UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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.

RECEIVER'S RESPONSE TO INVESTOR RESPONDENTS'
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Cliff Berg got his friends and colleagues into—and out of—his son-in-law's Ponzi scheme. Theirir connection to the scheme's perpetrator was the one important difference between the "Berg Investors"[1] and everyone else who invested in the scheme: when the fraud was about to be exposed, Berg used his relationship with his son-in-law to ensure that his people not only escaped unscathed, but reaped a handsome profit.

As the scheme was collapsing, Berg delivered millions of dollars to his clients under circumstances that would have seemed bizarre to any reasonable person: out of the blue—without even asking them or obtaining the appropriate paperwork—Berg told his clients that he had closed their "accounts" and handed them millions of dollars in cashier's checks without anything more. Berg's explanation was that there was an "audit" or an "investigation" going on, and he did not want their funds "locked up."

These transfers were fraudulent under the Minnesota morm Fraudulent Transfer Act. The Berg Investors cannot avoid that conclusion because they have not met—nor can they meet—the legal standard for good faith. Under the circumstances, a reasonable person in the shoes of the Berg Investors—or their agent, Cliff Berg—would have questioned whether the cashier's checks Berg handed to them in the summer of 2009 came from an insolvent entity or were being transferred with intent to hinder or delay

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[1] The Berg Investors at issue in this motion are Respondents Heises, Fredells, Cheneys, Hopfenspirger, Defiel, Morissets, Sundstrom, Kautzman, Hillesheims, McIntosh, Buysse, and Frahm. Respondents Dzik and Harris, who were also Berg's clients, settled with the Receiver and are no longer part of this action. Declaration of Marlee A. Jansen in Support of Receiver's Motion for Summary Judgment, Docket No. 194 ("Jansen") Ex. 204; Docket No. 181.

payment to other investors. In addition, the transfers unjustly enriched the Berg Investors at the expense of hundreds of innocent people who—lacking an insider connection—lost millions to the scheme.

The Berg Investors seek summary judgment in their favor on (1) the Receiver's fraudulent transfer claims and (2) the Receiver's unjust enrichment claims. Their motions must be denied because they are premised on legal error and ignore the facts most important to the Receiver's claims.

I. Factual Background

The facts relevant to this response, many of which are also set forth in the Receiver's memorandum in support of his motion for summary judgment[2], are set forth below:

A. The Cook Ponzi Scheme

The parties agree that Trevor Cook, along with his partners Bo Beckman, Pat Kiley, Gerald Durand, and Chris Pettengill, operated a massive Ponzi scheme.[3] Cook and his co-conspirators solicited investors, including the Berg Investors, into a sham foreign currency trading program that they claimed was a risk-free investment guaranteed to earn a 10–12% return.[4] Cook purported to make this money by capturing split-second differentials in the currency market.[5]

[2] Docket No. 193.
[3] Memorandum of Law in Support of Lenders' Motion for Summary Judgment, Docket No. 202 ("Br.") at 3.
[4] Jansen Ex. 1 at 2; *see also* Ex. 2, ¶ 21.
[5] Jansen Ex. 4 at 4–5.

The scheme was operated through numerous entities, many of which were no more than names on bank accounts and all of which are now under Receivership (the "Cook companies"). In the beginning, the scheme was marketed under variants of the name "UBS."[6] Later, it was offered through entities called "Oxford" or "Crown Forex."[7] The Berg Investors signed agreements with variants of all of these companies.

Cook ensured that he could tap into lucrative, but regulated, retirement accounts by affiliating with third-party administrators of self-directed IRAs.[8] Millennium Trust Company ("Millennium") and Entrust Group ("Entrust") were the third-party administrators used for this purpose.[9] Investors, including the Berg Investors, contracted with these companies to serve as independent custodians for IRA money that ultimately went to Cook.[10]

In total, Cook and his co-conspirators took in at least $194 million from investors. They spent all but a fraction of what they took in, spending other people's lives' savings for their own pleasure on everything from gambling, personal entertainment and travel, real-estate deals, purported equity investments in other companies, and high-risk trades.[11]

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[6] *See, e.g.*, Jansen Ex. 63; Ex. 64; Ex. 170; Ex. 172; Ex. 173.
[7] *See, e.g.*, Jansen Ex. 159–61; Ex. 83; Ex. 85; Ex. 86; Ex. 106; Ex. 117–19.
[8] An IRA is a trust established for the benefit of the investor that allows money to be invested tax-free or tax-deferred. *See, e.g.*, Jansen Ex. 179 at 7; Ex. 155 at 10; Ex. 147 at 6. Money placed in an IRA is known as "qualified" money and is subject to various IRS restrictions, including harsh tax penalties for early withdrawal. *Id*.
[9] *See, e.g.*, Jansen Ex. 135; Ex. 141; Ex. 176; Ex. 62; Ex. 71; Ex. 154; Ex. 178; Ex. 49; Ex. 76.
[10] *See, e.g.*, Jansen Ex. 145; Ex. 146; Ex. 147; Ex. 148; Ex. 172; Ex. 176.
[11] *See* Jansen Ex. 2, ¶ 39; Jansen Ex. 7, ¶ 12.

B. Cliff Berg's Role in the Scheme

One of Cook's salespeople was his father-in-law, Cliff Berg. Berg is a manufacturer's representative in the carpet industry, and has no investment training or background. Cook paid Berg to bring in money from his friends and colleagues in the carpet business.[12] Berg delivered, ultimately bringing well over $5 million into the scheme[13]—in large part because of his inside connection to Cook. The Berg Investors knew that Cook was Berg's son-in-law, that Cook ran the program, and that Berg would look out for them from the inside.[14]

Berg and Cook had an agreement: if there ever were any problems with the program, Berg and his clients could cash out.[15] According to Cook, "Cliff had stated to me that when he opened his own account, that he wanted his [and the Berg Investors'] money out if there was ever a possibility that anything would go wrong."[16] Berg had similar agreements with his clients: he would use his inside position to monitor the Cook companies and cash out his clients if he ever had any concerns.[17]

C. The Transfers at Issue

Cook's scheme began to collapse in the summer of 2009. On June 22, 2009, the SEC began an on-site investigation at the scheme's headquarters in the Van Dusen

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[12] *See* Jansen Ex. 9 at 32; Ex. 150 at 103; Ex. 57 at 78–79; Ex. 81 at 27–28; Ex. 56 at 46.
[13] Berg also opened accounts for himself and his wife totaling approximately $470,000. Jansen Ex. 10 at 22; *see also* Ex. 2.
[14] Jansen Ex. 56 at 44; Ex. 57 at 17, 23; Ex. 165 at 43; Ex. 166 at 13, 23, 26; Ex. 81 at 28; Ex. 82 at 31, 69–70; Ex. 99 at 41, 47, 55; Ex. 39 at 26; Ex. 40 at 73; Ex. 158 at 20–21; Ex. 120 at 40; Ex. 127 at 19–20; Ex. 128 at 15–16; Ex. 112 at 47, 58; Ex. 150 at 41.
[15] Jansen Ex. 12 at 168.
[16] Jansen Ex. 8 at 89, 180–81.
[17] *See infra* Parts IV.C.1–12.

mansion.[18] Berg heard about the investigation and started making calls. When Berg called the mansion, he was told that the SEC was conducting a routine audit.[19] Berg then followed up with Cook directly and asked whether there was a routine audit or an investigation going on.[20] Cook knew that the investigation was aimed at the fraud and that it was not routine, and he told his father-in-law as much. Cook told Berg that the SEC was conducting an investigation, not an audit, because: "You know, I wasn't going to lie to him."[21] Although none of the Berg Investors had submitted withdrawal forms to Berg or to Cook, Berg told Cook that he wanted all of his clients' accounts closed.[22] Contrary to the Berg Investors' statement that "Cook's employees kept their personal investments with the Cook Currency Entities based on the persuasiveness of Cook's explanation,"[23] Berg—who served as the Berg Investors' agent with respect to the scheme—also asked for his own money.[24]

Cook accommodated Berg's request by cobbling together funds from various accounts that he controlled. Instead of issuing conventional checks—which would not clear if the underlying accounts were drained or frozen—Cook ordered cashier's checks, which were guaranteed.[25] On June 29, 2009, Cook directed his assistant, Julia Smith, to withdraw fourteen cashier's checks for the Berg Investors from the Crown Forex account

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[18] *See* Jansen Ex. 13 at 164; Ex. 8 at 78, 87–88.
[19] Jansen Ex. 8 at 77–78; Ex. 12 at 168–69.
[20] Jansen Ex. 8 at 78–80.
[21] Jansen Ex. 12 at 169; *see also* Ex. 8 at 78; Ex. 14 at 295.
[22] Jansen Ex. 8 at 78, 138, 144; Ex. 12 at 169; Ex. 14 at 294–95.
[23] Br. at 25.
[24] Jansen Ex. 8 at 78, 138; Ex. 12 at 169.
[25] *See* Jansen Ex. 15–17.2.

at Associated Bank.[26] The same day, Cook directed his partner, Kiley, to withdraw eleven cashier's checks for them from the UBS Diversified Growth account at Wells Fargo.[27] On July 1, 2009, Cook directed Smith to withdraw two more cashier's checks for the Berg Investors from the Crown Forex account at Associated Bank.[28] The cashier's checks—totaling over $6 million—were made payable to the Bergs (Clifford and his wife, Ellen) and the Berg Investors in amounts equivalent to the principal they invested, plus fictional "interest" as follows:[29]

[26] Jansen Ex. 8 at 154–55; Ex. 15.
[27] Jansen Ex. 18 at 942; Ex. 16.
[28] Jansen Ex. 17.
[29] Jansen Ex. 15–17.2.

Recipient	Transferring Entity	Amount	Total for Recipient[30]	Net Profit[31]
Buysse	Crown Forex	$ 360,700	$ 360,700	$90,571.85
Cheney, P.	UBS	$ 101,000	$ 1,636,300	$255,457.49
Cheney, S.	UBS	$ 1,535,300		
Defiel	Crown Forex	$ 94,950	$ 94,950	$14,950.00
Frahm	UBS	$ 793,370	$ 916,570	$131,407.56
	UBS	$ 123,200		
Fredell, J.	Crown Forex	$ 25,700	$ 280,950	$47,450.00
Fredell, S.	Crown Forex	$ 243,250		
	Crown Forex	$ 12,000		
Heise, M. & J.	Crown Forex	$ 728,700	$ 795,911.53	$46,547.73
	Crown Forex	$ 67,211.53		
Hillesheim, C.	Crown Forex	$ 44,250	$256,150	$36,070.82
	UBS	$ 3,500		
Hillesheim, M.	Crown Forex	$ 48,900		
	UBS	$ 156,000		
	UBS	$ 3,500		
Hopfenspirger	UBS	$ 202,000	$ 202,000	$57,500.00
Kautzman	Crown Forex	$ 119,550	$ 119,550	$3,080.70
McIntosh	Crown Forex	$ 250,000	$ 250,000	$30,456.00
Morisset, G.	Crown Forex	$ 22,000	$ 61,050	$5,315.74
Morisset, K.	Crown Forex	$ 39,050		
Sundstrom	Crown Forex	$ 85,450	$ 85,450	$10,450.00

Cook personally delivered all of the cashier's checks to the Bergs' home.[32] As to his own checks, Berg promptly took them to the bank.[33] When he deposited them, Berg told the bank teller that he was "trying to help his son-in-law."[34] Berg then delivered each of the Berg Investors' checks, explaining that he had "closed their accounts"

[30] Jansen Ex. 34 at 10–13; Ex. 188. The "total" reflected here for the Berg Investors refers only to the cashier's checks they received in June and July of 2009. Some Berg Investors also received monthly "interest" payments from the scheme. Accordingly, the net total amount they actually received is greater than the amount at issue in this summary judgment motion.
[31] *See* Parts IV.B.1–12.
[32] Jansen Ex. 8 at 147–48.
[33] Jansen Ex. 10 at 37–38, 41; *see also* Ex. 16.1–16.3.
[34] Jansen Ex. 10 at 38, 42, 47-48.

because there was an "investigation" or "audit" going on.[35] He handed (or in a few cases, mailed) the checks to his clients without any receipts, account closing statements, or any documentation whatsoever.[36]

In an effort to support the idea that these transfers were not made pursuant to the Ponzi scheme, the Berg Investors mistakenly argue that by the time the cashier's checks were issued, Cook had stopped taking in new money and thus, the Ponzi scheme had come to an end. In fact, after June 30, 2009, over $960,000 from at least 20 different investors was deposited into bank accounts for the Cook companies.[37]

Then the Berg Investors contradict themselves and argue that the cashier's checks were actually transferred in the normal course of the fraud's business, processed along with every other withdrawal request that was made. Relying on Cook, they argue that withdrawals were being processed normally at the time the Berg Investors received their funds and that roughly 100 investors received complete withdrawals of principal and/or interest around the time the Berg Investors received transfers.[38] Cook actually said that "there was a lot of people that had withdrawals in the last couple of months. . . . I'd say 100 people."[39] Bank records show that "withdrawals" in July 2009 were limited to "interest" payments—the same lulling payments that Cook had been making all along.[40]

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[35] *See infra* Parts IV.C.1–12.
[36] *Id.*
[37] Declaration of Peter M. Kohlhepp in Support of Receiver's Responses to Respondents' Motions for Summary Judgment ("Kohlhepp"), Ex. 1.
[38] Br. at 33.
[39] Jansen Ex. 8 at 186.
[40] Kohlhepp Ex. 17; Ex. 17.1.

Requests for account closure (repayment of principal) were denied.[41] Although many tried, only the Berg Investors and Respondent Anderson, who had her own inside connection, were able to "cash out" of the scheme during this time.[42]

Among those who had been trying unsuccessfully to close their accounts at least as early as June 4, 2009, were Howard and Sharon Phillips.[43] On July 7, 2009, the Phillips' filed suit against Cook, Beckman, and others, alleging fraud and mismanagement.[44] To bolster their "normal course of business" argument the Berg Investors mistakenly argue that "[t]he Phillips [sic] received a transfer of $52,500.00 from the Cook Currency Entities on July 8, 2009, after filing the lawsuit."[45] The circumstances of this transaction, as well as the fact that it occurred on ***June*** 8, 2009, not July 8, 2009, were clearly explained during the depositions of Howard and Sharon Phillips, where counsel for the Berg Investors actively participated.[46] The Berg Investors persist in making this factually incorrect statement despite having been corrected multiple times.[47]

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[41] Jansen Ex. 22–25.
[42] *See* Jansen Ex. 23; Ex. 24; Ex. 11.
[43] Jansen Ex. 5, ¶¶ 111–12.
[44] Jansen Ex. 19.
[45] Br. at 33. They are also wrong in asserting that the Phillips' "were allowed to keep the principal payments they received from the Cook Currency Entities." Br. at 48. In fact, the Phillips' lost over $1.5 million in Cook's scheme. Ex. 11 at 9.
[46] *See* Declaration of James R. Magnuson In Support of Lender Respondents' Motion for Summary Judgment ("Magnuson"), Ex. 31 at 58-59, 61; Ex. 30 at 33-35, 100; *see also* Ex. 31 at Exhibit 5 to the Phillips Deposition (showing $52,500 in withdrawals on June 2009 statement).
[47] Docket No. 180 at 3 & n.1; Jansen Ex. 19 ¶¶ 50, 56; Jansen Ex. 5 ¶¶ 109, 115; Kohlhepp Ex. 18 at 1 (image of check number 1866, showing process date of 6/8/09), 5 (check number 1866 posted **June** 8, 2009), 8–9 (July account statement showing no

So strong was the evidence presented by the Phillips complaint that the Court concluded a "significant risk" existed, leading the Court to issue an *ex parte* temporary restraining order freezing assets of Cook, his colleagues, and their various companies.[48] As news of the Phillips lawsuit and asset freeze spread, investors flooded the Cook companies with calls[49] and written demands for their money.[50] Those efforts were futile.[51] To-date, the Receiver has determined that 725 investors lost over $158 million in Cook's Ponzi scheme.[52] These investors have recovered less than three cents on the dollar.[53] In contrast, all of the Berg Investors actually profited from the scheme.

D. This Action

On July 20, 2010, Chief Judge Davis entered an Order allowing this summary proceeding to be filed.[54] Chief Judge Davis found that the Cook companies had been used to perpetrate a Ponzi scheme and that all assets transferred by Cook or his fraudulent companies through 2009 were transferred pursuant to the scheme.[55]

On July 23, 2010, the Receiver filed this action seeking to recover those transfers as fraudulent transfers and unjust enrichment.[56]

$50,000 withdrawal), 16 (disbursement summary page from Phillips claim file), 29 (disbursement summary page from Phillips notarized challenge affidavit).

[48] Jansen Ex. 20.

[49] Jansen Ex. 22.

[50] Jansen Ex. 23.

[51] Jansen Ex. 25.

[52] Jansen Ex. 11 at 13.

[53] Jansen ¶ 206.

[54] Jansen Ex. 33.

[55] *Id.* at 3.

[56] Docket No. 1.

The parties have moved for summary judgment, which is appropriate when the facts and the law support only one reasonable conclusion. *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707, 708 (8th Cir. 1994) (citing *McDermott Int'l., Inc. v. Wilander*, 498 U.S. 337 (1991)).

II. Legal Standards Related to the Receiver's Fraudulent Transfer Claims

The Berg Investors grossly misstate the law regarding the Receiver's fraudulent transfer claims, asserting that "the Receiver ultimately must prove that the individuals receiving the funds objectively knew or should have known they were receiving funds from a ponzi scheme or from an insolvent entity prior to their receipt of such funds."[57] This one statement contains at least three important legal errors.

First, in order to void the transfers at issue and recover the stolen money for equitable distribution to all of Cook's victims under Minnesota's Uniform Fraudulent Transfer Act ("UFTA"),

the Receiver must prove only that transfer was made "with actual intent to hinder, delay, or defraud any creditor of the debtor." Minn. Stat. 513.44(a)(1). As the Berg Investors concede, actual fraudulent intent is presumed in a case such as this where the transfers are made pursuant to a Ponzi scheme.[58] To the extent the Berg Investors pursue the good faith defense provided in Minn. Stat. § 513.48(a), this is an ***affirmative defense***. It is ***their burden*** to prove that they took the funds in good faith.[59]

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[57] Br. at 1.
[58] Br. at 54.
[59] Later in their brief, the Berg Investors acknowledge that "Lenders bear the burden of proof" on the good faith affirmative defense. (Br. at 54.) Yet they continue to

Second, the Berg Investors misstate the standard for good faith. If a transferee has knowledge of facts suggesting ***possible*** fraud or insolvency on the part of the transferor that would have caused a reasonable person to inquire further—thereby putting him or her on "inquiry notice"—good faith cannot be found. *See, e.g.*, *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995); *Dev. Specialists, Inc. v. Hamilton Bank, N.A.*, 250 B.R. 776, 797–98 (Bankr. S.D. Fla. 2000). A transferee is on inquiry notice if he was aware of facts that would have caused a reasonable person to ***question*** whether the transfer was being made for a fraudulent purpose or whether the transferor was insolvent; the test does not require that a recipient "knew or should have known" to any degree of certainty that the transfer was being made for a fraudulent purpose or that the transferor was insolvent. *See*, *e.g.*, *Sherman*, 67 F.3d at 1355; *Terry v. June*, 432 F. Supp. 2d 635, 641 (W.D. Va. 2006). By confusing inquiry notice with actual notice, the Berg Investors greatly overstate the standard.

Finally, there is no support in the law for the assertion that good faith must be evaluated "prior to receipt" of the fraudulently transferred funds. Indeed, it would be absurd to argue that a recipient received money in good faith if a debtor handed over a check and, in his next breath, said that the money had been stolen. But this absurdity is precisely what the Berg Investors argue—presumably because, although their interactions with the Cook companies were replete with red flags throughout their involvement with

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improperly cast their argument in terms suggesting that they are entitled to a presumption of good faith and that the Receiver must prove a lack of good faith to recover. (*See, e.g.*, Br. at 55 ("the Receiver cannot point to any facts demonstrating that any of the Lenders lacked good faith[.]".)

the scheme, the most egregious red flags arose in the manner they received the money. The relevant time to analyze the red flags—in the aggregate, not in isolation—is when they received the transfers, not before.

A. Transfers Made with Actual Fraudulent Intent

1. The Ponzi Scheme Presumption

The Minnesota UFTA provides that transfers made with actual intent to hinder, delay, or defraud other creditors may be voided. Minn. Stat. § 513.44(a)(1). In order to recover under the actual fraud provision of the UFTA, the receiver for an entity that was an instrument of a Ponzi scheme must show that the Ponzi scheme operator transferred funds in furtherance of a fraud on any of his creditors (like the investors who were victims of his scheme) with actual fraudulent intent. *SEC v. Brown*, 643 F. Supp. 2d 1077, 1081–82 (D. Minn. 2009). Where the transferor has actual intent to defraud, the transfer may be voided whether the defrauded creditor's claim arose before or after the transfer. Minn. Stat. § 513.44(a)(1).

When a transfer occurs in the context of a Ponzi scheme, actual fraudulent intent may be established by the "Ponzi scheme presumption." This presumption has been applied without exception in the substantial body of caselaw arising out of fraudulent transfer actions in the wake of collapsed Ponzi schemes. If the existence of a Ponzi scheme is established (*e.g.* by the perpetrator's criminal conviction or guilty plea), all transfers made pursuant to the scheme are presumed to have been made with actual fraudulent intent. *See, e.g.*, *Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008); *In re Slatkin*, 525 F.3d 805, 814 (9th Cir. 2008); *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir.

2006); *In re M&L Bus. Mach. Co.*, 59 F.3d 1078, 1079–80 (10th Cir. 1995); *Scholes v. Lehmann*, 56 F.3d 750, 757 (7th Cir. 1995); *Brown*, 643 F. Supp. 2d at 1082.

The reason for the presumption is that Ponzi schemes—which lack legitimate income-generating business operations and simply pay off early investors with the money of later investors—are factually and legally insolvent from their inception. *See, e.g.*, *Warfield*, 436 F.3d at 558 (citing *Cunningham v. Brown*, 265 U.S. 1, 7–8 (1924)). A Ponzi scheme operator knows that the scheme cannot go on forever and that some investors will eventually lose. *SEC v. Cook*, No. 3:00-CV-272-R, 2001 U.S. Dist. LEXIS 2601, at *9 (N.D. Tex. Mar. 8, 2001). Thus, when the operator of a Ponzi scheme takes incoming money and transfers it to earlier investors, he does so with actual intent to hinder or delay payment to those who will ultimately lose in his scheme. *Armstrong v. Collins*, No. 01 Civ 2437, 2010 U.S. Dist. LEXIS 28075, at *64 (S.D.N.Y. Mar. 24, 2010); *Terry*, 432 F. Supp. 2d at 639–40.

2. The Transfers to the Berg Investors Were Made Pursuant to a Ponzi Scheme.

The Berg Investors concede, as they must in the face of the consistent and well-established caselaw, that actual intent to defraud is presumed for transfers made pursuant to a Ponzi scheme.[60] But they argue that the presumption should not apply to the transfers to them because "the Cook Currency Entities were winding down at the time of

[60] Br. at 54.

the transfers and not taking any new investors[.]"[61] The Berg Investors are wrong on both the facts and the law.

As a factual matter, Bank records show that new investor money from at least 20 people and totaling over $968,000 went into Cook company accounts (including the Crown Forex account from which the Berg Investors were paid) ***after*** the Berg Investors got their fraudulent transfers.[62] It is indisputable that Cook and his co-conspirators were "taking new investors" after Berg obtained cashier's checks totaling over $5 million for his clients.

