IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

THOMAS W. MCNAMARA, as the Court-Appointed Receiver for SSM Group, LLC; CMG Group, LLC; Hydra Financial Limited Fund I; Hydra Financial Limited Fund II; Hydra Financial Limited Fund III; Hydra Financial Limited Fund IV; River Elk Services, LLC; OSL Marketing, Inc., a/k/a OSL Group, Inc.; and related subsidiaries and affiliates,	)	
Plaintiff,	)	
v.	)	Case No. 4:16-cv-01203-SRB
KATTEN MUCHIN ROSENMAN LLP	)	
Defendant.	)	

ORDER

Before the Court is Defendant Katten Muchin Rosenman LLP's Motion to Dismiss. (Doc. #8). For the following reasons, the motion is denied.

I. Background

Plaintiff Thomas McNamara brings this suit against Defendant Katten Muchen Rosenman LLP, alleging it committed legal malpractice and breached its fiduciary duty to its clients. Plaintiff alleges Defendant gave negligent legal advice as to the applicability of the Consumer Financial Protection Act of 2010 ("CFPA") to entities for which Plaintiff is the court-appointed Receiver. Plaintiff alleges this negligent legal advice resulted in a lawsuit against the receivership entities by the Consumer Financial Protection Bureau ("CFPB").

Plaintiff was appointed as Receiver for a number of payday lending businesses ("the Moseley Entities") that were previously owned and operated by Richard Moseley, Sr. In September 2014, the CFPB sued Moseley and the Moseley Entities alleging that under

Moseley's control, the Moseley Entities issued loans to consumers without first obtaining the consumers' consent and authorization. The CFPB also alleged that the Moseley Entities misled consumers by failing to make required disclosures and by conditioning lending on pre-authorization of electronic payments. During the time period related to that suit, Defendant provided legal advice to the Moseley Entities. Plaintiff alleges Defendant is liable for attorney malpractice "by failing to advise [the Moseley Entities] that the loan documents they were using had to comply with [the Truth in Lending Act], the [Electronic Fund Transfer Act], and the CFPA once the CFPA went into effect, and by failing to advise the [Moseley] Entities that they could be held liable to CFPB under the CFPA for violations in the loan documents[.]" (Doc. #1, p. 31, ¶133).

Defendant moves to dismiss this action arguing Plaintiff's claims are barred by the doctrine of *in pari delicto*. Defendant argues the Moseley Entities' wrongdoing was deliberate, and a deliberate wrongdoer cannot recover against an accomplice under Missouri law. Plaintiff disputes the applicability of the doctrine of *in pari delicto* and alleges he is acting for the benefit of consumers as a court-appointed equity receiver.

II. Legal Standard

In order to survive a motion to dismiss, Plaintiff's Complaint must meet the standard set out in Rule 8(a), which requires that a plaintiff plead sufficient facts to state a claim upon which relief may be granted. Fed. R. Civ. P. 8(a); *accord* Fed. R. Civ. P. 12(b)(6). "'The complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1002 (8th Cir. 2016) (quoting *Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009)). "The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is

more than a 'sheer possibility.'" *Vang v. PNC Mortgage, Inc.*, 517 F. App'x 523, 525-26 (8th Cir. 2013) (quoting *Braden*, 558 F.3d at 594). "It is not, however, a 'probability requirement.'" *Id.* at 526. "Thus, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." *Id.* (internal quotations omitted). "A complaint states a plausible claim for relief if its factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "In making this determination, we must draw all reasonable inferences in favor of plaintiffs." *McCaffree Fin. Corp.*, 811 F.3d at 1002 (citing *Crooks v. Lynch*, 557 F.3d 846, 848 (8th Cir. 2009)).

III. Discussion

Defendant argues Plaintiff's "Complaint fails under well-established and longstanding principles of Missouri law, in particular the doctrine of *in pari delicto*." (Doc. #9, p. 11). Specifically, Defendant argues that because the Plaintiff-Receiver stands in the shoes of the Moseley Entities and Defendant participated in the Moseley Entities' alleged wrongdoing, the conduct is imputed to Plaintiff, and the claims should be barred. Defendant contends Plaintiff is not acting on behalf of consumers and is not empowered by the receivership Order to recoup money on behalf of consumers.

In response, Plaintiff argues "*[i]n pari delicto* is wholly inapplicable in these circumstances." (Doc. #14, p. 7). Plaintiff reasons that "if the Receivership Entities themselves or their former owners had elected to bring suit for their own benefit" then this doctrine would apply to bar suit. *Id.* However, Plaintiff states that because "this suit was brought by a court-appointed equity receiver for the benefit of consumers injured by [Defendant's] legal

malpractice[,]" the claims are not barred and Defendant's motion to dismiss this action must be denied. *Id*.

