**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**(WEST PALM BEACH DIVISION)**

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

v

DOLCE REGENCY SUITES, LLC CASE NO. 09-81224-CIV-HURLEY/HOPKINS

Defendant.

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JONATHAN E. PERLMAN, Esq., CASE NO. 09-81225-CIV-HURLEY/HOPKINS

as court appointed Receiver of Creative Capital Consortium, LLC, et al.,

Plaintiff,

v.

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

Defendants.
_____/

**RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD CREDITORS**

The Plaintiff, Jonathan E. Perlman, Esq., the court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G$ Trade Financial, Inc. and Unity Entertainment Group, Inc. (collectively

referred to as the "Receivership Entities"), files this Motion for Partial Summary Judgment pursuant to Rule 56(d) of the Federal Rules of Civil Procedure seeking a determination that the fraudulent transfers alleged by the Receiver in his Complaint were made by the Receivership Entities with actual intent to hinder, delay or defraud creditors of the Receivership Entities and states as follows:

## INTRODUCTION

The pleadings, discovery, and sworn testimony arising from these receivership proceedings and the related case being prosecuted by the United States Securities and Exchange Commission (the "SEC") leave no doubt that George Theodule ("Theodule") and the Receivership Entities engaged in a massive Ponzi scheme. Theodule, a native of Haiti, posing as a sophisticated investment broker, organized and operated the Receivership Entities for the sole purpose of enticing thousands of unwitting Haitian-born investors to willingly hand over more than $68 million in "investment funds" based upon the promise of doubling their investments within 90 days. Following the well-worn pattern of a classic Ponzi scheme, Theodule used some of the investment funds obtained as the scheme progressed to pay "returns" to initial investors. The remaining money obtained by Theodule and the Receivership Entities was promptly used for the benefit of Theodule and certain insiders of the Receivership Entities and otherwise squandered and lost by Theodule through speculative day-trading.

The evidence obtained to date in these proceedings and obtained through investigation conducted by the Receiver and the SEC unequivocally proves that there are no material facts in dispute concerning the Receiver's allegations that the alleged fraudulent transfers at issue in this case were made by the Receivership Entities in furtherance of the Ponzi scheme, and as such were made with actual intent to hinder, delay or defraud the creditors of the Receivership

Entities. The entry of an order under Fed. R. Civ. P. Rule 56(d) granting partial summary judgment and establishing the actual fraudulent intent of the Receivership Entities is therefore appropriate, and in the interest of judicial economy will serve to substantially simplify the trial of any remaining issues.

## PROCEDURAL HISTORY

On December 29, 2008, the Securities and Exchange Commission ("SEC") filed its Complaint for Injunctive and Other Relief (the "SEC Complaint") against George Theodule and certain of the Receivership Entities in an action styled: *SEC v. Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC and George L. Theodule*, Case No. 08-81565-CIV-HURLEY/HOPKINS, pending in the United States District Court, Southern District of Florida (the "SEC Receivership Action"). The SEC alleged that Theodule, through certain Receivership Entities, sold unregistered securities and violated various sections of the Securities Exchange Act of 1934 (the "Exchange Act"). More specifically, the SEC alleged that Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC and George L. Theodule (collectively, the "SEC Defendants") all violated section 10(b) of the Exchange Act.

The SEC sought a permanent injunction against the SEC Defendants to restrain them from any further securities law violations. Additionally, the SEC sought (1) an order requiring the SEC Defendants to provide a sworn accounting of all proceeds they received, directly or indirectly, as a result of the securities law violations; (2) an order requiring the SEC Defendants to disgorge, with prejudgment interest, any ill-gotten gains they received; (3) the imposition of civil penalties pursuant to section 20 (d) of the Securities Act and section 21 (d)(3) of the Exchange Act; (4) an order freezing the SEC Defendants' assets pending resolution of the matter; and (5) the appointment of a receiver over the Receivership Entities. (DE 1/DE 2)

On December 29, 2008, upon the request of the SEC, the Court entered an Order (the "Receivership Order") (DE 8) appointing the Receiver as receiver over the SEC Defendants, their subsidiaries, successors and assigns, in the SEC Receivership Action. By Order dated December 31, 2008, the receivership was expanded to include United Investment Club, LLC and Reverse Auto Loan, LLC. Further, by Order dated September 21, 2009, the receivership was again expanded to include Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G$ Trade Financial, Inc., and Unity Entertainment Group, Inc. (DE 14/DE 162)

Under the terms of the Receivership Order, the Receiver is authorized to investigate the affairs of the Receivership Entities, to marshal and safeguard these entities' assets, and to institute legal proceedings for the benefit and on behalf of the Receivership Entities' investors and other creditors. Additionally, and pursuant to the Receivership Order, the Receiver is authorized and has standing to assert claims against third parties including but not limited to: (i) all legal and equitable claims available to the Receivership Entities prior to the institution of the SEC Receivership Action; and (ii) claims to avoid and recover fraudulent and preferential transfers receiver for the Receivership Entities and by virtue of his status as a joint lien creditor of the Receivership Entities pursuant to Florida Statutes, 671.201(13) and 679.1021(1)(zz).

