UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re, Brendan Hampton Church, Debtor(s).	C/A No. 23-01436-HB Adv. Pro. No. 23-80047-HB Chapter 7
Dream Medical Group, LLC Joseph Agresti, Plaintiff(s), v. Church Enterprises, Inc. *et al.*,[1] Defendant(s).	**ORDER DENYING MOTION TO DISMISS**

THIS MATTER came before the Court for a hearing on January 4, 2024, on the Motion to Dismiss ("Motion") filed by a large group of defendants, some of whom are represented by Christine E. Brimm and whose names are listed on Exhibit A thereto (the "Brimm Defendants").[2] Defendants Bruce Investments, LLC, Jason Deyo, Garry Brumels, Chad L. Eisenga, Stephen D. Lowery, Robert S. Swindler, and the Swindler Revocable Family Trust who are represented by Michael H. Weaver (the "Weaver Defendants") are also movants.[3] Collectively, the Brimm Defendants and the Weaver Defendants are referred to herein as the "Moving Defendants." Plaintiffs Dream Medical Group, LLC ("DMG") and Joseph Agresti ("Agresti") (collectively, the "Plaintiffs") filed a response in opposition to the Motion.[4] The Moving Defendants request dismissal of this adversary proceeding as to them with prejudice pursuant to Fed. R. Civ. P.

[1] Pursuant to Fed. R. Civ. P. 10(a), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7010, the Court is naming only the first defendant in the caption rather than listing the numerous defendants in this action.
[2] ECF No. 46, filed Nov. 2, 2023.
[3] ECF No. 59, filed Nov. 17, 2023.
[4] ECF No. 61, filed Nov. 27, 2023.

12(b)(6), which is made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012(b). There are forty-seven (47) Moving Defendants, but approximately seventy-seven (77) Defendants are named in this action.

The background of this proceeding is found on the Court's dockets in the bankruptcy case and this adversary. On March 2, 2022, Plaintiffs filed an Amended Complaint naming numerous parties (the "Defendants"), including the Moving Defendants, in the Court of Common Pleas, Thirteenth Judicial Circuit, Greenville County, South Carolina (C.A. No.: 2022-CP-23-0576) (the "State Court Litigation").[5] On May 23, 2022, a group of Defendants that included the Moving Defendants filed a Motion to Dismiss the Amended Complaint in the State Court Litigation.[6]

On May 18, 2023, Brendan Hampton Church ("Debtor") filed a petition for relief under Chapter 11 of the Bankruptcy Code to begin the above bankruptcy case. On August 1, 2023, Debtor's case was converted to Chapter 7, and John K. Fort was appointed Chapter 7 Trustee (the "Trustee").

On August 15, 2023, Plaintiffs filed a Notice of Removal to remove the State Court Litigation to this Court and initiate the above adversary proceeding. At the time of the removal of the State Court Litigation, the Motion to Dismiss was pending.[7]

The Amended Complaint is summarized below.[8] The summary is presented merely as an aid in the Court's analysis of the Motion, and nothing therein shall be construed as a finding of fact or conclusion of law.

[5] ECF No. 1, Ex. 1-A, pp. 8-20.
[6] ECF No. 1, Ex. 1-C (Part 3), pp. 60-67.
[7] ECF No. 46, n.2; ECF No. 1, Ex. 1-D, pp. 25-29.
[8] On February 5, 2024, Plaintiffs filed a Motion for Leave to Amend the complaint solely in the event the Court denies the pending Motion to Remand and Abstain (ECF No. 20). ECF No. 77. At the hearing on this matter, Plaintiffs also requested leave to amend should the Court find insufficient the allegations supporting any cause of action.

On or about April 16, 2020, Agresti prepaid Old South Trading Co., LLC ("OST") and its owner, Debtor, $11.5M for five million KN95 masks. Debtor and OST did not deliver those masks as promised. Consequently, on May 5, 2020, Plaintiffs, Debtor, and OST entered into a Resolution Agreement, under which Debtor and OST promised to refund $5.5M to Plaintiffs and to deliver certain quantities of masks. Debtor and OST breached the Resolution Agreement by, among other things, failing to refund the money to Plaintiffs. Debtor and OST have claimed that they lack the resources to pay the debt owed to Plaintiffs.

