

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.

Where the summary judgment movant does not bear the burden of proof, the movant carries the initial burden of showing the absence of a genuine issue as to any material fact. The movant is not required to negate his opponent's claim, but rather, may discharge his burden merely by "'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). When this burden is met, the non-movant is then required "to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324.

A court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988); Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986), *reh'g denied*, 815 F.2d 66 (11th Cir. 1987). However, Rule 56, "[b]y its very terms, . . . provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no genuine issue of material fact."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). An issue is not genuine if it is created by evidence that is “merely colorable” or is “not significantly probative.” Anderson, 477 U.S. at 249-50. Substantive law will identify which facts are material. Id. at 248.

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”).¹ 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 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, 300 investors deposited approximately \$31

¹ Although, as Defendant Priebe 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. The Court notes that Priebe cites to the complaint in this action for a similar purpose in his statement of additional facts.

million to the Receivership Companies' bank accounts.² 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 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 allegedly 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.³ Ghods told Gish and other investors

² Defendant Priebe objects to this statement as irrelevant and immaterial to the case against him. The Court finds that it is necessary to provide some context to this action, and the Court will include this and other similar statements for this purpose.

³ The Court does not 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). More specifically, as to the default judgment entered against Ghods, Plaintiff does not cite any authority for the proposition that it is proper for the Court to consider facts admitted by Ghods because of her default to be undisputed material facts for the purpose of this summary judgment motion against Defendant Priebe. Moreover, the Court

that her investments were secured by iron ore mines that she claimed to own or control in Mexico. 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 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.

The Receivership Companies transferred \$10,200,736 to Ghods, Rusa Cap, and Unisource or to third parties at the direction of Ghods, Rusa Cap, and Unisource. The records of the Receivership Companies reflect that the Receivership Companies never received any consideration, income, or even any substantial return of principal from the funds transferred to Ghods, Rusa Cap, and Unisource.

Defendant Priebe met Ghods in 2003 or 2004, through a mutual business associate who believed that they may want to do business together. Ghods represented that she had been investing in various banking instruments, stock-based financing, and traded bank notes. Priebe had met Antonio Ruspoli in 2002 or 2003 through a mutual friend who wanted Priebe to become a member of a Catholic religious organization that Ruspoli headed. Priebe learned that Ruspoli was

has not considered the deposition of Zahra Ghods taken in another action, insofar as Priebe was not a party to that action and there is no indication that Priebe 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 indication 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).

involved in the garment industry and he claimed to have strong banking relationships in Italy and Europe. Priebe states that he was Ruspoli's business agent at one time. In 2003, Priebe introduced Ruspoli to Ghods, and they met with her in California regarding possible investments. According to Priebe, Ruspoli had opportunities in the garment industries and also possible acquisitions that needed financing. At that time, Priebe was approximately 28 years old, and Ruspoli was 58 years old. They discussed various business opportunities with Ghods, including "her possibility of acquiring different banking instruments," including "bank guarantees, letters of credit." Priebe and Ruspoli also met with Ghods in Europe to discuss various business opportunities.

One of the investments that Ghods discussed with Priebe and Ruspoli was a transaction involving gemstones that were supposedly worth \$2.39 billion and supposedly held in a Brink's facility in Germany. Apparently, Ghods wanted Ruspoli "to establish a line of credit or get some type of insurance guarantee or bonding to utilize the asset as . . . a cash value." When asked whether he believed Ghods' representations as to the gemstones, Priebe stated that the value was "very high" and the insurance "the little bit I understood of it didn't make sense." Additionally, "As well as going back to the iron ore mine and the company I formed, that didn't make any sense to me either. So I didn't proceed with either one of those business transactions." When asked whether it caused him to question Ghods' credibility, Priebe testified "Yeah, very much, very much." Priebe learned that the gemstones were synthetic and the insurance policy "a fake." The lack of authenticity of the documents and the fraudulent nature of the proposed transaction was suspected in late 2004 or early 2005, before Priebe engaged in the transaction at issue in this litigation.

