



Richard Roper, in his capacity as the court-appointed Receiver for Millennium Bank (the “Receiver”), United Trust of Switzerland S.A., UT of S, LLC, Millennium Financial Group, William J. Wise d/b/a Sterling Administration, William J. Wise d/b/a Sterling Investment Services, and William J. Wise d/b/a Millennium Aviation (“Millennium Bank Entities”), files this brief in support of his motion for summary judgment against Atlanta Northside Aviation, Inc. and respectfully shows as follows:

## V. INTRODUCTION

This is a suit to claw back amounts transferred to Defendant Atlanta Northside Aviation, Inc. (“ANA”) by the Millennium Entities, structured as loans, which remain largely unpaid and for which the Millennium Entities received nothing of value. It is undisputed that the Millennium Entities and ANA entered into two loan transactions, one in December 2008 and one in March 2009. Both transactions were documented with written agreements signed by Thomas Huff, owner of Atlanta Northside Aviation, and guaranteed by him personally. In accordance with these written agreements, the Millennium Entities transferred \$790,000 total to ANA. Further, it is undisputed that ANA has not repaid the balance of these loans. Because the loans were made by the Millennium Entities, which were conducting a Ponzi Scheme, the transfer of funds was both actually and constructively fraudulent under Georgia’s enactment of the Uniform Fraudulent Transfer Act. Moreover, because ANA has not repaid the loan proceeds, it has been unjustly enriched and a constructive trust should be imposed. For these reasons, the Millennium Entities are entitled to recover the outstanding amounts transferred to ANA.

## II. STATEMENT OF UNDISPUTED FACTS

The Millennium Entities and ANA entered into a December 16, 2008 agreement wherein the Millennium Entities agreed to loan \$300,000 to Atlanta Northside Aviation. Appendix at 2-3: *First Loan Agreement*. The loan agreement provided that the loan matured on December 16,

2009, making full repayment, including 12% *per annum* interest, due and payable at that time. *Id.* The Millennium Entities had previously funded the \$300,000 loan with a February 28, 2008 transfer of \$200,000 and an October 28, 2008 transfer of \$100,000, evidenced by bank records showing the wire transfers. Appendix at 7-8, 10-14: *Bank records from Millennium Entities & ANA.*

Then, on March 24, 2009, the Millennium Entities agreed to loan an additional \$500,000 to Atlanta Northside Aviation. The terms of that agreement provided that the loan matured just two months later on May 23, 2009, with full repayment, including 2% fees upfront and 1% monthly interest, due and payable on that date. Appendix at 5: *Second Loan Agreement.* The Millennium Entities funded this \$500,000, less the \$10,000 upfront fee, with a March 24, 2009 wire transfer of \$490,000 to Atlanta Northside Aviation, Inc. Appendix at 7: *Bank records for ANA.*

ANA contends that the transfers of funds from Millennium Entities to ANA were legitimate loans. Appendix at 21: *ANA Interrogatory Responses.* In repayment of these loans, ANA transferred funds to the Millennium Entities on two occasions. First, on December 18, 2008, ANA wired \$100,000 to the Millennium Entities. Appendix at 13: *Bank records from Millennium Entities.* Second, ANA wired \$245,000 to the Millennium Entities on March 26, 2009, mere days before the Receivership became known to Wise. Appendix at 14: *Bank records from Millennium Entities.*

In summary, the Millennium Entities transferred \$790,000 to ANA (the “Transfers”). But ANA repaid only \$345,000. Appendix at 27—*Deposition of Thomas Huff*, 87:16-88:7. Accordingly, ANA owes no less than \$445,000 to the Millennium Entities under the loan agreements.

ANA contends that it is entitled to offset of certain amounts for certain aviation and restaurant services it provided to William Wise and the Millennium Entities. *See* Answer of Atlanta Northside Aviation [Doc. #4]; Appendix at 27: *Deposition of Thomas Huff*, 87:16-88:7. Yet the loan agreements between the parties make no mention of any services to be provided or considered as repayment under the terms of the loans, a fact that ANA acknowledges. Appendix at 28: *Deposition of Thomas Huff*, 114:1-7.

