UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. Zayed, in his Capacity as
Court-Appointed Receiver for Trevor G.
Cook et al.,

Petitioner, Civil No. 11-cv-1042 SRN/FLN

v.

David Buysse, Steven and Pamela Cheney,
Walter Defiel, John Dzik, Terry Frahm,
Steven and Jenene Fredell, William Harris,
Michael Heise, Michael and Cynthia Hillesheim,
Larry Hopfenspirger, Steven Kautzman,
James McIntosh, George and Karen Morrisset,
Reynold Sundstrom, and Dot Anderson,

Respondents.

RESPONDENT DOT ANDERSON'S MEMORANDUM OF LAW IN OPPOSITION TO THE RECEIVER'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Dot Anderson ("Anderson") submits this Memorandum In Opposition to the Receiver's Motion for Summary Judgment. The Receiver asserted fraudulent transfer and unjust enrichment claims against Anderson, who at the age of eighty-nine made a $102,000 investment in Relief Defendant Basel. Anderson invested in mid-June 2009 on the advice of her grandson, Grant Gryzbowski, who worked for a Receivership Entity. Just weeks later, after reading a newspaper article about a lawsuit filed against Cook and others (but not Basel, into whom Anderson had invested), Anderson decided to close her

investment account. She filled out the appropriate paperwork and submitted the completed form, as the account opening documents instructed her to do. In response, Basel closed her account on July 15 and wired her $102,000. Julia Smith, the authorized signor on Basel's account, arranged the wire transfer to Mrs. Anderson. Anderson did not profit from her brief investment. She received only her principal investment back – to which she was entitled as a matter of law.

The Receiver's suit against Anderson seeks to do what Cook and the other crooks were unable to do in furtherance of the claimed Ponzi scheme – take Anderson's money from her and give it to other investors. The Receiver claims that the return to Anderson of her principal was a fraudulent transfer and "preferential." But the Minnesota Fraudulent Transfer Act permits preferential payments to legitimate creditors. The payment to Anderson was a payment *to* a creditor, not a transfer to *avoid* a creditor. The law of fraudulent transfers is designed to make sure that legitimate creditors such as Anderson are paid with available funds – it is not designed to equalize payments among all creditors.

The Receiver's motion fails to establish that Basel was involved in the Ponzi scheme. Nor is there any evidence that Anderson's decision to close her account was an effort by Cook (or anyone else) to defraud others or evade any creditors. Without such evidence, the fraudulent transfer claim fails. And the Receiver mixes up the elements of the statutory fraudulent transfer claim. Minnesota's fraudulent transfer statute grants a cause of action to defrauded creditors – it does *not* empower the Receiver who represents the debtor entity that made the transfer to undo the transaction. To try and salvage this

fundamental problem with the claims, the Receiver now claims that Cook is the "debtor" under the act. But Cook had no interest in Basel's Associated Bank account or funds transferred to Anderson. The funds Basel transferred came out of a Basel account out of which Cook did not even have signing authority. Thus, the Receiver cannot establish that Cook (the claimed debtor) had any interest in the funds returned to Mrs. Anderson, which is a necessary element of the MUFTA.

Anderson received her funds in good faith. She did not know of the Ponzi scheme when she requested her money back, nor could she have uncovered it. There was no evidence Basel was insolvent. Although her grandson Gryzbowski worked for Cook, Gryzbowski was kept in the dark about Cook's illegal actions. Gryzbowski did not know there was a Ponzi scheme being operated. Indeed, Gryzbowski never withdrew his own funds, his father's investment, or his mother's best friend's investment with Cook. Gryzbowski did not handle his grandmother's investment any differently than any other investor.

Nor could Anderson have learned of Cook's schemes. Chief Judge Davis addressed the issue of what information was knowable at the time Anderson received her funds, in the context of the government's attempt to claw back payments made to the lawyers representing Cook and others. Judge Davis concluded that when:

> [t]he fee retainer agreements were entered into, the SEC's and CFTC's investigations had only begun, and no criminal investigation had commenced. The same is true for the civil [Phillips] lawsuit. In July 2009, the record in the civil suit contained only pleadings and limited evidence. Under these circumstances, the Court will not find that counsel knew or should have known that the source of the funds paid were from a fraudulent scheme.

Case 0:09-cv-03332, Document 186, p. 8. Judge Davis concluded that counsel defending Cook, who could ask questions subject to the protections of the attorney-client privilege, could not have known their retainers were fruits from a fraudulent scheme. But the Receiver maintains that 89-year-old Anderson should have been able to uncover what even Cook's own lawyers did not know.

Anderson was not unjustly enriched when she received only the principal amount of her investment back. She had a contractual right to the funds. Investors in Ponzi schemes have legal and equitable claims against the defrauding entity in the amount of the principal they invested. One is not unjustly enriched by receiving what they have a legal right to claim. Nor do the facts justify the Receiver's claim that Anderson was "enriched" when compared to other investors, (even if that were the relevant standard). Indeed, the Receiver has allowed more than a 100 "winning investors" who profited from the Ponzi scheme to pay back only their profits, and keep the principal payments they received. Anderson should be treated no differently. The Receiver's motion should be denied.

BACKGROUND FACTS

1. Anderson's June 15, 2009 Investment With Basel.

When deposed, Mrs. Anderson was 90 years old. Jansen Depo. Ex. 182 (Anderson Depo.) at 71. Mrs. Anderson was suffering from depression at that time and had received seventeen shock treatments for her depression. *Id.* Those treatments affected Mrs. Anderson's memory. *Id.* at 71-72.

Anderson was 89 years old when she made her investment with "Basel Institutional" on June 15, 2009. *See* Declaration of Adam S. Huhta Doc. 190 (filed 12/21/2011)("Huhta Dec") Ex. 3 (Anderson Depo.) at 44.[1] Anderson provided $102,000 to her grandson Grant Gryzbowski, who worked for a Receivership Entity, to be invested with Basel. *Id.* at 43. Anderson provided a $102,000 cashier's check to Gryzbowski to be invested. *See* Declaration of Adam S. Huhta Containing Confidential Documents (Doc. 191 filed 12/21/2011) ("Huhta Confidential Dec.") Ex. 10 (Anderson Depo. Ex. 4) at IR 003224. To make her investment, Anderson filled out a Basel Customer Agreement.

The account opening documents Anderson signed gave her the right to request her funds back at any time. *See* Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 185-86; Jansen Ex. 13 at 218. That agreement provided that Anderson could terminate the agreement at any time: "The client or Basel Institutional may terminate the customer Agreement with immediate effect by giving notice to the other party at any time." Huhta Confidential Dec. Ex. 11(Anderson Depo. Ex. 1) at IR 003237 (section 3.1). Upon termination, Basel was required to provide the remaining account balance to Anderson. *Id.* at IR 003237. Anderson also signed a "Customer Order Authorization and Limited the Power of Attorney" granting Oxford Global Partners authority to trade her account. Huhta Confidential Dec. Ex. 12 (Anderson Depo. Ex. 2). Anderson also executed a "Management Agreement" with Oxford Global Partners that provided:

[1] To the extent possible, Anderson will cite to exhibits and declarations already submitted by the parties in their initial filings.

> [either] party may terminate this Agreement upon written notice. The advisor shall follow clients instructions for liquidating Clients positions upon any such termination.

Huhta Confidential Dec. Ex. 13 (Anderson Depo. Ex. 3) at IR 003638 (section VII B).

2. Anderson's July 14 Request to Close Her Account.

Shortly after making her investment, Anderson saw an article addressing the lawsuit filed by the Phillips', who had invested in Crown Forex (not Basel, like Anderson). Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 119-121; *Id.* at Ex. 8 (Gryzbowski Ex. 6 – Star Tribune article). The suit was filed against Cook, Crown Forex, and other Receivership Entities, **not Basel**. Jansen Ex. 19 (Phillips Complaint). Gryzbowski also read the article, and from his discussions with Cook, concluded that the Phillips were hedge fund clients who were upset that they could only withdraw their funds at quarterly endpoints. Jansen Ex. 13 at 203-204.

Anderson contacted Gryzbowski for information and guidance on what to do. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 120-121. Gryzbowski indicated he did not know what was going on. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 122. Gryzbowski told her what he had been telling other investors - to do what she thought was right. *Id.* at 121. Mrs. Anderson asked Gryzbowski to keep her informed about what he knew. *Id.* at 120-21.