"Under the doctrine of *in pari delicto*, the legal counterpart of the equitable doctrine of unclean hands, 'a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party.'" *Jo Ann Howard & Associates, P.C. v. Cassity ("Cassity II")*, 146 F. Supp. 3d 1089, 1097 (E.D. Mo. 2015) (quoting *Dobbs v. Dobbs Tire & Auto Centers, Inc.*, 969 S.W.2d 894, 897-98 (Mo. App. E.D. 1998)). In order for the Court to apply *in pari delicto* at the motion-to-dismiss stage of litigation requires "an essentially equitable and necessarily factbound apportionment of responsibility." *Pearlman v. Alexis*, No. 09–20865, 2009 WL 3161830, at *3 (S.D. Fla. Sept. 25, 2009). "A party may not maintain a claim for damages, where the cause of action is based on an unlawful act or transaction in which both plaintiff and defendant participated." *Id.* "This is a principle founded upon [Missouri] public policy, not for the sake of the defendant, but for the law's sake, and that only." *Dobbs*, 969 S.W.2d at 897 (citations and internal quotation marks omitted).

"The appointment of the receiver remove[s] the wrongdoer from the scene." *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995); *see also Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 737 (8th Cir. 2015) ("[B]ecause this case involves a Ponzi scheme, the Receivership Entities are considered victims of the fraud and thus creditors of the Ponzi scheme."). "[T]he receiver has the power to bring the claims on behalf of [the liquidating entity] and its creditors, not solely [the liquidating entity]." *Jo Ann Howard & Associates, P.C. v. Cassity ("Cassity I")*, 79 F. Supp. 3d 1001, 1017 n.13 (E.D. Mo. 2015). Receivers are acting on behalf of creditors as well as the entities who have committed the alleged wrongdoing, and "[w]hile the creditors may

not be in the same category as innocent holders of notes, they occupy a status brought about by reliance upon . . . the corporation conforming to the law." *Joy v. Godchaux*, 35 F.2d 649, 656 (8th Cir. 1929); *see also F.D.I.C. v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995) ("[A] party may itself be denied a right or defense on account of its misdeeds, [but] there is little reason to impose the same punishment on a trustee, receiver or similar innocent entity that steps into the party's shoes pursuant to court order or operation of law."). When the allegedly "corrupt officers have been removed from [the liquidating entity] and will not benefit from any recovery by [the Receiver] and the creditors of [the liquidating entity]," the rationale for *in pari delicto* disappears. *Cassity I*, 79 F. Supp. 3d at 1017.

Here, Plaintiff does not bring this suit for failure to detect fraud; rather, Plaintiff brings this suit for the allegedly negligent legal advice that may have exposed the Moseley Entities to liability. (Doc. #1, p. 8, ¶34). The Honorable Dean Whipple appointed Plaintiff as Receiver, requiring him to "[c]ontinue to conserve, hold, and manage all Receivership Assets, and perform all acts necessary or advisable to preserve the value of those Assets, in order to prevent any irreparable loss, damage, or injury to *consumers or to creditors* of the Receivership Defendants[.]" *Consumer Fin. Prot. Bureau v. Moseley*, No. 14-cv-00789-DW, Doc. #40, p. 24, ¶XV(D) (W.D. Mo. Oct. 3, 2014) (emphasis added). Just as in *Cassity I*, Plaintiff's status as Receiver changes the applicability of *in pari delicto*. *Cassity I*, 79 F. Supp. 3d at 1017. The allegations in Plaintiff's Complaint show that Plaintiff is charged with protecting assets of the Receivership for the benefit of creditors and consumers, not for the benefit of the entities' prior stakeholders. (Doc. #1, p. 8, ¶34). Because Plaintiff is acting on behalf of creditors and consumers pursuant to an order from this Court, the basis of the defense of *in pari delicto* is not present on the face of the Complaint and *in pari delicto* is not applicable.

Although the Court finds *in pari delicto* does not apply at this stage of litigation, the Court acknowledges the record has not been fully developed through discovery. Without discovery, the Court finds "the affirmative defense of *in pari delicto*, not having been established on the face of the Complaint, does not compel dismissal . . . at [the motion-to-dismiss] stage of the proceedings." *In re Student Fin. Corp.*, 335 B.R. 539, 547 (Bankr. D. Del. 2005). Therefore, because Plaintiff's Complaint does not show on its face that Defendant is entitled to the defense of *in pari delicto* for Plaintiff's legal malpractice or breach of fiduciary duty claims, Defendant's motion to dismiss is denied.

IV. Conclusion

Accordingly, it is hereby

ORDERED that Defendant Katten Muchin Rosenman LLP's Motion to Dismiss (Doc. #8) is **DENIED**.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH, JUDGE
UNITED STATES DISTRICT COURT

DATE: March 9, 2017