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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES  
TRADING COMMISSION,

Plaintiff(s)

Case No: 09-cv-3332 MJD/JJK

v.

TREVOR COOK d/b/a CROWN  
FOREX, LLC, PATRICK KILEY d/b/a  
CROWN FOREX, LLC, UNIVERSAL  
BROKERAGE FX and UNIVERSAL  
BROKERAGE FX DIVERSIFIED, OXFORD  
GLOBAL PARTNERS, LLC, OXFORD  
GLOBAL ADVISORS, LLC, UNIVERAL  
BROKERAGE FX ADVISORS, LLC f/k/a  
UBS DIVERSIFIED FX ADVISORS, LLC,  
UNIVERSAL BROKERAGE FX  
GROWTH, L.P. f/k/a UBS DIVERSIFIED FX  
GROWTH L.P., UNIVERSAL BROKERAGE  
FX MANAGEMENT, LLC f/k/a UBS  
DIVERSIFIED FX MANAGEMENT, LLC  
and UBS DIVERSIFIED GROWTH, LLC,

Defendant(s)

R.J. ZAYED,

Receiver.

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

UNITED STATES SECURITIES  
AND EXCHANGE COMMISSION,

Case No: 09-cv-3333 MJD/JJK

Plaintiff(s)

v.

TREVOR G. COOK,  
PATRICK J. KILEY,  
UBS DIVERSIFIED GROWTH, LLC,  
UNIVERSAL BROKERAGE FX  
MANAGEMENT, LLC,  
OXFORD GLOBAL ADVISORS, LLC,  
and OXFORD GLOBAL PARTNERS, LLC,

Defendants

and

BASEL GROUP, LLC,  
CROWN FOREX, LLC,  
MARKET SHOT, LLC,  
PFG COIN AND BULLION,  
OXFORD DEVELOPERS, S.A.,  
OXFORD FX GROWTH, L.P.,  
OXFORD GLOBAL MANAGED  
FUTURES FUND, L.P., UBS DIVERSIFIED  
FX ADVISORS, LLC, UBS DIVERSIFIED  
FX GROWTH, L.P., UBS DIVERSIFIED  
FX MANAGEMENT, LLC, CLIFFORD  
BERG, and ELLEN BERG,

Relief Defendants.

R.J. ZAYED,

Receiver.

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**MEMORANDUM IN SUPPORT OF RECEIVER’S MOTION TO COMPEL  
CLIFFORD AND ELLEN BERG TO RETURN RECEIVERSHIP FUNDS**

The Receiver, R.J. Zayed, has moved the Court for an Order compelling Clifford and Ellen Berg (“the Bergs”) to return \$222,197.98 in Receivership funds to the Receiver. The Bergs received a total of \$948,848.36 from the Receivership Entities. To date the Receiver has taken possession of \$726,650.38. Under this Court’s Orders, Minnesota’s Uniform Fraudulent Transfer Act, and equitable principles, the Bergs owe the balance of \$222,197.98 to the Receivership.

**FACTS**

**A. Trevor Cook’s Ponzi Scheme**

These cases concern a \$190 million Ponzi scheme run by Trevor Cook and others. On November 23, 2009, the Securities and Exchange Commission (“SEC”) and the Commodities Futures Trading Commission (“CFTC”) filed separate lawsuits against Trevor Cook, Patrick Kiley, and various entities controlled by them (collectively referred to as the “Receivership Entities”). *Complaint*, SEC Docket No. 1 (Nov. 23, 2009); *Complaint for Injunctive and Other Equitable Relief and For Penalties under the Commodity Exchange Act*, CFTC Docket No. 1 (Nov. 23, 2009). Trevor Cook has since admitted to, among other things, knowingly and intentionally creating and executing a scheme and artifice to defraud. *See United States v. Trevor Gilson Cook*, No. 10-cr-00075, Docket No. 7, at 1–3 (April 13, 2010).

