

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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

Petitioner,

Case No: 011-cv-1042 SRN/FLN

v.

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

Respondents.

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**REPLY IN SUPPORT OF RECEIVER'S  
MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

In opposing the Receiver's motion for summary judgment, the Berg Investors argue that Berg was not their agent and that the Receiver is barred from arguments based on his agency. The undisputed facts and the well-established law of agency defeat their contentions. Respondent Anderson continues to assert that Cook's Basel entity was not insolvent or a part of a Ponzi scheme despite all documentary evidence to the contrary. None of Respondents' arguments defeat summary judgment.<sup>1</sup>

### **I. Berg Was the Berg Investors' Agent and His Knowledge Is Imputed to Them.**

#### **A. The Receiver's Agency Theory Is Appropriately Raised.**

##### **1. The Receiver's Petition Is Sufficient Under Rule 9(b).**

A transfer may be voided under Minn. Stat. § 513.44(a)(1) if the *transferor* of the funds in question acted with actual fraudulent intent. The transferor in this case was *Cook*, not Berg, and—as the Court has already found in denying the Respondents' motion to dismiss—the petition meets the requirements of Rule 9(b):

The Petition describes Cook's Ponzi scheme, and alleges that all transfers made by the Receivership Entities during the pendency of the scheme 'were transferred pursuant to the Ponzi scheme.' By definition, transfers 'pursuant to [a] Ponzi scheme' are fraudulent transfers. Moreover, the Petition clearly alleges that Cook knew that what he was doing was fraudulent, thus satisfying the scienter element of the fraud and fraudulent transfer claims.<sup>2</sup>

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<sup>1</sup> Additional arguments in Respondents' response briefs are duplicative of their affirmative summary judgment motions. The Receiver has addressed those arguments in Dockets 207 and 227.

<sup>2</sup> Docket 108 at 11.

The Receiver is not “seeking to hold [the Berg Investors] liable for [Berg’s] fraud.”<sup>3</sup> The Receiver seeks to recover assets fraudulently transferred to the Berg Investors by Cook through their agent, Cliff Berg. Fraudulent intent (or lack thereof) on the part of the transferees (or their agent) is irrelevant. *See, e.g., Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006). Neither fraud on the part of Berg nor agency is an element of the Receiver’s fraudulent transfer claim; the requirements of Rule 9(b) therefore do not apply in the manner the Berg Investors argue.

## **2. The Receiver Fully Answered the Berg Investors’ Interrogatories.**

The Berg Investors propounded contention interrogatories asking the Receiver to identify “each and every fact” concerning the Receiver’s petition.<sup>4</sup> As this Court recognized, the Receiver’s responses were timely, detailed, and extensive.<sup>5</sup> Among them was a 16-page response to Interrogatory 13, which cites Berg no fewer than 88 times and exhaustively details Berg’s role in getting the Berg Investors in and out of the currency program. Interrogatory 21 incorporates the response to Interrogatory 13 by reference. In addition, Interrogatory 8 asked specifically about Berg’s knowledge of the SEC investigation of Cook. The Receiver’s response to that Interrogatory details, among other things, how Cook told Berg it was an investigation, not an audit, and how upon learning that news, Berg then told Cook that he wanted all of his clients’ accounts closed.

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<sup>3</sup> Docket 225 (“Br.”) at 34.

<sup>4</sup> Docket 210-1 (“Erickson”) Ex. 1.

<sup>5</sup> Docket 186 at 5.

There is nothing improper about the Receiver's agency theory in view of the questions the Berg Investors asked and the comprehensive answers that were provided in return. Every fact the Receiver relies on in support of his motion for summary judgment based on agency is recited in his answers to the Berg Investors' contention interrogatories.<sup>6</sup> The Court affirmed a protective order precluding deposition of the Receiver because, among other reasons, Respondents had "ample opportunity" to serve contention interrogatories on whatever topics they wished and the Receiver provided lengthy and detailed responses to every question that was asked.<sup>7</sup>

At no point did the Berg Investors ask an interrogatory regarding the legal bases for the Receiver's assertion that they did not take the transfers from the Cook companies in good faith. The Receiver's motion for summary judgment cannot be denied because the Berg Investors now wish they had taken more or different discovery, despite having ample opportunity to do so.

**3. The Receiver Cannot Be Estopped Based on His Opposition to the Berg Investors' Motion for Stay.**

On April 11, 2011—before a single deposition in this case had been taken—the Berg Investors moved for an indefinite stay of this case unless and until Berg agreed to testify.<sup>8</sup> The Receiver opposed the motion because the Berg Investors failed to cite any authority to support their extraordinary request and because even under the ill-fitting

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<sup>6</sup> Erickson Ex. 1.

<sup>7</sup> Docket 162 at 7–8; Docket 186 at 10–11.

