



Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991)). The movant “must show that, on all essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party.” Id. If the moving party fails to make this showing, then the motion must be denied and the court need not consider the non-movant’s response to the summary judgment motion. Fitzpatrick, 2 F.3d at 1116.

If, however, the movant satisfies this initial burden, the non-movant must “come forward with evidence sufficient to call into question the inference created by the movant’s evidence on the particular material fact.” Id. The non-movant may not “rest upon the mere allegations or denials of the [non-movant’s] pleading, but the . . . response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). Summary judgment should be granted only when, considering the combined body of evidence, no reasonable juror could find for the non-movant.

## **II. UNDISPUTED FACTS**

On May 17, 2006, the Securities and Exchange Commission (the “SEC”) filed a complaint to stop a Ponzi scheme operated by Geoffrey A. Gish, involving Weston Rutledge Financial Services, Inc., Zamindari Capital, LLC, Lexington International Fund, LLC, a/k/a Lexington International Fund, Inc., and Oxford Adams Capital, LLC (the “Receivership Companies”).<sup>1</sup> This Court granted a temporary restraining order and asset freeze against Gish and the Receivership Companies, and appointed Thomas S. Richey as Receiver of the Receivership Companies. The SEC obtained a Final Judgment against Gish pursuant to a settlement agreement with Gish, in which

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<sup>1</sup> Although, as Defendant correctly notes, this statement of fact is supported by citation to a pleading, in violation of Local Rule 56.1B, the Court finds it appropriate to provide some factual background here by describing the nature of the initial action by the SEC. The Court relies on statements in the complaint for this background.

Gish did not deny the facts alleged by the SEC.

The 2006 SEC complaint alleged that, from February 2004 to May 2006, Gish sold unregistered securities to investors through fraudulent misrepresentations and omissions of material fact involving investment programs that were operated as a Ponzi scheme. From February 2004 to May 2006, three hundred investors deposited approximately \$31 million to the Receivership Companies' bank accounts.<sup>2</sup> Approximately \$15 million was transferred from the Receivership Companies' bank accounts to third parties who were to use the funds in income-generating investments and return the proceeds to the Receivership Companies. Approximately \$18 million of investor funds were not returned to investors. Most investors who invested funds in the Receivership Companies lost all or substantially

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<sup>2</sup> Defendant objects to this statement on the grounds that the Affidavit of Michael Fuqua contains inadmissible hearsay because it is based on documents and records that have not been authenticated. In this Order, the Court has granted, as unopposed, Plaintiff's motion to file an amended and restated affidavit that includes authenticating evidence. Insofar as Defendant did not respond or oppose the amended affidavit, the Court concludes that the amendment resolved Defendant's hearsay objection. Even if Defendant still objects to the consideration of this affidavit, the Court finds that it is proper to consider it, for the reasons stated by Plaintiff.

The Court does not, however, consider facts supported only with a citation to pleadings (other than for purposes of background information, as explained above), see LR 56.1B(1)(b), and has not considered the deposition of Zahra Ghods taken in another action, insofar as Defendant Gulkanian was not a party to that action and there is no indication that Defendant Gulkanian had an opportunity to cross-examine Ms. Ghods at that deposition. Moreover, the Receiver has provided the Court with no authority suggesting that it is proper for this Court to consider this deposition here. Finally, the Court has not considered any statement of facts supported only by reference to exhibits to the motion for summary judgment where those exhibits lack authenticating affidavits or other indications of their authenticity. The Court has no information suggesting that such unauthenticated documents could be admissible at trial, and the Court will not consider them here. See Snover v. City of Starke, No. 09-16281, 2010 U.S. App. LEXIS 20238 (11th Cir. Sept. 30, 2010).

all of the principal amount they invested. The Receivership Companies were operated as a Ponzi scheme in which sufficient funds to cover their obligations were lacking, and in order to make payouts to investors of either so-called principal or interest, the Receivership Companies had to use funds from new investors. The money paid out to Receivership Company investors was paid from funds deposited by other Receivership Company investors, rather than from any actual earnings by the Receivership Companies or the investors on any investments or return of principal to them. The Receiver filed this action on April 8, 2008, against multiple Defendants who received funds from the Receivership Companies.

