UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-60907-CIV-MORENO

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.
_____/

RECEIVER JONATHAN E. PERLMAN'S MOTION FOR TURNOVER OF REAL PROPERTY BY RELIEF DEFENDANT JAMES MARCUS AND FOR OTHER RELIEF

Jonathan E. Perlman, ("Perlman") "Permanent Receiver" for the Receivership Defendants[1] (the "Receiver"), pursuant to the Court's Preliminary Injunction Order Appointing Receiver [ECF No. 21], submits this Motion For Turnover of Real Property located at 6665 Green Valley Circle #222, Culver City, CA 90230 (the "Property")[2] currently titled in the name of Relief Defendant James Marcus, who is Defendant Jeremy Lee Marcus' brother, and Jennifer

[1] Receivership Defendants are Financial Freedom National, Inc. f/k/a Institute for Financial Freedom, Inc. and Marine Career Institute Sea Frontiers, Inc. d/b/a 321 Loans, Instahelp America, Inc., Helping America Group, United Financial Support, Breeze Financial Solutions, 321Financial Education, Credit Health Plan, Credit Specialists of America, American Advocacy Alliance, and Associated Administrative Services, 321Loans, Inc., f/k/a 321 Loans, Inc. d/b/a 321Financial, Inc., Instahelp America, Inc. f/k/a Helping America Team, Inc. d/b/a Helping America Group, Breeze Financial Solutions, Inc. d/b/a Credit Health Plan and Credit Maximizing Program, US Legal Club, LLC, Active Debt Solutions, LLC f/k/a Active Debt Solutions, Inc. d/b/a Guardian Legal Center, Guardian LG, LLC d/b/a Guardian Legal Group, American Credit Security, LLC f/k/a America Credit Shield, LLC, Paralegal Support Group LLC f/k/a Paralegal Support LLC, Associated Administrative Services, LLC d/b/a Jobfax, Cockburn & Associate LLC, JLMJP Pompano, LLC, Halfpay International, LLC, Halfpay NV, LLC, HP Properties Group, Inc., HP Media, Inc., Omni Management Partners, LLC, Nantucket Cove of Illinois, LLC, Discount Marketing USA, S.A., Viking Management Services, LLC, White Light Media LLC, Blue42, LLC, and their divisions, subsidiaries, affiliates, predecessors, successors, and assigns. *See* [ECF No. 102].

[2] It is the Receiver's position that Relief Defendant James Marcus has settled the issues raised in this motion and is concurrently filing a motion to enforce the settlement reached. The Receiver files this motion, in the alternative, if the Court does not enforce the settlement reached.

Perez (James Marcus' wife).[3] Relief Defendant James Marcus and his wife were gifted the Property by Receivership Defendant Halfpay International, LLC ("Halfpay") and Defendant Jeremy Lee Marcus ("Defendant Marcus") who used consumer funds for its purchase

I. INTRODUCTION

The Federal Trade Commission ("FTC") and the Office of the Attorney General, State of Florida, Department of Legal Affairs ("State of Florida") brought this action against Defendants alleging that they engaged in a scheme largely orchestrated by Defendant Marcus to defraud consumers of many millions of dollars by offering phony debt-relief services and fake loans in violation of Section 5(a) of the FTC Act, 15 U.S.C. §45(a); the FTC's "Telemarketing Sales Rule," 16 C.F.R. Part 310; and Section 501.204 of the FDUTPA. [ECF No. 1]. The Court held, after hearing argument and reviewing volumes of evidence, that Plaintiffs had established a substantial likelihood of success, entered the preliminary injunction, and appointed Mr. Perlman Permanent Receiver over the Receivership Defendants, including "their affiliates, subsidiaries, divisions, or sales or customer service operations, wherever located…with the full power of an equity receiver." The Court further ordered the Receiver to "[t]ake exclusive custody, control and possession of all assets… of, or…under the control of, the Receivership Defendants," as well as to file any motions or actions necessary to do so, in order to preserve the value of those assets for the benefit of consumers and creditors. [ECF No. 21 at p.17-20].

With respect to the Property, the Receiver and his forensic accountants at KapilaMukamal, LLP ("KM") have traced and verified that the Property currently titled in the name of Relief Defendant James Marcus and his wife, Jennifer Perez, is in fact a Receivership

[3] The Receiver timely recorded this Court's Order for Reappointment [ECF No. 222] in the District Court where the Property, Relief Defendant James Marcus, and Jennifer Perez reside. Pursuant to 28 U.S.C. §754, this Court acquires *in rem* jurisdiction over all receivership property located in these other judicial districts (e.g., the Property) and *in personam* jurisdiction over any persons in possession of such property (Relief Defendant James Marcus and Jennifer Perez.).

Asset that Receivership Defendant Halfpay and Defendant Marcus used consumer monies to purchase the Property in September 2016. *See* Exhibit A. Relief Defendant James Marcus and Jennifer Perez currently reside at the Property. This Court has previously held under identical facts that the Property is a receivership asset subject to turnover. *See* ECF No. 100; ECF No. 197.

The Receiver's investigation further revealed that on or about May 13, 2017, days after the Plaintiffs filed this action, Relief Defendant James Marcus and his wife, Jennifer Perez, entered into a "cash out" mortgage with Watermark Capital, Inc. with the Property in the amount of $396,000.00 (the "Property Proceeds"). The Receiver discovered that the Property Proceeds were deposited into and transferred into various bank accounts titled in the names of Relief Defendant James Marcus and Jennifer Perez at Bank of America. The Receiver put Relief Defendant James Marcus and Jennifer Perez on notice that the Property Proceeds, as receivership property, were subject to this Court's asset freeze order. *See* Exhibit B.

Turnover is appropriate and required in this case under the language of the PI, as well as under the law of constructive trust and equitable lien, because the funds used to purchase, improve and maintain the Property were acquired through fraud or egregious conduct upon consumers and Relief Defendant James Marcus would be unjustly enriched if permitted to retain the Property and Property Proceeds. The Receiver is also entitled to turnover of the Property and Property Proceeds because the conveyance of the Property constitutes an avoidable fraudulent transfer under Fla. Stat. § 726.105(1).