Gryzbowski was not concerned about the Phillips lawsuit, given the explanation he received from Cook and Moeller. Gryzbowski did not believe there was any connection between Crown Forex and Basel, because they were different companies. Jansen Ex. 13 (Gryzbowski Depo) at 276-77.

After another article was printed, Anderson decided to close her account. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 121-22. While the Receiver quotes Anderson's testimony about seeing an article "in regards. . . to the Ponzi scheme. . ." (Br. at 84), Anderson never heard the situation describe as a Ponzi scheme until much later. Jansen Ex. 182 at 70-71.

On July 14, she signed the necessary paperwork to close her account. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 233-34; Huhta Confidential Dec. Ex. 14 (Anderson Depo. Ex. 8) at IR003221. Gryzbowski submitted the paperwork. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 138-39. Anderson was the only person Gryzbowski was aware of who had invested in Basel who asked to close their accounts. Jansen Ex. 13 at 139.

Cook then asked Julia Smith, the authorized signatory on the Basel bank account at Associated Bank, to close the account and authorize the wire transfer. Huhta Confidential Dec. Ex. 15 (July 15 e-mails requesting wire transfer); Huhta Confidential Dec. Ex. 16 at IR012613 (Depository Declaration). Gryzbowski believed that each individual client had their own account at the investment institutions, and that when any client got funds back, they were getting their money back from their own account. Jansen Ex. 13 (Gryzbowski Depo.) at 241. Accordingly, although a later newspaper article indicated that Judge Davis had frozen funds in Receivership Entity bank accounts, Gryzbowski was not concerned, believing that the client funds were at Crown Forex or Basel, and had nothing to do with Cook's accounts that were frozen. *Id*. at 130-31. Additionally, Gryzbowski was led to believe that the Phillips were hedge fund customers

who wanted to make a withdrawal, but the hedge fund requirements only allowed withdrawals at quarterly endpoints. *Id.* at 203-204.

Cook was not involved in Anderson's decision to close her account. Huhta Dec. Ex. 1 (Cook Depo.) at 125. Anderson **never** spoke with Cook. Huhta Dec. Ex. 3 (Anderson Depo.) at 17; *Id.* at Ex. 1 (Cook Depo.) at. 114. When assisting his grandmother, Gryzbowski was not trying to prevent other investors from getting their money. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 217. At that time, Gryzbowski was not aware that various Receivership Entities were a Ponzi scheme. *Id.; Id.* at Ex. 1 (Cook Depo.) at 124-25. It wasn't until November 2009 that Gryzbowski suspected a problem with his employer. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 217. The SEC's investigation was not a factor influencing Gryzbowski to assist his grandmother in closing her account. *Id.* at 202.

Gryzbowski did not ask anyone to handle his grandmother's withdrawal differently than any other account. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 186. And Gryzbowski, the Basel representative who primarily assisted Anderson in closing her account, testified he was not trying to keep the funds from other creditors. Jansen Ex. 13 at 217.

The funds sent to Anderson were withdrawn from the "Basel" account into which Anderson's deposit was made. Huhta Confidential Dec. Ex. 17 (Associated Bank Financial Statement of Accounts) at IR012617. After the wire to Anderson closing her account, Basel's bank account at Associated Bank had $302,682.45 in it. *Id.* at IR012617. At that time, Basel had only five remaining investors, who had provided

funds totaling $327,625. Huhta Confidential Dec. Ex. 18 (Spreadsheet excerpts) at IR025816.[2]

Basel was apparently being set up given the bankruptcy involving the Crown Forex entities. Cook intended to run it legitimately. Huhta Dec. Ex. 1 (Cook Depo.) at 122. Although the receiver claims Basel was never formally organized, the papers for the Minnesota Secretary of State were prepared. Huhta Confidential Dec. Ex. 16 at IR01261. Basel clearly made a filing with the IRS to obtain its tax identification number. Jansen Ex. 191 at IR012608. Basel did not get the trading platform set up. Jansen Ex. 14 at 238. According to Cook, "It never got started." Huhta Dec. Ex. 1 (Cook Depo) at 122-123. "Her [Anderson's] money was just sitting there and it wasn't being managed or it wasn't being traded or anything." Huhta Dec. Ex. 1 (Cook Depo.) at 122-123; Jansen Ex. 18 (Cook Depo.) at 791; *see also* Huhta Confidential Dec. Ex. 17 (Associated Bank Statements) at IR012616-617. Basel stopped taking money shortly after it was set up, on the advice of counsel. Jansen Ex. 12 (Cook Depo.) at 161-162. Cook indicated that Basel even returned checks to customers, who had provided funds to open an account, rather than deposit the funds. Jansen Ex. 12 (Cook Depo.) at 162.

Cook was not an authorized signator on Basel's Account at Associated Bank – only Julia Smith and Pat Kiley were. Huhta Confidential Dec. Ex. 17 at IR012612 – 613; Jansen Ex. 191; Jansen Ex. 2 at ¶5(a). Cook testified that he had no interest in the funds in Basel's Associated Bank account. Jansen Ex. 12 at 195.

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[2] One purported investor listed on the SEC's spreadsheet provided a $75,000 check that bounced. *See* Huhta Dec. Ex. 17 at IR) 12617, noting a $75,000 withdrawal for "Deposit Return Item 5814" and IR012625 (copy of check No 5814 for $75,000 that apparently had insufficient funds in the account.

Cook testified all withdrawal requests were honored up to a certain day. Huhta Dec. Ex. 1 (Cook Depo.) at 123-124. Gryzbowski also testified that when his grandmother asked for her funds back on July 14, he had not heard of any customer not receiving their funds back, except the Phillips. Jansen Ex. 13 (Gryzbowski Depo.) at 192-193. Up until July 9, every customer that asked him for their funds back received their funds. Jansen Ex. 13 (Gryzbowski Depo.) at 193.

Basel's payment to Anderson was not made to induce other investors to invest in any Receivership Entity. *Id.* at Ex. 1 (Cook Depo.) at 126. Cook testified that the return of Anderson's funds by Basel was not done in furtherance of the Ponzi scheme. *Id.* at 126.

Anderson did not profit from her brief investment. *Id.* at 126-27. She put in $102,000, and received $102,000 back. *Id.*

3. The SEC Investigation.

On June 22, 2009, the SEC appeared at the Receivership Entities' offices for a non-public investigation. Before then, the employees of the Receivership Entities had no knowledge of any problems with their employer. Huhta Dec. Ex. 4 (Moeller Depo.) at 27-28. During that investigation, Cook represented to his employees that the investigation was a routine audit that should not concern them. Huhta Dec. Ex. 4 (Moeller Depo.) at 135-136. Gryzbowski was told that the SEC was there conducting a regular audit associated with the mutual fund. Jansen Ex.13 (Gryzbowski Depo.) at 199; 201. There was nothing out of the ordinary about the SEC being at the mansion. *Id.* at 199-200; 201.

Gryzbowski and Moeller, both of whom had invested with the Receivership Entities, kept their own personal funds invested with Cook! Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 187; *Id.* at Ex. 4 (Moeller Depo.) at 120-121. Gryzbowski also made no effort to withdraw his father's investment, or his mother's best friend's investment with Cook. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 187-188.

As of October 2009, three months after Anderson closed her account, the SEC still had not made any determination that any Receivership Entities were involved in wrongdoing. To the contrary, the SEC, in response to investors' requests, was informing investors that the mere fact of the investigation should not be construed as an indication that any violation of law had occurred, or as an adverse reflection on any person, entity, or security. *See* Huhta Confidential Dec. Ex. 19 (October 2009 Letter from SEC Division of Enforcement).

4. Chief Judge Davis Concluded That The Attorneys Representing Cook Neither Knew, Nor Should Have Known, Their Retainers Were From Fraudulent Funds.