The Millennium Entities were a Ponzi scheme, and their operations were shut down and assets seized pursuant to orders entered by this Court on March 25, 2009, in an SEC enforcement action. *SEC v. Millennium Bank et al.*, No. 7:09-CV-050-0, United States District Court for the Northern District of Texas, Wichita Falls Division (“*SEC v. Millennium Bank, et al.*”) ANA contends that it used the loan proceeds to make improvements to the hangars it operates in Cobb County, Georgia. Appendix at 26: *Deposition of Thomas Huff*, 76:25-77:17. ANA leases those hangars and receives rents for them today. Appendix at 29: *Deposition of Thomas Huff*, 117:14.

## VI. ARGUMENTS AND AUTHORITIES

### A. Summary Judgment Standard

To prevail on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the moving party has the initial burden of demonstrating that there is no genuine issue as to any material fact and the judgment should be entered as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); FED. R. CIV. P. 56(c). Where the party seeking summary judgment does not bear the burden of proof, it does not need to present evidence, but need only show the absence of evidence supporting an essential element of the nonmoving party’s case. *See Celotex, id.* at 325; *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5<sup>th</sup> Cir. 1995).

Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence establishing a genuine fact issue. *See Anderson*, 477 U.S. at 257; *Matasushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-587 (1986). Although the evidence must be viewed in the light most favorable to the nonmoving party, conclusory allegations unsupported by specific, concrete facts will not prevent summary judgment. *See Duffy*, 44 F.3d at 312. “Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *See Celotex*, 477 U.S. at 322-23.

**B. Georgia law govern the Receiver’s claims against ANA.**

Georgia law applies to this suit. Atlanta Northside Aviation is located in Georgia, and the events made the basis of this complaint occurred in Georgia. As the Texas Supreme Court has provided, Section 145 of the Restatement (Second) Conflict of Laws governs choice of law disputes in tort actions. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984). Under § 145, the local law of the state which has the “most significant relationship to the occurrence and the parties” will govern the claim. *Id.*; Restatement (Second) Conflict of Laws §145(1) (1971). Under the known facts and based on this principle, Georgia law is the most appropriate to govern the instant claims.

**C. The Millennium Entities’ Transfers to ANA constitute an actual fraudulent transfer, and the outstanding amounts should be returned to the Receivership Estate.**

The Millennium Entities were not a “bank” in the traditional sense. They conducted no ordinary banking operations. They did not regularly make loans nor did they make investments.

Moreover, this Court has previously found that the Millennium Entities were conducted as a Ponzi scheme. Appendix at 33-37—Hearing transcript excerpts, *SEC v. Millennium Bank, et al.*, dated July 9, 2009. And a Ponzi scheme is, by its nature, a fraudulent enterprise. *See In re Int'l Mgmt. Assocs., LLC*, No. 09-MP-601, 2009 Bankr. Lexis 4240, \*8-9 (Bankr. N.D. Ga. Dec. 1, 2009). Any transfers made in furtherance of such an enterprise are presumptively fraudulent. *Id.*; *In re Christou*, No. 08-6405, 2009 WL 6498175, \*1 (Bankr. N.D. Ga. Sept. 29, 2009). Accordingly, the Transfers were made with actual fraudulent intent.

Further, when the Transfers were made, the assets of the Millennium Entities were insufficient to fully reimburse all of their Defrauded Investors for the money each invested in the Ponzi scheme. In fact, the March 24, 2009 transfer for \$490,000 from the Millennium Entities to ANA was made *one day* before this Receivership was instituted. The Millennium Entities therefore knew or should have known at the time the Transfers were made that the Millennium Entities would be unable to fully reimburse the Defrauded Investors who had invested in the Ponzi scheme.