On October 22, 2009, the Court entered a Judgment of Permanent Injunction and Other Relief against George Theodule (DE 179) and on March 26, 2010, the Court entered a Judgment of Permanent Injunction against Creative Capital Consortium, LLC and A Creative Capital Concept$, LLC. (DE 227)

As set forth in further detail, Creative Capital, which promised to double investments within 90 days risk free, raised in excess of $68 million from thousands of investors by and through the use of over 100 investment clubs. However, the Receiver has determined that

Creative Capital had no legitimate business operations whatsoever. Consequently, the Receiver determined that so-called "profit payments" made to investors by the Receivership Entities, along with other payments that appear to have no legitimate business purpose, could have only come from money raised from other investors, and, as such, Creative Capital was operated as a classic Ponzi scheme. Pursuant thereto, the Receiver and his professionals have attempted to locate and secure money illegally raised (and any proceeds thereof) from investors by and through the Receivership Entities. To that extent, the Receiver has initiated this lawsuit seeking, among other relief, to avoid and recover assets fraudulent transferred from the possession of the Receivership Entities.

## STATEMENT OF UNDISPUTED MATERIAL FACTS

The Receiver submits the following material facts[1] as to which there is no genuine dispute in support of its partial summary judgment motion against the Defendant(s).

### The Genesis of Theodule's Investment Scheme

1. A Creative Capital Concept$ ("ACCC") is an inactive Florida limited liability company organized in November 2007. (Theodule's Answer, SEC-DE 23, at ¶5; ACCC Certified Corporate Record attached as Exhibit 1). Theodule owned ACCC was its manager, along with two other individuals. (Theodule's Answer, SEC-DE 23, at ¶5 (admitting he was a manager); Exhibit 1; Florida Department of State, Division of Corporations fictitious name record (listing Theodule as

[1] The undisputed material facts set forth herein incorporate verbatim most of the facts cited by the SEC in its Statement of Undisputed Material Facts (SEC-DE #169), and all Exhibits referenced and incorporated into the SEC's Statement of Undisputed Facts in Support of its Motion for Summary Judgment (SEC-DE #'s 171 and 173), filed in conjunction with the SEC's Corrected Motion for Summary Judgment (SEC-DE #174) in the SEC Receivership Action. They are republished here for the Court's convenience. All references to docket entries in the SEC Receivership Action, as cited herein, are designated with the acronym "SEC-DE," followed by the corresponding docket entry in the SEC Receivership Action. References to docket entries for this action will be designated simply with the acronym "DE," followed by the corresponding docket entry in this case.

owner), Exhibit 22). ACCC was a so-called "investment group," which Theodule used to raise funds from investors until he formed Creative Capital Concept$, LLC in January 2008. (Testimony Transcript of Berthrum Brewster, attached as Exhibit 3 at pp. 33:22-34:22; Declaration of William P. Sabarese, attached as Exhibit Ex. 4 at ¶¶3-4, 8-10 and Exhibits A, B and C attached thereto).

2. Creative Capital Consortium, LLC ("CCC") is a Florida limited liability company organized in January 2008 with its principal place of business in Lake Worth, Florida. (Theodule Answer, SEC-DE 23, at ¶6; CCC Certified Corporate Record attached as Exhibit 5). CCC was an investment organization that became the primary entity through which Theodule raised investor funds and transacted business with investment clubs. (Theodule's Statement of Facts in Support his Summary Judgment Motion, SEC-DE 105, at pg.1, ¶1; pg. 4, ¶1; Ex. 3 at pp. 33:22-34:22; Declaration of Evelyn Metellus, attached as Exhibit 6 at ¶¶2-3; 8, 11). Theodule was CCC's President, CEO, and sole proprietor. (CCC Business Plan Section 2.1, attached as Exhibit 9 and Exhibit A thereto; authenticated in Exhibit 9 Affidavit and at Exhibit 11, 34:24-35:21, 56:11-57:2; Theodule business card, attached as Exhibit 4 and Exhibit A thereto, authenticated in Exhibit 4). He was also CCC's owner. (Florida Division of Corporations Records, Exhibits 21, 22 & 23).

3. George I. Theodule currently resides in Loganville, Georgia, where he relocated from Wellington, Florida in September 2008. (Theodule Answer, SEC-DE 23, at ¶7; Lexis/Nexis Search Record of George L. Theodule addresses attached as Exhibit 7; Ex. 3 at p. 123:11-16). He was the managing member of ACCC, the sole member and manager of CCC, and solicited investors for both of these companies. (Ex. 4 at ¶¶3-9; Ex. 5; Ex. 6 at ¶¶2-6, 8-10; Declaration of Collin Whitehall, attached as Exhibit 8 at ¶¶3-6; Declaration of Neptime Dieujuste, attached as Exhibit 9 at ¶21 and Exhibit A attached hereto at §2.1).

4. From at least November 2007 until approximately January 2008, Theodule solicited investors to invest through ACCC and CCC, which were purportedly "investment groups." (Ex. 4 and Exhibit C thereto).

5. Through ACCC and CCC, Theodule offered investors the opportunity to invest in stocks, bond, options, and other securities. (*Id.*).

6. Theodule and the Receivership Entities primarily targeted prospective investors in the United States Haitian community. (Ex. 3 at pp. 57:5-58:3; Ex. 4 at ¶14; Ex. 9 at ¶4).

7. Theodule ingratiated himself with investors by claiming he had recently decided to offer his investment expertise to help build wealth in the Haitian community. (Theodule Answer, SEC-DE 23, at ¶10; Ex. 3 at pp. 49:13-15, 81:8-19, 101:11-20, 172:3-173:5; Declaration of Carola Timothee, attached as Exhibit 10 at ¶7).