Although Plaintiffs did not immediately commence an arbitration proceeding against Debtor and OST based on Debtor's request to Agresti to delay the proceeding so Defendants would not lose their livelihoods, Plaintiffs eventually commenced an arbitration proceeding in late August 2020. In November 2020, while still having refused to pay the debt he owed to Plaintiffs, Debtor closed on the purchase of a lake house on Lake Keowee in Pickens County, South Carolina for over $2.7M, ostensibly with a portion of Plaintiffs' funds. On January 10, 2022, the panel presiding in the arbitration issued an award in favor of Plaintiffs (as well as two co-plaintiffs) and against Debtor and OST for $5,540,231.16, with any amounts not paid within 30 days of the award accruing interest at four percent.

In or before May 2020, or thereafter, each of the Defendants invested substantial sums in OST and Debtor. Debtor and OST promised and paid the Defendants returns on their capital investments of 10 percent per month for over a year, both before and for many months after May 2020. At some point in 2020, Debtor and OST reduced the rate of return they were paying Defendants to two percent per month. Though it was not known to Plaintiffs at the time, Debtor and OST were using the $11.5M in prepayments Plaintiffs had paid them in April 2020—including the $5.5M Debtor and OST promised to refund—to pay Defendants the returns.

Given the high rate of return Debtor and OST were paying Defendants, as well as Defendants' "family and friend" insider relationships with Debtor and OST, Defendants had at least constructive knowledge that Debtor and OST were attempting to defraud their creditors, including Plaintiffs. Additionally, given the family relationship between Debtor and many of the Defendants (Chuck Church, Kirsten Church, Jean Church, and Betsy Anderson), said Defendants had actual knowledge that Debtor and OST were using Plaintiffs' money to pay them in the manner of a Ponzi scheme. In short, Defendants were aware that Debtor and OST owed money to Plaintiffs and agreed with Debtor and OST's strategy of refusing to pay the debt owed to Plaintiffs and instead paying high rates of returns to Defendants. Thus, Defendants participated in Debtor's and OST's fraud.

In support of their actual and constructive fraudulent transfer claims under the Statute of Elizabeth, Plaintiffs allege Debtor and OST were indebted to Plaintiffs at the time they made transfers to Defendants. Second, Debtor and OST's transfers to Defendants were voluntary because they had the unilateral ability to reduce the returns they paid to Defendants. Third, Debtor and OST failed to retain sufficient property to pay the debt to Plaintiffs, deliberately divesting themselves of assets to avoid the obligations they owe to Plaintiffs through transfers to the Defendants. Finally, Plaintiffs allege Debtor and OST's transfers to Defendants were without consideration, or, alternatively, were with consideration and with actual intent to defraud Plaintiffs.

Plaintiffs assert they are entitled to the imposition of a constructive trust. They allege Defendants obtained money which does not equitably belong to them and which they cannot in good conscience retain or withhold from Plaintiffs who are beneficially entitled to it.

Asserting a claim for civil conspiracy, Plaintiffs allege Debtor, OST, and Defendants entered into an agreement—express or implied—to deprive Plaintiffs of the $5.5M refund owed

by Debtor and OST. They allege Debtor, OST, and Defendants acted in furtherance of this agreement by entering into "sham or bogus" investment contracts—under which Defendants were being paid 120% annual returns or 24% annual returns—that served as a front for absconding with Plaintiffs' $5.5M, and by Debtor and OST paying Defendants millions of dollars of funds which Debtor and OST acknowledged belonged to Plaintiffs. Plaintiffs allege they have been damaged as a result.

In support of their unjust enrichment cause of action, Plaintiffs allege Defendants received monies—the $5.5M arbitration award—under the guise of "investment" returns, which, in equity and good conscience, belong to Plaintiffs. Therefore, Defendants have been unjustly enriched to the detriment of Plaintiffs.

