

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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

Petitioner,

v.

Case No: 11-cv-01042 SRN/FLN

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 Morrisset, Reynold Sundstrom, and  
Dot Anderson,

Respondents.

---

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

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... vi

INTRODUCTION ..... 1

I. Factual Background..... 3

A. The Cook Ponzi Scheme ..... 3

1. Origins and Operations..... 3

2. Roles of “Insiders” in Recruiting Investors to the Scheme..... 5

3. Collapse of the Ponzi Scheme..... 6

4. The Receivership..... 8

5. The Criminal Cases ..... 9

B. This Action ..... 9

II. Standards for Summary Judgment ..... 11

III. The Uniform Fraudulent Transfer Act ..... 12

A. Actual Fraudulent Intent: The “Ponzi Scheme Presumption” ..... 14

B. The “Good Faith” Affirmative Defense ..... 15

1. Objective, Reasonable Person Standard..... 15

2. Inquiry Notice ..... 16

3. Imputed Knowledge: Agency Principles ..... 18

IV. Summary Judgment on the Receiver’s Fraudulent Transfer Claims Against the Berg Investors Must Be Granted. .... 20

A. Transfers Made to the Berg Investors Were Made Pursuant to a Ponzi Scheme, with Actual Intent to Hinder, Delay, or Defraud Payment to Other Creditors..... 20

B. The Berg Investors Cannot Show that Berg, Their Agent, Had Objective Good Faith When He Cashed His Clients out of the Fraud and Delivered Cashier’s Checks to Them. .... 21

1.	There Is No Evidence in the Record of Berg’s Good Faith. ....	21
2.	Berg Has Refused to Testify. ....	21
3.	An Adverse Inference from Berg’s Silence Is Appropriate. ....	22
4.	Berg Was On Inquiry Notice As to the Fraudulent or Insolvent Nature of Cook’s Scheme. ....	24
C.	None of the Berg Investors Can Demonstrate Good Faith. ....	26
1.	Michael and Jennifer Heise .....	28
a.	Facts .....	28
b.	Berg Was the Heises’ Agent. ....	31
c.	The Heises Were On Inquiry Notice. ....	32
2.	Steven and Jenene Fredell .....	34
a.	Facts .....	34
b.	Berg Was the Fredells’ Agent. ....	37
c.	The Fredells Were On Inquiry Notice. ....	37
3.	Steve and Pam Cheney .....	39
a.	Facts .....	39
b.	Berg Was the Cheneys’ Agent. ....	43
c.	The Cheneys Were On Inquiry Notice. ....	44
4.	Larry Hopfenspirger .....	46
a.	Facts .....	46
b.	Berg was Hopfenspirger’s Agent. ....	49
c.	Hopfenspirger Was On Inquiry Notice. ....	50
5.	Walter Defiel .....	51
a.	Facts .....	51
b.	Berg Was Defiel’s Agent. ....	54
c.	Defiel Was On Inquiry Notice. ....	54

6.	George and Karen Morisset .....	55
	a. Facts .....	55
	b. Berg Was the Morissets’ Agent. ....	57
	c. The Morissets Were On Inquiry Notice. ....	57
7.	Reynold Sundstrom .....	59
	a. Facts .....	59
	b. Berg Was Sundstrom’s Agent. ....	61
	c. Sundstrom Was On Inquiry Notice. ....	61
8.	Steven Kautzman.....	62
	a. Facts .....	62
	b. Berg was Kautzman’s Agent.....	64
	c. Kautzman Was On Inquiry Notice.....	64
9.	Cynthia and Michael Hillesheim.....	65
	a. Facts .....	65
	b. Berg Was the Hillesheims’ Agent.....	67
	c. The Hillesheims Were On Inquiry Notice. ....	68
10.	James McIntosh.....	69
	a. Facts .....	69
	b. Berg was McIntosh’s Agent.....	72
	c. McIntosh Was On Inquiry Notice.....	72
11.	David Buysse.....	74
	a. Facts .....	74
	b. Berg Was Buysse’s Agent.....	75
	c. Buysse Was On Inquiry Notice.....	76
12.	Terry Frahm.....	77
	a. Facts .....	77

b.	Berg Was Frahm’s Agent.....	79
c.	Frahm Was on Inquiry Notice.....	80
V.	Summary Judgment on the Receiver’s Fraudulent Transfer Claim Against Dot Anderson Must Be Granted.....	82
A.	Basel Group LLC Was Used to Perpetrate the Cook Ponzi Scheme.....	82
B.	Anderson’s Involvement with Cook’s Scheme.....	83
C.	The Transfer to Anderson Was Fraudulent Under Minnesota Uniform Fraudulent Transfer Act.....	85
D.	Anderson Lacked Good Faith.....	87
VI.	All Respondents Were Unjustly Enriched by the Transfers in Question.....	89
A.	Legal Background.....	89
B.	The Berg Investors Were Unjustly Enriched.....	91
1.	The Berg Investors Knowingly Received Something of Value.....	91
2.	The Berg Investors Were Not Entitled to the Money that Was Funneled to Them in the Summer of 2009 and It Would Be Unjust for Them to Keep It.....	92
C.	Anderson Was Unjustly Enriched.....	94
1.	Anderson Knowingly Received Something of Value.....	94
2.	Anderson Was Not Entitled to the Money that Was Funneled to Her in the Summer of 2009 and It Would Be Unjust for Her to Keep It.....	95
D.	Equality Is Equity’’: Each Respondent Is Entitled Only to His or Her <i>Pro Rata</i> Share of the Funds Recovered.....	97
VII.	Respondents’ Other Defenses Fail as a Matter of Law.....	99
A.	Failure to State a Claim.....	99
B.	Estoppel, Waiver, and Laches.....	100
C.	Failure to Mitigate, Election of Remedies.....	101
D.	Accord and Satisfaction.....	101

E.	Doctrine of Payment.....	103
F.	Res Judicata, Collateral Estoppel, Merger and Bar.....	104
G.	Unclean Hands, <i>In Pari Delicto</i> , and Preceding Breach of Contract.....	106
H.	Damages by Third Parties .....	107
I.	Good Faith, Minn. Stat. § 513.48(d), Recoupment and Setoff .....	107
	CONCLUSION .....	108

**TABLE OF AUTHORITIES**

**Cases**

*Anderson v. First Nat’l Bank*  
 303 Minn. 408 (Minn. 1975)..... 101

*Anderson v. Liberty Lobby, Inc.*  
 477 U.S. 242 (1986)..... 12

*Armstrong v. Collins*  
 No. 01 Civ. 2437, 2010 U.S. Dist. LEXIS 28075  
 (S.D.N.Y. Mar. 24, 2010) ..... 13, 14, 22

*Armstrong v. Red River Entm’t*  
 285 F.3d 1092 (8th Cir. 2002) ..... 22

*Baxter v. Palmigiano*  
 425 U.S. 308 (1976)..... 22

*Celotex Corp. v. Catrett*  
 477 U.S. 317 (1986)..... 11

*Cummings v. Paramount Pictures*  
 715 F. Supp. 2d 880 (D. Minn., 2010)..... 90, 93

*Cunningham v. Brown*  
 265 U.S. 1 (1924)..... 14

*Dev. Specialists, Inc. v. Hamilton Bank, N.A.*  
 250 B.R. 776 (Bankr. S.D. Fla. 2000)..... 16, 17, 18

*Donell v. Kowell*  
 533 F.3d 762 (9th Cir. 2008) ..... 12

*Goldberg v. Chong*  
 No. 07-20931, 2007 U.S. Dist. LEXIS 49980 (S.D. Fla. July 11, 2007)..... 90

*Hauschildt v. Beckingham*  
 686 N.W.2d 829 (Minn. 2004)..... 104

*Heckler v. Community Health Servs.*  
 467 U.S. 51 (1984)..... 101

*In re Agric. Research & Tech. Group, Inc.*  
 916 F.2d 528 (9th Cir. 1990) ..... 15

