IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

FAYE B. FEINSTEIN, NOT INDIVIDUALLY, BUT AS RECEIVER FOR WML GRYPHON FUND LLC,

Plaintiff,

v. Case No. 11-CV-00057

DENNIS J. LONG, individually and in his capacity as trustee of the Dennis J. Long & Patricia S. Magnette-Long Joint Revocable Living Trust, Dated 5/14/04, and PATRICIA S. MAGNETTE-LONG,

Defendants.

RECEIVER'S CIVIL L.R. 7(h) AND 7(i) EXPEDITED NON-DISPOSITIVE MOTION FOR LEAVE TO FILE SUR-REPLY TO DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiff, Faye B. Feinstein (the "Receiver"), not individually, but as receiver for WML Gryphon Fund LLC, a Wisconsin limited liability company ("Gryphon"), by her attorneys, hereby requests leave to file the attached *Sur-Reply of Receiver to Defendants' Reply in Support of Their Motion to Dismiss*. Defendants, without having obtained the Court's permission prior to the due date of their Reply, sought leave on that date (Docket No 11) ("Motion for Leave") to file a Reply that was six pages longer than the Court's local rules permit. Moreover, contrary to the Defendants' assertions in their Motion for Leave, the Reply raises arguments and incorporates secondary source material outside the scope of Defendants' memorandum of law in support of their original Motion to Dismiss and outside the issues raised and addressed by the Receiver's brief in opposition thereto. The Reply also makes objectively incorrect factual statements and mischaracterizes the Receiver's positions. The Receiver therefore respectfully requests leave to

file the Sur-Reply submitted as Exhibit 1 to this Motion, which concisely describes and responds to those aspects of the Defendants' Reply.

WHEREFORE, the Receiver asks that the Court enter an order (A) granting the Receiver leave to file the Sur-Reply submitted herewith as Exhibit 1; (B) directing the Clerk of the Court to file the Sur-Reply; and (c) granting the Receiver such other or further relief as the Court deems appropriate.

Respectfully submitted this 17th day of May, 2011.

/s/ Christopher Combest
One of the Receiver's Attorneys

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EXHIBIT 1

Proposed *Sur-Reply of Receiver to Defendants' Reply in Support of Their Motion to Dismiss*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

FAYE B. FEINSTEIN, NOT INDIVIDUALLY, BUT AS RECEIVER FOR WML GRYPHON FUND LLC,

Plaintiff,

v. Case No. 11-CV-00057

DENNIS J. LONG, individually and in his capacity as trustee of the Dennis J. Long & Patricia S. Magnette-Long Joint Revocable Living Trust, Dated 5/14/04, and PATRICIA S. MAGNETTE-LONG,

Defendants.

SUR-REPLY OF RECEIVER TO DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiff, Faye B. Feinstein (the "Receiver"), not individually, but as receiver for WML Gryphon Fund LLC, a Wisconsin limited liability company ("Gryphon"), by her attorneys, hereby makes this sur-reply to Defendants' *Reply in Support of Motion to Dismiss* (Docket No. 11-1) (the "Reply").[1] This Sur-Reply addresses arguments and authorities which Defendants raised for the first time in their Reply and corrects certain of Defendants' misleading or incorrect statements.[2]

(1) **Defendants' Assertion of Violation of Due Process**: Defendants raise for the first time that the Receiver's Complaint has somehow launched an "assault on [Defendants'] right to due process" of law. (Reply at 6.) However, Defendants do not explain how they have been

[1] On the date Defendants' reply was due to be filed, Defendants instead filed a motion (Docket No. 11) for leave to file the Reply as an overlength brief; the Reply was attached as an exhibit to that motion. As of the date hereof, that motion for leave has not been granted, and the Reply has not been separately entered on the docket.
[2] Capitalized terms not defined herein are intended to have the respective meanings ascribed to them in the Complaint or in the Receiver's Opposition to the Motion to Dismiss (Docket No. 9) (the "Opposition").

deprived of notice "of the pendency of the action and . . . an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) . Further, their only legal argument is that, in order to establish a right to recover assets from Defendants, due process requires the Receiver "to proceed in a separate proceeding under state law, rather than in the main receivership case . . . ." (Reply at 6, citing *Janvey* and *SEC v. Elliott*, 953 F.2d 1560, 1568 (11th Cir. 1992).)

