UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

CASE NO. 09-81225-CIV-HURLEY/HOPKINS
(Ancillary Proceeding to U.S.D.C. Case No. 09-81225-CIV-HURLEY/HOPKINS)

JONATHAN E. PERLMAN, Esq., 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.
_____/

PLAINTIFF RECEIVER'S RESPONSE IN OPPOSITION TO BW ASPIRE, LLC's MOTION TO DISMISS (D.E. #5)

The Plaintiff, Jonathan E. Perlman, Esq., the court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC, A Creative Capital Concept$, LLC,[1] United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G$ Trade Financial, Inc. and Unity Entertainment Group, Inc.,[2] hereby files this Response in Opposition to Defendant BW Aspire, LLC's Motion to Dismiss (D.E. #5) (the "Motion to Dismiss"), and states as follows:

[1] Creative Capital Consortium, LLC and A Creative Capital Concept$, LLC shall sometimes collectively be referred to herein as "Creative Capital" or the "Creative Capital Entities."

[2] Since the filing of the Complaint, the Receivership has again been expanded and now includes 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. which entities shall sometimes be collectively referred to as the "Receivership Entities."

PRELIMINARY STATEMENT

On August 21, 2009, the Receiver filed a Complaint for Damages and to Avoid and Recover Fraudulent Transfers and For Other Relief (the "Complaint") against Five Corners Investors I, LLC, Five Corners Investors II, LLC, CFD-Regency I, LLC, CFD-Regency II, LLC and BW Aspire, LLC, alleging the following causes of action: (i) the avoidance and recovery of fraudulent transfers under Florida's Uniform Fraudulent Transfer Act; (ii) unjust enrichment; and (iii) the imposition of a constructive trust or equitable lien or resulting trust.

On October 2, 2009, Defendant BW Aspire, LLC ("BW Aspire" or "Defendant") filed its Motion to Dismiss, which alleges the following arguments in support of its position for dismissal: [3]

(i) that the entire Complaint should be dismissed because the Receiver fails to allege that Defendant participated in any fraud;

(ii) that the entire Complaint should be dismissed because the Receiver fails to allege that Defendant received any money or assets from the alleged transfers;

(iii) that Counts 1 and 2 of the Receiver's Complaint alleging fraudulent transfer under the Florida Uniform Fraudulent Transfer Act at Chapter 726 of the Florida Statutes ("FUFTA") should be dismissed because the Receiver lacks standing; and

(iv) that Count 4 of the Receiver's Complaint alleging a claim for an equitable lien or constructive trust should be dismissed because the Receiver fails to identify a specific "res" or property subject to the imposition of an equitable lien or trust.

[3] The Court should be aware that that defendants Five Corners Investors I, LLC and Five Corners Investors II, LLC ("Five Corners") filed a Motion to Dismiss (D.E.#4) that is ***identical*** to the BW Aspire Motion to Dismiss (D.E. #5),which is the subject of this Response. As such, the Receiver's Responses in Opposition to both the BW Aspire motion to dismiss (argued herein) and the Five Corners motion to dismiss are identical.

As set forth in more detail below, Defendant's arguments are without merit. Either the Defendant fail to correctly interpret or apply the controlling legal authority in connection with the arguments raised in their Motion to Dismiss, or alternatively, the Defendant's arguments are overcome by the well-pled facts in the Complaint. More specifically, directly responding to the Defendant's arguments, the Receiver states as follows:

(i) The Defendant has misconstrued the pleading requirements for fraudulent transfer claims under FUFTA. There simply is no requirement that the Receiver plead the Defendant's participation in the fraud.

(ii) The Complaint ***clearly*** alleges that the transfers sought to be avoided were either made directly to the Defendant or were made "for the benefit of" the Defendant as required by FUFTA.[4]

(iii) The Complaint ***clearly*** alleges the Receiver's status as a creditor under FUFTA with the requisite standing to pursue his fraudulent transfer claims.[5]

(iv) The Complaint ***clearly*** alleges that the Defendant received certain promissory notes and security interests as part of the transfers sought to be avoided by the Receiver, which promissory notes and security interests comprise a "res" subject to the imposition of an equitable lien or trust.[6]

For the reasons set forth above, as more fully argued by the Receiver in its legal memorandum below, the Defendant's Motion to Dismiss should be denied.