Ghods also proposed a transaction to Priebe and Ruspoli involving "U.S.

dollar bonds" in 2004. Ghods met with Priebe and Ruspoli in California and handed them pieces of paper, which were supposedly original U.S. dollar bonds. Priebe stated that Ghods was proposing "to deposit them or establish a line of credit." Ghods supposedly had experience using "out-of-the-ordinary assets" as security to establish lines of credit. Priebe testified: "We believed after the meeting . . . that they were fraudulent just by looking at them." Priebe stated that he questioned the authenticity of the documents because the bonds were in the amount of "millions and millions of dollars" and Ghods just had them in her briefcase. Additionally, they were from 1915 and were all "crinkly and smudged." There were misspellings in the document and a lack of spacing between words. Right after the meeting, both Priebe and Ruspoli believed they were fraudulent, but Ruspoli still looked into it, having conversations with other people about whether it was possible that the bonds be issued with grammar and spelling errors. At the time Ghods presented the papers to Priebe and Ruspoli, they told her that they believed the documents were fraudulent.

Priebe stated that Ghods sent them other investment proposals over the years and that those investments were "potential instruments that she could have possession of or was supposedly the owner of. All of those were - my feelings were exactly the same as the gems and the bonds, that they were coming from obscure places, large dollar amounts" and that they were also fraudulent. In 2005, Priebe and Ruspoli discussed with Ghods "different investments within Europe where the principal would be protected" and there was "no risk" to the principal. Thereafter, Ghods told Priebe and Ruspoli that she had \$1 million to invest. Priebe testified that he did not know the money was coming from someone else and that he had never heard of Gish or the Receivership Companies at that time; however, he also testified that he had a lot of questions after the initial \$1 million arrived and that Ghods did

not want to answer questions about the source of the funds.

On March 20, 2005, Ghods, on behalf of Rusa Cap, and Priebe and Ruspoli, on behalf of R&P (which is defined simply as Ruspoli & Priebe) and RCISM (defined as Rusa Cap Inc. San Marino) entered into a Trade Agreement concerning the trading of bank notes and \$1 million represented to be in Rusa Cap's control. Ruspoli and Priebe signed for R&P and RCISM. The Trade Agreement was drafted by Priebe, Ruspoli, and Ghods. Pursuant to the Trade Agreement, the parties desired to trade bank notes, but Priebe did not understand how trading bank notes worked as a financial investment. The Trade Agreement provides that Rusa Cap "wishes to pledge and Wire [\$1 million] to the benefit of R&P's and RCISM funding bank for R&P's and RCISM account for R&P . . . to have established a credit line as reserved funds and pledge said funds in order to enhance said amount with safety of principal at all times." The Trade Agreement states that the trading was to be done "for the benefit of Unisource Cap LLC (Iron Ore pledged provider) and Zamindari LLC (for Cash pledged provider), for behalf of the investor and fund provider(s)." According to Priebe's deposition, the funds were to remain in the bank account or other notes or instruments would be held at the bank at all times. Priebe testified that the parties were agreeing to provide a return of 150 percent to Rusa Cap each month. When asked about this return, Priebe testified: "Well, to me the return seemed very, very high. However, from conversations with Ghods and Ruspoli they made it sound like that could be possible in regards to leverage." He stated that it was a "good investment if you could find something like that." The total net return to Rusa Cap would be 1500 percent, and Priebe testified that he understood that he and Ruspoli were promising this return to Rusa Cap. Under the Trade Agreement, Ghods, Ruspoli, and Priebe were each supposed to receive compensation of \$166,000 per month. This was an agreement to share in profits

between “Rusa Cap Inc. USA-Zahra Ghods” and “Antonio Maria Ruspoli & Jeffrey J. Mayo Priebe” that Priebe signed. According to Priebe, Ruspoli opened the bank account for Rusa Cap in San Marino and Priebe later became a signatory on the account.⁴ Priebe visited the bank in San Marino a “couple of times.” After the funds had arrived from Rusa Cap, Priebe went to the bank and signed papers in order to be added as a signatory. Priebe and Ruspoli were the only signatories to the account. Priebe went to the bank with Ruspoli to check on the account balances. The bank provided them with “a printout with a stamp and somebody would sign below that or on top of the stamp.” Priebe testified that, according to the Trade Agreement, R&P had the responsibility to ensure that the account was blocked. When Priebe visited the bank, he did not determine whether the account was blocked. He assumed that it was a blocked account based on the documentation that the bank had. Priebe testified that he did not do anything to ensure that the funds would be protected.