The material facts in this Motion are undisputed because Defendant Marcus has invoked his Fifth Amendment privilege against self-incrimination in response to all discovery requests and at deposition, thereby prohibiting him from refuting the record evidence and giving rise to

adverse inferences. [4] Likewise, any contention that Relief Defendant James Marcus may make that he need not turn over the Property and Property Proceeds because he was unaware of his brother's fraud or egregious conduct is immaterial to the relief sought. *In re Fin. Fed. Title & Trust, Inc.*, 347 F.3d 880, 890 (11th Cir. 2003) ("a lack of knowledge on the part of the person asserting the homestead exemption does not change the analysis, as it is the fraudulent nature of the funds which is of utmost importance"); *Hecker v. Kokomo Spring Co. (In re Hecker)*, 264 F. App'x 786, 789-91 (11th Cir. 2008) ("Both this Court … and the Florida Supreme Court … have explained why an equitable lien may be imposed upon property benefited by fraudulent proceeds even where one co-owner spouse is innocent and ignorant of fraud. The answer is straightforward: if an equitable lien is not placed on the property to the extent [defendant's] fraudulently obtained funds benefited the land, [the innocent party] would be unjustly enriched"); *In re Lee*, 574 B.R. 286, 292 n.32 (Bankr. MD. Fla. 2017) (same); SEC *v. Aquacell Batteries, Inc.*, No. 6:07-cv-608, 2008 WL 2915064, at *3 (M.D. Fla. July 24, 2008) (same); *Sweetners Plus, Inc. v. Glob. Supply Source, Inc.*, No. 6:11-cv-1799, 2013 WL 6890857, at *8 (M.D. Fla. Dec. 31, 2013) (same).

II. THE PROPERTY

On September 17, 2016, Relief Defendant James Marcus and his wife, Jennifer Perez, took title to the Property. The Receiver's investigation has established that neither Relief Defendant James Marcus, nor his wife, provided any consideration for the Property. Rather, the Receiver's forensic accountant's tracing analysis confirms that the ultimate source of funds was Receivership Entities. *See* Exhibit A.

On or about May 13, 2017, days after the Plaintiffs filed this action, Relief Defendant

[4] Recently, in this case, Defendant Jeremy Marcus stipulated to a permanent injunction and monetary judgment on the claims asserted by the Plaintiffs. [ECF No. 231].

James Marcus and his wife, Jennifer Perez, entered into a "cash out" mortgage with Watermark Capital, Inc. for the Property in the amount of the Property Proceeds. The Receiver's investigation revealed that the Property Proceeds were deposited into various bank accounts held by Relief Defendant James Marcus and Jennifer Perez at Bank or America. The Receiver put Relief Defendant James Marcus and Jennifer Perez on notice that the Property Proceeds, as receivership property, were subject to this Court's asset freeze order. *See* Exhibit B. Those funds are currently being frozen by Bank of America.

III. LEGAL ARGUMENT

A. This Court Has the Authority and Should Order Turnover of the Property to the Receiver.

The Preliminary Injunction appoints the Receiver as agent of the Court with the "full power of an equity receiver," and directs the Receiver to "take exclusive custody, control, and possession of all assets … of, or … under the control of, the Receivership Defendants, wherever situated," [*Id.* at pg. 17], as well as to file any motions or actions necessary to do so, in order to preserve the value of those assets for the benefit of consumers and creditors. [*Id.* at pp. 18-20]. Pursuant to the exercise of its broad equitable powers to protect the assets of the receivership estate, this Court may order parties and non-parties to turn over receivership assets to the Receiver in summary proceedings. *See, e.g., SEC v. Elliott*, 953 F.2d 1560 (11th Cir. 1992); *FTC v. Neiswonger*, No. 4:96-CV-2225, 2009 WL 2998356 (E.D. Miss. Sept. 15, 2009); *FTC v. Productive Mktg., Inc.*, 136 F. Supp. 2d 1096 (C.D. Cal. 2001); *FTC v. Pac. First Benefit, L.L.C., et al.*, 472 F. Supp. 2d 981 (N.D. Ill. 2007); *Eller Indus. v. Indian Motorcycle Mfg.*, 929 F. Supp. 369 (D. Colo. 1995); *FTC v. Vocational Guides, Inc.*, No. 3:01-0170, 2009 WL 943486 (M.D.

Tenn. Apr. 6, 2009).[5]

The Receiver confirmed that the Property was purchased with Receivership Defendant monies received from consumers as part of the Receivership Defendants' debt-relief enterprise. Accordingly, it is undisputed that this Property and Property Proceeds constitute property of the Receivership and title should be turned over to the Receiver. *See SEC v. Creative Capital Consortium*, No. 08-81565-CV, 2013 WL 12167733 (S.D. Fla. Jan. 23, 2013) (because it was undisputed that Options Accounts were funded by receivership Proceeds, they were therefore property of the receivership and "the Receiver ha[d] title to the Options Accounts by operation of law."); *SEC v. Aquacell Batteries, Inc.*, No. 6:07-cv-608, 2008 WL 4371329, at *2-3. (M.D. Fla. May 9, 2008) (granting receiver's turnover motion because "...purchase of property solely with [defendant corporate entity] funds renders the property receivership property...").[6] This Court previously held in this case that property acquired (and proceeds thereof) with receivership funds are subject to turnover in summary proceedings. *See* ECF No. 100; ECF No. 197.

B. Record Evidence Establishing Fraud and Egregious Conduct.

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[5] *See also FTC v. Johnson*, 567 Fed. Appx. 512, 515 (9th Cir. 2014) ("This court has long approved of the use of summary proceedings to determine possession of assets of nonparties in receivership proceedings"); *FTC v. Assail*, Inc., 410 F.3d 256, 267-68 (5th Cir. 2005) (affirming the district court's use of a summary proceeding to order the turnover of funds to the receiver that were subject to an asset freeze); *FTC v. NHS Sys., Inc.*, 708 F. Supp. 2d 456, 466-67 (E.D. Pa. 2009) (granting motion to compel turnover of receivership funds in summary proceedings).

