UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 14-22150-CIV-ALTONAGA/O'Sullivan

JAMES D. SALLAH, not individually but solely in his capacity as Corporate Monitor for OM GLOBAL INVESTMENT FUND LLC and OM GLOBAL LP,

Plaintiff,

v.

FAHRENHEIT VENTURE FUND LLC,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, FAHRENHEIT VENTURE FUND LLC ("Fahrenheit"), by and through its undersigned counsel and pursuant to Rules 8(a), 9(b), 12(b)(1), and 12(b)(6) of the *Federal Rules of Civil Procedure*, moves this Court to dismiss Plaintiff's Complaint [D.E. 1-2] for lack of subject matter jurisdiction and failure to state a cause of action for the reasons set forth below.

I. Procedural History.

On or about May 6, 2014, James D. Sallah (the "Corporate Monitor") – not in his individual capacity, but solely in his capacity as the Corporate Monitor for OM Global Investment Fund LLC and OM Global LP (collectively, "OM Global") – initiated an action in the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, alleging three purported causes of action against Fahrenheit for (1) Fraudulent Transfer under Section 726.105(1)(a), *Fla. Stat*., (2) Conversion, and (3) Unjust Enrichment.

On June 10, 2014, this action was timely removed to this Court. [D.E. 1].

II. Summary of the Argument.

Fahrenheit, a small family investment company, is one of many creditors of the OM Global investment scheme perpetuated by Gignesh Movalia. James D. Sallah, pursuant to his dubious authority as the "Corporate Monitor" for OM Global[1], attempts to sue Fahrenheit for recovering a portion of its own principal investment on the basis that Fahrenheit received more than other creditors. Plaintiff's action fails on several fronts.

First, the Corporate Monitor lacks standing to bring such claims, and as such this action should be dismissed for lack of subject matter jurisdiction. There exists no authority for the appointment of a corporate monitor in a non-SEC action, let alone for the delegation of the sweeping powers purportedly held by the Corporate Monitor herein. The Corporate Monitor is not a bankruptcy trustee or receiver, and even assuming a proper receivership had been established, the Corporate Monitor would have no standing to bring claims held by the other OM Global investors or creditors.

[1] Sallah was appointed as the Corporate Monitor of OM Global Investment Fund LLC pursuant to the Agreed Order Granting Plaintiff's Unopposed Motion for Appointment of Corporate Monitor dated May 29, 2013, in *Amin v. Gignesh Movalia, et al.*, Miami-Dade County case no. 2013-18620 CA 13 (the "Investor Action") [D.E. 1-2 at pp. 18-35]. Sallah's authority as Corporate Monitor was extended to encompass OM Global LP pursuant to that Agreed Order Granting Corporate Monitor's Emergency Motion to Expand Corporate Monitorship Over OM Global LP dated August 17, 2013 [D.E. 1-2 at pp. 36-37]. The Investor Action was brought by an individual investor – who was also represented by Levine Kellogg Lehman Schneider & Grossman LLP – alleging causes of action for (I) Injunction, (II) Accounting, and (III) Appointment of Corporate Monitor. This Court may take judicial notice of the Complaint in the Investor Action, a true and correct copy of which is attached hereto as **Exhibit "A,"** pursuant to Fed. R. Evid. 201(b). Judicial notice may be taken by a court "at any stage of the proceeding." Fed. R. Evid. 201(d). Alternatively, the Complaint may be considered pursuant to Fed. R. Civ. P. 10(c), which "holds that where a document is central to a plaintiff's claims, but is not attached it to the complaint, the court may consider the document when deciding a motion to dismiss under Rule 12(b)(6)." *Lotto v. Hamden Bd. of Educ.*, 400 F. Supp. 2d 451 (D.C. Conn 2005).

Second, the claims fail to state a cause of action. Count I, a cause of action for fraudulent transfer, must be dismissed because the claim fails to meet the statutory requisites, and the claim amounts to at best a preferential transfer that is unrecoverable outside of bankruptcy court. Count II, a cause of action for conversion, fails because Fahrenheit cannot convert its own property, conversion is not an available remedy for unsequestered monies, and OM Global consented to the return of Fahrenheit's investment. Finally, Count III, a cause of action for unjust enrichment, fails because there was no benefit conferred and any such claim is barred by the doctrine of *in pari delicto*.

III. Memorandum of Law.

A. Legal standards.

i. Lack of Subject Matter Jurisdiction under Rule 12(b)(1).