8. Theodule also told investors he used part of his trading profits to fund start-up businesses in the Haitian community, as well as business projects in Haiti and Sierra Leone. (Theodule Answer, SEC-DE 23, at ¶10; Ex. 3 at pp. 49:16-17, 81:8-19, 101:11-20, 172:3-173:5; Ex. 12 at ¶15).

9. Theodule and the Receivership Entities primarily attracted investors through word-of-mouth, and Theodule solicited investors during face-to-face meetings. (Ex. 3 at pp. 52:4-24, 62:17-64:18; Ex. 4 at ¶¶3-6; Ex. 6 at ¶¶2-5; Ex. 9 at ¶¶5-6; Theodule's Statement of Facts in Support his Summary Judgment Motion, SEC-DE 105, at pg.5, ¶5 ("Theodule would meet with companies and potential investors regarding investment opportunities.")).

10. Theodule touted his investment experience and trading acumen to prospective investors. (CCC Business Plan Section 2.1, attached as Ex. 9 and Ex. A thereto; authenticated in Ex. 9 Affidavit). CCC's business plan distributed to investors stated that Theodule "brings over 25

years of experience in the world of finance and sales. He also served as the Finance Director of several large companies and has significant expertise in sales. As the sole proprietor of CCC, Mr. Theodule brings over 20 years experience as an investor in the stock market and other business ventures." (*Id.*).

11. Theodule told prospective investors that he would double their money within 90 days. (Ex. 11, at 58:4-59:1, 61:22-64:4; Ex. 4 at ¶5) (Ex. 6 at ¶ 4; Ex. 8 at ¶3; Ex. 9 at ¶6; Ex. 14, Yolette Williams deposition, at 33:10-34:22; Ex. 19 at ¶ 4; Ex. 20 at ¶¶ 4,7).

12. Theodule typically depicted his investment plan and purported profits trading stocks and options on dry erase boards or flip charts. (Ex. 3 at pp. 61:14-23, 62:11-16).

13. Theodule routinely boasted to investors about CCC's high rates of return, and stressed the need to begin investing as soon as possible. (Ex. 6 at ¶¶3-5, 7-8). For example, he told one investor he had made millionaires out of a significant number of people in the time it had taken her to decide to invest, and pressured her to liquidate the equity in her home to invest with him. (Id. at ¶¶3, 7, 13-15).

14. Theodule's presentations to prospective investors also emphasized the safety and security of investing with them. (Ex. 4 at ¶5; Ex. 6 at ¶¶4, 6, 9-10; Ex. 8 at ¶5). Theodule and his Companies guaranteed investors 100% returns with no risk, and claimed to invest in the stocks and options of well-known companies such as Google, John Deere, Monsanto, Best Buy, GameStop, and others. (Ex. 3 at p. 51:3-6; Ex. 4 at ¶5; Ex. 6 at ¶¶4, 6, 9; Ex. 8 at ¶¶3, 5).

15. Theodule told investors to put their trust in him and guaranteed the safety of their investment. (Ex. 12 at ¶18).

**Funds Raised Through Investment Clubs**

16. To add to investors' sense of security, Theodule directed prospective investors to form "investment clubs" through Smart Investment Management Services, LLC ("SIMS"), which he told prospective investors was a self regulatory agency. (Ex. 3 at pp. 36:1-42:13; Ex. 8 at ¶¶7-13).

17. Theodule told prospective investors that SIMS would protect them by independently verifying their investment deposits. (*Id*.).

18. In reality, SIMS was a private company created by Theodule's brother and run by a former CCC employee, and not a regulatory entity. (Theodule Answer, SEC-DE 23, at ¶12; Ex. 3 at pp. 36:21-38:20, 41:11-44:20; Exhibit 13, Kathryn Parker Deposition, at 18:17-19).

19. The investment clubs did not operate independently of Theodule, investor funds placed with investment clubs were placed solely with Theodule and CCC, and Theodule misappropriated investor funds and commingled them with CCC funds. (Ex. 18 at 42-43; Ex. 2 at ¶¶9-11).

20. The investment clubs pooled investor funds and sent them to CCC for a 90-day period, during which Theodule purportedly traded stocks and options on behalf of the investment club members. (Ex. 3 at pp. 49:18-51:2, 66:16-67:23; Ex. 6 at ¶¶11, 15; Ex. 8 at ¶7; Ex. 10 at ¶4; Ex. 16-B at 56-60).

21. The investment club members did not participate in making investment decisions, rarely had club meetings, and deposited funds exclusively with Theodule and certain of the Receivership Entities. (Ex. 3 at pp. 160:20-161:7, 162:6-163:20; Ex. 4 at ¶10).

22. The investment clubs typically required a minimum investment of $1,000 per investor, which the investor could not withdraw for the 90-day investment period. (Ex. 4 at ¶ 8 and Exhibit B attached thereto; Ex. 6 at ¶17; Ex. 8 at ¶4; Ex. 9 at ¶¶6-7).

23. The investment clubs deposited the investors' funds into their own bank accounts, pooled the funds, and remitted the money to CCC, minus a 10% club commission. (Ex. 3 at pp. 59:1-61:25).