<sup>8</sup> Docket 82.

cases they did cite, the Berg Investors' motion still would fail.<sup>9</sup> Among other things, the Receiver argued that Berg's knowledge was not critical to resolving the issue of the Berg Investors' good faith, that the Berg Investors were the most important witnesses in the action, and (in the same paragraph) that *a jury would be "legally entitled to draw an adverse inference" against Berg if he were to assert his Fifth Amendment right at trial.*<sup>10</sup> Contrary to what the Berg Investors suggest, the Receiver never argued that Berg's knowledge was *per se* irrelevant. Rather, the Receiver argued that Berg's choice not to testify did not justify an indefinite stay of these proceedings. It would make no sense to argue for an adverse inference from Berg's silence if Berg's knowledge were *per se* irrelevant.

Equally important is that the Receiver made this argument before key testimony supporting agency was taken. Specifically, after that motion practice the Berg Investors testified about the "deals" they had with Berg to close their accounts in case of trouble<sup>11</sup> and Berg's explanation that he cashed them out because of an investigation.<sup>12</sup> And Cook later testified that he told Berg the SEC's visit "was not routine" and, as corroborated by bank records, that he cashed out the Berg Investors not on his own accord but rather on Berg's request.<sup>13</sup>

Indeed, in light of the admissions made in their depositions and the other evidence in the case, it is unlikely that Berg's testimony could help the Berg Investors. By their

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<sup>9</sup> Docket 89 at 3–8.

<sup>10</sup> *Id.*

<sup>11</sup> *See* Docket 193 at Parts IV.C.1, 2, 8, and 9.

<sup>12</sup> *See id.* at Parts IV.C.1–12.

<sup>13</sup> Jansen Ex. 8 at 78–79, 181–82; Ex. 15–17.2; Ex. 36.

own admissions and actions the Berg Investors have established Berg's agency and that Berg's inquiry notice of possible fraud or insolvency prompted him to cash out of the scheme. It is the Berg Investors' burden to produce evidence of their good faith, and they cannot avoid summary judgment in view of these undisputed facts.

**B. Berg Was the Agent of Each of the Berg Investors.**

**1. The Berg Investors Ratified Berg's Closure of Their "Accounts."**

Typically, agency requires two elements: mutual assent that the agent shall act on the principal's behalf and understanding that the principal is in control of the undertaking. *E.g., PMH Props. v. Nichols*, 263 N.W.2d 799, 802 (Minn. 1978). But even in the absence of a before-the-fact agreement, "[k]nowing acceptance of the benefit of a transaction ratifies the act of entering into the transaction." Restatement (Third) of Agency § 4.01(2)(b) & cmt. d; *see also Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1433 (8th Cir. 1995).

Each Berg Investor ratified Berg's closing of their accounts when he or she knowingly accepted the benefits of that transaction, *i.e.*, the cashier's checks from Berg. The assertion the Berg Investors make now—that they "believed that the transfers they received from the Cook Currency Entities were brought about because of their own independent requests, or Berg's actions on behalf of the Cook Currency Entities"—is not only unsupported by the record, it is belied by their own testimony:

- Michael Heise testified that he was able to get money out of the scheme “because [he] had Cliff Berg as [his agent], and he did the right thing, got [Heise’s] money out.”<sup>14</sup>
- The Fredells testified that Berg told them he “cashed [the Fredells] out” pursuant to their “agreement.”<sup>15</sup>
- Walter Defiel testified that he “imagine[d] it would have probably been Cliff or his son-in-law” who closed his account.<sup>16</sup>
- The Morissets testified that Defiel had told them that Dzik got their checks from Berg, and that they learned that “Cliff Berg got the money and gave it to John Dzik who then gave it to Walter who gave us ours.”<sup>17</sup>
- Reynold Sundstrom testified that Berg told him Berg had withdrawn Sundstrom’s money and, further, that he assumed Berg acted to close his account because of Berg’s concern about the investigation.<sup>18</sup>
- James McIntosh testified that Berg told him “I’ll go ahead and get the money and put a check in the mail to you.”<sup>19</sup>
- Steven Kautzman testified that Berg “performed” on their agreement when he got funds out of the scheme for Kautzman.<sup>20</sup>

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<sup>14</sup> Jansen Ex. 39 at 274–75.

<sup>15</sup> Jansen Ex. 56 at 75.

<sup>16</sup> Jansen Ex. 99 at 114.

<sup>17</sup> Jansen Ex. 105 at 33.

<sup>18</sup> Jansen Ex. 112 at 113.

<sup>19</sup> Jansen Ex. 150 at 163.

<sup>20</sup> Jansen Ex. 120 at 160–61.

- The Hillesheims testified that they were able to get money out of the scheme because Berg was “a good agent” who was “watching out for [them].”<sup>21</sup>
- The Frahms testified that Berg told them he had closed their account because of an investigation or audit going on.<sup>22</sup>

What is more, the Berg Investors do not and cannot dispute their *present* knowledge that Berg acted independently to close their accounts. Ratification occurs where “a principal accepts and retains the benefits of an unauthorized act of an agent with full knowledge of all the facts.” *Strader v. Haley*, 12 N.W.2d 608, 613–14 (Minn. 1943). “Where a principal fails to repudiate an agent’s act as soon as it is fully informed of what the agent has done, the principal may be held to ratification by implication.” *Baufield v. Safelite Glass Corp.*, 829 F. Supp. 285, 287 (D. Minn. 1993). To the extent the Berg Investors contend they did not know the material facts when Berg delivered their checks, they know now that upon learning of the SEC investigation, Berg told Cook to cash out his clients and that Cook honored Berg’s request. Yet not one of the Berg Investors has repudiated Berg’s actions on their behalf. There is no factual dispute that they accepted and retained the money Berg obtained for them; they ratified his agency as a matter of law.

