UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BURTON W. WIAND, as Receiver for
OASIS INTERNATIONAL GROUP, LTD.;
OASIS MANAGEMENT, LLC; AND
SATELLITE HOLDINGS COMPANY,

Plaintiff, Case No.: 8:20-cv-863-T-60SPF

v.

RAYMOND P. MONTIE, III,

Defendant.
_____/

THE RECEIVER'S OPPOSITION TO
THE DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

Defendant Raymond P. Montie, III ("**Montie**") owned a purported investment firm that bilked hundreds of investors out of tens of millions of dollars. He personally lured many of those investors into a Ponzi scheme. He invited them to one of his several houses. He vouched for his partner, Michael DaCorta ("**DaCorta**"). He told the investors DaCorta had "a printing press for money." He also told them that he and DaCorta "never lost money," and he knew that statement was false. Montie took the investors' college savings. He took their retirement money. His partner – DaCorta, whom Montie supposedly "trusted … with [his] life" – has been indicted on multiple felony counts and is awaiting trial. His other partner – Joseph S. Anile, II ("**Anile**") – pled guilty to multiple felony counts and has admitted operating the plaintiff entities as a Ponzi scheme. Investors have filed more than 700 claims seeking reimbursement for more than $70 million in alleged losses.

Despite all of this – despite the demonstrable misrepresentations, despite the indictments, despite the massive investor losses – Montie seeks to shirk responsibility for the consequences of his actions. His arguments are not based on technical or esoteric legal concepts but on the well-known and well-understood rules governing pleadings in this and other federal courts – *i.e.*, Federal Rules of Civil Procedure 8 and 9 (although the latter does not apply here, as explained below). The Receiver will not dedicate pages to explaining *Iqbal* and *Twombly* but will only note that those cases turn on the plausibility of the Receiver's allegations. In other words, the Court must ask: Is it plausible Montie breached his fiduciary duties of care and loyalty, given that one of his partners pled guilty to identical conduct and his only other partner has also been indicted? Is it plausible Montie received fraudulent transfers of money stolen from investors? Is it plausible Montie was unjustly enriched through a scheme that he and others began in 2012 that resulted in approximately $70 million in claimed losses to more than 700 investors? These matters are not just plausible, they are indisputable. The Receiver's Amended Complaint thus far surpasses the pleading requirements of the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND

Burton W. Wiand (the "**Receiver**") filed this case on behalf of Oasis International Group, Ltd. ("**Oasis**"); Oasis Management, LLC ("**Oasis Management**"); and Satellite Holdings Company ("**Satellite**") (collectively, the "**Oasis Entities**"). In Count I of the Amended Complaint, the Receiver asserts claims under three provisions of the Florida Uniform Fraudulent Transfer Act, Fla. Stat. § 726.101 *et seq.* ("**FUFTA**"): Florida Statutes Section 726.105(1)(a), which codifies claims under a theory of "actual fraud," and Florida

Statutes Sections 726.105(1)(b) and 726.106(1), which codify claims under a theory of "constructive fraud." In Count II, the Receiver asserts, in the alternative, a claim for unjust enrichment. In Counts III and IV, the Receiver asserts claims for breaches of fiduciary duties and aiding and abetting breaches of fiduciary duties, respectively.

These claims arise from the collapse of the Oasis Ponzi scheme. As noted above, Anile has admitted the fraudulent nature of the scheme:

> From at least as early as November 2011, through and including at least April 18, 2019, in the Middle District of Florida, the defendant, Joseph S. Anile, II, conspired with others to commit wire fraud and mail fraud. The defendant and coconspirators made false and fraudulent representations to victim-investors and potential investors to persuade them to transmit their funds, via wire and mail, to entities and accounts controlled by conspirators to be traded in the foreign exchange market ("FOREX"). In fact, the defendant and coconspirators used only a portion of the victim-investors' funds for FOREX trading, and the trading resulted in losses which conspirators concealed. **They used the balance of the victim-investors' funds to make Ponzi-style payments, to perpetuate the scheme**, and for their own personal enrichment….
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> In soliciting investments, the defendant and coconspirators made multiple false and fraudulent representations and material omissions in their communications to victim-investors and potential investors. In particular, they promoted one of the conspirators as an experienced FOREX trader with a record of success, but concealed the fact that he had been permanently banned from registering with the CFTC and was prohibited from soliciting U.S. residents to trade in FOREX and from trading FOREX for U.S. residents in any capacity. They also fraudulently represented that: (a) conspirators did not charge any fees or commissions; (b) investors were guaranteed a minimum 12 percent per year return on their investments; (c) conspirators had never had a month when they had lost money on FOREX trades; (d) interest and principal payments made to investors were funded by profitable FOREX trading; (e) conspirators owned other assets sufficient to repay investors' principal investments; and (f) an investment with conspirators was safe and without risk.