The Receiver sued, in the instant case, Zahra Ghods and her companies, Rusa Cap, Inc. ("Rusa Cap") and Unisource Cap, LLC ("Unisource"), who the receiver alleged to be key players in the Ponzi scheme, receiving over \$9 million from the Receivership Companies or from investors. The Receiver filed a motion for default judgment against Ghods and her companies, and this Court entered judgment on October 8, 2009, in the amount of \$12,266,599.33. The complaint in this action alleges that Ghods told the Receivership Companies and investors that their funds were secured by a \$100 million Certificate of Deposit ("CD") held in a Canadian Bank. Ghods is alleged to have told the Receivership Companies and investors about the CD to induce investment and entrustment of funds, and copies were allegedly posted on the internet for viewing by investors.

Ghods transferred at least \$886,000, but possibly as much as \$1.236 million, from Rusa Cap and Unisource accounts to Defendant Simon Gulkanian, to his company Prima Investments & Capital LLC ("Prima Investments"), to his associates Eugene Vayner and Armen Davtyan, and to third parties involved in the \$100 million CD. The complaint alleges that Ghods misled the Receivership Companies and investors to believe that she owned, rather than rented, the \$100 million CD and

that she had the ability to repay any funds received from the Receivership Companies. According to the complaint, the Receivership Companies accepted Ghods' representations and continued to entrust her with funds.

Defendant Gulkanian was the individual who facilitated the provision of documents to Ghods that supposedly proved the existence of the \$100 million CD. Gulkanian lives in California but is a refugee/asylee from Russia. He was acquainted with an individual named Eugene Vayner, who also lived in California. The two met in Russia. Mr. Vayner was working with Zahra Ghods and introduced Gulkanian to Ghods in connection with Ghods' attempts to locate a financial instrument to rent. Gulkanian understood from his first contacts with Ghods and Vayner that Ghods was attempting to rent a \$100 million CD. At the time Gulkanian was introduced to Ghods, he had not participated in a transaction where he engaged in the renting of a financial instrument.

Gulkanian claims that Alexander Pashanov, a fellow Russian expatriate living in Canada, called him out of the blue to tell him that he had investors interested in renting out financial instruments - "Just like, one day, like, surprised, he called me. Simon, I have some investors. They're offering leasing instruments." Gulkanian called Ghods and Vayner to let them know that he found a contact who could lease financial instruments from a Canadian bank to Ghods. Gulkanian informed Ghods that he had located an individual, Pashanov, who has "some investors in Canada through person who I know him. He offered me that service, leasing CD." Gulkanian testified that the "Canadian group" requested 8 percent of the value of the CD annually as the cost of renting the CD and that Ghods stated that she would pay him and Vayner 5 percent each from whatever she earned as profit for the CD.

Gulkanian and Ghods entered into a Memorandum of Understanding and Agreement on July 31, 2005, relating to the renting of a CD (the "CD Agreement").

The parties to the CD Agreement are (1) Ghods, Rusa Cap, and Unisource; (2) Eugene Vayner and Investment Financial Funds Bank Group, Inc. ("IF Fund"); and (3) Simon Gulkanian and Prima Investments. Prima Investments and Gulkanian signed on behalf of "CD group provider." Gulkanian and Prima Investments promised to "get \$100 million [CD] from a group of banking (sic) in Canada through Canadian Bank, by depositing \$400,000 and activate the said CD via SWIFT . . . ." The CD Agreement provided that Gulkanian and Prima Investments clearly understood that the CD would be issued in the name of "RUSA" and that Rusa Cap might request a "Proof of Funds" that the "CD is (sic) belong to RUSA." Thereafter, Gulkanian introduced, by telephone, Ghods to Pashanov in connection with Ghods renting a \$100 million CD. On August 26, 2005, Gulkanian, using the e-mail address [arinberd@aol.com](mailto:arinberd@aol.com), e-mailed Zahra Ghods at [ucllc@yahoo.com](mailto:ucllc@yahoo.com) with instructions for mailing documents to AP Import Expert Ltd. in Toronto, Canada, in connection with renting a CD. According to Gulkanian, AP Import Expert Ltd. is owned by Pashanov. Gulkanian testified about an e-mail that he sent to Ghods listing three different entities where she was supposed to wire money in connection with the leased CD transaction. Gulkanian testified that he received the information about the three entities from Pashanov.

