

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
(FT. LAUDERDALE DIVISION)**

**CASE NO 9:09-cv-81091-WJZ**

**(Ancillary Proceeding to Case No. 08-81565-CIV-HURLEY/HOPKINS)**

**JONATHAN E. PERLMAN, ESQ., as  
Court appointed Receiver of  
CREATIVE CAPITAL CONSORTIUM, LLC,  
et al.,**

**Plaintiff,**

**v.**

**MICHEL BEAUBRUN, an individual, and  
BEAUBRUN INVESTMENTS, LLC, a  
Florida corporation,**

**Defendant.**

\_\_\_\_\_ /

**DEFENDANTS' ANSWER TO COMPLAINT  
WITH AFFIRMATIVE DEFENSES/AVOIDANCES  
AND DEMAND FOR JURY TRIAL**

Pursuant to *Fed. R. Civ. P.* 8, Defendants Michel Beaubrun (“Beaubrun”), and Beaubrun Investments, LLC (“Beaubrun Investments”), (collectively, Beaubrun and Beaubrun Investments are referenced herein as “Defendants”), by and through their undersigned counsel, hereby submit this Answer and Affirmative Defenses/Avoidances to the Complaint and Demand a Jury Trial on all issues triable by a jury as a matter of right in accordance with *Fed. R. Civ. P.* 38, and, in support thereof, state as follows:

1. Defendants are without knowledge sufficient to admit or deny.
2. Defendants are without knowledge sufficient to admit or deny.
3. Defendants are without knowledge sufficient to admit or deny.

4. Defendants are without knowledge sufficient to admit or deny but deny that a Receivership Order can provide the Receiver with standing that he would not otherwise have under the law. *See, e.g., In re Wiand*, No. 8:05-cv-1856-T-27MSS, 2007 WL 963162 (M.D. Fla. Jan. 12, 2007) (court cannot confer standing on SEC Receiver that “would be contrary to constitutional and statutory law”), *citing Scholes v. Schroeder*, 744 F.Supp. 1419, 1421 (N.D. Ill. 1990).

5. Defendants are without knowledge sufficient to admit or deny but deny that the Receiver has set forth an accurate and complete statement of applicable legal principles and deny that three of the Receivership Entities — all of which were alleged to be under the control of Ponzi schemer George Theodule — can be deemed to be “creditors” of the fourth, Creative Capital Consortium, LLC (“Creative Capital”), for purposes of the Florida Uniform Fraudulent Transfer Act, Fla. Stat. § 726.101 *et seq.* (“FUFTA”). *See, e.g., In re Wiand*, No. 8:05-cv-1856-T-27MSS, 2008 WL 818504 at \* 1 (M.D. Fla. Mar. 26, 2008) (dismissing with prejudice all claims brought by Receiver on behalf of Receivership entity when Receiver failed to plead facts showing that entity was “a separate legal entity that was injured by disbursements of its funds for unauthorized purposes . . .”).

6. Defendants are without knowledge sufficient to admit or deny but deny that the Receiver has set forth an accurate and complete statement of applicable legal principles and deny that Creative Capital can be deemed a “debtor” for purposes of asserting a claim for fraudulent transfer under the FUFTA.

7. Denied.

8. Admitted.

9. Defendants are without knowledge sufficient to admit or deny.

10. Admitted.

11. Defendants are without knowledge sufficient to admit or deny.

12. Admitted that Beaubrun is an individual residing in Palm Beach County, Florida but denied that he “at all times material hereto, was an insider of the Creative Capital Entities.” Beaubrun was never an “insider of the Creative Capital Entities” and was a victim of Theodule and

his brother.

13. Admitted that Beaubrun Investments is a Florida limited liability corporation but denied that Beaubrun Investments was an “investment club” that assisted Theodule’s Ponzi scheme because Beaubrun Investments was formed in 2002 (long before the fraudulent Ponzi scheme operated by Theodule) on the recommendation of Beaubrun’s accountant to act as a holding company for property used by Beaubrun’s automotive business.

14. Admitted that Beaubrun was, at all material times, “an owner, officer, director and/or control person of Defendant BEAUBRUN INVESTMENTS, LLC” but denied that “at all times material hereto, BEAUBRUN INVESTMENTS, LLC was an alter ego of MICHEL BEAUBRUN because the entity was formed and/or operated for an improper purpose (including aiding and abetting a Ponzi scheme and hindering, delaying or defrauding creditors), and/or was otherwise the subject of the Defendant’s active or substantial control” because Beaubrun Investments was formed in 2002 (long before the fraudulent Ponzi scheme operated by Theodule) on the recommendation of Beaubrun’s accountant to act as a holding company for property used by Beaubrun’s automotive business and was not “formed and/or operated formed and/or operated for an improper purpose (including aiding and abetting a Ponzi scheme and hindering, delaying or defrauding creditors) . . .”