[6] *See also SEC v. Elmas Trading Corp.*, 620 F. Supp. 231 (D. Nev. 1985), aff'd 805 F.2d 1039 (9th Cir. 1986) (collecting cases where courts have held "that a receiver can exercise control over third-party property purchased using 'scheme proceeds.") (citing *S.E.C. v. Nadel*, No.8:09-cv-87-T-26TBM, 2013 WL 2291871, at *2 (M.D. Fla. May 24, 2013) (third party entity's use of scheme proceeds to purchase oil and gas leases subjected it to inclusion in receivership despite that it was not an alter ego of defendant); *see also SEC v. Lauer*, No. 03-80612-Civ, 2009 WL 812719, at *4-5 (S.D. Fla. Mar. 26, 2009) (proceeds from sale of condominium that was maintained with tainted funds are also tainted by the fraud); *In re Fin. Federated Title & Tr., Inc.*, 347 F.3d 880 (11th Cir. 2003) (establishing constructive trust on property purchased with over 90% funds from Ponzi scheme); *CFTC v. Hudgins*, 620 F. Supp. 2d 790, 795 (E.D. Tex. 2009) (directing sale of condominium because defrauder's innocent girlfriend paid the mortgage with Ponzi scheme funds).

Here, the record evidence demonstrates that the Property and Property Proceeds[7] should be returned to the Receiver because they are an asset of the Receivership Estate and under principles of constructive trust, equitable lien, and/or fraudulent transfer.[8]

i. Defendant Marcus' Admissions and the Adverse Inferences from his Invocation of the Fifth Amendment.

The evidence submitted by the FTC and State of Florida and this Court's findings in the PI, establish that Defendant Marcus directed the scheme[9] and that the Receivership Defendants, operating as a common enterprise, generally served as holding companies or conduits for assets derived from Defendants' scheme. PI Motion [ECF No. 6 at p. 16 -18]. As discussed, *infra*, the Receiver's investigation has confirmed all material allegations made by Plaintiffs against Defendant Marcus and the other Defendants. *See Receiver Jonathan Perlman's Agreed First Verified Motion to Expand Receivership* (the "Expansion Motion") [ECF No. 89], *Receiver's Amended First Interim Report* [ECF No. 70], and *Receiver's Second Interim Report* [ECF No. 136]. Defendant Marcus himself has not refuted the evidence against him in his sworn discovery

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[7] Property Proceeds no greater than $497,279.51 should be turned over to the Receiver.

[8] The burden of proof for imposition of an equitable lien is preponderance of the evidence. *FTC v. American Precious Metals*, No. 11-61072, 2017 WL 1323466, at *3 (S.D. Fla. Apr. 10, 2017) (Florida law requires a showing "by the preponderance of the evidence that the fraudulently obtained funds can be directly traced to the investment, purchase or improvement of the homestead" to impose an equitable lien.); *see Levy v. Kozyak (In re Financial Federated Title and Trust, Inc.)*, 347 F.3d 880 (11th Cir. 2003) (affirming order imposing equitable lien and constructive trust on defendant's property where most funds used to purchase property could be traced to Defendant's fraud). The burden of proof for imposition of a constructive trust is clear and convincing proof. *See In re Royal West Properties, Inc.*, 441 B.R. 158, 170 (S.D. Fla. 2010) (A constructive trust "arises through operation of law. Where one through fraud, abuse of confidence, or other questionable means gains property…."); *Bank of America v. Bank of Salem*, 48 So.3d 155 (Fla. 1st DCA 2010). To recover on a fraudulent transfer, the Receiver need merely prove "by a preponderance of the evidence that the Receivership Defendants transferred an interest in property on or within [four] year(s)." *Worldvision Entm't v. Greenmark (In re Worldvision Entm't)*, 275 B.R. 641, 655 (Bankr. M.D. Fla. 2002). The burden of proof for motions for turnover is not premised on equitable lien or fraudulent transfer and appear to be "clear and convincing evidence…; he must at least establish a *prima facie* case." *Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir. 1990) (quotations and citations omitted).

[9] Defendant Marcus is or was at all times the owner, director, president, managing member, or authorized representative of each Receivership Defendant. *Plaintiffs' Ex Parte Motion For Temporary Restraining Order With Asset Freeze, Appointment of A Receiver, And Other Equitable Relief, And Order To Show Cause Why A Preliminary Injunction Should Not Issue, And Memorandum In Support* (the PI "Motion") [ECF No. 6 at p. 10 n.66]. Defendant Marcus is also an authorized signatory on nearly all Corporate Defendant bank records. *Id.* at n.67.

responses or at his deposition.[10] Instead, Defendant Marcus asserted his Fifth Amendment privilege against self-incrimination in response to every discovery request propounded by the Plaintiffs, including all 13 interrogatories and 147 requests for admissions. These interrogatories and requests for admissions concern whether Defendant Marcus and the Receivership Defendants committed the acts alleged by the Plaintiffs in this action. Specifically, Defendant Marcus took the Fifth Amendment when asked about:

- His affirmative defenses that he and the Receivership Defendants did not make false or misleading statements or breach any lawful duty to consumers. (*See* ECF No. 184, Exhibit C, Defendant Marcus' Resp. to Interrog. & Doc. Req., at 1, 3).
- The Receivership Defendants' organization and operations. (*See* ECF No. 184, Exhibit D, Defendant Marcus' Resp. to Req. for Admis., at 1-31, 50-53, 60-61).
- The vast number of consumer complaints regarding the Receivership Defendants' business practices. (*Id.* at 83-99).
- The Receivership Defendants use of false and deceptive sales scripts when engaging in telemarketing. (*Id.* at 32-39); and
- The vast amounts of consumer monies he diverted for personal use through the Receivership Defendants. (*Id.* at 135, 143-147).