Whether or not Defendants' statement of the law is correct (and the Receiver does not concede that it is), their characterization of what due process requires is *exactly* what the Receiver has done: she filed a Complaint separate from the main receivership proceeding and under a separate docket number, served Defendants pursuant to agreement with Defendants' counsel to accept service on their behalf, and alleged causes of action under numerous provisions of *state law*. Moreover, even the authorities cited by Defendants establish that the Receiver has, in fact, proceeded properly. In *Elliott*, the district court had required (in a plan approval order) that certain investors disgorge allegedly fraudulent transfers, without having afforded those investors an opportunity to assert affirmative defenses and present evidence thereon. The appellate court found the district court's action to have violated those investors' due process rights. Conversely, in the receivership proceeding underlying the captioned action, this Court approved a plan that, while it did reserve the Receiver's right to bring separate litigation to recover fraudulently-transferred assets, did not itself compel disgorgement by any investor, including Defendants. Defendants here, of course, will have an opportunity to assert any defenses to the Complaint they might have. As to *Janvey*, after the Fifth Circuit ruled that he could not summarily proceed by requesting that investors be joined as "relief defendants", the receiver amended his complaints to assert fraudulent transfer and unjust enrichment claims

against certain of those parties. (*See, e.g.*, *Janvey v. Alguire*, Case No. 09-cv-00724, and *Janvey v. Letsos*, Case No. 09-cv-01329, both still pending in the United States District Court for the Northern District of Texas and both separate from, but ancillary to, the main receivership proceeding, *SEC v. Stanford Int'l Bank, Ltd.*, Case No. 09-00298.) Nothing in *Janvey* suggests that the Receiver here has violated Defendants' due process rights.

(2) **Defendants' Misstatement of the Seventh Circuit's Holdings in *SEC v. Wealth Management LLC***: Defendants cite the Seventh Circuit's decision in the underlying receivership case, *SEC v. Wealth Management LLC*, 628 F.3d 323, 335 (7th Cir. 2010), but they describe a holding that is nowhere to be found in that opinion. Referring to the appellants in *Wealth Management* – who had requested, but not received, full redemptions of their equity interests in WML Gryphon Fund LLC – the Seventh Circuit observed that WM had imposed a two-percent-per-quarter limitation on withdrawals in February 2008 and that the appellants had, in fact, received a two-percent payment on their full redemption request. The court then went on to state that, under Wisconsin law, appellants "did not become creditors" of Gryphon for the unpaid portion of their redemption request, that is, appellants were not entitled to priority payment of that portion ahead of other unpaid investors. *Id.* The Seventh Circuit *did not* "h[o]ld [that] those redemptions that were accepted by WM *prior to the 2% limitation* on future redemption requests entitled the redeemer to creditor remedies under Section 183.0606 [of the Wisconsin Limited Liability Company Act]." (Reply at 17 (emphasis added).) Nor did the Seventh Circuit find that unpaid redemption requests that had been submitted *after* WM notified investors of the limitation were the only ones subject to that limitation. By asserting these as the *holdings* of the case, the Reply crosses the line from legitimate interpretation into misleading distortion.