Chief Judge Davis addressed the issue of what information was knowable at the time Anderson received her funds, in the context of the government's attempt to claw back payments made to the lawyers representing Cook and others. Both the SEC and the CFTC asked the Court to find that the lawyers representing Cook and the Receivership Entities not be allowed to retain the fees paid because the source of the retainers were likely the fruits of Cook's and Kiley's fraud. *See* Case 0:09-cv-03332, Doc. 186. The government argued that counsel knew or should have known that such funds were likely obtained by fraud. *Id*. In support of the argument, the government highlighted the fact of

the SEC's surprise walk-in of Cook's offices in mid June 2009, the CFTC subpoena to Oxford Global Partners in June 2009, the fact that a lawsuit was filed in July 2009 against Cook and others alleging fraud, and the fact that numerous newspaper articles appeared detailing the alleged fraud. Based on these facts, the CFTC and SEC argued that counsel was aware of sufficient facts to put them on notice that the source of the fees paid were from defrauded customers. Judge Davis disagreed, and found:

> When the fee retainer agreements were entered into, the SEC's and CFTC's investigations had only begun, and no criminal investigation had commenced. The same is true for the civil [Phillips] lawsuit. In July 2009, the record in the civil suit contained only pleadings and limited evidence. Under these circumstances, the Court will not find that counsel knew or should have known that the source of the funds paid were from a fraudulent scheme.

Case 0:09-cv-03332, Document 186 at 8. Judge Davis correctly concluded that counsel defending Cook could not have known their retainers were fruits from a fraudulent scheme -- but the Receiver maintains that 89-year-old Anderson should have been able to uncover what Cook's own lawyers did not know.

And there are others who profited from the scheme the Receiver allowed to keep 100% of the principal they received from the Receivership Entities. In December 2010, the Receiver sent out 150 demand letters to investors who received more money from Receivership Entities than they invested. The demand letters asked these 150 "winning investors" for the "profit" back, but allowed them to keep the principal. *See* 0:09-cv-03333-MJD –FLN Document 658, (Seventh Status Report Of Receiver) for a discussion of the letters sent to "winning" investors.

And although the Receiver's brief claims that Mrs. Anderson's request for funds was the only one that was honored in July 2009 (Br. at 8), that statement is incorrect. The Phillips – the investors whose July 7 lawsuit received the newspaper coverage seen by Anderson -- received hundreds of thousands of dollars in payments before Cook's scheme collapsed. The Phillips' received a $52,500 distribution from Cook on July 8, 2009, *after* they filed their lawsuit against Cook and others, and within a week of Anderson's request to close her account. Huhta Confidential Dec. Ex. 18 (spreadsheet excerpts). The Receiver has taken no action to disgorge those funds, and has preferentially treated the Phillips, who have cooperated with the Receiver in this action.

ARGUMENT

I. THE RECEIVER IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE FRAUDULENT TRANSFER CLAIM.

A. The Summary Judgment Standard Relating to the Good Faith Defense.

This Court is certainly aware of the standard for summary judgment – it may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, the Receiver must show that there is no genuine issue of material fact as to Mrs. Anderson's good faith when she asked to have her account closed and her principle returned to her. *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 7 (S.D.N.Y. 2007). Summary judgment is generally not appropriate on a good faith defense to fraudulent transfer, given the factual intensity of the analysis. *In re Indep. Clearing House Co.*, 77

B.R. 843, 862 (D. Utah 1987). Competing evidence regarding a party's good faith presents the classic issue for the fact-finder. *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299, 1320 (M.D. Fla. 2009).

B. The Minnesota Fraudulent Transfer Act.

MFTA's purpose is to prevent debtors from putting property which is available for payment of their debts beyond the reach of their creditors. *In re Wintz Companies.*, 230 B.R. 848, 859-60 (Bankr. 8th Cir. 1999). The typical fraudulent transfer scenarios involve debtors conveying property to friends whom the debtor expects will use the property in a way that benefits the debtor, debtors transferring property to family members or friends without consideration, or debtors exchanging assets a creditor might readily reach for assets that are difficult to seize. *See generally Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1508-09 (1st Cir. 1987). But fraudulent conveyance law does not seek to void transfers characterized as "preferences" – when one legitimate creditor is paid leaving insufficient funds to pay other creditors. *Id.* at 1508. As Justice Breyer wrote while sitting on the First Circuit, '[t]he basic object of fraudulent conveyance law is to see that the debtor uses his limited assets to satisfy some of his creditors; it normally does not try to chose among them." *Id.* at 1509.

The Receiver characterizes Anderson's request to close her account, and receipt of the principal she provided to Basel for investment, as "preferential." But under long-standing Minnesota law, it is not a fraudulent conveyance for even an insolvent creditor (and there is no proof that Basel was insolvent) to pay some creditors to the exclusion of others. "In the absence of legislation forbidding it, a debtor, even though insolvent at the

time, may convey his property so as to give one creditor a preference over another." *Farmers Co-Op Ass'n v. Kotz*, 222 Minn. 153, 23 N.W. 2d 576, 578 (Minn. 1946). "It follows that a corporation, though insolvent, may, as a general proposition, prefer one general creditor over another." *Id.* at 579. Paying legitimate creditors, when you do not have sufficient funds to pay all, does not show an intent to defraud those other creditors. "The intention by a debtor to give one creditor preference over others does not constitute a 'purpose to hinder, delay, or defraud creditors'. . ." *Grager v. Hansen*, 206 N.W. 440, 441-442 (Minn. 1925); *see also Thompson v. Schiek*, 213 N.W. 911, 912 (Minn. 1927) ("Payment of an honest debt is not fraudulent . . . although it operates as a preference, the rule being that a preference by an insolvent debtor of one of his creditors can be avoided only by appropriate proceedings under the bankruptcy law and is not open to attack in an action brought by another creditor."); *Johnson v. O'Brien*, 144 N.W.2d 720, 721-722 (Minn. 1966) (upholding payment by insolvent debtors to son for fair consideration, even though son knew of parents' fraudulent purpose). "Even the preferential repayment of pre-existing debts to some creditors does not constitute a fraudulent conveyance, whether or not it prejudices other creditors…." *In re Sharp Int'l Corp.*, 403 F.3d 43, 54 (2d Cir. 2005). The Receiver ignores this long line of Minnesota fraudulent transfer cases, and instead asks this court to fundamentally change the nature of fraudulent conveyance law in Minnesota, as a substitute for the Bankruptcy Code. As a legitimate investor and creditor of Basel, Anderson was entitled to the return of her principal investment at her request. Anderson respectfully requests that the Court reject the Receiver's attempts to judicially re-work the Minnesota statutory scheme on fraudulent transfers.

Given the rarity of direct evidence of fraudulent intent, courts typically evaluate actual fraud claims using circumstantial indicia of intent called "badges of fraud." *In re Northgate Computer Sys., Inc.*, 240 B.R. 328, 360 (Bankr. D. Minn. 1999). Inferring fraudulent intent is proper if a creditor establishes a "confluence" of "several" badges of fraud. *Kelly v. Armstrong*, 141 F.3d 799, 802 (8th Cir. 1998); *Northgate*, 240 B.R. at 364 (a single badge is not enough, "no matter the strength of its evidence").

The Receiver argues that the so-called "Ponzi presumption" applies to permit an inference of actual intent to defraud here. The seminal decision in *Indep. Clearing House Co*. explained:

> One can infer an intent to defraud future [investors] from the mere fact that the debtor was running a Ponzi scheme. Indeed, no other reasonable inference is possible. A Ponzi scheme cannot work forever. The investor pool is a limited resource and will eventually run dry. The perpetrator must know that the scheme will eventually collapse as a result of the inability to attract new investors. . . . He must know all along, from the very nature of his activities, that investors at the end of the line will lose their money. Knowledge to a substantial certainty constitutes intent in the eyes of the law . . . and a debtor's knowledge that future investors will not be paid is sufficient to establish his actual intent to defraud them.

In re Indep. Clearing House Co., 77 B.R. 843, 860-61 (D. Utah 1987). "The perpetrator nevertheless makes payments to present investors, which, by definition, are meant to attract new investors. He must know all along, from the very nature of his activities, that investors at the end of the line will lose their money." *Id.* The Utah District Court held, "if at the time the debtors made transfers to earlier undertakers they had the actual intent to hinder, delay or defraud later undertakers, transfers to earlier undertakers may be fraudulent. . ." *Id.* In other words, courts assume fraudulent intent

because payments made to old investors in an ongoing Ponzi scheme are presumed to be fraudulent because they are for the purpose of convincing new investors to invest. The Receiver's attempt to hamstring the Respondents with Judge Davis' *ex parte*, unopposed Order Granting Summary Proceedings for the conclusion that all transfers were made pursuant to a Ponzi scheme is misplaced. To have collateral estoppel effect, "(1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment." *Lovell v. Mixon*, 719 F.2d 1373, 1376 (8th Cir. 1983). Because it was an unopposed *ex parte* motion, the issue was never litigated by anyone.