Additionally, at Defendant Marcus's deposition, which the Receiver took on December 21, 2017, Defendant Marcus asserted his Fifth Amendment privilege and refused to answer any questions except his legal name. Included amongst the hundreds of questions to which Defendant Marcus pleaded the Fifth were questions regarding all of the deceptive and fraudulent conduct that the Plaintiffs have alleged and submitted evidence upon, and evidence establishing

[10] The corporate defendants have defaulted in this case [ECF No. 99]. Halfpay agreed to a judgment on the pleadings [ECF No. 174].

that the Property was purchased with monies derived from such fraudulent, egregious conduct.

Because Defendant Marcus asserted his Fifth Amendment privilege, the Court can and should draw all negative inferences therefrom. *See SEC v. Weintraub*, No. 11-21549-CIV, 2011 WL 6935280, at *6 (S.D. Fla. Dec. 30, 2011) ("[T]he Court may, and does, draw adverse inferences for [defendant's] invocation of his Fifth Amendment right, particularly in view of compelling, independent evidence submitted by the SEC") (citations omitted).[11]

Such negative inferences regarding Defendant Marcus, who owned and controlled each of the Receivership Defendants, add to the already voluminous documentary evidence establishing that the Receivership Defendants, by and through Defendant Marcus, were engaged in a fraudulent scheme designed to prey upon consumers. *See Weintraub*, 2011 WL 6935280 (S.D. Fla.), at *6 (finding that "[defendant] did make materially false or misleading statements and omissions in connection with his proposed Kodak and AMR deals" because he has "not offered any affirmative evidence to refute or contravene the SEC's factual assertions," including by invoking his Fifth Amendment to virtually all interrogatories).

ii. Defendants' Bogus Loan Campaign

Defendants ensnared consumers in two ways, through their bogus loan campaign and account takeover campaign.[12] In the loan campaign, Defendants lured consumers with

[11] *See also United States v. Two Parcels of Real Property Located in Russell County, Ala.*, 92 F.3d 1123, 1129 (11th Cir. 1996) (affirming the district court's decision to draw an adverse inference that "the answers to the [deposition] questions would not have been favorable to the claimants asserting the [Fifth Amendment] privilege"); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1274 n.4 (S.D. Fla. 2007) (granting Plaintiff's motion to draw adverse inferences "based on the individual Defendants' invocation of their Fifth Amendment privilege in their answers and discovery responses"); *Court-Appointed Receiver of Lancer Mgmt. Group LLC v. Lauer*, No. 05-60584-CIV, 2009 WL 800144, at *3 (S.D. Fla. Mar. 25, 2009) (Receiver correctly argued that an adverse inference be drawn against defendants who invoked their Fifth Amendment privilege); *Kozyak v. Poindexter (In re Financial Federated Title & Trust, Inc.)*, 252 B.R. 834, 838 (Bankr. S.D. Fla. 2000) (acknowledging that trustee may ask the court for an adverse inference against defendant who asserts Fifth Amendment privilege).

[12] *See* ECF No. 6.

false promises of guaranteed, low interest rate, debt consolidation loans.[13] Defendants used direct mail, Internet websites, radio advertisements, and unsolicited telephone calls to pitch their scam. *Id.* at p. 3 n.6.[14]

Believing Defendants would pay their debts or get them settled or dismissed, consumers agreed to allow Defendants to take their first loan "repayment" or a processing fee immediately or shortly thereafter; even though federal law expressly prohibits companies that sell debt relief services through telemarketing from collecting any fees until **after** successfully renegotiating the consumers' debt. *See infra* at p. 11. Then, Defendants continued to take consumers' money each month, in amounts ranging from $200 to $1,000 or more.[15]

iii. Defendants' Account Takeover Campaign

Defendants also lured consumers through account takeover campaigns. Defendants called consumers already enrolled with third-party debt relief providers and informed them that Defendants were taking over the servicing of their existing debt relief accounts. Many of these consumers had worked for years with their third-party debt relief providers and had saved thousands of dollars in legitimate escrow accounts for use in negotiating with creditors.[16]

Defendants either instructed consumers to transfer the money in their escrow accounts to Defendants,[17] or simply took the escrow funds without the consumers' consent.[18] Again,

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[13] *Id.*at p. 3, n.5.
[14] Defendants' mail solicitations included personalized letters to consumers' homes stating that it is from the "Customer Approval Center" of "321LOANS," "A NOT FOR PROFIT CORPORATION," and suggested that a low interest rate loan for tens of thousands of dollars, "Pre-Approval - Guaranteed," was only a phone call away. *Id.* at p.3 n.7, 8. Defendants instructed consumers to call to receive a loan that will resolve their unsecured debts and build their credit. *Id.* Defendants told consumers they would be able to "[c]ombine all balances on [their] current alleged debt and make one easy payment with one very low interest rate." *Id.* at pp. 3-4 n.10. Defendants maintained Internet websites with similar false debt consolidation loan promises. *Id.* at p. 4 n.11. When consumers called in response to Defendants' debt relief service ads, or when Defendants contacted consumers through unsolicited telephone calls, Defendants led consumers to believe that their debts would be paid off. *Id.* at pp. 5-6 n.16.
[15] *Id.* at p. 7, n.31.
[16] *Id.* at p. 7, n.32.
[17] *Id.* at p. 7, n.36.
[18] *Id.* at pp. 7-8, n.37.