*In re Armstrong*  
 285 F.3d 1092 (8th Cir. 2002) ..... 15

*In re Bayou Group, LLC*  
 No. 06-22306, 2010 U.S. Dist. LEXIS 99590 (S.D.N.Y. Sept. 17, 2010) ..... 16

*In re Bonham*  
 229 F.3d 750 (9th Cir. 2000) ..... 83

*In re CEP Holdings*  
 No. 07-71810, 2010 Bankr. LEXIS 1145 (Bankr. N.D. Ga. Jan. 5, 2010)..... 17

*In re Hill*  
 342 B.R. 183 (Bankr. D.N.J. 2006) ..... 17

*In re M&L Bus. Mach. Co.*  
 59 F.3d 1078 (10th Cir. 1995) ..... 14

*In re M&L Bus. Mach. Co.*  
 84 F.3d 1330 (10th Cir. 1996) ..... 15, 17, 18

*In re Manhattan Inv. Fund Ltd.*  
 397 B.R. 1 (S.D.N.Y. 2007)..... 14, 17

*In re Pate*  
 No. 93 B 17792, 1997 Bankr. LEXIS 2389 (Bankr. N.D. Ill. Feb. 24, 1997)..... 18

*In re Sherman*  
 67 F.3d 1348 (8th Cir. 1995) ..... 15, 16, 17

*In re Slatkin*  
 525 F.3d 805 (9th Cir. 2008) ..... 14

*Jobin v. McKay*  
 164 B.R. 657 (D. Colo. 1994)..... 17

*LiButti v. United States*  
 107 F.3d 110 (2d Cir. 1997)..... 22, 23

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*  
 475 U.S. 574 (1986)..... 12, 15

*McDermott Intern., Inc. v. Wilander*  
 498 U.S. 337 (1991)..... 12

*Missal v. Washington*  
 No. 97-982, 1998 U.S. Dist. LEXIS 6016, (D.D.C. Apr. 17, 1998)..... 90

*Reed v. ULS Corp.*  
 178 F.3d 988 (8th Cir. 1999) ..... 12

*Rosebud Sioux Tribe v. A & P Steel, Inc.*  
 733 F.2d 509 (8th Cir. 1984) ..... 22, 23

*Roth v. U.S.S. Great Lakes Fleet, Inc.*  
 25 F.3d 707 (8th Cir. 1994) ..... 12

*Schneider v. Thompson*  
 58 F.2d 94 (8th Cir. 1932) ..... 19

*Scholes v. Lehmann*  
 56 F.3d 750 (7th Cir. 1995) ..... 14, 100, 103

*SEC v. Brown*  
 643 F. Supp. 2d 1077 (D. Minn. 2009)..... 13, 14

*SEC v. Colello*  
 139 F.3d 674 (9th Cir. 1998) ..... 22

*SEC v. Cook*  
 No. 3:00-CV-272-R, 2001 U.S. Dist. LEXIS 2601 (N.D. Tex. Mar. 8, 2001)..... 14

*SEC v. Forte*  
 No. 09-63, 2010 U.S. Dist. LEXIS 24705 (E.D. Pa. Mar. 17, 2010) ..... 16, 17, 18

*SEC v. Monterosso*  
 768 F. Supp. 2d 1244 (S.D. Fla. 2011) ..... 22

*SEC v. Suman*  
 684 F. Supp. 2d 378 (S.D.N.Y. 2010)..... 23

*SEC v. Tome*  
 638 F. Supp. 596 (S.D.N.Y. 1986)..... 23

*Smith v. Int’l Paper Co.*  
 523 F.3d 845 (8th Cir. 2008) ..... 12

*Smith v. Suarez*  
 417 B.R. 419 (Bankr. S.D. Tex. 2009) ..... 17, 18, 19, 20

*St. Paul Fire & Marine Ins. Co. v. FDIC*  
 968 F.2d 695 (8th Cir. 1992) ..... 19

*Terry v. June*  
 432 F. Supp. 2d 635 (W.D. Vir. 2006) ..... 14, 16

*Trs. of the Graphic Commc'ns Int'l Union v. Bjorkedal*  
516 F.3d 719 (8th Cir. 2008) ..... 18

*Tusing v. Des Moines Indep. Cmty. Sch. Dist.*  
639 F.3d 507 (8th Cir. 2011) ..... 12

*U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*  
307 N.W.2d 490 (Minn. 1981)..... 90

*United States v. Petters*  
No. 08-5348, 2011 U.S. Dist. LEXIS 7206 (D. Minn. Jan. 25, 2011)..... 100

*Warfield v. Byron*  
436 F.3d 551 (5th Cir. 2006) ..... 14, 15, 17, 24, 86

*Webb Bus. Promotions, Inc. v. Am. Elecs. & Entm't Corp*  
617 N.W.2d 67 (Minn. 2000)..... 102

*Wessels, Arnold & Henderson v. Nat'l Med. Waste*  
65 F.3d 1427 (8th Cir. 1995) ..... 18

**Statutes**

Minn. Stat. § 513 ..... 12, 13, 86, 88, 107

**Rules**

Fed. R. Civ. P. 56..... 11

**Treatises**

Restatement (Second) of Agency ..... 19

Restatement (Third) of Agency ..... 18

## INTRODUCTION

This case stems from the Cook Ponzi scheme, one of the largest frauds in Minnesota history. Trevor Cook and others ensnared victims by promising 10–12% returns from a currency trading program that did not exist. In total, over \$190 million was brought into the scheme from more than 1,000 investors. Cook and his co-conspirators stole every penny of it, using the money for everything from wild parties and gambling binges to radio shows used to lure in new victims.

The scheme began to collapse in the summer of 2009. On June 22, 2009, the SEC began an on-site investigation at the fraud's headquarters. On July 7, 2009, a group of investors filed suit because they could not get their money back from the currency program. On July 9, 2009, news of the fraud hit the papers. Discovering they had been duped, panicked investors desperately tried to get their money out. With the walls of his Ponzi scheme closing in on him, Cook funneled what little money was left out to a chosen few. Everyone else was left holding the bag. By the time the Receiver was appointed in November 2009, less than \$2 million remained in the bank accounts of the Receiver Estates.

Respondents were investors who had inside connections to Cook. Most are friends and colleagues of Cook's father-in-law, Cliff Berg. One is the grandmother of a Cook employee, Grant Gryzbowski. Thanks to their inside connections, Respondents thought they had narrowly escaped the fraud: they were handed over \$6 million in June and July 2009 as the scheme was collapsing. But the money was not theirs. Cook simply

took what remained in his shattered accounts and gave it to Respondents as part of a deal he had with his father-in-law and as a favor to an employee.

In this action, the Receiver asserts fraudulent transfer and unjust enrichment claims to retrieve the money that Cook gave to Respondents when the scheme was collapsing. There are no material fact disputes and the law is clear that the money Respondents received in the summer of 2009 must be returned for equitable distribution to all victims of this fraud. Therefore, the Receiver respectfully seeks summary judgment on the following issues:

- A. As to Count I (fraudulent transfer):
  - 1. The transfers in question were made with actual intent to defraud the Receivership Entities' creditors. (Parts IV.A and V.B.)
  - 2. Respondents cannot show that they received the transfers made after June 22, 2009 in good faith. (Parts IV.C and V.C.)
- B. As to Count II (unjust enrichment): Respondents were unjustly enriched by the transfers in question. (Part VI.)
- C. Respondents' other defenses fail as a matter of law. (Part VII.)