Am. Compl., Ex. C at 26-28 (emphasis added). The Amended Complaint alleges that Montie participated in this activity by acting as the chief salesperson for the Oasis Entities. *See id.*

¶¶ 56-71. In return, he received approximately $1.7 million in fraudulent transfers from the scheme. *See id.*, Ex. A. The Receiver seeks to recover that money for the benefit of the Receivership Estate. He also seeks damages due to related breaches of fiduciary duties. To date, investors have submitted approximately 700 claims to the Receiver, totaling $70 million in alleged losses. For the reasons explained below, Montie is liable for those damages.

ARGUMENT

"The Federal Rules of Civil Procedure generally do not require a plaintiff to set out in detail the facts upon which he bases his claim. Instead, all that ordinarily is required is that the claimant set forth a 'short and plain statement of his claim showing that the pleader is entitled to relief' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Wiand v. Dewane*, 2011 WL 4460095, at *1 (M.D. Fla. July 11, 2011), *adopted* 2011 WL 4459811 (M.D. Fla. Sept. 26, 2011) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007)); *Wiand v. EFG Bank*, 2012 WL 750447, at *2 (M.D. Fla. Feb. 8, 2012), *adopted* 2012 WL 760305 (M.D. Fla. Mar. 7, 2012) (same). This is particularly true in Ponzi scheme cases because "[t]hese people [here, approximately 700 victim-investors] were injured and may never be made whole. The role of the Receiver in this case, and similar cases, is to bring suits under UFTA[1] against [P]onzi scheme investors

[1] "UFTA" refers to the Uniform Fraudulent Transfer Act, which most states have implemented. UFTA, including as adopted by Florida, asks (unsurprisingly) that courts construe its provisions uniformly. *See* Fla. Stats. § 726.112 (FUFTA "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the law among states enacting it."). This opposition focuses on and cites to identical issues litigated by the Receiver before the United States District Court for the Middle District of Florida and the Court of Appeals for the Eleventh Circuit. To emphasize the well-settled nature of the Receiver's claims, this opposition also cites to cases from other

to the extent that investors have received payments in excess of the amounts invested and those payments are avoidable as fraudulent transfers. Hence, the innocent 'winners' in a [P]onzi scheme should not be permitted to enjoy an advantage over later investors sucked into the [P]onzi scheme who were not so lucky." *Wiand v. Morgan*, 919 F. Supp. 2d 1342, 1348-49 (M.D. Fla. 2013) (citations and quotations omitted). As explained in the Amended Complaint and throughout this opposition, Montie is not only a "winner" in that he profited from the Ponzi scheme that he, Anile, and DaCorta owned and operated for years, but he was also the chief salesperson, who – as the Hon. U.S. District Judge Kovachevich wrote in *Morgan* – "sucked" in people "who were not so lucky." *Id.*

I. THE RECEIVER HAS PROPERLY PLED FUFTA CLAIMS AGAINST MONTIE UNDER THEORIES OF ACTUAL AND CONSTRUCTIVE FRAUD

Montie argues the Court should dismiss Count I because (1) the Receiver's allegations purportedly fail to comply with Rule 9(b), and (2) the Receiver's claim that Montie cannot satisfy FUFTA's good faith affirmative defense is a "legal conclusion," which the Court should not accept as true.[2] *See* Mot. at 17. As explained below, Montie's arguments are wrong for at least four independent reasons.

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federal districts. Doing so is expressly authorized and, in fact, encouraged, by FUFTA and UFTA.

[2] Montie ignores the portions of Count I that relate to Fla. Stats. §§ 726.105(1)(b) and 726.106(1). Under §§ 726.105(1)(b) and 726.106(1), which codify fraudulent transfer claims under a theory of "constructive fraud," a transfer is fraudulent under two separate circumstances. A transfer is fraudulent under both sections if the transferor did not receive reasonably equivalent value for it, and then each section contains a different (but similar) second requirement. Section 726.105(1)(b) also requires that the transferor either (i) was engaged in a business or transaction for which the remaining assets of the transferor were unreasonably small or (ii) reasonably should have believed that he would incur debts beyond his ability to pay as they became due. Fla. Stats. §§ 726.105(1)(b)1 & 2. Section 726.106(1) also requires that the transferor was insolvent at the time of the transfer or became insolvent