Gulkanian produced from his records a September 18, 2005 agreement entitled a "Master payorder and procedures to Memorandum of Understanding dated 7/31/05 Joint Venture Agreement" (the "September 2005 Agreement"). The same parties to the CD Agreement are parties to the September 2005 Agreement.<sup>3</sup> Prima Investments was described as represented by Gulkanian and the document states:

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<sup>3</sup> During his deposition, Gulkanian stated that the September 2005 Agreement was prepared by Ghods and was an offer to the provider of the CD. Nonetheless, the September 2005 Agreement states that it is an agreement entered into on a certain date, by the parties who signed the document.

"Prima provider of CD group in direct JV with the Canadian group as CD provider in CIBC. Copy of said CD attached." The September 2005 Agreement states that "Prima will arrange to bring the [proof of funds] and followed by SWIFT-799 at later date." It further notes: "No one can reveal the funds is being leased, if that was mentioned the program will be stopped." At the time the parties entered into the September 2005 Agreement, Rusa Cap had already wired out \$500,000 to rent the CD for two months. Gulkanian states that he received a copy of the CD documents from Pashanov or Ghods and that the lease of the CD was cancelled in March 2006.

As previously stated, Ghods transferred at least \$886,000, but possibly as much as \$1.236 million, from Rusa Cap and Unisource accounts to Defendant Simon Gulkanian, to his company Prima Investments, to his associates Eugene Vayner and Armen Davtyan, and to third parties involved in the \$100 million CD. Ghods paid \$335,000 to Gulkanian, Armen Davtyan, and Prima Investments. In addition, Ghods also transferred \$26,000 from the Rusa Cap Wells Fargo account to Eugene Vayner, a former officer of Rusa Cap who Ghods claims recommended the \$100 million CD transaction to her. One check she wrote to Vayner in the amount of \$16,000 stated "For: 14500 + Simon 1500." Gulkanian later transferred funds to Vayner, such as a check for \$10,000 on March 1, 2006, a check for \$6,000 on April 11, 2006, and a check for \$5,700 on April 19, 2007. Gulkanian received funds from Vayner, including \$10,000 from Vayner via wire transfer on September 4, 2007, and an undated check for \$6,000 from a Washington Mutual account in the name of "Prima Investments & Capital and Eugene Vayner." In 2005, in connection with the leasing of the CD, Ghods transferred \$525,000 in funds from Rusa Cap and Unisource accounts directly to three entities, Balta Enterprises, Life Dream Travel Tours, and AP Import-Expert Ltd, that, according to the contract, Gulkanian represented in the CD lease transaction.

The funds transferred from Ghods to Gulkanian, Prima Investments, Armen Davtyan, Eugene Vayner, Balta Enterprises, AP Import-Expert and Life Dream Travel Tours were from the Receivership Companies. Gulkanian admits that these payments were for the purpose of renting the CD. Gulkanian admits that he received a wire in the amount of \$225,000 from Rusa Cap on November 16, 2005, and that Ghods/Rusa Cap made a \$40,000 payment to Armen Davtyan at his direction. Gulkanian testified that he was then supposed to pay \$265,000 to the Canadian Group and claims he wired \$265,000 to one of the three entities on February 28, 2006. The bank records show that the \$225,000 and \$40,000 payments were made from Rusa Cap to Gulkanian and Davtyan. The records show that Gulkanian never wired \$265,000 to anyone. Gulkanian testified that Ghods' son brought him a cashier's check for \$250,000 or \$260,000 or \$265,000 to make the second payment on the CD; he believes the cashier's check was from Wells Fargo. No cashier's check in any of these amounts was deposited to Gulkanian's accounts during 2005 or 2006; however, there is a deposit into Gulkanian's account of a \$350,000 cashier's check from Washington Mutual dated February 28, 2006. After deposit of the \$350,000 cashier's check in February 2006, on the same day, Gulkanian wired out \$250,000 to Balta Enterprises, \$50,000 to Life Dream Travel Tours, and \$50,000 to AP Import-Export Ltd. The bank records show that Gulkanian did not wire out the original \$265,000, but instead retained \$225,000 in his bank account and his associate retained \$40,000. Only after receipt of the \$350,000 cashier's check from Ghods and her son did Gulkanian wire funds out to the three entities.