"Under Federal Rule of Civil Procedure 12(b)(1), a defendant may move to dismiss a claim or claims for lack of subject matter jurisdiction." *Holy Cross Hosp., Inc. v. Baskot*, 2010 U.S. Dist. LEXIS 138368, at *5 (S.D. Fla. Dec. 23, 2010). "Standing is jurisdictional in nature," and thus a defendant may proceed under Rule 12(b)(1) to dismiss a complaint for lack of standing. *Id*. at *5-6 (citing *Stalley v. Orlando Regional Healthcare System, Inc*., 524 F.3d 1229, 1232 (11th Cir. 2008) ("Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1)." (internal quotations omitted))).

ii. Failure to State a Claim under Rule 12(b)(6).

Pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*, dismissal of a complaint for failure to state a claim upon which relief may be granted is appropriate when "no

construction of the factual allegations will support the cause of action." *Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). When considering a motion to dismiss, the Court must accept the factual allegations as true, but need not give credence to threadbare recitals of elements, conclusory statements, or internally inconsistent facts. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *U.S. ex rel. Carroll v. JFK Med. Ctr.*, 2002 WL 31941007, at *2 (S.D. Fla. Nov. 15, 2002). Dismissal of the complaint is appropriate if the plaintiff has not "nudged [its] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

A complaint may be dismissed with prejudice when no construction of the factual allegations will support a cause of action and the claims cannot be cured by the pleader by amendment. *See Woodbury v. City of Tampa Police Dep't*, 2010 U.S. Dist. LEXIS 62502, at *18 (M.D. Fla. June 8, 2010) (quoting *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1239-40 (11th Cir. 2000) (finding that leave to amend need not be granted where amendment would be futile).

B. The Corporate Monitor Lacks Standing to Bring the Claims Raised.

Standing is a "threshold inquiry" that must be addressed at the onset of the Court's review of the plaintiff's claim. *E.F. Hutton v. Hadley*, 901 F.2d 979, 983 (11th Cir. 1990). "In order to have standing to bring a claim, the plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

The Corporate Monitor lacks standing to bring the instant lawsuit. The Corporate

Monitor's authority is dubious, at best. Indeed, the term "corporate monitor" is not found in a single reported decision in all of Florida state law. In Florida's federal court decisions, the term is mentioned in only two cases, both of which are SEC/CFTC enforcement cases, to wit: *U.S. Commodity Futures Trading Commission v. Hunter Wise Commodities, LLC*, Southern District Case No. 12-cv-81311[2], and *Securities and Exchange Commission v. Crowley*, Southern District Case No. 04-cv-80354.[3] The ancillary relief permitted in SEC enforcement actions under the Securities Exchange Act of 1934 Section 21(d)(5), 15 U.S.C, § 78u(d)(5), pursuant to which a corporate monitor was appointed in those actions is absent here. There is not a single case in any Florida court (state or federal) or statute that authorizes the appointment of a corporate monitor in a non-SEC case.

The Corporate Monitor cannot be construed to be a receiver, as the underlying action pursuant to which the Corporate Monitor was appointed is not a dissolution action. *See* § 608.4492, *Fla. Stat*. (providing for appointment of a receiver in the event of an action for judicial dissolution of limited liability company). Even assuming the Corporate Monitor could be

[2] Indeed, the Agreed Order Granting Plaintiff's Unopposed Motion for Appointment of Corporate Monitor in this case appears largely derived from the Order Temporarily Appointing Special Corporate Monitor in the *CFTC v. Hunter Wise Commodities* case [D.E. 77], though with greatly expanded powers for the Corporate Monitor herein. Notably, the Agreed Order appointing the Corporate Monitor in this case includes the authorization to institute lawsuits to "increase the assets of OM Global and/or on behalf of OM Global and its investors and creditors" [¶ 13.N.], a power that was absent in the CFTC Order. Further, the Order Temporarily Appointing Special Corporate Monitor in the CFTC case specifically provided for a hearing "after appropriate notice to interested parties who have standing to assert their support or objection to the recommendation of the Special Monitor" [D.E. 77 at ¶ 37], which provision is conspicuously absent in the Agreed Order appointing the Corporate Monitor in this case.