**B. The Court's Receivership and Asset Freeze Orders**

On November 23, 2009, the Court appointed R.J. Zayed as Receiver in these cases and froze all assets of the Receiver Estates. *See Order Appointing Receiver*, SEC Docket No. 13 (Nov. 23, 2009); *see also Amended Order Appointing Receiver*, SEC Docket No. 18 (Nov. 24, 2009); *Second Amended Order Appointing Receiver*, SEC Docket No. 68 (Dec. 11, 2009); *Order Imposing Asset Freeze and Other Ancillary Relief*, SEC Docket No. 14 (November 23, 2009); *Order Identifying Frozen Accounts*, SEC Docket No. 15 (November 23, 2009); *Ex Parte Statutory Restraining Order*, CFTC Docket No. 21 (November 23, 2009); *Order Continuing Appointment of Temporary Receiver*, CFTC Docket No. 96 (Dec. 11, 2009).

The Receiver is charged with locating and preserving all assets that remain from the scheme for the benefit of over 1,000 investors who were defrauded by Mr. Cook and his colleagues. In doing so, the Receiver is authorized, among other things, to “take such action as necessary and appropriate to prevent the dissipation or concealment of any funds or assets or for the preservation of any such funds and assets of the Receiver Estates.” *Second Amended Order Appointing Receiver*, SEC Docket No. 68, at I.G.

The Court's Orders provide clear instructions to anyone in possession of Receivership assets. All assets of the Defendants and Relief Defendants are frozen, including “all other funds, accounts, and other assets to which proceeds from the Defendants' offering can be traced or which were acquired with proceeds of the Defendants' offering.” *Order Imposing Asset Freeze and Other Ancillary Relief*, SEC Docket No. 14, at I. All persons in possession of Receivership assets are ordered to turn

over to the Receiver “any and all property, including records of any nature, of which any of the Receiver Estates are the owners or have an interest in . . . .” *Second Amended Order Appointing Receiver*, SEC Docket 68, at IX. In addition, anyone holding or controlling Receivership assets is prohibited from disposing of or taking any action that interferes with “the taking control, possession, or management, by the Receiver, of any assets of the Receiver Estates, or . . . in any way interfere[s] with or harass[es] the Receiver, or . . . interfere[s] in any manner with the exclusive jurisdiction of this Court over the Receiver Estates.” *Second Amended Order Appointing Receiver*, SEC Docket No. 68, at VII.D.; *see also Order Imposing Asset Freeze and Other Ancillary Relief*, SEC Docket No. 14, at p. 8; *Ex Parte Statutory Restraining Order*, CFTC Docket No. 21, at I.A.

**C. Clifford and Ellen Berg’s Role in These Cases**

Clifford and Ellen Berg are Relief Defendants in the SEC case. *Complaint*, SEC Docket No. 1. The Bergs are Trevor Cook’s in-laws. *See Memorandum Opinion and Order*, SEC Docket No. 215, at 4 (Feb. 24, 2010). Clifford Berg was employed by Trevor Cook as a sales representative and was successfully recruiting investors for Cook’s Ponzi scheme at least as early as January 2007. Declaration of Alexandra J. Olson, May 5, 2010 (“Olson Decl.”), ¶ 2, Ex. 1.

The Bergs were also beneficiaries of the scheme. From July 2007 to July 2009, Receivership Entities transferred a total of \$7,048,848.36 to the Bergs and investors recruited by Clifford Berg. Of this total, \$948,848.36 went directly to Clifford and Ellen Berg. *See Declaration of Scott J. Hlavacek*, Nov. 20, 2009 (“Hlavacek Decl.”), SEC

Docket No. 4, Ex. 15. The remaining \$6,220,681.53 was cut into cashiers' checks and distributed among investors Clifford Berg had brought into the Ponzi scheme. Olson Decl., ¶ 3.