Moreover, even if they were factually correct, the Berg Investors have cited no legal support for cutting off the Ponzi scheme presumption after the last investor gets into a Ponzi scheme. There is none. As discussed above and by numerous courts, the Ponzi scheme perpetrator has actual fraudulent intent for every transfer he makes to earlier investors because he knows that the payment, consisting not of proceeds from a legitimate enterprise but simply of later investors' money, will necessarily hinder or delay payment to those later investors. *E.g.*, *Donell*, 533 F.3d at 770. In dicta, at least one court has questioned whether "certain transfers may be so unrelated to a Ponzi scheme that the presumption should not apply." *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 11 (S.D.N.Y. 2007) (discussing a non-Ponzi-scheme case in which repayment of a bank loan that pre-dated a fraud was at issue). But no court has declined to apply the presumption to transfers to investors (including situations where the Ponzi scheme

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[61] Br. at 55.
[62] *See* Kohlhepp Ex. 1.

happens to deal in "notes" or "loans") which constitute the core activity of the Ponzi scheme.

The indisputable facts and uncontroverted law make clear that the Ponzi scheme presumption applies to the transfers made to the Berg Investors in this case. The Receiver has met his burden to prove that the approximately $5 million given to the Berg Investors in late June of 2009 are fraudulent as a matter of law. It is therefore the Berg Investors' burden to prove that they took the funds in objective good faith and for reasonably equivalent value if they seek to take advantage of the good faith affirmative defense in Minn. Stat. § 513.48(a).

3. The Fact that the Transfers Were Preferential Is Irrelevant to Fraudulent Transfer Claims.

In a final attempt to deny that the Receiver has met his burden to prove the elements of his fraudulent transfer claims, the Berg Investors state that "fraudulent transfer analysis is distinct from preferential transfer analysis" and argue that preferential transfers to some creditors cannot constitute fraudulent conveyances.[63] But again, the Berg Investors are wrong on the law. "Courts have routinely applied UFTA to allow receivers or trustees in bankruptcy to recover monies lost by Ponzi-scheme investors." *Donell*, 533 F.3d at 767.

In making their argument, the Berg Investors cite only the non-Ponzi scheme cases of *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504 (1st Cir. 1987) and *In re Sharp Int'l Corp.*, 403 F.3d 43 (2d Cir. 2005). In both cases, the transferor paid back a

[63] Br. at 55.

loan that pre-dated the fraudulent activity of which he was accused. *Boston Trading Group*, 835 F.2d at 1510; *In re Sharp*, 403 F.3d at 55. Both cases put forward the unremarkable and inapplicable holding that payment of a debt incurred prior to a fraud is not *per se* a fraudulent transfer. *Boston Trading* Group, 835 F.2d at 1517; *In re Sharp*, 403 F.3d at 56–57.

It is true that the transfers to the Berg Investors at issue were preferential; Cook chose to pay his father-in-law's clients at the expense of hundreds of similarly situated investors who lacked an insider connection. Closeness to the Ponzi scheme perpetrator as the deciding factor between profit and ruin is troubling, to say the least, and the preferential nature of the transfers is relevant to the Receiver's claims of unjust enrichment. But the Berg Investors' preferential treatment has no bearing on the Receiver's fraudulent transfer claims. A preferential transfer made pursuant to a Ponzi scheme may be just as fraudulent under the UFTA as any other transfer made pursuant to a Ponzi scheme. *See, e.g.*, *Smith v. Suarez*, 417 B.R. 419, 443 (Bankr. S.D. Tex. 2009) (applying the Ponzi scheme presumption and voiding transfers made preferentially to insiders). The Berg Investors cannot escape the Ponzi scheme presumption, or the fact that Cook transferred money to them with actual intent to hinder or delay payment to and defraud other creditors.

B. Inquiry Notice

Relying on cases from 1895 and 1926, the Berg Investors assert that in "'normal' fraudulent transfer cases" a transferee can take in good faith even knowing that the

transferor is insolvent so long as he provides adequate consideration.[64] But it is well-established that inquiry notice of possible fraud or insolvency is fatal to a good faith defense under the UFTA, which was enacted in Minnesota in 1987. *See, e.g.*, *Sherman*, 67 F.3d at 1355; *In re Armstrong*, 285 F.3d 1092, 1096 (8th Cir. 2002); *In re M&L Bus. Mach. Co.*, 84 F.3d 1330, 1335–38 (10th Cir. 1996) ("*M&L II*"); *In re Bayou Group, LLC*, 439 B.R. 284, 314 (S.D.N.Y. 2010) ("*Bayou IV*").

1. Knowledge of Facts that Would Prompt a Reasonable Person to Question Possible Fraud or Insolvency Is Fatal to a Good Faith Defense.

The Berg Investors correctly note that the standard for good faith is objective rather than subjective; what a reasonable person of their experience ***should have known*** is what matters, not what the Berg Investors themselves actually knew.[65] *E.g.*, *Armstrong*, 285 F.3d at 1096; *Sherman*, 67 F.3d at 1355.

They err, though, when they argue that any fact which could have some explanation other than fraud or insolvency cannot be a red flag contributing to inquiry notice as a matter of law.[66] To the contrary, any fact that suggests "possible" fraud or insolvency—in other words, any fact that would suggest to a reasonable person that fraud or insolvency might be among the possible explanations for the fact—is a red flag that contributes to inquiry notice. *E.g.*, *Sherman*, 67 F.3d at 1355; *Terry*, 432 F. Supp. 2d at 641.

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[64] Br. at 57.
[65] Br. at 60–61.
[66] *E.g.*, Br. at 39–40 (arguing that the Cook companies' failure to charge account the closing fees required by written agreements cannot be a red flag because there could be explanations for it other than fraud or insolvency).

Indeed, "if the earmarks of an arms-length transaction are missing," a transferee is on inquiry notice. *In re Am. Lumber Co.*, 5 B.R. 470, 477 (D. Minn. 1980); *Sherman*, 67 F.3d at 1355. Some of the facts that courts have held to trigger inquiry notice include:

- Receipt of payments from an entity other than the one invested in (*Armstrong*, 2010 U.S. Dist. LEXIS 28075, at *28);
- Transferee's knowledge of the lawsuit pending against the transferor (*Sherman*, 67 F.3d at 1355–56; *see also In re Hill*, 342 B.R. 183, 203 (Bankr. D.N.J. 2006));
- SEC's investigation of an entity (*Warfield*, 436 F.3d at 555);
- Conduct in violation of written policies (*Dev. Specialists*, 250 B.R. at 799**Error! Bookmark not defined.**);
- Representation that an investment has no risk (*In re CEP Holdings*, No. 07-71810, 2010 Bankr. LEXIS 1145, at *15 (Bankr. N.D. Ga. Jan. 5, 2010));
- Promised rate of return in excess of the market rate without a plausible explanation (*M&L II*, 84 F.3d at 1338–39; *Jobin v. McKay*, 164 B.R. 657, 663 (D. Colo. 1994));
- Unnaturally consistent rate of return (*SEC v. Forte*, No. 09-63, 2010 U.S. Dist. LEXIS 24705, at *11 (E.D. Pa. Mar. 17, 2010));
- Unapproved conversions of one's investments (*Smith*, 417 B.R. at 443);
- Lack of "logical explanation" for the transferor's sudden agreement to transfer assets to transferee (*Hill*, 342 B.R. at 203);
- Irregularities in payment practices, such as the purported investment broker personally going to the transferee's bank and depositing money for him and bouncing checks (*In re Pate*, No. 93 B 17792, 1997 Bankr. LEXIS 2389, at *16–17 (Bankr. N.D. Ill. Feb. 24, 1997));
- Conduct inconsistent with industry norms (*Dev. Specialists*, 250 B.R. at 799);

- Knowledge that the person having recruited the transferee to the Ponzi scheme had received a commission for doing so (*M&L II*, 84 F.3d at 1338–39; *see also Smith*, 417 B.R. at 440); and

- Account statements that were printed on plain white paper and lacking cover letters, letterhead, or other identifying features (*Forte*, 2010 U.S. Dist. LEXIS 24705, at *11).

Many of these red flags, when taken in isolation, could be explained by circumstances other than fraud or insolvency—for example, they could be the result of honest mistakes or sloppy work. But because, to a reasonable person, they suggest ***possible*** fraud or insolvency—especially when considered in the aggregate—inquiry notice is triggered. The inquiry notice continues unless and until the transferee seeks and is given a plausible explanation. *Manhattan*, 397 B.R. at 23.

It bears repeating that the test is not whether the facts would tell a reasonable person there is fraud or insolvency to any degree of certainty, as the Berg Investors suggest. "Determining what [a transferee] knew is not the same as asking whether [the transferee] should have attempted to learn more." *Id.* 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*, 2010 U.S. Dist. LEXIS 28075 at *60. As a practical matter, transferees like the Berg Investors have an economic incentive not to inquire further—after all, as Respondent Heise explained his failure to investigate in the face of the odd circumstances surrounding his receipt of funds in the summer of 2009, "I don't really care because I've

got—my deposits are out[.]"[67] But inquiry notice must be evaluated from the point of view of a reasonable person who does not want to remain ignorant of possible fraud or insolvency for fear of what he might learn. If such a person has reason to inquire further—"reason to suspect" that the transferor ***might*** be insolvent or acting with fraudulent intent—and then does not have those concerns addressed, he or she does not have good faith. *Armstrong*, 285 F. 3d at 1096; *see also, e.g.*, *SEC v. Cook*, 2001 U.S. Dist. LEXIS 2601 at *11.

2. The Red Flags Triggering Inquiry Notice Must Be Considered Together, Not in Isolation.

The Berg Investors attempt to explain away some of the red flags known to them by treating each one independently and asserting that it—alone—would not cause a reasonable person to inquire. Analysis of each red flag in a vacuum is improper and contrary to the approach taken in every case discussing inquiry notice in the fraudulent transfer context. 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").

For example, in *Armstrong*, the court determined that there came a point after the investors' initial deposits in a Ponzi scheme and before the scheme's perpetrator admitted to them that he was using investor funds to trade for himself after which the investors

[67] Jansen Ex. 39 at 95–96.

"could no longer safely turn a blind eye to the mounting evidence that [the transferor] was not engaged in legitimate business." 2010 U.S. Dist. LEXIS 28075, at *82. Similarly, in *In re M&L Business Machine Co.*, the court found the transferee lacked good faith "in light of all of these circumstances" including an implausible explanation for high rates of return, the use of post-dated checks, and the fact that the salesperson bringing the transferee into the scheme received a commission for finding investors. 84 F.3d 1330, 1338–39 (10th Cir. 1996).

3. The Berg Investors Cannot Negate Red Flags "As a Matter of Law."

In light of the "whole picture" approach the law requires for a proper good faith analysis, it is absurd to assert, as the Berg Investors do, that any particular fact cannot be a red flag "as a matter of law."[68] Their arguments ignore the fact that good faith requires a very fact-specific analysis and fail to prove that a reasonable jury would be able—let alone compelled—to find that the combined red flags did not trigger inquiry notice under the circumstances of this case.

a. Account Opening Documents

The Berg Investors take a strange and contradictory stance on the paperwork that they filled out to open their "accounts" with the Cook entities. When they can argue that a provision helps them in some way, they gladly point to it. When a provision is directly contrary to their position, because its violation should have served as a warning that the Cook Entities were illegitimate, they ignore it. For instance, the Berg Investors point out

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[68] *E.g.*, Br. at 67.

that an agreement between Terry Frahm and Crown Forex SA gave the Cook currency entities the power to give orders related to Lenders' accounts, "including liquidation and transfers to Lenders."[69]

First and foremost, even a cursory glance at the cited document shows that it does no such thing. In what should be a red flag to anyone who looks at the document, this "Customer Order Authorization and Limited Power of Attorney," signed by Terry Frahm on behalf of the account of Terry Frahm, "authorizes and appoints" ***Terry Frahm*** as the agent, not a Cook entity.[70] A more nonsensical power of attorney is difficult to imagine.

Then there is the requirement for an explicit withdrawal request and that a particular form be used.[71] The Berg Investors do not mention this, or the failure of every Berg Investor to fill out that form and submit it to Crown Forex SA, anywhere in their brief. Additional problems jump out, including this explicit requirement on withdrawals:

> "Withdrawals will only be credited by wire transfer to the client personal bank account that was submitted in the Customer Trading Agreement."[72]

The Berg Investors do not mention that provision either, probably because the cashier's checks Berg gave to them violated the plain language of this provision in every respect. Money did not come by wire, and it did not go to the "client personal bank account." It did not even come from Crown Forex SA (the Switzerland-based entity).

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[69] Br. at 22 (citing "*Representative Crown Forex Agreement of Terry Frahm*, p. 14, Exhibit 22 to the Magnuson Declaration").
[70] *Id.* at IR010440.
[71] *Id.*
[72] *Id.* at 010431.

Instead, it came from a Cook entity, hand-delivered (or in some cases, mailed) by Berg, in the form of a cashier's check.

Either the forms mean something and should be given effect or they do not. Of course all of the paperwork associated with Cook's currency program was, in reality, a sham and an artifice to defraud. But the content of all of these forms do have meaning in the context of these summary judgment motions. Specifically, if the Berg Investors believed them to be legitimate, the stark contrast between what those account documents required with respect to withdrawals and what transpired in fact in the summer of 2009 would have caused a reasonable investor to question whether the cashier's checks that they suddenly received from Berg were conveyed with fraudulent intent or due to insolvency. *See Dev. Specialists*, 250 B.R. at 799 (finding conduct in violation of written policies to be a red flag).

b. Guaranteed Rate of Return with No Risk

Rates of return that are in excess of the market rate, that are unnaturally consistent, or that come with an unreasonable representation of being risk-free have been recognized as red flags in fraudulent transfer cases. *M&L II*, 84 F.3d at 1338–39 (10th Cir. 1996); *Forte*, 2010 U.S. Dist. LEXIS 24705, at *11; *CEP Holdings*, 2010 Bankr. LEXIS 1145, at *7. Cook offered a guaranteed 10–12% rate with no risk to the Berg Investors in 2008 and 2009, when the prime rate was between 3 and 6%.[73]

The cases that the Berg Investors cite for the proposition that Cook's rate was "reasonable as a matter of law" found an annual rate of 12% to be reasonable in 1997–

[73] Jansen Ex. 1, ¶ 16; Kohlhepp Ex. 26.

1998, when prime was 8.5%, *In re Unified Commercial Capital, Inc.*, 260 B.R. 343, 345–46 (Bankr. W.D.N.Y. 2001), and an annual rate of 15% to have been commercially reasonable in 1981 when prime was in excess of 15%, *In re Carrozzella & Richardson*, 286 B.R. 480, 484 n.7 (D. Conn. 2002). These cases are completely irrelevant to the question of whether Cook's promises—especially when considered in light of all of the other warning signs the Berg Investors had—would have contributed to inquiry notice of a fraud.

c. Berg's Promises to Monitor the Cook Companies

Berg had agreements with many of his clients to monitor the Cook companies for, among other things, "theft, cheating, [and] stealing."[74] If Berg had any "concerns," he was to cash his clients out.[75] The fact that Berg did cash his clients out—despite the fact that the Cook companies were purportedly generating handsome returns—makes these agreements highly relevant to the inquiry notice analysis. To argue that, as a matter of law, these agreements do not constitute a red flag ignores the reality of undisputed facts and caselaw.[76] *See Smith*, 417 B.R. 419, 430–32 (voiding transfers as fraudulent under the Texas UFTA where, after businesses operating Ponzi scheme began to crumble, advisory board "transferred substantially all funds out of [the scheme's] account to insiders and investors.")

[74] Jansen Ex. 39 at 266.
[75] *See, e.g.*, Jansen Ex. 39 at 76; Ex. 120 at 19; Ex. 127 at 83.
[76] Br. at 37.

d. Circumstances of the Transfers Initiated by Berg

The Berg Investors contend that it is "absurd" to view unrequested liquidation of an account as a possible sign of insolvency and that "no experienced investor would believe that the return of their funds without a specific request would be a 'red flag[.]'"[77] Setting aside the fact that elsewhere they state that they are inexperienced and unsophisticated investors, this argument fails because it is based on improper expert testimony that must be excluded under Federal Rule of Evidence 702.[78] It fails for other reasons as well.

Perhaps most tellingly, the Berg Investors themselves testified that they found it "odd" or even "shocking" that Berg had cashed them out of the Cook scheme without their having requested he do so.[79] The same conclusion would necessarily be drawn by an objective reasonable person with the same experience and sophistication as the Berg Investors looking at all of the facts at the time of the transfer, such as: the transfers were not requested, but instead initiated by the Berg Investors' personal friend and colleague, who happened to be Cook's father-in-law; the transfers violated the company's written policies and agreements; the transfers were in many cases explained with reference to an audit or an investigation; and the transfers came in the form of cashier's checks, in many cases from institutions with which the investors had no agreements or "accounts." In

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[77] Br. at 36.

[78] *See infra* Part III. The only support for this argument that is not improper expert testimony comes from Cook himself. (Br. at 36.) Cook's testimony that he had received distributions from hedge funds without his knowledge or consent is unavailing to whether the unsolicited transfer of non-hedge fund distributions to the Berg Investors' would serve as a red flag to a reasonable person of their experience.

[79] *See, e.g.*, Jansen Ex. 105 at 40; Ex. 127 at 79; Ex. 158 at 14-15.

short, an objective good faith view of the undisputed facts in the aggregate would prompt a reasonable person to question whether the Cook companies might be insolvent—owing more to investors than they would be able to cover—and whether Berg, having inside access to information, might be protecting his friends by funneling money out while that was still possible. The unsolicited nature of the transfers, along with these other unusual circumstances surrounding the transfers, would certainly contribute to inquiry notice. *See Sherman*, 67 F.3d at 1356 (facts suggesting something other than an arms-length transaction can be red flags).

e. Knowledge of an Investigation

The Berg Investors also argue that the SEC investigation cannot be relevant to the good faith analysis because they did not know the focus or scope of the investigation.[80] Here again, they err. Knowledge of an investigation has been held time and again to be a powerful red flag in fraudulent transfer cases, because—especially when combined with other red flags—it would cause a reasonable person to question whether the cause for the investigation was fraud or insolvency. *See, e.g.*, *Warfield*, 436 F.3d at 555.

This is especially true under the circumstances of this case. Whatever words Berg might have used regarding the investigation, his actions spoke louder: he was so concerned that he cashed himself and his friends out immediately. Many of the Berg Investors testified that they understood Berg "closed their accounts" because of his concerns—due to the investigation—that they might otherwise not be able to get their

[80] Br. at 40–41.

money.[81] Faced with this information, a reasonable person would question whether the Cook companies might be insolvent or fraudulent. None of the excuses proffered to a few of the Berg Investors regarding Beckman's side of the business or a possible move to Charles Schwab (even if they were plausible on their face) can change the fact that Berg was worried enough to cash out and his clients knew it.

f. Lack of Documentation

The Berg Investors also argue—with only improper expert testimony for support—that "account closure documents are usually produced ***after*** the investors [sic] funds are returned and the account is closed."[82] Thus, they argue, the fact that they were given millions of dollars with no closing statements, receipts, or documentation at any time "cannot be a red flag as a matter of law[.]"[83] Besides being incredible on its face, there is no authority for the proposition that a circumstance such as this cannot be considered in a good faith analysis. To the contrary, the totality of the circumstances must be considered from the point of view of an objective, reasonable person. And a reasonable person would question the legitimacy of a company that would dole out such large amounts of cash, without a receipt, and with no documentation. In addition, the lack of documentation with the transfers in the summer of 2009 was a departure from the Cook companies' past practices. As Pam Cheney testified, for example, she had received statements showing her "account" balance with all of the "interest" payments she had

[81] Jansen Ex. 39 at 76; Ex. 56 at 75, 205; Ex. 57 at 32-33; Ex. 150 at 163-164.
[82] Br. at 39.
[83] *Id.*

received from the scheme in the past.[84] Others also testified about receiving regular statements.[85]

g. Qualified IRA Money Bypassed Third Party Custodians

The Berg Investors further assert that their qualified IRA money bypassing the third party custodians Millennium and Entrust, with whom it was invested, cannot be a red flag because 1) they could not have known that the cashier's checks they received came directly from the Cook companies rather than these custodians, and 2) they were too inexperienced in the liquidation of qualified IRA funds to know that the funds were to be returned through the custodians. Both arguments fail.

First, the Berg Investors got their checks—either hand-delivered or in the mail—from Cliff Berg. The Berg Investors knew that Cliff Berg worked for Cook, not for a third party custodian.[86] Nor does any Berg Investor purport to explain how Berg could have had a cashier's check from Entrust or Millennium. Those investors who had gotten distributions of qualified money in the past had gotten it through the appropriate custodian.[87] And although they cite the "Representative Cashier's Checks to Cynthia Hillesheim," which had no notation regarding its purchaser, many of the other Berg Investors' checks *did* show that they came from Cook companies.[88]

The Berg Investors' second argument on the third party custodians is another example of them trying to have it both ways with respect to their experience and their

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[84] Jansen Ex. 82 at 15.
[85] Jansen Ex. 39 at 120; Ex. 112 at 152; Ex. 150 at 112; Ex. 165 at 74.
[86] *See, e.g.,* Jansen Ex. 56 at 78; Ex. 112 at 91.
[87] *See, e.g.,* Kohlhepp Ex. 11.2; s*ee also* Ex. 16.
[88] Br. at 42; Jansen Ex. 16.1–16.11.

documents. They say they are too inexperienced to realize that qualified IRA money must pass through the custodians with which it was invested, yet argue that they are sophisticated enough to know that "hedge funds and other firms engaged in levered transactions depend on the ability to quickly liquidate their clients' accounts and positions" and liquidation without notice is "normal in private investment vehicles."[89] At least Respondent Steve Fredell testified that he understood the qualified money would have to go back to the third party custodians before it could be distributed to him.[90] And all of the Berg Investors with qualified funds had agreements with their third party custodians outlining specific procedures that were violated when the money was sent directly to the investors.[91]

h. Discrepancies in Documents and Statements

The Berg Investors cite *Bayou IV* for the proposition that discrepancies in documents and account statements cannot operate as a red flag.[92] But *Bayou IV* held no such thing. The opinion explicitly states that a critical component of the scheme in that case was "consistent execution of investors' redemption requests ***in accordance with the Funds' operating agreements***" and never mentions any oddities or errors in documents or statements. 439 B.R. at 291.

By contrast, account statements including irregularities or lacking indicia of legitimacy on their face have been deemed to be red flags contributing to inquiry notice.

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[89] Br. at 69.
[90] Jansen Ex. 56 at 55–56.
[91] Jansen Ex. 50; Ex. 71; Ex. 73; Ex. 77; Ex. 78; Ex. 108; Ex. 111; Ex. 125; Ex. 143; Ex. 144; Ex. 147; Ex. 148; Ex. 155; Ex. 177; Ex. 179.
[92] Br. at 68.

See Forte, 2010 U.S. Dist. LEXIS 24705, at *11. As discussed in detail to the specific Berg Investors in Parts IV.B.1–12, statements from the Cook companies often arbitrarily rounded figures for deposits and interest payments and came from unfamiliar entities. Contrary to their contention that they were paid "in the correct amount,"[93] the Berg Investors' final payouts did not match the amount they would have been owed according to their contracts and/or account statements. For example, Respndent Kautzman invested $116,469.30 and was promised a rate of 10.5%, which would have resulted in a balance of $118,507.51 on June 1 or $119,526.62 on July 1.[94] He was paid $119,550.00 with a check dated June 30, 2009.[95] Respondent McIntosh was paid $250,000 when his "balance," based on his purported 10.5% interest rate, should have been $246,000.[96] These irregularities, especially when viewed in combination with other suspicious circumstances confronting the Berg Investors, would prompt a reasonable person to question whether the Cook companies might be insolvent or engaged in fraud.

i. Good Faith Is Fact-Intensive.

