UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

GRISEL ALONSO, as Receiver for Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund, LP, Elm Tree 'e'Conomy Fund, LP, Elm Tree Motion Opportunity, LP, and Etopia, LP,

Plaintiff,

v.

JAMES BENVENUTO, *et al.*,

Defendants.
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Case No. 16-62603-CIV-DIMITROULEAS
Proceeding Ancillary to
No. 15-CV-60082-Dimitrouleas/Snow

**RECEIVER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO TIMOTHY HARTMANN**

Plaintiff, GRISEL ALONSO, solely in her capacity as the Receiver for Elm Tree Investment Advisors, LLC ("ETIA"), Elm Tree Investment Fund, LP ("ETIF"), Elm Tree 'e'Conomy Fund, LP ("ETEF"), Elm Tree Motion Opportunity, LP ("ETMO"), and Etopia, LP ("Etopia"), respectfully submits this Reply in support of the Motion for Summary Judgment (the "Motion") as to Defendant Timothy Hartmann ("Hartmann") [D.E. 183].

## I. INTRODUCTION

Hartmann's Response in Opposition to the Receiver's Motion for Summary Judgment [D.E. 185] (the "Response") fails to raise any issues of material fact that would preclude summary judgment on the Receiver's fraudulent transfer claims or unjust enrichment claim.

First, Hartmann argues that summary judgment for the Receiver's fraudulent transfer claim under Fla. Stat. Section 726.105(1)(a) should be denied because: (i) the so-called "Ponzi presumption," which provides that transfers made in connection with a Ponzi scheme are

presumed fraudulent, is inapplicable [D.E. 185 at 4, 6-8]; and (ii) he acted in good faith with respect to the Transfers[1] and gave reasonably equivalent value in exchange [D.E. 185 at 3, 8-9]. With respect to the Ponzi fraud presumption, Hartmann misconstrues the applicable legal standard and fails to meet his burden to rebut that presumption, which burden shifted to him in light of the undisputed evidence set forth by the Receiver. With respect to Hartmann's alleged good faith in accepting the Transfers and giving reasonably equivalent value in exchange for the Transfers, Hartmann has not provided the Court with evidence—and thus not met his burden of establishing—that he provided reasonably equivalent value in exchange for the Transfers. Indeed, he has **admitted** he gave none to the Receivership Entities.

Second, Hartmann argues that the Receiver's constructive fraud claims under Fla. Stat. Sections 726.105(1)(b) and 726.106, and her unjust enrichment claim, fail because there was reasonable value given in exchange for the Transfers. [D.E. 185 at 8-11]. Again, Hartmann has not rebutted the undisputed evidence or raised any issue of material fact concerning whether reasonable value was given to the Receivership Entities in exchange for the Transfers. Indeed, he has **admitted** he gave none to the Receivership Entities. Nor has Hartmann disputed the existence of a Ponzi scheme or that the Receivership Entities were insolvent. Thus, based on the undisputed evidence, the Receiver is entitled to summary judgment as a matter of law.[2]

## II. THE PROMISSORY NOTE

Hartmann's sole argument against summary judgment is that an alleged promissory note,

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[1] As that term is used in the Receiver's Motion.

[2] Notably, the Receiver's constructive fraud and unjust enrichment claims *do not rely* on the fraud presumption, which is only applicable for claims under Section 726.105(1)(a). Even assuming *arguendo* the Court were to find the fraud presumption does not apply in this case, the Receiver is entitled to relief on her constructive fraud and unjust enrichment claims.

dated June 21, 2010, purportedly reflects that Hartmann was owed $40,000 by Cyber Investments International, Inc. ("Cyber").[3] Hartmann argues that the alleged loan reflected in the promissory note from Cyber, which is not a Receivership Entity, is the reasonably equivalent value he gave in exchange for the Transfers at issue (the single transfer he received from Elm and the five transfers he received from ETIA, a Receivership Entity). The Transfers at issue in this case began in December 2013 and ended in August 2014, between three and four years after the alleged promissory note to Cyber.

