercise control over the $11 million of Cardona's money given that the account Mr. Cardona transferred the funds into was not an account over which Creative Capital or even Mr. Theodule had signature control over. The account into which the $11 million of Cardona's money was deposited was a Florida Bar Interest on Lawyer Trust Account of Ms. Alexis, to which she as counsel had signatory authority

[10] Moreover, even if the *Safe-T-Break* test was applicable, the record evidence is that Creative Capital *did not* have such control. Mr. Cardona transferred his funds as a capital contribution to Dolce Regency to be used to purchase Regency Suites I pursuant to the operating agreement. While Mr. Theodule apparently also was a member of Dolce Regency, and assisted Mr. Cardona's transfer consistent with the operating agreement, this assistance did not transform the funds into the property of Creative Capital. The Receiver fails to recognize that as trust account funds, under the applicable Florida Bar Rules the funds could only be disbursed for the purposes deposited. See discussion *infra*. Also, as a member of a limited liability company, Mr. Theodule was subject to fiduciary duties, including a duty not to misappropriate the funds of the LLC. § 608.4225, Fla. Stat. Mr. Theodule's theoretical ability to breach Florida's business organization laws and illegally misappropriate Dolce Regency funds for purposes other than those called for by the operating agreement and for which Mr. Cardona provided them cannot properly be considered "control" over the funds. Indeed, if this argument were correct, the *Nordberg* Court's admonition that "more is necessary to establish the debtor's control over the funds than the simple fact that a third party placed the funds in an account of the debtor" would be meaningless since the debtor would *always* have such control over the funds because of his ability, notwithstanding the laws, to misappropriate them from his own account.

to disburse. Further, any disbursement by her was subject to strict and explicit restrictions on how funds could be used. Pursuant to Rule 5-1.1(b) of the Rules Regulating the Florida Bar (governing trust accounts), "[m]oney or other property entrusted to an attorney for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose." R. Regulating Fla. Bar 5-1.1(b) (underlining added). Because Mr. Cardona entrusted his $11 million to Ms. Alexis for the specific purpose of purchasing the membership interests in Regency Suites I as called for by the Operating Agreement, neither George Theodule, Creative Capital, nor even Ms. Alexis herself was authorized to direct any other use of the funds, to determine whether or not the funds would be paid out, or otherwise exercise any control over the funds.

C. The Receiver's Final Argument That He Need Not Trace The Funds Is Wrong and Contrary to His Own Pleadings.

The Receiver's final argument is that even if he cannot prove that Mr. Cardona's $11 million transfer is Creative Capital's property or was under the control of Creative Capital, he can still prevail because an additional $3 Million was transferred into Ms. Alexis' trust account by Mr. Theodule, not Mr. Cardona, and he can argue that the monies paid to Regency Realty came from those funds, not Mr. Cardona's funds. The Receiver bases this argument upon his contention that he is not required to prove a "dollar for dollar" tracing of the monies from the from their source to the recipient, and cites several cases ostensibly for this proposition. However, the cases the Receiver cites for this argument are clearly inapposite particularly where, as here, the funds are traceable and, in fact, the Receiver actually *has* traced them. These cases simply hold that where a claimant is able to prove by competent evidence that the transfer involved funds of the debtor, it is not necessary to account for each and every dollar.

For example, in *In re International Administrative Services* ("*IAS*"), cited by the Receiver, the creditor "proved by a preponderance of the evidence that the $1.050 million transferred to IBT from the Van Dan accounts, originated solely with IAS." *In re Int'l Admin. Svcs., Inc.*, 408 F. 3d 689, 708 (11th Cir. 2005). The Defendants in *IAS* actually stipulated that they had received $1,050,000 in transfers, but complained that the entry of judgment was improper given the plaintiff's inability to track every penny of the sum through a lengthy series of exceedingly complex transfers. *Id*. at 708.[11] The Court rejected this argument and found the proof to be sufficient. Similarly, in *In re Fin. Federated Title & Trust, Inc.*, a plaintiff was able to trace over 90% of the funds at issue to the debtor but was unable to make a full dollar-for-dollar accounting. *In re Fin. Federated Title & Trust, Inc.*, 273 B.R. 706, 718 (Bankr. S.D.Fla. 2001). Again, the Court reasonably determined that such proof was sufficient.