Defendants began making monthly withdrawals from the consumers' checking accounts ranging from $200 to $1,000 or more. *Id.* at p. 8 n.38.[19]

Consumers often eventually learned from their creditors that Defendants, despite taking money from consumer checking accounts each month as payment for Defendants' services, Defendants never contacted consumers' creditors to seek payment, settle, or dismiss the consumers' debts.[20] In some instances, even when consumers showed Defendants that their creditors had offered to settle their debts, Defendants refused to settle the debts. *Id.* at p. 8 n.46.[21]

While Defendants collected millions from consumers, consumers generally received little, if anything, in return. Consumers did not receive debt consolidation loans and generally did not get their debts paid, settled, or dismissed or have their credit improved.[22] To the contrary, Defendants left consumers in worse financial positions, many of whom were already in financial distress,[23] elderly or disabled.[24] Some consumers were ultimately sued by their creditors,[25] and even forced into bankruptcy.[26] Often consumers' credit ratings were severely damaged.[27]

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[19] Defendants, however, did not provide debt consolidation loans. *Id.* at p. 8, n.39. Nor did Defendants generally appear to have paid, settled, or obtained dismissals of consumers' debts or improve consumers' credit. *Id.* at p. 8, n.40.
[20] *Id.* at p. 8, n.44, 45.
[21] Consumers often first learned that Defendants intended to keep their loan "repayments" and/or funds transferred from their escrow accounts, as "fees," upon making complaints to law enforcement or the Better Business Bureau. *Id.* at p. 9, n. 51. Consumers who once thought their debts would be paid, settled, or dismissed were essentially told that their debts have more than doubled (*Id.* at p. 9, n.52) - not only did consumers still owe their original debts, they now learned Defendants expected an equal amount in payments. *Id.* at p. 9, n.53. Defendants typically refused to return consumers' money (*id.* at p. 9, n.54) and, in many instances, reported the purported loan to credit bureaus. *Id.* at p. 9, n.55. A consumer who initially had a total unsecured debt of approximately $30,000 may discover that his credit report now showed a total debt of approximately $60,000 due to Defendants' purported "loan," even though the consumer received no money. *Id.* at p. 9, n.56.
[22] *Id.* at p. 9, n.57.
[23] *Id.* at p. 9-10, n.58.
[24] *Id.* at p. 10, n.60.
[25] *Id.* at p. 10, n.61.
[26] *Id.* at p. 10, n 62.
[27] *Id.* at p. 6, n.20; p.10, n.63.

Defendants misrepresented that they would provide consumers a low interest rate loan to pay off consumers' unsecured debts. Defendants also misrepresented that they would negotiate, settle, or alter the terms of payment or other terms of consumers' unsecured debts to reduce the balance, interest rate, or fees owed to a creditor or debt collector. Defendants further misrepresented that they would otherwise eliminate consumers' unsecured debts. As set forth above, Defendants did not provide consumers a low interest rate loan to pay off consumers' unsecured debts. Nor did they typically negotiate, settle, alter the terms of, or otherwise eliminate such debts.[28] To the contrary, Defendants generally attempted to double consumers' debts by seeking an equal amount in payments.[29] Defendants also misrepresented that they would improve consumers' creditworthiness, when in fact they often damaged it.[30]

Finally, Defendants falsely represented that some of the Receivership Defendants, who were providing debt relief services, were non-profit entities.[31] Defendants told consumers their purported non-profit status enables them to provide the loans at such low interest rates.[32] Defendants also falsely stated that any money they earn comes from the interest rates consumers will pay, or from any difference between what consumers pay them and the debts they are able to dismiss or settle.[33] Many consumers have stated that Defendants' purported non-profit status was important, as it made Defendants and their offers appear more credible and legitimate.[34] Despite Defendants holding out many as non-profit organizations, all Corporate Defendants acted as for-profit entities operating for the benefit of themselves and their members.

That Defendants were engaged in a fraudulent scheme is self-evident. In addition,

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[28] *Id.* at p. 21, n.151.
[29] *Id.* at p. 21, n.152.
[30] *Id.* at p. 22, n.154.
[31] How a company actually operates and who it benefits are dispositive of the non-profit issue. *Id.* at p. 22, n.153.
[32] *Id.* at p. 6, n.21.
[33] *Id.* at p. 6, n.23.
[34] *Id.* at p. 6, n.25.

federal law specifically prohibits deceptive and abusive telemarketing acts or practices regarding debt-relief services.[35] Such businesses are also expressly prohibited from collecting advance fees – i.e., requesting or receiving fees until **after** having renegotiated or settled their consumers' debts.[36]

As set forth above, Defendants marketed their scheme through telemarketing, made numerous material misrepresentations, and collected advance fees. Indeed, Defendants took upfront payments from consumers' escrow accounts and thereafter debited hundreds or thousands of dollars each month from the same consumers' checking accounts.[37] Before taking the Fifth, Defendant Marcus admitted to the Receiver that he used these and other funds from consumers to acquire property for his own personal benefit.[38]

C. The Court Should Order Turnover Because Defendant Marcus Purchased the Property Using Receivership Monies and Relief Defendant James Marcus Will Be Unjustly Enriched to the Detriment of the Receivership Estate and Consumers.

The Receiver seeks an Order for turnover of the Property and Property Proceeds currently titled in Relief Defendant James Marcus' name to the Receiver. Turnover orders, such as is contemplated by this Motion, are appropriate in federal equity receivership cases.[39]