Including the \$350,000 cashier's check, Gulkanian and Prima Investments received transfers of \$685,000 from Ghods, Rusa Cap, and Unisource. Not including the \$350,000 cashier's check, Gulkanian and Prima Investments received \$335,000 from Ghods, Rusa Cap, and Unisource. Gulkanian admits that he received \$265,000

from Rusa Cap (\$40,000 check and \$225,000 wire) and that he did not do anything to earn these funds. Gulkanian states that he was supposed to forward to others any payments he received from Ghods and her companies. He admits that if he didn't forward the funds to anyone, he is obligated to return it, and states that he was not supposed to be paid a commission or any profit. At one point in his deposition, Gulkanian denies receiving any funds whatsoever from Ghods, Rusa Cap, or Unisource. At another point in the deposition, he states that he did receive money from Ghods. Plaintiff made a demand for Gulkanian for return of funds on August 29, 2007. Gulkanian failed to make any payments to Plaintiff.

The SEC sued Ghods in a separate action, alleging that Ghods and Rusa Cap actively participated in the Ponzi scheme at issue in this case and that she and her companies received \$9 million in investor funds. This Court granted summary judgment to the SEC in that case, finding that Ghods and Rusa Cap violated the antifraud provisions of the federal securities laws. In the instant case, the Receiver has alleged the following claims against Gulkanian: (1) fraudulent transfer; (2) conversion; (3) violation of the Racketeer Influenced and Corrupt Organization Act; (4) violation of Georgia's Racketeer Influenced and Corrupt Organization Act; (5) civil conspiracy; (6) unjust enrichment and constructive trust; (7) money had and received; (8) punitive damages; and (9) attorneys' fees and expenses.

### **III. LEGAL ANALYSIS**

Plaintiff seeks summary judgment on the following claims: (1) fraudulent transfer, (2) conversion, (3) unjust enrichment and constructive trust, (4) money had and received, and (5) attorneys' fees. Plaintiff additionally seeks an award of pre-judgment interest on funds received by Defendant Gulkanian and sought in this action.

#### **A. *Fraudulent Transfer***

Plaintiff contends that the amounts received by Gulkanian are fraudulent transfers. The Uniform Fraudulent Transfer Act provides as follows:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) Intended to incur, or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

O.C.G.A. § 18-2-74(a). The Receiver argues that the funds received by Gulkanian were fraudulent transfers because the management of the Receivership Companies transferred those funds to Ghods who then transferred them to Gulkanian with the "actual intent to hinder, delay, or defraud" creditors of the Receivership Companies.<sup>4</sup> This Court agrees.

The undisputed facts establish that the funds Ghods transferred to Gulkanian were from the Receivership Companies. The Receivership Companies were operated as a Ponzi scheme. "Under [the Uniform Fraudulent Transfer Act], transfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception." Quilling v. Schonsky, 247 Fed. Appx. 583, 586 (5th Cir. 2007); see also In re C.F. Foods, LP, 280

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<sup>4</sup> Notably, "[t]he use of intermediaries to transfer funds from a Ponzi scheme to a defendant-recipient does not undermine the viability of a fraudulent conveyance claim." Stenger v. World Harvest Church, Inc., No. 1:04-CV-0151-RWS, 2006 U.S. Dist. LEXIS 15108, \*48 (N.D.Ga. Mar. 31, 2006).

B.R. 103, 111 (E.D. Penn. 2002); In re Slatkin, 525 F.3d 805, 814 (9th Cir. 2008). “Courts have routinely applied [the Uniform Fraudulent Transfer Act] to allow receivers . . . to recover monies lost by Ponzi scheme investors.” Donell v. Kowell, 533 F.3d 762, 767 (9th Cir. 2008). The simple existence of a Ponzi scheme has been found sufficient to establish actual intent for the purposes of the Uniform Fraudulent Transfer Act. See Slatkin, 525 F.3d at 814. The Court so finds here.<sup>5</sup>

Gulkanian argues that the Receiver’s fraudulent transfer claim is barred by the statute of limitations. He relies on the one-year statute of limitations applicable to claims arising under O.C.G.A. § 18-2-75. See O.C.G.A. § 18-2-79. The Receiver’s fraudulent transfer claim in this case, however, is brought pursuant to O.C.G.A. § 18-2-74, which has a four-year statute of limitations under O.C.G.A. § 18-2-79. Accordingly, the Court cannot conclude that the claim is time barred. Gulkanian additionally relies on his alleged lack of knowledge regarding Gish or the Receivership Companies. Noticeably absent from this discussion, however, is any legal authority suggesting that the knowledge or intent of the transferee is a factor to be considered in determining whether a transfer is fraudulent.