The cases the Berg Investors cite are inapposite. For example, in *Anderson v. First Nat’l Bank of Pine City*, a plaintiff was found not to have ratified a mortgage on

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<sup>21</sup> Jansen Ex. 127 at 196–97.

<sup>22</sup> Jansen Ex. 165 at 114–16; Ex. 166 at 48–50.

which his signature was forged when he lacked knowledge of the material fact that the loan was secured by real property until the bank began foreclosure proceedings—at which point he repudiated the alleged contract. 228 N.W.2d 257, 259 (Minn. 1975). Here, the Berg Investors testified that they knew Berg acted for them to cash them out of Cook’s scheme. Rather than repudiating Berg’s “unauthorized conduct,” each and every one accepted and has retained the money from Berg. “Under Minnesota law, it is well established ‘that a principal cannot accept the benefits of the agent’s unauthorized conduct and then deny liability based on the fact that the conduct was unauthorized.’” *Wessels*, 65 F.3d at 1433.

## **2. The Berg Investors Controlled Berg’s Actions with Respect to Their Money.**

The Berg Investors make a vague argument that Berg was not their agent because they “never had any right to control the actions of Berg on an ongoing basis.”<sup>23</sup> They further assert that the Berg Investors had no legal right to demand that Berg examine the Cook companies’ books or conduct background checks.<sup>24</sup> The latter is of no significance to establishing agency. It does not matter whether the Berg Investors had the ability to control every action Berg took on an “ongoing basis” or whether Berg was legally bound to take any action they dictated. What matters is that the Berg Investors had the right to control Berg’s actions with respect to the money they sent to Cook’s scheme. The undisputed evidence shows that they did. *See, e.g., Bouffard v. State Farm Fire & Cas. Co.*, 27 A.3d 682, 688 (N.H. 2011) (“Control by the principal does not mean actual or

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<sup>23</sup> Br. at 46.

<sup>24</sup> *Id.*

physical control at every moment; rather, it turns upon the principal manifesting some continuous prescription of what the agent shall or shall not do.”)

None of the Berg Investors testified that Berg did not have the right to cash them out. Indeed, at least Respondents Heises, Fredells, Kautzman, and Hillesheims explicitly directed Berg to monitor the Cook companies and to liquidate their “accounts” if he had any concerns.<sup>25</sup> Berg followed these directions, and closed the “accounts” when he had “concerns” in the summer of 2009. In other words, Berg, the agent, acted in accord with the directions from his principals and under their control:

If the principal requests another to act on the principal’s behalf, indicating that the action should be taken without further communication and the other consents so to act, an agency relationship exists. If the putative agent does the requested act, it is appropriate to infer that the action was taken as agent for the person who requested the action[.]

Restatement 3d of Agency § 1.01 & cmt. c.

### **3. Fiduciary Duty Is Not an Element of Agency.**

Once the facts giving rise to an agency relationship exist, an agent owes a fiduciary duty to a principal. *E.g., Armstrong v. Republic Realty Mortgage Corp.*, 631 F.2d 1344, 1349 (8th Cir. 1980). But it does not follow that, in order to find agency, the Court must find that Berg “intended” to take on “a fiduciary duty to the Lenders, through which he owed a duty to fully disclose every material fact to them which related to Berg’s employer, the Cook Entities.”<sup>26</sup>

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<sup>25</sup> See Docket 193 at Parts IV.C.1, 2, 8, and 9.

<sup>26</sup> Br. at 46.

Setting aside the lack of evidence that the “Cook Entities” were Berg’s “employer,” the Berg Investors make a fundamental legal error: fiduciary duty is not an element needed to prove the agency relationship. Restatement 3d of Agency § 1.01 & cmt. e; *see also, e.g., Teeman v. Jurek*, 251 N.W.2d 698, 702 (Minn. 1977). A fiduciary relationship flows from agency—not the other way around—meaning that the agent must act in the principal’s interest. *Republic Realty*, 631 F.2d at 1349. Moreover, “an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow.” *PMH Properties*, 263 N.W.2d at 802–03.

Regardless of Berg’s intentions, the indisputable facts show an agency relationship between him and the Berg Investors. Berg was thus bound to act in their interest with respect to the Cook companies. He attempted to do just that; he did not want their money to be “locked up in an investigation,” so he “cashed them out.”<sup>27</sup> In so doing, Berg was most definitely not acting as a fiduciary to the Cook companies, which were harmed by the payments to the Berg Investors.