Millennium Bank made the Transfers with the actual intent to hinder, delay, or defraud its creditors, including the Defrauded Investors.<sup>1</sup> The claims of Millennium Bank's creditors, including the Defrauded Investors in the Ponzi scheme, arose before or within a reasonable time after the Transfers. The Transfers were fraudulent as to Millennium Bank's creditors, including the Defrauded Investors, pursuant to the Uniform Fraudulent Transfer Act, Ga. Code Ann. § 18-2-74 *et seq.*

ANA signed the loan agreements at issue. Appendix at 2-3. 5: *First & Second Loan Agreements*. ANA contends that the transfers were legitimate loans. Appendix at 21: *ANA*

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<sup>1</sup> Millennium Bank engaged in all relevant actions herein through its managers, members, and control persons; specifically the other SEC Defendants.

*Interrogatory Responses.* It is undisputed that ANA did not repay \$445,000 of the \$800,000 loan obligation (\$790,000 was actually transferred); in fact, ANA's president has testified that the money was used to construct hangars and other improvements to the Cobb County McCollum Airport. Appendix at 26: *Deposition of Thomas Huff*, 76:25-77:17. ANA has benefitted from the improvements and receives regular lease payments (and presumably profits) for the hangars it constructed with the loan proceeds. Appendix at 28: *Deposition of Thomas Huff*, 117:14. The Millennium Entities did not receive reasonably equivalent value for the transferred funds, as the loans were not repaid and the Receivership was instituted mere days after \$490,000 of the funds were transferred to ANA.

Therefore, the Transfers should be voided pursuant to Ga. Code Ann. § 18-2-77(a)(1). Further, a \$445,000 judgment should be entered in favor of the Receiver and against ANA pursuant to Ga. Code Ann. § 18-2-78(b). There is no issue of material fact and summary judgment is appropriate pursuant to Rule 56.

**D. The Millennium Entities' Transfers to ANA constitute a constructive fraudulent transfer, and the outstanding amounts should be returned to the Receivership Estate.**

Without receiving reasonably equivalent value in exchange for the Transfers, Millennium Bank engaged in a transaction for which the remaining assets of Millennium Bank were unreasonably small in relation to its business or the Transfers. Likewise, Millennium Bank intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due, including the claims of the Defrauded Investors. ANA has not repaid the loans upon which the Transfers were based in full, paying only \$345,000 of its total obligation. Therefore, the Transfers should be voided pursuant to Ga. Code Ann. § 18-2-77(a)(1). Further, a \$445,000 judgment should be entered in favor of the Receiver and against ANA pursuant to Ga. Code Ann. § 18-2-78(b).

**E. ANA has been unjustly enriched by receiving and not repaying the Transfers.**

ANA was unjustly enriched by the Transfers, based on principles of justice, equity, and good conscience. The Transfers caused ANA to receive money that belonged to Defrauded Investors for no reasonably equivalent exchange. Because of the nature of the Ponzi scheme and the fact that Millennium Bank's assets are insufficient to fully repay all of its creditors, the Defrauded Investors will only receive a fraction of the amount of their investments back from Millennium. It would be fundamentally unfair to allow ANA to receive funds truly belonging to the Defrauded Investors while the Defrauded Investors stand to recover little to none of their original investments.

Moreover, the Ponzi scheme involved actual fraud and was the source of the \$790,000 in Transfers to ANA. The Transfers also involved actual fraud on the part of the SEC Defendants. As a third-party beneficiary who obtained \$790,000 through the SEC Defendants' fraud, ANA was unjustly enriched and is not entitled to retain that money.

The funds used for the Transfers are directly traceable to funds of the Defrauded Investors in the Ponzi scheme. As such, they constitute Receivership Assets and are impressed with a constructive trust and should be disgorged and paid to the Receiver for ultimate distribution equitably among all Defrauded Investors.

**F. A constructive trust should be imposed on the Transfers.**

Because the Transfers constitute a fraudulent transfer under Georgia law, and/or because ANA has been unjustly enriched by at least \$445,000, the funds used for the Transfers are impressed with a constructive trust and should be disgorged. *See Total Supply, Inc. v. Pridgen*, 598 S.E.2d 805, 807 (Ga. Ct. App. 2004) ("A constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to the property, either from fraud or

otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity.”).