## I. Factual Background

### A. The Cook Ponzi Scheme

#### 1. Origins and Operations

Beginning as early as 2005<sup>1</sup>, Cook and others, including Patrick Kiley, Jason Bo-Alan Beckman, Gerald Durand, and Chris Pettengill, solicited investors into a sham foreign currency trading program. The program was sold as a risk-free investment, guaranteed to earn investors 10–12% return on principal.<sup>2</sup> Investors were told that this remarkable combination of safety and double-digit profit was possible by capturing split-second differentials in the currency market and borrowing interest-free money through Shariah compliant banks.<sup>3</sup>

The scheme operated under names that were designed to mimic legitimate institutions. In the beginning, the program was marketed under variants of the name “UBS.”<sup>4</sup> Later, it was offered through entities with “Oxford” in their title.<sup>5</sup> “Crown Forex” was another name that was used.<sup>6</sup> “Basel Group” was the last in this long line of entities—many of which were simply names on bank accounts—used to carry out the fraud.<sup>7</sup>

---

<sup>1</sup> Declaration of Marlee A. Jansen in Support of Receiver’s Motion for Summary Judgment (“Jansen”), Ex. 1 at 1; Ex. 33 at 3.

<sup>2</sup> Jansen Ex. 1 at 2; *see also* Ex. 2, ¶ 21.

<sup>3</sup> Jansen Ex. 4 at 4–5.

<sup>4</sup> *See, e.g.*, Jansen Ex. 63; Ex. 64; Ex. 170; Ex. 172; Ex. 173.

<sup>5</sup> *See, e.g.*, Jansen Ex. 159; Ex. 160; Ex. 161; Ex. 83; Ex. 85; Ex. 86.

<sup>6</sup> *See, e.g.*, Jansen Ex. 106; Ex. 117; Ex. 118; Ex. 119.

<sup>7</sup> Jansen Ex. 13 at 65–66; *see also, e.g.*, Declaration of Scott J. Hlavacek in Support of Receiver’s Motion for Summary Judgment (“Hlavacek”), Ex. II; Jansen Ex. 185; Ex. 30.1–30.6.

Cook accepted deposits of any form, including cash, precious metals, and loan proceeds from remortgaged homes.<sup>8</sup> He also ensured that he could tap into lucrative, but regulated, retirement accounts by affiliating with third-party administrators of self-directed IRAs.<sup>9</sup> Millennium Trust Company (“Millennium”) and Entrust Group (“Entrust”) were the third-party administrators used for this purpose.<sup>10</sup> Investors contracted with these companies to serve as independent custodians for the IRA money that ultimately went to Cook.<sup>11</sup>

Cook and his co-conspirators took in at least \$194 million from investors. Of that total, only a fraction was actually ever traded, although not in the advertized risk-free manner.<sup>12</sup> What Cook did trade produced losses of approximately \$68 million.<sup>13</sup> The rest of the money was used for various other illegitimate purposes. For example, approximately \$52 million was used for lulling payments.<sup>14</sup> Millions more were used for gambling junkets, personal entertainment and travel, real-estate deals, and purported equity investments in other companies.<sup>15</sup>

---

<sup>8</sup> See, e.g., Jansen Ex. 5 ¶¶ 152–53.

<sup>9</sup> 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.*

<sup>10</sup> See, e.g., Jansen Ex. 135; Ex. 141; Ex. 176; Ex. 62; Ex. 71; Ex. 154; Ex. 178; Ex. 49; Ex. 76.

<sup>11</sup> See, e.g., Jansen Ex. 145; Ex. 146; Ex. 147; Ex. 148; Ex. 172; Ex. 176.

<sup>12</sup> See Jansen Ex. 2, ¶ 38; Ex. 7, ¶ 11.

<sup>13</sup> Jansen Ex. 7, ¶ 12.

<sup>14</sup> Jansen Ex. 2, ¶ 38; Ex. 7, ¶ 12; Ex. 4 at 10.

<sup>15</sup> See Jansen Ex. 2 at 17.

## 2. Roles of “Insiders” in Recruiting Investors to the Scheme

Cliff Berg was Cook’s father-in-law.<sup>16</sup> Berg is a carpet salesperson, but he also worked for Cook, bringing colleagues from the carpet business and personal friends, into the scheme. These people, known here as the “Berg Investors,”<sup>17</sup> were Berg’s clients, and he was paid a commission for bringing in their money.<sup>18</sup> Berg could not solicit clients based on his investment training or background—because he had none.<sup>19</sup> Rather, he traded on his inside connection to Cook. The Berg Investors knew that Cook was Berg’s son-in-law and that Cook ran the program.<sup>20</sup> Ultimately, Berg brought \$5,059,669.64 into the scheme from the Berg Investors.<sup>21</sup>

Berg and Cook had an agreement: if there ever were any problems with the program, Berg and his clients could cash out.<sup>22</sup> 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.”<sup>23</sup> Berg had

---

<sup>16</sup> Jansen Ex. 2 at 10; Ex. 8 at 156–58 (explaining Berg’s daughter is now divorced from Cook but still visits him in prison).

<sup>17</sup> 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. Jansen Ex. 204; Docket No. 181.

<sup>18</sup> See Jansen Ex. 9 at 32; Ex. 150 at 103; Ex. 57 at 78–79.

<sup>19</sup> Jansen Ex. 57 at 79; Ex. 81 at 27–28; Ex. 56 at 46.

<sup>20</sup> Jansen Ex. 56 at 44; Ex. 57 at 17, 28; 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.

<sup>21</sup> He also opened accounts for himself and his wife totaling approximately \$470,000. Jansen Ex. 10 at 22; *see also* Ex. 2.

<sup>22</sup> Jansen Ex. 12 at 168.

<sup>23</sup> Jansen Ex. 8 at 89, 180–81.

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.<sup>24</sup>

Grant Gryzbowski has known Cook for about ten years.<sup>25</sup> He began working for Cook as a salesman in January 2007.<sup>26</sup> One of the people Gryzbowski brought into the scheme was his grandmother, Respondent Anderson.<sup>27</sup>

### 3. Collapse of the Ponzi Scheme

On June 22, 2009, the SEC began an on-site investigation at the scheme's headquarters in the Van Dusen mansion.<sup>28</sup> Berg heard about the investigation and tried to get in touch with Cook. When Berg called the mansion, he was told that the SEC was conducting a routine audit.<sup>29</sup> Berg then followed up with Cook directly and asked whether it was a routine audit or an investigation.<sup>30</sup> Cook knew that the investigation was aimed at the fraud and that it was not routine. He was selective in sharing that information—but he was honest with his father-in-law. Cook told Berg that the SEC was conducting an investigation, not an audit, because: “You know, I wasn’t going to lie to him.”<sup>31</sup> Although none of the Berg Investors had submitted withdrawal forms to Berg or

---

<sup>24</sup> See *infra* Parts IV.C.1–12.

<sup>25</sup> *Id.*

<sup>26</sup> Jansen Ex. 13 at 20–21.

<sup>27</sup> Jansen Ex. 182 at 11–13; Ex. 13 at 62–64.

<sup>28</sup> See Jansen Ex. 13 at 164; Ex. 8 at 78, 87–88.

<sup>29</sup> Jansen Ex. 8 at 77–78; Ex. 12 at 168–69.

<sup>30</sup> Jansen Ex. 8 at 78–80.

