IT IS ORDERED as set forth below:

Date: February 9, 2016

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: INTERNATIONAL MANAGEMENT ASSOCIATES, LLC, Debtor.	CASE NO. 06-62966-PWB CHAPTER 11
WILLIAM F. PERKINS, PLAN TRUSTEE, Plaintiff, v. CROWN FINANCIAL, LLC, Defendant.	ADVERSARY PROCEEDING NO. 06-6421-PWB

ORDER

William F. Perkins, Trustee for the Debtor, International Management Associates, LLC, seeks summary judgment on his claims that a transfer of money from the Debtor to Crown Financial, LLC ("Crown"), is avoidable and recoverable as a fraudulent transfer pursuant to 11 U.S.C. §§ 544(b), 548(a)(1), and 550, and O.C.G.A. §§ 18-2-74(a) and 18-2-77(a). Crown contends that the money was not property of IMA's estate because it was subject to a constructive trust. Crown also asserts that the Trustee cannot avoid the transfer because it received the transfer in good faith and for value.

For the reasons stated herein, the Trustee's motion is granted in part and denied in part. In summary, the Court concludes the following with respect to the specific issues the parties address:

1. The Trustee has established the elements of a prima facie claim for actual fraud against Crown pursuant to 11 U.S.C. § 548(a)(1)(A) and O.C.G.A. § 18-2-74(a)(1). (Section IV).

2. IMA had an interest in the funds transferred to Crown and such funds are not subject to a constructive trust in favor of Crown. (Section IV(A)).

3. The transfer was made with an intent to hinder, delay or defraud creditors because it was made in furtherance of a Ponzi scheme. (Section IV(B)).

4. For purposes of summary judgment, the Trustee has not established that the transfer of funds to Crown was constructively fraudulent pursuant to 11 U.S.C. § 548(a)(1)(B) and O.C.G.A. § 18-2-75(a) because a factual dispute exists as to whether IMA received less than reasonably equivalent value when it transferred monies to Crown in exchange for a release in the Settlement Agreement. (Section V).

5. Because factual disputes exist as to whether Crown took the Transfer in good faith, the Trustee has not, as a matter of fact and law, negated Crown's affirmative defenses under 11 U.S.C. § 548(c) and Georgia law. (Section VI).

6. The Trustee is entitled to summary judgment that the affirmative defense of O.C.G.A. § 18-2-78(e) is inapplicable to the transfer. (Section VII(A)).

7. The trustee is entitled to summary judgment that the defense of *in pari delicto* is not applicable to the Trustee's claims in this proceeding. (Section VII(B)).

8. The Trustee is entitled to prejudgment interest in an amount to be determined after trial. (Section VIII).

I. Procedural Background

On February 17, 2006, a group of investors sued International Management Associates, LLC, (IMA), represented to be a hedge fund operated by Kirk Wright, in the Superior Court of Fulton County, Georgia. The Superior Court appointed William F. Perkins as the receiver for IMA and its related affiliates. On February 27, 2006, the United States District Court for the Northern District of Georgia appointed Mr. Perkins as the federal receiver in a civil action brought by the Securities and Exchange Commission.

On March 16, 2006, IMA and its affiliates (the "IMA Debtors"), through Mr. Perkins, filed for relief under chapter 11 of the Bankruptcy Code. The Court ordered joint administration of these cases under Case No. 06-62966, and, later, the appointment of a chapter 11 trustee. The Office of the United States Trustee appointed Mr. Perkins as the Chapter 11 trustee on April 20, 2006.

After substantive consolidation of the cases, the Court entered an order confirming the Third Amended Trustee's Plan of Liquidation on August 27, 2008. [Case No. 06-62966,

Doc. 669]. The plan provides for Mr. Perkins to serve as the Plan Trustee and to liquidate assets of the consolidated estates, including the prosecution of avoidance actions, for distribution to creditors.

On October 10, 2006, the Plan Trustee filed a Complaint to Avoid and Recover Transfers against Crown Financial, LLC ("Crown"). The complaint relies in part on the contention that the IMA Debtors operated as a Ponzi scheme. On January 24, 2013, pursuant to the Order Consolidating Proceedings, Establishing Scheduling Deadlines, and Setting Trial Dates [Misc. Proceeding 12-506, Doc. No. 1], the Court conducted a trial, for purposes of this and other adversary proceedings, on the issue of whether Kirk Wright operated the IMA Debtors as a Ponzi scheme. On February 6, 2013, the Court entered an Order finding that, for purposes of this and other adversary proceedings, Kirk Wright operated the IMA Debtors as a Ponzi scheme during the period of October 1, 1997 through February 17, 2006. [Misc. Proceeding 12-506, Doc. No. 23]. The Eleventh Circuit affirmed this ruling.[1]

II. Undisputed Facts

The following facts are undisputed, except where noted.[2]

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[1] After ruling in the consolidated proceeding on the Ponzi scheme issue, this Court applied the Ponzi scheme finding to adjudicate the Trustee's claims against the individual defendants. The Eleventh Circuit affirmed the ruling in Curtis v. Perkins (*In re* International Management Associates, LLC), 781 F.3d 1262 (11th Cir. 2015).

[2] BLR 7056-1(a)(2) directs a respondent to a summary judgment motion to submit a "separate and concise statement of material facts, numbered separately, as to which the respondent contends a genuine issue exists to be tried." It also provides that "response should be made to each of the movant's numbered material facts." The local rule further provides, "All material facts contained in the moving party's statement that are not specifically controverted in respondent's statement shall be deemed admitted."
Crown's Statement does not contain an enumerated response to the Trustee's Statement, but it contains six asserted facts (disputing the Trustee's Facts Numbered 18, 19, 49, 50, 52, and 56). It also contains a generalized objection and dispute as to Trustee's reliance on affidavits and briefs attached to the Trustee's Statement, specifically their reference in the Trustee's Statement of Facts 15-19, 21-22, 35, 37, 47, and 50. Rule 56(c)(1) of the Federal Rules of

Dr. Lloyd Geddes, Jr., ("Geddes") is a principal of Oncology & Hematology Center of Atlanta, P.C. ("Oncology"). In 2005, Geddes sought a loan from the Defendant, Crown, to complete construction of Verve nightclub.