As many courts have stated, and the Berg Investors themselves acknowledge, the good faith analysis depends heavily on the facts of each case. *See, e.g.*, *Sherman*, 67 F.3d at 1355 ("Good faith is not susceptible of precise definition and is determined on a case-by-case basis."); *Bayou IV*, 439 B.R. at 317 ("[T]he good faith determination does not lend itself to the application of rigid or absolute rules."). Yet the Berg Investors cite

[93] Br. at 23.
[94] Jansen Ex. 34 at 11; Ex. 36; Ex. 120 at 111; Kohlhepp Ex. 10.
[95] Jansen Ex. 15.4.
[96] Jansen Ex. 15.5; Ex. 150 at 121.

several cases in an attempt to show that precedent requires dismissal of the Receiver's claims against them.[97]

The facts of the cases cited by the Berg Investors are very different from those presented here, and have no bearing on the issues before the Court. None of these cases discuss an out-of-the-blue transfer from a person with an inside connection to a Ponzi scheme. Although the Berg Investors spend significant time comparing their situation to those in *In re Dreier LLP* and *In re Hannover, Corp.*, reliance on those cases is particularly misplaced.[98] *Dreier* involved a loan made by a bank to a law firm. The trustee was unsuccessful in arguing that the loan should be collapsed into the transfer made from the law firm's principal, via another bank, pursuant to a Ponzi scheme; in short, the facts are not at all similar to those here. 453 B.R. 499, 513 (Bankr. S.D.N.Y. 2011). In *Hannover,* the transferee, upon finding out about the SEC investigation, "undertook its own investigation, contacting the SEC and the federal district court, eventually receiving assurances from the district court that [the transferee] could continue to receive option payments from [the transferor]." *In re Hannover*, 310 F.3d 796, 800 (5th Cir. 2002). The Berg Investors did no such thing.

4. Diligent Inquiry

The Berg Investors argue that even if they were aware of red flags sufficient to trigger inquiry notice, summary judgment in their favor is proper because "[t]he Receiver has no evidence that Lenders could have uncovered evidence of fraudulence or

[97] Br. at 63–65.
[98] Br. at 64.

insolvency, even through a diligent investigation."[99] In making this argument, they again misstate the law and ignore that it is ***their burden*** to prove every aspect of the good faith defense. They also ignore Eighth Circuit law that states that inquiry notice by itself is fatal to a good faith defense.

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

The leading Eighth Circuit case 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 good faith affirmative defense fails. *Id.*; *see also Armstrong*, 285 F.3d at 1096 (affirming district court's holding that transferee lacked good faith when it was on "inquiry notice that [transferor] might be insolvent" with no discussion of actual inquiry).

The Berg Investors 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. Indeed, it makes little sense to go beyond inquiry notice in a situation where, as here, the very reason the recipient got the transfer was that the fraudulent entity the transferor was operating was in the process of collapsing.

[99] Br. at 92.

b. In Jurisdictions Applying a "Diligent Investigation" Component as a Second Prong of Good Faith, Investigation Is Required.

The Berg Investors urge the Court to adopt the *Bayou IV* test for good faith, from the Southern District of New York, which includes a "diligent investigation" requirement for good faith "[o]nce a transferee has been put on inquiry notice of either the transferor's possible insolvency or of the possibly fraudulent purpose of the transfer." 439 B.R. at 311. Even if the Court were inclined to adopt this test, summary judgment for the Berg Investors must be denied because they have offered no support for the bald statement that diligent inquiry would have been futile. To the contrary, testimony from various Berg Investors suggests that Berg, their close friend and agent, would not have been able to explain away the facts that put them on inquiry notice.[100]

More importantly, even *Bayou IV*, like all of the other cases adding a diligent inquiry prong to the good faith test, requires the transferee ***to do something***—at a minimum, conduct a diligent investigation once they are on inquiry notice. 439 B.R. at 328; *see also, e.g.*, *Dev. Specialists*, 250 B.R. at 798 ("The mere failure to make inquiry in the face of unusual circumstances also is sufficient to preclude a good faith defense."). *Bayou IV* chastises the bankruptcy court for holding that futility evidence is irrelevant—***if the transferees actually did some investigation***, as they did in that case. 439 B.R. at 316. *Bayou IV* explicitly declines to disturb what it characterizes as the "standard rule that no investigation means no good faith defense." *Id.* at 317. In other words, where there is no investigation, futility evidence is irrelevant. To invoke the futility lifeline, a transferee

[100] Jansen Ex. 128 at 148–50.

needs to at least do ***something*** that resembles an investigation. In contrast to the Berg Investors, 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.

One reason for requiring actual diligent inquiry, as acknowledged by the Berg Investors, is to "ferret out" fraudulent schemes.[101] The reason for requiring diligent inquiry is that, as a matter of policy, we do not want to reward those who chose to remain willfully ignorant of a fraud. *See Dev. Specialists*, 250 B.R. at 798 ("Fundamental to the concept of good faith is that a transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor's fraudulent purpose.") Choosing to remain ignorant while on inquiry notice clearly increases the odds that more victims will be ensnared.[102]

Even if the Court were to look outside Eighth Circuit law and adopt a test for good faith that includes a "diligent investigation" prong, the Berg Investors still cannot pass it:

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[101] Br. at 93.

[102] The Berg Investors raise the "grave concern" that an investigation requirement will render the good faith defense illusory whenever a transferor is actually engaged in fraud because he or she will simply cash out after encountering evasion or stonewalling that exacerbates the concerns caused by the red flags that triggered inquiry notice in the first place. (Br. at 93 (citing *Bayou IV*, 439 B.R. at 316).) This concern is unfounded. A transferee would be able to meet the test by undertaking diligent investigation—even if the investigation is futile—and the transferee receives a plausible (though false) explanation which would extinguish a reasonable person's concerns of possible fraud or insolvency. If the investigation does not extinguish inquiry notice because it is met by evasion or stonewalling, cashing out—taking a profit and enabling the scheme to victimize more people—without further investigation is exactly the policy goal that the law seeks to avoid.

as discussed more fully in Parts IV.B.1–12 below, they do not and cannot dispute that they never inquired further into the Cook Companies or the true nature of the transfers at issue.

C. Imputed Knowledge: Agency

The Berg Investors' brief omits a critical discussion of the law of agency and the fact (discussed in detail in Parts IV.B.1–12 below) that Cliff Berg was their agent in their dealings with Cook's scheme. One is an agent if he acts for the benefit of the principal with the principal's consent. *Trs. of the Graphic Commc'ns Int'l Union v. Bjorkedal*, 516 F.3d 719, 727 (8th Cir. 2008) (citing Restatement (Third) of Agency § 3.01). The principal's consent may be either express or implied. *Id.* Even if the principal did not explicitly give authority to an agent in advance of a transaction, "knowing 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*, 65 F.3d 1427, 1433 (8th Cir. 1995). A broker is an agent for an investor if the investor gives the broker control over the investments—or ratifies the agent's action by accepting the benefit of it—in a particular account or entity. *See Smith*, 417 B.R. at 444.

"In general, an agent's actual notice or knowledge may be imputed to the agent's principal." *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695, 700 (8th Cir. 1992); Restatement (Second) of Agency § 9(3) ("A person has notice of a fact if his agent has knowledge of the fact, reason to know it or should know it[.]"). This is true so long as

the agent is acting within the scope of the agency relationship and not solely for the agent's own purposes. *Schneider v. Thompson*, 58 F.2d 94, 96 (8th Cir. 1932).

For example, in *Smith v. Suarez*, the trustee brought adversarial actions to recover transfers made to insider investors in the last days of a Ponzi scheme. The Court held that Luis de la Pena could not meet his burden to prove his good faith because he "should have known" that the organization was orchestrating a fraud based on, among other things, knowledge of unapproved conversions of his investments from CDs to bearer notes. 417 B.R. at 443. The court found that his sisters also were not entitled to the good faith defense because de la Pena managed their accounts on their behalf. *Id.* at 444. Although at least one of the sisters had had direct contact with the organization, de la Pena contacted the operator of the scheme requesting that the transfers in question be made to his sisters. *Id.* Based on his control over his sisters' account, de la Pena was his sisters' agent for the purposes of the accounts. *Id.* (citing Williston on Contracts and the Restatement (Second) of Agency and stating that there is an agency relationship when one party is acting for or representing another by the latter's authority). And, "[a]n agent's knowledge is imputed to the principal." *Id.*; *see also Bayou IV*, 439 B.R. at 318 & n.31 (noting that the transferees or their investment advisors received all of the alleged red flag information).

D. There Is No "Law of the Case" Regarding the Lenders' Inquiry Notice.

The Berg Investors make both a factual misstatement and a clear legal error by characterizing Chief Judge Davis's "denial of the Receiver's Motion seeking disgorgement of Cook's attorney fees from his attorneys" as the "law of the case" and

asserting that it "establishes that [the Berg Investors] were not on inquiry notice of fraud or insolvency."[103]

As a factual matter, the Receiver made no such motion. The Berg Investors are apparently referring to Chief Judge Davis's ruling on a motion made by Cook's and Kiley's attorneys, who sought clarification of the Court's November 23, 2009 Asset Freeze Order with respect to fees they had been paid before that Order was in place. (SEC Docket No. 178.)

As a legal matter, the issue in that motion, which concerned the Court's Asset Freeze Order, is distinct from the fraudulent transfer law at issue here. In the fee motion, the attorneys argued that money paid to them pursuant to non-refundable, earned-upon-receipt fee agreements before the Asset Freeze Order were not affected by that Order. (*Id.* at 5.) The SEC and CFTC argued that the attorneys should not be allowed to retain these fees because the source of the funds was likely fraud and because the attorneys were on notice of the illegitimate source of the funds. (*Id.* at 7.) In ruling on the issue, the Court simply applied the Eighth Circuit law that "[w]here an attorney reasonably relies on representations made to him/her by the client about the funds, and the attorney provided services for a reasonable fee, the attorney is entitled to retain such funds." (*Id.* at 8 (citing *Nat'l Credit Union Admin. Bd. v. Johnson*, 133 F.3d 1097, 1102–03 (8th Cir. 1998)).) There are obvious policy reasons for this law, among them the fact that the American system of justice favors assistance of counsel. U.S. CONST. amend. VI.

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[103] Br. at 90.

Nowhere in Chief Judge Davis's Order is the Minnesota UFTA or its defenses discussed. Nowhere is the good faith standard set forth in *Sherman* and relevant to the Berg Investors applied. And even if it had been, the contention that "Cook's criminal attorneys knew every 'red flag' [that the Berg Investors] knew" is absurd.[104] By way of just one example, Cook's lawyers did not invest in Cook's scheme and have their "accounts" closed without documentation or request by Cook's father-in-law.

III. Respondents' Assertion of Good Faith Rests Almost Entirely on Expert Testimony that Should Be Excluded Under Federal Rule of Evidence 702.

As will be set forth in greater detail in the briefing on the *Daubert* motion that is filed concurrently with this brief,[105] the expert testimony of Steven Adams should be excluded for four independent reasons:

First, expert opinions are unnecessary—and indeed inappropriate—in this case. The parties agree that the standard to be applied is an objective one, namely the reasonable, non-professional investor, much akin to the "reasonable person" standard routinely applied by juries without the aid of expert testimony. "If the subject matter is within the jury's knowledge or experience, [] the expert testimony remains subject to exclusion 'because the testimony does not then meet the helpfulness criterion of Rule 702.'" *Youa Vang Lee v. Andersen*, 616 F.3d 803, 809 (8th Cir. 2010) (citing *United States v. Arenal*, 768 F.2d 263, 269 (8th Cir. 1985)), *cert. denied*, 131 S. Ct. 829 (2010).

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[104] Br. at 91.

[105] The Receiver's *Daubert* motion originally was scheduled to be briefed and heard concurrently with summary judgment. The hearing on the Receiver's *Daubert* motion is now scheduled to be heard on April 24, 2012, at 1:30 p.m. The Receiver will file the opening brief on this issue in accordance with the Local Rules on March 15, 2012.

Because applying the reasonable investor standard is within the experience and abilities of lay jurors, expert testimony is unhelpful and fails to qualify under Rule 702.

Second, Adams' testimony would usurp the role of the jury. Courts "must guard against invading the province of the jury on a question which the jury was entirely capable of answering without the benefit of expert opinion." *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 732 (8th Cir. 2006) (*quoting Robertson v. Norton Co.*, 148 F.3d 905, 908 (8th Cir. 1998)). "Opinions that 'merely tell the jury what result to reach' are not admissible." *Lee*, 616 F.3d at 809. Adams' testimony does not help the jury understand the evidence, but simply tells the jurors what outcome to reach—specifically, he opines "it is my expert opinion that all of the Lender Respondents received their distributions of funds from the Cook entities in 'good faith' . . . ."[106] This testimony attempts to trump the jury, will confuse and mislead them, and should also be excluded under Rule 403.

Third, Adams applies the wrong legal standard, rendering his opinions unreliable in violation of Rule 702. Adams was asked to opine "whether certain [circumstances] should have put a reasonable investor objectively ***on notice of the fraud or insolvency*** of the Cook Entities."[107] He repeats this standard throughout his Expert Report.[108] This is simply the wrong standard; it is not one of inquiry notice, but of actual notice. If Adams'

[106] Magnuson Ex. 4, Part 1 at 22–23.
[107] *Id.* at ¶ 1 (emphasis added).
[108] *E.g.*, *id.* at ¶¶ 27, 31, 35, 38 and 40 (". . . no material which would put a reasonable investor on notice of fraud or insolvency."), at ¶ 44 (". . . would not have given a reasonable investor notice of fraud or insolvency . . ."), and at ¶ 49 (". . . would not have put the Lender Respondents on notice of fraud or insolvency . . .").

standard were correct, there would be no such thing as inquiry notice, as the only things that qualify as "red flags" are those that in and of themselves provide notice of the fraud. This is nonsensical and is not the law. The correct standard is whether facts would lead a reasonable person to ***question***—not know for certain, but question—whether the transfer was being made for a fraudulent purpose or whether the transferor was insolvent. *E.g.*, *Sherman*, 67 F.3d at 1355; *Terry*, 432 F. Supp. 2d at 641. Because Adams failed to apply the correct standard, his opinions are unreliable and should be excluded.

Fourth, even if expert testimony on this issue were appropriate, which it is not, Adams is not qualified to render these opinions by his knowledge, skill, experience, training, or education. He has little if any experience dealing with non-professional investors during his career. He has always inhabited a professional niche of the investing world that is far removed from the Berg Investors or the reasonable non-professional investor. Thus, he is simply not qualified under Rule 702.

Even if the Court credits the proffered testimony of Steven Adams, the Berg Investors are not entitled to summary judgment on any of their claims. In contrast, the Receiver's motion for summary judgment on his fraudulent transfer claims must be granted even if the Court credits Adams' opinions because Adams expresses no opinions on Berg's knowledge or Berg's role as the Berg Investors' agent.

IV. The Berg Investors' Motion for Summary Judgment on the Receiver's Fraudulent Transfer Claims Must Be Denied.

The Berg Investors have chosen to exclude from their brief many of the most important red flags that cropped up in their dealings with the Cook companies—red flags

which, viewed in the aggregate and under the correct legal standard for good faith, compel denial of their motion for summary judgment. Some of the most important facts they have omitted concern their agent, Cliff Berg; his knowledge, which is imputed to them; and what he did and said when transferring money from the Cook scheme to them in the summer of 2009. In addition, the Berg Investors try to have it both ways with respect to their account opening documents, highlighting the provisions they think support them and pleading ignorance as to the damaging ones.

A. The Berg Investors Have Not Shown that Berg, Their Agent, Had Objective Good Faith When He Cashed His Clients out of the Fraud.

1. There Is No Evidence in the Record of Berg's Good Faith.

The Berg Investors have not even discussed Cliff Berg's good faith (or lack thereof). Berg was the agent of each of the Berg Investors in their dealings with Cook's scheme.[109] Thus, Berg's knowledge is imputed to each of them.[110] The Berg Investors bear the burden of proof on the good faith affirmative defense, but they have not offered any evidence that could support a finding that Berg had objective good faith when he got money out of Cook's scheme for them. The Berg Investors' motion for summary judgment must be denied on this basis alone.

2. The Record Shows that Berg Lacked Good Faith.

What is more, the evidence strongly supports a finding that Berg lacked good faith. As part of his general investigative efforts, the Receiver interviewed Berg on

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[109] *See infra* Parts IV.B.1–12.
[110] *See supra* Part II.C.

January 6, 2010.[111] Berg's attorney was present.[112] In response to every question requiring a substantive answer, Berg invoked his Fifth Amendment right against self-incrimination and refused to respond.[113] Berg continued his Fifth Amendment refusals in response to later requests from counsel for the Berg Investors, as well as the Receiver, to testify in this action.[114]

Because it is their burden to demonstrate good faith, the Berg Investors cannot claim the good faith defense while at the same time benefitting from the shield of the Fifth Amendment. *Armstrong v. Collins*, 2010 U.S. Dist. LEXIS 28075, at *101. "[T]he claim of [5th Amendment] privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation." *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997).

a. An Adverse Inference from Berg's Silence Is Appropriate.

Berg's silence not only makes it impossible for the Berg Investors to carry their burden to prove that he took the transfers in good faith, it also affirmatively shows that Berg took the funds in bad faith. A court in a civil case can draw an adverse inference from the assertion of the Fifth Amendment privilege. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 521 (8th Cir.

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[111] Declaration of Richard L. Ostrom in Support of Receiver's Motion for Summary Judgment, Docket No. 198 ("Ostrom") ¶ 8.
[112] *Id.*
[113] *Id.*
[114] Declaration of Tara C. Norgard in Support of Receiver's Motion for Summary Judgment ("Norgard") ¶ 2.

1984). Here, the only reasonable inference is that Berg fears criminal prosecution for his role in dissipating the scheme's assets and refuses to testify in this action because he knew or had reason to know that Cook's scheme was either fraudulent or insolvent.

An adverse inference is entirely appropriate—and common—in the context of summary judgment. *SEC v. Colello*, 139 F.3d 674, 678 (9th Cir. 1998); *SEC v. Monterosso*, 768 F. Supp. 2d 1244, 1268 (S.D. Fla. 2011); *Armstrong* , 2010 U.S. Dist. LEXIS 28075, at *100–01; *SEC v. Suman*, 684 F. Supp. 2d 378, 386 (S.D.N.Y. 2010).

An adverse inference is appropriate because "the invocation of the privilege [in civil litigation] results in a disadvantage to opposing parties by keeping them from obtaining information they could otherwise get." *Suman*, 684 F. Supp. 2d. at 386. In other words, "the law of privileges tends to suppress the truth." *Rosebud*, 733 F.2d at 521. The adverse inference should "be given significant weight because silence when one would be expected to speak is a powerful persuader." *LiButti*, 178 F.3d at 120. This is particularly true where the person asserting the privilege is a non-party witness. *Rosebud*¸ 733 F.2d at 521 ("The policies supporting the Fifth Amendment apply with even less force when a non-party witness testifies in a civil proceeding and thus, the Amendment should not work to preclude an adverse inference in this situation.").

The only reasonable inference from Berg's refusal to testify in the action is that Berg did not act in good faith and was on inquiry notice (if not actual notice) of the insolvency or fraudulent nature of Cook's scheme when he cashed out his clients. The Berg Investors are Berg's lifelong friends and business associates. If Berg thought that his testimony would help them, he would surely break his silence. Thus, his refusal to do

so should be given significant weight. *See LiButti*, 178 F.3d at 120. Moreover, Berg (and the Berg Investors) should not be permitted to profit by Berg's silence in this action. *See SEC v. Tome*, 638 F. Supp. 596, 610 (S.D.N.Y. 1986).

b. Berg Was on Inquiry Notice of the Fraudulent or Insolvent Nature of Cook's Scheme.

Even setting aside any adverse inference, the evidence that ***is*** available shows that Berg was aware of many facts that would have caused a reasonable person to question whether the cashier's checks were issued for a fraudulent purpose or whether the Cook companies were insolvent. *See Sherman*, 67 F.3d at 1355.

Knowledge that a government agency is investigating is a "warning sign." *Warfield*, 436 F.3d at 555. It is undisputed that Berg knew that the SEC's investigation and that it was not "routine." Cook testified that sometime in the week of June 22, 2009, Berg called him to ask whether the SEC was conducting a routine audit or an investigation. Cook told Berg that it was an investigation, not a routine audit.[115] Respondent Harris testified that on June 28, 2009, Berg told Harris that "one of Trevor's partners was being investigated."[116] Berg's tone was "very serious."[117] Berg explained that Cook had come over to his house earlier that day and told him the news.[118] Harris explained that Berg "was obviously very concerned on what had happened or what was

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[115] Jansen Ex. 8 at 78, 138, 144; Ex. 12 at 169; Ex. 14 at 294–95.
[116] Jansen Ex. 35 at 135. Harris settled with the Receiver and is no longer a part of this action. Jansen Ex. 205.
[117] Jansen Ex. 35 at 136.
[118] *Id.* at 138–39.

about to happen at that time," and that Berg "was concerned that people had relied on him, made investments on him, and something may happen to those investments."[119]

Even more telling is Berg's reaction upon learning of the SEC's investigation. Berg was so concerned that he immediately demanded that he and his clients be cashed out—without even advising his clients ahead of time.[120] Cook and Berg had an agreement to protect Berg's clients if anything ever went wrong.[121] When the SEC came in, Cook cashed out Berg and his clients—no paperwork, withdrawal forms, or other formalities required.

Cook personally handed over $5 million in cashier's checks to Berg for distribution to his friends. Unlike conventional checks, cashier's checks would not "bounce" if the accounts from which they were drawn were frozen as a result of the investigation. The checks were not accompanied by any indicia of a legitimate arms-length transaction. Conspicuously absent were any receipts or statements showing that withdrawals had been made from the Berg Investors' accounts or that the accounts had been closed.[122] Moreover, at least fifteen of the cashier's checks that Berg got from Cook consisted of "qualified" IRA money, including two of the three checks that Berg got out for himself.[123] Berg knew—at a minimum from the agreement he personally signed with

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[119] *Id.*
[120] Jansen Ex. 8 at 78, 138, 144; Ex. 12 at 169.
[121] Jansen Ex. 8 at 89, 180; Ex. 12 at 168.
[122] *See, e.g.,* Jansen Ex. 158 at 24–25.
[123] Jansen Ex. 15–17.2.

Millennium—that qualified money was supposed to go through the third party custodian rather than directly to the investor.[124]

No reasonable person faced with these circumstances would think this was business as usual for a legitimate investment company. Berg certainly did not; he felt a need to explain to his clients why he had "closed their accounts," showing that he appreciated the strange and suspicious nature of doing so without being asked and hand-delivering cashier's checks. Berg told at least nine of the Berg Investors that he had "closed their accounts" because there was an "investigation" or "audit" going on.[125]

As for his share, when Berg went to deposit the cashier's checks made out to him and his wife, he told the bank teller he was "trying to help his son-in-law."[126] He then transferred those same funds through ten different accounts at three institutions before they were finally traced by the Receiver and frozen.[127]

Considered together, the myriad unusual circumstances surrounding Berg's dealings with Cook and his fraudulent companies in the final days of the scheme compel finding that Berg was on inquiry notice of fraud, insolvency, or both. Lest there be any doubt of his inquiry notice, he did, in fact, inquire. What he learned then only made the suspicion of fraud or insolvency stronger. Berg thus lacked objective good faith when he pulled money out of the scheme for himself and his friends and colleagues, and summary judgment in the Berg Investors' favor is inappropriate.

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[124] *E.g.*, Jansen Ex. 37 at 6.
[125] *See infra* Parts IV.B.1–12; *see also* Jansen Ex. 35 at 135.
[126] Jansen Ex. 10 at 37–38, 41.
[127] Jansen Ex. 38.

B. The Facts Related to Each Berg Investor Preclude Summary Judgment in His or Her Favor.

In addition to their omission of critical information regarding Cliff Berg, the Berg Investors omit many of the most important red flags known to each of them. And they analyze each of the red flags that they do address in isolation rather than as a part of the totality of the facts and circumstances known to them. The facts, when viewed as a whole, are clear and compelling: Berg delivered cashier's checks to the Berg Investors out of the blue and under bizarre circumstances that would have prompted a reasonable person to inquire whether the Cook companies from which the money came might be insolvent or involved in fraud. To characterize these withdrawals as "withdrawals in due course" strains credulity.[128] Not one of the Berg Investors asked Berg for the checks they received. The checks Berg delivered did not come with receipts, closing statements, or documentation of any kind. The payments were in rounded-off amounts, not the precise amounts that a legitimate financial company would calculate. And the payments violated the express terms of the agreements the Berg Investors had signed with the Cook companies—agreements on which they place great importance on in every other context.