[3] It appears that the very first "corporate monitor" was appointed in *Securities and Exchange Commission v. Worldcom*, pursuant to the Congressional approval of the use of ancillary relief in SEC enforcement actions. *See* The Use of the Corporate Monitor in SEC Enforcement Actions, Villanova University School of Law Working Paper Series, Year 2008, Paper 106, pp. 8-10, available at http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1109&context=wps (last visited 6/21/14).

construed to be a receiver, the Corporate Monitor lacks standing to bring these claims against Fahrenheit on behalf of the other OM Global investors.[4] "Although a receivership is typically created to protect the rights of creditors, **the receiver is not the class representative for creditors** . . . the receiver can bring actions previously owned by the party in receivership for the benefit of creditors, but he or she cannot pursue claims owned directly by the creditors." *Freeman v. Dean Witter Reynolds, Inc*., 865 So. 2d 543, 550 (Fla. 2d DCA 2003) (emphasis added); *see also Lichtman v. Litvin Law Firm P.C.*, 2014 U.S. Dist. LEXIS 39163, at *10 (S.D. Fla. Mar. 25, 2014) ("there is no indication that the consumers assigned their rights to the Receiver, or otherwise authorized him to sue on their behalf. Thus, the Receiver is attempting to assert the rights of third parties, and cannot satisfy the prudential requirements of standing."); *Wiand v. Mitchell*, 2007 U.S. Dist. LEXIS 24069, at *10-11 (M.D. Fla. Mar. 27, 2007) ("[I]n attempting to recover 'on behalf of . . . investors,' the Receiver purports to assert rights of third parties. Accordingly, to the extent the Receiver seeks to recover 'on behalf of investors,' the Receiver lacks standing to do so.").

This is the exact scenario contemplated by the Corporate Monitor herein. The Corporate Monitor seeks to recover funds from Fahrenheit not for the benefit of OM Global, but rather for the explicit "benefit of its investors who are currently owed money." [D.E. 1-2 at ¶ 1]. The Corporate Monitor explicitly pleads that Fahrenheit received an "overpayment" as compared to the other investors, and that the claims are brought in order to make distributions to other investors. [D.E. 1-2 at ¶¶ 30, 47]. Significantly, the Corporate Monitor does not claim that he

[4] The Corporate Monitor's counsel appears to be in a conflicted position, as it first represented one of the other creditors, Chirag Amin, not the Corporate Monitor. *See* Footnote 1.

has been delegated any authority by the other investors to pursue claims for their benefit, but rather that he was "appointed [by the Court] to marshal [OM Global's] assets for the benefit of all of its investors." [D.E. 1-2 at ¶ 7]. The claims asserted by the Corporate Monitor in this case belong exclusively to the other investors in OM Global. Thus, even assuming a proper receivership had been established, Plaintiff's claims are still barred.

C. Count I Fails to State a Cause of Action, as the Purported Creditors are Not Identified and the Purported Fraud is Not Alleged with Particularity.

Under Section 726.105(1)(a), *Fla. Stat.*, a "creditor" may bring a fraudulent transfer claim only when "the debtor made the transfer or incurred the obligation [w]ith the actual intent to hinder, delay, or defraud any creditor of the debtor." Where the Corporate Monitor "purports to bring a statutory claim, the allegations must fairly meet the statutory requisites." *Mitchell*, 2007 U.S. Dist. LEXIS 24069, at *13.

A fraudulent transfer claim under the FUFTA can only be brought by a creditor of the entity that made the allegedly fraudulent transfer (i.e., a debtor). *See Fla. West Gateway Inc. v. Maloney (In re Florida West Gateway Inc.)*, 182 B.R. 595, 597 n.2 (Bankr. S.D. Fla. 1995) ("Under Florida law, only a 'creditor' has standing to seek avoidance of fraudulent transfer."); *Friedman v. Heart Inst. of Port St. Lucie, Inc.*, 863 So. 2d 189, 192 (Fla. 2003) ("[A] plaintiff must show that he or she has a 'claim' which qualifies the party as a 'creditor.'"). The Complaint alleges that there are creditors, "including the Corporate Monitor and OM Global Investment Fund LLC" [D.E. 1-2 at ¶ 41], but fails to delineate who those purported creditors are, or detail the nature of OM Global's "claim," or identify the "debtor." Further, the Corporate Monitor fails to allege any facts in support of the bald legal conclusion that the return of a portion of Fahrenheit's initial investment was made "to hinder, delay, or defraud any creditor of

the debtor."