a. Rule 9(b) Does Not Apply To FUFTA Claims

First, Montie devotes most of his motion to arguing the Receiver's allegations purportedly fail to comply with Rule 9(b)'s heightened pleading requirements, but courts routinely hold that Rule 9(b) does not apply to FUFTA claims. *See, e.g., EFG Bank*, 2012 WL 750447 at *6 ("I find Rule 9(b)'s heightened pleading requirement inapplicable to Wiand's claims to avoid fraudulent transfers."); *Perlman v. Five Corners Investors I*, 2010 WL 962953, at *4 (S.D. Fla. March 15, 2010) ("Rule 9(b)'s heightened pleading standard does not apply to claims brought under FUFTA."); *Steinberg v. A Analyst Limited et al.,* 2009 WL 806780, at *3-4 (S.D. Fla. March 26, 2009) (same); *Gulf Coast Produce, Inc. v. Am. Growers, Inc.*, 2008 WL 660100, at *6 (S.D. Fla. Mar. 7, 2008) (same). The Court should deny the motion for this reason alone.

b. Montie's Intent Is Not Relevant To The Receiver's FUFTA Claims

Second, Montie also devotes a substantial portion of his motion to proclaiming his innocence and arguing he did not know his statements were false (*see, e.g.,* Mot. at 5-6), but Montie's *scienter* or intent is not relevant to the Receiver's FUFTA claims. The Amended Complaint alleges Anile and/or DaCorta caused the Oasis Entities to make fraudulent transfers to Montie and others, who are thus transferees under the statute. Am. Compl. 73-81; *see also Wiand v. Lee*, 753 F.3d 1194, 1202-03 (11th Cir. 2014) (explaining how FUFTA's debtor-creditor-transferee framework applies to clawback claims). Pursuant to

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as a result of the transfer. *Id*. § 726.106(1). "Since Ponzi schemes do not generate profits sufficient to provide their promised returns, but rather use investor money to pay returns, they are insolvent and become more insolvent with each investor payment." *Wiand v. Lee*, 753 F.3d 1194, 1201 (11th Cir. 2014). Sections 726.105(1)(b) and 726.106(1) are not subject to any affirmative defense. The Court should thus deny the motion as to Count I.

well-established, governing law, the requisite "actual intent to hinder, delay, or defraud any creditor" arises from the conduct of the debtor/transferor – not the transferee. *See, e.g.,* Fla. Stats. § 726.105(1)(a) (providing that a transfer is fraudulent "if the debtor made the transfer or incurred the obligation … [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor"); *Wing v. Horn*, 2009 WL 2843342, at *3 (D. Utah Aug. 28, 2009) ("[I]n a fraudulent transfer claim, a plaintiff need only plead and prove the transferor's … intent to defraud."). The transferee's intent or knowledge of fraud is irrelevant. *See, e.g., id.* ("The plaintiff is not required to plead or prove that the transferee participated in the fraudulent activity."); *Lee v. Wiand*, 603 B.R. 161, 169 (M.D. Fla. 2018) (upholding imposition of constructive trust and equitable lien on homestead purchased by "innocent" investors with money fraudulently transferred to them from a Ponzi scheme).

c. The Receiver Has Adequately Alleged The Oasis Ponzi Scheme, Including Anile's And DaCorta's Fraudulent Intent

Third, "[i]n cases like this, the requisite intent to hinder, delay or defraud may be established by the underlying scheme." *Dewane*, 2011 WL 4460095 at *3. The Eleventh Circuit has expressly adopted this "Ponzi scheme presumption." *See Lee*, 753 F.3d at 1201 ("We now clarify that, under FUFTA's actual fraud provision, proof that a transfer was made in furtherance of a Ponzi scheme establishes actual intent to defraud under §726.105(1)(a)…."); *Perkins v. Haines,* 661 F.3d 623, 626 (11th Cir. 2011) ("With respect to Ponzi schemes, transfers made in furtherance of the scheme are presumed to have been made with the intent to defraud for purposes of recovering the payments" under analogous provisions of the Bankruptcy Code); *In re World Vision Entertainment, Inc. v. R.W. Cuthill,*

Jr., 275 B.R. 641, 656 (M.D. Fla. 2002) ("to prove actual fraud ... in cases involving a Ponzi scheme, the analysis is simplified because fraudulent intent is inferred").[3]

"A Ponzi scheme uses the principal investments of newer investors, who are promised large returns, to pay older investors what appear to be high returns, but which are in reality a return of their own principal or that of other investors." *Lee*, 753 F.3d at 1201. When an individual pleads guilty to operating a Ponzi scheme, the plea agreement is admissible and establishes both the existence of the scheme and the individual's fraudulent intent.[4] Here, Anile pled guilty to making numerous misrepresentations to investors, and his