<sup>31</sup> Jansen Ex. 12 at 169; see also Ex. 8 at 78; Ex. 14 at 295.

to Cook, Berg told Cook that he wanted all of his clients' accounts closed, as well as his own.<sup>32</sup>

Cook accommodated Berg's request by cobbling together funds from various accounts that he controlled. Instead of issuing personal checks—which would not clear if the underlying accounts were drained or frozen—Cook ordered cashier's checks, which were guaranteed.<sup>33</sup> On June 29, 2009, Cook directed employee Julia Smith to withdraw fourteen cashier's checks for the Berg Investors from the Crown Forex Associated Bank account.<sup>34</sup> The same day, Cook directed Kiley to withdraw eleven cashier's checks for them from the UBS Diversified Growth account at Wells Fargo.<sup>35</sup> 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.<sup>36</sup> The cashier's checks—totaling over \$6 million—were made payable to the Bergs and the Berg Investors in amounts equivalent to the principal they invested, plus their fictional "interest."<sup>37</sup>

Cook personally delivered the cashier's checks to the Bergs' home.<sup>38</sup> Berg promptly took the checks issued to him deposited them in his personal bank account.<sup>39</sup> In so doing, Berg told the bank teller that he was "trying to help his son-in-law."<sup>40</sup> Berg then delivered each of the Berg Investors' checks, explaining that he had "closed their

---

<sup>32</sup> Jansen Ex. 8 at 78, 138, 144; Ex. 12 at 169; Ex. 14 at 294–95.

<sup>33</sup> See Jansen Ex. 15–17.2.

<sup>34</sup> Jansen Ex. 8 at 154–55; Ex. 15.

<sup>35</sup> Jansen Ex. 18 at 942; Ex. 16.

<sup>36</sup> Jansen Ex. 17.

<sup>37</sup> Jansen Ex. 15–17.2.

<sup>38</sup> Jansen Ex. 8 at 147–48.

<sup>39</sup> Jansen Ex. 10 at 37–38, 41; *see also* Ex. 16.1–16.3.

<sup>40</sup> Jansen Ex. 10 at 38, 42, 47–48.

accounts” because there was an “investigation” or “audit” going on.<sup>41</sup> He handed (or mailed) the checks to his clients without any receipts, account closing statements, or any documentation whatsoever.<sup>42</sup>

The following week, a group of investors from Ohio who had tried without success to get their money out of the currency program filed suit against Cook, Beckman, and others, alleging fraud and mismanagement.<sup>43</sup> The court issued the first of a series of asset freeze orders in that suit on the day it was filed.<sup>44</sup> A storm of publicity about the fraud quickly ensued, and investors flooded the Cook companies with calls<sup>45</sup> and written demands for their money.<sup>46</sup> Their efforts were futile.<sup>47</sup> Of the hundreds of requests that were received in July, only one was honored: that of Respondent Anderson, whom Cook knew was the grandmother of his employee, Grant Gryzbowski.<sup>48</sup> Cook wired funds to Anderson from an account that was frozen just a few hours later. Cook personally followed up to make sure she had received the money.<sup>49</sup>

#### **4. The Receivership**

On November 23, 2009, the SEC and CFTC brought suit against Cook, Kiley, and the fraudulent entities.<sup>50</sup> A separate case was later filed against Beckman.<sup>51</sup> Chief Judge

---

<sup>41</sup> *See infra* Parts IV.C.1–12.

<sup>42</sup> *Id.*

<sup>43</sup> Jansen Ex. 19.

<sup>44</sup> Jansen Ex. 20.

<sup>45</sup> Jansen Ex. 22.

<sup>46</sup> Jansen Ex. 23.

<sup>47</sup> Jansen Ex. 25.

<sup>48</sup> Jansen Ex. 188; Hlavacek Ex. I.

<sup>49</sup> Jansen Ex. 13 at 142.

<sup>50</sup> Case Nos. 09-cv-3332 (D. Minn.) and 09-cv-3333 (D. Minn.).

Davis appointed the Receiver to take control of all of the defendants' estates, thereby converting their assets to "Receiver Estates."<sup>52</sup> The Receiver's mandate is to recover the money Cook stole for equitable distribution among Cook's victims.<sup>53</sup>

To-date, the Receiver has determined that 725 investors lost over \$158 million to this Ponzi scheme.<sup>54</sup> Their recovery has paled in comparison, amounting to less than three cents on the dollar.<sup>55</sup>

## **5. The Criminal Cases**

Cook has pleaded guilty to charges stemming from his role in the Ponzi scheme; he is now serving a 25-year prison sentence.<sup>56</sup> Pettengill has also pleaded guilty to the fraud; he awaits sentencing.<sup>57</sup> Criminal charges are pending against Kiley, Beckman, and Durand, with trial scheduled in April 2012.<sup>58</sup>

### **B. This Action**

On July 20, 2010, Chief Judge Davis entered an Order allowing this summary proceeding to be filed.<sup>59</sup> 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.<sup>60</sup>

---

<sup>51</sup> Case No. 11-cv-574 (D. Minn.).

<sup>52</sup> Jansen Ex. 26 at 1–2; Ex. 27 at 7.

<sup>53</sup> See Jansen Ex. 28 at 3.

<sup>54</sup> Jansen Ex. 11 at 13.

<sup>55</sup> Jansen ¶ 203.

<sup>56</sup> See Jansen Ex. 1; Ex. 31.

<sup>57</sup> Jansen Ex. 4.

<sup>58</sup> Jansen Ex. 6; Ex. 32.

<sup>59</sup> Jansen Ex. 33.

<sup>60</sup> *Id.* at 3.

On July 23, 2009, the Receiver filed this action seeking to “claw back” those transfers.<sup>61</sup> Extensive fact discovery took place from November 2010 through October 2011, with Respondents requesting and the Receiver producing, among other things, copies of every document seized from the scheme.

The Receiver respectfully submits that none of the material facts underlying the Receiver’s claims for fraudulent transfer and unjust enrichment are in dispute. Accordingly, the Receiver now moves for summary judgment on those claims and for an Order requiring each Respondent to return the funds that were transferred to them in the summer of 2009, as summarized below:

---

<sup>61</sup> Docket No. 1.

Recipient	Date	Transferring Entity	Amount	Total for Recipient <sup>62</sup>
Heise, M. & J.	6/29/2009	Crown Forex LLC	\$ 728,700	\$ 795,911.53
	7/1/2009	Crown Forex LLC	\$ 67,211.53	
Fredell, J.	6/29/2009	Crown Forex LLC	\$ 25,700	\$ 280,950
Fredell, S.	6/29/2009	Crown Forex LLC	\$ 243,250	
	7/1/2009	Crown Forex LLC	\$ 12,000	
Defiel	6/29/2009	Crown Forex LLC	\$ 94,950	\$ 94,950
Cheney, P.	6/29/2009	UBS Diversified	\$ 101,000	\$ 1,636,300
Cheney, S.	6/29/2009	UBS Diversified	\$ 1,535,300	
Frahm	6/29/2009	UBS Diversified	\$ 793,370	\$ 916,570
	6/29/2009	UBS Diversified	\$ 123,200	
Hillesheim, C.	6/29/2009	Crown Forex LLC	\$ 44,250	\$ 256,150
	6/29/2009	UBS Diversified	\$ 3,500	
Hillesheim, M.	6/29/2009	Crown Forex LLC	\$ 48,900	
	6/29/2009	UBS Diversified	\$ 156,000	
	6/29/2009	UBS Diversified	\$ 3,500	
Hopfenspirger	6/29/2009	UBS Diversified	\$ 202,000	\$ 202,000
Kautzman	6/29/2009	Crown Forex LLC	\$ 119,550	\$ 119,550
McIntosh	6/29/2009	Crown Forex LLC	\$ 250,000	\$ 250,000
Sundstrom	6/29/2009	Crown Forex LLC	\$ 85,450	\$ 85,450
Buysse	6/29/2009	Crown Forex LLC	\$ 360,700	\$ 360,700
Morisset, G.	6/29/2009	Crown Forex LLC	\$ 22,000	\$ 61,050
Morisset, K.	6/29/2009	Crown Forex LLC	\$ 39,050	
Anderson	7/14/2009	Basel Group LLC	\$ 102,000	\$ 102,000

## II. Standards for Summary Judgment

The standard for summary judgment is well-established: summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

<sup>62</sup> 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.

