**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| **JASON L. NOHR, Receiver for MSC Holdings USA, LLC, MSC Holdings, Inc., and MSC GA Holdings, LLC,** | : | **CIVIL ACTION NO. 1:14-CV-02761-SCJ** |
| **Plaintiff,** | : | |
| **v.** | : | |
| **CORRINA JANG, et al.,** | : | |
| **Defendants.** | : | |

**ORDER**

This matter appears before the Court on Defendants' Frank and Teresa Vogel's Motion to Dismiss (Doc. No. [30]), Defendants' Stephen and Tonya Carr's Motion to Dismiss (Doc. No. [180]), Defendants' Cherie and Roger Mullins' Motion to Dismiss (Doc. No. [198]), and Defendants' Eveline and Norman Schneller's Amended Motion to Dismiss (Doc. No. [214]). For the following reasons, these motions are **DENIED**.

## I. BACKGROUND AND LEGAL STANDARD

Plaintiff, the appointed Receiver for MSC Holdings USA, LLC, MSC Holdings, Inc., and MSC GA Holdings, LLC ("Receivership Defendants"), filed the complaint in this action on August 26, 2014. Doc. No. [1]. Plaintiff alleges that

Defendants are liable under O.C.G.A. § 18-2-74, the Georgia Uniform Fraudulent Transfers Act, and for unjust enrichment. Id. Specifically, the complaint states that Defendants received a specific amount of "'referral fees' from the Receivership Defendants as payment for expanding the Ponzi scheme by securing additional funds from new investors[,]" and equity requires they return these referral fees so Plaintiff can make an equitable distribution to all investors. Id. at p. 46, 47–48, 53, 55.

A complaint may be dismissed if the facts as pleaded do not state a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 679–80 (2009) (explaining "only a complaint that states a plausible claim for relief survives a motion to dismiss"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–62, 570 (2007) (retiring the prior Conley v. Gibson, 355 U.S. 41, 45–46 (1957) standard which provided that in reviewing the sufficiency of a complaint, the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In Iqbal, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand "more

than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678.

In Twombly, the Supreme Court emphasized a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. Factual allegations in a complaint need not be detailed but "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (internal citations and emphasis omitted).

## II. DISCUSSION

Defendants' motions to dismiss contain the same arguments, except the Schneller Defendants add one additional argument regarding the statute of limitations. The Court will address these contentions in turn.

### A. Identical Arguments Contained in Motions to Dismiss

Defendants each claim that Plaintiff's fraudulent transfers and unjust enrichment claims fail as a matter of law as to them and, therefore, must be dismissed. Defendants argue that Plaintiff is required to offset the principal investment each of them made from the alleged referral fees they received. Doc.

No. [30], p. 7–9.[1] They contend that the referral fees each of them received are less than the principal investment each made into the alleged Ponzi scheme at issue. Id. at p. 7–8. Thus, the fraudulent transfers claim must be dismissed because Plaintiff can obtain no recovery. Id. at p. 7. For the same reasons, they argue, Plaintiff's unjust enrichment claim must fail because Defendants have not received a benefit for which no compensation was paid. Id. at p. 8. Defendants predicate each of their motions on Perkins v. Haines, 661 F.3d 623 (11th Cir. 2011). Defendants' ancillary argument is that because the unjust enrichment claim is duplicative of the fraudulent transfers claim, the unjust enrichment count must be dismissed. See Doc. No. [180], p. 8–9.

Plaintiff responds first with a factual argument that aggregating or "netting" transfers does not help these Defendants because they are, in fact, net winners. Doc. No. [40], p. 4–6. He attaches his own declaration to his response to the Vogel Defendants' motion that discusses independent banking documents showing the amounts the Vogel Defendants invested and received through the alleged Ponzi scheme. Doc. No. [40-1]. Plaintiff then presents a legal argument

[1] Because the arguments are the same, the Court will cite to the Vogel Defendants' briefs unless otherwise noted.

contending the Perkins case is inapplicable and claiming other legal authority holds that commissions or referral fees need not be aggregated. Id. at p. 6-12.[2]

Attached to the Vogel motion to dismiss, but no others, is a declaration by attorney Jason R. Doss and a letter dated October 4, 2013, from attorney Jason Nohr to the Vogel Defendants claiming the amount Mr. Nohr believes the Vogel Defendants owe the Receivership Defendants because of the alleged Ponzi scheme and demanding payment. Doc. No. [30-1]. The Vogel Defendants claim that the Court should consider Mr. Nohr's letter while ruling on the motion to dismiss because it is central to Plaintiff's case or complaint. Doc. No. [30], p. 5-7. The Court may consider a document outside the pleadings if the "plaintiff refers to a document in [his complaint], the document is central to [his claim], its contents are not in dispute, and the defendant attaches the document to [their] motion to dismiss." Fin. Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276, 1284 (11th Cir. 2007). The Court will not consider Mr. Nohr's letter when ruling on