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[3] *See also Donell v. Kowell,* 533 F.3d 762, 770 (9th Cir. 2008) (applying California's UFTA); *S.E.C. v. Res. Dev. Int'l, LLC,* 487 F.3d 295, 301 (5th Cir. 2007) (applying Texas's UFTA); *Warfield v. Byron,* 436 F.3d 551, 558-59 (5th Cir. 2006) (applying Washington's UFTA); *Wing v. Dockstader,* 482 Fed. App'x 361, 363 (10th Cir. 2012) (applying Utah's UFTA). Although the Receiver will not cite them all, dozens (if not hundreds) of cases apply the Ponzi scheme presumption, which is universally recognized.

[4] *See, e.g., Fin'l Federated Title & Trust, Inc.*, 347 F.3d 880, 886 n.5 (11th Cir. 2003) (guilty pleas and convictions that investment operations "were nothing more than a massive fraud and Ponzi scheme . . . eliminate[ ] need for [trustee] to prove continuing fraud"); *Wiand for Valhalla Inv. Partners, L.P. v. Rowe,* 2013 WL 12203148, at *10 (M.D. Fla. Jan. 9, 2013) ("Nadel's admissions, his plea agreement, his testimony at his plea and sentencing hearings, and his criminal judgment are persuasive evidence supporting the Receiver's motion for partial summary judgment…."); *In re Bernard L. Madoff Inv. Sec. LLC*, 445 B.R. 206, 221 (Bankr. S.D.N.Y. 2011) ("'[A] debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent….'") (quotation omitted); *Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995) ("Admissions – in a guilty plea …, as elsewhere – are admissions; they bind a party; and the veracity safeguards surrounding a plea agreement that is accepted as the basis for a guilty plea and resulting conviction actually exceed those surrounding a deposition."); *In re Rothstein Rosenfeldt Adler, P.A.*, 2010 WL 5173796, at *5 (Bankr. S.D. Fla. Dec. 14, 2010) ("[C]riminal convictions based on operating a Ponzi scheme establish fraudulent intent for the purposes of the fraudulent transfer provisions."); *In re McCarn's Allstate Finance, Inc.,* 326 B.R. 843, 851 (M.D. Fla. 2005) ("Even if the information or indictment did not specifically label the fraud a 'Ponzi scheme,' if the allegations in the information establish that the debtor ran a scheme whereby the debtor intended to defraud the debtor's creditors,

plea agreement is attached to the Amended Complaint as Exhibit C. *See* Am. Compl. ¶ 54. While DaCorta has not yet admitted to that conduct, he had been indicted for substantively identical wrongdoing and will stand trial for his actions in May 2021. *Id.*, Ex. D & ¶ 55. These matters, standing alone, are enough to satisfy the Receiver's pleading burden under Rule 8 or even Rule 9, but the Amended Complaint contains more, including (1) a detailed description of the Ponzi scheme (*see, e.g., id.* ¶¶ 37-53); (2) the precise fraudulent misrepresentations made by the Insiders (as defined in the Amended Complaint, particularly DaCorta) (*id.* ¶¶ 38, 39); (3) multiple transcripts of those exact misrepresentations during remarkably fraudulent conference calls (*id.* ¶¶ 58-62 & Ex. E); and (4) a contemporaneous document (produced daily) proving that new investors' money was not traded but rather immediately used to pay existing investors, sales agents, and defendant Montie himself (*id.* ¶ 41 & Ex. B). Put simply, the Receiver has adequately alleged both the existence of the Oasis Ponzi scheme and the requisite fraudulent intent under any applicable standard. *Compare Dewane*, 2011 WL 4460095 at *3; *Lee*, 753 F.3d at 1201-02 (describing the hallmarks of a Ponzi scheme); *EFG Bank*, 2012 WL 750447 at *6 ("I find that the complaint adequately states claims, including allegations showing that Wiand is entitled to relief, satisfying Rule 8's pleading requirements.").