These holdings, of course, have no application to this case where the funds are easily traced and, in fact, the Receiver in his own pleadings admits and tracks the funds from the original $11 Million wire transfer by Mr. Cardona into Ms. Alexis' trust account, then to the $7 Million transfer to the Dean Mead Law Firm, and finally to pay Regency Realty's mortgage. *Alexis*, Case No. 09-20865-CIV, Dkt. 17 at ¶61. In short, these cases do not stand for the proposition that such evidence and tracing are not required and can be ignored, but simply apply a reasonableness standard to such proof in certain circumstances not present here.

[11] Plaintiff's citation to *In re Bridge*, an Eastern District of Michigan bankruptcy case, is similar. There the court concluded that an inability to make a dollar-for-dollar tracing was not fatal given that "[t]he evidence demonstrate[d] that the Arabia Ranch sale was the sole source" of the subject property. *In re Bridge*, 90 B.R. 839, 847 (Bankr. E.D.Mich. 1988). By contrast, as discussed above, in this case the evidence demonstrates that the Receivership Entities were not a source of the subject transfers *at all*.

2. The Receiver Has Failed to Satisfy his Burden of Proving that the Transfers Were "in Furtherance" of a Ponzi Scheme.

Even if the Receiver was able to establish that the transfers at issue came from Receivership Entities (which, as discussed above, he cannot), he would still not be entitled to a judgment that the transfers were made with actual fraudulent intent. The Receiver attempts to establish fraudulent intent by arguing that the so called "Ponzi scheme presumption" applies. This presumption holds that transfers made "in furtherance" of a Ponzi scheme are presumed fraudulent. *See, e.g., In re World Vision Entertainment, Inc.*, 275 B.R. 641, 656 (Bankr. M.D.Fla. 2002). The presumption is applicable, therefore, only if the Receiver can establish without any fact question that the payments to Regency Realty's long standing mortgage were somehow "in furtherance" of the Ponzi scheme. The Receiver plainly has not and cannot do this because there is no record evidence that the payments of Regency Realty's mortgage had anything to do with the Ponzi scheme.

As the Bankruptcy Court for this District has recognized:

> In order to apply the Ponzi scheme presumption, the plaintiff *must show that the transfers in question were in furtherance of the Ponzi scheme*. The existence of a Ponzi scheme supports a finding that the debtor had a generalized intent to defraud. But this is not sufficient, by itself, to show that the transfers in question were made with fraudulent intent. *Transfers subject to the Ponzi scheme presumption are those that perpetuate the scheme, or that are necessary to the continuance of the fraudulent scheme*. This is the reason that case law applying the Ponzi scheme presumption typically involves claims against investors, brokers, and others who assisted in perpetrating the scheme.

Welt v. Publix Super Markets, Inc. (In re *Phoenix Diversified Inv. Co.*), Case No. 08-15917-EPK, 2011 Bankr. LEXIS 4100 at *7-8 (Bankr. S.D.Fla. June 2, 2011) (emphasis added).

In the *Publix* case, the bankruptcy trustee for a Ponzi scheme argued that the purchase of groceries represented a fraudulent transfer of Ponzi scheme proceeds because it was not in line

with the enterprise's purported business, and diverted funds that could be used to repay investors. The *Publix* Court rejected these arguments, holding that the trustee's attempt to argue that "any transfer of funds by a debtor while the debtor is involved in a Ponzi scheme, other than to repay investors, [ought to be] subject to avoidance under a theory of actual fraud" necessarily failed and was an unwarranted extension of the presumption. *Id*. at *9. Instead, the Court correctly recognized that the Ponzi scheme presumption was inapplicable because of the trustee's failure to demonstrate how the purchase of groceries and household items could possibly have furthered the Ponzi scheme. *Id*. at *10.

Similarly, in the case of *Kapila v. TD Bank, N.A.*, the trustee sought to recover payments made on several outstanding bank loans by the perpetrator of a Ponzi scheme. *Kapila v. TD Bank, N.A.* (In re *Pearlman*), 440 B.R. 900, 903 (Bankr. M.D.Fla. 2010). There the Court recognized that "loan repayments are traditionally not considered fraudulent transfers because they extinguish an antecedent debt." *Id*.[12] The Court noted that the trustee had to come forward with evidence of specific facts demonstrating how the repayment of the existing loans was in furtherance of the Ponzi scheme. The Court recognized that even if the loans had been fraudulently obtained – and that their proceeds were being used to meet cash demands of the Ponzi scheme – such facts did not demonstrate that the specific transactions at issue, the *repayment* of the loans, had been undertaken in furtherance of a Ponzi scheme. *Id*. at 905.