#### **4. Berg’s Liquidation of the Berg Investors’ Accounts Was Not a “Gratuitous Favor.”**

The Berg Investors argue that to the extent Berg cashed any of them out based on their agreement, he did so as “a gratuitous service to his friends,” not as their agent.<sup>28</sup> Although he was a friend and colleague to his clients, the undisputed facts show that in this context, he also served as their agent. The California case cited in the Berg Investors’ brief deals with a situation where a driver was deemed not to be a passenger’s

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<sup>27</sup> Jansen Ex. 150 at 224.

<sup>28</sup> Br. at 47.

agent when the driver offered the passenger a ride to town when he happened to be going that way. *Edwards v. Freeman*, 212 P.2d 883, 884 (Cal. 1949). By contrast, Berg acted affirmatively to affect a legal relationship between the Berg Investors and the Cook companies, closing their “accounts” on their behalf, for their benefit, pursuant to an agreement he had with them to do so.

**5. Berg’s Knowledge Is Properly Imputed to the Berg Investors.**

**i. Berg’s Knowledge Was Within Scope of His Agency.**

The Berg Investors first argue that even if he is their agent, Berg’s knowledge cannot be imputed to them because he did not learn about any “red flags” in the course of closing their accounts. But the very case they cite states the general rule that “knowledge of an agent acquired previous to the agency, but appearing to be actually present in his mind during the agency and while acting for his principal in the particular transaction or matter, will, as respects such transaction or matter, be deemed notice to the principal.” *Trentor v. Pothan*, 49 N.W. 129, 129 (Minn. 1891). The red flags contributing to Berg’s inquiry notice—including Cook’s disclosure that the SEC was conducting an investigation, not an audit—were in Berg’s mind when he closed the Berg Investors’ accounts; indeed, as soon as he learned that the SEC’s presence at Cook’s office was not at all routine, he immediately cashed the Berg Investors out. Thus, the red flags were within the scope of Berg’s agency.

**ii. Nothing Precludes Imputing Berg’s Knowledge to the Berg Investors.**

Even assuming, as the Berg Investors improperly do, that Berg was an “employee” of the Cook companies, nothing in the record precludes imputing his knowledge to them.<sup>29</sup> As the Berg Investors concede, “an analysis of imputation in a dual agency context must examine on whose behalf the agent is actually working.”<sup>30</sup>

Here, there is no doubt that Berg was working for the Berg Investors—not the Cook companies—in obtaining cashier’s checks for them. Berg got the checks by asking Cook to get himself and his clients out of the scheme, not the other way around.<sup>31</sup> Berg acted for the benefit of his friends and colleagues, each of whom profited from Berg’s actions. Berg’s closure of his clients’ accounts did not benefit the Cook companies in any way; to the contrary, it simply made those companies even less solvent and depleted them of resources they would have had to pay all defrauded investors.

Nor was Berg’s interest “adverse” to the Berg Investors such that imputation of his knowledge to them would be improper. In the case cited by the Berg Investors on this point, a principal was not guilty of fraud based on his attorney’s knowledge where the attorney committed an independent fraud on him. *Benton v. Minneapolis Tailoring & Mfg. Co.*, 76 N.W. 265 (Minn. 1898). Berg was not defrauding the Berg Investors by giving each of them cashier’s checks equivalent to their principal plus interest.

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<sup>29</sup> Br. at 50–51.

<sup>30</sup> Br. at 51 (citing *Lane v. Oustalet*, 873 So. 2d 92, 97 (Miss. 2004).)

<sup>31</sup> Jansen Ex. 8 at 78, 138.

Moreover, Berg told the Berg Investors exactly what he was doing and why: he was cashing them out because of concerns over the investigation.<sup>32</sup>

### iii. Inquiry Notice May Be Imputed.

The Berg Investors argue that Berg’s knowledge could only be imputed to them if he had “actual knowledge” of the Ponzi scheme. They misleadingly quote *Wardley Better Homes & Gardens v. Cannon*, 61 P.3d 1009, 1016 (Utah 2002), which in turn cites a 1973 legal encyclopedia, as stating that “imputed knowledge should not be used when determining whether a principal acted in good faith.”<sup>33</sup> They omit the critical portion of this quotation, which makes clear that it refers to *subjective*, not objective, good faith: “[I]mputed knowledge should not be used when determining whether a principal acted in good faith *and when determining whether a principal actually intended to form a contract.*” *Id.* (emphasis added). Indeed, the proposition for which the court cites the encyclopedia is that “[g]enerally, because imputed knowledge is constructive, it cannot be used when determining an individual’s *subjective mental state.*” *Id.* (emphasis added). The Berg Investors have acknowledged that the standard for good faith under the MUFTA is objective, not subjective.<sup>34</sup> See *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995). Thus, *Wardley* is irrelevant.

*Hare & Chase, Inc. v. Nat’l Surety Co.*, 49 F.2d 447 (S.D.N.Y. 1931), standing for the unremarkable proposition that knowledge not actually in possession of the agent cannot be imputed to the principal, is no more helpful to the Berg Investors. Here, it is

<sup>32</sup> See Docket 193 at Parts IV.C.1–12.

<sup>33</sup> Br. at 51.

<sup>34</sup> Br. at 22.

indisputable that Berg had actual knowledge of the red flags sufficient to prompt closure of his own “account” and those of his clients.