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evidence of a guilty verdict or plea agreement admitting the charges can establish the existence of a Ponzi scheme."). Although several of the cases cited above are bankruptcy cases, their holdings do not rely on bankruptcy law. Ponzi schemes are often adjudicated in bankruptcy court.

d. Montie's Affirmative Defense Is Not Appropriate For Resolution At The Motion To Dismiss Stage Of This Litigation

Fourth, Montie argues the Court should dismiss Count I because the Receiver's claim that Montie cannot satisfy FUFTA's good faith affirmative defense is a "legal conclusion," which the Court should not accept as true. *See* Mot. at 17. Courts, however, regularly hold that FUFTA's affirmative defense – particularly, the defendant's good faith – is not appropriate for resolution at the motion to dismiss stage and need not even be included in the plaintiff's complaint.[5] *See, e.g., EFG Bank*, 2012 WL 750447 at *8 (Fla. Stats. § 726.105(1)(a) "has no relevance to the sufficiency of Wiand's claims and is inappropriate for consideration at the motion to dismiss stage."); *Wiand v. Waxenberg,* 611 F. Supp. 2d 1319, 1320 (M.D. Fla. 2009) ("good faith presents a classic issue for the trier of fact"); *Wing*, 2009 WL 2843342 at *5 ("[W]hether a defendant took payments … in good faith and for reasonably equivalent value is an affirmative defense, the merits of which should properly be left to a later point in the proceeding.").

II. THE RECEIVER HAS STATED A CLAIM FOR UNJUST ENRICHMENT

Montie argues the Court should dismiss the Receiver's unjust enrichment claim "because the inadequately pled fraud is the only inequitable circumstance alleged, [and

[5] In any event, Montie cannot establish the affirmative defense with respect to his false profits, as a matter of law. *See, e.g., Wiand v. Lee*, 2012 WL 6923664, at *17 (M.D. Fla. Dec. 13, 2012), *adopted* 2013 WL 247361 (M.D. Fla. Jan. 23, 2013) ("[A]s the Receiver indicates, it is well-settled that a receiver is entitled to recover from winning investors profits above the initial outlay, also known as 'false profits,' and an investor in a scheme does not provide reasonably equivalent value for any amounts received from [the] scheme that exceed the investor's principal investment."); *Perkins*, 661 F.3d at 627 ("Any transfers over and above the amount of the principal—*i.e.,* for fictitious profits—are not made for 'value' because they exceed the scope of the investors' fraud claim and may be subject to recovery….").

therefore] Count II violates Rules 8(a) and 9(b)." Mot. at 18. Montie's argument is without merit because Rule 9(b) does not apply to unjust enrichment claims. *See, e.g., In re Burton Wiand Receivership Cases Pending in the Tampa Div. of the Middle Dist. of Fla.*, 2008 WL 818504, at *6 (M.D. Fla. Mar. 26, 2008) (holding "the Receiver has stated [unjust enrichment] claims for return of principal payments as well as false profits, under Rule 8 notice pleading standards" and "[w]hether the circumstances of the payments to [d]efendants were, in fact, inequitable as to the [r]eceivership [e]ntities, and whether the investors did, in fact, pay fair consideration for the funds they received, are issues not appropriate for resolution on a motion to dismiss").

In addition, the Receiver's unjust enrichment claim is asserted in the alternative to his FUFTA claim. Montie's receipt of funds stolen from defrauded investors, which is amply demonstrated by Exhibits A and B (*see also* Am. Compl. ¶ 41) is deeply inequitable, even setting aside Montie's role as the scheme's chief salesperson. *See In re Slatkin*, 525 F.3d 805, 815 (9th Cir. 2008) (noting "the source of any profits received by the defendants was a theft from the other investors").[6] As a result, receivers routinely bring both FUFTA and unjust enrichment claims, and courts generally deny attacks on the latter at the motion to dismiss stage. *See, e.g., EFG Bank*, 2012 WL 750447 at *7 (denying motion to dismiss

[6] *See also S.E.C. v. George*, 426 F.3d 786, 798-99 (6th Cir. 2005) (investors who received false profits ordered to return all distributions because "hundreds of other investors were victimized by this scheme, yet they will recover only 42 percent of the money they invested, not the 100 percent to which the relief defendants claim to be entitled"); *In re Bayou Group, LLC*, 372 B.R. 661, 665 (Bankr. S.D.N.Y. 2007) ("[N]on-redeeming investors' claims against the [Ponzi scheme] … may be worth little or nothing to the extent that … the principal investments of all investors had been reduced by trading losses and the depredations of the prior principals of the debtors.").

unjust enrichment claim because "Wiand alleges that when investors … received distributions of funds from Nadel's [P]onzi scheme, the investors received a portion of the other investors' commingled funds, pushing the underlying entities deeper into insolvency"); *Dewane*, 2011 WL 4460095 at *8 (refusing to dismiss unjust enrichment claim based on defendants' "meritless" arguments); *In re Wiand*, 2007 WL 963165, at *6 (M.D. Fla. Mar. 27, 2007) (noting "this Court is reluctant to dismiss a claim that is equitable in nature at this stage of the proceedings"); *Steinberg ex rel. Lancer Mgmt. Grp. LLC v. Alpha Fifth Grp.*, 2010 WL 1332844, at *2 (S.D. Fla. Mar. 30, 2010) (holding "[t]he Receiver may maintain an equitable unjust enrichment claim in the alternative to his legal claims").

III. THE RECEIVER HAS STATED A CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST MONTIE

Montie admits officers and directors (1) "owe both a duty of loyalty and a duty of care to the corporation they serve;" (2) "are required to act in the utmost good faith;" and (3) "undertake to give the corporation the benefit of their best care and judgment, and to exercise the powers the corporation confers on them solely in the interest of the corporation." Mot. at 18. Despite recognizing these stringent obligations, Montie again falls back on the Receiver's purported failure to plead Montie's fraud with particularity. *Id.* at 19. That argument is without merit for three independent reasons.

First, Rule 9(b) does not apply because fraud is not an element of a claim for breach of fiduciary duty. *See, e.g., Hugo on behalf of BankAtlantic Bancorp., Inc. v. Levan*, 2008 WL 11332035, at *5 (S.D. Fla. Dec. 12, 2008) ("Whether [d]efendants made any fraudulent misrepresentations to [p]laintiff is not dispositive, nor is [p]laintiff required to prove fraud to maintain his [breach of fiduciary duty] claim."); *Mehlenbacher ex rel. Asconi Corp. v. Jitaru*,

2005 WL 4585859, at *4 (M.D. Fla. June 6, 2005) ("[Plaintiff] has not brought a fraud claim; rather, he has sued the directors for breach of fiduciary duty. Rule 9(b)'s particularity requirement does not apply to a breach of fiduciary duty claim because fraud and *scienter* are not necessary elements of such a claim.").

Second, Montie ignores his duty of care, which is also not subject to Rule 9(b). *See, e.g., Fla. Software Sys., Inc. v. Columbia/HCA Healthcare Corp.*, 46 F. Supp. 2d 1276, 1285 (M.D. Fla. 1999) ("A breach of duty of care is not required to be pled with specificity under Rule 9(b) of the Federal Rules of Civil Procedure."). The Amended Complaint is replete with examples of Montie's abdication of his fiduciary duties as an offer and director, but three are especially noteworthy: (1) Montie apparently never examined the bank or trading records of the Oasis Entities, as doing so would have revealed that only a small portion of the money raised from investors was used for its intended purpose – *i.e.*, trading (Am. Compl. ¶ 40); (2) Montie apparently never examined the source of the money transferred to him or the daily cash reconciliations created by the Oasis Entities' fund administrator, as doing so would have revealed that Montie's transfers were funded by money stolen from other investors (*id*. ¶ 41); and (3) Montie never vetted the statements both he and DaCorta made to investors, despite knowing about DaCorta's sordid past, including the failure of his previous currency trading venture (*id*. ¶¶ 58-62). Montie claims he was not aware of his partners' fraud or the falsity of his own statements, but his purported ignorance is based on nothing more than his own inaction and willful blindness. *Cf. In re World Vision Ent.,* 275 B.R. at 660 ("The defendants did not perform the minimal due diligence steps needed to demonstrate that they acted in good faith. They sold the debtor's notes on faith after an inadequate

investigation. If the defendants had completed any true investigation, the defendants quickly would have learned of the debtor's insolvency, the debtor's lack of legitimate business, the utter lack of true insurance guaranteeing the repayment of the notes, and the fraudulent nature of the notes."). The duty of care exists to prevent exactly these scenarios, or if the worst comes to pass, to hold officers and directors accountable for their misconduct.

Third, Montie ignores his demonstrable lack of good faith. Because "good faith" is a component of FUFTA's affirmative defense, courts have had numerous opportunities to consider its meaning in litigation arising from collapsed Ponzi schemes. *See generally S.E.C. v. Forte*, 2010 WL 939042, *1 (E.D. Pa. 2010) (requiring receiver to "conduct an adequate individualized investigation as to whether … winning investors acted in good faith"). Montie bears the burden of establishing his good faith. *See, e.g., Terry v. June*, 432 F. Supp. 2d 635, 641 (W.D. Va. 2006) (collecting cases). Good faith is an objective standard. *See id.* "The relevant inquiry is what the transferee objectively knew or should have known instead of examining the transferee's actual knowledge from a subjective standpoint." *See Quilling v. Stark*, 2007 WL 415351, at *3 (N.D. Tex. 2007). In other words, good faith is measured by the transferee's actions and actual and imputed knowledge and whether the circumstances would place a reasonable person on inquiry notice of a transferor's fraudulent intent. *See In re World Vision Ent.*, 275 B.R. at 658. "Some recipients, such as insiders directly running the Ponzi scheme, obviously could not demonstrate good faith because of their involvement in the enterprise and their actual knowledge of the fraud." *Id.*

