

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO.: 09-CIV-20865-UNGARO/SIMONTON

JONATHAN E. PERLMAN, Esq., as court	:	
Appointed Receiver of Creative Capital	:	
Consortium, LLC, et al.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
GABRIELLE ALEXIS, et al.,	:	:
	:	
Defendants.	:	
	:	
	:	
	:	

**DEFENDANTS’ REPLY TO RECEIVER’S RESPONSE IN OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR
MORE DEFINITE STATEMENT**

The Defendants, Gabrielle Alexis, Law Office of Gabrielle Alexis, P.A., and Mondesir & Alexis Title Services, Inc., (hereinafter collectively “Alexis Defendants”) by and through their undersigned counsel hereby file this Reply to Receiver’s Response in Opposition to Defendants’ Motion to Dismiss or in the Alternative Motion for More Definite Statement (DE #10; the “Receiver’s Response”), and in support thereof, states as follows:

I. PRELIMINARY STATEMENT

1. The Plaintiff, Jonathan E. Perlman, in his capacity as Court Appointed Receiver for Creative Capital Consortium, LLC, A Creative Capital Concept\$, LLC, United Investment Club, LLC and Reverse Auto Loan, LLC; (“Receiver”) filed this lawsuit against the Alexis Defendants raising the following claims: (1) to avoid and recover fraudulent transfers pursuant to Fla. Stat. Chapter 726; (2) unjust enrichment; (3) imposition of a constructive trust, equitable

lien, or resulting trust; (4) aiding and abetting and/or conspiracy to breach of fiduciary duty; (5) conversion; (6) professional malpractice; and (7) breach of fiduciary duty.

2. On June 22, 2009, upon extension agreed to by the parties, the Alexis Defendants filed their Motion to Dismiss the Receiver's Complaint or in the Alternative Motion for More Definite Statement (D.E. 9; "Motion to Dismiss"). On July 10, 2009, the Receiver filed the Receiver's Response. As will be discussed herein, the very arguments presented by the Receiver in his Response belie the shortcomings of the Receiver's Complaint, and demonstrate the precise reasons why the Motion to Dismiss should be granted.

II. ARGUMENT AND MEMORANDUM OF LAW

A. The Standard of Review

3. As the Receiver correctly acknowledges in his Response, when ruling on a Motion to Dismiss, the Court "must accept as true all of the factual allegations in the Complaint." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007). Further, the Court's review is "limited to the four corners of the complaint." Wichombe v. TeeVee Toons, Inc. 555 F.3d 949 (11th Cir. 2009).

4. Despite these well-established limitations on the Court's review of a Motion to Dismiss, the Receiver not only urges the Court to look beyond those facts raised within the four corners of the Complaint, but raises extraneous facts which directly contradict those facts pled in the Complaint.

B. Facts Pled by the Receiver

5. In his Response, the Receiver alleges numerous facts which contradict the allegations raised within the Complaint. As will be discussed herein, these facts negate each and every argument raised by the Receiver in his Response to the Motion to Dismiss. Specifically, within the Complaint, the Receiver alleges the following:

a. The Receivership Entities had no legitimate business and were operating as a ponzi scheme. (Comp. ¶ 21)

b. The Receiver has attempted to locate and secure money illegally raised from investors by the Receivership Defendants. (Comp. ¶ 22)

c. The Creative Capital Entities have engaged in a fraudulent ponzi scheme (Comp. ¶ 23)

d. Theodule, using Creative Capital funds and other property owned by Creative Capital, acquired certain real and personal property as nominee for Creative Capital, the actual owner (Comp. ¶ 29)

e. The investment clubs pooled investor funds and sent them to Creative Capital for a 90-day period (Comp. ¶ 32)

f. Creative Capital hid its losses from current and prospective investors, paying principal and purported profits to existing investments clubs...from new investor funds (Comp. ¶ 40)

6. The Receiver further alleges that the Alexis Defendants received funds from Creative Capital (Comp. ¶¶ 48, 72, 73, 80, 107, 116, and 123). Additionally, the basis of the Complaint is that the Alexis Defendants breached duties owed to Creative Capital.