[2] The Vogel Defendants raise another argument in their reply brief regarding Plaintiff's failure to satisfy the pleading standard under Federal Rule of Civil Procedure 9(b) that is not contained in any of the other Defendants' briefs. Doc. No. [44], p. 6-9. The Court will not address this argument, however, because the Vogel Defendants failed to raise it in their initial brief. See Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1342 (11th Cir. 2005); Rindfleisch v. Gentiva Health Servs., Inc., 22 F. Supp. 2d 1295, 1301 (N.D. Ga. 2014).

these Defendants' motions to dismiss, however, because it is unnecessary to do so. While it is true that the amount Defendants invested in the alleged Ponzi scheme is central to Plaintiff's claims, Plaintiff attached his own declaration to his response brief that indicates interest payments and referral fees paid to the Vogel Defendants beyond what is stated in his demand letter. Doc. No. [40-1]. These motions are not for summary judgment and no party has requested the Court to convert these motions into motions for summary judgment. Given that there may be disputes of fact regarding the totality of payments made to the Vogel Defendants and investments made by the Vogel Defendants, the Court will not risk converting these motions to dismiss into motions for summary judgment and declines to consider these attachments to the parties' briefs.

Although the other Defendants do not attach a letter from Mr. Nohr regarding his preliminary investigation and although Mr. Nohr does not attach his own declaration regarding independent banking records to his other responses, the remaining Defendants, as did the Vogels, attached an affidavit to their replies stating the amounts the Defendants paid to and received from the Receivership Defendants. This again highlights an important problem with these Defendants' motions. While they offer legal authority to support their arguments,

see Perkins, 661 F.3d 623, they each ask the Court to make a factual determination about whether they are liable at all to Plaintiff. Yet no party to these motions asks the Court to convert the motions into ones for summary judgment, and the Court has no evidence to rule on besides the parties' own statements. The only facts before the Court on these motions to dismiss are the well-pleaded facts contained in the complaint, and the complaint and attached exhibit certainly contain sufficient factual allegations to survive a Rule 12(b)(6) motion to dismiss. The Court finds that it would be a grave mistake to convert these motions into summary judgment on what little evidence it has before it. Thus, while the parties raise legitimate legal arguments about "netting" or "aggregating," the more appropriate time to decide these issues is after discovery and on a motion for summary judgment.

Defendants also argue that Plaintiff's unjust enrichment claim is duplicative and should be dismissed. See Doc. No. [180], p. 8–9. Under Federal Rule of Civil Procedure 8, a party may plead in the alternative regardless of consistency. Fed. R. Civ. P. 8(d), (e). Plaintiff may, in the end, be barred from recovering under both counts, but it is too early at this stage to dismiss Plaintiff's claim for unjust enrichment. See WESI, LLC v. Compass Envtl., Inc., 509 F. Supp.

2d 1353, 1362–63 (N.D. Ga. 2007); Manhattan Constr. Co. v. McArthur Electric, Inc., No. 1:06-cv-1512-WSD, 2007 WL 295535, at *8–10 (N.D. Ga. Jan. 30, 2007). This is simply not a case, as Defendants suggest, where Georgia courts normally would dismiss duplicative claims that "rely on the same allegations and implausible inferences as" other claims. Hays v. Page Perry, LLC, 26 F. Supp. 3d 1311, 1320 (N.D. Ga. 2014). The Court already found that the complaint adequately states a claim for both fraudulent transfer and unjust enrichment, and the Court declines to dismiss either claim as a whole at this time.

**B. Schneller Statute of Limitations Argument**

The Schneller Defendants also argue that one of the alleged fraudulent transfers attributed to them occurred on July 22, 2010, more than four years before the complaint was filed. Doc. No. [180], p. 9–10. They contend this transfer does not subject them to liability because it occurred outside of the four-year limitations periods for claims of fraudulent transfer and unjust enrichment. Id.[3]

The parties both agree that the relevant statute of limitations for a fraudulent transfers claim is O.C.G.A. § 18-2-79(1), which states:

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[3] This argument is similar to one made by Defendant Norma Day which the Court ruled on in an order dated September 17, 2015. See Doc. No. [260]. That ruling is largely repeated here.

> A cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless action is brought . . . within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

O.C.G.A. § 18-2-79(1) (2012).

Because there is a "dearth of Georgia decisions construing the provisions of the Georgia UFTA," state courts look to other jurisdictions for guidance. Truelove v. Buckley, 318 Ga. App. 207, 209, 733 S.E.2d 499, 501 (2012). Plaintiff's reliance on Janvey v. Democratic Senatorial Campaign Comm., Inc., 712 F.3d 185 (5th Cir. 2013), a case that analyzed the similar Texas Uniform Fraudulent Transfers Act, is persuasive. In Janvey, the same one year discovery limitations provision was interpreted to "require[] that a fraudulent-transfer claim must be filed within one year after the *fraudulent nature of the transfer* is discovered or reasonably could have been discovered." Janvey, 712 F.3d at 195 (emphasis added). This is the majority position in jurisdictions that have ruled on the issue. Id. "The crucial issue is when the Receiver knew or could reasonably have known of the fraudulent nature of the transfers, not simply when he knew or

could reasonably have known that the transfers had been made." Id. at 196 n.10; see also Janvey v. Suarez, 978 F. Supp. 2d 685, 704 (N.D. Tex. 2013).