And the evidence in this case contradicts that dicta in Judge Davis' Order. Indeed, the Receiver fails to establish that Basel was operated as part of Cook's claimed Ponzi scheme. While the Receiver argues that Basel was operated as a Ponzi scheme, the Receiver fails to establish this crucial element of the Ponzi-scheme presumption. But the evidence established here proves that the payment to Anderson was not made to convince new investors to invest, or otherwise to prop up the claimed Ponzi scheme.

Courts invoking the Ponzi presumption require trustees and receivers to establish two elements: (1) "the *debtor* was indeed operating a Ponzi scheme"; and (2) the transfer at issue was "in furtherance" of that Ponzi scheme. *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 13 (S.D.N.Y. 2007); *In re Lake States Commodities, Inc.*, 272 B.R. 233, 241 (Bankr. N.D. Ill. 2002). The Receiver fails to establish that the presumption applies here.

C. The Receiver Fails to Establish That Basel was A Ponzi Scheme.

The Receiver argues that Basel was a Ponzi scheme because money was used for "non-investment purposes" such as marketing costs and attorneys fees. Br. at 83. Paying for marketing and attorneys are hardly the hallmarks of a Ponzi scheme – virtually every legitimate business pays those types of expenses![3]

And whether Cook generally was operating a Ponzi scheme does not establish that *Basel* was involved in that scheme. As Cook testified, Basel was recently set up, and he intended to run it legitimately. Huhta Dec. Ex. 1 (Cook Depo.) at 122. That testimony is unrebutted by the Receiver. Cook testified that he even refused to cash some Basel clients' checks and sent the funds back to the investors. Jansen Ex. 12 at 162.

The receiver contends that a criminal fraud conviction can establish the existence of a Ponzi scheme (Br. at 14-15.) Whatever merit that position might have regarding transfers Cook made personally, it is wholly irrelevant to transfers made by Basel, the transferor here. The criminal conviction of *the debtor* that can establish the *debtor's* actual intent to defraud. S*ee e.g.*, *In re Randy*, 189 B.R. 425, 439 (Bankr. N.D. Ill. 1995) ("That the *Debtor* Randy intended to defraud his investors was established by the jury verdict") (emphasis added); *see also In re Ramirez Rodriguez*, 209 B.R. 424, 433 (Bankr. S.D. Tex. 1997) (actual intent inferred from criminal conviction "based on the *debtors' operation of a Ponzi scheme*") (emphasis added). Here, the debtor/transfer or is Basel, not Cook. Basel was neither convicted nor indicted for any crime. Cook is not the

[3] The Receiver also claims Gryzbowski told Anderson that had she called six hours later she would not have been able to get her funds back. Br. at 85. In support, the Receiver cites Gryzbowski's deposition and notes of Austrum's interview of Anderson. Those references are clearly hearsay (and hearsay within hearsay with respect to Austrum's notes), unredeemed by any exception to the hearsay rules. Cooks other depositions (Jansen Ex. 12, 14, & 18) are also inadmissible against Respondents under Rule 804(b)(1).

debtor, and he had not interest in the money in Basel's account. Jansen Ex. 12 at 195. Cook did not even have signing authority on the Basel Account out of which Anderson was paid. Jansen Ex. 2 at ¶ 5 (a). Cook's plea cannot support applying the Ponzi presumption to a transfer by Basel.

And there were only a few investors in Basel. The Receiver cites no evidence that any "lulling" payments of fictitious profits were made out of Basel's account.

The Receiver argues, without citation to any evidence, that Basel was "insolvent from inception." Br. at 86. That bald unsupported statement ignores the evidence produced in this case. After the wire to Anderson closing her account, Basel's bank account at Associated Bank had $302,682.45 in it. Huhta Confidential Dec. Ex. 17 at IR012617. At that time, Basel had only five remaining investors. Huhta Confidential Dec. Ex. 18 (spreadsheet excerpts). The Receiver's motion submits no evidence to establish the "sum of the debtor's debts" or the "debtor's assets" to even try and establish the statutory test for insolvency under Minn. Stat. § 513.42. What were Basel's assets? What were its liabilities? Certainly, the Receiver had access to Basel's balance sheet, yet only submitted information about one bank account at Associated Bank.

And the Receiver's evidence on the amount of funds taken in from Basel investors is simply wrong. The Receiver claims a deficit of $99,900 in Basel's account. Br. at 86. For whatever reason, the Receiver's calculation omits the fact that a $75,000 check

provided by one investor bounced, increasing the purported (and inaccurate) amount supposedly provided by Basel investors.[4]

There is no evidence submitted by the Receiver that Basel was generally not paying debts as they become due, to satisfy Minn. Stat. § 513.42 (b)'s presumption of insolvency. Indeed, the Receiver submitted no evidence that any other investor from Basel even asked for their funds back or submitted a request to close their account (which also bears on the issue of inquiry notice). The only requests for withdrawal the Receiver submitted are from investors in Crown Forex and UBS Diversified – not Basel. *See* Jansen Ex. 23(Account Withdrawal Forms). Simply put, there is no evidence to support the Receiver's conclusory claim that Basel was insolvent when Mrs. Anderson received her funds.

D. The Transfer Was Not "In Furtherance" Of The Ponzi Scheme.

If the Receiver establishes that Basel was operated as part of the Ponzi scheme -- which he has not -- he must next demonstrate that the transfer to Anderson was made "in furtherance" of that scheme. The Receiver's motion fails on this point as well.

A transfer is "in furtherance" of a Ponzi scheme if it is "essential to the continuation of the scheme" and necessary for the scheme "to survive." *Manhattan*, 397 B.R. at 13; *In re IFS Fin. Corp.*, 417 B.R. 419, 439 n.15 (Bankr. S.D. Tex. 2009) (transfer must be "necessary for continuation of the fraud"). The "in furtherance" element necessarily restricts the scope of the Ponzi presumption -- some transfers are legitimate.

[4] [4] One purported investor listed on the SEC's spreadsheet provided a $75,000 check that bounced. *See* Huhta Dec. Ex. 17 at IR) 12617, noting a $75,000 withdrawal for "Deposit Return Item 5814" and IR012625 (copy of check No 5814 for $75,000 that apparently had insufficient funds in the account.

The presumption applies only to those deemed necessary to continue the fraud. *See In re Sheetex, Inc.*, No. 98-52263-JDW, 1999 WL 739628, at *17 (M.D. Ga. Sept. 21, 1999); *In re World Vision Ent., Inc.*, 275 B.R. 641, 658 (Bankr. M.D. Fla. 2002) ("Simply because a debtor conducts its business fraudulently does not make every single payment by the debtor subject to avoidance"); *see also In re Manhattan*, 397 B.R. at 11 ("[C]ourts must be sure that the transfers sought to be avoided are related to the scheme"). Judge Davis' ruling on the attorneys' fees issue applies this analysis.

Other transfers made by Cook or the Receivership Entities in no way bear on whether Basel's payment to close Anderson's account was fraudulent -- each transfer must be considered independently. *See In re Churchill Mortgage Inv. Corp*, 256 B.R. 664, 677-78 (Bankr. S.D.N.Y. 2000) ("The focus of the inquiry . . . is the specific transaction the trustee seeks to avoid"); *In re Carrozzella & Richardson*, 286 B.R. 480, 490 (D. Conn. 2002) ("[T]he proper focus of a fraudulent transfer inquiry is on the transfer itself, not the overall business practices of the Debtor").

The payment to Anderson, at her request, was not in furtherance of a Ponzi scheme, nor necessary for the continuation of the scheme. Cook himself testified that the payment to Anderson was not in furtherance of the Ponzi scheme or done to induce others to invest. Huhta Dec. Ex. 1 (Cook Depo.) at 126. The Receivership Entities had stopped taking new investments by the time Anderson decided to close her account. Huhta Dec. Ex. 4 (Moeller Depo.) at 29; Jansen Ex. 12 (Cook Depo.) at 161-162. David Austrum and Richard Ostrom, the Receiver's investigators, both testified that their

investigation did not uncover any facts that the transfer to Anderson was an attempt to evade creditors.

> Q: You're not aware of any facts that come up in the course of your investigation, in your interview of Grant Gryzbowski, that showed that transfer to Dot Anderson of her $102,00 when she asked for her for her account to be closed was an attempt to evade creditors?
>
> A: Again, I don't know all the facts.
>
> Q: I'm asking do you know of any facts in the course of your investigation that showed that?
>
> A: No.