On October 6, 2017, the Receiver sent discovery to Hartmann, including requests seeking documents related to all of Hartmann's agreements with, loans to, or payment of monies to or from any entities associated with Fred Elm. On or about November 1, 2017, Hartmann served the Receiver with demonstrably inadequate discovery responses[4] and a *single document*, the Cyber promissory note. Notably, Hartmann did not produce any proof that he ever actually loaned or transferred any money to Elm or Cyber. Similarly, during his deposition, Hartmann was deliberately evasive with respect to his efforts to prove that he actually loaned money in connection with the Cyber note. *See* 2/1/18 Depo. Tr. at 16:17-17:9 (testifying that he "did not know" whether he attempted to obtain and produce proof that he actually loaned funds in

[3] Hartmann's statement of facts begins with two *blatant* misrepresentations. The first misrepresentation is that the Hartmann "entered into a legally enforceable contract with Fred Elm." [D.E. 185 at 2]. The note is clearly given by Cyber and Elm signs on behalf of Cyber. The second misrepresentation is that "[t]he Promissory Note states that Hartmann will loan Elm Forty Thousand Dollars ($40,000)[.]" [D.E. 185 at 2]. The Cyber note on its face refutes this statement and it says no such thing.

[4] In his deposition, Hartmann admitted to communicating with Fred Elm and to the existence of e-mails, text messages, and other correspondence that he never produced. 2/1/18 Depo. Tr. at 18:9-27:2 (testifying that, during the relevant period, he e-mailed with Fred Elm, called Fred Elm, and texted with Fred Elm, but only produced the promissory note based on his personal determination that nothing else was "pertinent").

connection with Cyber note); 17:11-15 (testifying that he "did not know" where he would keep documents that might be responsive to the Receiver's requests). Hartmann was equally evasive and misleading with respect to the existence of any other "payments" he received from Elm-related entities or "loans" he made to Elm-related entities.[5]

During his deposition, Hartman testified that: (i) he does not know what Cyber is; (iii) he does not remember what, if anything, Elm told him about the company. 2/1/18 Depo. Tr. at 71:1-8. Now, Hartmann argues in his Response, without any evidence or sworn testimony to support it, that Cyber "was engaged in substantial legitimate and revenue-generating business operations at the time it entered into the loan with Hartmann." [D.E. 185 at 4]. This claim is made up out of whole cloth and is not supported by Hartmann's own testimony or any evidence anywhere in the record. Indeed, Hartmann is on the record as having **no** knowledge of any kind about Cyber's business or purpose.

To summarize, the promissory note on which Hartmann relies to show value was made by *Cyber*, which is neither a Receivership Entity nor an entity that made any of the Transfers to Hartmann.[6] Hartmann has no knowledge of Cyber's business or purpose. Moreover, Hartmann

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[5] *See* 2/1/18 Depo. Tr. at 71:1-8 (claiming that he never had any business dealings with Elm or any Elm-related entities, other than the Cyber note); 79:17-80:17 (claiming that he never received any payments from any entities associated with Elm other than the Transfers at issue); 82:17-88:13 (admitting, after being confronted with evidence, that he also received $14,000 in payments from Fiberforce, an Elm-related entity, from June 2012 to April 2013, which payments he claimed were also made in connection with the Cyber note); 90:17-95:17 (admitting, after being confronted with evidence, that TH Capital Group, an entity he owned, also received $12,000 in payments from Fiberforce, an Elm-related entity, from June 2013 to October 2013); 117:3-22 (admitting, after being confronted with evidence, that he made a $15,000 loan to MojiLife, an Elm-related entity, in July 1, 2016, and that his previous testimony was inaccurate).

[6] Indeed, the undisputed evidence shows that Receivership Entities did not yet exist in 2010. *See* [D.E. 1 at ¶¶ 8-12] in the primary SEC action, Case No. 15-CV-60082.

had the opportunity to submit evidence proving that he actually made a loan in connection with the promissory note, but he failed to submit any such evidence in discovery or in response to the Receiver's Motion. In sum, Hartmann's opposition to summary judgment relies exclusively on the single document that purports to be a promissory note from Cyber in defending against the Receiver's claims.