(3) **Defendants' Misstatement of the Seventh Circuit's Holdings in *Scholes v. Lehmann* and *Knauer v. Jonathan Roberts Financial Group***: Defendants assert that the Receiver cannot, as a matter of law, pursue Defendants for any amounts that constitute the Defendants' "principal investment," because – although they cite to no specific language in the case for this point – *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), purportedly "addresses only 'fictitious profits'" (with Defendants then appearing to admit that "about $300,000 of the $4.2 million the Receiver seeks" do constitute "fictitious profits") (Reply at 13). While the receiver in *Scholes* was, indeed, seeking from an investor only that investor's "net profits" from the investment scheme, the *Scholes* court nowhere says that it refused to apply the *in pari delicto* doctrine *because* the receiver was seeking only profits. In fact, that court observed that under a theory of actual fraudulent conveyance – asserted as Count I of the Receiver's Complaint – a defendant would have to "return the entire payment that he received rather than just the amount by which it exceeded the consideration that he gave in exchange for the payment." *Scholes*, 56 F.3d at 757.[3]

Similarly, Defendants rely on a "rule" from *Knauer v. Jonathan Roberts Fin. Group*, 348 F.3d 230 (7th Cir. 2003), that is not to be found in their citation to that case (Reply at 15). In *Knauer*, the Seventh Circuit agreed with its prior holding in *Scholes* and found that the receiver in *Knauer* had standing to pursue claims on behalf of the receivership entities, because they had "suffered a legal injury" – what the court characterized there as "embezzlement." Here, the Receiver also alleges that Gryphon, a receivership entity, suffered injury as a result of the

[3]Further in derogation of Defendants' position, on May 12, 2011, members of the Bayou Group LLC (a Ponzi scheme case) won verdicts against certain investors – including two trusts – requiring return of *principal* invested in the Ponzi scheme, because the defendants could not establish their affirmative defenses (specifically, the defense that they took payments in good faith). *See* Joel Rosenblatt, *Bayou Group Estate Wins $13 Million from Hedge Funds for Fraud Investors*, May 12, 2011, http://www.bloomberg.com/news/2011-05-13/bayou-group-estate-wins-13-million-from-hedge-funds-for-fraud-investors.html (attached hereto as Exhibit A).

transfers that WM caused Gryphon to make to Defendants. The Seventh Circuit found that the "key difference" between "fraudulent conveyance cases such as *Scholes*" and *Knauer* was that the *Scholes* receiver sought to "recover the diverted funds from the beneficiaries of the diversions". *Id.* at 236. So, too, does the Receiver in the captioned action.

Defendants are asking this Court to create a new rule of law: that a receiver may never establish that *any* investor received a fraudulent transfer under relevant state law, *unless* there is some prior finding that the investment vehicles were operated as Ponzi schemes and the damages sought are characterized as "embezzled" funds. There is no basis to deny a receiver the opportunity to seek redress for the benefit of the receivership estate. In fact, courts have found otherwise, even where the case does not involve a Ponzi scheme, *see, e.g., Lancer Mgmt. Group LLC v. Alpha Fifth Group,* Case No. 04-60899, 2010 WL 1332844, at *3 n.2 (S.D. Fla. Mar. 30, 2010) (attached hereto as Exhibit B) (under *Scholes*, "a Receiver has standing to bring fraudulent transfer claims because . . . the Receiver is in fact suing to redress injuries that the entities suffered when its members caused the entities to commit waste and fraud. [Citations omitted.] At the pleading stage, the Court will permit the Receiver to pursue this legal theory. A determination [of the merits] should await the development of a complete factual record.").

(4) **Effect of Defendants' Disgorgement on Distributions under Plan**: Defendants allege that, if the Receiver is successful in obtaining disgorgement of the demanded amounts, she will "leav[e] them with nothing." (Reply at 3.) To the contrary, as stated in her Opposition, the Receiver "seeks to remedy the injury to Gryphon by recovering the Transfers from Defendants, and redistributing those funds for the ultimate benefit of Gryphon's investors, according to their equitable entitlements under the Plan (*see, e.g.*, Compl., ¶¶82, 91, 105)." (Opposition at 13.) Defendants' entitlements under the Plan will depend upon the amounts returned to the Gryphon

estate by Defendants; return of those amounts could increase Defendants' net cash claim, which claim would then be treated under the Plan like all similarly-situated investor claims.