The moving party must demonstrate the absence of any genuine dispute regarding material facts, but the existence of a “scintilla” of evidence supporting the non-movant’s position is not enough to defeat a motion for summary judgment. *Tusing v. Des Moines Indep. Cmty. Sch. Dist.*, 639 F.3d 507, 514 (8th Cir. 2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

If the non-moving party fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party’s case, summary judgment must be granted. *Reed v. ULS Corp.*, 178 F.3d 988, 990 (8th Cir. 1999).

Summary judgment is mandated—even on typically fact-intensive issues—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 Intern., Inc. v. Wilander*, 498 U.S. 337 (1991)). Although ambiguities must be resolved in the light most favorable to the nonmoving party, summary judgment cannot be denied based on conjecture, surmise, “metaphysical doubt,” or self-serving conclusory statements. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Smith v. Int’l Paper Co.*, 523 F.3d 845, 848 (8th Cir. 2008).

### **III. The Uniform Fraudulent Transfer Act**

Minnesota has adopted the Uniform Fraudulent Transfer Act (“UFTA”). Minn. Stat. §§ 513.41–51 (2009). “Courts have routinely applied UFTA to allow receivers or trustees in bankruptcy to recover monies lost by Ponzi-scheme investors.” *Donell v. Kowell*, 533 F.3d 762, 767 (9th Cir. 2008). The UFTA provides that a transfer may be voided if it is made with the intent to defraud creditors or for less than reasonably

equivalent value if the transferor should have known that he would become insolvent—in other words, that he would incur debts that he would be unable to pay as they came due. Minn. Stat. § 513.44.

Most states' UFTA laws are nearly identical, so courts often look to other jurisdictions in deciding these cases. *Armstrong v. Collins*, No. 01 Civ. 2437, 2010 U.S. Dist. LEXIS 28075, at \*57 (S.D.N.Y. Mar. 24, 2010). The UFTA is also nearly identical to the fraudulent transfer provisions of the federal bankruptcy code, so courts also frequently look to bankruptcy cases in applying the UFTA. *Id.*; *see also SEC v. Brown*, 643 F. Supp. 2d 1077, 1082 (D. Minn. 2009).

The “actual fraud” provision of Minnesota’s UFTA is found in Minn. Stat. § 513.44(a)(1):

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor[.]

To void a transfer under this provision, the receiver for an entity that was an instrument of a Ponzi scheme must show that the Ponzi scheme operator (the debtor) 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. *Brown*, 643 F. Supp. 2d at 1081–82. The transfer need not be unlawful in the abstract. *Id.* at 1082. Furthermore,

any participation in the fraud (or lack thereof) on the part of the transferee is irrelevant. *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006).

**A. Actual Fraudulent Intent: The “Ponzi Scheme Presumption”**

Ponzi schemes are insolvent from inception. *Warfield*, 436 F.3d at 558 (citing *Cunningham v. Brown*, 265 U.S. 1, 7–8 (1924)). A Ponzi scheme operator knows that, using later investors’ money to pay off earlier investors, without money coming in from legitimate business, the scheme cannot go on forever; later 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). When the operator of a Ponzi scheme takes incoming money and transfers it to early investors, he does so with actual intent to hinder or delay payment to other creditors of the scheme. *Collins*, 2010 U.S. Dist. LEXIS 28075, at \*64; *Terry v. June*, 432 F. Supp. 2d 635, 639–640 (W.D. Vir. 2006).

The appellate courts are unanimous in upholding the “Ponzi scheme presumption”: proof of a Ponzi scheme conclusively establishes that transfers pursuant to the scheme were made with actual intent to hinder, delay, or defraud. *E.g.*, *Donell*, 533 F.3d at 770; *In re Slatkin*, 525 F.3d 805, 814 (9th Cir. 2008); *Warfield*, 436 F.3d at 558; *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). This Court is in accord. *Brown*, 643 F. Supp. 2d at 1082.

A criminal conviction of the Ponzi scheme operator precludes litigation on the existence of the Ponzi scheme and its operator’s fraudulent intent. *Terry*, 432 F. Supp. 2d at 640 (collecting cases); *see also In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 12 (S.D.N.Y. 2007) (relying on manager’s guilty plea setting forth that he continuously

falsified performance, sent statements to investors reflecting significant gains, concealed fund's true state, and used falsified records to attract new investors to find that the fund operated as a Ponzi scheme).

## **B. The “Good Faith” Affirmative Defense**

Once the plaintiff has met his burden of proving that a transfer was made with actual intent to defraud, it is the defendant's burden to prove that the transaction should not be voided because it was taken “in good faith and for a reasonably equivalent value[.]” Minn. Stat. § 513.48(a). The defendant bears the burden of proving *both* that he took in objective good faith and that he provided consideration of a reasonably equivalent value for the transfer. *Warfield*, 436 F.3d at 560. In the summary judgment context, the non-moving party must come forward with evidence that is more persuasive than typically required to survive summary judgment if his claim of good faith is “implausible” in light of the undisputed facts. *In re Agric. Research & Tech. Group, Inc.*, 916 F.2d 528, 534 (9th Cir. 1990) (citing *Matsushita*, 475 U.S. 574).

### **1. Objective, Reasonable Person Standard**

The standard for good faith is objective. *In re Armstrong*, 285 F.3d 1092, 1096 (8th Cir. 2002); *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995). “[C]ourts look to what the transferee objectively ‘knew or should have known’ instead of examining the transferee’s actual knowledge from a subjective standpoint.” *Id.* The law is well-settled, and the Eighth Circuit is in accord with the great majority of cases on this point. *See, e.g., Agric. Research*, 916 F.2d at 535–36; *In re M&L Bus. Mach. Co.*, 84 F.3d 1330, 1335–38 (10th Cir. 1996) (“*M&L II*”). If a transferee has knowledge of facts that would

have caused a reasonable person to inquire further—thereby putting him or her on “inquiry notice” of fraud or insolvency—good faith cannot be found. *See Sherman*, 67 F.3d at 1355; *Dev. Specialists, Inc. v. Hamilton Bank, N.A.*, 250 B.R. 776, 797–98 (Bankr. S.D. Fla. 2000).

Objective good faith is evaluated from the point of view of a reasonable person having a similar background to the transferee. Accordingly, objectivity incorporates the “standards, norms, practices, sophistication, and experience generally possessed by participants in the transferee’s industry or class.” *In re Bayou Group, LLC*, No. 06-22306, 2010 U.S. Dist. LEXIS 99590, at \*77 (S.D.N.Y. Sept. 17, 2010).

## 2. Inquiry Notice

A transferee is on inquiry notice if he was aware of facts that would have caused a reasonable person to *question*—not know for certain—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. “The mere failure to make inquiry in the face of unusual circumstances also is sufficient to *preclude a good faith defense*.” *Dev. Specialists*, 250 B.R. at 798 (emphasis added). A transferee cannot remain willfully ignorant and still take advantage of the good faith defense. *Id.* If an investor should have known the opportunity “was ‘too good to be true,’ the court will void the return of principal to that investor.” *SEC v. Forte*, No. 09-63, 2010 U.S. Dist. LEXIS 24705, at \*15 (E.D. Pa. Mar. 17, 2010).

Whether the transaction carries the earmarks of an “arms-length” or legitimate exchange is highly relevant to the issue of good faith. *Sherman*, 67 F.3d at 1355 (internal

quotations omitted); *see also Dev. Specialists*, 250 B.R. at 798. The question is not whether a reasonable person would know for certain there was a fraud; it is whether the “red flags” would cause reasonable person to investigate further. *See Manhattan Inv. Fund*, 397 B.R. at 23 (“Determining what [the transferee] knew is not the same as asking whether [the transferee] should have attempted to learn more.”). Any unusual circumstance may constitute a red flag serving to put the transferee on inquiry notice. *See Sherman*, 67 F.3d at 1356.