From March to June 2005, \$4.785 million of Receivership Company investor funds were transferred out of the Rusa Cap accounts by Ghods or at her direction and sent to the San Marino account. Priebe states that he may have prepared the document that Ghods provided to the Receivership Companies indicating the bank information for the Rusa Cap account in San Marino. Priebe spoke with Ghods quite a bit on the phone to help Ruspoli understand what Ghods was trying to say and vice versa. \$2,880,000 was transferred directly from the Receivership Companies into the San Marino account, and \$1,905,000 was transferred into the San Marino account by Ghods from funds in the Rusa Cap accounts that she received from the

⁴ Priebe’s statement of facts references a power of attorney authorizing Ruspoli to open the San Marino account. As the Receiver notes, this alleged power of attorney is dated several months after the funds were transferred to the San Marino account. The Court, therefore, does not consider the power of attorney to be significant.

Receivership Companies. According to the records available to the Receiver, at least \$4,785,000 of funds belonging to Zamindari Capital LLC, one of the Receivership Companies was transferred to the San Marino account. However, Priebe testified that he did not transfer the funds out of the San Marino account and does not know where the funds are now. Priebe admits that, as of July 4, 2005, \$5,001,122 was in the San Marino account. Priebe faxed a Proof of Funds reflecting that balance to Ghods.

Priebe provided to Ghods the bank statements from the San Marino account reflecting the amounts in the account. For example, as of March 30, 2005, \$1,003,000 was in the San Marino account. Priebe sent a fax to Ghods on July 4, 2005, indicating that the balance in the San Marino account was \$5,001,122. Priebe thought that Ghods would be sharing the proof of funds with others. To Priebe's knowledge, no investment was ever found for the \$5 million in the San Marino account. Priebe admits that the funds were never invested. Nothing was earned on the \$1 million investment or on the \$5 million investment. Priebe states that, to his knowledge, Ruspoli took the funds in the San Marino account. He denies knowing where the funds were transferred or the current whereabouts of the funds. He states that he did not transfer the funds out of the account and that he never transacted any business at the bank on the account. The Receiver does not know who withdrew the money from the account and has no evidence that Priebe is currently holding property that belongs to the Receivership Companies.

Ghods began demanding return of the funds by telephone calls and e-mails to Priebe and Ruspoli in 2006.⁵ Priebe admits that Ghods asked for the return of the funds. When Ghods asked for the funds to be returned to the Rusa Cap account in

⁵ According to Priebe, Ruspoli filed a lawsuit against Ghods in Italy asserting damages relating to his business reputation, which he alleges were caused by his involvement with Ghods and her fraudulent activities.

the United States, Priebe told her to get in touch with his lawyer. Priebe admits that he and Ruspoli have never returned any principal or profits to Rusa Cap or the Receivership Companies. Priebe admits that he has never attempted to locate the funds and that he has never asked Ruspoli where the funds are located, even after the filing of this litigation. From 2005 to 2008, Priebe testified that he has made no effort to determine whether the funds were still in the San Marino account. Priebe testified that he did not make any efforts to go to the bank and write a check to Rusa Cap and return the funds. Priebe lived in Modena, Italy in 2004-2005 with Ruspoli. He then lived in Rome, Italy for the next three years, until October 2008. Priebe visited Ruspoli nine or ten times in Italy in 2009. Priebe states that he never once asked Ruspoli about the whereabouts of the funds. On August 20, 2007, the Receiver made a demand on Priebe for the return of the Receivership Companies' funds. Priebe has failed to make any payments or return any funds to the Receivership Companies. The records of the Receivership Companies reflect that the Receivership Companies never received any consideration or return of principal or income from the funds.

In the instant case, the Receiver has alleged the following claims against Priebe: (1) fraudulent transfer; (2) conversion; (3) violation of the federal Racketeer Influenced and Corrupt Organization Act ("RICO"); (4) violation of Georgia RICO; (5) civil conspiracy; (6) unjust enrichment and constructive trust; (7) money had and received; (8) punitive damages; and (9) attorney fees and expenses. Defendant Priebe seeks summary judgment on all nine claims while the Receiver seeks summary judgment on the claims for fraudulent transfer, conversion, unjust enrichment, money had and received, and attorney fees and expenses. The Receiver also seeks prejudgment interest.