[4] See Receiver's Complaint at Paragraphs 58 and 59.

[5] See Receiver's Complaint at Paragraphs 61 through 63 and Paragraphs 71 through 73.

[6] See Receiver's Complaint at Paragraph 59.

THE STANDARD OF REVIEW FOR EVALUATING A MOTION TO DISMISS

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 factual allegations in the Complaint must be "construed in the light most favorable to the Plaintiff." Rivell v. Private Health Care Sys., 520 F.3d 1308, 1309 (11th Cir.2008). A court's review on a motion to dismiss is "limited to the four corners of the complaint." Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949 (11th Cir.2009); St. George v. Pinellas County, 285 F.3d 1334, 1337 (11th Cir.2002). A court may consider only the complaint itself and any documents referred to in the complaint which are central to the claims. *See* Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir.1997) (per curiam).

Although Rule 12(b)(6) allows a defendant to seek dismissal of a complaint for failure to state a claim upon which relief can be granted, it has been generally held that a complaint should not be dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed. 2d 80 (1957); Castro v. Secretary of Homeland Sec., 472 F.3d 1334, 1336 (11th Cir. 2006); Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 349 (11th Cir. 2006).

In Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 127 S. Ct. 1955, 1974, 164 L.Ed. 2d 929 (2007) the United States Supreme court made clear that in order to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) a complaint need only plead "enough facts to state a claim that is plausible on its face." The Supreme Court further made clear that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

will not do." Id. Rather, factual allegations "must be enough to raise the right to relief above the speculative level."[7] Id.

In Erickson v. Pardus, 127 S.Ct. 2197, 2200, 167 L.Ed. 2d 1081 (2007), decided just two weeks after Twombly, the United States Supreme Court reiterated that Fed. R. Civ. P. 8(a) requires only a short and plain statement demonstrating plaintiff's entitlement to relief. "*Specific facts are not necessary*; the statement need only give the defendant *fair notice* of what the claim is and the grounds upon which it rests." Id. (quoting Twombly, 127 S.Ct. at 1964). (emphasis added).

Additionally, the Eleventh Circuit has interpreted Twombly to require that a complaint need only specify enough facts "to raise a reasonable expectation that discovery will reveal evidence" of the required elements. Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1309 (11th Cir.2008)(*per curium*)(citing Twombly, 127 S.Ct. at 1965). In other words, the complaint need only identify "facts that are suggestive enough to render [the element] plausible."' Id. (quoting Watts v. Florida Int'l. Univ., 495 F.3d 1289, 1296 (11th Cir. 2007) (quoting Twombly, 127 S.Ct. at 1965)). This is simply "all that is required at this stage of the litigation." Watts, 495 F.3d at 1296. There is no requirement of probability, or of any detail- just plausibility. Id. A complaint need only plead "enough factual matter (taken as true) to suggest"' the required element. Id.

[7] The Supreme Court did *not* mandate a heightened federal pleading standard in Twombly. Rather, the Court did nothing more than clarify pleading requirements applicable to particular types of allegations. Warning of overly broad interpretations by overzealous advocates, the Court specifically advised that "we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation." Id. at 1973, n. 14 (internal citations omitted).

LEGAL ARGUMENTS

I. The Defendant Fails to Recognize the Correct Pleading Standard for Fraudulent Transfer Claims. The Receiver Is Not Required to Plead that the Defendant Participated in the Debtor's Fraud. Nor is the Receiver Required to Plead the Debtor's Fraud with Specificity Under Fed. R. Civ. P. Rule 9(b).

In part 1 of the its Motion to Dismiss, the Defendant essentially claim two things: (i) that the Complaint fails to allege that the Defendant had actual participation in the Ponzi Scheme and/or George Theodule's fraud upon investors, and (ii) that the Complaint fails to allege the fraudulent transfer claims with particularity, as required under Fed.R.Civ.P. Rule 9(b). The Defendant misses the mark on both arguments.