24. Thus, the investment clubs served principally as vehicles to funnel funds to Theodule and CCC. (Ex. 3 at pp. 67:16-67:23, 82:1-87:25 and Exhibit 4 attached thereto, 90:5-91:2; Ex. 8 at ¶¶7-14; Ex. 10 at ¶¶2-5, 12-21 and Exhibits A, B, and C attached thereto).

**The Investor Group Agreements**

25. Investors entered into a so-called "Investor Group Agreement" with CCC, whereby they authorized Theodule to serve as their agent and attorney-in-fact, to, among other things, "buy and sell and stocks, bonds, options, and other securities, including short sells, on margin or in a cash account." (Exhibit 4 and Exhibit C thereto).

26. Theodule signed the Investment Group Agreement on behalf of CCC. (*Id.*; Exhibit 11, Investor William Sabarese hearing testimony, at 63:15-64:4).

27. The Investment Group Agreement states that the investor's "initial investment is guaranteed zero loss after 90 days of start-up." (Exhibit 4, Sabarese Declaration, and Exhibit C thereto; Exhibit 11 at 65:14-65:6 (Sabarese testimony at Show Cause Hearing)).

**Investors' Contributions**

28. At the end of the 90-day investment period, when the investment amount had purportedly doubled, Theodule and/or the Receivership Entities returned what they claimed were the principal and profits back to the investment clubs, minus a commission on the profits. (Ex. 3 at pp. 74:12-80:23 and Exhibit 3 attached thereto).

29. Prior to distributing the proceeds back to the investors, the investment clubs typically charged a second 10% commission on the principal. (Ex. 3 at p. 76:1-20 and Exhibit 3 attached thereto).

30. During the course of the investment scheme, Theodule and/or the Receivership Entities raised approximately $68 million from investors nationwide. (Receiver's Affidavit, Exhibit 2, at ¶9(b); Theodule Answer, SEC-DE 23, at ¶11).

31. Of the $68 million Theodule raised, he:

a. Diverted approximately $23 million to third parties, including his wife and relatives. (Receiver's Affidavit, Exhibit 2, at ¶9(b)(i)). This amount also includes $122,000 in transfers to SIMS. (*Id.*);

b. Misappropriated approximately $31 million to his personal bank and brokerage accounts (*Id.* at ¶9(b)(ii)). This amount includes $20 million to his personal bank accounts, his cash withdrawals of more than $1.5 million, and more than $700,000 for personal expenses, including luxury automobiles, credit card bills, a wedding, and travel. (*Id.*). This amount includes nearly $8 million, which Theodule transferred to his personal brokerage accounts – all of which was lost in Theodule's options trading. (*Id.*); and

c. Transferred approximately $20 million to investment clubs and/or individual investors. (*Id.* at ¶9(b)(iii)).

32. Theodule traded $18.2 million of the $68 million he raised, and lost 98% of that. (*Id.* at ¶9(b)(ii), ¶10; Theodule Statement of Facts In Support of Summary Judgment, SEC-DE 90, at pg. 4, ¶1). He experienced a net trading loss from at least as early as November 2007 through December 2008. (Ex. 2, at ¶10; Theodule Statement of Facts In Support of Summary Judgment, SEC-DE 90, at pg. 4, ¶1; Theodule's Answer, SEC-DE 23, at ¶4 (admitting a net trading loss)).

33. In contrast to the actual heavy losses, CCC prepared and/or sent account statements for investors showing significant investment growth. For example, CCC's January 2008 account statements for one investor showed that his $1,000 initial investment had grown to $1,750 just one

month after investing, and had doubled to $2,000 within two months. (Exhibit 4, at ¶¶10-13 and Exhibit F thereto). In August 2008, CCC sent another investor an account statement showing that his $10,000 investment had appreciated to $20,000 within three months. (Exhibit 8, ¶ 16, at Exhibit A thereto).

34. Theodule used approximately $20 million of new investor funds to pay existing investors' purported returns. (Exhibit 2, at ¶9(b)(iii), ¶11).

35. When more recent investors attempted to withdraw their funds after the 90-day investment period, CCC did not return them. (Ex. 3 at pp. 127:20-129:1; Ex. 4 at ¶¶15-17; Ex. 6 at ¶¶18-22; Ex. 8 at ¶¶17-19; Ex. 9 at ¶¶35-44; Ex. 10 at ¶¶29-32; Exhibit 11, Sabarese testimony, at 71:14-72:13; Ex. 12, at ¶31).

36. In December 2008, Theodule sent investors a newsletter that stated "rest assured that your money is secure and not lost." (Ex. 12, at ¶¶39-40 and Exhibit G thereto).

37. Theodule's December 2008 newsletter told investors that "The monies that you have already invested will maintain its gain as long as you opt to not withdraw for one year." (Ex. 12 and Exhibit G thereto). The newsletter also stated that "CCC is growing strong and rest assured that you have invested with a capable group." (*Id.*).

**The Receivership Entities and Theodule's Misrepresentations and Omissions**

38. Theodule made numerous material misrepresentations and omissions regarding CCC's business, Theodule's stock trading, and the use of investor funds. (Ex. 3 at p. 52:12-24; Ex. 4 at ¶¶6-7; Ex. 6 at ¶¶4-9; Ex. 9 at ¶¶35-44)

39. For example, Theodule's claim of success trading stocks and options was demonstrably false. (Ex. 2 at ¶¶9-11). Of the more than $18 million deposited in brokerage accounts Theodule controlled, he lost approximately 98% of those funds trading stocks and options.