II. LEGAL ANALYSIS

A. *Fraudulent Transfer*

Plaintiff contends that the amounts transferred to the San Marino account are fraudulent transfers. Priebe argues that he did not receive any Receivership Company funds and that no amounts were transferred to him. 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). It is undisputed that Receivership Companies' funds were transferred to the San Marino account. The key question strongly contested by the parties is whether Priebe can be held responsible for the funds in the San Marino account. The Receiver admits that he does not know who took the funds out of the San Marino account. Priebe admits that he was a signatory on the account (even though he states that he was a signatory for a brief period of time and had no authority to remove funds). It is undisputed that at least \$4,785,000 of the Receivership Companies' funds were transferred to the San Marino account, and the whereabouts of these funds is currently unknown. Priebe states that Ruspoli took the funds. The Receiver's claim that Priebe should be responsible for amounts transferred to the account, regardless of who ultimately removed the funds from the

account, is based on the Trade Agreement discussed above. The Receiver identifies Priebe as Ruspoli's partner and submits that the Trade Agreement imposed an obligation on Priebe relating to the protection and safety of the funds, which Priebe failed to fulfill. There is no evidence that Priebe currently has, or at any time has had, any of the Receivership Companies' funds in his personal possession, separate from the San Marino account.

This Court has conducted a thorough review of the Trade Agreement. As an initial matter, the Court rejects Priebe's position that he signed the Trade Agreement only as a witness. There is no indication that Priebe signed in any different capacity than Ghods or Ruspoli. Instead, Priebe's signature appears below Ruspoli's, under the heading "For: R& P and RCISM." All parties signed below the following statement: "IN WITNESS WHEREOF, the parties hereto have executed or caused this Agreement to be executed on their behalf as of the day and year set forth opposite their signature or the signature of their authorized representative" Although Priebe is designated to act on behalf of R&P as a witness for Rusa Cap in the agreement, there is simply no support in the Trade Agreement for Priebe's argument that he **signed** the document only as a witness for Rusa Cap.⁶ Instead, he signed on behalf of R&P.

The Receiver takes the position that Ruspoli and Priebe entered into a partnership or joint venture and relies exclusively on the Trade Agreement to

⁶ The Court does not consider Priebe's testimony that he signed only as a witness to create a genuine issue of material fact here because Priebe is bound by the document that he signed. See Charles S. Martin Distributing Co. v. Bernhardt Furniture Co., 213 Ga. App. 481, 445 S.E.2d 297 (1994) ("There are few rules of law more fundamental than that which requires a party to read what he signs and be bound thereby.") (citation omitted). Moreover, the Court notes that Priebe signed the monthly payment schedule providing for a payment of \$166,000 to himself, the same amount as Ghods and Ruspoli, and he does not contend that he signed this document as a witness.

support this conclusion. The first page of the Trade Agreement lists Rusa Cap and Ghods as “Investor” and below the contact information for these two investors it states “Represented by: Antonio Maria Ruspoli & Jeffrey J. Mayo Priebe (HEREIN, ‘R&P’).” The Trade Agreement thereafter references R&P. Under Georgia law⁷, “[t]he theory of joint venturers arises where two or more parties combine their property or labor, or both, in a joint undertaking for profit, with rights of mutual control (provided the arrangement does not establish a partnership), so as to render all joint venturers liable for the negligence of the other.” Kissun v. Humana, Inc., 267 Ga. 419, 420, 479 S.E.2d 751 (1997). The right to exercise mutual control is critical. Williams v. Chick-fil-A, Inc., 274 Ga. App. 169, 170, 617 S.E.2d 153 (2005) (citation omitted) (noting that “there must be not only a joint interest in the purpose of the enterprise . . . but also an equal right, express or implied, to direct and control the conduct of one another in the activity causing the injury”). If Ruspoli and Priebe are found to be joint venturers in the Trade Agreement, general agency principles apply. Id. (citation omitted). Although the Trade Agreement satisfies some of the elements of a joint venture, by combining the labor of Ruspoli and Priebe in a joint undertaking for profit, the Court cannot find as a matter of law that it provides for mutual control, such that Ruspoli had the right to direct and control the conduct of Priebe and vice versa. The Trade Agreement does not address rights of control between and among Priebe and Ruspoli. Moreover, Priebe testified that he was a signatory on the San Marino account for a short period of time, and the Receiver has