(5) **Recoveries From Defendants Will Not Benefit WM**: Contrary to Defendants' assertion (Reply at 14), amounts received by the Receiver pursuant to the Complaint will not inure to the benefit of WM itself, because WM was not an investor in Gryphon. Defendants do not explain how the Receiver's success on her claims "would reduce the exposure of WM and its principals in pending or future litigation." (Reply at 14.) In any event, this issue has no bearing on whether the Receiver's claims are legally sufficient.

(6) **Effect of Back-Dating of Effectiveness of Defendants' Redemption Request**: Defendants argue in their Reply for the first time that WM's treatment of their January 5, 2008, redemption request as having been effective December 31, 2007 – a full calendar quarter earlier than under the ordinary rules contained in the Gryphon Operating Agreement – made no difference to their payment rights, because the limitations imposed upon redemptions purportedly applied only to redemption requests submitted after the limitations were put in place. (Reply at 1-2, 10.) Defendants' statements are unsupported; in fact, the history of redemptions from Gryphon shows that, after the December 2008 suspension of withdrawals, all members with outstanding redemption requests ceased being paid – except for the Long Defendants and the defendants named in the Receiver's other two lawsuits (Case Nos. 11-00058 and 11-00060). In any event, how redemption requests were, or were required to be, handled, to the extent relevant, are factual issues not appropriate for resolution upon a motion to dismiss.

(7) **Defendants' Characterization of SEC Policy**: Defendants move well beyond arguments from *Janvey v. Adams*, 588 F.3d 831 (5th Cir. 2009), and, instead, fabricate a statement of purported Securities and Exchange Commission ("SEC") policy on litigation.

(Reply at 2-3.) Defendants encourage confusion by using the non-statutory term "claw back" to refer to both the *Janvey* lawsuits *and* the Receiver's Complaint. The term "claw back" is used as shorthand to refer to any of a variety of actions that seek recovery of money previously paid, including fraudulent transfer, unjust enrichment, and preference actions. The SEC also used the term to refer to receiver Janvey's actions to acquire control of assets by deeming their owners to be "relief defendants." That the SEC may have disagreed with that approach does not mean that it opposes any suit that can be characterized, in common parlance, as a "claw back" action.

On May 10, 2011, the SEC filed a motion for leave to file a response to this aspect of the Reply, attaching the response to its motion as an exhibit (Docket Nos. 14 and 14-1) (the "SEC Submission"). While the Receiver respectfully suggests that an SEC "policy" or position does not bear on whether the Receiver has raised claims that, as a matter of law, can withstand Defendants' Motion to Dismiss, if this Court were to consider the SEC's position, as Defendants urge it to do, the Court should allow the SEC Submission to be filed, because the SEC is in the best position to articulate its view.[4]

WHEREFORE, for the reasons stated herein and in the Receiver's Opposition to Defendants' Motion to Dismiss, the Receiver asks that the Motion be denied.

Respectfully submitted this 17th day of May, 2011.

/s/ Christopher Combest
One of the Receiver's Attorneys

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[4] Defendants' object (Docket No. 16) to the SEC's request to be heard with regard to the relevance to this proceeding of the SEC's brief, filed in a different case, to address different facts and legal issues. Defendants would like to use statements made by the SEC in its *Janvey* brief for Defendants' own purposes, while denying the author of those statements, the SEC itself, leave to address the relevance of those same statements.

EXHIBIT A

Joel Rosenblatt, *Bayou Group Estate Wins $13 Million from Hedge Funds for Fraud Investors*, May 12, 2011

<http://www.bloomberg.com/news/2011-05-13/bayou-group-estate-wins-13-million-from-hedge-funds-for-fraud-investors.html>

Bloomberg

Bayou Group Estate Wins $13 Million From Hedge Funds for Fraud Investors

By Joel Rosenblatt - May 12, 2011

The estate of hedge-fund firm Bayou Group LLC, which turned out to be a Ponzi scheme, won a jury verdict requiring hedge funds that redeemed their money before Bayou collapsed to pay investors $13 million, a lawyer said.