First regarding Defendant's claim that the Complaint does not allege that they actually participated in the Ponzi scheme and/or George Theodule's fraud upon investors, it is facially clear under the text of the Florida Uniform Fraudulent Transfer Act at Fla. Stat. §726.101 et eq. ("FUFTA"), that the Plaintiff, here suing as a "creditor" of Dolce Regency (the "debtor"), need *only* establish that the "*debtor*" made the alleged fraudulent transfers with "actual intent to hinder, delay, or defraud" its creditors. FUFTA does ***not require*** (and therefore the Receiver need not plead) that the Plaintiff establish that the Defendant had knowledge of the actual fraud (i.e. the Ponzi Scheme and/or George Theodule's fraud upon investors) when they received the transfers in question. The Defendant mistakenly confuses or misinterprets the applicable language of FUFTA, and its argument for dismissal is simply without merit.

Second, and contrary to Defendant's assertion in part 1 of its Motion to Dismiss, this Court has previously concluded that the heightened pleading standard of Fed. R. Civ. P. Rule 9(b) does not apply to claims brought under FUFTA. Special Purpose Accounts Receivable Co-op. Corp. v. Prime One Capital Co., L.L.C. No. 00-cv-06410, 2007 WL 4482611, *4 (S.D.Fla. Dec.19, 2007). Unlike common law fraud claims, fraudulent transfer claims are asserted against

a person or entity that did not deal directly with the plaintiff in the challenged transaction. Therefore, the plaintiff generally possesses little or no information about the alleged fraudulent transfer other than the fact that it occurred.[8] The fraudulent act, the clandestine act of hiding money, is allegedly committed by a defendant and another, to the exclusion of the plaintiff. Id.

This is in stark contrast to a common law fraud claim where a plaintiff alleges that a defendant made a material false statement or omission directly to the plaintiff. Under such circumstances, the plaintiff is in a position to plead with the specificity required by Rule 9(b). This Court has concluded that despite the use of the word "fraud," a fraudulent transfer claim is significantly different from other fraud claims to which Rule 9(b) is directed. Id.; Nesco Inc. v. Cisco, No. Civ.A. CV205-142, 2005 WL 2493353, * 3 (S.D.Ga. Oct.7, 2005) (finding common law fraud and fraudulent transfer "bear very little relation to each other" since the element of false representation need not be proven in fraudulent transfer cases). *See also*, Official Committee of Unsecured Creditors of Verestar, Inc., v. American Tower Corp. (In re Verestar, Inc.), 343 B.R. 444 (Bankr. S.D.N.Y. 2006); Miller v. Greenwich Capital Fin. Products, Inc., 362 B.R. 135 (Bankr. D. Del. 2007); Brandt v. Trivest II, Inc. (In re Plassein Int'l Corp.), 352 B.R. 36 (Bankr. D. Del. 2006); Giulano v. U.S. Nursing Corp., (In re Lexington HealthCare Group, Inc.), 339 B.R. 570 (Bankr. Del. 2006). Thus, the application of a heightened pleading standard is inappropriate with respect to the Receiver's FUFTA claims.

[8] As discussed by Wright and Miller, a common reason identified by courts to require heightened pleading for fraud claims rests on the idea that without this information, a defendant would be unable to formulate a responsive pleading. C. Wright & A. Miller, 5A Federal Practice & Procedure § 1296 (2004). In the fraudulent transfer context, however, the defendant, as opposed to the plaintiff, is more likely to possess the particularized information about the complained-of conduct.

II. The Receiver's Complaint Clearly Identifies Two Types of Alleged Fraudulent Transfers – Those Made "Directly" to the Defendant, and Those Made "For the Benefit of" the Defendant.