A motion filed under Rule 12(b)(6) challenges the legal sufficiency of the complaint and provides that a party may move to dismiss for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). The legal sufficiency of the complaint is measured by whether it meets the standards for a pleading set forth in Rules 8 and 12(b)(6). *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). Rule 8 requires the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).[9] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint meets the plausibility standard when it "articulate[s] facts, when accepted as true, that 'show' that the plaintiff has stated a claim entitling him to relief, *i.e.*, the 'plausibility of entitlement to relief.'" *Giacomelli*, 588 F.3d at 193 (quoting *Iqbal*, 556 U.S. at 678). The pleader must provide more than

[9] Fed. R. Civ. P. 8 is made applicable to this adversary proceeding by Fed. R. Bankr. P. 7008.

mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). However, the Court will not extend this assumption of truth to "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

Additionally, there are heightened pleading requirements with respect to fraud claims. Rule 9 requires a party alleging fraud or mistake to "state with particularity the circumstances constituting fraud or mistake," though "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).[10] In other words, "plaintiffs must particularly allege the who, what, when, where, and how of the alleged fraud." *U.S. v. Walgreen Co.*, 78 F.4th 87, 92 n.4 (4th Cir. 2023) (internal quotation marks and citation omitted). However, the Court should hesitate to dismiss a complaint under Rule 9(b) if it is satisfied that (1) the defendant has been made aware of the particular circumstances for which it will have to prepare a defense at trial, and (2) plaintiff has substantial prediscovery evidence of those facts. *McCauley v. Home Loan Inv. Bank, F.S.B.*, 710 F.3d 551, 559 (4th Cir. 2013) (citation omitted).

In ruling on a Rule 12(b)(6) motion to dismiss, the Court's review is limited to the allegations of the complaint, documents explicitly incorporated into the complaint by reference, documents attached to the complaint as exhibits, and undisputedly authentic documents submitted by the movant that are integral to the complaint. *Glenn v. Wells Fargo Bank, N.A.*, 710 F. App'x 574, 576 (4th Cir. 2017) (citing *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165-66 (4th Cir. 2016); Fed. R. Civ. P. 10(c)).

S.C. Code Ann. § 27-23-10, also known as the Statute of Elizabeth, provides:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond,

[10] Fed. R. Civ. P. 9 is made applicable to this adversary proceeding by Fed. R. Bankr. P. 7009.

> suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

S.C. Code Ann. § 27-23-10(A). "Under the Statute of Elizabeth, existing creditors may avoid transfers under an actual fraudulent transfer theory or under a constructive fraud theory." *In re Genesis Press, Inc.*, 559 B.R. 445, 453 (Bankr. D.S.C. 2016) (citing *In re J.R. Deans Co., Inc.*, 249 B.R. 121, 130 (Bankr. D.S.C. 2000)). A creditor is an "existing creditor" at the time of the transfer at issue if the debt was "in existence . . . at or before the time of the transfer." *Albertson v. Robinson*, 371 S.C. 311, 317, 638 S.E.2d 81, 84 (Ct. App. 2006). Under an actual fraudulent transfer theory, the plaintiff must prove that, even though there was valuable consideration for the transfer, (1) the transfer was made by the grantor with the actual intent of defrauding his creditors; and (2) that intent is imputable to the grantee. *Id.* at 316, 638 S.E.2d at 83 (citing *McDaniel v. Allen*, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975)). "[A] conveyance made with an actual intent to defraud will be set aside to the extent the value of the conveyance exceeds the consideration received." *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 337 S.C. 592, 595, 524 S.E.2d 621, 623 n.7 (1999).