(Ex. 2 at ¶10). In fact, Theodule consistently lost money trading in those accounts after November 2007, and never generated net trading profits. (Ex. 2 at ¶10(b); Theodule's Answer, SEC-DE 23, at ¶4 (admitting a net trading loss)).

40. CCC and Theodule hid those losses from investors, sending account statements showing high returns (Exhibit 4, at ¶¶10-13; Exhibit 8, ¶ 16, at Exhibit A thereto), and paying principal and purported profits to existing investment clubs and individual investors of approximately $20 million from new investor funds. (Ex. 2 at ¶¶9,11).

41. Contrary to Theodule's representations to prospective investors that he used trading profits to fund new business ventures, some of which purportedly benefitted the Haitian community in the United States and Haiti, and others in Sierra Leone (Ex. 3 at pp. 49:13-15, 81:8-19, 172:3-173:5; Ex. 10 at ¶7), there were no trading profits. Most of the funds disbursed went to pay earlier investors their purported profits, not fund business projects. (Ex. 2 at ¶¶9-11).

42. Theodule's representations about the safety and security of investors' funds were also patently false. SIMS was not a regulatory agency, but rather a private entity that was, until recently, headed by a former CCC employee. (Theodule Answer, SEC-DE 23, at ¶11 (admitting SIMS is a private entity) and ¶15 (admitting SIMS is not a governmental regulatory agency)).

43. Theodule and/or the Receivership Entities paid SIMS and its employees, and transferred at least $122,000 to them. (Ex. 2 at ¶9(b)(ii)). There is no evidence SIMS verified investors' deposits to ensure the safety of investor funds, and Theodule took the Fifth Amendment on this issue. (Ex. 15, Theodule Deposition Testimony, at 61:19-62:5).

44. To the contrary, Theodule commingled investor funds extensively with his own personal accounts and misappropriated at least $31 million. (Ex. 2 at ¶9(b)(ii)).

45. Of the investor funds raised, Theodule transferred approximately $20 million to his personal bank accounts, made cash withdrawals of more than $1.5 million, and siphoned off more than $700,000 for personal expenses, including luxury automobiles, credit card bills, a wedding, and travel. (Exhibit 2 at ¶9(b)(ii)). He also bought his sister a condominium. (Ex. 17, Yolette Williams Deposition, at 25-26).

46. In addition, contrary to Theodule's representations to prospective investors that they could withdraw their investor funds after 90 days, ACCC did not pay investors who requested the return of their principal and supposed profits after the 90-day period. (Ex. 3 at pp. 127:20-129:1; Ex. 4 at ¶¶15-17; Ex. 6 at ¶¶18-22; Ex. 8 at ¶¶17-19; Ex. 9 at ¶¶35-44; Ex. 10 at ¶¶29-32).

47. In December 2008, Theodule told investors ACCC "will ask to delay any withdrawals for at least 90 days," but even then he told investors that their money was "secure and not lost," despite knowing, among other things, that he had lost 98% of investors' funds he traded and had siphoned off investors' funds for his personal use. (Ex. 12, at Exhibit G; Ex. 2, Receiver's Affidavit, at ¶¶9-10 (Theodule's personal use of funds and net trading losses); SEC-DE 23, Answer, at ¶4 (admitting net trading loss); and Theodule Statement, SEC-DE 90, at pg. 4).

48. In connection with and in furtherance of the Ponzi scheme, using funds illicitly obtained from the Ponzi scheme victims, which funds are and were the assets of CCC, Theodule and the Receivership Entities, including CCC, caused the transfers identified at Paragraph 54 of the Receiver's Complaint against Defendant Dolce Regency Suites, LLC, and Paragraph 58 of the Receiver's Complaint against Defendants Five Corners Investors I, LLC, and Five Corners Investors II, LLC, of the Receiver's Complaint to be made to the Defendant(s) (the "Fraudulent Transfers**").** (Exhibit 2 at ¶ 12).

## LEGAL ARGUMENT AND CITATION TO AUTHORITY

## I. The Standard for Partial Summary Judgment

The Receiver recognizes that there are factual issues to be tried in this case. However, the facts that (i) the Receivership Entities engaged in a massive Ponzi scheme, and (ii) the Defendants actually received the alleged fraudulent transfers, are not one of them. Under Rule 56(d) of the Federal Rules of Civil Procedure, the Court "shall, if practicable, ascertain what material facts exist without substantial controversy and what facts are actually and in good faith controversial" (emphasis added). At a trial on the remaining issues, such undisputed facts "shall be deemed established and the trial shall be conducted accordingly." *Id*. According to Rule 56(d), if a court finds "that summary judgment cannot be granted (as to the entirety of a claim on defense) because there are genuine issues of material fact to be tried, it is empowered, when it would be practicable to save time and to simplify the trial, to issue an order that specifies the facts that appear without substantial controversy." (10B) Wright & Miller, Federal Practice and Procedure, §2737 at Pages 311-312.

The same standards that apply to summary judgment for an entire claim or defense should be applicable to determining "what material facts exist without substantial controversy." Pursuant to Federal Rule of Civil Procedure 56, summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." The Supreme Court has reaffirmed the vitality of summary judgment as a method for the just, speedy and inexpensive disposition of cases. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Summary judgment may be entered only where there are no genuine issues of material fact. *See Twiss v. Kury*, 25 F.3d 1551, 1554 (11th Cir. 1994). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. The material fact and legal element of certain of the Plaintiff's claims at issue in this adversary proceeding is the Debtor's intent.