Yet despite all of this, not a single one of the Berg Investors undertook a diligent investigation—or any investigation at all—into the true nature of the transfers. None of them was given a plausible explanation for the payment he or she received sufficient to extinguish the red flags that put him or her on inquiry notice. Instead, each Berg Investor chose to take the money from Berg—in every case, significantly more than he or she had

[128] Br. at 56.

invested—without asking any questions. These facts, discussed in detail specific to each Berg Investor below,[129] mandate denial of the Berg Investors' motion for summary judgment.

1. David Buysse

a. Facts

As Buysse states in his brief, he met Berg through his operation of a carpeting business.[130] In fact, Berg has sold him carpet for at least 20 years and does approximately $5,000 to $10,000 worth of business with Berg annually.[131] Buysse testified that Berg approached Buysse about an "an investment, an opportunity for investment and . . . an opportunity to get some return on investment" with Cook—not a "lending opportunity" as Buysse now asserts.[132] Berg then arranged a meeting between Cook and Buysse at Cook's headquarters.[133] Berg told Buysse that Buysse would be "guaranteed" a 10% return on his investment with no risk.[134] Buysse knew that Berg was Cook's father-in-law.[135]

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[129] In discussing "facts" specific to each individual, the Berg Investors' brief generally does not cite evidence in the record. Unsupported facts cannot form the basis for summary judgment, and the Berg Investors' failure to provide evidentiary support for their statements provides another reason for denying their motion.
[130] Br. at 5.
[131] Jansen Ex. 158 at 20, 52.
[132] *Id.* at 9–11; Br. at 6.
[133] Jansen Ex. 158 at 8, 42–44.
[134] *Id*. at 11.
[135] *Id.* at 20, 21.

From November 2007 through July 2008, Buysse claims he sent $320,128.15 to Cook's scheme.[136] Omitted from his brief is a discussion of one $50,000 deposit that Buysse contends he made in the form of 500 one-hundred dollar bills given to Berg.[137] Buysse never received a receipt for this cash deposit.[138]

Buysse signed agreements with Oxford Global Advisors and Crown Forex SA requiring the party terminating the accounts to provide written notice to the other party.[139] Buysse's account statements came from a number of entities other than those with whom he had written agreements, including The Oxford and UBFX Diversified.[140]

The statements contained several other irregularities as well. Despite Buysse's initial investment being in the amount of $85,311.27, his first statement showed a balance of an even $85,312.00.[141] Buysse's subsequent statements showed rounded monthly additions of $850—not the $853.11, which would have corresponded with the 12% annual rate (1% per month) he was promised and that was reflected on his statements.[142] Buysse's statements for his other account showed similar rounding.[143] Nothing in the account documents Buysse signed states that the Cook companies would round off dollars at their discretion and neither Buysse nor any of the other Berg Investors have

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[136] Jansen Ex. 36; Ex. 34 at 10–13.
[137] Jansen Ex. 158 at 91-99.
[138] *Id.* at 93.
[139] Jansen Ex. 159; Ex. 160; Ex. 162.
[140] Jansen Ex. 164; Ex. 158 at 70–74.
[141] Kohlhepp Ex. 2.1 at 1; Jansen Ex. 36 at 1.
[142] Kohlhepp Ex. 2.1.
[143] *Id.*

submitted any evidence to suggest that they had an understanding that any such rounding would occur.

In late June 2009, Berg called Buysse and told him that "we are closing this account" and that Buysse could expect a check in the mail.[144] Not more than a couple of days later, a cashier's check was delivered to Buysse for a rounded $360,700 (at least $40,571.85 more than he claims to have invested with Cook).[145] The check was the only item in the envelope Buysse received from Berg; there were no accompanying account closing documents, receipts, final statements, or other papers of any kind. Buysse had never requested that his account be closed, in writing or otherwise, and did not complete any withdrawal forms.

b. Berg Was Buysse's Agent.

Berg was Buysse's agent with respect to Cook's fraudulent companies. Berg "closed Buysse's account" for Buysse's benefit. Buysse then ratified Berg's action by accepting the benefit of Berg's action— the cashier's check for $360,700. As Buysse's agent, Berg's knowledge is imputed to Buysse. Because a reasonable jury would conclude that Berg, Buysse's agent, lacked objective good faith, summary judgment for Buysse on the Receiver's fraudulent transfer claim must be denied.

c. Buysse Was on Inquiry Notice.

Buysse's interactions with Cook's fraudulent companies were marked by numerous unusual circumstances that would have caused a reasonable person to

[144] Jansen Ex. 158 at 14.
[145] Jansen Ex. 15.11.

investigate further. Buysse claims he handed Berg $50,000 in one-hundred dollar bills for the program without getting a receipt. A reasonable person would find this contrary to industry norms and inconsistent with an arms-length transaction. Another red flag was the fact that Buysse received—without explanation—statements from entities other than those in which he had invested and with which he had signed agreements. In addition, the Cook companies apparently rounded Buysse's deposits and "interest" payments off (some in Buysse's favor, some not) rather than crediting Buysse for the accurate amounts of his deposits and paying him the exact interest rate reflected on his statements. Buysse never inquired about any of these inconsistencies or oddities.

Most striking of all, Berg called Buysse out of the blue to advise that Buysse's "account" had been closed—without his request, signature, or the written notice required by the agreements he signed. Several days later, Buysse received a cashier's check for a rounded off amount without a receipt, final statement, or any other paperwork. A reasonable person would certainly question the legitimacy of an entity that sends an arbitrarily rounded payment of hundreds of thousands of dollars with absolutely no records whatsoever.

These facts would have caused a reasonable person to suspect that the cashier's check he received in June 2009 was not the product of an arms-length transaction. But at no point did Buysse investigate further, choosing instead to keep the money and remain willfully ignorant. Buysse was on inquiry notice of the fraudulent nature of the transfer or the insolvency of Cook's scheme, and he failed to undertake any diligent investigation

that would have extinguished inquiry notice. Buysse cannot meet his burden to prove the good faith defense, and his motion for summary judgment must be denied.

2. Steve and Pamela Cheney

a. Facts

Steve Cheney has known Berg "quite well" for at least twenty years through the carpet business.[146] In fact, while he and his family were invested in the Ponzi scheme, Cheney was one of Berg's biggest customers, buying between $200,000 and $400,000 of carpet from Berg in 2008 and 2009.[147]

As he acknowledged in his brief, Cheney is a very experienced investor in real estate.[148] But he also has over forty years of experience investing in stocks and bonds and is a private lender.[149] He considers himself to be an "experienced investor" in general.[150]

Berg introduced Cheney to the currency program and told him about mutual friends from the carpet industry who had already invested.[151] Berg then invited Cheney to a seminar at Cook's headquarters where Bo Beckman and Cook, among others, promoted "a complete investment company with different departments that could do different things for you."[152] After the group presentation, Cheney met with Cook in

[146] Jansen Ex. 81 at 42, 108.
[147] *Id.* at 43–44.
[148] Br. at 7
[149] Jansen Ex. 81 at 21
[150] Jansen Ex. 81 at 119; Ex. 83.
[151] Jansen Ex. 81 at 29.
[152] *Id.* at 20.

Cook's office, along with Berg and Respondent Larry Hopfenspirger.[153] Cook said that the currency program would guarantee a return of 12% per year.[154] He further told Cheney that the program was risk-free because they "hedge themselves out of risk."[155] Cheney said that he was satisfied with this explanation.[156]

Cheney knew that Berg was Cook's father-in-law—and, contrary to the Berg Investors' assertion that those "who knew Berg did not place their trust in Berg's relationship to Cook,"[157] Berg's relationship to Cook was a significant factor in Cheney's decision to invest.[158] As Cheney explained, "you assume that Cliff and his son-in-law have a good relationship and if Cliff brings these people into the business, that, you know, the guy isn't going to steal from—from Cliff's customers or friends."[159] Cheney further explained that but for Berg, and his relationship to Berg, he would not have invested in the program. That relationship "gave [Cheney] a little more comfort."[160]

From February 2008 through March 2009, Cheney and his wife, Pam, gave Cook a total of $1,620,962.51.[161] Cheney testified that of this total, $520,000 was on behalf of his sons Scott, David, and Joseph Cheney, and his sister-in-law, Sharon Reed.[162] Cheney signed an Oxford Global Advisors agreement requiring a party terminating the account to

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[153] *Id.* at 26.
[154] *Id.* at 54.
[155] *Id.* at 35.
[156] Jansen Ex. 81 at 35.
[157] Br. at 71
[158] Jansen Ex. 81 at 28, 111; Ex. 82 at 31, 69, 70.
[159] Jansen Ex. 81 at 111.
[160] *Id*. at 108.
[161] Jansen Ex. 36; Ex. 34 at 12.
[162] Jansen Ex. 81 at 51, 52.

provide 30 days' written notice to the other party.[163] The agreements signed by each of the Cheney family members listed Cliff Berg as the Cheneys' "Representative."[164] The Cheneys also signed Oxford Global Advisors "Subscription Forms," making various handwritten, initialed notes and changes to the terms of these documents.[165] The Cheneys did not sign agreements with any other entities.

Before Berg cashed them out in June 2009, each member of the Cheney family received monthly payments from Cook, either by check or wire, totaling more than $241,000.[166] The Cheneys admit in their brief to receiving only $162,120 of this—the payments to Steve and Pam.[167] This is inexplicable, given that the Cheneys include the amount of principal invested by each of the Cheney family members in their deposits with the scheme; there is no plausible reason for failing to include the periodic payments "earned" by all of the principal in the calculation of the total received from the scheme.[168] None of the Cheneys received tax forms reflecting the distributions they received.[169] This was unusual in Cheney's experience.[170]

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[163] Jansen Ex. 83.
[164] Jansen Ex. 89–92.
[165] Jansen Ex. 86–88.
[166] Jansen Ex. 36; Ex. 34 at 12.
[167] Br. at 26.
[168] Br. at 26 (adding the $520,000 in principal allegedly invested for Scott, David, and Joseph Cheney and Sharon Reed to the $1,000,000 invested by Steve Cheney and the $100,000 invested by Pam Cheney and stating that "Berg delivered two checks to Cheney on June 29, 2009 for the balance of Cheney and his wife's loans of $1,636,000.00" but then, in the same paragraph, excluding the $78,000 in "interest" payments to those family members when stating "the Cheneys had also received interest payments over the course of the loan of $162,120.00.")
[169] Jansen Ex. 81 at 154.
[170] *Id.*

In August of 2008, the Cheneys' monthly payments suddenly started coming from Crown Forex, an entity with which none of them had signed an agreement.[171] Cheney did not ask about the unannounced and unexplained change.[172] Then in January 2009, Steve Cheney's monthly payment came from Universal Brokerage FX Management, once again, an entity with which he did not have an agreement.[173] And once again, Cheney did not inquire.[174] Nor did anybody inquire why Pam's investment of $50,962.51 on May 18, 2008 was rounded down to $50,000.00 on her first statement,[175] or why she suddenly started receiving less than her 12% interest rate for May and June, 2009.[176]

Cheney contends that he had called Cook on June 27 or 28, 2009 to ask about investing additional money, but Cook told Cheney to hold off because there was "a problem with a different part of the company" that Cook was concerned about.[177] According to Cheney, Cook said that he was moving his business to Charles Schwab.[178] Cheney then called Hopfenspirger and told him about the "problems in another part of the company."[179] According to Cheney, he called Cook back the next day and asked Cook to

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[171] Jansen Ex. 36; Ex. 93.
[172] Jansen Ex. 81 at 144.
[173] Jansen Ex. 36; Ex. 94.
[174] Jansen Ex. 81 at 146–48.
[175] Jansen Ex. 36; Ex. 12; Kohlhepp Ex. 3.1 at 1.
[176] Kohlhepp Ex. 3; Jansen Ex. 36; Ex. 12.
[177] Jansen Ex. 81 at 91, 162.
[178] Br. at 26.
[179] Jansen Ex. 81 at 98–99.

close his account.[180] Cheney knew there were problems and said that he took the money out "to be safe."[181]

Cheney's accounting in his brief of his conversations with Cook does not square with his testimony or other evidence. There is no evidence that Cook assured Cheney his funds were in a segregated account.[182] Apparently attempting to minimize the concern underlying his decision to pull out of the Cook program, Cheney states that he was "very risk-averse."[183] He had previously represented, however, that he was "risk-willing."[184]

None of the Cheneys ever made a written request to close their accounts. Nevertheless, on or about June 30, 2009, Berg hand-delivered three cashier's checks to Cheney's office.[185] The first, for an even $1,535,300, was made out to Steve Cheney, the second, for an even $101,000, was made out to Pam Cheney, and the third, for $202,000, was made out to Respondent Hopfenspirger.[186] The checks were issued from a UBS Diversified Growth LLC account—once again, an entity with which Cheney and his family did not have signed agreements.[187] Although his sons and sister-in-law supposedly had separate accounts, and had previously received their own individual payments, all of the money from their purported accounts was combined in the check

[180] *Id*. at 90.
[181] *Id*. at 105–06.
[182] Br. at 26; Jansen Ex. 81.
[183] Br. at 26.
[184] Jansen Ex. 81 at 120; Ex. 83 at 2; Ex. 84 at 5.
[185] Jansen Ex. 81 at 59; Ex. 95 at 125.
[186] Jansen Ex. 16.11; Ex. 16.10; Ex. 16.4; Ex. 95 at 125.
[187] Jansen Ex. 16.11; Ex. 16.10.

made out to Steve Cheney.[188] Berg did not provide any account closing documents, receipts, or final statements with these cashier's checks.[189]

Cheney knew that all of the people in the carpet business who had invested in Cook's program had gotten their money out and that Berg was the common denominator.[190] Cheney testified that "people started calling each other after we got our money."[191]

Cheney, Hopfenspirger, and Respondent John Dzik called Berg in July 2009 to discuss concerns they had about the timing of the closing of their accounts. They asked Berg whether they would have to pay the money back.[192] Cheney was particularly concerned about the possibility that the Cook companies would file for bankruptcy, triggering the automatic recall of the money each of them had received.[193]

b. Berg Was the Cheneys' Agent.

Berg was the Cheney family's agent with respect to Cook's scheme. Even assuming Cheney asked Cook to close his account in late June 2009, Cook actually acted on ***Berg's*** request to cash out his clients.[194] The Cheneys' cashier's checks were withdrawn along with those for Berg's other clients and Cook delivered them all to Berg as a group. Cheney trusted Berg to act on his behalf, and only invested in the scheme based on the trust he had in Berg and Berg's inside connection to Cook. And Cheney

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[188] Jansen Ex. 81 at 100-01.
[189] *Id.*
[190] *Id*. at 48.
[191] *Id.* at 60.
[192] *Id.* at 63–64.
[193] *Id*. at 65.
[194] Cook does not recall Cheney asking to close his accounts. Jansen Ex. 8 at 91.

ratified Berg's action as his agent by accepting the money that Berg got for him and his family. As their agent, Berg's knowledge is imputed to the Cheneys. Because a reasonable jury would conclude that Berg, the Cheneys' agent, lacked objective good faith, summary judgment for the Cheneys on the Receiver's fraudulent transfer claim must be denied.

c. The Cheneys Were on Inquiry Notice.

Steve Cheney's dealings with the Cook companies were replete with red flags that would have caused a reasonable person of his sophistication and investment experience to inquire further as to the legitimacy and solvency of the program. Cheney, however, did not inquire further because regardless of what Cook might do to others, "the guy isn't going to steal from—from Cliff's customers or friends."[195] As one of Berg's biggest customers, he enjoyed a certain "comfort level" with the Cook companies.[196]

For starters, the irregularities in the statements and payments that the Cheneys received were red flags. No legitimate investment company would lop off nearly $1,000 from an investment for the apparent sake of making the math on an "interest" payment easier. Nor would a legitimate company start sending checks and statements from unfamiliar entities without explanation. To the extent the Cheneys argue that they did not notice these issues, that goes to subjective—rather than the appropriate objective—good faith. The statements and payments were sent to the Cheneys, and the discrepancies and oddities contained in them would have contributed to a reasonable person's suspicions

[195] Jansen Ex. 81 at 111.
[196] *Id*. at 109–10.

about the Cook companies, especially in light of the red flags that came toward the end of June 2009.

The most obvious of those was that ***Cook told Cheney there was a problem with the Cook companies***.[197] Cheney admits that he was concerned enough that he told Cook he wanted to withdraw "to be safe." He further admits that he was concerned enough to tell his friend, Respondent Hopfenspirger, to do the same. Although Cheney now suggests that Cook's reassurances and explanations were sufficient to put him completely at ease, Cheneys actions speak louder than his words.

Not only did Cheney know about problems with the company, he knew his dealings were outside the bounds of the contract he signed. Despite agreements requiring 30 days' advance written notice to close an account, no notice was provided on either side of the transaction, much less in writing. Moreover, although each of his three sons and his sister-in-law had their own purported accounts and had always received their own separate monthly payments, when Berg delivered the money, there was one check written to Steve Cheney, supposedly representing the funds in all five of his family members' accounts.

Yet another red flag is that Cheney's check, as well as the check written to his wife, was drawn on the account of UBS Diversified Growth, a company with which he had had no dealings whatsoever. The checks were not accompanied by a receipt, final statement, or any other documentation regarding the closure of the accounts.

[197] Jansen Ex. 81 at 91–93.

When the head of the company advises against investing additional money into his investment program, a reasonable person has inquiry notice of possible insolvency or illegitimacy, especially when combined with earlier red flags including interest payments coming from various unfamiliar institutions; lack of tax forms, which Cheney admitted was unusual; and a guaranteed 12% rate of return with no risk to principal, explained only by the implausible statement (to Cheney, a very experienced investor) that "we hedge ourselves out of risk."

These facts would prompt a reasonable person to ask questions and are more than sufficient to trigger inquiry notice of fraud or insolvency. Any contention to the contrary is belied by the fact that Cheney and many of the Berg Investors were calling each other as soon as they got the money from Berg, wondering whether they might have to return it. Because a reasonable jury would find that the Cheneys cannot meet their burden of proving the good faith affirmative defense, summary judgment for the Cheneys on the Receiver's fraudulent transfer claim must be denied.

3. Walter Defiel

a. Facts

Defiel also knows Berg through the carpet business.[198] Defiel managed a company owned by Respondent Cheney and was a co-worker and friend of Respondent Dzik.[199] Defiel knew that Dzik and Cheney had invested with Cook, and Defiel told Dzik

[198] Jansen Ex. 99 at 19–20.
[199] *Id*. at 11–12, 17, 21, 23.

that he wanted in on the deal.[200] Defiel then met with Berg and was told that his rate of return—12%, dropping down to 10.5 or 10.25%—was guaranteed.[201] This was over ten times the 1% Defiel was earning at the time.[202] Berg also told Defiel, in response to Defiel's questions, that "there wasn't any risk" and that Defiel could get his money out at any time.[203] Defiel knew that Berg was Cook's father-in-law.[204]

Omitted from Defiel's brief is the fact that, before he invested with Cook, Defiel talked to his financial advisor about the program.[205] Defiel's advisor told him "not to do it" because he "didn't think it was legit."[206] Defiel's advisor further stated, "If it sounds too good, looks too good, something like it just isn't going to happen."[207]

Against his financial advisor's advice, Defiel sent $80,000 to Oxford Global Advisors.[208] Defiel signed an agreement with Oxford Global Advisors requiring the party terminating the account to provide 30 days' written notice to the other party.[209] Defiel also signed an agreement that imposed a "contingent deferred sales charge" or "early redemption fee" if the account were closed within four years of the opening

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[200] *Id*. at 25.
[201] *Id*. at 30.
[202] *Id*. at 57.
[203] *Id*. at 31–32.
[204] *Id*. at 41, 47, 55.
[205] *Id*. at 36, 64–65.
[206] *Id*. at 35.
[207] *Id*.
[208] *Id*. at 35, 49, 54; Ex. 36.
[209] Jansen Ex. 101.

date.[210] Defiel received statements not only from Oxford Global Advisors, the only Cook entity with which he had an agreement, but also from The Oxford.[211]

In or about May of 2009, Defiel was contemplating retirement and had some questions regarding his account, including, "What's the difference between this and my IRA, 401K?"[212] Defiel called the number on a business card he had been given to ask these questions.[213] Indisputably refuting the contention in his brief that "any questions Lenders had were answered promptly and fully,"[214] Defiel testified that nobody could answer his questions and he was told to call back the next day.[215] Although he did not get "the answers [he] was looking for at the time," Defiel did not call back to follow up.[216]

On or about June 29, 2009, Respondent Dzik[217] handed Defiel a cashier's check—which he had gotten from Berg—for a round $94,950 ($14,950 more than Defiel had invested).[218] He also handed Defiel a cashier's check for Respondents George and Karen Morisset, friends of Defiel's whom Defiel had introduced to the currency program.[219] Defiel had not requested that his account be closed and never completed any withdrawal

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[210] Jansen Ex. 102.
[211] Jansen Ex. 103; Ex. 99 at 90–91.
[212] Jansen Ex. 99 at 33.
[213] *Id*. at 32–33.
[214] Br. at 24.
[215] *Id*. at 33–34.
[216] *Id*.
[217] Dzik settled with the Receiver at the onset of this action, returning the money he got from the scheme to the Receiver. Jansen Ex. 204.
[218] Jansen Ex. 99 at 59; Ex. 15.14.
[219] Jansen Ex. 99 at 48, 59, 74.

paperwork.[220] Nor had he requested money on behalf of the Morissets—indeed, he had no authority to do so. No account statement, receipt, or other paperwork accompanied Defiel's check. Despite the agreements he signed, Defiel was not charged any fees whatsoever when his account was closed.[221] Defiel testified that he remembers hearing "something with Schwab," but he did not testify that he was satisfied by the explanation.[222] To the contrary, he stated that he "probably would have" asked more questions about the transfer, but "he was busy at the time, so [he] didn't."[223]

b. Berg Was Defiel's Agent.

Berg was Defiel's agent with respect to the Ponzi scheme. Berg closed Defiel's account for Defiel's benefit, and Defiel ratified Berg's action by accepting the benefit of Berg's action—the cashier's check for $94,950. As his agent, Berg's knowledge is imputed to Defiel. Because a reasonable jury would conclude that Berg, Defiel's agent, lacked objective good faith, Defiel's motion for summary judgment on the Receiver's fraudulent transfer claim must be denied.

c. Defiel Was on Inquiry Notice.

Defiel had admitted—but conveniently left out of his brief—that the facts he knew even prior to receiving his money back were questionable enough to cause him to ask his financial advisor whether the Cook program was legitimate.[224] Berg's representations of a guaranteed 10–12% rate of return, with no risk to principal, struck Defiel as "too good

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[220] *Id*. at 60–61.
[221] *Id*. at 61, 85.
[222] Br. at 27; Jansen Ex. 99 at 60.
[223] Jansen Ex. 99 at 60.
[224] *Id.* at 17, 35–36, 64–65.

to be true." That is why he consulted his advisor, who not only failed to ease Defiel's suspicions but who told Defiel "not to do it" because he "didn't think it was legit."[225] This red flag would be sufficient to raise the suspicion of a reasonable person, but Defiel—who was earning 1% interest in a savings account at the time—instead chose the path of willful ignorance.

After Defiel invested, he became aware of even more red flags. Although the program was designed to accept retirement accounts like Defiel's, nobody working there could answer even the most basic question on that topic. Defiel admitted to being upset by the lack of answers, but again chose not to follow up but to simply sit back and profit from the scheme. Defiel also received statements from an entity that was unknown to him called The Oxford, which would have caused a reasonable person to inquire further.

Then, on or around June 29, 2009, Defiel suddenly was cashed out of the seemingly lucrative program by Berg and handed a check from his friend John Dzik (who was not a signator on Defiel's account). The check was from Crown Forex, an entity with which Defiel had not invested. Defiel had not asked for his account to be terminated either orally or in writing, as was required by the agreement he signed. Nor had the requisite 30 days' advance notice been given from either side of the transaction. Defiel was not charged any early redemption fees, also in contravention of the agreements he signed.