These principles have been applied by the U.S. District Court for the District of South Carolina in the context of Ponzi schemes. A "Ponzi scheme" "takes its name from Charles Ponzi, who in the late 1920s was convicted for fraudulent schemes he conducted in Boston" and refers to "[a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger

investments" usually "without any operation or revenue-producing activity other than the continual raising of new funds." *Ponzi Scheme*, BLACK'S LAW DICTIONARY (11th ed. 2019). Establishing the existence of a Ponzi scheme helps to demonstrate the first element of an *actual* fraudulent transfer claim because "[t]he existence of a Ponzi scheme gives rise to a presumption of fraudulent intent on the part of the proponent of the scheme." *Ashmore v. Taylor*, No. 3:13–2303–MBS, 2014 WL 6473714, at *3 (D.S.C. Nov. 18, 2014) (citing *Grayson Consulting, Inc. v. Wachovia Sec., LLC (In re Derivium Cap., LLC)*, 396 B.R. 184, 192-93 (Bankr. D.S.C. 2008)).[11] Further, evidence showing the transferee either had actual knowledge of or participation in the debtor's fraudulent intention, or "at the time of the transfer the transferee had notice of circumstances which would arouse the suspicion of an ordinarily prudent man and cause him to make inquiry as to the purpose for which the transfer was being made, which would disclose the fraudulent intent of the maker" helps to show the second element of an actual fraudulent transfer claim. *Id.* at *4 (quoting *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74, 80 (1973)).

Under a *constructive* fraud theory, a plaintiff is not required to prove actual intent to defraud creditors. *Genesis Press, Inc.*, 559 B.R. at 453 (citing cases). Instead, the plaintiff must prove the transfer was made "without valuable consideration." *Albertson*, 371 S.C. at 317, 638 S.E.2d at 84 (citing *McDaniel v. Allen*, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975)). Even where the plaintiff shows the transfer was made without valuable consideration, the transfer will be set aside only when the plaintiff establishes: "(1) the grantor was indebted to the creditor at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed

[11] The facts of these cases are not on all fours with the situation presented here, where a putative creditor of the alleged perpetrators of the Ponzi scheme is seeking to avoid transfers made in the scheme. In *Ashmore*, the plaintiff was a Court-appointed Receiver seeking to recover the winnings of a "net winner" investor in a Ponzi scheme for the benefit of other investors in the scheme. In *Derivium*, the plaintiff was a corporation that had bought the Chapter 7 Trustee's rights for $25,000.00 and an agreement to pay the estate a percentage of any net recovery on the plaintiff's claims, which included fraudulent transfer claims based on allegations of a Ponzi scheme.

to retain sufficient property to pay his indebtedness to the creditor in full, not merely at the time of transfer, but in the final analysis when the creditor seeks to collect the debt." *Id.* (citing *Mathis v. Burton*, 319 S.C. 261, 265, 460 S.E.2d 406, 408 (Ct. App. 1995)). A voluntary conveyance is "a conveyance made upon a mere nominal consideration or without consideration." *In re Amelung*, 436 B.R. 806, 810 (Bankr. D.S.C. 2010) (quoting *First State Sav. and Loan Ass'n v. Nodine*, 291 S.C. 445, 450, 354 S.E.2d 51, 54 (Ct. App. 1987)). "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Factor King, LLC v. Dooleymack Constructors of S.C., LLC*, No. 2:17-cv-1845-PMD, 2017 WL 5001289, at *2 (D.S.C. Nov. 2, 2017) (internal quotation marks omitted) (quoting *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009)). Establishing the existence of a Ponzi scheme may help to meet the third element of a constructive fraudulent transfer claim because "the nature of a Ponzi scheme leads ultimately to insolvency because the proponent incurs debts beyond his ability to pay as they become due." *Ashmore*, 2014 WL 6473714, at *3 (citations omitted). At least for purposes of bankruptcy litigation, investors in a Ponzi scheme may retain returns on their investments to the extent of their investments, and any amounts they receive above that are recoverable as a fraudulent conveyance. *Id.* at *4 n.3; *see also Ashmore v. Sullivan*, No. 8:15-cv-00563-JMC, 2016 WL 6927888, at *3 (D.S.C. Nov. 28, 2016) ("South Carolina has sufficient controlling precedent regarding Ponzi schemes under the Statute of Elizabeth and the doctrine of unjust enrichment, which allows Plaintiff to recover 'profits' from net winners. . .").