Today's victory in federal court in Manhattan follows the estate's previous recovery of $5.4 million in "fictitious profits," bringing the total recouped to more than $60 million, said Gary Mennitt, a lawyer representing the estate for the benefit of its investors.

The estate sued to recover the amounts withdrawn by hedge funds Redwood Growth Partners and Heritage Hedged Equity, investment company D. Canale & Co., two trusts and an endowment fund, Mennitt said in a phone interview. The jury found the funds failed to prove that they had, in good faith, conducted a diligent investigation of the Bayou fraud before withdrawing their principal investment, he said.

"This is first time that a Ponzi scheme estate has been successful at trial in defeating an investor's good-faith defense and thus recovering the full principal, or amount paid to the redeeming investor," the lawyer said.

David Baum, a lawyer representing the defendant hedge funds, said in a phone interview he was disappointed by the verdict and that the funds will appeal.

In 2009, Samuel Israel, the convicted founder of Bayou Group LLC, was sentenced to two additional years in prison for faking his suicide and running away the day he was to begin a 20-year term for a $400 million fraud.

Israel founded Bayou in 1995 with James Marquez. After the company lost money in 1998, Marquez and finance chief Daniel Marino created a sham accounting firm to serve as the company's external auditor, Israel admitted. Rather than disclose modest losses, Bayou reported profits, Israel said. Bayou filed for bankruptcy in May 2006.

The estate recovery case is In Re Bayou Group, LLC, 09- 2313, U.S. District Court, Southern District of New York (Manhattan). The Bayou fraud case is U.S. v. Israel, 1:05-cr- 01039, U.S. District Court, Southern District of New York (Manhattan).

To contact the reporter on this story: Joel Rosenblatt in San Francisco at jrosenblatt@bloomberg.net

To contact the editor responsible for this story: Michael Hytha at mhytha@bloomberg.net

EXHIBIT B

Lancer Management Group LLC v. Alpha Fifth Group, **Case No. 04-60899, 2010 WL 1332844 (S.D. Fla. Mar. 30, 2010)**

Slip Copy, 2010 WL 1332844 (S.D.Fla.)
(Cite as: 2010 WL 1332844 (S.D.Fla.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Florida.
Marty STEINBERG as Court-Appointed Receiver for LANCER MANAGEMENT GROUP LLC, et al., Plaintiffs
v.
ALPHA FIFTH GROUP, et al., Defendants.

No. 04-60899-CIV.
March 30, 2010.

Andrew David Zaron, Craig Vincent Rasile, Kevin Michael Eckhardt, David Eugene Bane, Hunton & Williams, Miami, FL, for Plaintiffs.

Allan Michael Lerner, Fort Lauderdale, FL, Brian E. O'Connor, Jeffrey Scott Siegel, Willkie Farr & Gallagher, Russell Shanks, Cyruli Shanks & Zizmor LLP, New York, NY, David Charles Pollack, Stearns Weaver Miller Weissler Alhadeff & Sitterson, Daniel Frederick Blonsky, Robert Kent Burlington, Coffey Burlington, Ricardo Jesus Cata, Benjamin Joseph Biard, Wilson Elser Moskowitz Edelman & Dicker, Scott M. Grossman, Greenberg Traurig et al., Miami, FL, Stephen A. Mendelsohn, Greenberg Traurig et al., Boca Raton, FL, Gregory Eric Schwartz, Schwartz Zweben & Associates, Hollywood, FL, Andrew L. Jiranek, Baltimore, MD, Barry Adam Postman, Cole Scott & Kissane, Gregor J. Schwinghammer, Jr., Gunster Yoakley & Stewart, West Palm Beach, FL, Jonathan Seth Robbins, Akerman Senterfitt & Eidson, Fort Lauderdale, FL, for Defendants.

Martin H. Garvey, Essex Falls, NJ, pro se.

ORDER AND OPINION DENYING UNITED NEIGHBORHOOD HOUSES' MOTION TO DISMISS

KENNETH A. MARRA, District Judge.