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[225] *Id*. at 35, 49.

The only "fact" Defiel relies on as evidence of his good faith is that "he was never informed about the existence of an investigation."[226] Regardless, in light of the undisputed facts surrounding Defiel's involvement with the Cook scheme, a reasonable jury would conclude that Defiel was on inquiry notice as to the fraudulent nature of the transfer or the insolvency of the scheme when he received his check from Berg. Defiel concedes that he did not undertake a diligent investigation. Therefore, his motion for summary judgment on the Receiver's fraudulent transfer claim must be denied.

4. Terry Frahm

a. Facts

Jean Frahm is Berg's dental hygenist.[227] During one of Berg's appointments, she overheard him talking about the Cook program and asked Berg for a brochure.[228] Her husband, Terry Frahm, reviewed the brochure, which promised a guaranteed 12% return, and underlined the portions guaranteeing "zero fluctuation of principal."[229] Terry Frahm works as a global sales representative and considers himself to be an "experienced investor."[230] He began investing in the money markets in the mid-1980's and has worked with investment advisors at both Piper Jaffray and Smith Barney.[231]

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[226] Br. at 78–79.
[227] Jansen Ex. 166 at 10, 11.
[228] Jansen Ex. 165 at 22–23.
[229] Jansen Ex. 180.
[230] Jansen Ex. 165 at 85–86, 191; Jansen Ex. 170.
[231] Jansen Ex. 165 at 14, 15–17, 85–86.

The Frahms met with Cook and Berg on at least two occasions and knew that Berg was Cook's father-in-law.[232] At the meetings, the Frahms were told they would earn a 10.5–12% return on their "investment" and that there was little or no risk to their principal.[233] From July 2, 2007 through January 21, 2009 Frahm sent a total of $765,162.44 of qualified and nonqualified money to UBS Diversified LLC, Crown Forex LLC, and Oxford Global Advisors.[234] Terry Frahm signed an agreement with Crown Forex SA providing not only the power of attorney to himself discussed in Part II.B.3.a above, but specific directions for withdrawing funds: "to request a withdrawal, fill in the related form and fax it or email it to us."[235] The agreement showed where the form was available online, and further required that money be wired to the investor's account.[236] Frahm also signed at least three other agreements imposing a "contingent deferred sales charge" or "redemption fee" on account closings within four years of opening the account.[237] Frahm was focused on the fees—he underlined the portion of a UBS Diversified brochure he received specifying a "4 year contingent sales charge of 4%, 3%, 2%, 1%."[238]

In the spring of 2009, Frahm called Cook with questions regarding the tax consequences of his "investments." Frahm "got a bad feeling" from the answers Cook

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[232] Jansen Ex. 166 at 19–22, 13, 23, 26; Jansen Ex. 165 at 43.
[233] Jansen Ex. 34 at 22–23; Jansen Ex. 165 at 231, 184.
[234] Jansen Ex. 36.
[235] Jansen Ex. 174 at 5.
[236] *Id.*
[237] Jansen Ex. 173; Ex. 167; Ex. 168.
[238] Jansen Ex. 180 at 6.

gave him and "felt uncomfortable with Cook."[239] Although Frahm now claims in his brief that the bad feeling came only because Cook refused to give him tax advice, Frahm's earlier statements indicated that Cook actually was willing to discuss tax strategies with him but that Frahm felt uneasy because of Cook's demeanor.[240] Frahm claims that this is what prompted him to send a letter to Cook requesting that his account be closed in the spring of 2009. The document he produced in this litigation is unsigned and he does not remember mailing it.[241] Frahm disposed of the computer he allegedly used to write the letter shortly thereafter and did not keep an electronic copy.[242]

In late June 2009, Berg called the Frahms and told Jean that he had some checks for her.[243] Berg then personally delivered two cashier's checks in round amounts: one for $123,200, purportedly consisting of Frahm's qualified IRA funds, and a second for $793,370, purportedly consisting of Frahm's nonqualified funds.[244] These numbers do not match the amount that Frahm would have been owed according to the statements he had received from the Cook companies, which also contained arbitrary rounded off numbers (i.e. crediting Frahm with $2,355.00 or $2,350.00 per month when the reported interest rate of 11.30% annually would have resulted in $2,354.17 per month).[245]

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[239] Jansen Ex. 189 at 53. *See also* Jansen Ex. 165 at 101–02, 131.
[240] Br. at 44-45; *See, e.g.,* Ex. 165 at 101–03.
[241] Jansen Ex. 181; Jansen Ex. 165 at 172–74.
[242] Jansen Ex. 190 at 6–7.
[243] Jansen Ex. 166 at 48.
[244] Jansen Ex. 16.5; Ex. 16.7.
[245] Kohlhepp Ex. 5; Ex. 5.1.

Berg explained to the Frahms that ***he had closed their account*** because there was an "investigation" or "audit" going on.[246] He did not say that he was delivering a check pursuant to Frahm's request. Indeed, had he been doing so, he would not have felt the need to explain his actions by referring to the investigation, which Frahm admits he did.[247] Although Frahm contends that this statement was made "after receiving the checks," it was indisputably made in the same meeting during which the money changed hands.

Frahm and his wife had at least one joint account with Cook's scheme, but each of the checks was made out only to Terry Frahm.[248] Berg did not provide Frahm with a receipt, final statement, or any other written confirmation that Frahm's accounts had been closed.[249] Moreover, Frahm was not charged any account closing fees whatsoever, despite the fact that it had been only two years since his first investment.

b. Berg Was Frahm's Agent.

Notwithstanding the letter Frahm says he sent to Cook in May, Cook actually acted on ***Berg's*** demand to cash his clients out, not the unsigned letter that may or may not have been received.[250] Cook created and delivered the cashier's checks for Frahm as part of the same transaction in which he got money out for all of Berg's clients. Frahm then ratified Berg's action on his behalf—which Berg told him he had taken—by

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[246] Jansen Ex. 165 at 114–16; Jansen Ex. 166 at 48.
[247] Br. at 79.
[248] Jansen Ex. 165 at 160, 162.
[249] Jansen Ex. 165 at 237.
[250] Cook testified about the details of cashing out the Berg Investors. He does not recall ever seeing Terry Frahm's letter. (Jansen Ex. 8 at 92–93.)

accepting the money that Berg got for him. As his agent, Berg's knowledge is imputed to Frahm. Because a reasonable jury would conclude that Berg, Frahm's agent, lacked objective good faith, Frahm's motion for summary judgment on the Receiver's fraudulent transfer claim must be denied.

c. Frahm Was on Inquiry Notice.

Frahm's argument that he received the money in objective good faith rests on the assertion that he requested the funds himself because he wanted to invest in equities.[251] But even if that is true, Frahm knew that the funds were being given to him not pursuant to his request—which he concedes he did not make in accordance with the agreements purportedly governing his investments—but pursuant to Berg's actions. Berg told the Frahms that he had "closed their accounts." And Berg felt the need to tell the Frahms ***why*** he was hand-delivering cashier's checks, explaining that there was an "investigation" or "audit" going on.[252] Again, to the extent Berg attempted to minimize the investigation by saying it had to do with Beckman, his actions spoke louder: he was concerned enough about the investments with Cook that he got his clients out—and Frahm knew this. Also, any argument that this red flag should be ignored because it came after the checks were handed to Frahm has no support in the law. Berg's statement came in the same conversation during which he passed the money to the Frahms, and certainly contributed to what Frahm knew or should have known "when he received the transfer."

[251] Br. at 80.
[252] Jansen Ex. 166 at 48.

The contents—or lack thereof—of Berg's delivery were also unusual, and certainly would have appeared so to an "experienced investor" like Frahm claims to be. The checks did not reflect any early withdrawal fees, even though Frahm knew they would apply because his account was closed within four years of its opening. Indeed, Frahm was so focused on those fees that he underlined the portion of the UBS Diversified brochure describing them.[253] Moreover, the cashier's checks—totaling nearly $1 million—were delivered without any accompanying receipt, final statement, or paperwork of any kind. An experienced investor such as Frahm certainly would expect paperwork to accompany a transaction of the nature and size of the check he received.

The cashier's checks ostensibly included qualified IRA money. Frahm claims he requested that these IRA funds be rolled directly over into Oxford PCG equities program,[254] but it was not—rather it was returned directly to him by Berg. This was in violation of the Entrust agreement Frahm had signed. When he set up his Entrust account to manage the retirement funds he had given to Cook, Frahm crossed out the power of attorney section that would have given Cook authority to directly withdraw the funds.[255] Despite this, Cook not only withdrew the funds but bypassed Entrust altogether. Frahm's Entrust contract also imposed a 0.5% fee for account termination or transfers.[256] Yet Frahm was never charged this fee. Thus the delivery of a cashier's check consisting of Frahm's IRA money—without any fees taken out, without any interaction with Entrust,

[253] Jansen Ex. 165 at 125–26; Jansen Ex. 180.
[254] Jansen Ex. 165 at 120.
[255] Jansen Ex. 179 at 3.
[256] *Id*. at 4.

and without any explanation—should have caused a reasonable person of Frahm's experience level and sophistication to inquire further.

Even assuming that Frahm did send the May 2009 letter asking Cook to close his "accounts," Frahm knew or should have known that his request did not follow the procedures he had agreed to. The Crown Forex agreement Frahm signed required a very specific procedure for getting money: the investor was to fill out a withdrawal form, available at the website location provided in the Crown Forex agreement.[257]

Finally, the statements Frahm had received from the Cook companies had reflected arbitrarily rounded amounts rather than exact calculations.[258] An experienced, hands-on, and sophisticated investor like Frahm, who watched his investments intently, read the agreements closely, and asked questions when he had them, should have recognized that a legitimate financial institution would not engage in such practices.

In view of the numerous red flags known or apparent to Frahm when he received $916,570 in cashier's checks from Berg, the only reasonable conclusion is that Frahm was on inquiry notice of the fraudulent nature or the insolvency of Cook's scheme. Frahm cannot meet his burden of proving good faith, and his motion for summary judgment on the Receiver's fraudulent transfer claim must be denied.

[257] Jansen Ex. 174 at 5.
[258] Kohlhepp Ex. 5; Ex. 5.1.

5. Steven and Jenene Fredell

a. Facts

Respondent Steven Fredell and his wife Jenene are lifelong friends of Berg and his wife Ellen.[259] In fact, Steven Fredell considers Berg to be his "best" friend—the "deciding factor" in Fredell's decision to invest in Cook's scheme.[260] Naturally, the Fredells knew that Berg was Cook's father-in-law.[261] They counted on Berg's inside connection to "the head guy" and trusted Berg to "watch [their] account."[262]

The Fredells met with Cook before they gave him their money.[263] He guaranteed them a 10.5–12% return with "no risk of loss."[264] The Fredells believe they invested $245,381.63 with Cook, through custodians Millennium and Entrust, between January 28, 2008, and August 15, 2008.[265] Steven Fredell understood that the money would have to go back to the third party custodians before it could be distributed to the Fredells.[266]

The Fredells signed agreements with Crown Forex, Oxford Global Advisors, and UBS Diversified requiring the party terminating the account to give written notice to the other party.[267] They also signed agreements that imposed a "contingent deferred sales

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[259] Jansen Ex. 56 at 40, 199; Ex. 57 at 14.
[260] Jansen Ex. 56 at 199.
[261] *Id*. at 44; Ex. 57 at 17, 23.
[262] Jansen Ex. 56 at 199, 216.
[263] *Id*. at 203; Ex. 57 at 19–20.
[264] Jansen Ex. 56 at 58, 147; Ex. 57 at 22.
[265] Jansen Ex. 36; Ex. 79.
[266] Jansen Ex. 56 at 55–56.
[267] Jansen Ex. 58; Ex. 59; Ex. 60; Ex. 64; Ex. 65; Ex. 66; Ex. 67; Ex. 68; Ex. 69; Ex. 70.

charge" or "early redemption fee" if their accounts were closed within four years of their opening dates.[268]

Steven Fredell had what he characterized as "handshake deals" with both Berg and Cook. He made this deal over the telephone with Cook: "It was understood that for any reason, big or small, cash me out, no questions asked."[269] Fredell made a deal in-person with Berg, saying, "You know, between you and Trevor, I'm counting on you to, you know, get my butt out of there if things are not up to snuff for any reason."[270] Fredell trusted Berg to "be the point man, keep—keep an eye on things" from the inside, and that is exactly what Fredell understood Berg to be doing when he closed Fredell's account.[271]

The Fredells never requested their accounts to be closed, they did not complete any withdrawal paperwork, and they did not receive notice that they were being terminated from the seemingly lucrative Cook program.[272] Cliff and Ellen Berg came to the Fredells' house out of the blue one night and delivered two cashier's checks for rounded amounts of $243,250 and $25,700.[273] The Fredells received another check dated July 1, 2009 for an even $12,000, purportedly representing another $11,881.63 rollover that Steven Fredell attempted a few days earlier on June 19, 2009 (which in reality never

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[268] Jansen Ex. 58; Ex. 59; Ex. 66.
[269] Jansen Ex. 56 at 72–73.
[270] *Id*. at 73.
[271] *Id*. at 147–48.
[272] *Id*. at 72; Jansen Ex. 57 at 30–31, 67.
[273] Jansen Ex. 15.6; Ex. 15.7; Ex. 56 at 80.

made it to the scheme from custodian Entrust).[274] The Fredells did not ask why an investment they had made just days before was being returned or how it had accumulated over $100 in interest in such a short time.[275] Despite the agreements they signed, the Fredells were not charged any fees by the Cook companies for these disbursements. By way of explanation, on the night he personally delivered the cashier's checks to their house, Berg stated that he "cashed [the Fredells] out," pursuant to their "agreement." Berg further stated that "the SEC was in doing some checking" on Cook associate Bo Beckman.[276] Berg further told Steven Fredell that Berg was concerned because the SEC had come to Cook's offices.[277] Steven Fredell testified that he understood that Berg pulled his money out because he concluded the SEC was investigating something problematic with respect to the Cook companies.[278]

b. Berg Was the Fredells' Agent.

The Fredells testified that they trusted Berg (with a "lifetime of trust") to "watch out" for their money, to "keep an eye on things," and to "cash [them] out" for any reason with "no questions asked."[279] Berg "cashed the Fredells out," illustrating not only that he had serious concerns about the safety of money in the scheme, but that he was acting as the Fredells' agent in accordance with their instructions. Moreover, the Fredells ratified

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[274] This $11,881.63 check was cashed by Entrust and, as of December 31, 2010, remained there for Steven Fredell's benefit. (Jansen Ex. 17.1; Ex. 79; Ex. 80.) Thus, the Fredells recovered this attempted investment twice.
[275] Jansen Ex. 56 at 90–91.
[276] *Id*. at 75.
[277] *Id*. at 204–05.
[278] *Id*. at 205–06.
[279] Jansen Ex. 56 at 72, 74, 139, 199.

Berg's actions, accepting the checks that he gave them. As their agent, Berg's knowledge is imputed to the Fredells. Because a reasonable jury would conclude that Berg, the Fredells' agent, lacked objective good faith, the Fredells' motion for summary judgment on the Receiver's fraudulent transfer claims must be denied.

c. The Fredells Were on Inquiry Notice.

According to the Fredells, the explicit terms of their agreements with Cook and Berg were that Cook/Berg would "get my butt out of there" if anything "big or small" was wrong, with "no questions asked."[280] Accordingly, when Berg unexpectedly showed up at their home bearing unsolicited cashier's checks with the purported contents of the Fredells' investment accounts (but no receipts, final account statements, or any other documentation), the only reasonable inference would be that something was indeed wrong. These facts alone would have prompted further inquiry from a reasonable person who was not trying to remain willfully ignorant of the illegitimacy or insolvency of Cook's scheme.

There were many additional circumstances that should have suggested to the Fredells that their unexpected windfall of cash was not a legitimate transaction. For one, they were "guaranteed" an unrealistic 10.5–12% rate of return with "no risk of loss." The $12,000 they received on July 1, 2009 for an attempted investment of $11,881.63 just days before reflected earnings even higher than what they had been guaranteed. In addition, all of the money that the Fredells invested consisted of qualified IRA funds that should have been routed back to them through third party custodians Millennium and

[280] *Id*. at 72–73.

Entrust. The Fredells knew this, yet chose to ignore it.[281] The Fredells also knew they were not charged the early redemption fees provided in the agreements they signed.[282]

Finally, when he delivered the checks to the Fredells, Berg told his best friends that "the SEC was in doing some checking" into the business[283]; in other words, the Fredells had ***actual knowledge*** of an SEC investigation at Cook's offices. Steven Fredell admitted that he understood that Berg pulled money out because Berg had concluded that the SEC was investigating something problematic with Cook's companies. The Fredells suggest that they learned this fact "after" receiving the checks from Berg, but their testimony shows that the conversation happened during the same meeting in which Berg gave them their checks.[284] Any argument that this information should not be considered in the good faith analysis is absurd and has no support in the law.

These undisputed facts show that no reasonable jury could find that the Fredells can meet their burden of proving the good faith affirmative defense. Their motion for summary judgment must be denied.

6. Jennifer and Michael Heise

a. Facts

The Heises have known Berg since they opened their carpet store twenty-nine years ago.[285] In fact, the Heises' store was one of Berg's largest carpet accounts.[286] Berg

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[281] Jansen Ex. 56 at 55–56.
[282] *Id.* at 179.
[283] *Id*. at 75.
[284] *Id.* at 75.
[285] Jansen Ex. 40 at 18–19.
[286] Jansen Ex. 39 at 66–67.

told Michael Heise about Cook's program and then introduced him to Cook, personally driving him to a meeting with Cook and other investors at the Van Dusen mansion.[287] Heise was told that he could get a rate of return of 10.5% and that his money was retrievable at any time.[288] The Heises knew that Berg was Cook's father-in-law.[289]

Michael Heise handled all of the Heises' investments.[290] In his own estimation, he was an "experienced investor," conducting about 80% of his investments through a broker and the other 20% himself.[291] Heise's investment portfolio included stocks, bonds, CDs and real estate.[292] When Heise sent his money to Cook, he was aware that other low-risk investment opportunities, such as CDs, were offering approximately 2% interest.[293]

From May 2008 through June 2009, the Heises gave a total of $752,133.80 to the Cook companies.[294] Checks deposited in early June 2009 consisted of qualified IRA money, and thus were routed through Entrust, the third-party administrator of self-directed IRAs used by Cook.[295] Michael Heise signed Crown Forex and Oxford Global Advisors agreements requiring that if either party terminated the account, advance written notice was required.[296] The agreements further imposed a "contingent deferred sales

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[287] *Id.* at 64.
[288] *Id.* at 50–51, 147.
[289] *Id.* at 26; Jansen Ex. 40 at 73.
[290] Jansen Ex. 40 at 17–18.
[291] Jansen Ex. 39 at 14, 17, 144.
[292] *Id.* at 16–17.
[293] *Id.* at 60.
[294] *See* Jansen Ex. 36.
[295] *Id.*; Jansen Ex. 55.
[296] *See* Jansen Ex. 41–48.

charge" or "redemption fee" on account closings within four years of their opening date.[297] Heise's agreement with Crown Forex provided specific directions for withdrawing funds: "to request a withdrawal, fill in the related form and fax it or email it to us."[298] The agreement showed where the form was available online.[299] Heise also signed a contract with Entrust imposing a 0.5% account termination fee.[300]

The Heises received monthly statements from "The Oxford," "Crown Forex SA," "Crown Forex," and "C.G.I. Forex" reflecting the purported value of their accounts.[301] At one point Michael Heise noticed that the interest on his statement "did not add up to the 10 percent [he] had in [his] mind."[302] He told Berg that "something didn't add up," and the next month Berg had the problem fixed.[303] Later, the interest rate disappeared altogether from the statements.[304]

Berg was under instructions from Michael Heise to liquidate his accounts "if anything did go backwards or whatever."[305] Berg was to be on the lookout for "a whole realm of possibilities, from theft, cheating, stealing, bad markets, bad decisions."[306]

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[297] Jansen Ex. 41; Ex. 44.
[298] Jansen Ex. 46 at 5; *see also* Ex. 45 at 10.
[299] *Id*.
[300] Jansen Ex. 50 at 1.
[301] Jansen Ex. 51; Ex. 52; Ex. 39 at 124–30, 198–200.
[302] Jansen Ex. 39 at 122.
[303] *Id.*
[304] *Id.* at 128.
[305] *Id.* at 76, 263.
[306] *Id.* at 266.

Heise was comfortable investing through Berg because he "knew that [Berg] had an inside track of watching what was taking place [at Cook's headquarters]."[307]

The Heises never requested their accounts to be closed, never completed any withdrawal paperwork, and never received written notice that they were being terminated from the seemingly profitable program.[308] The Heises were at their vacation home in Canada in late June 2009 when Berg called to tell them that he was liquidating their accounts.[309] He delivered two cashier's checks from Crown Forex LLC (totaling $795,911.53) to the Heises' daughter at their carpet store before they came home.[310] Contrary to the agreements they signed, the Heises were not charged any fees from either the Cook companies or Entrust when their accounts were closed. Indeed, the checks the Heises received inexplicably bypassed Entrust altogether.

When the Heises returned to Minnesota, Berg explained that "something was amiss or being investigated" on the Bo Beckman side of the business.[311] According to Heise, he was able to get money out of the scheme "because [he] had Cliff Berg as [his] rep, and he did the right thing, got [Heise's] money out."[312] Jennifer Heise believed she and her husband were able to get money out of the scheme "because of [their]

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[307] *Id.* at 259.
[308] *Id.* at 71, 188; Jansen Ex. 40 at 34.
[309] Jansen Ex. 39 at 76.
[310] *Id.* at 76–77, 81, 93.
[311] *Id*. at 79–80.
[312] *Id*. at 274–75.

relationship with Berg" and she "assume[s]" that Berg was able to get their money out before anyone else's.[313]

On or around June 26, 2009, the Heises also had tried unsuccessfully to roll over Jennifer Heise's 401(k) account into Cook's scheme with two checks, totaling $72,721.39, made out to "Entrust Group FBO Jennifer A Heise IRA."[314] These checks were returned to the Heises uncashed and without explanation. Apparently unsure what to do with the uncashed checks, the Heises deposited them in their personal bank account at KleinBank along with one of the cashier's checks that Berg had dropped off.[315]

b. Berg Was the Heises' Agent.

Berg was the Heises' agent in dealings with Cook's scheme. Michael Heise asked Berg to handle everything from fixing the "error" in his account statement to being on the lookout for activities such as cheating and stealing. Heise's trust was not premised on Berg having any expertise or even understanding the strategy; in fact, Heise testified that he didn't think Berg understood the strategy at all.[316] Rather, Heise asked Berg to manage his account because he "trusted that [Berg] knew what his son-in-law was doing" and because he "knew that [Berg] had an inside track of watching what was taking place."[317]

Heise had expressly directed Berg to liquidate his account if there was trouble. Berg did so, illustrating not only that there was trouble, but that he was acting as the

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[313] Jansen Ex. 40 at 85, 86.
[314] Jansen Ex. 53.
[315] Jansen Ex. 54.
[316] Jansen Ex. 39 at 37.
[317] *Id*. at 258–59.

Heises' agent in accordance with their instructions. Moreover, the Heises ratified Berg's actions, cashing the checks that he gave them. As their agent, Berg's knowledge is imputed to the Heises. Because a reasonable jury would conclude that Berg, the Heises' agent, lacked objective good faith, summary judgment for the Heises on the Receiver's fraudulent transfer claims must be denied.

c. The Heises Were on Inquiry Notice.