Huhta Dec. Ex. 5 (Ostrom Depo.) at 139. Austrum also found no evidence Anderson's account closure was an attempt by anyone to evade creditors. Huhta Dec. Ex. 6 (Austrum Depo.) at 103-105, 109.

Anderson, not Cook, made the decision to close her account. Anderson, not Cook, had the paperwork prepared to effectuate the account closing. And Julia Smith, the appropriate signatory on the Basel account, not Cook, contacted Associated Bank to authorize the wires to Anderson closing her account. Huhta Confidential Dec. Ex. 15 (E-mails to Smith).

How can a request to close an account initiated by Anderson -- who knew nothing of the Ponzi scheme -- assisted by her grandson Gryzbowski -- who was also duped by Cook – somehow become fraudulent? The Receiver has no evidence that the payment to Anderson, at her request, was made with the intent to defraud any of Basel's creditors. The Receiver does not establish that Basel made the transfer to Anderson, at her request, to frustrate, hinder, or delay creditors. Anderson made a legitimate request to close her

account, which Basel was contractually obligated to fulfill. The Receiver has identified no evidence that the processing of Anderson's request to close her account was made with the actual intent to defraud.

Because the presumption of actual intent to defraud does not apply, the court must consider the factors set forth in Minn. Stat. 513.44 to assess Basel's payment to Anderson to close her account. Those factors are whether:

the transfer or obligation was to an insider	**Anderson is not an insider** under Minn. Stat. 513.41(7)ii.
the debtor retained possession or control of the property transferred after the transfer	**Basel did not retain possession** or control of Anderson's principle.
the transfer or obligation was disclosed or concealed	There is no evidence either way on this factor.
before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit	**Basel had not been sued** or threatened with suit.
the transfer was of substantially all the debtor's assets	The transfer was ***not*** substantially all of either Basel or Cook's assets.
the debtor absconded	**Basel did not abscond**.
the debtor removed or concealed assets	There is no evidence that Basel concealed or removed any assets.
the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred	**Anderson provided reasonably equivalent value**, by setting her claim with Basel for the return of the $102,000 she provided.
the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred	There is no evidence that Basel was insolvent.
the transfer occurred shortly before or shortly after a substantial debt was incurred; and	There is no evidence that Basel (or Cook) incurred any additional debt in this timeframe.
the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of	Does not apply.

the debtor	

Minn. Stat. § 513.44. These factors weigh against a finding of an intent to defraud. Anderson is not an insider – she is not a director, officer, or person in control of Basel. Minn. Stat. § 513.41(7)(ii). Neither Basel, nor any other person or entity retained control of the funds transferred. Basel had not been sued. Although the Phillips had instituted a suit against Cook and Oxford, Basel, the entity Anderson had invested with, was not a named defendant. Knowledge of a lawsuit against the *transferor* (and the suit here was not against Basel) has been held insufficient to preclude a finding of good faith. *Rucker v. Steelman*, 619 S.W.2d 5, 7 (Tex. Civ. App. 1981). Thus, the mere fact that the Phillips had filed suit is not sufficient to preclude a finding of good faith. The closure of Anderson's account was not hidden. And Basel received reasonably equivalent value from Anderson - Basel received a dollar-for-dollar forgiveness of its contractual debt to Anderson. *See In re Carrozzella & Richardson*, 286 B.R. 480, 491 (D. Conn. 2002) ("In exchange for the interest paid to the Defendants, the Debtor received a dollar-for-dollar forgiveness of a contractual debt. This satisfaction of an antecedent debt is 'value,' … and in this case 'reasonably equivalent value.'")

Anderson had the contractual right to request and receive her funds back under the account opening documents. And as Cook testified, account withdrawals were regularly processed. Huhta Dec. Ex. 1 (Cook Depo.) at 123-124. The payment was to a creditor, not to avoid creditors. All she received were funds to which she was entitled. Nothing more.

E. The Receiver Looks to the Wrong Debtor.

The Receiver claims Cook, as a Ponzi scheme operator, is the debtor. Br. at 13. But Basel and Julia Smith, not Cook, transferred the funds to Anderson. Basel, not Cook, had an interest in the account from which the funds were drawn. Cook had no control over the account, and no signing authority over the Associated Bank account. And the transfer of Basel's money was not a transfer of funds that Cook had any interest in. Accordingly, the Receiver's claim fails as a matter of law.[5]

Anderson is the third party alleged to have received the transfers. Basel is the debtor/transferor that made the transfer. The right to sue under MUFTA belongs to the creditors of the debtor/transferor that made the allegedly fraudulent transfer. *See* Minn. Stat. § 513.47. Under the facts here, the right to sue for fraudulent transfer belongs to the creditors of the Receivership Entities - not to the Receiver, who stands in the shoes of Basel - the debtor/transferor. Because no "creditor" is bringing the claim, it fails as a matter of law and the Receiver's motion cannot be granted.

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[5] Nor is the fraudulent transfer claim brought by a creditor of the Receivership Entities, and fails as a matter of law. A receiver stands in the place of the entities for which he was appointed receiver and is only permitted to bring any claim in their place. *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1514-16 (1st Cir. 1987). "[W]hen a receiver is appointed over a corporation, the receiver may only assert claims that could have been asserted by the corporation, and the receiver lacks standing to institute action on behalf of investors in the corporation." *Liberte Capital Group, LLC v. Capwill*, 248 Fed.Appx. 650, 656 (6th Cir. 2007). Here, Basel, as the debtor/transferor, could not assert a fraudulent transfer claim against Anderson. Nor can the Receiver assert such a claim for Basel.

D. ANDERSON ACTED IN GOOD FAITH WHEN SHE ASKED TO CLOSE HER ACCOUNT.

Anderson acted in good faith – a reasonable person in her position would have had no reason to know of a fraudulent purpose behind the agreement to close her account, or to believe that Basel (or any other Receivership Entity) was near insolvency. And no matter what investigation Anderson did, she would not have been able to uncover any alleged fraud. Basel received value in closing Anderson's account and extinguishing its obligation to her.

1. Law Governing The Good Faith Defense.

If a creditor establishes a voidable fraudulent transfer under the fraudulent transfer statute (which Anderson disputes) the transferee can retain the transfer if she establishes the "good faith" defense. Minn. Stat. §513.48 provides: "A transfer or obligation is not voidable under section 513.44(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee."

Under Minnesota law, a transferee may take in good faith even knowing that the transferor is insolvent, as long as the transferee gave consideration like Anderson did. *Schlecht v. Schlecht*, 168 Minn. 168, 174, 209 N.W. 883, 886 (1926). Good faith is a lack of "notice of the fraudulent intent of the [transferor]." *Leqve v. Smith*, 63 Minn. 24, 26, 65 N.W. 121, 121 (1895). On the other hand, "a transaction is not done in good faith if the earmarks of an arms-length transaction are missing." *In re Am. Lumber Co.*, 5 B.R. 470, 477 (D. Minn. 1980). The Receiver cannot demonstrate that Anderson had notice of any alleged fraudulent intent – Anderson, not anyone else, initiated the request to close

her account. She had provided Basel $102,000 for investment, and received $102,000 back after she signed the appropriate paperwork in an arms-length transaction. And neither she nor her grandson Gryzbowski knew or suspected that an alleged Ponzi scheme was being operated.

When assessing good faith, "courts look to what the transferee 'knew or should have known' rather than examining the transferee's actual knowledge from a subjective standpoint." *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995). Other courts look first to whether the transferee had sufficient knowledge to place the transferee on "inquiry notice" of: (a) "the *debtor's* fraudulent purpose" in making the transfer; or (b) "the *debtor's* . . . possible insolvency." *In re M & L Bus. Mach. Co., Inc.*, 84 F.3d 1330, 1336-1338 (10th Cir. 1996); *In re Bayou Group, LLC*, 439 B.R. 284, 314 (S.D.N.Y. 2010). Red flags indicating fraud must generally indicate a fraudulent purpose underlying the transaction at issue, not indications that the transferor itself is engaged in fraud. *In re Bayou Group, LLC*, 439 B.R. 284, 311 (S.D.N.Y. 2010); *see also, In re M & L Bus. Mach. Co., Inc.*, 84 F.3d 1330, 1336 (10th Cir. 1996).