FUFTA allows a creditor to avoid and recover two "types" of fraudulent transfers – namely, those made directly to a defendant as initial transferee, and those to "person(s) for whose benefit the transfer was made" - a defendant who has not directly received the subject transfer. Fla. Stat. §726.109 states in relevant part:

> (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. The judgment may be entered against:
>
> (a) ***The first transferee of the asset or the person for whose benefit the transfer was made.***

Fla. Stat. §726.109(2)(a), emphasis supplied.

In his Complaint, the Receiver has sufficiently alleged both "direct" transfers made to the Defendant (for which the Defendant actually and physically received an asset from the transferor) and "beneficial" transfers made to the Defendant, for which the Defendant was the "person for whose benefit the transfer was made." Each of these transfers is discussed separately below.

A. The "Regency Suites Expense Transfer" in the Amount of $7 Million Identified by the Receiver in Paragraph 58 of His Complaint Sufficiently Alleges a Transfer Made "For the Benefit of" the Defendant.

Interpreting parallel provisions regarding transfers made for "the benefit of" certain transferees under Section 550 of the Bankruptcy Code, federal courts have held[9] that in order to impose liability upon a defendant who has benefitted from a fraudulent transfer without actually

[9] The provisions of FUFTA and the provisions of the Bankruptcy Code regarding fraudulent transfers are similar and are appropriately analyzed and determined in like fashion by the Florida courts. In re Tower Environmental, Inc., 260 B.R. 213, (Bkrtcy.M.D.Fla.1998); In re Venice-Oxford Associates Ltd. Partnership, 236 B.R. 820, (Bkrtcy.M.D.Fla.1999.)

physically receiving the asset constituting the transfer, the defendant in question must have received a benefit which is "direct, ascertainable and quantifiable." In re International Management Assoc., 399 F.3d 1288 (11th Cir. 2005); See also In re Connolly North America, LLC, 340 B.R. 829, (Bankr. E.D. Mich. 2006) (although defendant was not a guarantor, defendant's exposure to liability was reduced by the debtor's transfer and, accordingly, the defendant received a benefit); In re B.S. Livingston & Co., Inc., 186 B.R. 841 (D.N.J. 1995) (principals of debtor were benefited by receiving lucrative positions as a result of the transfer); In re McCook Metals, L.L.C., 319 B.R. 570, (Bankr. N.D. Ill. 2005) (benefit must be actual and quantifiable).

The Receiver's allegations regarding the identity of the Defendant as a member of the limited liability company Regency Suites I, LLC, as well as certain debts of the Defendant and Regency Suites I paid at the closing of the sale of the "Dolce Property" fall within the ambit of allegations which contend such a "direct, ascertainable and quantifiable" benefit to the Defendant. Specifically, at Paragraphs 58, and 13, the Receiver alleges:

> 58. On August 13, 2008, in contemplation of the purchase of the Regency Property, Creative Capital, by and through Alexis and GAPA, 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, Edgarton, Bloodworth, Capuano, and Bozarth, P.A, as escrow agent for the sale of the Regency Property (the "Dolce Transfer.") ***The Dolce Transfer funds were used, to and for the benefit of the Defendants, to pay the outstanding financial obligations of Regency Suites I at the closing of the sale of the Regency Property*** (the "Regency Suites Expense Transfer.")
>
> 13. The Defendant, BW Aspire, LLC is a Nevada limited liability company, whose address is unknown to the Receiver, and ***at all times material hereto is a member of Regency Suites I.***

By virtue of the above allegations regarding the "Regency Suites Expense Transfer" in the amount of $7 million dollars, the Receiver contends without equivocation that the Defendant

received the benefit of having its debts paid by the Receivership Entities and Dolce Regency at the closing for the Dolce Property. FUFTA contemplates the avoidance of these transfers and their ultimate recovery from the Defendant as a "person for whose benefit" these transfers were made.

B. <u>The "Regency Suites Equity Transfers" Identified by the Receiver at Paragraph 59 of His Complaint Sufficiently Alleges "Direct" Transfers to the Defendant.</u>

In its Motion to Dismiss, the Defendant does not address or otherwise ignores the Receiver's allegation that certain transfers to the Defendant in the form of promissory notes and their attendant security liens are subject to avoidance and recovery as "direct" transfers made to the Defendant. FUFTA specifically provides for the avoidance of such transfers by virtue of defining the creation of debt and the imposition of such liens as "transfers":

> "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and ***includes payment of money, release, lease, and creation of a lien or other encumbrance***.