The Court concludes that Plaintiffs' actual fraudulent transfer claim is sufficient to survive the Motion to Dismiss.[12] The Amended Complaint's allegations of a Ponzi scheme are adequate at this stage to allege fraudulent intent on the part of Debtor, OST, and Moving Defendants. Moreover, determining whether each Moving Defendant received returns over and above their principal investment such that Plaintiffs have a remedy for their actual fraudulent transfer claim against each Moving Defendant would require the Court to make findings of fact and weigh the evidence—facts which are not in this record and deliberations that would be inappropriate at this stage. The Court also concludes that Plaintiffs' constructive fraudulent transfer claim is sufficient at this stage. The Amended Complaint alleges Debtor and OST were already indebted to Plaintiffs under the Resolution Agreement when at least some of the alleged transfers to Moving Defendants were made, and that Debtor and OST have been unable to pay their debt to Plaintiffs. Further, as the details of Moving Defendants' transactions with Debtor and OST are not part of this record, the Court cannot determine whether the "substantial sums" the Amended Complaint alleges the Moving Defendants "invested" in Debtor and OST would constitute consideration for any returns they received from Debtor and OST such that Plaintiffs' constructive fraudulent transfer claim is untenable. Again, finally determining this issue will require the Court to make findings of fact and weigh the evidence for each Moving Defendant, and therefore the cause of action cannot be dismissed at this stage pursuant to a Rule 12(b)(6) motion.

"Authority exists to support the proposition that a claim for imposition of a constructive trust is not an independent cause of action." *Hale v. Finn*, 388 S.C. 79, 89, 694 S.E.2d 51, 57 (Ct. App. 2010) (internal quotation marks and citations

[12] The Court leaves aside at this time the question of the proper party to assert fraudulent transfer claims. *See Ivester v. Miller*, 398 B.R. 408, 430 (M.D.N.C. 2008) (summarizing Fourth Circuit precedent that only the trustee has standing to bring a fraudulent conveyance cause of action until such action has been abandoned).

omitted) (citing authorities); *see also Uhlig, LLC v. Shirley*, No. 6:08–cv–01208–JMC, 2012 WL 2711505, at *2 (D.S.C. July 9, 2012) (citing *Hale*, 388 S.C. 79, 694 S.E.2d at 90) ("A constructive trust is a flexible remedy which may be enforced in the equitable discretion of the court to prevent unjust enrichment."). However, other authorities suggest that seeking the imposition of a constructive trust may constitute a cause of action. *See, e.g., Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 879 (2012) (emphasis added) (citation omitted) ("**An action to declare a constructive trust** is in equity. . ."). "A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." *M.R. Jackson Constr., LLC v. State Farm Ins.*, No. 2019-000181, 2021 WL 2701529, at *1 (Ct. App. June 30, 2021) (quoting *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990)). "Fraud is an essential element, although it need not be actual fraud." *Rogers v. Rowland*, No. 2:22-00279-RMG, 2022 WL 17960777, at *6 (D.S.C. Dec. 27, 2022) (quoting *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987)). "A constructive trust may only be placed over ascertainable and sufficiently identifiable property—the property subject to the trust, or the trust res." *Id.* (citing *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 126 F. Supp. 3d 611, 642 (D.S.C. 2015)). "In order to maintain a claim for constructive trust, the plaintiff must be able to trace the funds into the res at issue." *Id.* (citing *Old Republic Nat'l Title Ins. Co. v. Tyler (In re Dameron)*, 155 F.3d 718, 723 (4th Cir. 1998)).

The language of several cases indicates that a request for the imposition of a constructive trust may constitute a claim or cause of action, so the Court will not dismiss this request on the

basis that it is only a remedy. Additionally, in the absence of a fully developed record, the Court is unable to balance the equities or determine the ownership of the funds at issue. Further, as noted above, by alleging the existence of a Ponzi scheme, the Amended Complaint sufficiently alleges fraud on the part of Debtor, OST, and Moving Defendants for this stage of the proceedings. Accordingly, this request will not be dismissed.