The Plaintiff has the burden of meeting Rule 56's standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The nature of the movant's initial burden "varies, however, depending on whether the legal issues, as to which the facts in question pertain, are ones on which the movant or the nonmovant bears the burden of proof at trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). Once the moving party identifies those portions of the record that demonstrate the absence of a genuine issue of material fact, any party opposing summary judgment must set forth specific facts showing a genuine issue for trial, and may not rely on mere allegations or denials. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 256-57. If the record as a whole could not lead a rational finder of fact to find for the non-moving party, then there is no genuine issue of fact precluding summary judgment. *Matsushita*, 475 U.S. at 586-87.

In ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991). However, this does not mean that a court must accept all of the non-movant's factual characterizations and legal arguments as true. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 458-59 (11th Cir. 1994). Rather, if the Court concludes that the evidence presented by the defendants is insufficient to allow a reasonable juror to conclude that

their position is more likely true than not, summary judgment must be granted in favor of Plaintiff. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993).

Once the Plaintiff satisfies its initial burden of demonstrating the absence of a genuine issue of material fact, the burden shifts to the Defendants to "'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir. 1995) (*quoting Celotex*, 477 U.S. at 324). An adverse party to a summary judgment motion "must come forward with facts, and not doubts as to the veracity of the moving party's allegations." *Claudio v. United States*, 907 F.Supp. 581, 584 (E.D.N.Y. 1995) (emphasis added). "The nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Id.* (*quoting Matsushita*, 475 U.S. at 586). "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in rule 56(c), except the mere pleadings themselves." *Celotex*, 477 U.S. at 324. "Legal memoranda and oral argument are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion." *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1372 (3d Cir. 1996). *See also Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) ("neither 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the nonmovant's burden . . . pleadings are not summary judgment evidence."). Moreover, "[a] mere 'scintilla' of evidence supporting the (nonmoving) party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997).

## II. Proof of Actual Fraudulent Intent Renders the Alleged Fraudulent Transfers "Avoidable."

At Count 1 of his Complaint against Defendant Dolce Regency Suites, LLC, and at Counts 1 and 2 of his Complaint action against Defendants Five Corners Investors I, LLC, and Five Corners Investors II, LLC, the Receiver seeks the "avoidance and recovery" of the alleged fraudulent transfers made to the Defendant(s) by application of Fla. Stat. §726.105, which provides in relevant part:

> **726.105. Transfers fraudulent as to present and future creditors**
>
> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) ***With actual intent to hinder, delay, or defraud any creditor of the debtor***

*Fla. Stat. §726.105(1)(a), emphasis added.*

The "avoidance" and "recovery" of fraudulent transfers are two closely related but separate concepts. Avoidance invalidates the transfer; recovery brings the property transferred or its value back into the estate. *25 Am. Jur. Proof of Facts 3d 591(1994.)* The Florida Uniform Fraudulent Transfer Act ("FUFTA") appropriately distinguishes the concepts of avoidance and recovery. Fla. Stat. §726.108 addressing the concept of "avoidance" as a remedy to an injured creditor provides in relevant part:

> **726.108. Remedies of creditors**
>
> (1) In an action for relief against a transfer or obligation under ss. 726.101-726.112, a creditor, ***subject to the limitations in s. 726.109*** may obtain:
>
> (a) ***Avoidance of the transfer*** or obligation to the extent necessary to satisfy the creditor's claim;

*Fla. Stat. §726.108(1)(a), emphasis added.*

By comparison, Fla. Stat. §726.109 in setting forth the limitations upon the avoidance of fraudulent transfers referred to in §726.108(1)(a) above, discusses the "recovery" which may be

obtained by an injured creditor in light of a transferee's defenses and provides in relevant part as follows:

> **726.109. Defenses, liability, and protection of transferee**
>
> (2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under s. 726.108(1)(a), ***the creditor may recover judgment for the value of the asset transferred***, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less.

*Fla. Stat. §726.109(2), emphasis added.*

Thus by virtue of its statutory scheme, FUFTA recognizes and distinguishes the difference between the "avoidance" and "recovery" of fraudulent transfer claims by identifying claims which are "voidable" in §726.108 and providing rules for separate "recovery" in §726.109.

As set forth in detail by the Receiver in the arguments below, this distinction is of important significance in connection with the alleged fraudulent transfers in this case which arise out of the Ponzi scheme perpetrated by Theodule and the Receivership Entities. Transfers made in conjunction with and in furtherance of a Ponzi scheme are *per se* fraudulent, and are therefore *per se voidable* under FUFTA. Once the transfers alleged by the Receiver are deemed voidable, the only issues remaining for resolution at trial are those relating to affirmative defenses raised by the Defendant(s).

## III. Transfers Made in Connection with the Ponzi Scheme Are *Per Se* Fraudulent

Assuming the Receiver can and has established evidence that a transfer of the Receivership Entities' assets to the Defendant has occurred, then to prove actual fraud, the only additional element the Receiver must prove is that the Receivership Entities made the transfers with the actual intent to hinder, delay, or defraud a creditor or prospective creditor. *In re World Vision Entertainment, Inc.*, 275 B.R. 641, 656 (M.D. Fla. 2002). Given the difficulties usually

associated establishing a transferor's actual intent, courts generally look at the totality of the circumstances and the badges of fraud surrounding the transfers. *In re Model Imperial, Inc.,* 250 B.R. 776, 790-791 (Bankr.S.D.Fla.2000)*( citing In re XYZ Options, Inc.*, 154 F.3d 1262, 1275 (11th Cir.1998.)