**D. Clifford and Ellen Berg Are Subject to the Court's Receivership And Asset Freeze Orders**

The Court's Receivership Order specifically includes "all funds, accounts, and other assets held by or for Relief Defendants Clifford Berg and Ellen Berg, which were received, directly or indirectly, from [Cook or the Receivership Entities] or were acquired with funds or other assets received, directly or indirectly, from [Cook or the Receivership Entities]." *Order Appointing Receiver*, SEC Docket No. 13, at 4 (Nov. 23, 2009); *see also Amended Order Appointing Receiver*, SEC Docket No. 18, at 4 (Nov. 24, 2009); *Second Amended Order Appointing Receiver*, SEC Docket No. 68, at 2 (Dec. 11, 2009); *Ex Parte Statutory Restraining Order*, CFTC Docket No. 21, at 7 (Nov. 23, 2009); *Order Continuing Appointment of Temporary Receiver*, CFTC Docket No. 96 (Dec. 11, 2009).

The Court's Asset Freeze Order similarly applies to the Bergs, freezing "all funds, accounts, and other assets held by or for Relief Defendants Clifford Berg and Ellen Berg, which were received, directly or indirectly, from the Defendants or were acquired with funds or other assets received, directly or indirectly, from the Defendants." *Order Imposing Asset Freeze and Other Ancillary Relief ("Asset Freeze Order")*, SEC Docket No. 14, at 3 (Nov. 23, 2009); *see also Order of Preliminary Injunction, Asset Freeze, and Other Ancillary Relief ("Preliminary Injunction Order")*, SEC Docket No. 51, at 5–6 (Dec. 8, 2009). The Order further enjoined the Bergs from "transferring, selling,

encumbering, receiving, changing, pledging, assigning, liquidating, incurring debt upon . . . or otherwise disposing of or withdrawing, any funds, accounts or other assets . . . owned by, controlled by, held for the benefit of, or in the possession of the Defendants and/or Relief Defendants.” *Asset Freeze Order*, SEC Docket No. 14, at 4; *see also Preliminary Injunction Order*, SEC Docket No. 51, at 7. The Order also provided a nonexclusive list of the Berg’s accounts that were subject to the asset freeze. *Asset Freeze Order*, SEC Docket No. 14, at 6. *See also Preliminary Injunction Order*, SEC Docket No. 51, at 9.

On December 3, 2009, the Bergs objected to the Asset Freeze Order, arguing that they did not violate any federal laws or regulations; or, in the alternative, requesting that the Order be amended to remove from the freeze the principal of funds that they said came from “legitimate” sources. *Memorandum Opinion and Order*, SEC Docket No. 215, at 2. This Court denied the Bergs’ request, making clear that the entire amount received by the Bergs, including the principal they invested, is subject to the freeze. *Id.* at 4–5. Moreover, this Court stated that there is no basis to give the Bergs a preference over other investors. *Id.*

**E. Receivership Entities Transferred \$948,848.36 To Or For The Benefit of The Bergs**

From May 2007 through July 2009 Trevor Cook caused money to be transferred to the Bergs, or for the benefit of the Bergs, on at least eighteen separate occasions. *See Hlavacek Decl.*, Ex. 15. On each occasion, the money came from the account of a Receivership Entity—UBS Diversified Growth LLC, PFG Coin and Bullion, Oxford

Global Advisors, Crown Forex LLC, or Oxford Global Partners. *Id.* In total, the Bergs received at least \$948,848.36 of Receivership funds personally and \$6,220,681.53 to be distributed among Clifford Berg's investors. *Id.*

**1. The Bergs Received At Least \$119,379.80 from May 2007 through May 2009**

From May 2007 through May 2009 the Bergs received at least \$119,379.80 from bank accounts controlled by the Receivership Entities. *See* Hlavacek Decl., Ex. 15. Cook transferred this money to or for the benefit of the Bergs in at least fifteen separate transactions ranging in value from \$2,500 to \$33,379.80. *Id.*

**2. The Bergs Received \$829,468.56 After the SEC and CFTC Began Investigating the Fraud and An Additional \$6.2 Million For Their Investors**

In mid-June 2009 the SEC conducted a surprise walk-in inspection of the Receivership Entities' offices. *Memorandum Opinion and Order*, SEC Docket No. 215, at 4. Also in June 2009, the CFTC subpoenaed Oxford Global Partners, in the care of Trevor Cook. *Id.* Soon thereafter, Trevor Cook caused millions of dollars to be transferred from Receivership accounts to the Bergs and a select group of investors who had been recruited into the Ponzi scheme by Clifford Berg. All told, in June and July 2009, the Bergs were given \$829,468.56 in Receivership funds to pay themselves and \$6,220,681.53 to pay off Clifford Berg's investors. Hlavacek Decl. Ex. 15; *see also* Olson Decl., ¶¶ 3–9, Exs. 2–11.