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[35] *See* 16 C.F.R. § 310.3(a)(2)(x).
[36] *See* 16 C.F.R. § 310.4(a)(5)(i).
[37] *Id.* at p. 23, n.162, 163.
[38] *Receiver's Second Interim Report* [ECF No. 136 at p. 14-15].
[39] *See SEC v. Creative Capital Consortium*, No. 08-81565-CV, 2013 WL 12167733 (S.D. Fla. Jan. 23, 2013) (holding that because it was undisputed that Options Accounts were funded by receivership proceeds, they were therefore property of the receivership and "the Receiver ha[d] title to the Options Accounts by operation of law."); *SEC v. Aquacell Batteries, Inc.*, No. 6:07-cv-608, 2008 WL 4371329, at *2-3. (M.D. Fla. May 9, 2008) (granting receiver's turnover motion because ". . .purchase of property solely with [defendant corporate entity] funds renders the property receivership property. . ."); *see also SEC v. Elmas Trading Corp.*, 620 F. Supp. 231 (D. Nev. 1985), *aff'd* 805 F.2d 1039 (9th Cir. 1986) (collecting cases where courts have held "that a receiver can exercise control over third-party property purchased using 'scheme proceeds.") (citing *S.E.C. v. Nadel*, No.8:09-cv-87-T-26TBM, 2013 WL 2291871, at *2 (M.D. Fla. May 24, 2013) (third party entity's use of scheme proceeds to purchase oil and gas leases subjected it to inclusion in receivership despite that it was not an alter ego of defendant); *see also SEC v. Lauer*, No. 03-80612-Civ, 2009 WL 812719, at *4-5 (S.D. Fla. Mar. 26, 2009) (proceeds from sale of condominium that was maintained with tainted funds are also tainted by the fraud); *In re Fin. Federated Title & Tr., Inc.*, 347 F.3d 880 (11th Cir. 2003) (establishing constructive trust on property purchased with over 90% funds from Ponzi

Like in *Creative Capital Consortium and Aquacell Batteries,* where both this Court and the Middle District Court of Florida held that the properties at issue constituted receivership property that must be turned over to the Receiver because they were obtained solely with funds from a receivership entity, here too, the Property was purchased with funds from Receivership Defendants.

Turnover is likewise required under the law of constructive trust to avoid unjust enrichment of Relief Defendant James Marcus at Receivership and victim expense. "A constructive trust is one raised by equity in respect of property which has been acquired by fraud, *or where, though acquired originally without fraud, it is against equity, that it should be retained by him who holds it* . . . [E]quity will raise a constructive trust and compel restoration, where one through actual fraud, abuse of confidence reposed or accepted, *or through other questionable means* gains something for himself which in equity and good conscience he should not be permitted to hold." *In re Lee*, 574 B.R. at 293 (emphasis in original) (quotation omitted). *See In re Fin. Fed. Title & Trust*, 347 F.3d at 891 ("The doctrine of constructive trusts is a recognized tool of equity designed in certain situations to right a wrong committed and to prevent unjust enrichment of one person at the expense of another either as a result of fraud, undue influence, abuse of confidence or mistake in the transaction."). Because Defendant Marcus obtained the Property through, at best, questionable means and thereby transferred something to his brother for no consideration, which in equity and good conscience, Relief Defendant James Marcus should not be permitted to retain the Property and Property Proceeds which should be turned over to the Receiver.

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scheme); *CFTC v. Hudgins*, 620 F. Supp. 2d 790, 795 (E.D. Tex. 2009) (directing sale of condominium because defrauder's innocent girlfriend paid the mortgage with Ponzi scheme funds).

D. Alternatively, the Court Should Impose an Equitable Lien on the Property.

Florida courts impose equitable liens on homesteads when the plaintiff can establish that "funds obtained through fraud or egregious conduct were used to invest in, purchase or improve a homestead." *In re Hecker*, 264 F. App'x at 790 (affirming application of equitable lien where fraudulently obtained funds were used to improve property). Thus, to obtain an equitable lien on a Florida homestead, a plaintiff need merely establish by a preponderance of the evidence: (1) the existence of egregious or fraudulent conduct, and (2) the tracing of funds from that conduct to the purchase or improvement of the homestead. *FTC v. American Precious Metals*, No. 11-61072, 2017 WL 1323466, at *3 (S.D. Fla. Apr. 10, 2017) (Florida law merely requires showing "by the preponderance of the evidence that the fraudulently obtained funds can be directly traced to the investment, purchase or improvement of the homestead."); *In re Mazon*, 387 B.R. 641, 646 (M.D. Fla. 2008) ("dollar-for-dollar accounting is not required, but the party challenging the homestead exemption has the burden of proving his case by a preponderance of the evidence."). Moreover, the focus of the inquiry is on preventing unjust enrichment, not on defendants' culpability. *Lee*, 574 B.R. at 293; *see also In re Financial Federated*, 347 F.3d at 890 (same).

"Once an equitable lien is imposed, the property can be sold and the proceeds applied in favor of the lien holder." *American Precious Metals*, 2017 WL 1323466, at *1; *see also SEC v. Kirkland*, No. 6:06-cv-183, 2008 WL 1787234, at *5 (M.D. Fla. Apr. 11, 2008) (citing *Jones*, 106 So. at 129) (imposing equitable lien on defendant's homestead and granting the receiver's motion to sell property).

Here, the Receiver has undisputedly traced the monies Relief Defendant Marcus used to purchase the Property as coming from the Receivership Defendants operated by Defendant Marcus. Additionally, the Receiver has shown by far more than a preponderance of the evidence

that the monies were obtained from consumers through fraud and other egregious means, including false representations that Defendants would pay, settle, or obtain dismissals of consumers' debts and improve consumers' credit. [40] Instead, Defendant Marcus misappropriated millions of dollars to purchase the Property (amongst other things). *See American Precious Metals*, 2017 WL 1323466, at *2 (imposing equitable lien on the homestead of defendant who "was an owner or manager of [the fraudulent corporate entity] and oversaw its day-to-day operations.").

Because the Receiver has established the existence of fraudulent or egregious conduct, and established that the Property was purchased with Receivership Defendant monies from such conduct, as well as the unjust enrichment Relief Defendant James Marcus enjoys by his ownership, the Court should grant the Receiver's Motion for equitable lien and return of the Property and Property Proceeds.

E. Turnover is also appropriate under Chapter 726 of the Florida Statutes.

For the same reasons set forth above, turnover is alternatively required pursuant to Fla.