In connection with the loan, Geddes provided Crown with Oncology's balance sheet showing that Oncology owned an IMA account worth $500,000. On September 7, 2005, Kirk Wright provided Crown with an investor account statement that showed Oncology as an investor in the IMA Platinum Group, LLC ("Platinum") and that the value of Oncology's account had grown from $1,050,101.72 on April 1, 2005, to $1,123,438.04 on June 30, 2005.

Crown asserts that it did due diligence on IMA and found that its professional accountants, brokers, and plan administrator were reputable and that IMA appeared to be in good standing.

On September 12, 2005, Crown made a $550,000 loan to Geddes and Oncology. Geddes and Oncology executed a promissory note in favor of Crown (the "Geddes Note") and Oncology pledged its interest in the IMA Platinum account to Crown. The loan had a due date for repayment on or before December 5, 2005.

Notwithstanding the account statements provided by Kirk Wright regarding the value of Oncology's account, the Trustee asserts that IMA's books and records do not reflect that Oncology ever executed an IMA Platinum Group limited liability company agreement. He

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Civil Procedure specifically contemplates the use of affidavits and discovery to show that a fact cannot be or is genuinely disputed. As a result, Crown is incorrect in its assertion that the use of these materials is inappropriate.

Crown has also set forth "Background Facts" in its Brief. [Doc. 69]. These facts are not included in its Statement of Material Facts. [Doc. 70]. Although the Court could disregard these because they do not comply with procedural requirements, the Court will exercise its discretion and consider them since Crown has cited to supporting documents attached to the Brief. To the extent, however, that either side makes assertions of fact unsupported by the record, the Court will disregard them.

also asserts that the books and records reflect that Oncology never transferred any funds to any of the IMA Debtors before the loan to Geddes and Oncology. On September 13, 2005, the day after the $550,000 loan to Geddes, Oncology transferred $500,000 to one of IMA's checking accounts.

In October 2005, Geddes asked Crown to satisfy the loan from Oncology's IMA account. At this time, Crown asserts, it learned that Geddes and Wright were in business together in the development of Verve nightclub, but that they had had a falling out.

On October 5, 2005, Crown requested a November 5, 2005 payoff of $561,979.23 from IMA from Oncology's IMA account. Kirk Wright wrote to Chad Tribe, a Crown employee, that the request was not timely and would not be processed on November 5, 2005.

On November 4, 2005, Crown made a second request for a payoff from Oncology's IMA account, for $569,250.00 to be made on December 5, 2005. IMA did not comply with this second request, despite inquiries from Crown.

When payment from IMA was not forthcoming for the second time, Crown developed concerns about not receiving its money and about Wright's avoidance of telephone calls.

On December 8, 2005, Crown was informed that Oncology's interest in the Platinum account was only worth $100,000. Geddes and his attorney claimed to be unaware of the reduction in value. Crown's manager believed the decline in value was "an absolute lie."

On December 9, 2005, Crown filed a complaint and emergency petition for a temporary restraining order against IMA, Platinum, Kirk Wright, Oncology, and Geddes in the Superior Court of Fulton County, Georgia. (Doc. 65, Exh. 38). Crown's claims included breach of contract, tortious interference with contract, and fraud. Crown alleged that IMA

was a mere instrumentality of Wright being used to advance his personal interests. It also alleged that Wright made misrepresentations about the value of the IMA accounts.

Four days later, Kirk Wright and Crown exchanged offers regarding a payoff to Crown and an assignment of the Geddes Note from Crown to Kirk Wright. IMA's counsel, Smith Gambrell & Russell, at Wright's instruction, wired $590,000 to Crown's lawyers, Powell Goldstein Frazer & Murphy, LLP, on December 15, 2015.

After some back and forth, on January 5, 2006, Kirk Wright, IMA, Platinum, and Crown executed a Settlement Agreement. The Settlement Agreement provided for Crown to receive the previously wired $590,000, and for Crown to assign the Geddes Note to Kirk Wright.

The transfer at issue here (the "Transfer") occurred on January 6, 2006, when Powell Goldstein wired the $590,000 in its account to Crown. This was about six weeks before a number of investors sued IMA in Fulton County Superior Court as noted above.

At the time of the Transfer, IMA was insolvent and had creditors. As noted above, this Court on February 6, 2013, entered an Order finding that Kirk Wright operated the IMA Debtors as a Ponzi scheme during the period of October 1, 1997 through February 17, 2006.

The import of the foregoing can be summarized as follows. Geddes and Oncology borrowed $550,000 from Crown, secured by a nonexistent investment account with entities being operated by Kirk Wright as a Ponzi scheme. The scheme's operator represented to Crown that Oncology had an account worth more than twice the amount of the loan, but neither Geddes nor Oncology had ever transferred any money to the entities until after Crown made the loan.

After Crown sued IMA and others for, among other things, fraud, Crown eventually received payment of $590,000 from IMA and assigned the note evidencing the loan to Wright instead of the Debtor.

III. Overview of the Positions of the Parties

The Trustee contends that the Transfer from IMA to Crown is actually fraudulent under 11 U.S.C. § 548(a)(1)(A) and under Georgia law, which the Trustee may invoke under 11 U.S.C. § 544(b)(1). To prove either claim, the Trustee must establish: (1) a transfer (2) of an interest of the debtor in property (3) within one year before the bankruptcy filing (4) with the actual intent to hinder, delay, or defraud (5) creditors.