Once on inquiry notice, as a matter of law, the transferee fails to act in good faith if "a *diligent* inquiry would have discovered the fraudulent purpose." *Id.* at 659; *see also In re*

Lake States Commodities, Inc., 253 B.R. 866, 878 (Bankr. N.D. Ill. 2000); *In re M&L Bus. Machine Co.*, 84 F.3d 1330, 1338 (10th Cir. 1996). "Importantly, a transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor's fraudulent purpose, and then put on 'blinders' prior to entering into transactions with the debtor and claim the benefit of [good faith]." *In re World Vision Ent.*, 275 B.R. at 659 (internal citations and quotations omitted). Further, the defendant bears the burden of establishing that he was not on inquiry notice. *In re Bayou Group,* 439 B.R. 284, 308 (S.D.N.Y. 2010); *see also In re World Vision Ent.*, 275 B.R. at 661 (holding that transferee's excuse that "he didn't know better" merely establishes ignorance, not good faith). In turn, the requisite diligent inquiry must ameliorate the issues that placed the transferee on inquiry notice in the first place and cannot consist of merely inquiring with the transferor about the suspicious circumstances. "[I]f the circumstances would place a reasonable person on inquiry notice of a debtor's fraudulent purpose, and *diligent* inquiry would have discovered the fraudulent purpose, then the transfer is fraudulent." *In re World Vision Ent.*, 275 B.R. at 659; *Jobin v. McKay*, 84 F.3d 1330, 1338 (10th Cir. 1996) (same); *In re Agric. Research & Tech. Grp.,* 916 F.2d 528, 536 (9th Cir. 1990) (same).

While the cases discussed above deal with good faith in the fraudulent transfer context, the Court should consider them in evaluating Montie's good faith compliance with his fiduciary duties. After all, Montie is an insider with access to the books and records of the Oasis Entities as well as to his partners, Anile and DaCorta.[7] *See, e.g.,* Am. Compl. ¶ 93.

[7] Montie and DaCorta were also close friends. DaCorta wrote glowingly about Montie: "My special thanks to Ray who really forced me back on the horse after a couple of years of being doubtful I could ever recover totally from 2008." Am. Compl. ¶ 60 & Ex. H. Montie spoke

Such special relationships and unique access to information are the hallmarks of fiduciary duties. The Court should not hold Montie to a lower standard of good faith than that applicable to any third-party investors under FUFTA and related caselaw, especially at the motion to dismiss stage. *See Waxenberg,* 611 F. Supp. 2d at 1320 ("good faith presents a classic issue for the trier of fact").

IV. THE RECEIVER HAS STATED A CLAIM FOR AIDING AND ABETTING BREACHES OF FIDUCIARY DUTIES

Montie essentially admits Anile and DaCorta owed fiduciary duties to the Oasis Entities and that Montie substantially assisted their breaches of those duties, but Montie claims he did not know that Anile and DaCorta – his only partners – were committing fraud. Mot. at 19-20. As an initial matter, this argument is essentially an admission that Montie breached his own duty of care by completely abdicating his responsibilities. In any event, Montie's argument is flawed and overbroad because, as an officer and director of the Oasis Entities, he need only have acted recklessly. "An affirmative duty to disclose material information has been traditionally imposed on corporate insiders, particularly officers and directors." *Court Appointed Receiver of Lancer Offshore, Inc. v. Citco Grp. Ltd.*, 2008 WL 926509, at *7 (S.D. Fla. Mar. 31, 2008) (refusing to dismiss aiding and abetting claim where receiver alleged that director "recklessly failed to use reasonable skill and care to be aware of, discover, investigate and report numerous glaring red flags which would have put a reasonably prudent director on notice that [Ponzi perpetrator] was engaged in conduct to the extreme detriment of the [Ponzi entities].").

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glowingly about DaCorta: "I trust the guy with my life," and "I just can't say enough good things about him." *Id.* ¶ 58.