**3. The Bergs Proceeded To Transfer \$829,468.56 In Receivership Funds Among Ten Accounts At Three Different Financial Institutions**

Using the Court's subpoena power, the Receiver was able to trace the Receivership funds that the Bergs received through and among ten separate accounts and three different financial institutions over a three month period of time. These tactics were designed to conceal the source of the proceeds and are described below.

**a. Initial Deposits at American Bank**

On or about June 30, 2009 the Bergs received three cashier's checks from the Receivership Entities, totaling \$754,802.00. Hlavacek Decl. Ex. 15; *see also* Olson Decl., ¶¶ 4–5, Exs. 2–6. That same day, Clifford Berg went to the American Bank branch location in Apple Valley, Minnesota to deposit the checks. Dec. 4, 2009 Tr. (Karges) at 36. While he was there, Mr. Berg spoke with the bank manager, Kathryn Karges and told her that he would be depositing multiple large checks. *Id.* at 38. Mr. Berg then explained that he was trying to help his son-in-law. *Id.* Mr. Berg proceeded to deposit the three cashier's checks into two separate accounts held by the Bergs at American Bank: a savings account owned by Ellen Berg (account number 4636) and another savings account jointly owned by Ellen and Cliff Berg (account number 1804).<sup>1</sup> Olson Decl., ¶¶ 6–7, Exs. 7–8.

On July 3, 2009, the Bergs received another check for \$74,666.56 in Receivership funds. *Id.* at ¶ 8, Ex. 9. Three days later, Clifford Berg deposited that cashier's check

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<sup>1</sup> Accounts discussed in this Memorandum are referenced by the last four digits of their account numbers.

into the Bergs' joint savings account (number 1804) at American Bank, less \$266.56 in cash back from the teller. Dec. 4, 2009 Tr. (Karges) at 46; *see also* Olson Decl., ¶ 9, Exs. 10–11.

**b. Transfers from American Bank to Charles Schwab**

In August 2009, the Bergs transferred the Receivership funds from their accounts at American Bank to and among four different accounts held by them at Charles Schwab. First, on August 3, 2009, the Bergs transferred \$696,049 from their American Bank accounts to three different Charles Schwab accounts (account numbers 7821, 2632, and 2218). Olson Decl., ¶¶ 10–12, Exs. 10, 12–18. Then, on August 12, 2009, they made three separate transfers, totaling \$225,000, from their Schwab 2218 account to a fourth Schwab account (account number 8750). *Id.* at ¶ 13, Exs. 18–19.

**c. Transfers from Charles Schwab to First Commercial Bank**

In September 2009, the Bergs transferred the Receivership funds out of their Charles Schwab accounts into three new accounts at First Commercial Bank. On September 15, 2009, the Bergs wired \$225,131.09 from Schwab account number 8750 to a First Commercial Bank account numbered 4257. Olson Decl., ¶ 20, Exs. 28, 30. Then, on September 22, 2009, they deposited \$278,076.41 from Schwab account number 2632 into another First Commercial Bank account, numbered 2602. *Id.* at ¶ 15, Exs. 23–25. Finally, on September 28, 2009, they deposited \$192,858.53 from Schwab account 7821 to yet another First Commercial Bank account, numbered 2603. *Id.* at ¶ 14, Exs. 20–22.