Finally, *Thomas v. N.A. Chase Manhattan Bank*, 1 F.3d 320 (5th Cir. 1993) explains that an agent must actually inform a principal of facts before those facts may be “re-imputed” to someone else. *Id.* at 325. Again, this has no applicability to the case before the Court.

But the facts of this case are similar to those in *Smith v. Suarez*, a fraudulent transfer case stemming from a Ponzi scheme in which an agent’s inquiry notice of the fraud was fatal to his principals’ good faith defense. 417 B.R. 419, 443–44 (Bankr. S.D. Tex. 2009). The Berg Investors have failed to distinguish *Smith* on any meaningful grounds. Contrary to their statement that the agent there was proven to have “‘actual knowledge’ that he was involved in a fraudulent enterprise,”<sup>35</sup> the *Smith* court stated that the agent “knew (*or at the very least, should have known*)” about the illegitimacy of the scheme and imputed that inquiry notice to the agent’s principals. 417 B.R. at 443 (emphasis added); *see also In re Bayou Group, LLC*, 439 B.R. 284, 312–13 (S.D.N.Y. 2010) (“Bayou IV”).

**iv. Public Policy Is Not Served by Precluding Imputation of Berg’s Knowledge.**

Finally, the Berg Investors argue that imputing an agent’s knowledge would mean the good faith defense would “never be sustainable in a ponzi scheme context” because

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<sup>35</sup> Br. at 52.

someone in the chain of transfer would always have knowledge of the fraud.<sup>36</sup> The Berg Investors miss the point that they, unlike the hundreds of other investors Cook defrauded, had an agent on the inside protecting them and “cashing them out” at the last minute. No legitimate public policy is served by making an exception to the general rule of imputing an agent’s knowledge to a principal so that people like Berg can cash their friends out of a failing scheme at the expense of other, innocent victims. Indeed, in the *Bayou IV* case so frequently cited by the Berg Investors, the court noted that the transferees “or their investment advisors” received all of the alleged red flag information. 439 B.R. at 318 & n.31.

**C. Berg Was on Inquiry Notice.**

There is no evidence in the record of Berg’s good faith; the red flags of which Berg was indisputably aware were sufficient to prompt a reasonable person—and did in fact prompt Berg—to question whether the Cook companies were fraudulent or insolvent. *See Sherman*, 67 F.3d at 1355; *Dev. Specialists, Inc. v. Hamilton Bank, N.A.*, 250 B.R. 776, 797–98 (Bankr. S.D. Fla. 2000). The Berg Investors mention that “Berg invested and eventually lost hundreds of thousands of dollars in the Cook Entities,” disingenuously suggesting that Berg must have had good faith because he too was duped.<sup>37</sup> But Berg “lost” this money only because, as a Relief Defendant, he returned it to the Receiver in a settlement.<sup>38</sup> Indeed, when Berg learned of the SEC’s investigation

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<sup>36</sup> Br. at 54.

<sup>37</sup> Br. at 4.

<sup>38</sup> Declaration of Joseph M. Kaczrowski in Support of Receiver’s Motion for Summary Judgment (“Kaczrowski”), Ex. 6.

and cashed out his clients, he also got almost \$950,000 in checks for himself and his wife. In depositing these, Berg explained to the bank teller that he was “trying to help [his] son-in-law.”<sup>39</sup> He proceeded to transfer the funds through ten separate accounts at various financial institutions.<sup>40</sup>

Because the Receiver has proven Berg’s agency, and the Berg Investors have not carried their burden to prove his good faith, the Receiver’s motion for summary judgment on his fraudulent transfer claims against the Berg Investors must be granted.

## **II. Respondents’ Factual Misstatements**

Over a year ago, Respondents were provided complete access to every copy and electronic file that the Receiver seized from Cook and his companies. Later, the Receiver gave counsel for Respondents their own complete set of the same key-word-searchable material, plus additional information from the Receiver’s investigative files. Despite this, Respondents continue to make unsupported statements that are flatly contradicted by bank records and other evidence that has long been at their disposal. Respondents cannot defeat the Receiver’s motion for summary judgment with misstatements and by attempting to create the appearance of a factual dispute without any supporting evidence whatsoever.

Among the more egregious misstatements made by Respondents:

- The Berg Investors do not cite a single provision of any of their supposed contracts to support their repeated assertion that the Cook companies had a

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<sup>39</sup> Jansen Ex. 10 at 38.

<sup>40</sup> Jansen Ex. 38.