Fla. Stat. §726.102(12), emphasis supplied.

Specifically, at paragraph 59 of the Complaint, the Receiver alleges as follows:

> 59. On August 13, 2008, upon the closing of the purchase of the Regency Property, Theodule, as a nominee managing member of Dolce Regency on behalf of Creative Capital, caused Dolce Regency to execute and deliver a purchase money promissory note to and for the benefit of the Defendants in the amount of Six Million Thirty Thousand ($6,030,000) Dollars, which promissory note was secured by One Hundred (100%) Percent on the membership interests in Regency Suites I (the "Regency Suites Equity Transfer.")

By virtue of the above allegations regarding the "Regency Suites Equity Transfer" in the amount of $6,030,000 dollar, the Receiver contends without equivocation that direct transfers in the form of security liens were made to the Defendant. Such transfers are clearly avoidable under FUFTA by virtue of their being expressly defined as transfers pursuant to §726.102 (12).

C. The Identification of the Transfers, Their Source and Amount and the Identity of the Defendant as Transferee is Sufficient to Satisfy FUFTA's Pleading Requirements.

As previously discussed, in In re Plassein Int'l Corp., the court found Rule 9(b) to be inapplicable altogether with respect to fraudulent transfer claims because in the context of such avoidance claims, the "circumstances constituting fraud" are those set forth in the statute itself. 352 B.R. at 40. "[I]t is simply not helpful to speak of Rule 9 pleading standard, whether 'relaxed' or otherwise, as if it requires something more than pleading the factual elements of the cause of action. Accordingly, the Court joins in those decisions that have (either implicitly or explicitly) evaluated fraudulent transfer complaints using Rule 8(a)(2)'s notice pleading standard." Id. at 40-41; see also Profilet v. Cambridge Fin. Corp., 231 B.R. 373, 379 (S.D. Fla. 1999); In re Sverica Acquisitions Corp., 179 B.R. 457, 463 (Bankr. E.D. Pa. 1995); In re O.P.M. Leasing Services, Inc., 32 B.R. 1999, 2003 (Bankr. S.D.N.Y. 1983).

The Receiver satisfies the requisite *notice* pleading requirements of Rule 8. Among the factors deemed sufficient to put a defendant on notice of a fraudulent transfer claim under a Rule 8 notice pleading standard are (1) the transfer date, (2) the amount, (3) the name of the transferor, and (4) the name of the transferee. In re APF Co., 308 B.R. at 188. In his Complaint at Paragraph 59, the Receiver fulfills these requirements by setting forth the factual allegations concerning "direct transfers" in the form of the "Regency Suites Equity Transfer" in the amount of $6,030,000 dollars. Likewise, in his Complaint at Paragraph 59, the Receiver fulfills these requirements by setting forth the factual allegations concerning "beneficial transfers" in the form of the "Regency Suites Expense Transfer" in the amount of $7 million dollars.

III. The Receiver is a Creditor Under FUFTA With Standing to Pursue Fraudulent Transfer Claims Against the Defendant.

In its Motion to Dismiss, the Defendant argues that the Complaint fails to allege sufficient facts to show that the Receiver has standing to assert a fraudulent transfer claim against Defendant under FUFTA. The Defendant *seemingly*, though not entirely clearly, alludes to the correct standard under which the Receiver may pursue his claims under FUFTA. Namely, the Receiver must show that: (1) there is a creditor with a claim against a debtor; (2) that the debtor made a transfer to a third party rendering the debtor unable to pay the creditor's claim; and (3) that a third party received the transfer from the debtor/transferor. See, e.g., Nationsbank N.A. v. Coastal Utilities, Inc., 814 So. 2d 1227, 1229 (Fla.4th DCA 2002); Gulf Coast Produce, Inc. v. American Growers, Inc., 2008 WL 660100, *6 (S.D. Fla. March 7, 2008); In re Burton Wiand, 2008 WL 818509, *6 (M.D. Fla. Jan. 8, 2008). The Defendant argues that the Receiver is not a "creditor" within the meaning of FUFTA, and thus lacks standing to pursue his fraudulent transfer claims.