The Court has thoroughly reviewed the affidavit of the Receiver’s accountant, along with the attached exhibits. The Court finds that \$335,000 was transferred to Gulkanian from the Receivership Companies and Gulkanian will be liable for this amount as a fraudulent transfer. The Court will not hold Gulkanian responsible for amounts transferred to others, without evidence that such transfers were made at his direction, insofar as the Receiver has failed to establish that Gulkanian had control over these funds or otherwise should be held responsible for funds not

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<sup>5</sup> The Court, therefore, disagrees with Defendant’s position that the existence of a Ponzi scheme is not enough to establish intent to defraud under Georgia law. The Court agrees that this issue has not been directly addressed by Georgia courts; however, the Court is persuaded by the authority from other jurisdictions.

transferred to him other than one transfer that he admits was made at his direction.

The Court additionally finds, for the reasons stated by Plaintiff, that the funds transferred to Defendant Gulkanian were made without the Receivership Companies receiving a reasonably equivalent value in exchange and that (1) the Receivership Companies were engaged in a business for which the remaining assets were correspondingly small in relation to the nature of the business and (2) the Receivership Companies intended to incur debts beyond their ability to repay. The Court concludes that Defendant Gulkanian received fraudulent transfers in the total amount of \$335,000.00 as a matter of law.

***B. Conversion, Unjust Enrichment, and Money Had and Received***

As alternative theories of recovery, the Receiver argues that Gulkanian is liable for conversion, unjust enrichment, and money had and received. For the reasons stated by the Receiver, the Court concludes that these alternative theories of recovery are meritorious. Even if the Court did not find that the \$335,000 transferred to Gulkanian was a fraudulent transfer, the Court would find that Gulkanian is liable to return this amount under any of these alternative theories of recovery.

***C. Costs and Attorneys' Fees***

Plaintiff seeks an award of attorneys' fees and expenses in this case. O.C.G.A. § 13-6-11 provides that a plaintiff may recover such amounts "where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." Notably, Gulkanian did not respond to this claim in his response brief. Based on the record before this Court, however, and particularly in light of the fact that the Receiver is seeking amounts in this action that were not directly transferred to Gulkanian and amounts (the \$350,000 cashier's check) lacking a known source, along with the Court's finding that Gulkanian is not

liable for the entire amount sought or demanded, the Court cannot conclude that he has acted in bad faith or has been stubbornly litigious here. The Court, therefore, will not grant summary judgment to the Receiver on fees and expenses.

*D. Pre-judgment Interest*

Plaintiff submits that an award of pre-judgment interest is appropriate in this action, insofar as the amounts received by Gulkanian were sums certain. O.C.G.A. § 7-4-15 provides that liquidated demands bear interest from the time the responsible party becomes liable and bound to pay them. The rate applied is 7 percent per annum simple interest. O.C.G.A. § 7-4-2. The Court finds that, because of the disputes regarding the amounts due described above (and noting that the demand letter sought \$990,000 whereas this Order awards \$335,000), an award of pre-judgment interest is not warranted here.

**IV. CONCLUSION**

For the reasons stated above and for the reasons stated by Plaintiff, the Court **GRANTS in part and DENIES in part** Plaintiff's Motion for Partial Summary Judgment as to Defendant Simon Gulkanian [Doc. No. 103] and **GRANTS** Plaintiff's Motion to File the Amended and Restated Affidavit of Michael Fuqua in Support of the Motion for Partial Summary Judgment as to Simon Gulkanian [Doc. No. 115]. The Clerk of Court is **INSTRUCTED** to enter judgment in favor of Plaintiff and against Defendant Gulkanian in the principal amount of \$335,000.00.

The parties are **DIRECTED** to file a proposed joint consolidated pretrial order as to the remaining claims within the next thirty (30) days.

SO ORDERED this 31st day of March, 2011.

*s/ CLARENCE COOPER*

CLARENCE COOPER  
SENIOR UNITED STATES DISTRICT JUDGE