**d. Intra-Bank Transfers at American Bank, Then To First Commercial Bank**

On September 9, 2009, the Bergs transferred \$12,000 from American Bank account number 1804, to another account jointly held by Clifford and Ellen Berg at American Bank, numbered 3908. *See* Olson Decl., ¶ 16, Exs. 10, 26. The same day, Clifford Berg wrote a personal check for \$11,000 from American Bank account 3908 and deposited it in First Commercial Bank account number 4257. *See id.* at ¶ 18, Exs. 26–28.

On September 15, 2009, the Bergs transferred an additional \$20,000 from American Bank account number 1804 to account number 3908. *See id.* at ¶ 17, Exs. 10, 26. The following day, Clifford Berg wrote a personal check for \$20,000 from American Bank account number 3908 and deposited it in First Commercial Bank account number 4257. *See id.* at ¶ 19, Exs. 26, 28–29.

**4. The Receiver Froze And Took Possession of the Receivership Funds Located At First Commercial Bank**

On December 4, 2009, the Receiver sent a letter to First Commercial Bank enclosing the Court’s Asset Freeze Order, noting that the three Berg accounts contained Receivership funds and requesting that the accounts be frozen. Olson Decl., ¶ 21, Ex. 31. Pursuant to this Court’s Orders, First Commercial Bank froze \$726,650.38, which was the remaining balance in the Bergs’ accounts as of December 7, 2009. *Id.* at ¶¶ 22–25, Exs. 32–33.

In view of this Court’s *Memorandum Opinion and Order*, on March 30, 2010 the Receiver sent a letter to First Commercial Bank requesting that the money frozen in the Bergs’ accounts be transferred to the Receiver. Olson Decl., ¶ 27, Ex. 34. On April 6,

2010, First Commercial Bank transferred to the Receiver the \$726,650.38 that had been frozen, along with an additional \$4,093.16 in interest earned on the three Berg accounts from December 7, 2009 through April 6, 2010. *Id.* at ¶ 26, 28, Ex. 35.

**F. The Bergs Owe The Receiver \$222,197.98 in Receivership Assets**

To date, the Receiver has taken possession of \$726,650.38 of the \$948,848.36 the Bergs received from the Receivership Entities. The balance owed to the Receiver is \$222,197.98.

Although First Commercial Bank transferred a total of \$730,743.54 to the Receivership, the Receiver credits the Bergs for the return of only \$726,650.38, the amount frozen on December 7, 2009. The \$4,093.16 in interest earned after the funds were frozen properly accrued to the benefit of the Receivership, not the Bergs.

**G. The Bergs Have Refused To Return the Money They Owe To The Receiver**

On April 22, 2010, the Receiver sent a letter to the Bergs' counsel, demanding that the Bergs return the \$222,197.98 difference between what the Bergs received and what the Receivership has recovered. *See* Olson Decl., ¶ 29, Ex. 36. The Bergs have refused to return the funds.

**ARGUMENT**

One of the Receiver's primary duties is to maximize distributions to defrauded investors and other claimants. *See Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995) (Receiver's "only object is to maximize the value of the [Receivership assets] for the benefit of their investors and any creditors"); *SEC v. TLC Invs. & Trade Co.*, 147 F.

Supp. 2d 1031, 1042 (C.D. Cal. 2001); *SEC v. Kings Real Estate Inv. Trust*, 222 F.R.D. 660, 669 (D. Kan. 2004). To maximize distributions, the Receiver must work diligently to recover all Receivership assets—including the entirety of Receivership funds transferred to the Bergs. Pursuant to these duties and this Court’s Orders, the Receiver respectfully requests that the Court order Clifford and Ellen Berg to promptly return the \$222,197.98 that they owe to the Receivership.

**A. The Receiver is Entitled to \$222,197.98 as the Remaining Portion of Funds Fraudulently Transferred to the Berg**

Trevor Cook fraudulently transferred \$948,848.36 to the Bergs in violation of Minnesota’s version of the Uniform Fraudulent Transfer Act (“UFTA”). *See* Minn. Stat. §§ 513.41–.51 (2009). In each instance, Cook caused the funds to be transferred to the Bergs with actual intent to hinder, delay, or defraud his creditors. *Id.* § 513.44(a)(1). The Receiver may avoid such transfers. *See Donell v. Kowell*, 533 F.3d 762, 770–771 (9th Cir. 2008). The Receiver has been able to trace and take possession of \$726,650.38 in Receivership funds held in various of the Berg’s bank accounts. The Receiver is entitled to disgorgement of the remaining \$222,197.98 directly from the Bergs.