The Trustee also contends that the Transfer is constructively fraudulent under § 548(a)(1)(B) and Georgia law. To prevail on this count, the Trustee must show: (1) a transfer; (2) of an interest of the debtor in property (3) made within one year before the bankruptcy filing (4) for which the debtor received less than reasonably equivalent value (5) as a result of which the debtor was or became insolvent.

Crown contends that the Trustee cannot prevail on the actual fraud claim for two reasons. First, it contends the Transfer was not a transfer of an interest of the debtor in property, but instead was money held in a constructive trust and, therefore, outside the reach of the Trustee's avoidance powers. Second, it contends the Transfer was not made in furtherance of a Ponzi scheme.

With respect to both the actual fraud and constructive fraud claims, Crown contends the Trustee cannot prevail because it took the transfer (1) for value; and (2) in good faith. The Trustee contends that as a matter of fact and law these affirmative defenses fail.

The Trustee also seeks prejudgment interest from Crown on the transfer at the rate of 4.9% per annum beginning on October 10, 2006, the date the complaint was filed, through the date of entry of judgment. Crown opposes any award of prejudgment interest on the ground that the action was stayed for five years during the course of other consolidated litigation of adversary proceedings in this case and that any award would be inequitable.

The Court will examine these arguments in further detail herein. Section IV examines whether the Transfer was actually fraudulent under §§ 544(b), 548(a)(1)(A) and O.C.G.A. §§ 18-2-74(a) and 18-2-77(a). Section V considers whether the Transfer was constructively fraudulent under §§ 544(b), 548(a)(1)(B) and O.C.G.A. §§ 18-2-75(a) and 18-2-77(a). Section VI addresses Crown's defense that it took the Transfer for value and in good faith under § 548(c) and O.C.G.A. § 18-2-78(a). Section VII deals with other affirmative defenses Crown invokes, including the applicability of O.C.G.A. § 18-2-78(e) and the doctrine of *in pari delicto*. Finally, Section VIII considers the Trustee's entitlement to prejudgment interest.

IV. Whether the Transfer was actually fraudulent under §§ 544(b), 548(a)(1)(A) and O.C.G.A. §§ 18-2-74(a) and 18-2-77(a)

The Trustee contends that the transfer of $590,000 from IMA to Crown is avoidable under §§ 544(b) and 548(a)(1)(A) of the Bankruptcy Code and O.C.G.A. §§ 18-2-74(a) and 18-2-77(a).

Section 548(a)(1)(A), as enacted at the time this case was filed on March 16, 2006,[3] provides:

[3] In 2005 Congress extended the reach-back period from one year to two years, but this change affects cases filed on or after April 21, 2006. Pub. L. No. 109-8, § 1406(b)(2) (2005).

The Trustee may avoid any transfer . . . of any interest of the debtor in property . . . that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily –

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . . .

Section 544(b) of the Bankruptcy Code permits a trustee to avoid a transfer that is voidable under applicable law by a creditor holding an unsecured claim, thus making O.C.G.A. § 18-2-74(a) applicable. Section § 18-2-74(a) of the Georgia Code provides:

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 . . . .

The elements of an actually fraudulent transfer under §§ 544(b), 548(a)(1)(A) and O.C.G.A. §§ 18-2-74(a) and 18-2-77(a) are the same for present purposes. They are (1) a transfer (2) of an interest of the debtor in property (3) within one year before the bankruptcy filing (4) with the actual intent to hinder, delay, or defraud (5) creditors.

There is no dispute that there was a transfer made within one year prior to the bankruptcy filing and that creditors of the Debtor existed. Disputes exist as to whether (1) the Debtor had an interest in the funds transferred to Crown; and (2) whether the transfer was made with the actual intent to hinder, delay, or defraud.

A. Whether the IMA Debtors had an interest in the funds transferred to Crown

The Trustee asserts that the $590,000 transfer from the IMA accounts to Crown, via conduits Smith Gambrell & Russell and Powell Goldstein, pursuant to the January 5, 2006 Settlement Agreement, was a transfer of property of IMA that he may avoid and recover for the benefit of the estate.

Crown contends that, while the funds were transferred from an IMA account, they were not property of IMA and, instead, were subject to a constructive trust in favor of Crown. The theory is that the funds were loaned to Geddes and Oncology for the purpose of developing the Verve nightclub, a venture in which IMA had no interest. Thus, Crown asserts, although IMA may have held legal title to the funds since they were deposited in an IMA account, their designated purpose for the use in developing a nightclub prevented the funds from becoming IMA's property.

Section 541(a) provides that a debtor's estate consists of all legal or equitable interests of the debtor in property wherever located and by whomever held and any interest in property that the trustee recovers under 11 U.S.C. § 550. Section 541(d), however, qualifies the expansive reading of § 541(a) and provides that property in which the debtor holds only legal title and not an equitable interest "becomes property of the estate . . . only to the extent of the debtor's legal title to the property but not to the extent of any equitable interest in such property that the debtor does not hold." Thus, property in a debtor's possession but held in trust for a third party does not become property of the estate.

There is no express trust among any of the parties that would exclude the $590,000 transfer from property of the estate. Crown asserts instead that as a matter of equity it is the

beneficiary of a constructive trust over these funds that renders the funds not subject to avoidance by the Trustee.

A constructive trust is an equitable remedy "implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." O.C.G.A. § 53-12-132(a). It is not a cause of action, but is imposed to prevent the unjust enrichment of a party. *Morrison v. Morrison*, 284 Ga. 112, 663 S.E.2d 714 (2008); *Perry Golf Course Development, LLC v. Housing Authority of City of Atlanta*, 294 Ga. App. 387, 670 S.E.2d 171 (2008). A constructive trust is "a fiction, for [it is] an after-the-fact remedy to achieve an equitable result, rather than a result of a property interest acquired by the victim at the time a triggering event or circumstance occurs." Lieb and Chan,"The Constructive Trust Remedy in Bankruptcy Cases." NORTON ANNUAL SURVEY OF BANKRUPTCY LAW (1996).

The imposition of a constructive trust is not favored in bankruptcy because it has the effect of undermining the priority scheme of distribution of assets set forth in the Bankruptcy Code. *Haber Oil Co. v. Swinehart (In re Haber Oil Co.)*, 12 F.3d 426, 436 (5th Cir. 1994). The burden of proving the existence of a constructive trust is on the party seeking to exclude a given asset from the estate as having been held by a debtor in trust. *In re Vacuum Corp.*, 215 B.R. 277, 281 (Bankr. N.D. Ga. 1997) (Drake, J.). Absent a clear and compelling reason, bankruptcy courts are and should be reluctant to impose a constructive trust on the property in a debtor's estate. *In re Chambers*, 500 B.R. 221, 230 (Bankr. N.D. Ga. 2013) (Mullins, C.J.); *Vacuum Corp.*, 215 B.R. at 281-282.

While Georgia law recognizes that a constructive trust may be imposed upon property acquired by fraud, a constructive trust is not a remedy for a simple breach of contract or breach of a promise.

The focus of Crown's argument is that Geddes borrowed money from Crown and then did not use it for its intended purpose, the Verve nightclub, but instead deposited it in an IMA account. Crown admits that IMA took legal title to the funds when it received them, but contends that the funds were not property of the estate because IMA was not a part of the Verve project, and therefore IMA cannot enjoy the beneficial interest in the funds.

These facts do not support the imposition of a constructive trust.

Nothing is inherently unique or extraordinary about the circumstances of the Crown loan. Crown loaned money to Geddes and Oncology. Crown had a right of repayment from them. Repayment of the loan was guaranteed by a note and a pledge of Oncology's interest in an IMA account. Geddes instructed Crown to seek repayment from Oncology's IMA account. After much wrangling, Crown obtained $590,000 from IMA.

The fact that the loan funds were deposited in an IMA account is irrelevant. If, for example, Geddes had simply given the loan proceeds directly to Kirk Wright (his partner in the Verve project) or used it for another purpose entirely, and then defaulted on the repayment to Crown, Crown still would have recourse under Geddes' pledge of Oncology's interest in an IMA account. The pledge of the IMA account was not because the loan money would be there, but because it was, according to the statement accounts, sufficiently liquid to fund repayment of the debt if necessary.

The relevant transaction here is the transfer of money from the IMA account to satisfy Crown's persistent demands for transfer of sums from an account it claimed as collateral.

Crown did not demand return of funds it had lent; it demanded that IMA honor its redemption request as contemplated by Geddes' pledge of the IMA account funds as a guarantee of payment.

Crown has not cited any case that supports the imposition of a constructive trust under the circumstances here. The Court concludes that Transfer has none of the hallmarks of a transaction warranting the imposition of a constructive trust in Crown's favor.

B. Whether the transfer was made with an intent to hinder, delay, or defraud creditors

The Trustee contends that the transfer of $590,000 from the IMA Debtors to Crown was made with an intent to hinder, delay, or defraud creditors because IMA was operated as a Ponzi scheme at the time of the Transfer and the Transfer was made in furtherance of that Ponzi scheme.

Crown asserts that, notwithstanding this Court's determination that Kirk Wright operated IMA as a Ponzi scheme, the Court did not determine that the *transfer to Crown* was made in furtherance of it.

A Ponzi scheme operates by using the principal investments of newer investors to pay older investors what appear to be significant profits that are actually only a disbursement of their own principal or the principal of other investors. *In re Financial Federated Title & Trust, Inc.*, 309 F.3d 1325, 1327 n. 1 (11th Cir. 2002). "Since Ponzi schemes do not generate profits sufficient to provide their promised returns, but rather use investor money to pay returns, they are insolvent and become more insolvent with each investor payment." *Wiand v. Lee*, 753 F3d 1194, 1201 (11th Cir. 2014); *Financial Federated Title & Trust*, 309 F.3d at

1332 ("By definition, a Ponzi scheme is driven further into insolvency with each transaction.").

A transfer made in furtherance of a Ponzi scheme is presumed to have been made with the intent to defraud for purposes of recovering the payments under §§ 548(a) and 544(b). *Perkins v. Haines*, 661 F.3d 623, 626 (11th Cir. 2011). Since a Ponzi scheme is inherently fraudulent and cannot be sustained forever, payments made by a debtor to continue the scheme may actually be made with the actual intent to hinder, delay, or defraud creditors. *In re World Vision Entertainment*, 275 B.R. 641, 656 (Bankr. M.D. Fla. 2002).

On January 24, 2013, pursuant to the Order Consolidating Proceedings, Establishing Scheduling Deadlines, and Setting Trial Dates [Misc. Proceeding 12-506, Doc. No. 1], the Court conducted a trial on the issue of whether Kirk Wright operated the IMA Debtors as a Ponzi scheme. Crown had the opportunity to participate in this trial. On February 6, 2013, the Court entered an Order finding that Kirk Wright operated the IMA Debtors as a Ponzi scheme during the period of October 1, 1997 through February 17, 2006. As such, the Ponzi scheme presumption applies to this transfer. Because a Ponzi scheme existed, and because any transfer that occurs is in furtherance of it, the Ponzi scheme presumption applies here.

When the Ponzi scheme presumption applies, the burden shifts to the transferee to show that the transfer was not in furtherance of the Ponzi scheme. FED. R. EVID. 301. As one court has observed, "once a trustee has proved the circumstances [of the Ponzi scheme], the defendant in the avoidance action must produce probative, significant evidence that the transferor-debtor lacked the intent to take the transferred value away from contemporaneous or future creditors, i.e., that there was a bona fide, legitimate purpose for the transfer." *In re Polaroid Corp.*, 472 B.R. 22, 35 (Bankr. D. Minn. 2012).

Crown contends that the Trustee's assertion in his Affidavit that "IMA's transfer of $590,000 to [Crown] was made in furtherance of Kirk Wright's operation of IMA as a Ponzi scheme" is conclusory and should be stricken pursuant to Rule 56(c)(4) of the Federal Rules of Civil Procedure, made applicable by Rule 7056 of the Federal Rules of Bankruptcy Procedure, because it is not supported by fact. There is no basis for striking the Trustee's assertion because, as discussed above, the Court found as a matter of fact that Kirk Wright operated the IMA Debtors as a Ponzi scheme during the period of October 1, 1997 through February 17, 2006. Based on that finding, a presumption of fact exists that any payment made in furtherance of the Ponzi scheme is made with the intent to defraud creditors.

Crown has offered no evidence to rebut the presumption. Its argument is simply that this Court did not conclude that this transfer in particular was in furtherance of the Ponzi scheme. This, however, ignores the nature of the Ponzi scheme presumption. The burden is on Crown to prove with evidence that the Transfer it received was legitimate.

Because Crown has not rebutted the Ponzi scheme presumption by showing that the transfer to it was not in furtherance of the Ponzi scheme, the Court concludes the transfer of $590,000 from the IMA Debtors to Crown was made with an intent to hinder, delay, or defraud creditors.

Based upon the Court's conclusions in Part IV, sections A and B, that the Debtor had an interest in the transferred funds to Crown and that the transfer was made with the actual intent to hinder, delay, or defraud, coupled with the undisputed facts that there was a transfer made within one year prior to the bankruptcy filing and that creditors of the Debtor existed, the Court concludes that the Trustee has established the elements of a claim for avoidance of

an actually fraudulent transfer under § 548(a)(1)(A). The Court will address Crown's affirmative defenses in section VI.

V. Whether the transfer was constructively fraudulent under §§ 544(b), 548(a)(1)(B) and O.C.G.A. §§ 18-2-75(a) and 18-2-77(a)

The Trustee also seeks a determination that the transfer of $590,000 from IMA to Crown is avoidable pursuant to §§ 544(b) and 548(a)(1)(B) of the Bankruptcy Code and O.C.G.A. §§ 18-2-75(a) and 18-2-77(a).

Section 548(a)(1)(B), as enacted at the time this case was filed on March 16, 2006,[4] provides:

> The trustee may avoid any transfer … of an interest of the debtor in property . . . that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

Section 18-2-75(a) of the Georgia Code requires proof of the same elements in order to establish that a transfer is constructively fraudulent for purposes of Georgia law.

There is no dispute that there was a transfer made within the applicable time period and that IMA was insolvent. Further, as explained in section IV(A), the transfer was of an interest of the debtor in property. The only remaining issue is whether IMA received "reasonably equivalent value" for the transfer to Crown.

[4] *See supra*, note 3.

The Trustee contends that, as a matter of fact and law, IMA received less than "reasonably equivalent value" when it transferred $590,000 to Crown. Crown disputes this.

The term "reasonably equivalent value" is not defined by either the Bankruptcy Code or Georgia Code. *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). The purpose of avoiding a transfer where "reasonably equivalent value" is not present is to protect creditors against the depletion of a bankrupt's estate. *Kipperman v. Onex Corp.*, 411 B.R. 805, 837 (N.D. Ga. 2009). If a transfer "confers an economic benefit upon the debtor," either directly or indirectly, no basis for avoidance exists since "the debtor's net worth has been preserved," and the interests of the creditors will not have been injured by the transfer. *In re Rodriguez*, 895 F.2d 725, 727 (11th Cir.1990).

In order to determine whether a debtor received "reasonably equivalent value," the court must look at what "value" the debtor received in return for the transfer. Courts generally use a two-part test for determining "reasonably equivalent value": (1) whether the debtor received value; and (2) if so, whether it was "reasonably equivalent" to what the debtor transferred. *Pension Transfer Corp. v. Beneficiaries under the Third Amend. To Fruehauf Trailer Corp. Retirement Plan No. 003 (In re Fruehauf Trailer Corp.)*, 444 F.3d 203 (3d Cir. 2006).

Crown has not addressed the issue of reasonably equivalent value directly and, instead, focuses on the issue of value in the context of its affirmative defenses under 11 U.S.C. § 548(c) and Georgia law.[5] Nevertheless, because the Court as a first step must determine whether the Debtor received value in exchange for the transfer, the Court considers the issue.

[5] Section 548(c) provides an affirmative defense to an otherwise avoidable transfer. Georgia law is slightly different. *See* infra, section VI, for further discussion.

The Bankruptcy Code defines "value" for purposes of § 548 as "property, or satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2). Georgia's definition is comparable.[6] O.C.G.A. § 18-2-73(a) ("Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.").

The Trustee asserts that the IMA Debtors' records do not reflect the receipt of any value from Crown in exchange for IMA's $590,000 transfer to Crown. (Perkins Affidavit at ¶8).

Crown, in response, contends that it provided value in two respects: (1) Crown conveyed to Kirk Wright the Geddes note that had a value in excess of $600,000; and (2) the Settlement Agreement Among Wright, IMA and Crown included a release by Crown of all its claims against IMA.

As to the first argument, Crown's assignment of the Geddes note to Kirk Wright does not provide any value at all to IMA. The ability to sue Geddes and Oncology that Crown assigned to Kirk Wright as part of the Settlement Agreement benefits Kirk Wright, not the Debtor and, therefore, is of no "value" to the Debtor's estate.

Crown's release of claims against IMA in the Settlement Agreement does, however, constitute "value" as contemplated by 548(d)'s definition.

Section 548(d) defines "value" for purposes of § 548 broadly: (1) "property;" or (2) "satisfaction or securing of a present or antecedent debt of the debtor." "Debt" includes

[6] The parties have not differentiated between "reasonably equivalent value" as used in the Bankruptcy Code and in the Georgia Code (to the extent there is a difference), so the Court's analysis will focus on "reasonably equivalent value" as used in a bankruptcy context.

"liability on a claim," 11 U.S.C. § 101(12), and "claim" is broadly defined as the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). So a debt to a transferee exists if the debtor has liability with regard to a right of the transferee to payment. An antecedent debt – although not statutorily defined – is simply a debt existing prior to the transfer.

Here, Crown had (and had asserted in its lawsuit) claims against IMA based in part on IMA's allegedly fraudulent representations about Oncology's account. As the Trustee alleges, Crown lent money to Geddes and Oncology, secured by Oncology's IMA account, after receiving an IMA financial statement presented by Wright that showed Oncology had a balance of $1,123,438.04 in the Platinum Fund on June 30, 2005. But the Trustee contends this representation was false because Oncology did not "invest" with IMA until Crown made the loan and Oncology transferred $500,000 to IMA (presumably funded with loan proceeds). As Crown pressed for repayment of its loan from Oncology's IMA account, Wright informed Crown that the Oncology account was only around $100,000.

In its lawsuit, Crown alleged that Wright and IMA's representations about the account's value "were made with the knowledge they were false and were made with the intent to deceive Crown as to the status of the Platinum Account" and, to the extent that funds actually existed in the Account, Wright and IMA were "making additional material false representations." [Doc. 65 at 122, ¶¶ 61-62].

These allegations establish that Crown held a tort claim against IMA for fraud. When IMA entered into the Settlement Agreement and paid $590,000, it received "value" in the form of the release of the tort claim against it.

Having determined that "value" existed in the transfer, the question is whether the release was "less than reasonably equivalent" to the $590,000 transfer.

Whether the value IMA received in exchange for its transfer to Crown was reasonably equivalent to $590,000 is a question of fact. *Nordberg v. Arab Banking Corp., (In re Chase & Sanborn Corp.)*, 904 F.2d 588 (11th Cir. 1990). The fact that the term "equivalent" is modified by the term "reasonably" suggests that the value does not have to be identical. Still, it must be something of value that makes the exchange worthwhile.

The factual issue here is the true monetary value of Crown's release of its tort claim against IMA. The parties have not addressed how to measure this. The Trustee takes the position that the release's value was intangible and minimal since IMA was insolvent and judgment proof at the time the transfer was made (and since the true value was the Geddes note assigned to Wright, not IMA). Crown does not address the "reasonably equivalent" issue at all. Instead, Crown appears to assume that the values of both the release and the note transferred to Wright, collectively, constituted "reasonably equivalent" value.

The Court cannot conclude as a matter of law, based on the record before it, the true value of the Settlement Agreement's release of IMA. Thus, whether IMA received less than reasonably equivalent value in the exchange is a disputed issue of material fact and, therefore, the Trustee is not entitled to summary judgment on his claims under Sections 544(b) and 548(a)(1)(B) of the Bankruptcy Code and O.C.G.A. Sections 18-2-75(a) and 18-2-77(a).

VI. Whether Crown took the transfer for value and in good faith under § 548(c) and O.C.G.A. § 18-2-78(a)

Even if the Trustee carries his burden of establishing the elements of an actually fraudulent and/or constructively fraudulent transfer, he cannot avoid the Transfer if Crown

establishes an affirmative defense under § 548(c) of the Bankruptcy Code or O.C.G.A. § 18-2-78.

Section 548(c) of the Bankruptcy Code provides:

> Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

Georgia law is comparable. O.C.G.A. § 18-2-78(a) and (d).[7]

A defendant transferee must establish two things for a successful defense under § 548(c) or Georgia law: (1) it took the transfer "in good faith" and (2) it gave value to the debtor in exchange for the transfer. Crown can only avoid liability *to the extent* that it gave value.

The Trustee seeks summary judgment that Crown cannot prevail on its affirmative defense that it took the transfer for value and in good faith. Although Crown carries the burden of establishing an affirmative defense, because the Trustee is the party moving for summary judgment he must establish that there is no genuine dispute as to any fact such that Crown cannot prevail. For summary judgment purposes, it is the Trustee who must establish that Crown did not take the transfer for value and in good faith.

A. Whether Crown took the transfer "for value"

[7] Georgia law differs slightly with respect to a defense to an actually fraudulent transfer. Under O.C.G.A. § 18-2-78(a)(1), a transferee must take in good faith and for a *reasonably* equivalent value. Section 548(c) requires only that that the transferee take for value.

For the reasons stated supra in Section V, the Court concludes that Crown did take the transfer for value. The extent of that value has not been established.

B. Whether Crown took the transfer in "good faith"

In order to avail itself of the affirmative defense to a fraudulent transfer under 11 U.S.C. § 548(a)(1)(A) or (B) or Georgia law, a transferee must not only establish that it took the transfer "for value," but also that it took the transfer "in good faith." § 548(c); O.C.G.A. § 18-2-78(a) and (d).

The Bankruptcy Code does not define the concept of "good faith" for purposes of § 548(c). *See Jimmy Swaggart Ministries v. Hayes (In re Hannover Corp.)*, 310 F.3d 796, 800 (5th Cir.2002) ("[T]he bankruptcy code does not define 'good faith' and the statute's legislative history is quite thin.") It customarily requires a consideration of the totality of circumstances to determine whether a party's conduct accords with notions of fair dealing and reasonableness. These considerations are comparable for purposes of Georgia law.

Courts generally employ a two-part test to determine whether a transferee acted in good faith. The court in *In re Bayou Group, LLC*, 439 B.R. 284, 310-314 (S.D.N.Y. 2010)(citations omitted), explained the test as follows:

> The first question typically posed is whether the transferee had information that put it on inquiry notice that the transferor was insolvent or that the transfer might be made with a fraudulent purpose. While the cases frequently cite either fraud or insolvency, these two elements are consistently identified as the triggers for inquiry notice . . . .[Second], once a transferee has been put on inquiry notice of either the transferor's possible insolvency or of the possibly fraudulent purpose of the transfer, the transferee must satisfy a

"diligent investigation" requirement. Once again, the case law is not clear as to the nature of this requirement.

The Trustee contends that as a matter of law Crown cannot establish that it took the transfer of $590,000 in good faith based on the following: (1) Crown had reason to believe that IMA was insolvent or operating fraudulently based upon its failure to honor two redemption requests; (2) Crown believed that Kirk Wright was lying about the value of the Platinum account; (3) Crown's lawsuit filed in Fulton County Superior Court, which alleges breach of contract, tortious interference with contract, and fraud against Wright and IMA, shows that Crown had sufficient knowledge to put it on inquiry notice of IMA's insolvency or fraudulent activity; (4) the allegedly irregular nature of the terms, negotiation and execution of the Settlement Agreement among IMA, Kirk Wright and Crown and Crown's concern that Kirk Wright would hide the escrowed funds if returned to him; and (5) Crown's allegedly limited due diligence, both before making the Crown loan and before accepting the transfer from IMA as part of the Settlement Agreement, was not sufficient to establish good faith in view of all of the indicia of insolvency and fraudulent purpose.

Crown contends that it is a good faith transferee. It contends that before making the loan to Geddes, it had a contact at the Oppenheimer brokerage firm use his hedge funds contacts to find information about IMA. The contact reported to Crown the identities of IMA's accountants and its brokers, that IMA used a well-known firm as a plan administrator, and that there were no known complaints about IMA's operation.

When Crown made its redemption request, it contends it had no reason to think that IMA would not honor it. Even when Wright delayed honoring the request, Crown contends that its Oppenheimer contact reported nothing negative about IMA or its value. Even if Wright's

conduct may have been suspicious enough to put Crown on inquiry notice, Crown continues, it would not have discovered his fraud given the lack of transparency in the hedge fund market and the information it had from its contacts.

What is reasonable and prudent under the circumstances for purposes of the good faith test is a matter of fact. Factual disputes exist on matters including, but not limited to, the timing of Crown's knowledge about IMA; the nature and quality of the information Crown obtained from its sources; and what Crown could have or should have known or discovered about IMA's insolvency or fraud. Based on these factual issues, the Court cannot conclude that the Trustee is entitled to summary judgment that Crown did not take the transfer in good faith.

Because the Court determines that value exists to some extent and that factual disputes exist with respect to the good faith element, the Court denies the Trustee's motion for summary judgment on the issue of Crown's affirmative defenses under § 548(c) and Georgia law.

VII. Other affirmative defenses

The Trustee seeks summary judgment on two additional defenses raised by Crown in its answer. Crown has not addressed either one in its response to the motion for summary judgment.

A. Whether O.C.G.A. § 18-2-78(e) bars recovery by the Plan Trustee

In its answer, Crown asserts that O.C.G.A. § 18-2-78(e) bars any recovery by the Trustee because the transfer resulted from the enforcement of a security interest under Article 9 of the Uniform Commercial Code. The Trustee asserts as a matter of law that § 18-2-78(e) is inapplicable.

Section 18-2-78(e)(2) provides, "A transfer is not voidable under paragraph (2) of subsection (a) of Code Section 18-2-74 or Code Section 18-2-75 if the transfer results from . . . enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code, other than acceptance of collateral in full or partial satisfaction of the obligation it secures." Since 18-2-78(e)(2) is limited in application only to §§ 18-2-74(a)(2) and 18-2-75, the argument is relevant only to Count IV, the constructive fraud claim under Georgia law.

The Trustee contends that § 18-2-78(e) is not applicable to Crown because the transfer was not the act of a secured creditor with an interest in pledged collateral recovering its debts from the pledged collateral. Instead, the Trustee contends that the transfer was one component of a transaction "that is more properly described as a sale of the Crown Loan to Kirk Wright after Crown initiated litigation against Kirk Wright and IMA." (Doc 64, at 24).

The party invoking § 18-2-78(e) as an affirmative defense bears the burden of proof. O.C.G.A. § 18-2-78(g)(1). The Debtor has not responded to the Trustee's motion on this issue.

The Court concludes that O.C.G.A. § 18-2-78(e) is inapplicable to this Transfer. Although Dr. Geddes in his capacity as president of Oncology executed a security agreement with Crown that granted to Crown a security interest in all of Oncology's interest in the IMA Platinum Fund to secure repayment of the $500,000 loan, this was not the source of the Transfer. The Transfer occurred as part of the Settlement Agreement after Crown sued IMA. As such, Crown did not enforce a security interest in compliance with Article 9. Moreover, there was not a segregated, discrete fund in which Crown could have exercised its security interest.

Under these circumstances, as a matter of law, the defense is inapplicable. Accordingly, the Court grants the Trustee's motion for summary judgment as to the inapplicability of § 18-2-78(e) to the Transfer.

B. Whether the doctrine of in pari delicto applies to the transfer

The Trustee seeks summary judgment that the defense of *in pari delicto* asserted by Crown in its answer is inapplicable to this proceeding as a matter of law. Crown has not responded to this argument.

The doctrine of *in pari delicto* provides that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." *Official Comm. Of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1152 (11th Cir. 2006). The *in pari delicto* doctrine "prevents a plaintiff from recovering on claims for which the plaintiff bears fault equal to or greater than that of the defendant." *Laddin v. Edwards*, 2005 WL 6076939 at *3 (N.D. Ga. 2005) (Thrash, J.).

In *Kipperman v. Onex Corp.*, 411 B.R. 805, 837 (N.D. Ga. 2009), the court concluded that the *in pari delicto* defense cannot be used to bar a trustee's fraudulent transfer and preference actions under 11 U.S.C. §§ 544, 547, and 548. Citing *In re Personal & Bus. Ins. Agency*, 334 F.3d 239, 245–47 (3rd Cir. 2003), and *Corzin v. Fordu (In re Fordu)*, 209 B.R. 854, 863 (6th Cir. BAP 1997), the *Kipperman* court concluded that the Eleventh Circuit would likely reach the same conclusion given its prior ruling in *In re Davis*, 785 F.2d 926 (11th Cir. 1986) and its dicta in *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1152 (11th Cir. 2006).

The Court agrees with the analysis of *Kipperman* and concludes that the *in pari delicto* defense is not applicable to the Trustee's claims in this proceeding. The Trustee is entitled to summary judgment on this issue.

VIII. Whether the Trustee is Entitled to Prejudgment Interest

The Trustee seeks to recover prejudgment interest on the Transfer to Crown. Pursuant to 28 U.S.C. § 1961, the Trustee contends that the applicable 52 week United States Treasury bond rate on October 10, 2006, was 4.9% per annum. See http://www.federalreserve.gov/releases/h15/20061010/. As a result, the Trustee contends that he is entitled to summary judgment on his claim for prejudgment interest from October 10, 2006, through the date of judgment totaling $258,924.29.

Crown contends that the award of prejudgment interest is discretionary and that courts may deny prejudgment interest when there has been a delay in the prosecution of the trustee's avoidance action for which the creditor is not responsible. Crown asserts that it is inequitable to assess prejudgment interest against it when this proceeding was stayed from December 17, 2007, through December 10, 2012, due to the consolidation of certain common legal issues in the miscellaneous proceeding.

The general rule is that a trustee is entitled to recover prejudgment interest upon a recovery of a voidable transfer from the date of demand for its return or, in the absence of a demand, from the date of commencement of the suit for recovery, usually at the rate provided by 28 U.S.C. § 1961. *In re Int'l Administrative Svcs., Inc.*, 408 F.3d 689, 709-710 (11th Cir. 2005); *In re Southwest Recreational Industries, Inc.*, 2008 WL 2816948, *8 (Bankr. N.D. Ga. 2008) (citations omitted).

The Eleventh Circuit has recognized, however, that the award of prejudgment interest on an avoidance action brought pursuant to the Bankruptcy Code is discretionary and any award must be "equitable." *In re Globe Manufacturing Corp.*, 567 F.3d 1291, 1300 (11th Cir. 2009). In *Globe Manufacturing*, the Eleventh Circuit rejected the "inflexible" rule that the Seventh Circuit adopted in *In re Milwaukee Cheese Wisconsin*, 112 F.3d, 845, 849 (7th Cir. 1997), under which prejudgment interest must be awarded to make the trustee whole, absent gratuitous delay by a trustee. Instead, the Eleventh Circuit concluded that "a standard of reasonableness," which enables a court to consider the circumstances of the case as a whole, was preferable. *Globe Manufacturing*, 567 F.3d at 1300-1301. To that end, the Eleventh Circuit concluded that the bankruptcy court's decision not to award prejudgment interest on the trustee's preferential transfer claim was not an unreasonable use of its "equitable powers" since the court found that the defendant's position was reasonable, the parties' dispute was genuine, and there was no evidence that either party was responsible for delaying the resolution of the case. *Id.*

The Court concludes that the Trustee is entitled to prejudgment interest from the date of the filing of the complaint, October 10, 2006. Crown, however, makes a valid point that it should not have to bear the cost and time of extensive litigation, especially litigation, namely the investor for value miscellaneous proceeding, that did not directly affect the claims at issue here.

Accordingly, the Court – in its discretion – will award prejudgment interest from October 10, 2006, through the date of trial, in an amount to be determined after trial, excepting the period of December 17, 2007, through December 10, 2012.

IX. Conclusion

Based on the foregoing, the Court concludes as follows:

(1) The Court grants the Trustee's motion for summary judgment on his claims that the transfer to Crown is actually fraudulent for purposes of 11 U.S.C. §§ 544(b) and 548(a)(1)(A) and O.C.G.A. §§ 18-2-74(a) and 18-2-77(a).

(2) The Court denies the Trustee's motion for summary judgment on his claims that the transfer to Crown is constructively fraudulent for purposes of 11 U.S.C. §§ 544(b) and 548(a)(1)(B) and O.C.G.A. §§ 18-2-75(a) and 18-2-77(a) because disputes of material fact exist as to whether the transfer was for "reasonably equivalent value."

(3) The Court denies the Trustee's motion for summary judgment on his claim that Crown is not entitled to an affirmative defense under 11 U.S.C § 548(c) and O.C.G.A. § 18-2-78(c) because disputes of material fact exist as to whether Crown took the transfer in good faith.

(4) The Court grants the Trustee's motion for summary judgment on to the Trustee's claim that the affirmative defense of § 18-2-78(e) is inapplicable to the transfer at issue.

(5) The Court grants the Trustee's motion for summary judgment on the claim that the doctrine of *in pari delicto* is inapplicable.

(6) The Court grants the Trustee's motion for summary judgment on the entitlement to prejudgment interest in part in an amount to be determined after trial.

The Trustee contends that this is a core proceeding. Crown denies this and has made a jury trial demand. The parties have not raised any issues of this Court's jurisdiction or

authority to determine issues in this motion for summary judgment. Because it is necessary for this matter to be scheduled for trial, the Court shall schedule a pretrial conference to discuss how this matter shall proceed. Accordingly, it is

ORDERED that the Trustee's motion for summary judgment is granted in part and denied in part as set forth in Section IX. It is

FURTHER ORDERED AND NOTICE IS HEREBY GIVEN that the Court shall hold a pretrial conference on **March 8, 2016**, at **10:30 a.m.**, in Courtroom 1401, U.S. Courthouse, 75 Ted Turner Drive, SW, Atlanta, Georgia.

END OF ORDER

THIS ORDER HAS NOT BEEN PREPARED FOR, AND IS NOT INTENDED, FOR PUBLICATION

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