However, in cases involving a Ponzi scheme, the analysis is simplified because ***fraudulent intent is inferred***. *Merrill v. Abbott (In re Independent Clearing House Company),* 77 B.R. 843, 860 (D.Utah 1987). "Ponzi-type schemes are not legitimate business." *DuVoisin v. Anderson (In re Southern Ind. Banking Corp.),* 87 B.R. 524, 525 (Bankr.E.D.Tenn.1988). A Ponzi scheme is "any sort of fraudulent arrangement that uses later acquired funds or products to pay off previous investors." *Danning v. Bozek (In re Bullion Reserve of North America),* 836 F.2d 1214, 1219 n. 8 (9th Cir. 1988), cert. denied, *Bozek v. Danning*, 486 U.S. 1056, 108 S.Ct. 2824, 100 L.Ed.2d 925 (1988).

A debtor, *by definition,* acts with actual intent to hinder, delay or defraud, where the debtor engages in illegal activities or other highly questionable conduct, such as participating in a Ponzi scheme. *World Vision Entertainment, Inc.*, 275 B.R. 641, at 656. "By extension, any acts taken in furtherance of the Ponzi scheme, such as paying brokers commissions, are also fraudulent. ***Every payment made by the debtor to keep the scheme on- going was made with the actual intent to hinder, delay, or defraud creditors***, primarily the new investors.") *Id. Emphasis added. See also, Plotkin v. Pomona Valley Imports, Inc. (In re Cohen),* 199 B.R. 709, 717 (BAP 9th Cir.1996); *Jobin v. Lalan (In re M & L Business Machine, Inc.),* 160 B.R. 851 (Bankr. D. Colo.1993); *Hayes v. Palm Seedlings Partners-A (In re Agricultural Research & Technology Group, Inc.),* 916 F.2d 528, 535-36 (9th Cir.1990.)

The United States District Court for the Central Division of Utah in determining that a debtor acts with actual fraudulent intent in connection with transfers made in furtherance of a Ponzi scheme offers the following well-reasoned analysis:

> "One can infer intent to defraud future undertakers from the mere fact that a debtor was running a Ponzi scheme. Indeed, no other reasonable inference is possible. A Ponzi scheme cannot work forever. The investor pool is a limited resource and will eventually run dry. The perpetrator must know that the scheme will eventually collapse as a result of the inability to attract new investors. The perpetrator nevertheless makes payments to present investors, which, by definition, are meant to attract new investors. He must know all along, from the very nature of his activities, that investors at the end of the line will lose their money. Knowledge to a substantial certainty constitutes intent in the eyes of the law(.)"

*Merrill v. Abbott (In re Independent Clearing House Co.)*, 77 B.R. 843, 860 (Bankr. D. Utah 1987.)

## IV. Evidence of the Ponzi Scheme Conducted by Theodule and the Receivership Entities Is Simply Irrefutable.

The Receiver has overwhelmingly established the existence of a Ponzi scheme perpetrated by Theodule and the Receivership Entities. The evidence is derived from a forensic accounting review and analysis of the Receivership Entities by the Receiver and the SEC, coupled with admissions from George Theodule and his insiders. The irrefutable information presents all of the indicia determinative of a classic Ponzi scheme, including importantly: (i) the solicitation of funds from unwary investors; (ii) the promise of unrealistic returns; (iii) payment of falsified investment returns to initial investors to encourage ongoing investment in perpetration of the scheme; (iv) falsified financial reports of investment gains to ward off suspicion by participating investors; and (v) the siphoning of investment funds by Theodule and other insiders.

More specifically, the Receiver points to the following undisputed information in support of his arguments that Theodule and the Receivership Entities were in fact involved in a Ponzi scheme:

- From November 2007 until this Court entered a Temporary Restraining Order against him on December 29, 2008, Theodule and his Companies made false statements and omissions to prospective and actual investors to lure them into investing in stocks and options through the Companies.[2]
- Theodule, directly and through the Companies, told prospective and actual investors he had a successful history in trading stocks and options, promised to double their money within 90 days, and represented that this was a no-risk investment.[3] The scam worked, and Theodule raised more than $68 million from investors.[4] Theodule has now admitted that he never realized a net profit from trading.[5]
- Theodule traded approximately $18 million of the $68 million he raised, and lost 98% of that through trading.[6] Additionally, Theodule diverted approximately $23 million to his wife and close relatives.[7] He also siphoned off approximately $31 million for himself.[8]
- To conceal the truth from investors, Theodule and his Companies used approximately $20 million of new investor funds to pay existing investors their purported returns.[9]

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[2] *Infra*, at Receivers Statement of Undisputed Material Facts, at ¶¶ 4, 9, 38-47.

[3] *Id.* at ¶¶ 10-15, 25-27.

[4] *Id.* at ¶ 30.

[5] *Id.* at ¶¶ 32, 39, 47.

[6] *Id.* at ¶¶ 31-32, 39.

[7] *Id.* at ¶ 31(a).

[8] *Id.* at ¶¶ 31(b), 45.

[9] *Id.* at ¶¶ 31(c), 34, 40.