At most, the Corporate Monitor can only complain that the transfer to Fahrenheit amounted to a preference as compared to other investors in the fund. But a preference does not, in itself, give rise to a valid fraudulent transfer claim. *See B.E.L.T., Inc. v. Wachovia Corp*., 403 F.3d 474, 477 (7th Cir. 2005) (holding that a creditor who receives repayment of its loan from a company perpetrating a Ponzi scheme is "presumptively entitled to keep the repayment," and recognizing that "preferential transfers differ from fraudulent conveyances"). OM Global is not a debtor in bankruptcy, and so the avoidance powers under the Bankruptcy Code are unavailable. *Id*. ("a preference by any other name is still a preference and cannot be recovered outside bankruptcy.") No case applying Section 726.105(1)(a), *Fla. Stat*., has recognized a cause of action to claw back a preferential transfer outside of bankruptcy.

Count I should also be dismissed for its failure to plead the FUFTA claim with particularity as required by Fed. R. Civ. P. 9(b). While a Ponzi scheme is deemed fraudulent as a matter of law, *see In re 21st Century Satellite Communications, Inc*., 278 B.R. 577, 584 (Bankr. M.D. Fla. 2002) (stating that Ponzi schemes are inherently fraudulent *ab initio*), if any fraud is alleged against Fahrenheit - which is admittedly not a perpetrator of the OM Global investment fraud - it must be alleged with particularity. The Complaint merely states that Fahrenheit "'knew or should have known' that Movalia was running a Ponzi Scheme, or, at a minimum, had doubts about the ways in which Movalia was conducting the fund" because of other alleged "professional and social relationships with members of Fahrenheit Venture." [D.E. 1-2 at ¶¶ 32, 34]. Such scant allegation of an alleged fraud is insufficient to meet the heightened pleading standards of Rule 9(b).

In light of the foregoing, the FUFTA claim should be dismissed.

D. Plaintiff's Claim for Conversion Fails because Fahrenheit Cannot Convert Its Own Property, Conversion is Not an Available Remedy for Unsequestered Monies, and OM Global Consented to the Return of Fahrenheit's Investment.

Plaintiff's claim for conversion fails because Fahrenheit cannot convert its own property, conversion is not an available remedy for unsequestered monies, and OM Global consented to the return of Fahrenheit's investment.

First, Plaintiff's claim for conversion fails because Fahrenheit cannot convert its own property. The elements of conversion in Florida are: "(1) act of dominion wrongfully asserted; (2) over another's property; and (3) inconsistent with his ownership therein." *Del Monte Fresh Produce Co. v. Dole Food Co.,* 136 F. Supp. 2d 1271, 1294 (S.D. Fla. 2001). By definition, a conversion is the exercise of dominion over **another's** property; in this case, Plaintiff alleges that Fahrenheit received a return of a portion of its own initial investment (i.e., a "99% return of its principal investment in FB"). [D.E. 1-2 at ¶ 27]. While Plaintiff baldly claims that Fahrenheit received "duped victim funds," such a claim is baseless, as "money is fungible." *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1345 (11th Cir. 2011). The funds in this case were commingled, and thus it is impossible to determine which specific investor dollars were returned to Fahrenheit. *See SEC v. Lauer,* 2009 U.S. Dist. LEXIS 23510, at *14 (S.D. Fla. Mar. 25, 2009) ("money is fungible and as such, it is impossible to differentiate between 'tainted' and 'untainted' dollars in a bank account."). Therefore, Fahrenheit was not exercising dominion over another's property, but rather received a return of its own property, and thus the claim for conversion cannot stand.

Further, in order for money as personal property to be a proper subject of conversion, it

must consist of "specific money capable of identification." *Fin. Bus. Equip. Solutions, Inc. v. Quality Data Sys.*, 2008 U.S. Dist. LEXIS 87152, at *13 (S.D. Fla. Oct. 27, 2008). Plaintiff repeatedly emphasizes that Fahrenheit's investment funds were commingled with that of other investors. [D.E. 1-2 at ¶ 18, 28, 37]. Plaintiff has not identified, and cannot identify, the specific funds allegedly converted, nor has Plaintiff shown an obligation to keep intact or deliver the specific money in question, and thus Plaintiff's claim for conversion is properly dismissed. *See Fin. Bus. Equip. Solutions*, 2008 U.S. Dist. LEXIS 87152, at *13.

Finally, "[t]here can be no conversion where a person consents to the possession by another of the assets allegedly converted." *Comprehensive Care Corp. v. Katzman*, 2011 U.S. Dist. LEXIS 79420, at *29 (M.D. Fla. July 20, 2011) (citations omitted). In this case, OM Global consented to Fahrenheit's possession of the funds by releasing the redemption to Fahrenheit. [D.E. 1-2 at ¶ 27]. Accordingly, the claim for conversion fails to state a cause of action, and should be dismissed.