⁷ The Court applies Georgia law here, however, the Court has some concerns about doing so because it is not clear that the Trade Agreement was signed in Georgia. Although Priebe states that the alleged partnership was formed in San Marino, Italy, Priebe has cited no record evidence or legal authority to support this statement. Priebe has responded to the Receiver’s arguments using Georgia law, and the Court has no briefing on the law of San Marino that would enable the Court to determine whether a partnership or joint venture was formed under San Marino law.

not established that this testimony was contradicted by any other evidence in the record. As a result, Priebe could not have exercised the same degree of control over the funds as did Ruspoli, foreclosing a finding of mutual control in this case. Accordingly, the Court finds that the Trade Agreement does not create a joint venture between Ruspoli and Priebe.

Pursuant to O.C.G.A. § 14-8-6(a), a partnership is defined as “an association of two or more persons to carry on as co-owners a business for profit.” To determine whether a partnership exists, a court may consider the following factors: “common enterprise, the sharing of risk, the sharing of expenses, the sharing of profits and losses, a joint right of control over the business, and a joint ownership of capital.” Rosenfeld v. Rosenfeld, 286 Ga. App. 61, 63, 648 S.E.2d 399 (2007) (citation omitted). The “true test” of a partnership is “the intention of the parties.” Id. (citation omitted). Here, the Court cannot find that the Trade Agreement establishes the existence of a partnership between Priebe and Ruspoli as a matter of law. There is no discussion of the details relating to joint right to control, the sharing of business expenses, the joint ownership of capital, or sharing of risk. The intent of Priebe and Ruspoli to form a partnership is absent from the Trade Agreement. The Court concludes that the Trade Agreement does not evidence a partnership between Priebe and Ruspoli, and there is no suggestion of an implied partnership agreement. See Huggins v. Huggins, 117 Ga. 151, 155, 43 S.E.759 (1903) (noting that a partnership results from an express or implied agreement).

Notwithstanding the Court’s finding in this regard, the Court concludes that Priebe’s status as a party to the Trade Agreement, along with his admission to having been a signatory to the San Marino account for some period of time, establishes that he did have control over Receivership Companies’ funds that were

transferred to the account by Ghods.⁸ The question for the Court to consider is whether Priebe's control over that account for some period of time is sufficient to find that he received a fraudulent transfer, although Priebe currently denies ever having any of the funds transferred to the San Marino account in his possession (in other words, he states that he never removed funds from the account) and denies that he had the authority to remove funds from the account. The Court, having undertaken an extensive search, has located no authority holding the signatory of a bank account liable for amounts fraudulently transferred to that bank account where that individual did not actually withdraw the funds or direct their disposition, and the Receiver has not cite any such authority. There is nothing to contradict Priebe's testimony that he did not withdraw the funds from the San Marino account and that he does not know where the funds are currently located. Under these circumstances, the Court is aware of no grounds for holding Priebe responsible for these amounts as fraudulent transfers, and the Court will grant his motion for summary judgment on the fraudulent transfer claim.

B. Conversion

Under Georgia law, to establish a claim for conversion, the plaintiff must show "(1) title to the property or right of possession, (2) actual possession in the other party, (3) demand for return of the property, and (4) refusal by the other party to return the property." Metzger v. Americredit Financial Services, 273 Ga. App. 453, 615 S.E.2d 120 (2005) (citations and marks omitted). In the instant case, for the reasons set forth above, the Court concludes that there is insufficient evidence from which a jury could conclude that Priebe actually possesses the funds that were once

⁸ 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).

in the San Marino account. The Receiver does not know who withdrew the funds from the account. Priebe has testified that he did not withdraw the funds and that he does not know when they were withdrawn or where they are located at present. Under these circumstances, the Court finds no factual basis from which the elements of the conversion tort could be satisfied. The Court accordingly will grant summary judgment to Priebe on this claim.