The initial inquiry concerning standing involves jurisdictional questions based upon constitutional concerns. In re Wiand, 2007 WL 963165 (M.D.Fla. Mar.27, 2007). To fulfill the constitutional requirements for standing, the Receiver must show that: (1) it suffered or is immediately likely to suffer an injury in fact; (2) a causal connection exists between the injury and the alleged conduct; and (3) there is a likelihood that a favorable judicial decision will redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The seminal case on the question of whether a court-appointed receiver has standing to set aside allegedly fraudulent transfers by a perpetrator of a Ponzi scheme is Scholes v. Lehman, 56 F.3d 750 (7th Cir.1993). In addressing standing, the Seventh Circuit Court of Appeals held

that the transfers made by the perpetrator of the Ponzi scheme "removed assets from the corporations for an unauthorized purpose and by doing so injured the corporations." Scholes, 56 F.3d at 754. Because the corporation was injured by the diversion of its assets, the receiver, standing in the shoes of the corporation, had standing to set aside the fraudulent transfers. *See also*, In re Wiand, 2007 WL 963165 (M.D.Fla. Mar.27, 2007).[10] Likewise, employing a similar analysis, the Receivership Entities were injured by the diversion of their assets, and the Receiver, standing in the shoes of the Receivership Entities, has standing to set aside those transfers under FUFTA.

The Defendant further argues that the Receiver lacks standing to pursue the fraudulent transfer claims because he is not a "creditor" within the meaning of FUFTA. However, the term "creditor" as defined by FUFTA is broadly interpreted to give meaning to the statutory purpose of FUFTA. To utilize the protections of chapter 726, however, a plaintiff must show that he or she has a "claim" which qualifies the party as a "creditor." *See* § 726.102(4), Fla. Stat. (2002). As defined in section 726.102, a "claim" is broadly constructed and "means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 726.102(3), Fla. Stat. (2002). Thus, as settled in Florida and universally accepted, "A 'claim' under the Act may be maintained even though 'contingent' and not yet reduced to judgment."

[10] Numerous other courts have found that an equity receiver has standing to maintain fraudulent transfer claims against the recipients of money acquired in a Ponzi scheme under various states' uniform Fraudulent Transfer Acts. *See* Obermaier v. Arnett, 2002 WL 31654535 (M.D. Fla. Nov.20, 2002) (citing Scholes and finding the receiver had standing under FUFTA); Quilling v. Cristell, 2006 WL 316981 (W.D.N.C. Feb.9, 2006) (citing Scholes and finding that the receiver had standing under either North Carolina or Florida's UFTA); *see also* Marwil v. Farah, 2003 WL 23095657 (S.D.Ind. Dec.11 2003) (citing Scholes and finding the receiver had standing to pursue equitable disgorgement claims); O'Halloran v. First Union Nat'l. Bank of Florida, 350 F.3d 1197, 1203-04 (11th Cir.2003) (bankruptcy trustee had standing to bring tort claims against bank in which Ponzi scheme funds were deposited because the corporation was legally injured by the withdrawal of funds from its accounts).

Cook v. Pompano Shopper, Inc., 582 So.2d 37, 40 (Fla. 4th DCA 1991); *see also* Money v. Powell, 139 So.2d 702, 703 (Fla. 2d DCA 1962) ("In this state contingent creditors and tort claimants are as fully protected against fraudulent transfers as holders of absolute claims.").