## III. THE RECEIVER'S CLAIMS

### A. Relief Pursuant to Fla. Stat. § 726.105(1)(a) – Actual Fraud

#### *i. The Ponzi Presumption for Fraudulent Intent*

Hartmann does not challenge that Elm and ETIA were involved in a Ponzi scheme, which conclusion is supported by the Receiver's Motion, the Amended Complaint, and the Declaration of Dick Haslam. Instead, Hartmann argues that the Receiver's Motion fails because the Receiver "does not even address" whether the Transfers were made "in furtherance" of the Ponzi scheme. [D.E. 185 at 4].

Hartmann's claim that the Receiver failed to address whether the Transfers were made "in furtherance" of the Ponzi scheme is false. The Receiver set forth facts in her Motion that establish that the debtors were engaged in a Ponzi scheme. [D.E. 183 at ¶¶ 1-7]. Mr. Haslam set forth similar facts in his declaration submitted in support of the Motion. [D.E. 183-1 at ¶¶ 3-6]. Moreover, both the Motion and Mr. Haslam's declaration establish unrebutted evidence that the Transfers were made in furtherance of the Ponzi scheme, such that the transferor's fraudulent intent is presumed. [D.E. 183 at ¶ 10; 183-1 at ¶ 10]. Notably, "when the Ponzi scheme [fraud] presumption applies, the burden shifts to the transferee to show that the transfer was not in furtherance of the Ponzi scheme." *In re: Int'l Mgmt. Associates*, 2016 WL 552491, *8 (N.D. Ga.

2016). Indeed, once the circumstances of a Ponzi scheme are proven, the transferee "must produce probative, significant evidence that the transferor-debtor lacked the intent to take the transferred value away from contemporaneous or future creditors, *i.e.*, that there was a bona fide, legitimate purpose for the transfer." *Id.*

Here, Hartmann has not met his burden of proving that the Transfers were *not* made in furtherance of Elm's Fraudulent Scheme.[7] *Hartmann submits no evidence on the issue, beyond the Cyber promissory note*.[8] Instead, Hartmann rests on the false and unsubstantiated premise that the Transfers were "payments for commercial goods or services of the sort used in the ordinary course of legitimate business activity." [D.E. 185 at 7].

The cases Hartmann cited are not applicable and do not support denial of summary judgment. Hartmann cites *ATM Fin. Services* for the finding that the fraud presumption in a Ponzi scheme must have some limitations. 2011 WL 2580763, *4. In that case, the transfers at issue were payments made by the debtor-transferor to a Buick-Pontiac-GMC truck dealership for the payment of six vehicles.[9] *Id.* at *2. Under that set of facts, the court was hesitant to apply the fraud presumption because the transfers were in actuality payments for legitimate goods that had no real connection to the Ponzi scheme itself.

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[7] As that term is defined in the Motion and Amended Complaint.

[8] As discussed above and below, the Cyber note cannot be found to be reasonably equivalent value offered in exchange for the Transfers, because Cyber is not one of the debtor-transferors with respect to the Transfers. Moreover, the alleged loan was not made to a Receivership Entity.

[9] Importantly, with respect to the Receiver's constructive fraud claims under 726.105(1)(b) and 726.106, and the Receiver's unjust enrichment claim, the court found that there was no reasonably equivalent value received in exchange for the transfers because the vehicles went to parties other than the debtor-transferor, which is identical to the situation here.

Hartmann also cites to *In re Phoenix Diversified* for the argument that the mere existence of a Ponzi scheme is insufficient to establish the fraud presumption. 2011 WL 2182881, *3. In that case, the transfers at issue were payments for groceries from Publix supermarkets. The court refused to apply the fraud presumption because the transfers at issue were payments for groceries that had no connection to the Ponzi scheme itself.