C. *Unjust Enrichment*

“The theory of unjust enrichment applies when there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated.” Cochran v. Ogletree, 244 Ga. App. 537, 538-39, 536 S.E.2d 194 (2000); see also Engram v. Engram, 265 Ga. 804, 807, 463 S.E.2d 12 (1995) (noting that unjust enrichment applies “when the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefitted party equitably ought to return or compensate for.”) (citations and marks omitted). The Court concludes that a jury could not reasonably conclude that Priebe has been unjustly enriched based on the undisputed evidence before the Court. That evidence shows that the funds were transferred to the San Marino account, that Priebe was a signatory on that account for a brief period of time, that he did not take money out of the account, and that he does not know the current whereabouts of the money that was in the account. Absent a joint venture or partnership or another basis for holding Priebe responsible for the acts of Ruspoli, the Court cannot conclude that Priebe has received a benefit. Accordingly, the Court will grant Priebe’s motion for summary judgment on this claim.

D. *Money Had and Received*

To establish liability for a money had and received claim, the plaintiff must show that “a person has received money of the other that in equity and good

conscience he should not be permitted to keep; demand for repayment has been made; and the demand was refused.” Fernandez v. WebSingularity, Inc., 299 Ga. App. 11, 13, 681 S.E.2d 717 (2009) (citation and marks omitted). This claim is very similar to an unjust enrichment claim. Because Priebe undisputedly does not know the whereabouts of the funds and because Priebe did not withdraw the funds from the San Marino account, the Court concludes that the Receiver cannot establish that Priebe received money of another. For this reason, the Court grants Priebe summary judgment on this issue.

E. Federal and State RICO

Under federal law, persons engaged in a pattern of racketeering activity may be liable in a civil action brought by those injured as part of a RICO violation. See 18 U.S.C. § 1964; 18 U.S.C. § 1961 *et seq.* The elements of a federal RICO claim are: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” Langford v. Rite Aid of Alabama, Inc., 231 F.3d 1308, 1311 (11th Cir. 2000) (citation omitted). To succeed, a plaintiff “must identify and prove a pattern of racketeering activity, defined as two ‘predicate acts’ of racketeering activity within a 10 year period.” Id. at 1311-12 (citing 18 U.S.C. § 1961(5)). The Receiver’s complaint in this action identifies wire fraud and mail fraud as the predicate acts of racketeering activity. Priebe argues that the Receiver cannot establish either the existence of the predicate acts or Priebe’s participation in the alleged enterprise.

To establish liability for mail or wire fraud, the Receiver must prove “(1) that [Priebe] knowingly devised or participated in a scheme to defraud [the Receivership Companies], (2) that [he] did so willingly with an intent to defraud, and (3) that [Priebe] used the U.S. mails or the interstate wires for the purpose of executing the scheme.” Id. at 1312 (citations omitted). The Receiver identifies the Trade Agreement and Priebe’s obligations and responsibilities under that agreement, as

evidence that he knowingly participated in a scheme to defraud the Receivership Companies. The Court agrees with the Receiver's position and finds that the Trade Agreement and Priebe's obligations under that agreement, including his responsibility to maintain funds in a safe account, to engage in trading certain bank instruments, to manage and facilitate the trading, to obtain certain rates of return, and to be an agent for the trading bank provide a basis for the jury to conclude that Priebe knowingly participated in the scheme. Although Priebe submits that he did not know Geoff Gish and did not know the names of the investors in Georgia, the Trade Agreement specifically references one of the Receivership Companies, Zamindari LLC, and states that the trading of bank notes was, at least in part, for the benefit of Zamindari. The parties agreed to an extraordinary rate of return, 150% per month over possibly 10 months. Priebe was to receive a monthly salary of \$166,000 but Priebe testified that he did not understand how the trading of bank notes worked as an investment. He nonetheless participated in authoring the Trade Agreement, became a signatory on the account, and acquired proof of funds or bank statements. Priebe participated in this endeavor having been presented with various fraudulent investment opportunities from Ghods in the past, as chronicled in the undisputed facts set forth above. The bank statements or proof of funds were sent from Priebe to Ghods. Numerous emails and other communications regarding the funds and the Trade Agreement were made between Priebe and Ghods. The Court also finds that a reasonable juror could conclude that Priebe used the United States mail or interstate wires for the purpose of furthering the scheme. The undisputed facts establish that Priebe communicated with Ghods via email and telephone while Priebe was in Italy and Ghods was in the United States regarding the San Marino account and funds that were deposited therein. The Court therefore finds that a reasonable juror could find two or more of the predicate acts of mail fraud and wire

fraud to exist here.