Courts recognize numerous red flags, including:

- 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);
- Representation that an investment has no risk (*In re CEP Holdings*, No. 07-71810, 2010 Bankr. LEXIS 1145, at \*7 (Bankr. N.D. Ga. Jan. 5, 2010));
- Promised rate of return in excess of the market rate without a plausible explanation of how the rates could be paid (*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 (*Forte*, 2010 U.S. Dist. LEXIS 24705, at \*11);
- Unapproved conversions of one’s investments (*Smith v. Suarez*, 417 B.R. 419, 443 (Bankr. S.D. Tex. 2009));
- 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 (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 feature (*Forte*, 2010 U.S. Dist. LEXIS 24705, at \*11).

As varied as the red flags may be in UFTA cases, courts’ analysis of them is remarkably consistent and commonsensical. If the aggregate facts are such that a reasonable person would inquire further as to the propriety of the transfer, the transferee does not have good faith.

### **3. Imputed Knowledge: Agency Principles**

As shown in Part IV.C.1–12, Berg was the agent for the Berg Investors in their dealings with Cook’s scheme. An individual 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. An individual named Luis de la Pena could not meet his burden of proving the good faith prong of his affirmative defense; 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 de la Pena's 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 de la Pena's 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.*

**IV. Summary Judgment on the Receiver's Fraudulent Transfer Claims Against the Berg Investors Must Be Granted.**

The Receiver's motion for summary judgment with respect to the Berg Investors must be granted because there is no genuine dispute of material fact that the cashier's checks Berg gave them came from a Ponzi scheme and that Cook had actual fraudulent intent in issuing those checks. Moreover, a reasonable jury necessarily would conclude that the Berg Investors lacked objective good faith when they received the transfers.

**A. Transfers Made to the Berg Investors Were Made Pursuant to a Ponzi Scheme, with Actual Intent to Hinder, Delay, or Defraud Payment to Other Creditors.**

There is no reasonable dispute that Cook was running a Ponzi scheme. In fact, the Berg Investors admit as much.<sup>63</sup> Thus, the Ponzi scheme presumption applies. As Chief Judge Davis found in his Order Granting Summary Proceedings, all transfers from Cook's fraudulent entities, including those from which the cashier's checks in question were drawn, were made with actual intent to hinder, delay, or defraud.<sup>64</sup> The transfers to the Berg Investors are thus fraudulent as a matter of law.

---

<sup>63</sup> Docket No. 184.

<sup>64</sup> Jansen Ex. 33; *see also* Part III.A *supra*.

**B. The Berg Investors Cannot Show that Berg, Their Agent, Had Objective Good Faith When He Cashed His Clients out of the Fraud and Delivered Cashier's Checks to Them.**

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

Berg was the agent of each of the Berg Investors in their dealings with Cook's scheme.<sup>65</sup> Thus, Berg's knowledge is imputed to each of them.<sup>66</sup> The Berg Investors bear the burden of proof on the good faith affirmative defense. There is simply no evidence in the record from which a reasonable jury could conclude that Berg acted with objective good faith when he initiated the transfers in question. Summary judgment on the Receiver's fraudulent transfer claims against the Berg Investors must be granted on this basis alone.

**2. Berg Has Refused to Testify.**

As part of his general investigative efforts, the Receiver interviewed Berg on January 6, 2010.<sup>67</sup> Berg's attorney was present.<sup>68</sup> In response to every question requiring a substantive answer, Berg invoked his Fifth Amendment right against self-incrimination and refused to respond.<sup>69</sup> 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.<sup>70</sup>

---

<sup>65</sup> See *infra* Parts IV.C.1–12.

<sup>66</sup> See *supra* Part III.B.3.

<sup>67</sup> Declaration of Richard L. Ostrom in Support of Receiver's Motion for Summary Judgment ("Ostrom") ¶ 8.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Declaration of Tara C. Norgard in Support of Receiver's Motion for Summary Judgment ("Norgard") ¶ 2.

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. Red River Entm't*, 285 F.3d 1092, 1096 (8th Cir. 2002); *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).

### **3. 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. 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.

In a civil action a court is entitled to draw an adverse inference against a person who invokes the Fifth Amendment privilege and refuses to testify. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 521 (8th Cir. 1984). 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 v. Collins*, 2010

U.S. Dist. LEXIS 28075, at \*101; *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.”).

Here, 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. 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). Berg’s consistent and continuing refusal to testify thus weighs strongly in favor of granting summary judgment for the Receiver.

#### 4. Berg Was on Inquiry Notice as to 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. *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 was aware of 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 an audit, because "[y]ou know, I wasn't going to lie to him."<sup>71</sup> Respondent Harris testified that on June 28, 2009, Berg told Harris that "one of Trevor's partners was being investigated."<sup>72</sup> Berg's tone was "very serious."<sup>73</sup> Berg explained that Cook had come over to his house earlier that day and told him the news.<sup>74</sup> Harris explained that Berg "was obviously very concerned on what had happened or what was 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."<sup>75</sup>

---

<sup>71</sup> Jansen Ex. 8 at 78, 138, 144; Ex. 12 at 169; Ex. 14 at 294–95.

<sup>72</sup> Jansen Ex. 35 at 135. Harris settled with the Receiver and is no longer a part of this action. Jansen Ex. 205.

<sup>73</sup> Jansen Ex. 35 at 136.

<sup>74</sup> *Id.* at 138–39.

<sup>75</sup> *Id.*

Even more telling is Berg's reaction upon learning of the SEC's investigation. Berg was so concerned by this knowledge that he immediately demanded that he and his clients be cashed out—without even advising his clients ahead of time.<sup>76</sup> Cook and Berg had an agreement to protect Berg's clients if anything ever went wrong.<sup>77</sup> When the SEC came in, Cook cashed out Berg and his clients—no paperwork, withdrawal forms, or other formalities required.

Cook personally handed over \$6 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 became frozen by Court Order. 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.<sup>78</sup> 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.<sup>79</sup> Berg knew—at a minimum from the agreement he personally signed with Millennium—that qualified money was supposed to go through the third party custodian rather than directly to the investor.<sup>80</sup>

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

---

<sup>76</sup> Jansen Ex. 8 at 78, 138, 144; Ex. 12 at 169.

<sup>77</sup> Jansen Ex. 8 at 89, 180; Ex. 12 at 168.

<sup>78</sup> *See, e.g.*, Jansen Ex. 158 at 24–25.

<sup>79</sup> Jansen Ex. 15–17.2.

<sup>80</sup> *E.g.*, Jansen Ex. 37 at 6.

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 these 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.<sup>81</sup>

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.”<sup>82</sup> He then transferred those same funds through ten different accounts at three institutions before they were finally traced by the Receiver and frozen.<sup>83</sup>

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. Berg thus lacked objective good faith when he helped to pull money out of the scheme for himself and his friends and colleagues.

### **C. None of the Berg Investors Can Demonstrate Good Faith.**

“Although questions of good faith may generally be difficult to establish on summary judgment,” in a case where a Ponzi scheme and thus actual intent to defraud creditors has been proven, “it is important to bear in mind that [Respondents] carry the burden of demonstrating their *objective* good faith at trial.” *Agric. Research & Tech.*, 916 F.2d at 539. Thus, summary judgment is entirely appropriate in a case such as this where, based on the undisputed facts, no reasonable jury could find that Respondents

---

<sup>81</sup> See *infra* Parts IV.C.1–12; see also Jansen Ex. 35 at 135.

<sup>82</sup> Jansen Ex. 10 at 37–38, 41.

<sup>83</sup> Jansen Ex. 38.

received the transfers from Cook in good faith. *See id.* (affirming summary judgment on Receiver's fraudulent transfer claims in a Ponzi scheme case).