“contractual right to liquidate [their] funds and return them at any time.”<sup>41</sup>

The unsolicited return of funds was not provided for in the agreements they signed. Moreover, the manner in which they received money in the summer of 2009 violated express terms of those agreements.<sup>42</sup>

- The transfers to the Berg Investors were not “made after the Ponzi scheme had ceased to accept funds from new investors.”<sup>43</sup> New investor money from at least 20 people totaling over \$968,000 went into Cook company accounts *after* the Berg Investors got their fraudulent transfers.<sup>44</sup>
- Respondents Hopfenspirger and McIntosh did not make “independent requests for return of their funds.”<sup>45</sup> Hopfenspirger merely responded to Cheney’s question of “should I get your money out for you too?” with “Sure”<sup>46</sup> after Cheney recounted his conversation with Cook. And McIntosh simply said “OK” when Berg said it would be best to take the money out.<sup>47</sup>
- The Phillipses did not receive any money from the Cook companies after they filed their lawsuit against Cook.<sup>48</sup> They filed suit precisely because they could not get any money out after June 4, 2009, despite their repeated

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<sup>41</sup> *E.g.*, Br. at 7, 16, 65.

<sup>42</sup> *E.g.*, Jansen Ex. 160; Ex. 162; Ex. 168; Ex. 174.

<sup>43</sup> Br. at 21.

<sup>44</sup> *See* Kohlhepp Ex. 1; Docket 134-1 at 21–23.

<sup>45</sup> Br. at 9.

<sup>46</sup> Jansen Ex. 95 at 135.

<sup>47</sup> Jansen Ex. 150 at 163.

<sup>48</sup> Br. at 17.

attempts to do so.<sup>49</sup> The last payment the Phillipses received from the Cook companies was a check dated June 1, 2009.<sup>50</sup> They ultimately lost \$1,519,400 to the Cook scheme and have recovered the same *pro rata* share as every other losing investor in this fraud.<sup>51</sup> Respondents' imprudent argument that the Phillips' have been allowed to keep their principal "due to their agreement to assist the Receiver" is not only demonstrably false, it only further denigrates their own credibility.

- Investor requests for account closure were not being "processed normally at the time [Respondents] received their funds."<sup>52</sup> "Withdrawals" in late June and July 2009 were limited to "interest" payments that Cook had been making all along.<sup>53</sup> Many investors tried to withdraw money or close their accounts altogether—and were denied—while Berg cashed out the Berg Investors for a profit.<sup>54</sup> And contrary to the Berg Investors' unsupported arguments, records produced to them long ago show that the vast majority of investors who were attempting to withdraw funds by phone and email when the Berg Investors got their transfers were not Durand's clients.<sup>55</sup>

Also, prior to July 15, 2009, when Cook transferred money to Respondent

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<sup>49</sup> Jansen Ex. 5 at 26.

<sup>50</sup> Kohlhepp Ex. 18.

<sup>51</sup> Jansen Ex. 11 at 9.

<sup>52</sup> Br. at 11; Docket 226, ("Anderson Br.") at 10.

<sup>53</sup> Kohlhepp Ex. 17; Ex. 17.1.

<sup>54</sup> Jansen Ex. 22–25; Ex. 36.

<sup>55</sup> Kaczowski Ex. 1–4.

Anderson, there were at least fourteen written withdrawal requests that were denied—none of which were Durand’s clients.<sup>56</sup>

- Basel was insolvent when Cook made the transfer to Anderson.<sup>57</sup> Anderson argues that after her withdrawal, “Basel had only five remaining investors, who had provided funds totaling \$327,625” and that there was money left in the Basel account to pay them.<sup>58</sup> Anderson’s math is wrong. Although one investor’s \$75,000 check originally bounced, bank records show that the same investor re-deposited the \$75,000 via wire.<sup>59</sup> Basel actually had seven remaining investors and was insolvent by at least \$99,000 when Cook made the transfer to Anderson.<sup>60</sup>
- Grzybowski’s statement to Anderson that if she had waited “six more hours” she would not have been able to get money is not hearsay.<sup>61</sup> Anderson testified that the statement was made.<sup>62</sup> The statement is not offered to show that it was true, but as an additional red flag pointing to fraud or insolvency of which Anderson was aware.

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<sup>56</sup> Jansen Ex. 23.

<sup>57</sup> See Anderson Br. at 14.

<sup>58</sup> Anderson Br. at 8–9, 19–20.

<sup>59</sup> Kohlhepp Ex. 17; Hlavacek Ex. I. See also Hlavacek Ex. II.

<sup>60</sup> Hlavacek Ex. I.

<sup>61</sup> See Anderson Br. at 18, n.3

<sup>62</sup> Jansen Ex. 182 at 55.

### III. Respondents Lacked Good Faith.

#### A. Respondents Erroneously Analyze “Red Flags.”

Respondents err when they argue that any fact that could have some explanation other than fraud or insolvency cannot be a red flag as a matter of law.<sup>63</sup> To the contrary, any fact that would cause an objective reasonable person to inquire whether a transfer might be the product of fraud or insolvency is a red flag that contributes to inquiry notice. *E.g., Sherman*, 67 F.3d at 1355; *Terry v. June*, 432 F. Supp. 2d 635, 641 (W.D. Va. 2006). The test is not whether the facts would tell a reasonable person there is fraud or insolvency to any degree of certainty, as Respondents suggest. Inquiry notice means only that a reasonable person would have cause to inquire into whether the transferor’s purpose in effectuating the transfer was to delay, hinder, or defraud the transferor’s creditors. *E.g., Armstrong v. Collins*, No. 1-cv-2437, 2010 U.S. Dist. LEXIS 28075 at \*60 (S.D.N.Y. March 24, 2010).