Even independent of Berg's knowledge, a reasonable jury would conclude that Michael Heise, the admittedly experienced investor who handled all of the Heises' finances, was on inquiry notice of fraud or insolvency when Berg handed him unrequested cashier's checks as the Ponzi scheme was collapsing. The many red flags known to Heise up to and including this point would have suggested to a person of his sophistication and experience that his dealings with the Cook companies were not legitimate arm's-length transactions. Most telling is the fact that Heise expressly instructed Berg to watch out for various situations including "cheating," "stealing," and "bad decisions."[318] When Berg then closed the Heises' accounts without warning or request, the only inference a reasonable person could make would be that "cheating," "stealing," or "bad decisions" might have occurred—in other words, that the Cook companies might be insolvent or illegitimate. A reasonable person who was not turning a blind eye to such a possibility would certainly have been prompted to inquire further.

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[318] Jansen Ex. 39 at 266.

But, as Heise testified, regardless of what he might have suspected, "I don't really care because I've got—my deposits are out[.]"[319]

There were numerous other "unusual circumstances" surrounding the transfer. The Heises' cashier's checks were unaccompanied by any receipts, closing statements, or documentation of any kind. The money, which was supposed to be qualified IRA money, bypassed the third party custodian, Entrust, without the 0.5% account termination fee their agreement required. The transfer also violated the agreements the Heises had signed with the Cook companies; no withdrawal paperwork had been completed, no early withdrawal fees were charged, and no written notice had been tendered by either party. In addition, the IRA checks Jennifer Heise tried to deposit just days earlier were returned without explanation. The Heises claim to not recall this event, but a reasonable person in their situation would certainly question the apparent and unexplained rejection of a $72,721.39 investment, especially because IRA funds are required at all times to be held in a qualified account to avoid adverse tax consequences.

All of these red flags surrounding the events in late June 2009 came in addition to the red flags that cropped up in the Heises' earlier dealings with the scheme. For example, an experienced investor such as Michael Heise should have questioned whether the opportunity was "too good to be true" when it offered consistent double-digit returns at a time that other low-risk options such as bank CDs offered 2%.[320] In addition, irregularities in his monthly statements, including a math error and the dropped interest

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[319] *Id.* at 95–96.
[320] *Id.* at 60.

rate, were highly suspect. Considering all of these undisputed facts together, a reasonable jury would not find that the Heises can meet their burden of proving the good faith affirmative defense. Therefore, their motion for summary judgment must be denied.

7. Cynthia and Michael Hillesheim

a. Facts

Cynthia Hillesheim has known Berg for seventeen years through the carpet business.[321] The Hillesheims knew that Berg was Cook's father-in-law.[322] Berg told Hillesheim about Cook's program and arranged for her and her husband, Michael, to visit Cook at his headquarters.[323] Berg and Cook promised the Hillesheims a guaranteed 10% rate of return with no risk to their principal.[324] The Hillesheims state in their brief that Cook told them about "sophisticated computer software" that he used to operate his purported currency arbitrage program,[325] but Michael Hillesheim testified at his deposition that Cook never discussed or mentioned any propriety currency trading software.[326]

Between June of 2007 and May of 2008, the Hillesheims gave $220,079.18 to Cook.[327] Funds invested in October 2007 and April 2008 consisted of qualified IRA money, and were sent to the scheme through custodian Millennium.[328] The Hillesheims

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[321] Jansen Ex. 128 at 15.
[322] *Id.* at 15–16.
[323] *Id.* at 20–21.
[324] *Id.* at 21–23.
[325] Br. at 17.
[326] Jansen Ex. 127 at 181.
[327] Jansen Ex. 36.
[328] Jansen Ex. 127 at 117.

signed agreements with Crown Forex, Oxford Global Advisors, and UBS Diversified requiring the party terminating the account to provide written notice to the other party.[329] The Crown Forex agreement provided specific directions for withdrawing funds: "to request a withdrawal, fill in the related form and fax it or email it to us."[330] The agreement showed where the form was available online.[331]

Like other Berg Investors, the Hillesheims had an agreement with Berg that Berg was to "get their money out of there" if they ever did not get the return they were supposed to or if Berg had any "concerns."[332]

During the time they were invested in the scheme, the Hillesheims were getting the returns they had been promised.[333] They never asked to be terminated from the profitable program, never completed any withdrawal paperwork, and never gave or received the required written notice to close their accounts. Yet in late June of 2009, Berg suddenly and unexpectedly called Cynthia Hillesheim at work to inform her that "had to close—were closing the accounts."[334] Cynthia Hillesheim was "in shock."[335] Berg seemed "worried" on the telephone, and told Hillesheim that there was an

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[329] Jansen Ex. 129–134; Ex. 137–140.
[330] Jansen Ex. 140 at 7.
[331] *Id*.
[332] Jansen Ex. 127 at 83,193; Ex. 128 at 31, 71–72.
[333] Jansen Ex. 36; Jansen Ex. 149; Jansen Ex. 127 at 133–38.
[334] Jansen Ex. 128 at 61.
[335] *Id.*

investigation.[336] Berg said that he did not want the Hillesheims' money to be "locked up" in the investigation.[337]

The Hillesheims then received cashier's checks for an even $256,150—$36,070.82 more than they had put into the scheme.[338] There was no receipt, closing statement, or other paperwork delivered with the checks.[339] Contrary to the forms they signed, a check purporting to contain their retirement funds was given to them without involving custodian Millennium at all.[340] The Hillesheims now assert that when Cynthia Hillesheim called Berg to ask where to re-invest the money they had received, Berg told her that Cook's currency trading would be moving to Charles Schwab.[341] But that is inconsistent with Cynthia Hillesheim's deposition testimony—she testified that during that call Berg merely told her to "just put it into probably Charles Schwab or something," and that Charles Schwab "would probably be a good place to put it for now."[342] There was absolutely no discussion about any purported plan to move Cook's currency trading to Charles Schwab.

Cynthia Hillesheim assumed that Berg had some "concerns" about the Cook companies and was acting on the "joking kind of understanding" that Berg had with the

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[336] *Id.* at 64–66.
[337] Jansen Ex. 128 at 148–50.
[338] Jansen Ex. 36; Ex. 15.8; Ex. 15.9; Ex. 16.6; Ex. 16.8; Ex. 16.9.
[339] Jansen Ex. 127 at 80.
[340] Jansen Ex. 15.8; Ex. 15.9; Ex. 16.6; Ex. 16.8; Ex. 16.9; *see also* Ex. 141; Ex. 142.
[341] Br. at 30.
[342] Jansen Ex. 128 at 65, 141.

Hillesheims.[343] The Hillesheims believed that they were able to get money out of the scheme because Berg was "a good agent" who was "watching out for [them]."[344]

b. Berg Was the Hillesheims' Agent.

Michael Hillesheim testified that he "had a good agent" in Cliff Berg, and indeed, Berg was the Hillesheims' agent in their dealings with the Cook scheme.[345] The Hillesheims explicitly granted Berg the authority to act on their behalf to "get their money out of there" if they failed to get the interest rate they had been promised or if Berg had any "concerns."[346] Berg's actions to "close their accounts"—when they had, in fact, been getting the promised interest rate—illustrates not only that Berg had concerns but that he was acting on the Hillesheims' authority as their agent. As their agent, Berg's knowledge is imputed to the Hillesheims. Because a reasonable jury would conclude that Berg, the Hillesheims' agent, lacked objective good faith, summary judgment for the Hillesheims on the Receiver's fraudulent transfer claim must be denied.

c. The Hillesheims Were on Inquiry Notice.

In support of their affirmative defense of good faith, the Hillesheims assert that the "loan operated according to [their] expectations" and that "the unsolicited return of funds is a common situation."[347] But this assertion is belied by Cynthia Hillesheim's testimony that she was "in shock" when Berg closed the account.[348] The Hillesheims also assert

[343] Jansen Ex. 128 at 63, 138.
[344] *Id.* at 151; Jansen Ex. 127 at 197.
[345] Jansen Ex. 127 at 197.
[346] Jansen Ex. 127 at 83, 193.
[347] Br. at 84.
[348] Jansen Ex. 128 at 61.

that they received the funds "on time" and "as provided in [their] agreement."[349] But it is clear that the Hillesheims did not receive the funds "on time" or "as provided in their agreement," which specified that the funds were to be invested for four years, with penalty fees for early withdrawal, and that written notice was required to close the account.[350] It is undisputed that the manner in which Berg gave money to the Hillesheims was contrary to *all* of these provisions. Nor do the Hillesheims offer any specific evidence that the sudden, unsolicited closing of their "accounts" was provided for in the agreements they signed—presumably because it was not. Finally, the Hillesheims spin Cynthia Hillesheim's call to Berg requesting advice on where to re-invest the funds as an "indisputable sign" that the Hillesheims were not "aware of fraud or insolvency."[351] First, as discussed earlier, the correct standard is *inquiry notice*, not actual awareness of fraud or insolvency. Second, the more reasonable explanation is that Hillesheim's call merely shows that the Hillesheims still trusted *Berg*. And with good reason—he had just managed to get them money out of an insolvent scheme.

The Hillesheims were aware of numerous "red flags" sufficient to put them on inquiry notice of insolvency or fraud. Cynthia Hillesheim admitted that she believed Berg had acted on their agreement to "get the money out of there" if Berg had any "concerns" when he called her out of the blue to inform her that he had checks for them.[352] Berg explained that he was worried that the investigation could have "locked

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[349] Br. at 84.
[350] Jansen Ex. 129-134.
[351] Br. at 83.
[352] Jansen Ex. 128 at 138.

up" the Hillesheims' money. As discussed above, the good faith analysis does not end literally at the second the funds are transferred. Hillesheim found out about the investigation in the course of discussing the transfer with Berg, and this knowledge is relevant.

When Berg closed their accounts, the Hillesheims did not fill out any withdrawal forms and they did not receive any written notice, despite explicit provisions in their agreements to the contrary. The cashier's checks that Berg mailed to the Hillesheims were unaccompanied by any receipts, final statements, or any documentation whatsoever. Michael Hillesheim knew that the qualified IRA money he had "invested" through third party custodian Millennium had to be returned through a third party custodian,[353] but instead the money came directly from Cook's fraudulent entities. The Hillesheims argue that they had no way of knowing whether the cashier's checks they received had been purchased by the IRA custodian or some third party,[354] but a reasonable person would have to assume that a legitimate IRA custodian would not send a bare cashier's check unaccompanied by any receipt or other paperwork.

In addition, at the outset, the Hillesheims were promised guaranteed 10% rate of return with no risk to their principal, at a time when the prime interest rate was significantly lower.[355]

The aggregation of these red flags leaves only one reasonable conclusion: that the Hillesheims were on inquiry notice of possible fraud or insolvency when they received

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[353] Br. at 84.
[354] *Id.*
[355] *See, e.g.,* Jansen Ex. 56 at 194; Ex. 82 at 11–12; Ex. 99 at 57.

money from the scheme in the summer of 2009. Yet the Hillesheims did no investigation whatsoever, choosing instead to remain willfully ignorant and collect a profit. Thus, the Hillesheims cannot meet their burden to establish the good faith affirmative defense and their motion for summary judgment must be denied.

8. Larry Hopfenspirger

a. Facts

Hopfenspirger has been an investment partner and friend of Respondent Steve Cheney for over 30 years.[356] In early 2008, Cheney brought Hopfenspirger to a meeting at Cook's headquarters to learn more about Cook's currency investment program.[357] At the meeting, which Berg also attended, Bo Beckman encouraged potential investors to stay away from the equity market and instead invest with Cook.[358] Hopfenspirger understood Cook and Beckman's business relationship to be that of "two people living under one house."[359] At a second meeting at Cook's headquarters, Hopfenspirger was promised a guaranteed 12% rate of return generated by "riskless transaction[s]."[360]

Hopfenspirger has degrees in business and economics from the University of Minnesota and has made his living by investing full-time since 1997.[361] To him, Cook's program sounded like "Monopoly, free parking."[362] Hopfenspirger viewed the currency program as an alternative to a savings account, only at 24 times the rate of return: "In

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[356] Jansen Ex. 95 at 30, 31.
[357] *Id*. at 33.
[358] *Id*. at 39.
[359] *Id*. at 42.
[360] *Id*. at 30, 188, 51.
[361] *Id*. at 17–20, 22.
[362] *Id*. at 84.

actuality, it was even more stark than that because there was a bank right here, and the Van Dusen mansion is right here, so all I had to do was go to this bank, walk down a block, put it in here for 24 times as much money per month as I did here because that was the Franklin Bank there."[363] Hopfenspirger did not do any due diligence on Cook or his purported currency strategy.[364]

On March 17, 2008 Hopfenspirger gave $600,500 to Oxford Global Advisors.[365] He signed an Oxford Global Advisors subscription form, making handwritten changes to its terms, including writing "12% interest is guaranteed for one year," and had Cook initial the changes.[366] Hopfenspirger also signed a separate Oxford Global Advisors agreement requiring the party terminating the account to give 30 days' written notice to the other party.[367] Hopfenspirger made handwritten, initialed changes to this agreement as well, including changing the written notice requirement for terminating the account to two days, lining out the "Risk of Loss" disclosure, and writing "no risk" in the margin.[368] Hopfenspirger wrote the "no risk" provision into the agreements three or four times because he wanted to be "audaciously clear that there was no risk"—he felt this was necessary "so there would be no mistake about it."[369]

Hopfenspirger received monthly payments ranging from $2,000 to $6,000 from

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[363] *Id*. at 38.
[364] *Id*. at 214.
[365] Jansen Ex. 36.
[366] Jansen Ex. 98.
[367] Jansen Ex. 97.
[368] *Id*.; Ex. 95 at 60–61.
[369] Jansen Ex. 95 at 195.

the scheme in purported "interest."[370] The initial payments came from Oxford Global Advisors, the entity with which he had signed agreements, but later payments came from Crown Forex—an entity with which he did not have any relationship at all.[371] Hopfenspirger did not inquire about the change.[372] He also made two separate withdrawals of $200,000 each, one in October 2008 and one in December 2008.[373] Hopfenspirger specifically requested each of these withdrawals.[374]

In late June 2009, Respondent Cheney told Hopfenspirger that there "was some kind of inquiry being made on the brokerage part of Oxford" or that Oxford was being "investigated" because "there could be some an impropriety" and that Cheney was taking his money out.[375] Cheney then asked "Larry, would you like me to . . . get your money and send it to you?" and Hopfenspirger said yes.[376] Hopfenspirger did not at any time ask Cook, Berg, or anyone associated with the Cook scheme for the $200,000 that remained of his "investment," nor did he make any written request to anyone to close his account.[377]

Berg delivered a cashier's check payable to Hopfenspirger to Cheney, who in turn mailed it to Hopfenspirger.[378] The cashier's check was written for $202,000 from UBS Diversified LLC—yet another entity with which Hopfenspirger had no agreement—

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[370] Jansen Ex. 36.
[371] Jansen Ex. 36; Ex. 96–98.
[372] Jansen Ex. 95 at 200.
[373] Jansen Ex. 36.
[374] Jansen Ex. 95 at 112, 115.
[375] *Id*. at 124–25, 127; Jansen Ex. 81 at 98–99.
[376] Jansen Ex. 95 at 132.
[377] *Id*. at 129.
[378] *Id*. at 125.

giving Hopfenspirger a net profit of $59,000 from the scheme.[379] Hopfenspirger did not receive any account closing documents, receipts, final statements, or paperwork of any kind reflecting that his account had been closed.[380]

Hopfenspirger testified that his account was improperly closed and that Cheney should not have been able to access it: "I think, you know, based on [the contract language], that [the Cook companies] probably should have gotten authority from me [before closing the account] which I automatically would have given. [But] I don't believe that's what happened."[381] Nobody associated with the Cook companies called or talked to Hopfenspirger to verify that he actually wanted to close the account or that Berg was authorized to give his Hopfenspirger's check to Cheney.[382]

b. Berg Was Hopfenspirger's Agent.

Berg was Hopfenspirger's agent with respect to Cook's scheme. Berg hand-delivered Hopfenspirger's check to Cheney, in marked contrast to the way in which Hopfenspirger had previously gotten money from Cook. Hopfenspirger then ratified Berg's action by accepting the benefit of the cashier's check for $202,000. As his agent, Berg's knowledge is imputed to Hopfenspirger. Because a reasonable jury would conclude that Berg, Hopfenspriger's agent, lacked objective good faith, summary judgment for Hopfenspirger on the Receiver's fraudulent transfer claim must be denied.

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[379] Jansen Ex. 36.
[380] Jansen Ex. 95 at 137.
[381] *Id*. at 130–31, 194.
[382] *Id*. at 130.

c. Hopfenspirger Was on Inquiry Notice.

In an attempt to show objective good faith, Hopfenspirger relies on assertions that are inconsistent with both his deposition testimony and other undisputed facts.

First, Hopfenspirger makes the unsupported assertion that Cheney told him that Cook was moving his currency trading business to Charles Schwab.[383] But this is an apparently new recollection—there is absolutely no mention of Charles Schwab in Hopfenspirger's deposition testimony. And even if Cheney did say this, it is not evidence of Hopfenspirger's good faith in accepting the transfer. If anything, it should have raised more questions—what legitimate entity closes out customers' accounts while it "thinks" about moving its business to a different partner? Hopfenspirger also contends that he assumed that Cheney would be able to get money for Hopfenspirger and "does not recall" any contractual provisions that would have prevented it.[384] But this assertion is contradicted by Hopfenspirger's deposition testimony: Hopfenspirer admitted that Cheney should not have had the authority to get money out for Hopfenspirger; that a legitimate company would not simply close one client's account based on a third party's unauthorized request; and that Oxford "probably should have gotten authority from me" before giving the money to Cheney.[385]

Hopfenspirger further argues that he asked Cheney to get the $200,000 out for him not because of the investigation, but because he wanted to repay a line of credit that was

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[383] Br. at 85.
[384] Br. at 45, 85.
[385] Jansen Ex. 95 at 127, 131, 194.

coming due.[386] But Hopfenspirger testified only that he was "thinking" about paying off the line of credit, and admitted that it was Cheney's telephone call informing him of investigation that actually prompted the withdrawal.[387]

Finally, Hopfenspirger argues that he "made a request as he had done before" and that the funds were given to him "as they had been before."[388] This is not true. As an initial matter, Hopfenspirger did not request the funds—as he testified, "Actually, Steve said: Would you like me to get your money out at the same time? I said, yes."[389] And the transaction did not happen "as before." Previously, Hopfenspirger made personal requests to Cook and Ryan Moeller, and received a check directly from Cook or Moeller. In contrast, when he received the fraudulent transfer in June 2009, Hopfenspirger did not make a direct request to anyone associated with the Cook companies, and he received the check from Cheney, who had gotten it from Berg. The circumstances of the June 2009 transfer were materially different from the October and December 2008 transfers.

Hopfenspirger's brief also conveniently ignores many other red flags, the cumulative effect of which was more than sufficient to put a reasonable investor of his sophistication on inquiry notice. First, he was promised a guaranteed double-digit rate of return with absolutely no risk of principal. Hopfenspirger's incredulity at this extraordinary offering was demonstrated when he reiterated these terms on his Oxford Global Advisors agreements three or four times. There can be no doubt that

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[386] Br. at 85.
[387] Jansen Ex. 95 at 128–29.
[388] Br. at 85.
[389] Jansen Ex. 95 at 129.

Hopfenspirger thought the promises were "too good to be true"; he characterized the investment—which offered 24 times the interest that legitimate, risk-free savings accounts were offering—as "Monopoly, free parking."[390]

Second, many of Hopfenspirger's monthly interest payments came from an entity with which he had no written agreement. Yet Hopfenspirger did not question this inconsistency.

Third, the transfer violated the express terms of Hopfenspirger's signed agreement with Oxford Global Advisors—terms that Hopfenspirger had scrutinized closely and made handwritten changes to. The fact that Hopfenspirger was apparently able to obtain two prior withdrawals in October and December of 2008 on an oral request only—also in violation of the agreement he signed—does not diminish this red flag. Indeed, it simply means Hopfenspirger was aware of it longer.

Most obvious of all, Hopfenspirger ***was told of an investigation*** by his trusted friend and colleague, who said he was getting out of the program because of it. Hopfenspirger now asserts that a reasonable investor would not be on notice of fraud or insolvency because Cheney told him that the investigation concerned the Oxford brokerage side of the business.[391] But Cheney, also a sophisticated investor, was concerned enough that, despite making consistent, double-digit returns, he was closing all of his family's accounts with Cook's program. The fact that *any* entity associated with

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[390] *Id*. at 84.
[391] Br. at 85.

Cook's business was being investigated, combined with Cheney's obvious concern and eagerness to get out of the program, clearly would have prompted further investigation.

Hopfenspirger is a professional investor. The unusual circumstances surrounding his dealings with Cook's scheme were many, and would have caused a reasonable person of his sophistication, education, and experience to inquire further into the circumstances of the transfer to him. But despite the accumulation of numerous red flags, Hopfenspirger did absolutely no investigation. Hopfenspirger has failed to carry his burden of proving that he took the funds in good faith; his motion for summary judgment must be denied.

9. Steven Kautzman

a. Facts

Kautzman is another of Berg's carpet customers and has known Berg for over eleven years.[392] Berg told Kautzman that his son-in-law was involved with an investment opportunity that offered a 10–12% rate of return.[393] There was no mention of "structured notes." Kautzman then met with Cook employee Ryan Moeller at Cook's headquarters, and decided to send IRA funds totaling $116,469.30 to the scheme in March 2009.[394] He routed his IRA funds through custodian Entrust.[395] Kautzman signed agreements with Crown Forex and Oxford Global Advisors requiring the party terminating the account to

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[392] Jansen Ex. 120 at 25.
[393] *Id.* at 30, 40.
[394] *Id.* at 37, 42.
[395] Jansen Ex. 120 at 18; Ex. 126.

provide written notice to the other party.[396] The Oxford Global Advisors agreement further imposed a "contingent deferred sales charge" or "redemption fee" on account closings within four years of the opening date.[397]

Kautzman told Berg that "you need to protect me here and make darn sure that . . . we got to get out of this thing if there's ever anything going on."[398] Kautzman also told Berg "you got to take care of me;" "watch out for my butt;" and "I need you to get my money clear if something happened."[399] According to Kautzman, Berg "performed" on this agreement when he sent funds back to Kautzman.[400]

Kautzman never asked to cash out of the seemingly profitable program, did not complete any withdrawal paperwork, and did not provide or receive any notice whatsoever about the account closure.[401] Yet in late June 2009, Berg called Kautzman and left a voicemail stating that one of Cook's partners was "having some issues so that they were mailing the check" to Kautzman.[402] Berg then mailed Kautzman a check for an even $119,550.[403] No fees were charged for the transaction.

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[396] Jansen Ex. 121; Ex. 122
[397] Jansen Ex. 121.
[398] Jansen Ex. 120 at 19.
[399] *Id.* at 54–56, 160.
[400] *Id.* at 160, 161, 53–56.
[401] *Id.* at 43, 60, 95.
[402] *Id.* at 52.
[403] Jansen Ex. 15.4.

b. Berg Was Kautzman's Agent.

Berg was Kautzman's agent in dealings with Cook's scheme. Kautzman asked Berg to "get [his] money clear if something happened" to the Cook companies.[404] Berg "performed" on those instructions by getting money out of the scheme for Kautzman. Because a reasonable jury would conclude that Berg, Kautzman's agent, lacked objective good faith, summary judgment in favor of Kautzman must be denied.

c. Kautzman Was on Inquiry Notice.

Kautzman's attempts to establish that he took the funds he received in good faith fall short. Kautzman contends that he received a voicemail from Berg informing him that there were problems with one of Cook's partners, that other "Lenders" were having their "loans" repaid, and that Cook was moving his business to Charles Schwab.[405] But this is inconsistent with his deposition testimony—Kautzman never mentioned anything about Berg saying that he was repaying other investors, and Berg never mentioned Schwab in the first phone call. It was only in a later conversation, after the fraudulent transfer had already been made, that Berg apparently mentioned Schwab.[406] And in that later conversation, Berg never told Kautzman that Cook was moving to Charles Schwab, only that they were "working on a deal probably with Charles Schwab" or "investigating going to Charles Schwab."[407] Kautzman contends that Berg mentioned something about

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[404] Jansen Ex. 120 at 160.
[405] Br. at 85–86.
[406] Jansen Ex. 120 at 54 ("We talked after [the initial voicemail] and you know, I said: Well, what are we supposed to do? . . . [Berg] had talked that him and Trevor were investigating going to Charles Schwab.")
[407] Jansen Ex. 120 at 54, 167.

a "temporary glitch" or "red tape," but Kautzman admitted at his deposition that he had absolutely no recollection of Berg ever using those words. Curiously, Kautzman re-asserts them as fact in his brief, albeit with no citation. Kautzman offers no further evidence of his alleged good faith; his attempt to prove it as a matter of law must fail.