In *Bayou*, the Southern District of New York recently rejected the Bankruptcy Court's holding that evidence of any "infirmity in [the debtor] or [in] the integrity of its management" was sufficient to place a transferee on inquiry notice. *Id.* (quotations omitted). The District Court re-affirmed the general rule that the first prong of the good faith test concerns whether the transferee had notice of the debtor's (i) possible insolvency or (ii) fraudulent purpose. *Id.* And, significantly, with respect to fraudulent purpose, the court "should focus on the *circumstances specific to the transfer at issue*," as

opposed to whether "the transferee has information indicating that the transferor's activities in general might be fraudulent." *Id.* at 314.

Notice of other "problems" is irrelevant. *Id.* at 314. "[W]hether a transferee is on inquiry notice is informed by the standards, norms, practices, sophistication, and experience generally possessed by participants in the transferee's industry or class." *Id.* at 313. *See also In re Lockwood Auto Group, Inc.*, 428 B.R. 629, 636 (Bankr. W.D. Pa. 2010) (notice of transferor's fraudulent purpose, transferor's unfavorable financial condition, or improper nature of a transaction preclude a finding of good faith). If the transferee is on inquiry notice, the transferee must then demonstrate that a diligent inquiry would not have uncovered the transferor's fraud. *In re Bayou Group, LLC*, 439 B.R. 284, 317 (S.D.N.Y. 2010); *In re Manhattan Inv. Fund II,* 359 B.R. at 523–24; *In re World Vision Entm't, Inc.,* 275 B.R. at 659.

The "red flags" alleged here are insufficient to put Anderson on inquiry notice of fraud or insolvency or are otherwise irrelevant. The Receiver cites dicta in *S.E.C. v. Forte*, for the proposition that if an opportunity was "too good to be true," the court will void the transfer. *S.E.C. v. Forte*, CIV.09-63, 2010 WL 939042. Indeed, the case *Forte* cites for this proposition involved a 20% profit every 90 days. *Donell v. Kowell*, 533 F.3d 762, 766 (9th Cir. 2008). But a hoped for 10.5% return alleged here is a far cry from being too good to be true. And court permitted the transferee in Donnell to keep the principal received, and only clawed back profits. *Id* at 773.

The Receiver's motion wholly ignores the "diligent inquiry" aspect of the test. Nor does the Receiver argue what a diligent inquiry would have uncovered. And the

reason is simple, Anderson could not have determined there was an apparent Ponzi scheme being operated.

And what Anderson learned after the transfer cannot put her on inquiry notice. The relevant timeframe is what the transferee knew before the transfer.

1. Anderson Acted In Good Faith – She Had No Knowledge Of, Or Reason To Suspect, Any Fraudulent Activity Or That Basel Was Near Insolvency.

Anderson acted in good faith. The account opening documents gave her the unrestricted right to close her account. Huhta Confidential Dec. Ex. 11 at IR003237; *Id.* at Ex. 13 (Anderson Depo. Ex. 2) at IR003638. There is no evidence that Anderson "knew or should have known" of any fraud, let alone fraud with respect to her decision to close her account. Nor is there any evidence that Anderson had reason to suspect Basel was on the brink of insolvency.

Although the Receiver claims Anderson was on inquiry notice due to several factors, the Receiver never identified any of those facts in discovery, and should be held to their discovery responses. In discovery, Anderson asked the Receiver to identify all facts upon which the Receiver relied for the assertion that Anderson did not take her funds in good faith. In response, the Receiver only indicated that Anderson know of the lawsuit filed by the Phillips, and then decided to close her account. Huhta Dec. Ex. 7 (Receiver's First Supplemental Objections And Responses To Investor Respondent Dot Anderson's First Set Of Interrogatories) at No. 11. At no point did the Receiver allege Anderson was on inquiry notice of any issue, so should not now be able to argue otherwise.

But even under an inquiry notice analysis, Anderson acted in good faith and a diligent inquiry would not have illustrated Basel's insolvency or any fraud. Indeed, as Chief Judge Davis concluded, even Cook's sophisticated defense attorneys -- who could ask Cook questions under the protections of the attorney-client privilege -- neither knew nor should have known of Cook's fraudulent scheme. Case 0:09-cv-03332, Doc. 186, at 8. Yet the Receiver apparently maintains that 89-year-old Anderson could have concluded what Cook's own lawyers did not know. Importantly, whether a transferee was on "inquiry notice" may also be informed by the experience or sophistication of the transferee. *Jobin v. McKay,* 84 F.3d at 1338.

The receiver argues that knowledge of a lawsuit should have put Anderson on inquiry notice, relying on *In re Sherman* and *In re Hill*. (Br. at 17). But those cases are factually distinguishable and describe significantly more evidence of fraud and insolvency than the mere filing of a lawsuit. *In re Hill*, 342 B.R. 183, 203 (Bankr. D.N.J. 2006), involved a transferor's counter-offer that was significantly better than the transferees request, *after* a judgment against the transferor. And significantly, the transferor's proposal prevented the transferee from disclosing any information to any party interested in the litigation, or having any contact with the judgment creditor, its employees, agents, principals, subsidiaries, or affiliates. *Id* at 203. *See also In re Sherman*, 67 F.3d 1348, 1355-1356 (8th Cir. 1995) (finding transferees on inquiry notice of insolvency where they knew that debtors had substantial debts, were in lawsuit for non-payment, were behind in mortgage payments and facing foreclosure).

Knowledge of a lawsuit against the transferor has been held insufficient to preclude a finding of good faith. *Rucker v. Steelman*, 619 S.W.2d 5, 7 (Tex. Civ. App. 1981). Thus, the mere fact that the Phillips had filed suit against Cook (not Basel, the transferor and entity into which Anderson had invested) is not sufficient to preclude a finding of good faith. And the mere fact that lawsuit was filed does not mean Basel (or Cook, for that matter) was insolvent.[6]

The Receiver's reliance on Warfield for the argument that knowledge of an SEC investigation is a "red flag," is also misplaced. *Warfield* involved a summary judgment motion entered by default. *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006). And the evidence in *Warfield* was much more egregious than alleged here. While the transferee did know that the entity into which he was investing was under investigation by the SEC, the evidence did not stop there. The transferee knew of a *past* Ponzi scheme operated by the s*ame principals in which he investing*. *Id.* at 560. The transferee knew the earlier entity was in an SEC receivership. *Id.* And the later investment was similar to the investment scheme used in the earlier Ponzi scheme. But even in the face of this evidence, the court in *Warfield* only found that there were "serious questions" about the transferee's good faith, and ruled against the transferee because he had not given reasonably equivalent value. *Id.*

Other cases hold that knowledge of an SEC investigation is not a red-flag. The Court's findings in *Bayou IV* are instructive – there, the court held that: "(1) allegations

[6] While the Receiver claims that a the Phillips suit should have put Anderson on inquiry notice, the Receiver permitted the Phillips WHO MADE THE ALLEGATION OF FRAUD IN THE LAWSUIT to keep the $52,5000 payment they received after they filed suit! If "equity is equality," as the Receiver asserts, Anderson should likewise be permitted to keep what she received then.

[S.E.C. violations, and criminal activity] made in a lawsuit filed against the transferor by former [principal of the transferor]; (2) [the transferor's] delay in providing net asset values ("NAVs") for [the transferor] in March and April 2004, [the transferor's] inconsistent statements about who was responsible for preparing NAVs, and [the transferor's] ultimate disclosure that a related entity], rather than an offshore administrator, was calculating NAVs for the [transferor], and (3) negative information [related to significant litigation and concerns about the transferor's integrity] concerning [transferor and its principal] set forth in two background investigation reports" were insufficient to prompt an inquiry notice as a matter of law. *In re Bayou Group, LLC*, 439 B.R. 284, 318 (S.D.N.Y. 2010) (*Bayou IV*); *see also In re Hannover Corp.*, 310 F.3d 796, 801 (5th Cir. 2002) (knowledge of SEC investigation alleging fraud, allegations of wrongdoing on the part of a principal, payments in cash and by signing over third party checks not sufficient red flags). The fact that the SEC was investigating various Receivership Entities (which Anderson did not know) is insufficient to preclude a finding of good faith. And in July when Anderson received her funds, the SEC had not made any negative determination about Cook or any Receivership entity. Had Anderson contacted the SEC, she would not have been informed of any potential issues. As late as October 2009, the SEC was informing investors that neither the Commission nor its staff had concluded there were any violations of the securities laws. Moreover, they indicated that the existence of their investigation **should not be construed as an indication by the Commission that any violation of law had occurred, or as an adverse reflection upon**

any person, entity, or security. *See* Huhta Confidential Dec. Ex. 19 (SEC Enforcement Division letter).