Respondents make the additional legal error of attempting to explain away each red flag in isolation. Although good faith must be determined on a “case-by-case basis,” *Sherman*, 67 F.3d at 1355, courts have been consistent in taking the commonsense approach of looking at red flags in the aggregate to determine whether they are sufficient to prompt a reasonable person to make further inquiry. *See, e.g., Sherman*, 67 F.3d at 1355–56 (“the combination of these factors places [the transferee] on inquiry notice”).

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<sup>63</sup> *E.g.*, Br. at 55–66; Anderson Br. at 29–34.

By the time Berg handed them cashier's checks, the red flags<sup>64</sup> of which the Berg Investors were aware would have accumulated to form a very suspicious picture. Even assuming a reasonable person would not have questioned the Cook companies' possible fraud or insolvency earlier, by the time they received the checks from Berg, the Berg Investors knew, at a minimum, that Berg had *sua sponte* liquidated their "accounts"; that such liquidation was in violation of agreements they had with the Cook companies; that such liquidation was in response to an investigation or audit; that there were no receipts or documents confirming the closure of their accounts; that there were mathematical irregularities in their transactions with the Cook companies; and that the rates of return they realized were well in excess of market rates with purportedly no risk. Faced with these facts in the aggregate, a reasonable person who did not want to remain willfully ignorant would be prompted to inquire whether Berg quickly cashed them out because the Cook companies *might* be fraudulent or insolvent.

For Respondent Anderson's part, she urges that a reasonable person would not view fraud or insolvency as a *possibility* despite having actual knowledge of a lawsuit alleging fraud, a Court Order freezing assets based on the lawsuit, and the statement that, had she waited six more hours, she would not have been able to get money out. No reasonable jury could agree.

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<sup>64</sup> The Receiver withdraws his argument that the cashier's checks to Respondents Cheney and Hopfenspirger showed unfamiliar Cook companies on their face.

The only reasonable conclusion upon an objective assessment of the facts known to each Respondent is that each of them was, at a minimum, on inquiry notice that the checks they received were from an insolvent or fraudulent source.

**B. Having Conducted No Further Inquiry, Respondents Cannot Prove Good Faith.**

Respondents do not dispute that, faced with the red flags identified by the Receiver, none of them conducted a diligent investigation into the true nature of the transfers they received.<sup>65</sup> They nevertheless argue that the Receiver's motion for summary judgment should be denied because investigation would not have revealed the Cook companies' fraud or insolvency.<sup>66</sup> Although they include cases from various bankruptcy courts, Respondents conveniently omit the Eighth Circuit's seminal fraudulent transfer case, *In re Sherman*, in their discussion of "every major fraudulent transfer case."<sup>67</sup> What is more, they do not even meet the good faith test from the Southern District of New York that they advocate.

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<sup>65</sup> Karen Morisset testified that she thought it "was kind of odd" that Defiel handed them checks that Berg had obtained for them and that she tried to call Oxford to find out what was going on. Jansen Ex. 105 at 23–24. She testified that she never was able to get a hold of anyone and that within a week she knew something was wrong because she read a front page article in the Star Tribune article about investors who could not get their money out. *Id.* at 24–25. Morisset's actions only further substantiate that a reasonable objective person would have inquired about the checks because she did, at least, conduct an initial inquiry but apparently stopped when she read about the allegations against Cook in the newspaper.

<sup>66</sup> Br. at 105–08; Anderson Br. at 28–29.

<sup>67</sup> Br. at 23.

**1. Under Eighth Circuit Law, Inquiry Notice Is Fatal to the Good Faith Defense.**

Eighth Circuit precedent on the good faith defense states that “a transferee does not act in good faith when he has sufficient knowledge to place him on inquiry notice[.]” *Sherman*, 67 F.3d at 1355. There is no “second prong” to the good faith test; if a transferee is aware of facts that would prompt a reasonable person to inquire further into possible fraud or insolvency, the defense fails. *Id.*; *see also In re Armstrong*, 285 F.3d 1092, 1096 (8th Cir. 2002). Respondents have not pointed to any controlling authority that supports their position that a transferee on inquiry notice of fraud or insolvency may still be able to prove the good faith defense.

**2. Jurisdictions Applying “Diligent Investigation” as a Second Prong of Good Faith Require Actual Investigation.**

Even if the Court were inclined to adopt the *Bayou IV* good faith test, which includes a diligent inquiry prong, summary judgment for the Receiver still must be granted because no Respondent conducted a diligent investigation into the true nature of the transfers. *Bayou IV* requires a diligent investigation once a transferee is on inquiry notice. 439 B.R. at 328; *see also, e.g., Dev. Specialists*, 250 B.R. at 798. *Bayou IV* chastises the bankruptcy court for holding that futility evidence is irrelevant—*if the transferees actually did investigate*, as they did in that case. 439 B.R. at 316. But *Bayou IV* explicitly declines to disturb the “standard rule that no investigation means no good faith defense.” *Id.* at 317. In contrast to Respondents, who did nothing, the Bayou investors did extensive investigation after learning of a lawsuit filed against Bayou by a

former Bayou partner/employee, attempting to question both the former employee and the Bayou partners about the allegations in the complaint. *Id.* at 321.<sup>68</sup>