In the instant case, which again involves payments of an unquestionably antecedent and non-fraudulent mortgage loan in existence since 2004, while the Receiver argues that the

[12] The Court explained this rationale further by quoting from the Second Circuit decision of *HBE Leasing Corp. v Frank*, 48 F. 2d 623, 624 (2d Cir. 1995) which held "[t]he preferential repayment of preexisting debts to some creditors does not constitute a fraudulent conveyance, whether or not it prejudices other creditors, because the basic concept of fraudulent conveyance law is to see that the debtor uses his limited assets to satisfy some of his creditors; it normally does not choose among them."

transfers were made in furtherance of a Ponzi scheme, he fails to provide any supporting evidence or specific facts. Such "argument", of course, does not support entry of judgment in favor of the Receiver. Rather, the Receiver "*must come forward with specific facts demonstrating how the transfers . . . were in furtherance of [a] Ponzi scheme* . . . . If he cannot, [he] may not rely on the Ponzi scheme presumption and must otherwise establish the requisite actual fraudulent intent." *TD Bank, N.A.*, 440 B.R. at 905 (emphasis added).

As recognized in the *Publix* and *TD Bank* cases, the classic application of the Ponzi scheme presumption is to purported profits paid to investors and commissions paid to brokers or recruiters, two classes of payments that are unquestionably necessary to the continuance of the fraudulent scheme. *See Publix*, 2011 Bankr. LEXIS 4100 at *7-8. The mortgage payments to Regency Realty plainly do not fall into these classes. Rather, the payments are more akin to payments to, "[o]ther recipients such as third party vendors and landlords [and mortgage holders], [who] probably can show good faith with relative ease. These types of recipients only deliver goods or rent buildings [or hold mortgages] and have no reason, and more importantly, no duty, to inquire into the nature of the debtor's business." *In re World Vision Entertainment, Inc.*, 275 B.R. at 658-59 (bracketed portions and underlining added). Again, the payments to Regency Realty involved payments on a mortgage that had been in existence since 2004 and by the same borrower entity, with simply the addition of Mr. Theodule as an additional guarantor. As such, by no objective standard can these payments be deemed "in furtherance" of any Ponzi scheme.

The only possible evidence offered by the Receiver that could conceivably be interpreted as supporting his "in furtherance" argument are the allegations contained in Paragraph 49 of the Motion, which references two affidavits from alleged investors that Mr. Theodule stated that he

was purchasing a hotel. *See* Dkt. # 40-19 at ¶6, Dkt. # 40-20 at ¶¶6-7. These affidavits, however, hardly satisfy the Receiver's burden for several reasons. First, the relevant portions of these affidavits to this issue are rank inadmissible hearsay -- alleged out of court statements by Mr. Theodule. Such statements cannot support summary judgment. *See* Fed. R. Civ. P. 56(c)(4) (an affidavit must "set out facts that would be admissible in evidence"); *see also Macuba v. DeBoer*, 193 F. 3d 1316, 1322-23 (11th Cir. 1999) ("[t]he general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment") (internal quotations omitted). Second, the affidavits do not identify the Regency Realty mortgage payments, but instead the acquisition of a "hotel in Orlando," presumably referring to the Regency Suites I acquisition. [13]

Finally, such affidavits are contrary to the record evidence that the transfers were for the separate investment purpose of Mr. Cardona and Dolce Regency, which was separate from Creative Capital. *See* Dkt. #38, Ex. 4 at ¶6; Dkt. # 38 Ex. 5 at ¶¶6, 8. Indeed, had Mr. Cardona's wire transfer been directly to the Dean Mead Law Firm, or even paid directly to Regency Realty, there would be no argument that this separate transaction, not involving investor monies or ownership, could in any way be considered in furtherance of the Ponzi scheme. Also, the Receiver offers no suggestion as to how the purchase by Dolce Regency of the membership interest in a real estate holding company, with an unfinished property as its sole capital asset, was "necessary to the continuance of [a] fraudulent scheme" by Creative Capital allegedly involving the short-term trading of non-existent option securities.[14] *Publix*, 2011 Bankr. LEXIS 4100 at *7-8.

[13] Regency Realty notes again that the "in furtherance" analysis must focus only upon the mortgage payments to Regency Realty, and not the acquisition of real property via the purchase of the Regency Suites I membership interest, a distinction which the Receiver would no doubt like to avoid.

[14] Indeed, even the affidavits discussed *supra* state that investors questioned how the purchase of a hotel had any relation to short-term options trading. *See* Dkt. # 40-19 at ¶6, Dkt. # 40-20 at ¶¶6-7.

III. CONCLUSION

For the foregoing reasons, the Receiver's Motion should be denied.

Dated: January 22, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 22, 2013, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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