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[40] Finally, Defendant Marcus's fraudulent conduct was further confirmed when the Receiver's team interviewed customers who were victims of Defendant Marcus' fraudulent scheme. For example:
(1) Patricia W. paid $1,400 (CAD) (approximately $1,057) per month from February 2015-May 2017, for a total of $28,500.00. Her total debt was $53,775 (CAD) (approximately $40,869). Originally, she was working with the Law Offices of Cockburn & Associates in Toronto, Canada. However, she was recently contacted by phone and e-mail, by Receivership Defendant Cockburn to move her file over to their "Litigation Prevention" Department. Patricia W. was unaware that this was a totally different company than her original debt-settlement company. Her escrow money was then moved to a new account titled in the name of Cockburn. She later learned that there were funds missing from her escrow. The explanation she was given by Cockburn was that the company took its fee. She was also told she had to build up her escrow again to settle more accounts. She was told Cockburn would fix her credit rating, but in fact, her credit rating has deteriorated and she cannot even rent an apartment or get a car loan.
(2) In August 2013, Jaime H. signed a contract with a debt relief company named Brite Solutions who put him on a five-year plan to escrow $350.23 a month to pay down debt so he could buy a home. Then in February 2015, Jaime H. was contacted by Receivership Defendant Guardian Legal and/or Breeze Financial Solutions who told him that his portfolio was being transferred to them. He then signed a new contract with Guardian Legal/Breeze Financial Solutions, whereby he would continue to escrow $350.23 per month toward debt relief. Jaime H. inquired about his escrow money and was told that the money would be transferred to Guardian Legal. He was not given an option to opt out. In total, he paid close to $16,000 and received no debt relief. After 5 years of making payments, when he thought he would be debt-free, Jaime H. is left with nothing.

Stat. §§ 726.105(1)(a) and (b) which permit the avoidance of transfers made with actual intent to hinder, delay or defraud creditors, **or** for no consideration.

To recover, the Receiver need merely prove "by a preponderance of the evidence that the Receivership Defendants transferred an interest in property on or within [four] year(s)." *Worldvision Entm't v. Greenmark (In re Worldvision Entm't),* 275 B.R. 641, 655 (Bankr. M.D. Fla. 2002). *See also Bauman v. Bliese (In re McCarn's Allstate Fin., Inc.),* 326 B.R. 843, 848 (Bankr. M.D. Fla. 2005) ("The elements of a case under Bankruptcy Code section 548 and Florida Statutes section 725.105(1)(a) are as follows: a. The debtor must have transferred the property within one year (under section 548) or four years (under section 726.105) of filing of the bankruptcy petition .... b. The transfer must have been made with the actual intent to hinder, delay, or defraud any entity to which the debtor was indebted."). The threshold issue is whether the property transferred represents property of the Receivership Defendants or, more specifically, an interest of the Receivership Defendants in property. *See Beiger v. IRS,* 496 U.S. 53, 59, 110 S.Ct. 2258, 2262-63, 110 L. Ed. 2d 46 (1990).

The United States Supreme Court has determined that in the context of an avoidance action, the term "property of the debtor" is best understood as "property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings." *Beiger,* 496 U.S. at 58. As it relates to fraudulent transfer actions, the Eleventh Circuit has determined that "any funds under the control of the debtor, regardless of the source, are property deemed to be the debtor's property, and any transfers that diminish that property are subject to avoidance." *Nordberg v. Sanchez (In re Chase & Sanborn Corp.)*, 813 F.2d 1177, 1180 (11th Cir. 1987).

The undisputed evidence in this case demonstrates that the Receivership Defendants *via*

Defendant Marcus were in control of the funds at issue in this case and directed the disposition of the funds to acquire, improve and maintain the Property. There is no legal or factual dispute that the monies in question constitute property of the Receivership Defendants which are subject to fraudulent transfer claims.

1. The Receivership Defendants Received Nothing as Consideration for the Purchase of the Property and the Transfers Are Therefore Avoidable under Fla. Stat. § 726.105(1)(B).

KM's tracing analysis shows receivership funds were used to acquire the Property. There is no evidence that the Receivership Defendants received anything as consideration for the transfer of the Property to Relief Defendant James Marcus.

To the extent Relief Defendant James Marcus argues that he provided an unsecured promissory note to his brother or receivership entity Halfpay (*see* Exhibit C) in exchange for the gift of the Property, this argument is unavailing. Relief Defendant James Marcus never made a payment on the note. The terms of the note contradict themselves and do not appear to be arms-length. The Receiver's investigation has not revealed any evidence to support a finding that there was any expectation that the unsecured promissory note would be repaid or enforced. Prior to the Receiver's appointment, no efforts were made to collect on the defaulted note. Despite Relief Defendant's "cash out" mortgage, he made no effort to repay any portion of the note. Moreover, it does not appear that Relief Defendant James Marcus ever had the financial capability to pay the promissory note. These facts clearly reflect that the Property was a gift from Defendant Marcus to his brother, Relief Defendant James Marcus. *See Estate of Flandreau v. C.I.R.*, 994 F.2d 91 (2nd Cir. 1993).

As such, the transfers of monies by Defendant Marcus from the Receivership Defendants to acquire, improve and maintain the Property are fraudulent and the transfer to Relief Defendant

James Marcus is avoidable as a matter of law. *See* Fla. Stat. §726.105(1)(b).

2. The Transfers to Acquire the Property were made with the Actual Intent to Hinder, Delay, or Defraud Creditors.

Alternatively, the transfers made in connection with the Property were made with the actual intent to hinder, delay, or defraud creditors. *See* Fla. Stat. §726.105(1)(a). "The presence of only one [badge of fraud] has been held to justify a finding of actual fraudulent intent." *Meninger v. Khanani (In re Khanani)*, 374 B.R. 878, 889 (Bankr. M.D. Fla. 2005); *see also Kipperman v. Onex Corp.*, No. 1:05-CV-1242, 2007 WL 2872463, at *9 (N.D. Ga. Sept. 26, 2007).