15. Defendants are without knowledge sufficient to admit or deny.
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47. Defendants are without knowledge sufficient to admit or deny.

48. Defendants are without knowledge sufficient to admit or deny.

49. Defendants are without knowledge sufficient to admit or deny.

50. Denied in its entirety and strict proof demanded because Beaubrun and Beaubrun Investments did not have knowledge of, or actively participate in and/or otherwise conspire with Theodule in his Ponzi scheme. Beaubrun Investments was formed in 2002 long before Theodule's Ponzi scheme and did not operate as an investment club or other business entity to "collect and transfer investor funds to and from the Creative Capital Entities," did not solicit any Creative Capital investors, and did not misappropriate and divert Creative Capital funds and other assets for personal use and benefit.

51. Defendants are without knowledge sufficient to admit or deny.

**COUNT 1**  
**Action to Avoid and Recover**  
**Fraudulent Transfers Pursuant**  
**to Chapter 726 of The Florida Statutes**

52. Defendants reallege their responses to paragraphs 1 through 51 above as if fully set forth herein.

53. Defendants are without knowledge sufficient to admit or deny but deny that a Receivership Order can provide the Receiver with standing that he would not otherwise have under the law. *See, e.g., In re Wiand*, No. 8:05-cv-1856-T-27MSS, 2007 WL 963162 (M.D. Fla. Jan. 12, 2007) (court cannot confer standing on SEC Receiver that “would be contrary to constitutional and statutory law”), *citing Scholes v. Schroeder*, 744 F.Supp. 1419, 1421 (N.D. Ill. 1990).

54. Denied that the Defendants received any monies or transfers from Creative Capital or Theodule that were “for less than reasonably equivalent value.” Beaubrun met Theodule through other investors in late 2007 and he personally made two investments with Theodule, the first for \$50,000 in December 2007 and the second (on behalf of Beaubrun Investments) for \$100,000 in 2008. Beaubrun was paid a return on (and of) the first investment in the amount of \$150,000 and Beaubrun Investments received a return on (and of) the second investment in the amount of \$250,000. The payment of \$410,000 was ostensibly to assist a friend of Theodule to purchase a short sale home but the sale fell through and Beaubrun was instructed by Theodule to disburse those funds on behalf of various of Theodule’s relatives.

55. Defendants are without knowledge sufficient to admit or deny but deny that the Receiver is entitled to avoid any transfer made to them.

56. Defendants are without knowledge sufficient to admit or deny but deny that the Receiver is entitled to recover any transfer made to them.

57. Denied.

58. Denied that Creative Capital did not receive reasonably equivalent value for any transfers made to Defendants since Defendants invested funds but Defendants are without knowledge sufficient to admit or deny the allegations relating to the solvency or lack thereof of “the Creative Capital family of companies.”

59. Defendants are without knowledge sufficient to admit or deny any “actual intent” of Creative Capital to hinder, delay or defraud its creditors but deny that they did not act in good faith in receiving any transfers. Defendants are without knowledge sufficient to admit or deny the Receiver’s allegations as to the “badges of fraud” ostensibly demonstrated by Creative Capital except that Defendants deny that they did not provide reasonably equivalent value for any transfers received.

60. Denied.

**COUNT 2**  
**Unjust Enrichment**

61. Defendants reallege their responses to paragraphs 1 through 51 above as if fully set forth herein.

62. Defendants admit that the Receiver purports to assert a claim for unjust enrichment but deny that the Receiver has stated a viable claim or is entitled to any relief.

63. Defendants admit that transfers received may be construed as a “benefit” except that the transfer of \$410,000 did not benefit the Defendants at all and was disbursed on behalf of Theodule’s family members pursuant to his instructions.

64. Defendants admit that they have accepted and retained payments from certain of the

Receivership Entities in exchange for reasonably equivalent value (except for the payment of \$410,000 which was not retained by the Defendants but was disbursed on behalf of Theodule's family members pursuant to his instructions) but deny that they "knowingly and voluntarily" did anything wrongful.