7. Similarly, there are absolutely no facts pled which would establish that either Creative Capital or the Alexis Defendants received any funds of any of the Receivership Entities aside from Creative Capital.

C. The Doctrine of *In Pari Delicto* Bars the Receiver's Claims

8. It is well established that the doctrine of *in pari delicto* acts as a complete bar to claims for damages suffered by a receivership entity from a ponzi scheme when that entity is used exclusively to perpetrate the scheme. *See, e.g., O'Halloran v. First Union National Bank of Florida*, 350 F.3d 1197 (11th Cir. 2003); *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543 (Fla. 2d DCA 2003); and *O'Halloran v. PricewaterhouseCoopers LLP*, 969 So. 2d 1039 (Fla. 2d DCA 2007).

9. Accordingly, by the Receiver's own allegations raised in the Complaint, the doctrine of *in pari delicto* acts to bar the Receiver's claims, as the Receivership Entities themselves had no legitimate business operation and were operated as a classic ponzi scheme.¹

10. In light of the foregoing, it is clear that the Receiver's reliance upon the adverse interest exception is misplaced and not substantiated by the allegations of the Complaint.

11. Similarly, while the Receiver is correct that courts have recognized that in limited circumstances the doctrine of *in pari delicto* does not act to bar a receiver's claims, such is not applicable in the instant matter. Quite simply, this limited exception applies where applies only in those instances where it can be demonstrated that the corporate entities had a non-fraudulent existence totally separate and apart from the underlying fraud. Freeman v. Dean Witter Reynolds, Inc., 865 So. 2d 543, 550 (Fla. 2d DCA 2003). As the Receiver himself alleges, the Receivership Entities had no legitimate business purposes and were solely the vehicle by which the ponzi scheme was committed.

D. The Receiver Cannot Pursue Fraudulent Transfer Claims Against the Alexis Defendants

12. The Receiver's argument that it is a creditor such that he has standing to raise a claim under FUFTA is entirely lacking in factual basis. The Receiver fails to plead that any of the funds transferred belong to any entity aside from Creative Capital. Without factual allegations regarding the creditor/debtor relationship and other substantive requirements that must be pled to state a valid fraudulent transfer claim, the Receiver's claim under FUFTA should be dismissed.

III. CONCLUSION

It is respectfully submitted that the Alexis Defendants have met their burden establishing that the Receiver has failed to state a cause of action against them and that the Complaint should be dismissed with prejudice. Since these deficiencies cannot be cured through an amendment, the Complaint must be dismissed with prejudice. In the alternative, the Alexis Defendants

¹ The Receiver's statement in the Response that discovery will demonstrate the existance of one or more "innocent" managers of the Receivership Entities, not only contradicts the allegations contained within the Complaint, but asks the Court to examine facts not pled within the Complaint. This supports the Alexis Defendants' argument that the Receiver failed to allege sufficient ultimate facts to state a claim upon which relief could be granted.

request that the Receiver be required to amend the Complaint to include a more definitive statement.

WHEREFORE, it is respectfully requested that this Court enter an Order dismissing the Complaint, with prejudice, and such other and further relief as this Court deems just and appropriate.

DATED: July 15, 2009
Boca Raton, Florida

SHENDELL & POLLOCK, P.L.

Attorneys for Defendants

One Park Place
621 N.W. 53rd Street
Suite 310
Boca Raton, Florida 33487
Phone: (561) 241-2323
Facsimile: (561) 241-2330

By: /s/ Kenneth S. Pollock

Gary R. Shendell
Florida Bar No. 0964440
gary@shendellpollock.com
Kenneth S. Pollock
Florida Bar No. 0069558
ken@shendellpollock.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, on this 15th day of July, 2009. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Kenneth S. Pollock
Gary R. Shendell
Florida Bar No. 964440

SERVICE LIST

David C. Cimo, Esq.
Genovese Joblove & Battista, P.A.
100 S.E. Second Street, 44th Floor
Miami, FL 33131
VIA CM/ECF