To state a claim for civil conspiracy, a plaintiff must establish "(1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cnty. Sch. Dist*., 433 S.C. 562, 574-75, 861 S.E.2d 774, 780 (2021) (citations omitted). The plaintiff "must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115-16, 682 S.E.2d 871, 875 (Ct. App. 2009) (citations omitted), *overruled on other grounds by Paradis*, 433 S.C. 562, 861 S.E.2d 774. Stated another way, "[w]here the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." *Todd v. S.C. Farm Bureau Mut. Ins. Co*., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (quoting 15A C.J.S. Conspiracy § 33, at 718), *overruled on other grounds by Paradis*, 433 S.C. 562, 861 S.E.2d 774; *see also Coker v. Norwich Com. Grp., Inc.*, No. 3:20-03071-MGL, 2021 WL 4037472, at *6 (D.S.C. Sept. 3, 2021) (dismissing a civil conspiracy claim because the plaintiff "merely reincorporated his previous claims and added conclusory allegations the Individual Defendants were engaged in a civil conspiracy"). A plaintiff cannot avoid pleading separate and independent acts in furtherance

of the conspiracy by simply couching the conspiracy claim as an alternative to other causes of action asserted in the complaint. *See Jinks v. Sea Pines Resort, LLC*, No. 9:21-CV-00138-DCN, 2021 WL 4711408, at *4 (D.S.C. Oct. 8, 2021) (citing *Howard v. Allen Univ.*, No. 3:11-2214-MBS-SVH, 2012 WL 3637754, at *8 (D.S.C. Feb. 27, 2012)), *report and recommendation adopted*, 2012 WL 3637746 (D.S.C. Aug. 22, 2012). Additionally, "[s]ince civil conspiracy is an intentional tort, an intent to harm . . . remains an inherent part of the analysis." *Paradis*, 433 S.C. at 574, 861 S.E.2d at 780 n.9 (citation omitted); *see also Jinks*, 2021 WL 4711408, at *3 ("Where, for example, alleged conspirators acted out of a general desire to make a profit rather than to harm the plaintiff, a claim for civil conspiracy cannot lie. Thus, a claim for civil conspiracy requires at least some degree of relationship between the plaintiff and the alleged conspirators.") (citing *Bivens v. Watkins*, 313 S.C. 228, 437 S.E.2d 132, 136 (Ct. App. 1993)).

Viewing the allegations in the light most favorable to the Plaintiffs, the Court finds the Plaintiffs' civil conspiracy cause of action is sufficient at this stage of the proceedings. The Amended Complaint alleges Debtor, OST, and the Moving Defendants entered an express or implied agreement to deprive Plaintiffs of the $5.5M refund owed them, and acted in furtherance of this agreement by entering "sham or bogus" investment contracts as a front and by Debtor and OST's payment of Plaintiffs' money to the Moving Defendants. The allegations thus portray the Moving Defendants as intending to make a profit at Plaintiffs' direct expense. Further, Plaintiffs allege they have been damaged as a result. Accordingly, Plaintiffs' claim for civil conspiracy is sufficient to survive the Moving Defendants' Rule 12(b)(6) motion.

To prevail on a claim for unjust enrichment, "the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff

for its value." *Inglese v. Beal*, 403 S.C. 290, 297, 742 S.E.2d 687, 691 (Ct. App. 2013) (citations omitted).

Relying on the allegations of the Amended Complaint, the Court concludes the Plaintiffs have stated a claim for unjust enrichment sufficient to survive the Motion to Dismiss. Without the benefit of a fully developed record, the Court cannot determine whether the Moving Defendants received funds that belonged to Plaintiffs as alleged and cannot weigh the equities.

IT IS, THEREFORE, ORDERED the Motion to Dismiss of the Moving Defendants is **denied**.

FILED BY THE COURT
02/08/2024

Entered: 02/08/2024

Chief US Bankruptcy Judge
District of South Carolina