The Receiver also argues that the fact that the payment to Anderson came from *Basel* should have put Anderson on inquiry notice, because Anderson thought she invested with "Oxford." . BUT THE PAYMENT WAS BY WIRE DIRECTLY INTO ANDERSON'S ACCOUNT. There is no evidence in the record that Anderson knew the source of the funds (whether from Basel, Oxford, or Santa Claus). Here, the Receiver is simply trying to take advantage of what happens when a 90 year old woman is deposed. The Receiver knows Anderson's initial paperwork disclosed the investment was with Basel. The Receiver knows Anderson had a check prepared for Basel. The Receiver knows the paperwork submitted to close the account was a Basel form. So the fact that payment came from Basel (had Anderson known) would hardly put Anderson on notice of anything if she knew that Basel made the payment.

The Receiver claims that Anderson was "promised a 10.5% return with no risk." Br. at 88. The Receiver is again taking liberties with the facts. Anderson merely testified she and Gryzbowski did not did not talk about risks associated with the investment – not that she was affirmatively told there were no risks. Jansen Ex. 182 (Anderson Depo) at 32. And a 10.5% rate of return is insufficient to put an investor on inquiry notice. *See In re Unified Commercial Capital*, 01-MBK-6004L, 2002 WL 32500567 (W.D.N.Y. June 21, 2002) (interest of up to 12% annually found to be commercially reasonable); *Carrozzella & Richardson*, 270 B.R. at 97 (holding that an annual interest rate of 15% was commercially reasonable); *In re Indep. Clearing House Co.*, 77 B.R. 843, 862 (D.

Utah 1987). (even a high rate of return - approximately 8% per month - does not put a defendant on notice of fraud if "a legitimate accounts payable factoring program could have supported the promised rate of return….").

Gryzbowski and Moeller both testified they had no knowledge that any Receivership Entity was operating a Ponzi scheme. Huhta Dec. Ex. 4 (Moeller Depo.) at 28-29. Gryzbowski left his own money, his father's money, and his mother's best friend's money invested with Cook. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 187. There is no evidence that Anderson could have discovered any alleged fraud by Basel, or any claimed insolvency. Because she received her funds in good faith, the Receiver's motion fails.

And the Receiver has produced no evidence that any other investor in Basel asked to close their account. The lawsuit and negative publicity were against Cook and Crown Forex – not Basel. As the Court noted in Bayou IV, what other investors did in the face of potential red-flags is relevant. "

> Appellants have presented credible evidence that other, similarly situated investors did not redeem and did not suspect insolvency or fraud after learning of the Westervelt litigation and other alleged "red flag" information. In determining what weight a reasonably prudent institutional hedge fund investor would have given the alleged "red flag" information, the fact finder may consider the reaction and responses of such investors who did in fact receive the information. Cf. *In re Manhattan Inv. Fund III, 397 B.R. at 23* ("the best evidence of what a prudent prime broker would have done is what Bear Stearns actually did")".

Bayou (IV) at *82-83.

Anderson did precisely what one would expect when she had a question about her investment – she contacted her account representative (who happened to be her grandson) and asked him for information. But Gryzbowski knew nothing. No amount of additional research would have uncovered what Cook was doing.

II. THE RECEIVER IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE UNJUST ENRICHMENT CLAIM.

The Petition's purported claim for unjust enrichment claim is premised on the idea that the repayment to Anderson, at her request, was "preferential." In essence, Anderson was paid, while other investors did not. That is neither unjust, nor a fraudulent transfer.

The Receiver claims the only difference between Anderson and the other investors in Basel is that Anderson received her money back. But the true distinction is that Anderson *asked* for her money back *before* the receivership was created. None of the other investors did. There is no evidence that any of the other Basel investors ever requested their funds back from Basel. None of the withdrawal forms the Receiver submitted in evidence were from any Basel investor. *See* Jansen Ex. 23. The Receiver claims it is "undisputed" that Cook preferentially treated Anderson, and that it is "undisputed" that Anderson received other people's money. Brief at 96. Anderson does dispute those claims.

Cook did not initiate Anderson's request to close her account, or transfer any funds to her. Anderson decided to close her account. She signed the appropriate paperwork. Julia Smith, the authorized representative of Basel with signing authority on the account processed the transfer to Anderson.

And Anderson received her own funds back. The Associated Bank account statement show Andersons funds going in on June 16 and coming out on July 15. Huhta Confidential Dec. Ex. 17 (Associated Bank Statements) at IR012616-617. As Cook testified, Anderson's funds were not invested and just sitting there because they had not gotten the Basel trading platform up and running. Huhta Dec. Ex. 1 (Cook Depo) at 122-123. The balance never dropped below Anderson's $102,000 deposit. Huhta Confidential Dec. Ex. 17 (Associated Bank Statements) at IR012616-617. Under the lowest intermediate balance rule applied in tracing funds, those funds were hers. *See In re MJK Clearing, Inc.,* 371 F.3d 397, 401 (8th Cir. 2004).

The Receiver does not argue that the return to Anderson of her principle investment is unjust as it relates to any Receivership Entity represented by the Receiver. Instead, the Receiver argues it was unjust compared to the other investors. But the Receiver does not represent those investors. Accordingly, the claim fails as a matter of law.

A. Anderson Had A Contractual Right To Receive Her Funds, So The Unjust Enrichment Claim Fails.

Anderson had a contractual right to the funds, and the unjust enrichment claim therefore fails. To establish unjust enrichment, the Receiver must prove that Anderson knowingly received or obtained something of value, was not be entitled to the benefit, and under circumstances that would make it unjust to retain what was received. *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137 140 (Minn. Ct. App. 1992). "Unjust enrichment is an equitable doctrine used to prevent a defendant from

wrongfully benefiting from fraud, mistake or moral wrongdoing against the plaintiff." *Meyer v. Dygert,* 156 F.Supp.2d 1081, 1089 (D. Minn.2001) (emphasis added). Under Minnesota law "[a] party is unjustly enriched when it knowingly receives something of value that it was not entitled to under circumstances that make it unjust for the party to retain the benefit." *Ehlen v. Hanratty & Assoc., Inc.,* No. A08–2290, 2009 WL 3255399, at *6 (Minn. Ct. App. Oct. 13, 2009). "Unjust enrichment requires unjust or illegal conduct." *Id* .

The payment to Anderson was made under the obligations of a contract between Anderson and Basel. The Receiver's claim therefore fails – receiving back what she had a contractual and equitable claim to by definition cannot be "unjust enrichment." *Schaaf v. Residential Funding Corp*., 517 F.3d 544, 554 (8th Cir. 2008) ("Thus, unjust enrichment does not occur when a defendant 'is enriched by what he is entitled to under a contract or otherwise.'"). "The existence of an express contract between the parties precludes recovery under the theories of quasi-contract, unjust enrichment, or quantum meruit." *Sterling Capital Advisors, Inc. v. Herzog,* 575 N.W.2d 121, 126 (Minn. Ct. App. 1998). A recent Minnesota state court decision analyzing unjust enrichment claims in the Ponzi scheme context applied this general rule, finding where "each of the transfers was made as payments for contractual debts, the Receiver's claims for unjust enrichment fail as a matter of law." *Finn v. Alliance Bank*, 2011 WL 5006458, No. 19HA-CV-11-2856 (Dakota County Dist. Ct., August 16, 2011).

To try and overcome the fact that equitable claims fail in the face of a contact, the Receiver cites *Cummings v. Paramount Pictures*, 715 F.Supp. 2d 880, 911 (D. Minn.