“[T]he mere existence of a Ponzi scheme [is] sufficient to establish the actual intent to hinder, delay, or defraud creditors under [the Bankruptcy Code] . . . or another state’s equivalent fraudulent transfer statute.” *In re Slatkin*, 525 F.3d 805, 814 (9th Cir. 2008); *see also Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) (stating that a Ponzi scheme is insolvent from inception); *SEC v. Brown*, 643 F. Supp. 2d 1077, 1082 (D. Minn. 2009). Trevor Cook was running a Ponzi scheme—he was diverting funds

received from investors for other purposes, including making interest and principal payments to other investors. *See United States v. Trevor Gilson Cook*, No. 10-cr-00075, Docket No. 7, at 2–3 (April 13, 2010). This scheme was in existence by at least May 2007. *Id.* at 1. Any money the Bergs received from the Receivership Entities on or after this date was fraudulently transferred, and the Receiver is entitled to recover it.

Although the existence of a Ponzi scheme is sufficient to establish intent to defraud as a matter of law, the facts also demonstrate Trevor Cook’s actual intent to hinder, delay, or defraud his creditors by transferring funds to the Bergs. Circumstances tending to show actual intent under Minnesota law include situations where the transfer was to an insider; where the debtor had been sued or threatened with suit before the transfer was made; or where the debtor was insolvent or became insolvent shortly after the transfer was made. Minn. Stat. § 513.44. Such circumstances were present in the case of Cook’s transfer to the Bergs from at least 2007 through 2009.

First, the Bergs benefited from their “insider” status as Cook’s in-laws, and in Clifford Berg’s case, as Cook’s employee or independent contractor. Second, Cook caused the vast majority of the money the Bergs received to be transferred shortly after the SEC’s surprise walk-in of Cook’s offices in mid-June, 2009. *Memorandum Opinion and Order*, SEC Docket No. 215. Lest there be any doubt about the purpose of these transfers, Clifford Berg, when depositing multiple large checks received from the Receivership Entity UBS Diversified Growth LLC, told the bank teller that he was trying to help his son-in-law. *Id.* at 3–4. Third, other investors tried but were unable to withdraw their principal both before and after Cook caused significant payments to be

made to the Bergs. *E.g., Phillips v. Cook*, No. 09-cv-1732, Docket No. 197, at 38 (D. Minn. Nov. 4, 2009) (Third Amended Verified Complaint).

The burden is on the Bergs to establish an affirmative defense, if any, of both good faith and provision of reasonably equivalent value. Minn. Stat. § 513.48. “To determine whether a transferee acts in good faith, courts look to what the transferee objectively ‘knew or should have known’ instead of examining the transferee’s actual knowledge from a subjective standpoint. In other words, a transferee does not act in good faith when he has sufficient knowledge to place him on inquiry notice of the debtor’s possible insolvency.” *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995) (applying analogous language from the federal Bankruptcy Code); *see also Terry v. June*, 432 F. Supp. 2d 635, 641 (W.D. Va. 2006). The Receiver is therefore entitled to recover the full amount of funds transferred to the Bergs, unless the Bergs prove *both* objective good faith *and* provision of reasonably equivalent value.<sup>2</sup>

**B. The Receiver is Entitled to \$222,197.98 Under the Doctrine of Unjust Enrichment**

In Minnesota, unjust enrichment occurs in “situations where it would be morally wrong for one party to enrich himself at the expense of another.” *SEC v. Brown*, 643 F. Supp. 2d 1077, 1083 (D. Minn. 2009) (quoting *Cady v. Bush*, 283 Minn. 105, 166

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<sup>2</sup> Even if the Bergs could demonstrate objective good faith as to funds received by Clifford Berg from May 2007 to May 2009, the Bergs did not receive these commissions in exchange for reasonably equivalent value. *See Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006) (affirming recovery of commissions received by an employee of a Ponzi scheme and finding that the employee did not provide reasonably equivalent value—“[i]t takes cheek to contend that in exchange for the payments [the employee] received, the [ ] Ponzi scheme benefitted from his efforts to extend the fraud by securing new investments”).