#### **IV. The Receiver Is Entitled to Summary Judgment on His Unjust Enrichment Claims.**

##### **A. Respondents Are Not Entitled to a 100% Return of Their Principal.**

Respondents claim they were not unjustly enriched because they had a contractual right to the funds. But any contracts Respondents had with the Cook companies are invalid and unenforceable as the products of fraud, in violation of public policy, and lacking a meeting of the minds. Respondents have not and cannot explain away the cases cited by the Receiver on this point—many of which involve a transferee from a Ponzi scheme seeking to keep money pursuant to a contract. *See Hays v. Adam*, 512 F. Supp. 2d 1330, 1342 (N.D. Ga. 2007); *Goldberg v. Chong*, No. 07-20931, 2007 U.S. Dist. LEXIS 49980 at \*4–5, \*29–30 (S.D. Fla. Jul. 11, 2007); *see also Wing v. Wharton*, No. 08-cv-887, 2009 U.S. Dist. LEXIS 41795, at \*11 (D. Utah May 14, 2009).

What is more, Respondents’ “contracts” are substantially the same as those that every other defrauded investor also had.<sup>69</sup> Those investors are not entitled to any legal remedy under those contracts, but rather to the equitable remedy of a *pro rata* distribution of any money recovered. There is no reason to treat Respondents differently from the other investors whose money remained in the collapsing scheme solely because they did not have an inside connection.

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<sup>68</sup> The Bayou investors nonetheless failed to prove their good faith at trial, and verdicts totaling over \$14 million against them were entered in May 2011. Kaczrowski Ex. 5.

<sup>69</sup> Jansen Ex. 29; Ex. 30.

**B. The Preferential Treatment Respondents Received Does Not Preclude Summary Judgment.**

Respondents also argue that the Receiver is somehow prohibited from recovering on unjust enrichment because the transfers were preferential and preferential transfers can only be recovered in bankruptcy. Their argument is a red herring. It is true that the transfers at issue were preferential in that Respondents were chosen by insiders over hundreds of similarly situated investors who had an equal claim to the money. The preferential nature of the transfers is particularly apparent in the case of the Berg Investors, who did not even request the money they received.

But the transfers were not just preferential, they were also fraudulent under the Minnesota UFTA because they were made pursuant to a Ponzi scheme with actual intent to hinder, delay, or defraud other creditors. And they unjustly enriched Respondents because investors who did not have an insider cashing them out upon learning that the SEC investigation “was not routine,” did not have the same opportunity to get out. An unjust enrichment analysis is broad and includes *all* factors and equities, not just those that would be considered in a preferential-transfer claim under the bankruptcy code. The fact that the transfers were preferential only bolsters the Receiver’s equitable claims.

**C. Respondents Are Not Like the “Winning Investors.”**

Respondents refer to the approximately 150 “winning investors” who closed their accounts with the Cook companies before their collapse and argue that the Receiver unfairly singles out Respondents for disparate treatment.<sup>70</sup> But it is incorrect that the

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<sup>70</sup> Br. at 110; Anderson Br. at 12.

Receiver sought only the return of winning investors' profits. The Receiver sent demand letters articulating the bases for his claims to these investors, including claims for the entire amount transferred from the Cook companies, and then reached settlements with a number of the investors that were appropriate and reasonable in light of the facts—which did not include connections to an insider who cashed them out as the scheme collapsed.

Respondents are comparing themselves to the wrong group of investors. Had Respondents lacked an insider connection, they would be in the same position as the people who were still “invested” in the scheme at the time of its collapse. Those 700+ “losing investors” lost over \$150 million, and have only collectively recovered about \$4 million, less than three cents for every dollar they lost.<sup>71</sup> As Grant Grzybowski testified, “it’s fair” that Respondents, including his grandmother, pay back what they received as the scheme collapsed because “I don’t think there should be special treatment for anybody in this whole situation.”<sup>72</sup>

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<sup>71</sup> Jansen Ex. 11; Jansen Decl. ¶ 206.

<sup>72</sup> Jansen Ex. 13 at 237, 245.

**CONCLUSION**

The Receiver respectfully asks that his motion be granted for all of the reasons discussed above and in his opening memorandum.

Dated: January 30, 2012

Respectfully submitted,

*s/ Tara C. Norgard*

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R.J. Zayed (MN Bar No. 309,849)

Tara C. Norgard (MN Bar No. 307,683)

Russell J. Rigby (MN Bar No. 323,652)

Marlee A. Jansen (MN Bar. No. 389,428)

Peter M. Kohlhepp (MN Bar No. 390,454)

Carlson, Caspers, Vandenburg & Lindquist

225 S. 6<sup>th</sup> Street, Suite 3200

Minneapolis, MN 55402

Telephone: (612) 436-9600

Facsimile: (612) 436-9605

Email: tnorgard@ccvl.com