"Common badges of fraud include: (1) the lack or inadequacy of consideration for the property transferred; (2) the existence of a family, friendship or other close relationship between the transferor and the transferee; (3) the transferor's retention of the possession, control, benefits or use of the property in question; (4) the financial condition of the transferor both before and after the transfer took place; i.e., whether the transfer resulted in insolvency; (5) the cumulative effect of these transactions and course of conduct after the onset of financial difficulties or dependency or threat of suit by creditors; and (6) the general chronology and timing of the transfer in question." *Khanani,* 374 B.R. at 889 (citing *Ingersoll v. Kriseman (In re Ingersoll),* 124 B.R. 116, 121-22 (Bankr. M.D. Fla. 1991)). In addition, courts may also consider other factors enumerated in Fla. Stat. §726.105(2).

Here, the factors overwhelmingly demonstrate that the transfers by the Receivership Defendants for Relief Defendant James Marcus to acquire the Property were made with actual intent. First, there was no consideration paid by Relief Defendant James Marcus, or his wife Jennifer Perez, to the Receivership Defendants for their transfer of funds to acquire the Property. Despite providing the funds for the acquisition of the Property, the Receivership Defendants

received no ownership or security interest in the Property. In addition, Defendant Marcus was an insider and control person for the Receivership Defendants and his brother, an insider, was the beneficiary of the transfers. All of these facts are factors that support a finding of actual intent.

In addition, as discussed previously, substantial evidence exists, including admissions by Defendant Marcus, that funds provided by consumers were not utilized in the represented fashion. Defendant Marcus' acquisition of the Property for his brother is just another example of his purchasing real estate with consumer funds. [*See* ECF No. 90; ECF No. 91]. No evidence exists that consumers consented to the use of their monies in this fashion. In short, Defendant Marcus' misappropriation of consumer funds to purchase the Property is compelling evidence that the transfers at issue were made with actual intent to hinder, delay, or defraud creditors.

IV. CONCLUSION

By way of this Motion, the Receiver seeks an order from this Court compelling Relief Defendant James Marcus to turn over the Property and the Property Proceeds.

The Receiver has conferred with counsel for Plaintiffs who support the relief sought. Defendants Jeremy Marcus, Smith and Segrea have no position on the relief sought.

WHEREFORE, the Receiver respectfully requests this Court to enter an Order for the turnover of the Property and the Property Proceeds, together with such other and further relief as this Court deems just and proper.

Respectfully submitted this 30th day of April 2018.

GENOVESE JOBLOVE & BATTISTA, P.A.
Attorneys for Jonathan E. Perlman, Court-Appointed Permanent Receiver
100 Southeast 2nd Street, Suite 4400
Miami, Florida 33131
Telephone: (305) 349-2300;
Facsimile: (305) 349-2310

By: /s/ Gregory M. Garno
Gregory M. Garno, Esq., FBN 87505
ggarno@gjb-law.com
Allison Day, Esq., FBN 494097
aday@gjb-law.com
Theresa M.B. Van Vliet, Esq., FBN 374040
tvanvliet@gjb-law.com
Heather L. Harmon, Esq., FBN 13192
hharmon@gjb-law.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via CM/ECF Notification and/or U.S. Mail to all parties on the attached service list on this 30th day of April 2018.

By: /s/ Gregory M. Garno, Esq.
Gregory M. Garno, Esq.

SERVICE LIST

Federal Trade Commission v. Jeremy Lee Marcus, et al.
USDC, SD Fla., Case No. 17-cv-60907-MORENO

Ryann Flack, Esq.
Ryann.Flack@myfloridalegal.com
Ronnie Adili, Esq.
Ronnie.Adili@myfloridalegal.com
Office of the Attorney General
Consumer Protection Division
SunTrust International Center
1 S.E. 3rd Ave, Suite 900
Miami, FL 33131
Telephone: (786) 792-6249
Attorneys for State of Florida, Office of Attorney General

Valerie M. Verduce, Esq.
vverduce@ftc.gov
Angeleque P. Linville, Esq.
alinville@ftc.gov
Federal Trade Commission
225 Peachtree Street, Suite 1500
Atlanta, GA 30303
Telephone: (404) 656-1355
Facsimile: (404) 656-1379
Attorneys for Federal Trade Commission

Jonathan E. Perlman, Esq.
jperlman@gjb-law.com
Gregory M. Garno, Esq.
ggarno@gjb-law.com
Allison Day, Esq.
aday@gjb-law.com
Theresa M.B. Van Vliet, Esq.
tvanvliet@gjb-law.com
Genovese Joblove & Battista, P.A.
Miami Tower, 44th Floor
100 Southeast 2nd Street
Miami, FL 33131
Telephone: (305) 349-2300
Facsimile: (305) 349-2310
Receiver and his Counsel

Rachel Hirsch, Esq.
rhirsch@ifrahlaw.com
A. Jeff Ifrah, Esq.
jeff@ifrahlaw.com
Ifrah Law
1717 Pennsylvania Avenue, NW, Suite 650
Washington, DC 20006

Maurice B. VerStandig, Esq.
mac@mbvesq.com
The VerStandig Law Firm, LLC
12505 Park Potomac Avenue, Sixth Floor
Potomac, Maryland 20854
Counsel for Defendant Jeremy Lee Marcus and
Relief Defendants Halfpay International, LLC; Halfpay NV LLC;
JLMJP Pompano, LLC; and Nantucket Cove of Illinois, LLC

Edward Shohat, Esq.
eshohat@joneswalker.com
Barry S. Turner, Esq.
bturner@joneswalker.com
Jones Walker, LLP
201 South Biscayne Blvd., 26th Floor
Miami, FL 33131
Counsel for Defendants Craig Davis Smith and
Yisbet Segrea

Mark Wilensky, Esq.
dubiner_wilensky@bellsouth.net
Dubiner & Wilensky, L.L.C.
1200 Corporate Center Way, Suite 200
Wellington, FL 33414
Counsel for Relief Defendant James Marcus

Relief Defendants

Jack Marcus
jackmarcus@bellsouth.net
6436 Grand Cypress Cir.
Lake Worth, FL 33463
Relief Defendant Via Electronic Mail

Teresa Duda
110 Glouchester Street
Boca Raton, FL 33487
Pro Se Via U.S. Mail