N.W.2d 358, 361–62 (Minn. 1969)). The Bergs knowingly received funds from the Receivership Entities when they were not entitled to that benefit, under circumstances that would make it unjust to permit them to retain it. This is the essence of unjust enrichment. *See Southtown Plumbing, Inc. v. Har-Ned Lumber Co.*, 493 N.W.2d 137, 140 (Minn. App. 1992). Such payments do not belong to the Bergs. Rather, in equity and good conscience they must be returned to the Receivership for distribution among all defrauded investors.

Moreover, the Bergs are not entitled to a preference over other investors. Referring to the principal the Bergs invested with the Receivership Entities, this Court has noted that, while “at the appropriate time [] the Bergs may file a claim for the return of their funds[,] . . . there is no basis before the Court that would support giving a preference to the Bergs over any other investor.” *Memorandum Opinion and Order*, SEC Docket No. 215, at 4–5.

A preference is exactly what the Bergs received when they accepted \$948,848.36 in Receivership funds. Trevor Cook caused the majority of the money received by the Bergs to be transferred immediately following the SEC’s surprise walk-in of Trevor Cook’s offices in mid-June, 2009. *Id.* at 4. The Bergs were able to recover the principal they invested with the Receivership Entities—as well as significant funds in excess of their investment—because of their personal connections to Trevor Cook and their access to “insider” information. It would be unjust and inequitable to allow the Bergs to retain even a portion of this benefit at the expense of investors who lacked a similar “insider”

connection. Justice requires nothing less—the Bergs must be placed in the same situation that every other defrauded investor finds himself or herself.

Moreover, it appears that many, if not most of the payments the Bergs received from May 2007 through May 2009 were commissions Clifford Berg “earned” by recruiting investors into Cook’s Ponzi scheme. Under Minnesota law, it is not necessary to show that the Bergs themselves engaged in illegal conduct or fraud—it is sufficient that they benefited from Cook’s wrongdoing. *Kranz v. Koenig*, 484 F. Supp. 2d 997, 1001 (D. Minn. 2007). Clifford Berg recruited new investors using the misrepresentations in sales propaganda provided by Cook and the Receivership Entities. Whether or not Clifford Berg was aware of the fraud, any “commissions” he received came to him as a direct result of the fraud by which it was obtained. *Honeywell/Alliant Techsystems Fed. Credit Union v. Buckhalton*, No. C2-99-1194, 2000 Minn. App. LEXIS 66, at \*8 (Minn. App. Jan. 25, 2000). The Bergs directly benefited from Trevor Cook’s fraudulent scheme, and in so doing were unjustly enriched.

To allow the Bergs to retain money received from the Receivership Entities would be morally wrong. How that money is characterized—return of capital, return on capital, commission, or otherwise—is irrelevant. Moreover, it is immaterial if or when the Bergs knew of the fraud. The Bergs directly benefited from Trevor Cook’s fraud at the expense of investors who were left with nothing as the Bergs went to the bank. The Bergs currently retain at least \$222,197.98 in Receivership funds—money that must, in equity and good conscience, be returned to the Receivership.

**CONCLUSION**

This Court's Orders, the law of fraudulent transfer, and the principles of justice and equity require that the Bergs return \$222,197.98 in Receivership funds. For the reasons expressed herein, the Receiver respectfully requests an Order compelling the Bergs to turn over \$222,197.98 to the Receiver. A proposed Order granting the relief requested is submitted herewith.

Dated: May 5, 2010

Respectfully submitted,

s/ R.J. Zayed

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