65. Denied.

66. Denied.

67. Denied.

**COUNT 3**  
**Imposition of Constructive Trust or**  
**Equitable Lien**

68. Defendants reallege their responses to paragraphs 1 through 51 above as if fully set forth herein.

69. Defendants admit that the Receiver purports to assert a claim "to impose a constructive trust or equitable lien" but deny that the Receiver has stated a viable claim or is entitled to any relief.

70. Defendants admit that transfers received may be construed as a "benefit" except that the transfer of \$410,000 did not benefit the Defendants at all since it was disbursed on behalf of Theodule's family members pursuant to Theodule's instructions.

71. Defendants admit that they have accepted and retained payments from certain of the Receivership Entities in exchange for reasonably equivalent value (except for the payment of \$410,000 which was not retained by the Defendants but was disbursed on behalf of Theodule's family members pursuant to Theodule's instructions) but deny that they "knowingly and voluntarily" did anything wrongful.

72. Denied.

73. Denied.

74. Denied.

**COUNT 4**  
**Aiding and Abetting and/or**  
**Conspiracy to Breach of Fiduciary Duty**

75. Defendants reallege their responses to paragraphs 1 through 51 above as if fully set forth herein.

76. Defendants are without knowledge sufficient to admit or deny.

77. Defendants are without knowledge sufficient to admit or deny.

78. Defendants are without knowledge sufficient to admit or deny but deny that Theodule engaged in any “questionable transactions with no legitimate or justifiable business purpose to advance the interests of . . . Defendants.”

79. Defendants are without knowledge sufficient to admit or deny but deny that they received any benefit that had an adverse impact on Creative Capital.

80. Denied that Defendants had any knowledge of any wrongful behavior by Theodule or “rendered substantial assistance” in regard to any breaches of fiduciary duty by Theodule. In addition, Defendants deny that they “actively conspired” with Theodule with regard to any alleged breaches of any fiduciary duties he may have owed to the Creative Capital Entities.

81. Denied.

82. Denied that Defendants have “aided and abetted” any breach of fiduciary duty by Theodule or that any conduct by the Defendants proximately caused any damage to Creative Capital.

**COUNT 5**  
**Conversion**

83. Defendants reallege their responses to paragraphs 1 through 51 above as if fully set forth herein.

84. Denied.

85. Denied.

86. Denied that Defendants, “by virtue of their acts and omissions,” engaged in “unauthorized acts that caused the wrongful dissipation and transfer of such funds which deprived the Creative Capital Entities of their property permanently . . .”

87. Denied.

88. Denied.

With respect to all *ad damnum* clauses of the Complaint, Defendants deny that they are liable to the Receiver for any monetary relief or any other form of equitable or legal relief. Any and all other allegations of the Complaint which were not specifically addressed above, if any, are hereby denied.

**WHEREFORE**, Defendants respectfully request that this Court: (a) enter a judgment in favor of Defendants in this case and deny all requests for relief by the Receiver; (b) award to Defendants the costs of defending this suit as allowed by law; and (c) award Defendants such other and further relief as this Court deems just and proper.

**AFFIRMATIVE DEFENSES/AVOIDANCES**

**FIRST AFFIRMATIVE DEFENSE/AVOIDANCE -  
DEFENDANTS ACTED IN GOOD FAITH AT ALL TIMES**

At all times material hereto, the Defendants acted entirely in good faith and without knowledge of any wrongful conduct by Theodule or any of the Receivership Entities. Indeed, Defendants were victims of the unlawful Ponzi scheme perpetrated by Theodule and the Receivership Entities and have suffered harm as a result thereof.

**SECOND AFFIRMATIVE DEFENSE/AVOIDANCE -  
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Pursuant to *Fed. R. Civ. P.* 12(b)(6), the Complaint fails to adequately state a claim against Defendants because the Receiver does not have standing to assert FUFTA claims and cannot make out such claims as a matter of law. The Receiver's attempt to artificially segregate all of the Receivership Entities except Creative Capital into "creditors," while denoting Creative Capital a "debtor" so as to assert FUFTA claims fails because all of the Receivership Entities were mere instrumentalities of Ponzi schemer George Theodule and were not truly independent entities. The Receiver's claims brought pursuant to FUFTA fail, therefore, as a matter of law because neither the Receiver nor the Receivership Entities is a "creditor" for purposes of asserting a FUFTA claim. The Receiver's claims brought pursuant to FUFTA also fail as a matter of law because assets transferred were not the assets of the Debtor. Further, the Receiver has failed to plead sufficient specific facts to set forth any actionable claim against the Defendants whatsoever and has instead filed a "form" complaint that fails to apprise the Defendants of exactly what conduct the Receiver contends was wrongful and/or gives rise to civil liability while pleading inconsistent and repetitive causes of action. Defendants did not "aid and abet" any conduct by Theodule and his Creative Capital Entities

and had no knowledge of the Ponzi scheme. The Receiver has failed to plead any facts that would support any allegation that the Defendants substantially assisted Theodule in perpetrating his unlawful Ponzi scheme or in breaching any fiduciary duties he owed to the Receivership Entities.