Here, the Receiver has a "claim" under FUFTA (thus qualifying him as a "creditor" under FUFTA) by virtue of the fact that Creative Capital (as one of the eight Receivership Entities the Receiver represents), made transfers to the Defendant. And, since many, if not all, of the remaining Receivership Entities had invested in Creative Capital (*see* Complaint, ¶¶ 2-4; 30-37), they are therefore creditors of Creative Capital. Thus, the Receiver, standing in the shoes of the other Receivership Entities, as creditors of Creative Capital (the eighth Receivership entity), clearly has a "claim" as a "creditor" against the Defendant under the requirements of FUFTA.

Furthermore, the Receivership Entities (and therefore the Receiver, standing in the "shoes" of the Receivership Entities) have standing as a creditor with a claim, because both the Florida Statutes and related case law specifically provide so. As previously stated in paragraph 4 of the Receiver's Complaint, pursuant to the Receivership Order appointing him as Receiver, and in conjunction with Florida Statutes §671.201(13) and 679.1021(1)(zz), the Receiver has automatic standing in this matter, as he is a de facto ***judgment lien creditor*** (one with priority over the assets of the Receivership Estate, no less). Zirot v. Gilmer, 336 So.2d 680 (Fla. 4th DCA 1976); Fla. Stat. §§671.201(13) ("Creditor" includes a receiver in equity); Fla. Stat. §679.1021(1)(zz). Upon his appointment as Receiver, and therefore a judgment lien creditor, the Receiver himself now holds "claims" (as defined by FUFTA) against the assets of the receivership entities by virtue of his ability to file an action exercising his priority rights over other claimants.

IV. The Receiver Sufficiently Identifies a "Res" Supporting a Claim for an Equitable Lien or Constructive Trust.

The general rule of requiring the existence of identifiable property in order to impose an equitable lien is sufficiently satisfied by the Receiver in the Complaint. In paragraph 59 of the Complaint, the Receiver identifies the property or *res* in question: namely the promissory notes and their corresponding security interests giving rise to the "Regency Suites Equity Transfer." The promissory notes are unquestionably negotiable instruments under the Uniform Commercial Code comprising sufficiently identifiable property which may be exchanged or transferred – ostensibly with detrimental consequence to the Receiver.

Alternatively, despite Defendant's reliance upon the general rule that requires directly identifiable property, Florida courts have previously held that "equitable liens may also be declared by a court of equity out of general considerations of right or justice as applied to the relationships of the parties and the circumstances of their dealings. To be entitled to an equitable lien, there must be circumstances such as fraud or misrepresentation of material facts upon which the plaintiff specifically relied in good faith…" In re Cameron, 359 B.R. 818 (Bankr.M.D.Fla.2006) (emphasis added) (internal citations omitted); see also Ross v. Gerung, 69 So.2d 650 (Fla.1954); Jennings v. Connecticut General Life Insurance Co., 177 So.2d 66 (Fla. 2d DCA 1965).

Here, both the Regency Suites Expense Transfer and the Regency Suites Equity Transfer (as defined in Paragraphs 58-59 of the Complaint) were provided to the Defendant from the sale of the Regency Property, a transaction wholly consummated by Creative Capital and/or George Theodule as part of the Ponzi scheme perpetrated against countless investors and creditors. Thus, out of general considerations of right or justice, this Court may grant an equitable lien to the Receiver based upon the Regency Suites Expense Transfer and the Regency Suites Equity

Transfer to the Defendant, along with the fraud previously alleged above and throughout the Complaint.

CONCLUSION

Based on the foregoing, the Receiver respectfully requests that Defendant's Motion to Dismiss be denied that the Defendant be required to file an answer to the Complaint within ten (10) days. Alternatively, to the extent that this Court grants any part of the relief requested by the Defendant in its Motion to Dismiss, the Receiver requests leave to amend the Complaint accordingly.

WHEREFORE, the Receiver respectfully requests the entry of an order granting the relief requested herein and for any other relief the Court deems appropriate.

Dated: October 30, 2009
Miami, Florida

Respectfully submitted,

By: /s/ David P. Lemoie

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009, 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 below Service List, 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
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SERVICE LIST

JONATHAN E. PERLMAN, ESQ., as court appointed Receiver of Creative Capital Consortium, LLC, et al. v. Five Corners Investors I, LLC, et al.
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