## V. Theodule's Assertion of Fifth Amendment Privileges Against Self-Incrimination Further Support the Receiver's Claims.

Throughout these receivership proceedings and the SEC Receivership Action, Theodule has asserted his Fifth Amendment privilege against self-incrimination whenever called on to testify. He has refused to answer any questions about the offer and sale of the investments, his role in the sales process, statements he made to prospective investors, or what he did with the millions of dollars he and his companies received. For example, when the Receiver deposed Theodule 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 16 A-B, Theodule Deposition, at 19-23, 25, 32-33, 41-42, 53-55, 59-76, 78-79, 84, 87-88, 94-95, 98-104, 108-110, 122, 124-125, 127-128, 135, 152, 164-170).[10] Specifically, Theodule took the Fifth Amendment when asked about:

- His net worth and sources of income, including CCC. (*Id.* at 22, 124-25);
- His employment history and experience with investments, commercial property development, and general professional experience. (*Id.* at 19-23);
- CCC's organization, operations, and control over investment clubs. (*Id.* at 21-22, 109-110);
- His solicitation of investors. (*Id.* at 19-23); and
- The vast amounts of investors' money he diverted for personal use or lost through CCC. (*Id.* at 57-84, 109-110, 127-28, 167).

Similarly, when the Commission deposed Theodule on August 14, 2009, Theodule took the Fifth Amendment on every single question relating to the substance of every element of the claim against him in this case. (Ex. 15, at 5 ("Mr. Theodule will be taking the Fifth Amendment as to any substantive questions.")). Specifically, he took the Fifth concerning, among other things:

[10] References to Exhibit Numbers refer to the Exhibits to the Commission's Statement of Undisputed Facts, filed as DE 171, and Amended Exhibit 2, filed as DE 173.

- The use of investor funds (*Id.* at 31:9-20; 68:3-13, 114:12-146:2; 155:22-159:16);

- Theodule paying investors their purported profits from new investors' funds (*Id.* at 87:10-23); whether SIMS was an independent regulatory agency and third-party verification system (*Id.* at 40:18-25, 41:16-14), Theodule's affiliation with SIMS (*Id.* at 39:6-8); whether CCC paid SIMS employees, SIMS lack of independent judgment (*Id.* at 41:1-6); and whether SIMS actually provided any verification services (*Id.* at 61:19-62:5);

- Theodule's affiliation and control over the investment clubs (*Id.* at 42:16-51:11; 83:13-17).

- His representations to investors about his investment background and experience, (*Id.* at 54:2-56:8), representations about the growth rate of investors' funds (*Id.* at 53:6-19), his promises to double investors' funds within 90 days (*Id.* at 70:4-71:24, 76:1-15, 87:10-23), the safety of their investment and investment returns (*Id.* at 99:7-105:10; 107:6-108:13; 112:20-114:15), and whether from November 2007 until December 2008 he raised money from CCC investors making false promises that he never delivered on (*Id.* at 159:10-16).

Because Theodule asserted his Fifth Amendment privilege and chose not to answer the questions posed at his depositions, the Court can draw all negative inferences therefrom. *See In re Elisade*, 172 B.R. 996, 1001 (Bankr. M.D.Fla. 1994) ("it is appropriate for this Court, in this civil matter, to draw a negative inference from the invocation by each of the Luengos of their Fifth Amendment privileges"); *Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976)("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"); *LiButti v. United States*, 107 F.3d 110, 121 (2d Cir.1997)(A litigant denied discovery based upon the assertion of the Fifth Amendment privilege may ask the court or trier of fact to draw a negative inference from the invocation of that right.) Such negative inferences regarding George Theodule, who was an officer, director, and/or control persons for each of the Receivership Entities, acting on their behalf, add to the already voluminous documentary evidence establishing that at all times material to the Fraudulent Transfers, the Receivership Entities, by and through George Theodule, were engaged in a classic Ponzi scheme designed to hinder, delay or defraud its creditors.

## CONCLUSION

Based upon the foregoing, the Receiver respectfully requests that this Court enter partial summary judgment on Count 1 of his Complaint against Defendant Dolce Regency Suites, LLC, and on Counts 1 and 2 of his Complaint against Defendants Five Corners Investors I, LLC, and Five Corners Investors II, LLC, specifically finding that:

(i) The Receivership Entities made the Fraudulent Transfers to the Defendant(s) in the amount identified in the Receiver's Complaint;

(ii) the Receivership Entities were involved in and participated in a Ponzi scheme at the time the Fraudulent Transfers were made to the Defendant(s); and

(iii) the Receivership Entities, pursuant to FUFTA, acted with actual intent to hinder, delay or defraud their creditors when making the transfers to the Defendant(s).

**[Remainder of page was left blank intentionally]**

WHEREFORE, the Receiver respectfully requests the Court grant the relief requested herein and for such other and further relief as the Court deems just and proper.

Dated: July 6, 2010
Miami, Florida

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 6th, 2010, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the 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/ David P. Lemoie
David P. Lemoie

**SERVICE LIST**

**JONATHAN E. PERLMAN, ESQ., as court appointed Receiver of Creative Capital Consortium, LLC, et al.**
**v. DOLCE REGENCY SUITES, LLC. and FIVE CORNERS INVESTORS I, LLC, et al.**
**CASE NO. 09-81224-CIV-HURLEY/HOPKINS and 09-81225-CIV-HURLEY/HOPKINS**
**United States District Court, Southern District of Florida**

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