First, as explained in Part IV.B above, Berg lacked objective good faith when he demanded that he and his clients be cashed out of the fraud. Because he acted as their agent in this transaction, and they ratified his actions when they accepted the checks, Berg's knowledge must be imputed to the Berg Investors. On this basis alone, no Berg Investor can show a genuine issue of material fact as to his or her lack of objective good faith.

But even independent of Berg's knowledge, each Berg Investor had ample red flags to put him or her on inquiry notice of the insolvency of the scheme or the fraudulent nature of the transfers made in June and July of 2009. Common to all Berg Investors is the fatal red flag that Berg gave them cashier's checks, without any paperwork to accompany the withdrawal or receipt of the funds, and without ever having asked Berg for the money. It is simply beyond dispute that a reasonable person would seriously question the legitimacy of an organization that spontaneously hand-delivered cashier's checks to its investors without notifying them of or confirming the transaction in any way.

The unsolicited nature of the transfers, without plausible explanation or documentation, in and of itself mandates summary judgment in favor of the Receiver that the Berg Investors cannot meet their burden of proving objective good faith. But there are additional red flags that support summary judgment. Because each Berg Investor had slightly different "unusual circumstances" that would have caused a reasonable person to

question the legitimacy and solvency of the scheme, the facts giving rise to each one's inquiry notice are addressed in turn.

## 1. Michael and Jennifer Heise

### a. Facts

The Heises have known Berg since they opened their carpet store twenty-nine years ago.<sup>84</sup> In fact, the Heises' store was one of Berg's largest carpet accounts.<sup>85</sup> Berg 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.<sup>86</sup> Heise was told that he could get a rate of return of 10.5% and that his money was retrievable at any time.<sup>87</sup> The Heises knew that Berg was Cook's father-in-law.<sup>88</sup>

Michael Heise handled all of the Heises' investments.<sup>89</sup> In his own estimation, he was an "experienced investor," conducting about 80% of his investments through a broker and the other 20% himself.<sup>90</sup> Heise's investment portfolio included stocks, bonds, CDs and real estate.<sup>91</sup> When Heise sent his money to Cook, he was aware that other low-risk investment opportunities, such as CDs, were offering approximately 2% interest.<sup>92</sup>

---

<sup>84</sup> Jansen Ex. 40 at 18–19.

<sup>85</sup> Jansen Ex. 39 at 66–67.

<sup>86</sup> *Id.* at 64.

<sup>87</sup> *Id.* at 50–51, 147.

<sup>88</sup> *Id.* at 26; Jansen Ex. 40 at 73.

<sup>89</sup> Jansen Ex. 40 at 17–18.

<sup>90</sup> Jansen Ex. 39 at 14, 17, 144.

<sup>91</sup> *Id.* at 16–17.

<sup>92</sup> *Id.* at 60.

From May 2008 through June 2009, the Heises gave a total of \$752,133.80 to the Cook companies.<sup>93</sup> 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.<sup>94</sup> Michael Heise signed Crown Forex and Oxford Global Advisors agreements requiring that if either party terminated the account, advance written notice was required.<sup>95</sup> The agreements further imposed a “contingent deferred sales charge” or “redemption fee” on account closings within four years of their opening date.<sup>96</sup> 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.”<sup>97</sup> The agreement showed where the form was available online.<sup>98</sup> Heise also signed a contract with Entrust imposing a 0.5% account termination fee.<sup>99</sup>

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.<sup>100</sup> 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.”<sup>101</sup> He told Berg that “something didn’t add up,”

---

<sup>93</sup> See Jansen Ex. 36.

<sup>94</sup> *Id.*; Jansen Ex. 55.

<sup>95</sup> See Jansen Ex. 41–48.

<sup>96</sup> Jansen Ex. 41; Ex. 44.

<sup>97</sup> Jansen Ex. 46 at 5; *see also* Ex. 45 at 10.

<sup>98</sup> *Id.*

<sup>99</sup> Jansen Ex. 50 at 1.

<sup>100</sup> Jansen Ex. 51; Ex. 52; Ex. 39 at 124–30, 198–200.

<sup>101</sup> Jansen Ex. 39 at 122.

and the next month Berg had the problem fixed.<sup>102</sup> Later, the interest rate disappeared altogether from the statements.<sup>103</sup>

Berg was under instructions from Michael Heise to liquidate his accounts “if anything did go backwards or whatever.”<sup>104</sup> Berg was to be on the lookout for “a whole realm of possibilities, from theft, cheating, stealing, bad markets, bad decisions.”<sup>105</sup> 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].”<sup>106</sup>

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.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> 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.

---

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 128.

<sup>104</sup> *Id.* at 76, 263.

<sup>105</sup> *Id.* at 266.

<sup>106</sup> *Id.* at 259.

<sup>107</sup> *Id.* at 71, 188; Jansen Ex. 40 at 34.

<sup>108</sup> Jansen Ex. 39 at 76.

<sup>109</sup> *Id.* at 76–77, 81, 93.

When the Heises returned to Minnesota, Berg explained that “something was amiss or being investigated” on the Bo Beckman side of the business.<sup>110</sup> 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.”<sup>111</sup> Jennifer Heise believed she and her husband were able to get money out of the scheme “because of [their] relationship with Berg” and she “assume[s]” that Berg was able to get their money out before anyone else’s.<sup>112</sup>

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.”<sup>113</sup> 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.<sup>114</sup>

**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

---

<sup>110</sup> *Id.* at 79–80.

<sup>111</sup> *Id.* at 274–75.

<sup>112</sup> Jansen Ex. 40 at 85, 86.

<sup>113</sup> Jansen Ex. 53.

<sup>114</sup> Jansen Ex. 54.

he didn't think Berg understood the strategy at all.<sup>115</sup> 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."<sup>116</sup>

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 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 no reasonable jury could conclude that Berg, the Heises' agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**c. The Heises Were on Inquiry Notice.**

Even independent of Berg's knowledge, no reasonable jury could conclude that Michael Heise, the admittedly experienced investor who handled all of the Heises' finances, was not 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

---

<sup>115</sup> Jansen Ex. 39 at 37.

<sup>116</sup> *Id.* at 258–59.

“bad decisions.”<sup>117</sup> 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. But, as Heise testified, regardless of what he might have suspected, “I don’t really care because I’ve got – my deposits are out[.]”<sup>118</sup>

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.

---

<sup>117</sup> Jansen Ex. 39 at 266.

<sup>118</sup> *Id.* at 95–96.

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%.<sup>119</sup> In addition, irregularities in his monthly statements, including a math error and the dropped interest rate, were highly suspect. Considering all of these undisputed facts together, no reasonable jury could find that the Heises can meet their burden of proving the good faith affirmative defense. They must return the \$795,911.53 they received in fraudulent transfers to the Receiver for equitable distribution to Cook's victims.

## **2. Steven and Jenene Fredell**

### **a. Facts**

Respondent Steven Fredell and his wife Jenene are lifelong friends of Berg and his wife Ellen.<sup>120</sup> In fact, Steven Fredell considers Berg to be his "best" friend—the "deciding factor" in Fredell's decision to invest in Cook's scheme.<sup>121</sup> Naturally, the Fredells knew that Berg was Cook's father-in-law.<sup>122</sup> They counted on Berg's inside connection to "the head guy" and trusted Berg to "watch [their] account."<sup>123</sup>

---

<sup>119</sup> *Id.* at 60.

<sup>120</sup> Jansen Ex. 56 at 40, 199; Ex. 57 at 14.

<sup>121</sup> Jansen Ex. 56 at 199.

<sup>122</sup> *Id.* at 44; Ex. 57 at 17, 23.

<sup>123</sup> Jansen Ex. 56 at 199, 216.