Like the other Berg Investors, Kautzman also ignores the red flags that would have put a reasonable investor in his position on inquiry notice. For example, Kautzman does not dispute that he instructed Berg to "protect" him and "make darn sure" that Kautzman got his money back "if there's ever anything going on."[408] Kautzman admits that Berg "performed" on that agreement when he sent funds to Kautzman in the summer of 2009.[409] Berg told Kautzman that one of Cook's partners was "having some issues," and was concerned enough that he had closed Kautzman's account without consulting him.[410] Given Berg's obvious concern, a reasonable person under these circumstances would certainly question the solvency or legitimacy of Cook's operations. Moreover, Kautzman did not provide or receive any withdrawal forms or written notice, and was not charged any penalty fees for early closure of his "account"—all in violation of the express terms of agreements he signed. The cashier's check that Berg sent to Kautzman was unaccompanied by any receipts, final statements, or any documentation whatsoever. Curiously, the cashier's check consisted of a rounded number that did not match what Kautzman would have "earned" with the promised 10.5% interest rate.[411] Finally,

[408] *Id.* at 19, 54.
[409] *Id.* at 161.
[410] *Id.* at 52.
[411] Kohlhepp Ex. 16.

although Kautzman had invested qualified IRA money through third party custodian Entrust, all of the money he received came directly from the Cook companies and bypassed the custodian.

Kautzman attempts to sidestep the accumulation of red flags, arguing that only information suggesting fraud or insolvency can put a transferee on inquiry notice and that he was merely aware of a "problem" with one of Cook's partners.[412] But Kautzman's knowledge of the "problem," combined with Berg's obvious concern and the other red flags discussed above, was more than sufficient to put a reasonable person on inquiry notice that the purpose of the transfer may have been fraudulent or that Cook's entities might be insolvent.

10. James McIntosh

a. Facts

McIntosh first met Berg in 1979 through the carpet industry and considers Cliff and Ellen Berg to be his friends.[413] In early 2008, Berg told McIntosh about Cook's currency investment program and set up a meeting between Cook and McIntosh. At that meeting, McIntosh was told that there would be no risk to his principal because of Cook's proprietary computer software.[414] McIntosh decided to invest in Cook's program because the returns he was getting on his IRA money "weren't exactly at the same levels" as the returns Cook was offering—in fact, he had actually lost money in the last quarter before

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[412] Br. at 86.
[413] Jansen Ex. 150 at 33–35.
[414] *Id*. at 198.

he invested with Cook.[415] McIntosh now for the first time asserts in his brief that he actually chose Cook's program because the "structured notes" represented "a complete departure from the equity markets."[416] But there is no support for this assertion in McIntosh's deposition transcript—he invested with Cook simply because the returns were better and he thought that it was "fairly risk-free."[417] Berg's connection to Cook was also a factor in McIntosh's decision to invest: "You wouldn't think that a family member was going to go ahead and put you in a scheme that was so risky or whatever that you were going to lose your money."[418] Berg promised McIntosh that Berg would watch out for him, and McIntosh "trusted [Berg] was acting in [McIntosh's] best interest."[419] Based on the high, risk-free returns and Berg's family connection to Cook, McIntosh rolled $250,000 of qualified IRA money into Cook's scheme in August 2008.[420]

In order to put qualified IRA money into Cook's scheme, McIntosh opened up a self-directed IRA account with Entrust.[421] The agreement McIntosh signed with Entrust made clear that he was required to "self-direct" his account by sending written buy or sell directions to Entrust, which would then allow Entrust to execute his commands.[422] Under the terms of the agreement, McIntosh was the only person with the authority to command

[415] *Id.* at 130.
[416] Br. at 14.
[417] Jansen Ex. 150 at 77-80.
[418] *Id.* at 61.
[419] *Id*. at 165, 214, 216.
[420] *Id*. at 56, 130.
[421] Jansen Ex. 154; Ex. 155.
[422] Jansen Ex. 154 at 3; *see also* Ex. 155 at 4; Ex. 155 at 6; Ex. 155 at 8–9; Ex. 155 at 11.

transactions invested through his Entrust account—McIntosh crossed out the power of attorney section that would have given that power to Cook or his companies.[423] McIntosh agreed to a 0.5% "termination" fee upon closure of his Entrust account.[424]

McIntosh also signed agreements with Crown Forex and Oxford Global Advisors. These agreements required the party terminating the purported account to provide written notice to the other party.[425] The Oxford Global Advisors agreement further imposed a "contingent deferred sales charge" or "redemption fee" on account closings within four years of opening the account.[426] The Crown Forex agreement provided specific directions for withdrawing funds: "to request a withdrawal, fill in the related form and fax it or email it to us."[427] The agreement showed where the form was available online.[428]

McIntosh filled out and signed a written "Distribution Form," directing Entrust to send him $2,188 every month from the Cook companies.[429] Between September 2008 and June 2009, McIntosh received at least eleven monthly "interest" payments from the scheme.[430] Each of these distributions came in the form of a conventional check, payable from the account of "Entrust Midwest, LLC."[431] In addition, McIntosh had received a

[423] Jansen Ex. 155 at 7.
[424] Jansen Ex. 155 at 3.
[425] Jansen Ex. 151; Ex. 152.
[426] Jansen Ex. 151.
[427] Jansen Ex. 152 at 9.
[428] *Id.*
[429] Jansen Ex. 155 at 1–2; *see also* Ex. 156; Ex. 157.
[430] Kohlhepp Ex. 11; Jansen Ex. 34 at 13; Ex. 36; Ex. 156; Ex. 157.
[431] *See, e.g.,* Jansen Ex. 157.

$4,000 disbursement on or about September 10, 2008, meaning his "balance" on June 30, 2009, should have been $246,000.[432]

On or about that day, Berg called McIntosh to tell him that Bo Beckman was being investigated, and said that McIntosh should "get out" to avoid the chance of his money being "tied out."[433] McIntosh never completed any withdrawal paperwork, never provided or received written notice that his account would be terminated, and never directed Entrust to send him any funds beyond the monthly distributions he was getting.[434] Nevertheless, several days later he received a cashier's check directly from Crown Forex (rather than Entrust) for $250,000.[435] Contrary to the agreements he signed, McIntosh was not charged any fees from the Cook companies or Entrust.[436] McIntosh continued to receive his monthly "interest" payments from Entrust for the next two months, even though Berg had already "returned" McIntosh's purported IRA funds.[437]

b. Berg Was McIntosh's Agent.

McIntosh "trusted Berg to act[] in [his] best interest." Berg confirmed the agency relationship between the two, telling McIntosh that he would watch out for McIntosh. Berg acted with McIntosh's consent and for McIntosh's benefit when he got money out of the disintegrating scheme for McIntosh. McIntosh accepted the benefit of Berg's

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[432] Jansen Ex. 36 at 2.
[433] Jansen Ex. 150 at 162–64.
[434] *Id*. at 118, 166–67, 186.
[435] *Id*. at 166, 118; Jansen Ex. 15.5.
[436] Jansen Ex. 150 at 120.
[437] Jansen Ex. 156 at 4; Ex. 157 at 1-3, 12.

action—a $250,000 cashier's check. Because a reasonable jury would conclude that Berg, McIntosh's agent, lacked objective good faith, summary judgment for McIntosh must be denied.

c. McIntosh Was on Inquiry Notice.

McIntosh has also failed to carry his burden to establish that he took the funds that Berg sent him from the failing scheme in objective good faith. McIntosh argues that because Berg told him that the investigation related to Bo Beckman and that his investment wouldn't be affected because it was in a segregated account, he was not on inquiry notice.[438] But Berg's actions belie his words—Berg was concerned enough to call McIntosh and recommend that he "get[] out" immediately so that the funds wouldn't be "tied out." If there was truly no cause for concern that the Cook companies might not be able to pay McIntosh later, then there would be no reason for Berg to take such immediate, aggressive, and decisive action to get them out. McIntosh offers nothing further in support of his objective good faith.

McIntosh also ignores numerous other red flags that would have put a reasonable person in his position on inquiry notice of the possibility that the transfer was fraudulent or made by an insolvent entity. First, Berg got money for McIntosh without any withdrawal forms, without any written notice, and without charging any early redemption fees—all in violation of the written agreements McIntosh had signed.

Second, the cashier's check that Berg sent to McIntosh were not accompanied by any receipt, final statement, or other documentation. Any reasonable person with even

[438] Br. at 31–32, 86.

rudimentary investment experience would necessarily find it highly concerning to have the proceeds of a $250,000 retirement account appear out of the blue without any paperwork whatsoever. Moreover, McIntosh's account purportedly contained only $246,000, not the $250,000.00 that he actually received. No legitimate entity simply rounds up the amount in an investment account to the nearest $10,000.

Third, McIntosh received two sets of statements that did not reconcile with each other. The statements from Crown Forex SA, show that McIntosh was being credited with "interest" at a rate of $72.50 per day, which equates to $2,205.21 per month.[439] However, the statements (and checks) from Entrust showed distributions of $2,188 per month.[440]

Finally, the manner in which McIntosh received the $250,000 in qualified IRA money was contrary to both the agreements he signed with Entrust and his past course of dealing. Because he contracted with Entrust to serve as the custodian for the money he sent to Cook's scheme, he gave Entrust written instructions to send monthly distributions. And Entrust did so, sending monthly checks that showed on their face that they were drawn from Entrust's account. Strangely, Entrust continued to send monthly distributions for two months *after* Berg had closed McIntosh's account. In contrast, McIntosh never directed Entrust to send him the $250,000 that Berg sent him. In fact, the money bypassed Entrust entirely. Based on his past experience alone, this should have been a burning red flag to McIntosh.

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[439] Kohlhepp Ex. 11.1.
[440] Kohlhepp Ex. 11.2.

Faced with all of these red flags, McIntosh simply pocketed the money and did no investigation whatsoever. Thus he has failed to demonstrate that he took the funds he received in good faith as a matter of law, and his motion for summary judgment must be denied.

11. George and Karen Morisset

a. Facts

The Morissets learned about the Cook scheme from their lifelong friend, Walter Defiel.[441] Before investing, the Morissets met with Cook employee Ryan Moeller, who promised them a return of 10% and that they could get their money out at any time.[442] Karen Morisset has worked as a loan officer and at a credit union for the past thirteen years, and the highest rate of return she had heard of for an investment product prior to the Cook strategy was 6%.[443]

In July of 2008, the Morissets decided to put $55,734.26 of qualified IRA money in Cook's scheme.[444] To do so, they opened up self-directed IRA accounts with third party custodian Entrust.[445] The agreements the Morissets signed with Entrust made clear that they were required to "self-direct" their accounts by sending written buy or sell directions to Entrust, which would then allow Entrust to execute their commands.[446] Under the terms of the agreements, the Morissets were the only people with the authority

[441] Jansen Ex. 104 at 16; Ex. 99 at 47–48.
[442] Jansen Ex. 104 at 45; Ex. 105 at 18–19.
[443] Jansen Ex. 105 at 18.
[444] Jansen Ex. 36 at 2.
[445] Jansen Ex. 104 at 110–11; Ex. 105 at 62–63; Ex. 108–11.
[446] Jansen Ex. 108 at 3; Ex. 110 at 2, 3, 7–8; Ex. 109 at 3; Ex. 111 at 1–2, 4, 8–9, 10–11.

to command transactions invested through their respective Entrust accounts—they crossed out the power of attorney sections that would have given that power to Cook or his companies.[447] They agreed to a 0.5% "termination" fee upon closure of their Entrust accounts.[448]

The Morissets also signed Crown Forex agreements requiring the party terminating the accounts to give written notice to the other party.[449] The agreements provided specific directions for withdrawing funds: "to request a withdrawal, fill in the related form and fax it or email it to us."[450] The agreements showed where the form was available online.[451] During the year they were invested in the scheme, the Morissets never received any account statements.[452]

The Morissets never asked for their accounts to be closed, never authorized John Dzik or Walter Defiel to handle their funds, and never received any notice that they would be cashed out.[453] Yet in late June of 2009, Defiel called and said that he "had the checks."[454] Karen Morisset thought it was "odd" that they got these checks without requesting them or signing any paperwork.[455] She called Cook's headquarters the next day to try to find out what was going on, but was unable to reach anyone.[456]

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[447] Jansen Ex. 110 at 3; Ex. 111 at 4.
[448] *See* Jansen Ex. 111 at 5.
[449] Jansen Ex. 106 at 17; Ex. 107 at 17.
[450] Jansen Ex. 106 at 9; Ex. 107 at 9.
[451] *Id*.
[452] Jansen Ex. 104 at 59–60.
[453] *Id*. at 77; Ex. 105 at 38–40.
[454] Jansen Ex. 104 at 72.
[455] Jansen Ex. 105 at 23.
[456] *Id*. at 40–41.

b. Berg Was the Morissets' Agent.

Berg was the Morissets' agent with respect to the Ponzi scheme. Berg closed the Morissets' accounts for their benefit, and the Morissets ratified Berg's action by accepting the cashier's checks for $61,050 that were delivered to them via Respondents Dzik and Defiel. Because a reasonable jury would conclude that Berg, the Morissets' agent, lacked objective good faith, summary judgment in favor of the Morissets must be denied.

c. The Morissets Were on Inquiry Notice.

The Morissets have also failed to carry their burden to demonstrate that they took the funds in objective good faith. They admit that they were surprised and concerned by the sudden, unsolicited transfers they received.[457] They also admit that Karen Morisset called the Cook entities to figure out what was going on, but could not reach anyone. Puzzlingly, they argue that this somehow "conclusively demonstrates good faith" because they "would not have taken this action if they knew they had received an improper transfer."[458] But this is nonsensical—Morisset took this action precisely *because* she suspected something was improper about the transfer. Moreover the Morisset's argument misapplies the inquiry notice standard—they do not have to "know" that the transfer was improper; rather, inquiry notice is triggered by facts that would cause a reasonable person to inquire further to determine whether the transfer was made for a fraudulent purpose or from an insolvent entity. Here, Karen Morisset initially did inquire, but then was unable

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[457] Br. at 87.
[458] *Id.*

to contact anyone. Inquiry notice continues unless and until the transferee gets a plausible explanation. *Manhattan*, 397 B.R. at 23. After one attempt to inquire, Morisset got no explanation whatsoever, much less a plausible one, and then did nothing further. Morisset's call to the Cook companies after receiving an unsolicited transfer, failure to reach anyone, and subsequent failure to investigate further, shows that the Morissets were on inquiry notice and thus that they lacked objective good faith.

The Morissets also argue that they received funds "in the manner provided by their agreement[s]."[459] But this is demonstrably wrong—they did not ask for their accounts to be closed, nor did they provide or receive the written notice and withdrawal form required by the Crown Forex agreements they signed. Nor was the unsolicited return of funds "provided for in the contract[s]" they signed, even assuming the contracts were valid.[460] The Morissets do not point to any specific agreement or any specific term of any agreement in support of this assertion, and the Receiver is not aware of any that exists.

The Morissets further contend that unsolicited account closures are "common industry practice," but it clearly surprised and concerned Karen Morisset enough to prompt her to call the Cook companies. Moreover, George Morisset stated that it was his understanding that no one could close his account without his knowledge or direction.[461]

The Morissets' brief also ignores other red flags that contributed to inquiry notice. Karen Morisset admitted that she found it "odd" that the cashier's checks payable to them and purporting to liquidate their Crown Forex accounts were given to their friend, Walter

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[459] *Id.*
[460] Br. at 87.
[461] Jansen Ex. 104 at 68.

Defiel, out of the blue.[462] Indeed, neither Defiel nor John Dzik were signators or otherwise authorized on the Morissets' accounts. Karen Morisset, a loan officer who had also spent years working in the finance business, had never heard of another principal-protected investment offering more than 6%, let alone one that guaranteed a double-digit return in the bleak economy of 2008. The fact that the Morissets never received any statements or other documentation from the scheme—even when their accounts were supposedly closed—was another red flag. Further, the amounts received by the Morissets ($22,000 and $39,050) did not even match the amounts on the statements they received from their third-party custodian, Entrust ($22,596.60 and $38,128.82).[463] Finally, the fact that the Morissets' qualified IRA money not only bypassed the custodian, without the Morissets directing the custodian to send them funds, but also was payable to them individually and not to their IRAs, is yet another sign that the checks they received were not the product of a legitimate, arms-length transaction.[464]

The cumulative effect of these red flags was sufficient to put the Morissets on inquiry notice of fraud or insolvency and to prompt Karen Morisset to call the Cook companies. Despite not getting answers to her questions, the Morissets did no further investigation. Under these circumstances, the Morissets have not demonstrated that they took the funds in good faith as a matter of law, and their motion for summary judgment must be denied.

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[462] *Id.* at 23.
[463] Jansen Ex. 15.2; Ex. 15.3; Kohlhepp Ex. 12.
[464] *See* Jansen Ex. 111 at 9 (explaining "'You' are not the Individual Retirement Account. You and the IRA are two entirely separate entities.")

12. Reynold Sundstrom

a. Facts

Reynold Sundstrom, another of Berg's carpet customers, has known Berg both professionally and as a friend for many years.[465] Berg told Sundstrom about the 10% returns he was getting from the Cook scheme, and gave Sundstrom a brochure about the program.[466] Realizing that 10% "sounded awful good," Sundstrom asked his attorney to look into the opportunity to see "if there's something wrong with it."[467] Sundstrom never heard back from his attorney.[468] Berg set up a meeting for Sundstrom and his wife at Cook's headquarters, at which the Sundstroms were promised an interest rate of 12% and that they could get their money out any time they wanted to; their principal was guaranteed.[469] At the time, Sundstrom was not aware of any other investment opportunities that were paying even 6%.[470] The Sundstroms knew that Berg was Cook's father-in-law, which gave them additional comfort in the Cook companies.[471] Sundstrom trusted Berg would "watch out for" him.[472]

When Sundstrom decided to put money into the program, he signed agreements with Oxford Global Advisors and Crown Forex requiring the party terminating the

[465] Jansen Ex. 112 at 31, 33.
[466] *Id.* at 37, 39.
[467] *Id*. at 38–39.
[468] *Id*.
[469] *Id*. at 72, 75, 77.
[470] *Id.* at 78.
[471] *Id*. at 47, 58.
[472] *Id.* at 113.

account to give written notice to the other party.[473] Sundstrom also signed an agreement providing for a "contingent deferred sales charge" if the account were closed within four years of the opening date.[474]

Sundstrom received statements from Crown Forex showing "interest" being calculated and credited to his "account" on a daily basis.[475] These statements show a daily credit of $19.14 until Sundstrom sent another $15,000 to the scheme, at which point the daily credit changed to $23.20.[476]

Sundstrom never requested that his account be closed, never completed any withdrawal paperwork, and never received any notice whatsoever that his account was being terminated.[477] In late June of 2009, Berg called Sundstrom and told him that Berg had withdrawn Sundstrom's money because there was an "investigation" going on.[478] Berg further told Sundstrom that Cook was moving his business to Charles Schwab and that Sundstrom could reinvest "when things cool down."[479] Berg then sent Sundstrom a cashier's check for an even $85,450.[480] According to Sundstrom, he trusted Berg to "watch out for" him, and that is what Berg was doing when he sent this money.[481] Sundstrom assumed that Berg acted because he was concerned about the investigation.[482]

[473] Jansen Ex. 115; Ex. 113; Ex. 117.
[474] Jansen Ex. 112 at 144; Ex. 113; Ex. 116.
[475] Kohlhepp Ex. 13.1.
[476] Kohlhepp Ex. 13; Ex. 13.1
[477] Jansen Ex. 112 at 151.
[478] *Id*. at 198, 200.
[479] *Id*. at 200.
[480] Jansen Ex. 15.10.
[481] Jansen Ex. 112 at 113.
[482] *Id*. at 113, 133.

Sundstrom was not charged any fees for closing the account even though it was closed within four years of its opening.[483]

b. Berg Was Sundstrom's Agent.

Berg brought his longtime friend and customer Sundstrom into the Cook scheme, and Sundstrom trusted Berg to "watch out for" him. When Berg acted in late June 2009 to get money out of the scheme for Sundstrom, he was acting with Sundstrom's consent and for Sundstrom's benefit. Sundstrom ratified Berg's agency by accepting and cashing the $85,450 cashier's check. As Sundstrom's agent, Berg's knowledge is imputed to Sundstrom. Because a reasonable jury would conclude that Berg, Sundstrom's agent, lacked objective good faith, Sundstrom is not entitled to summary judgment.

c. Sundstrom Was on Inquiry Notice.

To support his purported good faith in the face of Berg's unsolicited transfer, Sundstrom claims that he believed that Cook was not implicated in the investigation and that Cook was moving his currency scheme to Charles Schwab.[484] But Berg called Sundstrom and told him point blank that ***because of the investigation***, Berg had cashed Sundstrom out. Sundstrom admits that he assumed he got his check because of Berg's concern over the investigation, and that he had trusted Berg to watch out for him.[485] If it was true that the investigation did not concern Cook or Sundstrom's funds, and that Cook was merely moving the currency trading scheme over to Charles Schwab, then there should have been no need for Berg to send the money to Sundstrom until "things cool

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[483] *Id*. at 145.
[484] Br. at 32, 88.
[485] Jansen Ex. 112 at 113, 197.

down." No legitimate, solvent entity would need to send funds back to investors while an investigation is pending, so that investors can hold the funds until things "cool down."

Sundstrom also makes the completely unsupported argument that the Cook entities had the power to sua sponte close his "account."[486] Sundstrom does not point to any agreement supporting this assertion, and the Receiver is not aware of any that exists.

Finally, Sundstrom claims that his alleged intent to reinvest with Charles Schwab is evidence of his good faith. But Sundstrom knew that there was an investigation going on, that there was a risk that money would become unavailable, and that Berg was sending the money to him out of concern for the investigation. Regardless of where Sundstrom subjectively intended to send the money in the future, he was on inquiry notice that the source of the funds was potentially fraudulent or insolvent.

Conspicuously absent from Sundstrom's brief is any discussion of other red flags that put him on inquiry notice. Sundstrom knew from the beginning that Cook's scheme was "too good to be true." It sounded so "awful good" to Sundstrom that he asked his attorney to investigate the program to see "if there's something wrong with it."[487] At the time he was considering the investment, Sundstrom had not heard of other opportunities offering even half of what Cook was offering. Even though he admits to being on inquiry notice that there might be "something wrong," Sundstrom chose to rely on his connection

[486] Br. at 88.
[487] Jansen Ex. 112 at 39.

to Berg and Berg's connection to Cook—which admittedly gave him additional "comfort"—and to abandon further due diligence.[488]

In addition, Sundstrom's cashier's check was for an even $85,450. Sundstrom received statements showing that he was "earning interest" at a rate of $23.20 per day, which should have resulted in his "account" holding $86,926.83 on the date of his check.[489] And, like the other Berg Investors, Sundstrom received the cashiers' check without any receipt, final statement, or other documentation.

Faced with all of these red flags when Berg sent him the unsolicited check, Sundstrom did nothing. He simply took the check, cashed it, and buried his head in the sand. Sundstrom cannot show good faith under these circumstances, and his motion for summary judgment must be denied.