The Court appointed Plaintiff as Receiver in the related action on February 11, 2013. See SEC v. McClintock, No. 1:12-CV-04028-SCJ (N.D. Ga.), Doc. No. [19], p. 3. The Court authorized Plaintiff to bring legal action to recover and conserve Receivership Assets, but only after he sought leave of Court to lift a stay on litigation. Id. at p. 19–20. The Court also tolled the statute of limitations "as to a cause of action accrued or accruing in favor of one or more of the Receivership Defendants against a third person or party" until further order of the Court. Id. at p. 16–17. On June 14, 2013, Plaintiff sought this Court's leave to pursue legal action pursuant to his authority as Receiver, and the Court ordered him to proceed on September 11, 2013. Doc. Nos. [30], [36]. Plaintiff claims that he did not identify the factual basis for his claims, determine which transactions were fraudulent, identify the recipient or location of fraudulent transfers, or request and review thousands of pages of documents prior to seeking this Court's leave to bring legal action against third parties. Doc. No. [36], p. 5. The complaint also states that, prior to seeking leave of Court to file third-party actions, Plaintiff

conducted a preliminary investigation indicating potential claims he could bring on behalf of the Receivership Defendants. Doc. No. [1], p. 6.

The Court finds that Plaintiff's fraudulent transfers claim against Defendant is not barred by the statute of limitations. The Court tolled the statute of limitations during the period it ordered a stay of litigation beginning on February 11, 2013, and it did not lift that stay as to the Receiver until September 11, 2013. Nothing in the complaint or any evidence that Defendants put forward indicates that Plaintiff discovered or reasonably could have discovered the fraudulent nature of their transfers before the stay began and Plaintiff was appointed Receiver on February 11, 2013. Plaintiff obviously learned of the fraudulent nature of the transfers at some time after February 11, 2013, and the evidence tends to show that he discovered or reasonably could have discovered the fraudulent nature of the transfers on or after September 11, 2013 – the day the Court lifted the stay. In any event, neither party has requested this motion to be converted into one for summary judgment, and Defendants failed to carry their burden on a motion to dismiss regarding this statute of limitations argument.

The instant action is distinguishable from Wiand v. Meeker, 572 F. App'x 689 (11th Cir. 2014), a case analyzing the identical statute of limitations contained

in the Florida Uniform Fraudulent Transfers Act. In Wiand, the court stated, "Based on the record here, we conclude that Wiand could not have reasonably been alerted to a possible fraudulent transfer by the mere act of the transfer from the Hedge Funds to the Meeker Trust. Rather, the one-year limitations period began to run when Wiand was appointed receiver." Wiand, 572 F. App'x at 692. Again, this is not a motion for summary judgment, and the Court will not convert it into one. The only evidence before the Court is the date of transfer which alone, as the Eleventh Circuit stated in Wiand, is insufficient to conclude that Plaintiff could have reasonably been alerted to a possible fraudulent transfer. While this ruling may be subject to change on a motion for summary judgment with proper evidence in the record, the Court has found no binding law within this circuit holding that the one-year savings provision contained in O.C.G.A. § 18-2-79(1) automatically begins with the appointment of the Receiver. The Court particularly declines to create such a rule when it tolled the statute of limitations within its order appointing the Receiver.

The unjust enrichment claim is subject to the four year limitations period found in O.C.G.A. § 9-3-26. See Hays v. Adam, 512 F. Supp. 2d 1330, 1346 (N.D. Ga. 2007). "When the question is raised as to whether an action is barred by the

statute of limitations, the true test to determine when the cause of action accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful result." Pridgen v. Auto-Owners Ins. Co., 204 Ga. App. 322, 322, 419 S.E.2d 99, 100 (1992) (internal quotations omitted). Plaintiff could not bring his action against Defendants until first, he was appointed as Receiver, and second, he received an order from the Court removing the litigation stay. Plaintiff filed this action within four years from both of those dates. The earliest conceivable time Defendants could argue that their cause of action accrued is November 19, 2012—the date the complaint was filed by the Securities and Exchange Commission in the related enforcement action—but Plaintiff filed the instant action within four years from that date as well. See Hays, 512 F. Supp. 2d at 1346.

## CONCLUSION

For the foregoing reasons, Defendants' Frank and Teresa Vogel's Motion to Dismiss (Doc. No. [30]), Defendants' Stephen and Tonya Carr's Motion to Dismiss (Doc. No. [180]), Defendants' Cherie and Roger Mullins' Motion to Dismiss (Doc. No. [198]), and Defendants' Eveline and Norman Schneller's Amended Motion to Dismiss (Doc. No. [214]) are **DENIED**.

**IT IS SO ORDERED,** this 18th day of September, 2015.

Steve C. Jones

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE