IT IS ORDERED as set forth below:

Date: January 05, 2010

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NOS. 07-71810 and 07-71813 Jointly Administered under 07-71810
CEP Holdings, Inc. and Colon End Parenthesis Trust, LLC,	CHAPTER 11
Debtors.	JUDGE MASSEY
CEP Holdings, Inc. and Colon End Parenthesis Trust, LLC,	
Plaintiffs,	
v.	ADVERSARY NO. 07-6428
Gary Schreier, Susan Schreier and Schreier Family Retirement Assets, LLC,	
Defendants.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 1, 2008, the Court conducted a trial in this and other adversary proceedings limited to the issues of whether CEP Holdings, Inc. ("Holdings") and Colon End Parenthesis

Trust, LLC ("CEP Trust") were operating a Ponzi scheme in 2006 and whether Holdings and CEP Trust were insolvent during this period. Holdings and CEP Trust, the debtors in the above-styled Chapter 11 case, are hereafter referred to individually and collectively as "Debtors." On May 22, 2008, the Court entered Findings of Fact and Conclusions of Law addressing these issues (the "May 2008 Findings and Conclusions") (Docket No. 40).

On August 20, 2009, the Court conducted a trial on the remaining issues raised in the Amended Complaint for Avoidance and Recovery of Transfers filed by Plaintiffs against Defendants Gary Schreier ("Gary"), Susan Schreier ("Susan") and Schreier Family Retirement Assets, LLC (the "LLC"). The May 2008 Findings and Conclusions are incorporated herein.

The Court makes the following additional findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52 made applicable by Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. Gary and Susan formed the LLC in April 2006. Gary is the LLC's managing member. (Def. Ex. 10.) In May and June of 2006, Susan and Gary each subscribed for an initial contribution of $17,454.00 of Class A voting capital in the LLC registered to Sterling Trust Company, Custodian for the benefit of each of Gary's and Susan's IRAs. (Def. Exs. 15 and 16.) The Court infers that each of their IRAs owned one half of the equity in the LLC. Gary caused the LLC to make investments and decided when and in what vehicles the LLC would invest money.

2. On June 10, 2006, Susan and Gary opened a bank account with an account number ending in 0295 in the name of the LLC at Laconia Savings Bank (the "LLC Account"). Each of them was a signatory on the LLC Account, and there were no restrictions or limitations with

respect to the right or ability of either Susan or Gary to withdraw or transfer funds from that account.

3. Susan and Gary opened a joint bank account with an account number ending in 4048 in their own names at Laconia Savings Bank in September 2006 (the "Joint Account"). Each of them had authority to sign checks written on that account and to withdraw funds from that account. The Court infers that the intent of Susan and Gary was to create a joint tenancy in the Joint Account with each of them independently having dominion and control of the Joint Account. The Joint Account was opened to receive transfers from the Debtors, although Gary could not state that that was the sole purpose of the Joint Account. By the time of trial the Joint Account had been closed.

4. On June 10, 2006, the day the LLC Account was created, Gary requested a transfer of funds from the LLC Account to his E-gold account in the amount of $17,350.00 (the "E-gold Account"). (Def. Exs. 1 & 2.) Gary testified that the E-gold Account was in his name because E-gold did not allow corporate accounts. Gary's testimony to the effect that such funds belonged to the LLC in his E-gold Account was not credible, particularly in light of the free use that Defendants made of the LLC Account.

5. The records of the Debtors showing the E-gold Account to have been in the name of Susan are hearsay as to which Defendant actually owned the E-gold Account. Gary testified and produced a redacted document (Def. Ex. 1), which he asserted showed the account was in his name as of July 9, 2009, the date it was printed from a screen viewed using the Internet. The E-gold Account was in the name of Gary and not Susan.

6. In 2006, Gary also opened two accounts with CEP Trust in his name and participated in one or more programs offered by Debtors that were part of their Ponzi scheme (the "CEP Accounts"). Gary claimed to have transferred on June 13, 2006, $5,100.00 from his E-gold Account to Debtors to participate in programs touted by Debtors to produce extraordinary returns at no risk. Thereafter, the records of Debtors show that Gary made additional transfers totaling $1,210.49 from his E-gold Account to Debtors beginning on November 21, 2006 and periodically thereafter to February 13, 2007. (Pl. Ex. 2). Defendants' Exhibit 17 reflects some but not all of the credits shown on Plaintiffs' Exhibit 2. Gary testified that he made an additional payment of $7,000 to Debtors in December 2006, but none of the exhibits admitted into evidence reflect that payment. Mr. Perkins testified, however, that the payments made by Gary to Debtors totaled $13,200. The sum of the initial transfer claimed by Gary, the transfers reflected on Plaintiff's Exhibit 2 and the transfer of $7,000 in December 2006 claimed by Gary total $13,310.49. On the basis of the evidence, the Court finds that Gary made payments to Debtors totaling $13,200, of which only $5,100 was paid prior to December 2006. This sum constitutes the total amount of anything of value transferred by Gary to Debtors. Defendants Susan and the LLC made no payments or other transfers of value to Debtors.

7. Paper profits posted by Debtors to Gary's accounts by Debtors were fictitious. The emails that Gary allegedly received from Debtors referring to a "receipt of funds at CEP Trust" are not credible evidence that Gary or any other Defendant made any cash transfers or other transfers of value to Debtors, other than as reflected in paragraph 6 above.

8. Debtors' website, on which Gary relied in making payments to Debtors, claimed that there was no "pyramid scheme" because "you purchase a product: advertising packages.

Advertisers need people to see their advertisements, and this is a great way of putting websites in front of people to see." Def. Ex. 14, p.3. Yet, Defendants made no showing that they looked at "advertising packages" purportedly purchased by Gary. The website then asked: "What happens if people all of a sudden stop purchasing advertising from us?" The answer: "We go to the reserve." This question was directed to the fact that the revenue stream of Debtors was derived from small purchases by members of the public (such as the initial payment of $5,100 Gary made) but that the return of those funds plus the extraordinary profits promised to any one making a purchase of an "advertising package" required future cash purchases by others. There was no basis to believe that any "reserve" existed or that any could exist because Debtors had no source of income other than new purchases. Thus, the remarkable thing about this Ponzi scheme was that the Debtors announced it on their website by admitting that the scheme depended on similar payments from others in the future. These statements of the way in which Debtors' alleged business worked, which Defendants offered into evidence presumably to show their ignorance, were sufficient to excite the attention of a person of ordinary prudence and thereby to induce a further inquiry. Defendants made no such inquiry.

9. The two CEP accounts were in Gary's name on the records of the Debtors, and the Debtors' books and records do not show that the LLC had an account with the Debtors. Defendants offered their Exhibit 9 to show that the LLC had an account with Debtors, but that document does not show that it was ever accepted by Debtors. There is no credible evidence that the LCC had an account with the Debtors or that either one of the CEP Accounts opened by Gary belonged to the LLC. The transfers to the LLC Account came primarily from Gary's CEP account that ended in 0028 and commenced in mid-November 2006. Pl. Exs. 4 and 7. There

were, however, also transfers from this account to the Joint Account, beginning with the check for $7,601 that cleared Debtors' bank account on October 2, 2006. Pl. Ex. 4. Hence, the payouts from CEP account ending in 0028 are not consistent with a contention that it was owned by the LLC.

10. As reflected in Plaintiffs' Exhibits 6 and 7, between October 1, 2006 and May 31, 2007, the Debtors made transfers to the Defendants into the following accounts:

(a) Joint Account: $67,681.84 (the "Joint Account Transfers");

(b) LLC Account: $161,695.27 (the "LLC Transfers"); and

(c) E-gold Account: $945.82 (the "E-gold Transfer").

The Joint Account Transfers, the LLC Transfers and the E-gold Transfer are hereafter referred to as the "Transfers," and each transfer constituting one of the Transfers is hereafter referred to as a "Transfer."

11. On July 27, 2007, Debtors filed their Chapter 11 cases.

12. Each Transfer by Debtors to a Defendant, with the exceptions noted below, was effected through an automatic clearinghouse transfer that resulted in a debit to a bank account of Debtors and a corresponding credit to the bank account of one or more of the Defendants. Debtors transferred $7,601.00 to the Joint Account by a check that cleared on October 2, 2006. The Transfer of $945.82 to E-gold for the benefit of the account of Gary at E-gold occurred on October 31, 2006. All of the Transfers, other than the one that took place on October 2, 2006 and the E-Gold Transfer, occurred after October 31, 2006.

13. All of the funds transferred to the LLC have been withdrawn or transferred by Defendants to other alleged investments. Through their respective interests in their IRAs, each of

which owned one-half of the equity in the LLC, Gary and Susan each derived a benefit from each of the LLC Transfers in the form of the increased liquidity of the LLC. Each of the LLC Transfers increased the value of the LLC from what it was worth immediately prior to each such transfer because even though each such transfer was fraudulent and subject to recovery by creditors or a bankruptcy trustee or debtor in possession, the contingent nature of the liability did not offset the value of the cash on hand at the time of the transfer.

14. Gary or Susan effected further transfers of the LLC Transfers into other investments or perhaps for their own personal use, thereby evidencing the benefit bestowed on each of them as a direct result of the LLC Transfers. When asked whether she would benefit from such investments, Susan answered, "eventually." (Trial Tr., Doc. 59, p. 70, August 20, 2009.) Further, Susan and Gary each benefitted from each LLC Transfer at the moment it was made because each of them had unfettered access to the LLC Account at all times.

15. Gary has a college degree in computer science and psychology. He had jobs related to computer software and sales. He has experience investing in stocks and commodities. He and Susan have self-directed IRAs. Gary testified that he did no financial due diligence on the Debtors and did not have any discussions with Debtors' principals. Gary's testimony that he was misled by the Debtors was not credible in light of his education, employment history, his experience with the Internet, the extent of which he stated was "actually quite extensive[]" and his testimony showing his depth of knowledge of how legitimate earnings are generated from advertising on websites. (Trial Tr., Doc. 59, pp. 36-39, August 20, 2009.) Defendants offered no credible evidence to prove that any of them acted in good faith with respect to any of the Transfers.

CONCLUSIONS OF LAW

1. Section 548(a)(1)(A) of the Bankruptcy Code provides:

> (a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years 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[.]

2. Each of the Transfers made by Debtors to a Defendant was a transfer of an interest in property of one or both of the Debtors. Debtors, through their principals and their other agents, made each such Transfer with the actual intent to hinder, delay or defraud the creditors of the Debtors to which the Debtors were or became indebted on or after the dates that the Transfers were made. This conclusion is fully support by the May 2008 Findings and Conclusions, including that Debtors had no business that earned income or profits other than new deposits from public participants in their programs, that all of the funds paid to participants came from new participants, that insiders took out more than $3,000,000 in less than a year and that less than $100,000 was on hand when Mr. Perkins was appointed Receiver of the Debtors. The evidence establishing those facts was clear, convincing and uncontradicted.

3. Each of the Transfers was made by Debtors with the actual intent to hinder, delay or defraud their existing and future creditors. Defendants admit that the LLC Transfers were fraudulent transfers, though they incorrectly deduct amounts credited to Gary's CEP accounts prior to October 31, 2006 from the amount of those Transfers. (Defendants' Proposed Findings of Fact, Doc. No. 60, p. 10.)

4. All the Transfers, including the Transfer made on October 2, 2006, are avoidable under section 548(a)(1)(A), whether or not the Debtors were insolvent when each such Transfer was made because Debtors committed actual fraud in making all such transfers as part of their Ponzi scheme. Plaintiffs did not have to prove constructive fraud. "Where a conveyance is made with actual intent to hinder, delay, or defraud creditors, it is not necessary to show that the debtor was insolvent for the conveyance to be voidable as fraudulent." *Pirrone v. Toboroff* (*In re Vaniman Intern., Inc*.), 22 B.R. 166, 185 (Bankr. E.D.N.Y. 1982). Debtors' insolvency is relevant solely as evidence of Debtors' fraudulent scheme.

4. Each Transfer to the Joint Account was made to both Gary and Susan because each one had, independent of the other, dominion over and control of that account and could write checks on and withdraw funds from that account. The transfer to the E-gold Account was made to Gary because he had sole dominion over and control of that account, which was in his name only. Each Transfer to the LLC Account was made to the LLC.

5. Each Transfer to the LLC Account was made for the benefit of Gary and Susan in equal shares because each of their IRAs owned one half of the equity of the LLC and each had the unfettered dominion over and control of the LLC Account to make, and in fact made, further investments using those Transfers for their personal benefit.

6. Section 548(d)(1) of the Bankruptcy Code provides:

> (d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

The word "transfer" is defined in section 101(54)(D) of the Bankruptcy Code as the "disposing of or parting with - property."

5. Each of the Transfers occurred when the account or accounts of Debtors were debited reflecting the completion of an ACH transfer, the clearing of a check or the transfer of funds to E-gold within a week of the dates reflected on Plaintiffs' Exhibits 6 and 7, and no later than the dates on which each such Transfer was deposited in the Joint Account or the LLC Account.

6. Section 548(c) of the Bankruptcy Code provides:

> (c) 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.

7. Defendants had the burden of proving that they gave value to Debtors in exchange for the Transfers and took the Transfers in good faith.

> The burden of proof is on the defendant transferee. *See In re M. & L. Bus. Mach. Co., Inc*., 84 F.3d 1330 (10th Cir.1996); *In re Agric. Research & Tech. Group*, 916 F.2d 528 (9th Cir.1990). To avail himself of this defense, the transferee must demonstrate that he "[took] value in good faith." To keep what he received, he must subsequently demonstrate that he "gave value."

In re Hannover Corp., 310 F.3d 796, 799 (5th Cir. 2002). Accord: *In re Grueneich*, 400 B.R. 688, (8th Cir. BAP 2009); *In re Bayou Group, LLC*, 396 B.R. 810, 843-844 (Bankr. S.D.N.Y. 2008).

8. The Court rejects the good faith defense offered by Defendants under 11 U.S.C. § 548(c) because they failed to prove facts to show they had any basis to believe that anyone could legitimately earn extraordinary profits on relatively small investments at no risk that depended on future purchasers seeking the same returns.

"Good faith is not limited to lack of actual knowledge of actual fraud but also encompasses a lack of knowledge of circumstances requiring further investigation." *Tavenner v. Smoot (In re Smoot),* 265 B.R. 128, 140 (Bankr. E.D.Va. 1999) (citations omitted). A reasonable person making an investment of $13,200 would have questioned a scheme that could have and did provide Defendants with a return of over $215,000 in excess of an investment of $13,200 and in Susan's case on an investment of nothing. Defendants failure to make an inquiry under the circumstances bars a good faith defense under 11 U.S.C. § 548(c). *See, e.g., Jobin v. McKay (In re M&L Bus. Mach. Co.),* 84 F.3d 1330, 1338 (10th Cir. 1996) (stating that good faith under § 548(c) should be measured objectively; if circumstances would place a reasonable person on inquiry of debtor's fraudulent purpose and diligent inquiry would have discovered a fraudulent purpose, then the transfer is fraudulent); *Merrill v. Abbott* (*In re Indep. Clearing House Co.),* 77 B.R. 843, 862 (D. Utah 1987) (adopting objective standard for good faith by examining what defendant knew or should have known rather than examining solely what defendant asserts was subjective knowledge of transaction); *Plotkin v. Pomona Valley Imps., Inc.* (*In re Cohen),* 199 B.R. 709, 719 (B.A.P. 9th Cir. 1996) (holding that one lacks good faith if possessed of enough knowledge of facts to induce a reasonable person to inquire further); *Hayes v. Palm Seedlings Partners-A (In re Agricultural Research and Tech. Group, Inc.),* 916 F.2d 528, 536 (9th Cir. 1990) (holding that if circumstances would place a reasonable person on inquiry of debtor's fraudulent purpose and diligent inquiry would have disclosed fraudulent purpose, then transfer is fraudulent); *see, e.g., Scholes v. Lehmann,* 56 F.3d 750, 759 (7th Cir. 1995) (stating that in cases of actual fraud, an investor "is not entitled to keep *any* part of the money she received from the corporations-provided, we emphasize, that she knew or should have known of [the debtor's]

fraudulent intent.") (emphasis added); *Hayes*, 916 F.2d at 535-36 (determining the issue of good faith requires courts to look to whether transferee knew or should have known, not what transferee actually knew from subjective point of view).

9. Section 550(a) of the Bankruptcy Code provides:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> >
> > (2) any immediate or mediate transferee of such initial transferee.

Gary was the initial transferee of the E-Gold Account Transfer. Gary and Susan were each an initial transferee of the Joint Account Transfers. The LLC was the initial transferree of the LLC Transfers. Gary is a person for whose benefit one-half of the LLC Transfers were made, and Susan is a person for whose benefit one-half of the LLC Transfers were made.

10. "The paradigm case of a benefit under § 550(a) is the benefit to a guarantor by the payment of the underlying debt of the debtor." *Reily v. Kapila (In re Int'l Mgmt. Assoc.*), 399 F.3d 1288, 1292 (11th Cir. 2005). Although the instant case does not involve a guarantor, the principles underlying the general paradigm are present. Similar to a guarantor who benefits dollar for dollar for the amount transferred, the Transfers to the LLC had the effect of increasing the value of the membership interests in the LLC and producing benefits for them in subsequent investments made by Gary and Susan for their benefit directly or indirectly through their IRAs. The argument that holding them liable for Transfers made to the LLC would require piercing the corporate veil is without merit. Their liability is not derivative of the liability of the LLC but

flows from the acknowledged benefit they derived from the LLC Transfers through the use of those funds to invest for their benefit and through the enhanced value of the LLC.

11. Plaintiffs are entitled to a judgment avoiding the Transfers pursuant to 11 U.S.C. § 548(a)(1)(A).

12. Plaintiffs are entitled to a judgment pursuant to 11 U.S.C. § 550(a), as follows: (a) against Gary and Susan, jointly and severally, for $67,681.84 with respect to the Joint Account Transfers; (b) against the LLC for $161,695.27 with respect to the LLC Transfers; (c) against Gary for $80,847.64, which is one-half of the LLC Transfers; (d) against Susan for $80,847.64, which is one-half of the LLC Transfers; Susan is liable for one-half of the LLC Transfers totaling $80,847.64; and (e) against Gary for $945.82 with respect to the E-Gold Transfer. In summary, Plaintiffs are entitled to a judgment against Gary for $149,474.30, a judgment against Susan for $148,529.48, and a judgment against the LLC for $161,695.27. Plaintiffs are further entitled to interest on the judgment at the rate imposed by 28 U.S.C. § 1961. Plaintiffs are entitled to only one satisfaction of the amounts for which Defendants are jointly liable under 11 U.S.C. 550(a). 11 U.S.C. § 550(d).

END OF FINDINGS OF FACT AND CONCLUSIONS OF LAW