2010). The receiver claims that Judge Kyle found that "Defendants cannot hide behind the [contracts] in this matter because those contracts were obtained through fraud." Br. at 90. But the Receiver blatantly omits crucial language directly before the quoted section in their brief. The full quotation is: "In addition, **Plaintiffs argue that** Defendants cannot hide behind the [contracts] in this matter because those contracts were obtained through fraud." *Id.* at 911. The section the Receiver quoted as a holding was Judge Kyle merely characterizing the plaintiffs' argument. In assessing the motion to dismiss, Judge Kyle merely held that the fraud alleged to support a securities violation could be sufficient to satisfy the "wrongful" conduct requirement of an unjust enrichment claim. As this court recognized, at the motion to dismiss stage, unjust enrichment can be pled as an alternative to other legal theories. Both *Cummings* and *TCS Holdings, Inc. v. Onvoy, Inc.*, CIV. 07-1200 DWFAJB, 2007 WL 2226025 (D. Minn. Aug. 1, 2007) are distinguishable for another reason – both involve situations where the party committing the fraud is trying to enforce the terms of the contract to their benefit. Should Cook or Beckman get the benefit of the contracts they fraudulently induced the investors to enter? Of course not. But the existence of fraud by another does not invalidate the innocent party's contractual rights to receive what they bargained for.

The Receiver here alleges nothing more than Anderson was repaid the amount of her principal investment while other investors were not paid. That is not enrichment under Minnesota law because she is entitled to the funds she received. The Receiver's claim fails because as a matter of law.

And Basel cannot show damages from the payment to Anderson. The payment to Anderson benefitted Basel, by decreasing the obligations it owed. While the Receiver is attempting to marshal resources to satisfy the other defrauded investors' restitution claims, had Anderson not received her investment back, she would have legal and equitable claims against Basel up to the amount of her investment. Anderson, not the Receiver, is entitled to summary judgment on the unjust enrichment count.

And finally, the Receiver claims that "equity is equality." That argument is premised solely on the *Cunningham v. Brown* case, involving bankruptcy preferences. The entire body of bankruptcy law (as opposed to fraudulent conveyances and unjust enrichment) is to ensure that all creditors are treated identically, and receive the same proportionate share of recovery. That is codified in the bankruptcy code. But not in the law for fraudulent transfers or equity. Minnesota law specifically allows in insolvent creditor to prefer one legitimate creditor over another. Even if that other creditor receives nothing. "In the absence of legislation forbidding it, a debtor, even though insolvent at the time, may convey his property so as to give one creditor a preference over another." *Farmers Co-Op Ass'n v. Kotz*, 222 Minn. 153, 23 N.W. 2d 576, 578 (Minn. 1946); *Grager v. Hansen*, 206 N.W. 440, 441-442 (Minn. 1925); *Thompson v. Schiek*, 213 N.W. 911, 912 (Minn. 1927) ("Payment of an honest debt is not fraudulent . . . although it operates as a preference, the rule being that a preference by an insolvent debtor of one of his creditors can be avoided only by appropriate proceedings under the bankruptcy law and is not open to attack in an action brought by another creditor."); *Johnson v. O'Brien*, 144 N.W.2d 720, 721-722 (Minn. 1966).

While it is unfortunate that Cook defrauded a host of people, there is no legal or equitable basis to undo Basel's decision to pay Mrs. Anderson the funds Basel owed her when Mrs. Anderson requested the funds. Mrs. Anderson was entitled to receive what she did. Taking her funds now to pay other investors is precisely the definition of a Ponzi scheme – taking one investor's money from one investor and paying it to others.

III. ANDERSON'S OTHER DEFENSES

The Receiver also seeks summary judgment on "all defenses" asserted by Anderson, but fails to specifically address Anderson's asserted defenses in the argument section, except for sections A and I. Anderson's defenses in the Answer relating to standing (¶31), reasonably equivalent value (¶34), ratification and past performance (¶ 37) are not addressed by the Receiver and cannot be dismissed. Because the Receiver uses the phrase Respondents', Anderson will address each of the other arguments asserted.

A. Failure to State a Claim.

Anderson's failure to state a claim affirmative defense is based primarily upon her Motion to Dismiss. Under the fraudulent transfer statute, the Receiver represents the debtor/transferor Basel. The Receiver is not a creditor of the transferor/debtor. Accordingly, the fraudulent transfer claim fails as a matter of law. And on the unjust enrichment claim, the Receiver has not alleged or proven any damage to a Receivership Entity. While payments to Anderson may have decreased the funds available to pay creditors of Basel, the payment benefitted Basel by decreasing the liabilities it owed.

Accordingly, the claim as stated as being "unjust to other investors" fails to state a claim. Summary judgment is not appropriate.

B. **Good Faith, Recoupment And Setoff.**

For the reasons discussed above, Anderson acted in good faith, and is entitled to a set-off or recoupment against the claims asserted against Anderson.

C. Estoppel, Waiver, and Laches.

Basel voluntarily decided to return to Anderson the funds she provided for investment. Basel therefore waived its claims against Anderson, and is estopped from attempting to unwind the transactions it voluntarily entered.

And the Receiver had an opportunity to make a claim for the return of preferential transfers in a bankruptcy proceeding but failed to do so. The Receiver is estopped from seeking Anderson's "preferential transfer" because bankruptcy proceeding provide the only legal basis to do so.

D. **Failure to Mitigate.**

The Receiver claims that all transfers made were pursuant to the alleged Ponzi scheme. If so, every investor that ever received any funds should be required to repay all funds ever received. And the Receiver chose to allow 150 "winning" investors to retain their principle, and the Phillips, who received funds after filing their lawsuit. The Receiver therefore failed to mitigate the claimed damages. Also, the Receiver failed to put the Receivership Entities in bankruptcy. The Bankruptcy Code permits the recovery of preferences, while Minnesota cases interpreting the fraudulent transfer statute do not.

E. Accord and Satisfaction.

Basel received a dollar-for-dollar reduction in Anderson's claim when it voluntarily chose to permit her to close her account. Anderson's request, and Basel's assent, extinguished the Anderson's and Basel's claims against each other. The Receiver cannot both claim the benefit of said bargain (no claim by Anderson against Basel), while simultaneously demanding the return of the consideration Anderson paid Basel.

F. Unclean Hands, In Pari Delicto, Preceding Breach of Contract.

The equitable doctrines of unclean hands and *in pari delicto* prevent the Receiver's claims. Under "the doctrine of unclean hands: 'he who seeks equity must do equity, and he who comes into equity must come with clean hands.'" *Peterson v. Holiday Recreational Indus., Inc.*, 726 N.W.2d 499, 505 (Minn. Ct. App. 2007). The Receiver and Receivership Entities do not have clean hands. The Receiver maintains that all Cooks' entities were involved in a Ponzi scheme. If so, they cannot pursue equitable claims such as unjust enrichment. The Receiver likewise permitted other investors to retain the principal payments they received, yet seeks to force Anderson to disgorge what Basel owed her. And the doctrine of i*n pari delicto* holds that a wrongdoer forfeits all rights, and prevents those engaged in fraud from pursuing legal or equitable claims. *Brubaker v. Hi-Banks Resort Corp.*, 415 N.W.2d 680, 683 (Minn. Ct. App. 1987). If as the Receiver alleges Basel was involved in the Ponzi scheme, it should not be permitted to seek relief from Anderson.

G. Damages by Third Parties.

Cook and others, not Anderson, damaged the Receivership Entities. The Receiver cannot unwind the transfers to the Cook Currency Entities because as was previously

demonstrated, the damages to the Cook Currency Entities were done by Trevor Cook and his cronies, not Lenders. Anderson did not cause damages to other investors – Cook did. Anderson did not participate in any acts causing damages to other investors as alleged by the Receiver. Simply put, the Receiver cannot funds from Anderson for damages caused by third parties beyond her control.

CONCLUSION

The law of fraudulent transfers is designed to make sure that legitimate creditors such as Anderson are paid with available funds – it is not designed to equalize payments among creditors. There is no evidence that Anderson's decision to close her account was an effort by Basel, Cook, or anyone else, to defraud others or evade any creditors. Without such evidence, the fraudulent transfer claim fails. And the Receiver does not represent a "creditor" under the Minnesota Fraudulent Transfer Act. Minnesota's fraudulent transfer statute grants a cause of action to defrauded creditors – it does not empower the Receiver who represents the debtor entity that made the transfer to undo the transaction.

Anderson received her funds in good faith. She did not know of the Ponzi scheme when she requested her money back, nor could she have uncovered it.

And as a matter of law, Dot Anderson was not unjustly enriched when she received only the principal amount of her investment back to which she had a contractual right to claim. For these reasons, Anderson respectfully requests that the court deny the Receiver's motion.

Dated: January 11, 2012

s/ Adam S. Huhta___________

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