In the two cases cited by Hartmann, the evidence submitted by the defendants-transferees established that the transfers at issue were "payments for commercial goods or services of the sort used in the ordinary course of legitimate business activity." Unlike *ATM Fin. Services* and *In re Phoenix Diversified*, Hartmann has produced no evidence of legitimate business activity. Hartmann's testimony about Cyber does not establish that Cyber was engaged in legitimate business activity or that there was any exchange of commercial goods. Hartmann has submitted no evidence to support this contention.[10]

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[10] Different courts have found that transfers are "in furtherance of" a Ponzi scheme when the transfers somehow perpetuate the scheme, were made to keep the scheme ongoing, or were necessary to the continuance of the scheme. *See In re ATM Financial*, at *5; *In re World Vision Entertainment*, 275 B.R. 641, 657 (M.D. Fla. 2002) ("Every payment made by the debtor to keep the scheme on-going was made with actual intent to hinder, delay, or defraud creditors, primarily new investors."); *In re Phoenix Diversified*, at *3. Here, the Receiver has shown that the scheme was a Ponzi scheme and that the Ponzi scheme was ongoing at the time of the Transfers. The Receiver has submitted evidence that suggests the Transfers to Hartmann were made in furtherance of the Ponzi scheme, and Hartmann has not submitted any evidence to the contrary, despite his burden to do so. Moreover, based on Hartmann's own testimony, it is entirely plausible that the Transfers he received (which were made using funds obtained from innocent investors in the Fraudulent Scheme) perpetuated the Fraudulent Scheme by making it more likely that Hartmann and others known to Hartmann and Elm would be willing to invest or loan money to feed the Ponzi scheme in the future. Based on Hartmann's own testimony, he and Elm were part of a group of individuals who associated socially, many of which were indeed investors in the Receivership Entities. 2/1/18 Depo. Tr. at 53:6-15, 115:7-15 (testifying that he, Elm, and several individuals who were investors in Elm's Ponzi scheme, namely Benvenuto, Bukhshtaber, and Walia, would gather socially). The record evidence also demonstrates that Hartmann did loan an Elm-related entity (which is associated with Etopia, a Receivership Entity) additional

Hartmann has not satisfied his burden of showing that the Transfers were *not* made in furtherance of a Ponzi scheme, which is required to overcome the application of the fraud presumption for actual fraud claims under Fla. Stat. Section 726.105(1)(a).

*ii. Hartmann's Good Faith and Reasonably Equivalent Value Defense*

Hartmann has not set forth any facts or submitted any evidence to demonstrate that he gave reasonably equivalent value in exchange for the Transfers. As discussed above, Hartmann's only argument is that there is an alleged promissory note with Cyber, an entity that is not a debtor, a transferor, or one of the Receivership Entities. The promissory note with *Cyber* cannot constitute reasonably equivalent value in exchange for the transfer of Receivership assets by *Elm* and *ETIA* because Hartmann gave no monies, value, or benefit to the Receivership Entities. Cases with similar facts have been ruled upon by district courts in the past, and are commonly referred to as "wrong payor" cases. *See In re Pearlman*, 515 B.R. 887, 895 (M.D. Fla. 2014) (finding transferor received no reasonably equivalent value in exchange for transfers, where any benefit or value went to different entity); *see also In re Berkman*, 517 B.R. 288, 301 (M.D. Fla. 2014) (analysis whether "reasonably equivalent value" was given for a transfer by the debtor focuses on the *benefit actually obtained by the debtor* in the transaction; in other words, value is measured from the debtor's point of view).

For the foregoing reasons, the Receiver is entitled to summary judgment on her actual fraud claim.

**B. Relief Pursuant to Fla. Stat. §§ 726.105(1)(b) and 726.106 – Constructive Fraud**

Hartmann's sole argument against the Receiver's *constructive* fraud claims is that the

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money in 2016, after receiving the Transfers at issue. 2/1/18 Depo. Tr. at 117:3-22.