***1 THIS CAUSE** is before the Court upon Defendant United Neighborhood Houses' Motion to Dismiss Plaintiff's Sixth Amended Complaint [DE 665]. The Court has carefully considered the motion and response, and is otherwise fully advised in the premises. No reply was submitted.

Introduction[FN1]

FN1. The following background information is taken from the Affidavit of Nancy Wackstein, submitted by UNH in support of its Motion to Dismiss. The Receiver provides very little information about UNH, and the Court finds this information helpful in putting the arguments in context. The Court may consider this affidavit as extrinsic evidence since UNH makes a factual challenge to subject matter jurisdiction. *Morrison v. Amway Corp.*, 323 F.3d 920, 925 n. 5 (11th Cir.2003). In any case, the Receiver does not take issue with any of these background facts.

United Neighborhood Houses' ("UNH") is a 501(c)(3) charitable not-for-profit organization and is a federation of 34 independent settlement houses and community centers throughout New York City. UNH was founded in 1919 and its membership comprises one of the largest human service systems in New York City, working to provide social, educational and recreational services and activities to more than one-half million New Yorkers annually. Wackstein Aff. ¶ 3.

Between the years of 1998 and 2003, among others, UNH, through a project called Hedge Funds Care, participated in organizing and running an annual dinner and dance benefit to assist abused children called the *Open Your Heart to Children Benefit*. Wackstein Aff. ¶¶ 7, 9. Between the years 1998 and 2003, Lancer Management Group LLC ("LMG") and Lancer Management Group II LLC ("LMG II") collectively donated the total sum of $76,000 to the *Open Your Heart to Children Benefit*

as follows:

(a) December 15, 1998-$12,000 by LMG II to purchase a table for 10 at the 1999 benefit;

(b) November 20, 1999-$12,000 by LMG to purchase a table for 10 at the 2000 benefit;

(c) December 10, 2000-$25,000 by LMG II to purchase two tables of 10 at the 2001 benefit;

(d) December 11, 2001-$15,000 by LMG II to purchase a table for 10 at the 2002 benefit; and

(e) January 6, 2003-$12,000 by LMG II to purchase a table of 10 at the 2003 benefit.

The Receiver brings this action against UNH to recover the $76,000 in charitable donations which are allegedly fraudulent transfers from LMG and LMG II, two of the Receivership Entities.

Standard of Review

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all factual allegations in a complaint as true and take them in the light most favorable to the plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007). When a defendant challenges the plaintiff's standing through a motion to dismiss, the court must construe all disputed facts in the light most favorable to the plaintiff in an effort to discern whether relief could be granted under any set of facts that could be proven consistent with the allegations. *See Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir.2004).

To satisfy the pleading requirements of Federal Rule of Civil Procedure 8, a complaint must contain a short and plain statement showing an entitlement to relief, and the statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (citing Fed.R.Civ.P. 8); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [ ] a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do ... Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true" *Twombly*, 550 U.S. at 555 (citations omitted). Plaintiff must plead enough facts to state a plausible basis for the claim. *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 570).

Discussion

***2** In its Motion to Dismiss, UNH argues that the complaint should be dismissed because: (1) this Court lacks personal jurisdiction over UNH; (2) several of the transfers are barred by the applicable statute of limitations; (3) the Receiver's unjust enrichment claim is barred due to the existence of an adequate legal remedy; (4) the Receiver's unjust enrichment claim is barred because UNH was a conduit for the transfers; (5) the Receiver lacks standing under the Florida Uniform Fraudulent Transfer Act ("FUFTA"), Fla. Stat. § 726.101, *et seq.;* and (6) the Receiver's claims are barred by the doctrine of *in pari delicto.*

Many of these arguments have been addressed and rejected in prior orders of this Court. *See e.g.*, Order and Opinion on Defendant Nantucket Capital Management's Motion to Dismiss, *Marty Steinberg, et al., v. Alpha Fifth Group, et al.*, Case No. 04-60899-CIV-MARRA, DE 307. Regarding UNH's first argument, since UNH is subject to personal jurisdiction in the Southern District of New

