

SIGNED.



Dated: November 04, 2008

Randolph J. Haines

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re	)	Chapter 11
)	
GLOBAL GROUNDS GREENERY,	)	Case No. 2:06-bk-01701-RJH
LLC, et al.	)	Case No. 2:06-bk-01702-RJH
	)	Case No. 2:06-bk-01718-RJH
	)	Case No. 2:06-bk-01741-RJH
Debtor.	)	Case No. 2:06-bk-01743-RJH
	)	Case No. 2:06-bk-01744-RJH
	)	Case No. 2:06-bk-01758-RJH
MORRIS C. AARON, Chapter 11)	
Liquidating Trustee,	)	(Jointly Administered)
Plaintiff,)	
vs.	)	ADVERSARY NO. 2:08-ap-00317-RJH
PETER J. MCQUAID, an individual; and)	
ASHLEY LIMITED, a Cayman Islands	)	MEMORANDUM DECISION DENYING
corporation,	)	AARON'S MOTION FOR JUDGMENT ON
Defendants.	)	THE PLEADINGS

This is a fraudulent transfer action in which the Plaintiff Morris Aaron, the Chapter 11 Liquidating Trustee of the Entity Liquidating Trust, seeks to recover payments made to an investor in a Ponzi scheme. Aaron seeks judgment on the pleadings because the Defendant Peter J. McQuaid admits the payments were made as part of a Ponzi scheme, which Aaron contends therefore satisfies the requisite "actual intent to hinder, delay or defraud" for purposes of Bankruptcy Code § 548 and A.R.S. § 44-1004(A). McQuaid's principal defense to the Motion for Judgment on the Pleadings is that the pleadings fail to establish that he cannot assert the good faith defense of Code § 548(c) and A.R.S. § 44-1008(A). Regardless of whether McQuaid had subjective good faith, however, Aaron argues that the good faith defense is not

1 available to him because McQuaid did not take the payments for reasonably equivalent value.
2 Aaron's argument for lack of reasonably equivalent value hinges on McQuaid's Proof of Claim
3 filed for the entire amount he was allegedly due for his investment, which included precomputed
4 or imputed interest, rather than merely for return of his principal.

5 The parties do not dispute that Ninth Circuit law effectively gives a subjectively
6 good faith Ponzi investor a reasonably equivalent value defense to the extent of principal
7 invested, and renders such investors liable only for profits received in excess of their principal.¹
8 Nor do they dispute that the amounts received by McQuaid were far less than the amounts he
9 had invested--McQuaid was a "net loser." In effect, however, Aaron is arguing that McQuaid
10 has waived the defense of the "net investment rule" by filing a Proof of Claim that also sought
11 recovery of profits or interest.

12 The Court finds and concludes that a Ponzi scheme investor does not lose the "net
13 investment" defense simply by filing a Proof of Claim for the entire amount promised to be paid
14 him for his investment. Judicial estoppel certainly would not require such a result, because the
15 investor has not received any benefit by filing the Proof of Claim in that amount, rather than
16 merely for the net investment. And even if good faith was lacking when a Proof of Claim was
17 filed that did not satisfy Rule 9011, that does not establish lack of good faith when the returns
18 on the investment were paid. Finally, it appears that the "net investment" rule is a rule of law
19 adopted by the Ninth Circuit for the benefit of all parties in interest in the estate in Ponzi cases,
20 that may not be subject to variance solely on account of the litigation position asserted by one
21 litigant.

22 On these pleadings, return to McQuaid of less than he invested may still qualify as
23 a return of value reasonably equivalent to the value of the restitution claim he had as of the date
24 of the payments, and McQuaid's good faith in receipt of such payments remains a fact issue that
25 cannot be resolved on the pleadings alone.

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28 ¹*Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008).

1 For the foregoing reasons, Aaron's Motion for Judgment on the Pleadings is
2 denied.

3 DATED AND SIGNED ABOVE

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5 Copy of the foregoing e-mailed
6 this 4th day of November, 2008, to:

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/s/ Pat Denk
Judicial Assistant

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