The Receiver has a superior equitable interest to recover the investor funds used for the Transfers. Once the funds are recovered, they will be distributed on a pro rata basis, or as otherwise provided by a distribution plan approved by this Court, to the Defrauded Investors and appropriate Millennium creditors. The Receiver alone is in a position to re-distribute the limited funds available to the Receivership Estate, including those the Receiver should be awarded based on the Transfers to ANA.

Pursuant to the principles of equity, the Receiver seeks the imposition of a constructive trust on the \$445,000 received by ANA and not repaid, and the immediate turnover of such funds to the Receiver. To the extent the funds used for the Transfers have been used to acquire real or personal property in which ANA claims an interest, the property should be set aside, a constructive trust imposed on such property, and the property should be immediately turned over to the Receiver. To the extent that ANA is unable to return the funds received, the Receiver seeks a money judgment against ANA in an amount equal to the \$445,000 in Transfers that remain unpaid.

**G. ANA is not entitled to offset the amount owed under the loan transactions by amounts allegedly owed by the Millennium Entities for aviation and restaurant services.**

ANA contends that it is entitled to offset for amounts the Millennium Entities ostensibly owe to ANA for payment for aviation and restaurant services incurred by Wise at the airport. *See Answer of Atlanta Northside Aviation [Doc. #4]; Appendix at 27: Deposition of Thomas Huff, 87:16-88:7.* ANA has not pleaded the particulars of these supposed offsets. *See Answer of Atlanta Northside Aviation, Doc. #4.* However, these supposed amounts owed to ANA represent

separate transactions for which ANA is a general unsecured creditor. The aviation and restaurant services are not made a part of the loan agreement between the parties. Appendix at 28: *Deposition of Thomas Huff*, 114:1-7. Since the final \$500,000 loan was made a mere one day before this Receivership was instituted and ANA promised to repay that amount, the parties clearly did not contemplate that the loan proceeds were intended as payment for any services delivered before that date.

A fraudulent transfer action is intended to restore funds belonging to defrauded parties back to the corpus of an Estate, both in a bankruptcy and a receivership context. Here, while ANA and the Millennium Entities may have had a relationship whereby ANA provided services to the Millennium Entities and expected payment, they are no different in that regard to any other general unsecured creditor in the Receivership. To permit offset of an unsecured debt in the context of a fraudulent transfer action would defeat the purpose of the action, which is to restore funds to the Estate for fair distribution. *See Janvey v. Alguirre*, 647 F.3d 585, 602 (5<sup>th</sup> Cir. 2011); *Bustamante v. Johnson*, 934 F.2d 662, 667 (5<sup>th</sup> Cir. 1991); *Mack v. Roberts*, 737 F.2d 1343, 1366 (5<sup>th</sup> Cir. 1984).

The separateness of the loan transaction is further borne out by the fact that ANA agreed to repay the second loan of \$500,000 despite ostensibly being owed large sums for services previously rendered. To permit ANA to retain monies belonging to Defrauded Investors under the circumstances would be inequitable, as ANA would receive a windfall where other creditors and Defrauded Investors would receive next to nothing. Under the applicable law, defendants are not entitled to offset for other unsecured debts in a fraudulent transfer action brought under the Uniform Fraudulent Transfer Act. Therefore, their claim for offset should be denied. ANA

may make a claim with the Receivership Estate like any other unsecured creditor for amounts it claims it is owed.

## VII. CONCLUSION

THEREFORE, the Receiver requests that Atlanta Northside Aviation be ordered to return the \$445,000 in funds transferred from the SEC defendants to the Receivership Estate, and that summary judgment be entered against Atlanta Northside Aviation and in favor of the Receiver for \$445,000. In the case that the funds were spent to acquire any real or personal property, the Receiver requests that a constructive trust be imposed upon the property, and an order that it must immediately be turned over to the Receiver. Further, the Receiver requests that it be granted any other relief, both special and general, to which it may be justly entitled.

Dated this 13th day of January, 2012.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

On January 13, 2012, I electronically submitted the foregoing document to the Clerk of the Court for the United States District Court for the Northern District of Texas using the electronic case filing system of the Court.

/s/ Jennifer Ecklund  
Jennifer Ecklund