The Court next turns to Priebe's participation in the enterprise. The Receiver identified the enterprise as Rusa Cap, or, alternatively, an association-in-fact between the defendants in this action. Priebe argues that there is no evidence to support these allegations. The Court disagrees. An "enterprise" is statutorily defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An association-in-fact enterprise "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, ___ U.S. ___, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009). The association-in-fact concept is expansive, and the framework within which it operates may be informal. *Id.* at 2243. While the Court finds that the record does not include evidence of Priebe's participation in Rusa Cap, the Court agrees with the Receiver's position that a jury could reasonably find that the parties to the Trade Agreement constitute an association-in-fact for RICO purposes and that Priebe participated in this enterprise. For these reasons, the Court finds that there is a genuine issue of fact regarding Priebe's participation in an enterprise.

Because Priebe argues that the Receiver's Georgia RICO claims fail for the same reasons that the federal RICO claims fail and the Court has concluded that the federal RICO claims may proceed to trial, the Court finds that Priebe has failed to establish grounds for granting summary judgment on the Georgia RICO claim.

F. Civil Conspiracy

Priebe argues that because all of the Receiver's underlying claims fail, including the Receiver's RICO claims, the Receiver's civil conspiracy claim fails. As

noted above, however, the Court finds that the Receiver's RICO claims may proceed to trial. Accordingly, having been provided with no other basis to grant summary judgment, the Court denies Priebe's motion in this regard. See B&M Nat'l Automation, LLC v. AMX Corp., No. 06-20412 CIV-COOKE/BROWN, 2007 U.S. Dist. LEXIS 18382 (S.D. Fla. Mar. 15, 2007).

G. Punitive Damages

Priebe argues that the Receiver's punitive damages claim must fail because all of the underlying claims fail and the punitive damages claim is not an independent cause of action. As previously stated, the Court will allow the Receiver's federal and state RICO claims and civil conspiracy claim to proceed in this case; therefore, the Court rejects Priebe's first argument. Priebe additionally contends that the Receiver cannot establish the requirements under Georgia law for an award of punitive damages because there is insufficient evidence that Priebe engaged in any conduct that would raise a presumption that he acted with conscious indifference to the consequences. In Georgia, punitive damages may be awarded in tort actions where "it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequences." O.C.G.A. § 51-12-5.1(b). In this case, a jury could find that Priebe acted with an entire want of care by agreeing to participate in the trading of bank notes which he did not understand, by failing to take any actions to ensure that the amounts transferred to the San Marino account were safe, and by failing to inquire as to the lack of investment activity on the account, when the Trade Agreement provided that certain investments would be undertaken. In short, if Priebe's testimony is to be believed, he signed an agreement with an individual that he knew had presented fraudulent investment opportunities

in the past, promising a rate of return that he knew was very, very high, and agreed to receive compensation at a rate of \$166,000 although he did not understand the trading of the bank notes under the agreement. A reasonable juror could find an award of punitive damages to be warranted in this case. The Court, therefore, denies Priebe's motion for summary judgment on this point.

H. Costs and Attorneys' Fees

The Receiver 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." Insofar as the Court has denied the Receiver's motion for summary judgment and has granted Priebe's motion for summary judgment on a number of claims pending in this action, the Court finds no grounds for an award of costs and attorneys' fees here.

IV. CONCLUSION

For the reasons and to the extent stated above, the Court **GRANTS in part and DENIES in part** Defendant Jeffrey James Mayo Priebe's Motion for Summary Judgment [Doc. No. 99] and **DENIES** Plaintiff's Motion for Partial Summary Judgment as to Defendant Jeffrey James Mayo Priebe [Doc. No. 102].

The Court **INSTRUCTS** Priebe and the Receiver to file a proposed joint consolidated pretrial order, as set forth in the Local Rules, as to the remaining claims.

SO ORDERED this 31st day of March, 2011.

s/ CLARENCE COOPER

CLARENCE COOPER
SENIOR UNITED STATES DISTRICT JUDGE