Cyber note constitutes reasonably equivalent value in exchange for the Transfers.[11] As discussed above, that cannot possibly be the case because the paying/transferring entities were *not* Cyber.[12] *Pearlman*, 515 B.R. at 895.

Hartmann does not dispute that the Fraudulent Scheme was a Ponzi scheme. Hartmann does not dispute that the Transfers occurred while the Ponzi scheme was ongoing. Hartmann does not dispute, based on those facts, that Elm and ETIA were insolvent. To prevail under a constructive fraud theory, the Receiver must show that the transferor was insolvent at the time the transfer was made and received less than reasonably equivalent value in exchange for the transfer. *See In re Pearlman*, 515 B.R. 887 (M.D. Fla. 2014). These facts are **all** unrefuted. "As for the first prong, insolvency, there is little debate that a company run as a Ponzi scheme is insolvent as a matter of law." *Id.* (internal quotations omitted).[13] Notably, the Receiver's constructive fraud claims are *not reliant* on the fraud presumption applicable to actual fraud claims, and even if the Court were to determine the fraud presumption did not apply or that there

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[11] *See* [D.E. 185 at 3] (arguing that the existence of the Cyber note renders the Receiver's allegation that the *Receivership Entities* did not receive reasonably equivalent value "demonstrably false and insupportable").

[12] As cited above, Mr. Hartmann received approximately $70,000 from Elm-related entities, made up of the $44,000 in Transfers at issue in this action, and approximately $26,000 in earlier transfers from non-Receivership entities. 2/1/18 Depo. Tr. at 130:14-131:7. Thus, Mr. Hartmann has received approximately $30,000 more than the alleged loan amount, which further proves that the Cyber note and related loan are not reasonably equivalent value.

[13] *See also Donell v. Kowell*, 533 F. 3d 762, 770-71 (9th Cir. 2008) (finding that transfers made pursuant to a Ponzi scheme generally establish that the scheme operator was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due); *In re Pearlman*, 472 B.R. 115, 125 (M.D. Fla. 2012) (because the Ponzi scheme was already underway at the time of certain transfers, the debtors were by definition presumed insolvent and that a defendant's good faith in accepting repayment is irrelevant).

were questions of facts that remained with respect to the fraud presumption, the Receiver is still entitled to summary judgment on her constructive fraud claims.[14]

For the foregoing reasons, Hartmann has failed to raise any issue of material fact with respect to the Receiver's constructive fraud claims, and the Receiver is entitled to summary judgment on Counts 16 and 17.

**C. Unjust Enrichment**

Again, Hartmann's only argument is that the Cyber note "directly negates [the] Receiver's unsupported allegation that the Receivership Entities did not receive reasonably equivalent value in exchange for the Hartmann Transfers[.]" [D.E. 185 at 10]. As discussed above, the *Cyber* note cannot be found to be reasonably equivalent value given to *Elm and ETIA* in exchange for the Transfers. Arguments along those lines have been summarily rejected by the courts in deciding "wrong payor" cases. Here, it is undisputed that Hartmann received $44,000 in Transfers, Hartmann accepted the Transfers, and that Hartmann paid no value *to Elm or ETIA* for those Transfers. As with the Receiver's constructive fraud claims, the unjust enrichment claims is *not reliant* on the fraud presumption in Ponzi cases.

## IV. CONCLUSION

Based on the foregoing, Plaintiff, GRISEL ALONSO, respectfully requests this Honorable Court enter an Order granting the Motion.

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[14] Even if the Court were to find that the Cyber note constitutes value received by Elm *personally*, Hartmann does not challenge that the Transfers he received were assets of the Receivership, derived from funds invested by innocent victims of Elm's scheme. [D.E. 183 at p. 3 and ¶ 10; D.E. 183-1 at ¶ 10]. In fact, Hartmann falsely argues the Cyber note is value given to the *Receivership Entities*. [D.E. 185 at 3, 10].

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on April 9, 2018, a true and correct copy of the foregoing was served via electronic transmission or U.S. Mail on all counsel or parties of record.

Respectfully submitted,

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