E. Plaintiff Fails to State a Claim for Unjust Enrichment, and Any Such Claim is Barred by the Doctrine of *In Pari Delicto*.

Plaintiff does not, and cannot, state a cause of action for unjust enrichment, and so the claim should be dismissed. "A claim for unjust enrichment has three elements: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendants to retain it without paying the value thereof." *Virgilio v. Ryland Grp., Inc.*, 680 F.3d 1329, 1337 (11th Cir. 2012) (citations omitted). "It is axiomatic that there must be a benefit conferred before unjust enrichment exists." *Henry M. Butler, Inc. v. Trizec Properties, Inc.,* 524 So. 2d 710, 712 (Fla. 2d DCA 1988). In this case, the Corporate Monitor has failed to plead any "benefit"

conferred upon Fahrenheit by OM Global. By Plaintiff's own pleading, OM Global returned Fahrenheit's own investment, and thus no benefit was conferred. To the extent that the burden of losses was unevenly distributed amongst the OM Global investors, any alleged "benefit" was conferred by the other investors, not OM Global itself. Further, it is undisputed that Fahrenheit paid at least the value of the alleged "benefit" conferred, as it delivered to OM Global the sum of $850,171.00, and received $841,333.29. [D.E. 1-2 at ¶ 25, 27].

Further, the equitable defense of *in pari delicto* bars any recovery by the Corporate Monitor for unjust enrichment. "This doctrine, in its complete form, '*in pari delicto, potior est condition defendentis*,' provides that where the wrong of one party equals that of the other, the defendant is in the stronger position." *Wiand v. Mitchell*, 2007 U.S. Dist. LEXIS 24069, at *21-22 (S.D. Fla. Mar. 27, 2007) (citing 22 Fla. Jur. Equity § 76). Where, as here, the parties are *in pari delicto*, "the law will leave them where it finds them; relief will be refused in the courts because of public interest." *Stermer v. Credit Exch. Corp.*, 2009 U.S. Dist. LEXIS 41571, at *3 (S.D. Fla. May 1, 2009) (citing *Patterson v. Law Office of Lauri J. Goldstein, P.A.*, 980 So. 2d 1234, 1237 (Fla. 5th DCA 2008) (quotations omitted)).

As a general rule in Florida, a receiver steps into the shoes of the corporation, individual or estate whose interests he was appointed to protect and therefore takes the rights, causes and remedies that were available to the entity he was chosen to represent. *See Hamilton v. Flowers*, 134 Fla. 328, 343 (1938); Fla. R. Civ. P. 1.620 (2014). In certain circumstances, the placing of an entity into receivership "cleanses" the sins of the corporation and allows a receiver to pursue equitable causes of action that would otherwise be barred by the doctrine of *in pari delicto. See Sallah v. Worldwide Clearing LLC*, 860 F. Supp. 2d 1329, 1336 (S.D. Fla. 2011). This

cleansing is only available, however, where there is "at least one honest member of the board of directors or an innocent stockholder," because there is otherwise no way to separate the fraud from the corporation itself. *Mitchell*, 2007 U.S. Dist. LEXIS 24069, at *23-24. The Complaint alleges that "[a]t all material times, Gignesh Movalia was the portfolio manager of OM Global Investment Fund LLC" and that OM Global LP was the "continuation of OM Global Investment Fund LLC." [D.E. 1-2 at ¶¶ 8, 16]. Plaintiff fails to plead the existence of an innocent member or partner of either company. Further, OM Global has not been placed into receivership, and there exists no authority to suggest that the same "cleansing" holds true for a so-called "corporate monitor." In this case, the appointment and purported authority of the Corporate Monitor was granted with the express consent of the bad actors, OM Global, via the Agreed Order Granting Plaintiff's Unopposed Motion for Appointment of Corporate Monitor (the "Agreed Order"). [D.E. 1-2, Ex. A]. Therefore, the Corporate Monitor inherits the uncontroverted sins of OM Global, and is barred from obtaining equitable relief from this Court.

IV. Conclusion.

WHEREFORE, Defendant, FAHRENHEIT VENTURE FUND LLC, for all of the foregoing reasons respectfully requests that this Honorable Court dismiss the Complaint and award Defendant its reasonable attorney's fees and costs incurred in defending against this action, and grant such other relief as this Court deems just and proper.

[Remainder Intentionally Left Blank]

DATED this 26th day of June, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 26, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send an electronic copy to:

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