V. The Berg Investors' Motion for Summary Judgment on the Receiver's Unjust Enrichment Claims Must Be Denied.

The Berg Investors argue that the Receiver's claim for unjust enrichment fails because (1) equitable relief cannot be granted where the parties' rights are governed by a valid contract and (2) the agreements the Berg Investors signed legally entitled them to the money they received. But this is wrong for at least three reasons. First, the law of this case is to the contrary—this Court already explicitly rejected these arguments in its Order denying Respondent Anderson's motion to dismiss. Second, the caselaw recognizes that Ponzi schemes are different, because there is no valid contract that fully governs the rights of those duped into investing in the scheme. And even if there were

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[488] *Id*. at 63, 65, 190.
[489] Kohlhepp Ex. 13; Ex. 13.1.

valid contracts, the transfers to the Berg Investors did not occur in accordance with those documents' terms. At a minimum, the Berg Investors failed to make a written request, as required by the purported agreements they signed and now seek to rely on. Third, this Court has further recognized—by setting up an equitable distribution process—that the rights of defrauded investors are governed by equity rather by the terms of the fraudulent agreements they signed.

A. This Court's Order Denying Respondent Anderson's Motion to Dismiss Squarely Rejected the Argument that as a Matter of Law the Respondents Are Entitled to a 100% Return of Their Principal.

Earlier in this action, Respondent Anderson moved to dismiss the Receiver's unjust enrichment claim for failure to state a claim "because the Receivership Entities had a contractual and equitable obligation to return to [Anderson] the money she invested in the currency Trading Program."[490] This Court considered and squarely rejected that argument:

> ***[M]erely because Anderson invested $102,000 in the Ponzi scheme does not mean that she was entitled, either equitably or contractually, to the return of 100% of that money***. The payment to Anderson undoubtedly dissipated the assets of the Receivership Entities and, in turn, made less money available to other defrauded investors. Anderson's "inside track" to recover the amount she invested artificially increased her priority in the line of Cook's creditors. ***The Court cannot say as a matter of law that it is not unjust enrichment for one investor in a Ponzi scheme to recover the full amount of her investment and for others to recover nothing.***

(Docket No. 108 at 10) (emphasis added).

[490] Docket No. 72 at 11.

In reviving this argument in the context of summary judgment, the Berg Investors ignore the law of the case. This Court has already fully considered and decided this issue.

B. In the Context of a Ponzi Scheme, the Rights of the Parties Are Not Governed by Any Valid Contract.

1. "Agreements" Signed by Investors in Ponzi Schemes Do Not Bar Recovery on an Unjust Enrichment Claim.

As a general rule, "equitable relief cannot be granted where the rights of the parties are governed by a valid contract." *U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981). But this is not a normal case.

In a Ponzi scheme, there are no valid contracts—the investment strategy is a sham, as are documents investors sign when they put their money into the scheme. Contracts obtained through fraud, like those in this Ponzi scheme, lack a meeting of the minds and thus are void. *Cummings v. Paramount Pictures*, 715 F. Supp. 2d 880, 911 (D. Minn. 2010) (denying motion to dismiss claim of unjust enrichment and finding that "Defendants cannot hide behind the [contracts] in this matter because those contracts were obtained through fraud."); *see also TCS Holdings, Inc. v. Onvoy, Inc.*, No. 07-1200, 2007 U.S. Dist. LEXIS 56275, at *14–15 (D. Minn. Aug. 1, 2007) (denying motion to dismiss claim of unjust enrichment where plaintiff alleged a contract was invalid because there was no meeting of the minds due to defendant's fraud).

Contracts that require violation of federal law are also void. *Alpha Real Estate Co. of Rochester of Minnesota v. Delta Dental Plan*, 671 N.W.2d 213, 217 (Minn. Ct. App. 2003). A Ponzi scheme operator necessarily violates federal securities laws when

performing on the sham agreements he has entered into with purported "investors." *Hays v. Adam*, 512 F. Supp. 2d 1330, 1342 (N.D. Ga. 2007) ("Because the act of performance under the contract necessarily resulted in violation of federal securities laws by the defendants, the court holds that the contracts were void and thus do not bar the Receiver's claim for unjust enrichment.").

Further, certain contracts are void for reasons of public policy. *See Perkins v. Hegg,* 3 N.W.2d 671, 672 (Minn. 1942). Among those are contracts that investors sign with Ponzi scheme operators. *See In re Hedged-Investments Assocs.,* 84 F.3d 1286, 1290 (10th Cir. 1996). It would be contrary to public policy to enforce the agreements that are the tools of a Ponzi scheme; doing so would require a court to condone the practice of using later investors' money to pay off earlier ones. "To allow an [investor] to enforce his contract to recover promised returns in excess if his [investment] would be to further the debtors' fraudulent scheme at the expense of other [investors]." *Id.* (quoting *In re Indep. Clearing House Inc.,* 77 Bankr. 843 (D. Utah 1987) (en banc)).

Even if Respondents were somehow considered to have valid contracts with the Ponzi scheme, courts recognize an exception to the rule when the benefit in question consists of the proceeds of a fraud. This district, for example, denied a motion to dismiss a Receiver's claim for unjust enrichment against a mortgage company for "payments it received in consideration for a legal mortgage transaction." *Brown*, 643 F. Supp. 2d at 1084; *see also Hays*, 512 F. Supp. 2d at 1342 (granting summary judgment in favor of Receiver's unjust enrichment claim and finding employment contract "void and thus [does] not bar the Receiver's claim for unjust enrichment"); *Goldberg v. Chong*, No. 07-

20931, 2007 U.S. Dist. LEXIS 49980, at *29–30 (S.D. Fla. July 11, 2007) (granting summary judgment to Receiver on unjust enrichment despite defendant's compensation agreement).

The Berg Investors cite three cases for the proposition that equitable relief cannot be granted where the rights of the parties are governed by a valid contract, none of which are apposite.[491] *Sterling Capital Advisors, Inc. v. Herzog* concerned a contract dispute related to the sale of a holding company. 575 N.W.2d 121, 123–24 (Minn. App. 1998). Unlike the present action, it included a breach of contract claim, did not allege fraud, and certainly did not seek to redress a Ponzi scheme. *Id.* Their next case, *Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Canada, Ltd.* concerned a contract dispute related to the compensation clauses of an employment agreement. 552 N.W.2d 254, 268 (Minn. App. 1996). Again, the case contained a breach of contract claim, did not allege fraud, and did not concern a Ponzi scheme. Each of these cases concerned valid contracts. By contrast, Ponzi schemes are unique in that the "agreements" signed by duped investors cannot be considered valid contracts. Moreover, Ponzi schemes invoke equitable considerations that are not present in conventional contract disputes.

The Berg Investors' third case, *Finn v. Alliance Bank*, is an unpublished state district court case and does arise out of a Ponzi scheme. No. 19HA-CV-11-2856, 2011 WL 5006458 (Dakota County Dist. Ct., Aug. 16, 2011). But even more critically, the court in that case merely assumed—rather than decided—that there was a valid contract in the first place. *See id.* at *10. In any event, *Finn* is not controlling law and, because it

[491] Br. at 57.

fails to even consider the unique considerations in the context of fraud or Ponzi schemes and is contrary to the weight of Minnesota (and other jurisdictions') precedent. *Brown*, 643 F. Supp. 2d at 1084 (denying motion to dismiss unjust enrichment claim despite existence of a contract); *Cummings*, 715 F. Supp. 2d at 911 (same); *TCS Holdings, Inc.*, 2007 U.S. Dist. LEXIS 56275, at *14–15 (same); *see also Hays*, 512 F. Supp. 2d at 1342; *Goldberg*, 2007 U.S. Dist. LEXIS 49980, at *29–30.

The cases cited by the Berg Investors in support of the contention that they were not unjustly enriched because they were legally entitled to the funds are similarly inapposite. Each concerned a *fraudulent transfer* claim, not an unjust enrichment claim. *See M&L II*, 84 F.3d at 1342; *Unified Commercial Capital*, 260 B.R. at 350; *Carrozzella*, 286 B.R. at 489. Accordingly, discussion of "reasonably equivalent value" in those cases is specific to the statutory affirmative defense. *Id.* These cases have no bearing on the Receiver's unjust enrichment claims.

a. The Receiver's Unjust Enrichment Claim Is Not Precluded by the Purported "Agreements" Signed by the Berg Investors.

First, there were no "valid" contracts between the Berg Investors and Cook or his companies—there never was any true or meaningful meeting of the minds between Cook and the investors he was duping.

Investors understood that Cook would use their money to do currency trading. Based on this understanding and Cook's assurances that the currency trading strategy was essentially risk free, investors signed written agreements with Cook's entities and "invested" money.

Cook's understanding was quite different. Unlike the Berg investors, who thought they were investing money, Cook knew he was stealing it. There is no dispute that Cook and his agents made material misrepresentations in the brochures and prospectuses promoting the "investment program," in presentations and meetings with prospective "investors," and in the terms of the written agreements themselves. (See *supra* Part I.A.) And there also is no dispute that as soon as it was in hand, Cook used the money investors had given him under the "contracts" for his own purposes and to further perpetrate the fraud. These expenditures are not only clearly established by bank records, Cook has admitted it.[492]

In short, there is no dispute that the agreements signed by the Berg Investors (and all other "investors" in Cook's scheme) were procured by fraud. As such, the agreements are void as a matter of law and do not preclude the Receiver's unjust enrichment claim. *Cummings*, 715 F. Supp. 2d at 911; *TCS Holdings*, 2007 U.S. Dist. LEXIS 56275, at *14–15.

Second, the agreements signed by the Berg Investors are void because performance requires the violation of federal securities laws. Cook has admitted to using later investors' money to pay fictitious "returns" on earlier investors' purported investments.[493] Cook has also admitted to making false or misleading statements regarding the "investments" he was offering.[494] Cook could perform his obligation under the contract—paying the Berg Investors their "guaranteed" 10–12% returns—only by

[492] Jansen Ex. 1; Ex. 31.
[493] Jansen Ex. 1.
[494] *See* Jansen Ex. 1; Ex. 4; Ex. 6.

violating federal securities laws, because the only way to obtain the money necessary to make those payments was to dupe other victims into "investing" into Cook's Ponzi scheme using false and misleading statements. *See SEC v. Edwards*, 540 U.S. 389, 394 (2004) (noting that "investments pitched as low risk (such as those offering a 'guaranteed' fixed return)" are indicative of investment fraud that violates federal securities laws). Thus the agreements the Berg Investors signed are void and do not bar recovery on the Receiver's unjust enrichment claim. Nor do they somehow entitle the Berg Investors to the windfall benefit that they received.

Third, the agreements signed by the Berg Investors would violate public policy if enforced. The agreements "entitled" the Berg Investors to guaranteed returns of 12%. Because there were no "real" investments generating the promised 10–12% returns, there was never enough money to pay those returns for all investors. Thus by enforcing any such contract, a court would simply continue the Ponzi scheme, paying the earlier investor with a later investor's money.

b. The Berg Investors Are Not Entitled to 100% of the Funds They Received.

The Berg Investors argue that the agreements they signed entitle them to the funds they receive.[495] But that is untrue, both legally and in view of the undisputed facts.

First, there never were any valid agreements or contracts between the Berg Investors and Cook or his entities, for all of the reasons explained in Part V.B, *supra*. Absent valid agreements, the Berg Investors have no claim of "legal entitlement" to the

[495] Br. at 51–54.

money they received. It does not matter whether the funds received are characterized as "return of principal," payments of "interest," or "profit."

Second, to the extent the Berg Investors are equitably entitled to anything, it is only to that to which every other defrauded investor is entitled: his or her share of the *pro rata* distribution of any money recovered. The Berg Investors signed the same agreements as other defrauded investors and invested in the same fraudulent program. And like other defrauded investors, their money remained in Cook's fraudulent program when the scheme began to collapse in late June 2009. There is simply no reason to treat the Berg Investors differently from other investors whose money remained in the collapsing scheme because they did not have a connection to an insider who could get it out for them.

Third, even if the agreements were somehow valid, the Berg Investors were not entitled to the funds they received under the terms of the agreements themselves. Each of the Berg Investors signed agreements requiring the party terminating the account to give written notice to the other party.[496] It is undisputed that no Berg Investor—with the possible exception of Frahm[497]—*gave* written notice of account termination to Cook or his fraudulent companies. It is also undisputed that no Berg Investor *was given* written notice of account termination. Moreover, at least Respondents Defiel, Frahm, Fredells,

[496] See Parts IV.B.1–12.
[497] At the very least, there is a disputed issue of material fact as to whether Frahm gave the written notice required by his "agreements." The document Frahm produced in this litigation as evidence of a written request is unsigned, Frahm does not remember mailing it, and the computer that it was allegedly written on has been destroyed. Jansen Ex. 181; Jansen Ex. 165 at 172–74.

Heise, Kautzman, McIntosh, and Sundstrom signed purported agreements that imposed a "Contingent Deferred Sales Charge" or "Redemption Fee" on account closings within four years of opening the account.[498] Thus, even under the terms of the agreements they signed, the Berg Investors were not legally "entitled" to the funds they received.

Each Berg Investor received money worth many times the present value of his or her share of the eventual *pro rata* recovery, just as Cook's scheme was falling apart. Neither the law nor the facts entitle them to this windfall.

2. This Court Has Recognized that the Rights of All Investors in this Scheme Are Governed by Equity, Not Contract.

Chief Judge Davis recognized at the outset of this case that the rights of investors in this Ponzi scheme are properly governed by equity, rather than the terms of Cook's fraudulent agreements. For example, this Court used its substantial equitable powers to create the Receivership and appoint the Receiver.[499] The purpose of creating a receivership in the context of a securities enforcement action is to provide the Court with a means for *equitably* remedying the widespread harm caused by massive Ponzi schemes. *SEC v. Byers*, 637 F. Supp. 2d 166, 175–76 (S.D.N.Y. 2009). The very act of creating the Receivership shows the Court's recognition that it is not possible to adequately redress the diffuse and unique harm caused by Ponzi schemes using purely legal remedies.

[498] Jansen Ex. 102; Ex. 194; Ex. 58; Ex. 59; Ex. 41; Ex. 44; Ex. 121; Ex. 151; Ex. 113.
[499] SEC Docket No. 68.

Moreover, this Court set up an *equitable* process for distributing recovered funds among defrauded investors.[500] Under the process set up by this Court, each investor who was defrauded by this scheme does not have a *contractual* claim for the amount allegedly "owed" him or her under a written agreement signed with Cook. Rather, the only benefit he or she is entitled to is an *equitable* claim for his or her *pro rata* share of the money recovered, based on the amount he or she initially "invested." (*Id.* at ¶ 3 ("This proposed civil interim distribution shall be made on a *pro rata* basis, such that every investor's interim payout will be proportionate to his or her verified loss in Cook's scheme.").)

The Court's claims process does not differentiate between any of the losing investors, even though some signed what the Berg Investors characterize as "Structured Notes" and some did not.[501] The Court's claims process recognizes that in reality, all investors' money went into the same fraudulent investment program and thus it is equitable to treat each investor's claim in the same manner. The Berg Investors should not get to reap a windfall benefit by relying on the terms of their fraudulent agreements, while the rest of the investors in Cook's scheme—who signed identical fraudulent agreements—must content themselves with the equitable remedy set up by this Court.

VI. Attempts to Characterize Respondents as "Lenders" Are Unavailing and Immaterial.

Early on in this case, the Berg Investors changed course from acknowledging that they were investors in the Cook scheme and started referring to themselves as

[500] SEC Docket No. 556.
[501] *See id.* at ¶¶14–17 (detailing the process for challenging claim amounts).

"lenders."[502] Despite their counsel's representation in open court that "there certainly is an argument that the profits are a fraudulent transfer" and that "about 85 percent of the cases out there . . . say that the profits are fraudulent transfers," this recharacterization is apparently an attempt by the Berg Investors to keep the profits they gained at the expense of Cook's victims.[503]

A. The Receiver's Fraudulent Transfer Claims Succeed Regardless of Whether Respondents Are Characterized as "Lenders" or "Investors" Because They Lack Good Faith.

The good faith affirmative defense requires proof ***both*** that the transferee took in objective good faith and that he provided consideration of a reasonably equivalent value for the transfer. Minn. Stat. § 513.48(a). As discussed fully in Parts IV.B.1–12 above, the Berg Investors did not receive the transfers initiated by Cliff Berg in good faith because they were—at a minimum—on inquiry notice of the fraud or insolvency of the Cook companies. Under such circumstances, a transfer will be voided as fraudulent regardless of whether the Ponzi scheme operated by selling "notes." *In re Christou*, No. 06-68251, 2010 U.S. Dist. LEXIS 3430, at *11–12 (Bankr. N.D. Ga. Sept. 24, 2010). Further, since the "notes" are void as a matter of law, they cannot justify the fraudulent transfers.

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[502] *Cf.* SEC Docket No. 574 (arguing that the group of respondents "received the return of its own investment monies from the Trevor Cook entities well in advance of the SEC, CFTC and the DOJ commencing proceedings against Trevor Cook") with Br. at 103 ("Lenders received a contractual interest rate pursuant to their loan to the Cook Currency Entities.").

[503] Docket No. 92 at 65.

B. The Berg Investors Are Not Entitled to Profit from the Cook Scheme Because They Did Not Provide Reasonably Equivalent Value.

Even if the Berg Investors could prove their good faith, which they cannot, they would be unable to keep the profits they reaped from Cook's scheme. In a Ponzi scheme, initial "investments" may be considered to provide reasonably equivalent value for later payouts up to that amount. *Armstrong*, 2010 U.S. Dist. LEXIS 28075, at *67–68. As described in the comments to the Uniform Fraudulent Transfer Act, "value" is to be determined in light of Act's purpose: to protect the creditors of the debtor's estate. Unif. Fraudulent Transfer Act § 3, cmt. 2, 7A U.L.A. 639, 651 (1985). Thus, consideration having no use from a creditor's viewpoint does not satisfy the statutory definition. *Id.*

An investor does not technically provide "value" with his investment, because it simply perpetuates a fraudulent scheme. But courts generally hold that "a defrauded investor in a Ponzi scheme gives 'value' to the debtor in the form of a dollar-for-dollar reduction in the investor's restitution claim against the Ponzi scheme." *Armstrong*, 2010 U.S. Dist. LEXIS 28075, at *67; *Donell*, 533 F.3d at 771. Thus, if (and only if) investors recovered their "principal" in good faith, they may be allowed to keep it.

But the overwhelming weight of authority makes clear that the fictitious profits paid to an investor from a Ponzi scheme ***are not*** exchanged for reasonably equivalent value. *E.g.*, *Scholes*, 56 F.3d at 757; *Armstrong*, 2010 U.S. Dist. LEXIS 28075, at *89; *Donell*, 533 F.3d at 770; *Terry*, 432 F. Supp. 2d at 642; *Warfield v. Carnie*, No. 3:04-CV-633-R, 2007 U.S. Dist. LEXIS 27610, at *36 (N.D. Tex. Apr. 13, 2007) ("The vast majority of courts that have considered the issue have held that a debtor does not receive

reasonably equivalent value for any payments made to investors that represent false profits."). The creditors of the debtor are no better off by virtue of these payments; payments of profits (or fictitious "interest") do not diminish the claims against the fraudulent entity, but simply deplete the amount of money left to pay those claims. Thus, to the extent investors have received payments in excess of the amounts of principal that they originally invested, those payments are voidable as fraudulent transfers under the UFTA regardless of the innocence or good faith of the investor. *Scholes*, 56 F.3d at 757.

The Berg Investors cite two outlier bankruptcy court cases[504] to support their argument for summary judgment as to the money they got out of the scheme over and above what they put in. The court in *In re Unified Commercial Capital, Inc.* "simply [did] not agree that it is against sound public policy" to allow an investor to enforce a contract with a Ponzi scheme operator and held that the defendants were entitled to the interest rates provided in their loan contracts with the fraudulent entity. 260 B.R. at 351. The court in *In re Carrozzella & Richardson* relied on the *Unified Commercial Capital* case, but also on an additional fact not present here: there had been no proof that the transfers at issue consisted of investment funds deposited by defrauded investors as opposed to legitimate revenues. 286 B.R. at 491.

These two outliers do not hold up under the reasoning articulated by the likes of Judge Posner in *Scholes* and the many other circuit courts that have considered the issue: payments to the Berg Investors in excess of their principal were not in exchange for

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[504] *In re Unified Commercial Capital* is incorrectly cited as a district court case. (Br. at 104.)

reasonably equivalent value, as they "conferred no benefit on the corporations but merely depleted their resources faster." *Scholes*, 56 F.3d at 757. And, as they acknowledge, they are in a tiny minority with respect to their views on policy. *See Donell*, 533 F.3d at 770 ("The 'winners' in the Ponzi scheme, even if innocent of any fraud themselves, should not be permitted to enjoy an advantage over later investors sucked into the Ponzi scheme who were not so lucky." (internal quotations omitted)); *Scholes*, 56 F.3d at 757–58 (discussing the "injustice" of allowing an investor to retain his profits at the expense of other investors, which is relevant considering the equitable origins of the concept of fraud, and holding that one "should not be permitted to benefit from a fraud" even if he or she is not to blame for the fraud).

C. The Receiver's Unjust Enrichment Claims Succeed Whether the Respondents Are "Lenders" or "Investors."

As the Berg Investors concede, they signed the same account opening documents as all of the other investors in Cook's scheme.[505] They have not—and cannot—argue that they are any more entitled to the windfall they received because of their insider connection if their involvement is considered to be a loan rather than an investment.

D. The Berg Investors Were Actually Investors in the Cook Scheme.

Finally, to the extent the Berg Investors' present contention that they are lenders rather than investors has any bearing on the Receiver's claims, the Receiver disputes this characterization.

[505] Br. at 68–69.

It makes no sense for loaned funds to be put into segregated accounts. Nor does one earn "dividends" on a loan, as at least Respondent McIntosh's account statements showed.[506] In addition, the Berg Investors signed many of their account opening documents as "investors."[507] Entrust, one of the third party administrators with which they dealt, affirmatively stated that the transactions were not loans.[508]

The Berg Investors' characterization is also belied by their own testimony. For example, Michael Heise testified as follows:

> Q: Have you ever heard of a loan that's retrievable at any time?
>
> A: I don't like that word being used in here. I wasn't loaning money to anybody. I was making an investment. Now, I don't know if—why we used that terminology, but I have no clue why—is there a reason why they used the word "loan"?
>
> Q: . . . I'm just asking your knowledge here.
>
> A: For the sake of the way I viewed it, can I use the word investment?
>
> Q: You can use whatever word you'd like.
>
> A: Well, I like the word investment better then.
>
> Q: You like that—
>
> A: I never had the feeling that I was loaning anybody any money.[509]

Other investors, including Respondents, Fredell, Hillesheim, and McIntosh, similarly characterized their dealings with the Cook companies as an "investment."[510]

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[506] Kohlhepp Ex. 11.2 at 1–2, 6–7, 11—12.
[507] *See, e.g.*, Jansen Ex. 63; Ex. 65; Ex. 135; Ex. 137; Ex. 173.
[508] Kohlhepp Ex. 16; Ex. 11.2.
[509] Jansen Ex. 39 at 254–55.
[510] *See, e.g.*, Jansen Ex. 56 at 165, 196; Ex. 127 at 184; Ex. 150 at 204; Ex. 166 at 40.

Respondent Kautzman submitted a sworn financial loss statement in connection with Cook's criminal case in May of 2010 which read "I invested $116,889 of my 401K rollover."[511]

VII. Conclusion

In a sense, the Berg Investors are simply another group of people who were victimized by Trevor Cook and his this Ponzi scheme. When Berg handed them millions of dollars in the summer of 2009, the Berg Investors likely thought they had escaped the financial damage that the Ponzi scheme had inflicted on so many others. But, in reality, their money had been stolen from them the minute they gave it to Cook, and these cashier's checks consisted of money stolen from other victims that was never theirs. To the extent they ask what they were supposed to do upon receipt of money under circumstances that would cause a reasonable person to suspect might have been fraudulently transferred,[512] the answer under the law is that there was nothing they could have done at that point to legitimize the stolen money and make it theirs to keep. They cannot profit from this scheme at the expense of other innocent investors who did not have a person on the inside ready to get them out when the scheme was about to be exposed.

[511] Kohlhepp Ex. 14.
[512] Br. at 70.

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Respectfully submitted,

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