York where the Receiver filed the Receivership Order and the Order of Reappointment, this Court has personal jurisdiction over UNH by virtue of 28 U.S.C. §§ 754 and 1692 and the Court's powers of nationwide service of process under Rule 4(k)(1)(D). *Id.* As to UNH's second argument, that the Receiver's claims are time barred, the Court has already determined that because the Receiver has not limited his recovery to causes of action solely under Florida law, the pleadings leave open the possibility that the laws of another jurisdiction such as New York, which has a six year statute of limitations for the recovery of fraudulent transfers, may apply. *See* Order and Opinion on Taubman's Motion to Dismiss, *Court-Appointed Receiver v. Alfred A. Taubman as Trustee for the Taubman Ret. Rev. Trust, et al.*, Case No. 05-60199-CIV-MARRA, DE 96. At this stage of the litigation, it is premature to undertake a choice of law analysis.

As to UNH's third argument, the Court has also previously rejected the argument that the Receiver's claim for unjust enrichment fails because an adequate remedy at law exists. *Id; see also* Order and Opinion on Motions to Dismiss, *Court-Appointed Receiver v. Michael Lauer, et al.*, Case No. 05-60584-CIV-MARRA, DE 353. The Receiver may maintain an equitable unjust enrichment claim in the alternative to his legal claims against UNH.

Mere Conduit

UNH's fourth argument asserts that it served as a "conduit" for the transfers for the eventual recipients and as a matter of law the Receiver cannot recover the transfers from UNH. The parties agree that the test to determine whether an entity qualifies as a "conduit" for transfers is whether that entity had legal control over the transfers and the right to use those transfers for its own purposes. This issue presents a question of fact that cannot be considered on a motion to dismiss. The Receiver has alleged in the Complaint that UNH received the transfers. Even if UNH has a valid argument that it was a mere "conduit" for the transfers, that argument is an affirmative defense to be proven at trial, not on a motion to dismiss. *See Dept. of Ins. v. Blackburn*, 633 So.2d 521, 524 (Fla.Dist.Ct.App.1994) ("commercial conduit" defense for intermediary transferees constitutes an affirmative defense and thus cannot justify dismissal of complaint with prejudice).

Receiver's Creditor Status

***3** UNH's fifth argument asserts that the Receiver, as a matter of law, cannot bring claims under FUFTA because the Receiver represents the Receivership Entities that are the debtor/transferors that made the transfers. According to UNH, the right to sue for fraudulent transfer in this case belongs to the creditors of the Receivership Entities, not to the Receiver, who stands in the shoes of the Receivership Entities that made the allegedly fraudulent transfer. "[T]he Receivership Entities cannot simultaneously qualify as both "debtors" and "creditors" under FUFTA is sound as a matter of policy." DE 665 at 15. UNH contends that neither the Receiver, nor the Receivership Entities, are "creditors" within the meaning of the Act.

Previously, the Receiver's claims under FUFTA were dismissed because of the lack of specific factual allegations establishing the debtor creditor relationship. *See e.g.*, Order and Opinion on Motion to Dismiss Fifth Amended Complaint, DE 586. In another ancillary case, the Court concluded that the Receiver failed to sufficiently allege standing to bring claims under FUFTA because, among other things, he "neither identified on which specific entity's behalf he is suing as a creditor, nor has he clearly articulated the basis upon which the transferor would be a debtor." *See* Order and Opinion on Motions for Reconsideration, *Court-Appointed Receiver et al. v. the Citco Group, LLC, et al.*, Case No. 05-60055-CIV-MARRA, DE 92 at 5, DE 93 at 6. After reconsideration, the Court stated that in order to bring claims under FUFTA, the Receiver must show that "he has a claim which qualifies him as a creditor of the entity or individual who has either transferred or received assets which thwarts the creditor's attachment." *Id.* The Court

also noted that if the Receiver wishes to assert a claim as a creditor, he must plead factual allegations establishing the creditor/debtor relationship.