Montie had actual knowledge of DaCorta's checkered past but failed to disclose that material information to investors and, in fact, made numerous contrary representations, including that DaCorta had "a printing press for money."[8] *See* Am. Compl. ¶¶ 58-62. Montie knew that he and others were illegally soliciting investors inside the United States because he hosted promotional events at his own properties. *Id.* ¶¶ 69-71. He knew insiders were causing the Oasis Entities to pay illegal, transaction-based compensation because he personally received such compensation and offered it to others through "contests." *Id.* ¶¶ 63, 65-68. And as demonstrated by Exhibit G (raising questions about the Oasis Pools, including about the status of OIG's registration with the National Futures Association, regulatory filings, and outside auditors), Montie knew about numerous red flags but literally laughed about them. *Id.* ¶ 64. These allegations are enough to demonstrate actual knowledge, and even if they do not, they nevertheless demonstrate extreme recklessness and willful blindness, which are both sufficient to defeat Montie's motion to dismiss. *See id.* ¶ 102 ("Montie knew of or was willfully blind to that activity."); *In re World Vision Ent.*, 275 B.R. at 661 ("Any reasonable person would have verified the rules and regulations relating to the sale of the notes and the due diligence requirements *before* they started selling the notes. Given that good faith is determined using an objective standard and that no reasonable person

[8] Montie failed to disclose that (1) DaCorta's prior currency trading firm (ICT) failed, causing massive investor losses; (2) DaCorta filed bankruptcy in 2010 to avoid liabilities to his customers, including a federal lawsuit; (3) DaCorta previously lost hundreds of thousands of dollars in connection with a failed investment company called Sierra Fund I (one-third of which Montie owned through a shell company); (4) DaCorta was not registered with the CFTC to trade commodities and, in fact, had been permanently barred from registering with the Commission in any capacity due to prior misconduct and the failure of ICT; and (5) DaCorta's house was in foreclosure when he left New York and moved to Florida. Am Compl. ¶ 61.

would have proceeded in a manner similar to the defendants without completing the requisite due diligence, [the defendant's] excuse that 'he didn't know better' merely establishes ignorance, not good faith. No reasonable broker would have sold the debtor's notes based on these defendants' investigation.").

V. MONTIE'S REMAINING ARGUMENTS ARE WITHOUT MERIT

Montie raises additional arguments that warrant only brief discussion. For example, Montie complains that the Receiver has identified several investors by their initials to protect their privacy and likens the situation to plaintiffs who attempt to sue anonymously. Mot. at 20-21. The investors, however, are not plaintiffs; they are, at most, witnesses. The Receiver is only asserting claims that belong to the Oasis Entities. *See, e.g.,* Am. Compl. ¶ 96 ("Importantly, the Receiver is not asserting those investors' claims; rather, he is seeking to recover from Montie for the damage caused to OIG and the other Oasis Entities by his conduct."). It is noteworthy that Montie does not appear to recognize the individuals he "sucked into the [P]onzi scheme." *Morgan*, 919 F. Supp. 2d at 1348-49. In any event, this purported issue can be easily remedied should the Court determine that the investors must be named in the Receiver's pleadings. The use of initials does not warrant dismissal.

In addition, Montie argues the Amended Complaint should be dismissed with prejudice because Montie made similar arguments in a prior motion to dismiss filed in a separate litigation with the CFTC. Mot. at 21-22. This argument is frivolous for several reasons. First, Montie's motion to dismiss the CFTC's claims was never granted. Rather, Montie consented to the entry of a preliminary injunction against him, and the government stayed the case to protect its criminal investigation, which has already resulted in the

indictment of Montie's partners, Anile and (Montie's good friend) DaCorta. Although the Receiver will not attempt to litigate the CFTC's case, the arguments made in Montie's prior motion are as baseless as the arguments in the instant motion. *Cf. United States v. Perraud*, 672 F. Supp. 2d 1328, 1339 (S.D. Fla. 2009) (explaining that, in an SEC enforcement action, the receiver assists the SEC in carrying out its mandate, but "the receiver is an arm of the court and not of the SEC").

Second, Montie's objections to the Amended Complaint are based entirely on the particularity of the Receiver's pleadings. He does not raise any legal arguments that would preclude the Receiver's claims, and no court has ever dismissed the underlying allegations, whether made by the Receiver, the CFTC, or the government. For the reasons explained herein, the Court should deny Montie's motion to dismiss, but if it grants any portion thereof, the Court should also grant the Receiver leave to amend. *See, e.g.,* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

CONCLUSION

Montie fundamentally misunderstands the Receiver's claims and thus incorrectly relies almost entirely on Rule 9(b) to shirk his responsibility for the Oasis Ponzi scheme. The Receiver has previously litigated virtually all the issues raised in the motion, and for the reasons described in those cases and this opposition, the Court should deny the motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 17, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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