**THIRD AFFIRMATIVE DEFENSE/AVOIDANCE -  
REASONABLY EQUIVALENT VALUE**

It is axiomatic that when adequate consideration has been provided in exchange for the benefit conferred, a claim of unjust enrichment fails. *See, e.g., Gene B. Glick Co. v. Sunshine Ready Concrete Co.*, 651 So.2d 190 (Fla. 4<sup>th</sup> DCA 1995) (“Unjust enrichment is equitable in nature and cannot exist where payment has been made for the benefit incurred.”). Similarly, FUFTA claims fail when there has been an exchange of “reasonably equivalent value.” Defendants submit that they were good faith transferees who provided fair consideration and “reasonably equivalent value” for any and all transfers received and retained by them.

**FOURTH AFFIRMATIVE DEFENSE/AVOIDANCE -  
ENFORCEABLE CONTRACT BARS UNJUST ENRICHMENT**

There can be no viable claim for unjust enrichment when there is an enforceable contract between the parties. If the Court determines that there was a binding and enforceable investment contract between either of the Defendants and a Receivership Entity, the Receiver’s claim for unjust enrichment is barred. Further, the Receiver has not plead his claim of unjust enrichment as an alternative theory of recovery and a claim of unjust enrichment is inconsistent with the Receiver’s remaining claims.

**FIFTH AFFIRMATIVE DEFENSE/AVOIDANCE -  
IN PARI DELICTO, UNCLEAN HANDS AND ESTOPPEL**

The Receiver's claims are barred by the doctrines of *in pari delicto*, unclean hands, and estoppel.

**SIXTH AFFIRMATIVE DEFENSE/AVOIDANCE -  
SET OFF**

The Receiver's claims are subject to set off, including a substantial set off for the principal amounts that the Defendants had invested in good faith.

**SEVENTH AFFIRMATIVE DEFENSE/AVOIDANCE -  
LACK OF STANDING**

The Receiver does not have standing to bring the claims asserted.

**DEMAND FOR JURY TRIAL**

Pursuant to *Fed. R. Civ. P.* 38, Defendants demand a trial by jury on all issues triable by a jury as a matter of right.

Dated: September 8, 2009

Respectfully submitted,

**s/ Michael Hursey**

Michael Hursey, Esq.

Florida Bar No. 457698

*Counsel for Defendants Michel Beaubrun  
and Beaubrun Investments, LLC*

**MICHAEL HURSEY, P.A.**

5220 S. University Drive

Suite C-110

Davie, FL 33328

Telephone: (954) 252-7458

Facsimile: (954) 252-3353

E-Mail: [mhpalaw@bellsouth.net](mailto:mhpalaw@bellsouth.net)

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on September 8, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to which will send a notice of electronic filing to all counsel of record as indicated below.

**s/ Michael Hursey, Esq.**  
 Michael Hursey, Esq.  
*Counsel for Defendants Michel Beaubrun and  
 Beaubrun Investments, LLC*

<b>Party</b>	<b>Method of Service</b>	<b>Name, Address, Telephone, and Facsimile of Party's Counsel</b>
JONATHAN E. PERLMAN, ESQ., as Court appointed Receiver of CREATIVE CAPITAL CONSORTIUM, LLC, et al., <i>Plaintiff</i>	CM/ECF System	David C. Cimo David P. Lemoie Harris J. Koroglu Genovese Joblove & Battista, P.A. 4400 Bank of America Tower 100 Southeast Second Street Miami, Florida 33131 Telephone: (305) 349-2300 Facsimile: (305) 349-2310 <a href="mailto:dcimo@gjb-law.com">dcimo@gjb-law.com</a> <a href="mailto:dlemoie@gjb-law.com">dlemoie@gjb-law.com</a> <a href="mailto:hkoroglu@gjb-law.com">hkoroglu@gjb-law.com</a>

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