The Sixth Amended Complaint now contains many paragraphs addressing this concern. *See* Compl. ¶¶ 26-80. The Receiver alleges that he is the receiver of each of the Receivership Entities, as well as receiver of the post-receivership entities, and as such he is a creditor of the pre-receivership "zombie" [FN2] entities managed by Lauer. *See, e.g.*, Compl. ¶¶ 31-32. These so called pre-receivership "zombies" managed by Lauer made the transfers that are directly or indirectly traceable from investors in the Receivership Entities. *See, e.g.*, Compl. ¶ 33. The Receiver further alleges that he is a creditor of the entity transferees on the basis that the transferees received monies dissipated by the Receivership Entities. *See, e.g.*, Compl. ¶ 34.

> FN2. In *Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir.1995), the Seventh Circuit held that, during the operation of a ponzi scheme, the corporations created by the scheme operator were "robotic" "evil zombie" tools of the operator, but nonetheless separate legal entities in the eyes of the law that were forced (by the operator) to pay out funds to early investors instead of using the corporation's funds for legitimate investments. *Id.* at 754. Once the scheme collapsed, "[t]he appointment of the receiver removed the wrongdoer from the scene." Freed from his spell these former "zombie" entities became entitled to the return of the moneys-for the benefit not of the operator but of innocent investors-that the operator had made the corporations divert to unauthorized purposes. *Id.* Other courts have agree with the Seventh Circuit's "colorful analysis" and found a Receiver has standing to bring fraudulent transfer claims because, although the losing investors will ultimately benefit from the asset recovery, the Receiver is in fact suing to redress injuries that the entities suffered when its managers caused the entities to commit waste and fraud. *See, e.g., Donell v. Kowell*, 533 F.3d 762, 767 (9th Cir.2008); *Knauer v. Jonathon Roberts Financial Group, Inc.*, 348 F.3d 230, 235 (7th Cir.2003) ("As long as an entity is legally distinct from the person who diverted funds from the entity, a receiver for the entity has standing to recover the removed funds"). At the pleading stage, the Court will permit the Receiver to pursue this legal theory. A determination of whether this theory is legally viable and whether the Receiver can prevail on this theory should await the development of a complete factual record.

The Receiver makes the assertion in his response that each of the Receivership Entities holds claims against the Management Companies that fraudulently dissipated funds. The Receiver maintains that he can stand as a creditor of the Management Companies with standing to pursue the fraudulent transfers because, as receiver of the newly "cleansed" Management Companies, he may assert claims against the "evil zombie" Management Companies which wrongfully dissipated funds to entities such as UNH.

***4** Accepting all factual allegations in the complaint as true and taking them in the light most favorable to the Receiver, as the Court must at this stage, the Court finds that the Receiver has made sufficient factual allegations regarding his standing as a creditor under FUFTA. Whether he truly qualifies as a creditor is a question of fact which cannot be resolved now, but must be reserved for summary judgment or trial.

In Pari Delicto

UNH's last argument is that the Receiver's unjust enrichment claim is barred by the equitable doctrine of *in pari delicto*. The Receiver responds that the doctrine of *in pari delicto* does not apply to bar claims by an equity receiver because the wrong-

doing of a receivership entity or its principals is not imputed to such a receiver.

This issue has been raised by other defendants in ancillary cases and the Court has ruled that *in pari delicto* is an affirmative defense that is not appropriately considered at this point. *See* Order and Opinion on Motions to Dismiss, *Court-Appointed Receiver v. Michael Lauer, et al.*, Case No. 05-60584-CIV-MARRA, DE 353.

Conclusion

According to the conclusions made herein, it is hereby

ORDERED AND ADJUDGED that Defendant United Neighborhood Houses' Motion to Dismiss Plaintiff's Sixth Amended Complaint [DE 665] is DENIED.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 29th day of March, 2010.

S.D.Fla.,2010.
Steinberg ex rel. Lancer Management Group LLC v. Alpha Fifth Group
Slip Copy, 2010 WL 1332844 (S.D.Fla.)

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