The Fredells met with Cook before they gave him their money.<sup>124</sup> He guaranteed them a 10.5–12% return with “no risk of loss.”<sup>125</sup> The Fredells believe they invested \$245,381.63 with Cook, through custodians Millennium and Entrust, between January 28, 2008, and August 15, 2008.<sup>126</sup> Steven Fredell understood that the money would have to go back to the third party custodians before it could be distributed to the Fredells.<sup>127</sup>

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.<sup>128</sup> They also signed agreements that imposed a “contingent deferred sales charge” or “early redemption fee” if their accounts were closed within four years of their opening dates.<sup>129</sup>

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.”<sup>130</sup> 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.”<sup>131</sup> Fredell

---

<sup>124</sup> *Id.* at 203; Ex. 57 at 19–20.

<sup>125</sup> Jansen Ex. 56 at 58, 147; Ex. 57 at 22.

<sup>126</sup> Jansen Ex. 36; Ex. 79.

<sup>127</sup> Jansen Ex. 56 at 55–56.

<sup>128</sup> Jansen Ex. 58; Ex. 59; Ex. 60; Ex. 64; Ex. 65; Ex. 66; Ex. 67; Ex. 68; Ex. 69; Ex. 70.

<sup>129</sup> Jansen Ex. 58; Ex. 59; Ex. 66.

<sup>130</sup> Jansen Ex. 56 at 72–73.

<sup>131</sup> *Id.* at 73.

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.<sup>132</sup>

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.<sup>133</sup> Cliff and Ellen Berg came to the Fredells’ house out of the blue one night and delivered two cashier’s checks.<sup>134</sup> The checks were for \$243,250 and \$25,700, rounded amounts reflecting their principal “investments” and fictitious “interest.”<sup>135</sup> 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 made it to the scheme from custodian Entrust).<sup>136</sup> 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.<sup>137</sup> 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

---

<sup>132</sup> *Id.* at 147–48.

<sup>133</sup> *Id.* at 72; Jansen Ex. 57 at 30, 67.

<sup>134</sup> Jansen Ex. 15.6; Ex. 15.7; Ex. 56 at 80.

<sup>135</sup> *Id.*

<sup>136</sup> 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.

<sup>137</sup> Jansen Ex. 56 at 90–91.

Beckman.<sup>138</sup> Berg further told Steven Fredell that Berg was concerned because the SEC had come to Cook's offices.<sup>139</sup> 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.<sup>140</sup>

**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."<sup>141</sup> 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 Berg's actions, accepting the checks that he gave them. As their agent, Berg's knowledge is imputed to the Fredells. Because no reasonable jury could conclude that Berg, the Fredells' agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**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."<sup>142</sup> Accordingly, when Berg unexpectedly showed up at their home bearing unsolicited cashier's checks with the purported contents of the

---

<sup>138</sup> *Id.* at 75.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Jansen Ex. 56 at 72, 74, 139, 199.

<sup>142</sup> *Id.* at 72–73.

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 Entrust. The Fredells knew this, yet chose to ignore it.<sup>143</sup> The Fredells also knew they were not charged the early redemption fees provided in the agreements they signed.<sup>144</sup>

Finally, when he delivered the checks to the Fredells, Berg told them that "the SEC was in doing some checking" into the business<sup>145</sup>; 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.

---

<sup>143</sup> Jansen Ex. 56 at 55–56.

<sup>144</sup> *Id.* at 179.

<sup>145</sup> *Id.* at 75.

These undisputed facts show that no reasonable jury could find that the Fredells can meet their burden of proving the good faith affirmative defense. They must return the \$280,950 they received in fraudulent transfers to the Receiver for equitable distribution to Cook's victims.

### **3. Steve and Pam Cheney**

#### **a. Facts**

Steve Cheney has known Berg "quite well" for at least twenty years through the carpet business.<sup>146</sup> 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.<sup>147</sup>

Cheney has over forty years of experience investing in stocks, bonds, and real estate and as a private lender.<sup>148</sup> He considers himself to be an "experienced investor."<sup>149</sup>

Berg introduced Cheney to the currency program and told him about mutual friends from the carpet industry who had already invested.<sup>150</sup> 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."<sup>151</sup> After the group presentation, Cheney met with Cook in

---

<sup>146</sup> Jansen Ex. 81 at 42, 108.

<sup>147</sup> *Id.* at 43–44.

<sup>148</sup> *Id.* at 21

<sup>149</sup> Jansen Ex. 81 at 119; Ex. 83.

<sup>150</sup> *Id.* at 29.

<sup>151</sup> *Id.* at 20.

Cook's office, along with Berg and Respondent Larry Hopfenspirger.<sup>152</sup> Cook said that the currency program would guarantee a return of 12% per year.<sup>153</sup> He further told Cheney that the program was risk-free because they "hedge themselves out of risk."<sup>154</sup> Cheney said that he was satisfied with this explanation.<sup>155</sup>

Cheney knew that Berg was Cook's father-in-law—and it was a significant factor in Cheney's decision to invest.<sup>156</sup> 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."<sup>157</sup> 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."<sup>158</sup>

From February 2008 through March 2009, Cheney and his wife, Pam, gave Cook a total of \$1,620,962.51.<sup>159</sup> 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.<sup>160</sup> Each of the Cheney family members signed an Oxford Global Advisors agreement requiring a party terminating the account to provide 30 days' written notice to the other party.<sup>161</sup>

---

<sup>152</sup> *Id.* at 26.

<sup>153</sup> *Id.* at 54.

<sup>154</sup> *Id.* at 35.

<sup>155</sup> Jansen Ex. 81 at 35.

<sup>156</sup> Jansen Ex. 81 at 28; Ex. 82 at 31, 69, 70.

<sup>157</sup> Jansen Ex. 81 at 111.

<sup>158</sup> *Id.* at 108.

<sup>159</sup> Jansen Ex. 36; Ex. 34 at 12.

<sup>160</sup> Jansen Ex. 81 at 51, 52.

<sup>161</sup> Jansen Ex. 83; Ex. 89–92.

These agreements listed Cliff Berg as the Cheney's "Representative."<sup>162</sup> The Cheney's also signed Oxford Global Advisors "Subscription Forms," making various handwritten, initialed notes and changes to the terms of these documents.<sup>163</sup> None of the Cheney's changed the 30-day written notice requirement to close their accounts.<sup>164</sup>

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.<sup>165</sup> None of the Cheney's received tax forms reflecting these distributions.<sup>166</sup> This was unusual in Cheney's experience.<sup>167</sup>

In August of 2008, the Cheney's monthly payments suddenly started coming from Crown Forex, an entity with which none of them had signed an agreement.<sup>168</sup> Cheney did not ask about the unannounced and unexplained change.<sup>169</sup> 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.<sup>170</sup> And once again, Cheney did not inquire.<sup>171</sup>

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

---

<sup>162</sup> Jansen Ex. 89–92.

<sup>163</sup> Jansen Ex. 86–88.

<sup>164</sup> Jansen Ex. 83; Ex. 89–92.

<sup>165</sup> Jansen Ex. 36; Ex. 34 at 12.

<sup>166</sup> Jansen Ex. 81 at 154.

<sup>167</sup> *Id.*

<sup>168</sup> Jansen Ex. 36; Ex. 93.

<sup>169</sup> Jansen Ex. 81 at 142.

<sup>170</sup> Jansen Ex. 36; Ex. 94.

<sup>171</sup> Jansen Ex. 81 at 146–48.

problem with a different part of the company” that Cook was concerned about.<sup>172</sup>

Cheney then called Hopfenspirger and told him about the “problems in another part of the company.”<sup>173</sup> According to Cheney he called Cook back the next day and asked Cook to close his account.<sup>174</sup> Cheney knew there were problems and said that he took the money out “to be safe.”<sup>175</sup>

None of the Cheney's ever made a written request to close their accounts in the seemingly lucrative program, which had been paying them handsome monthly distributions for over a year. Nevertheless, on or about June 30, 2009, Berg hand-delivered three cashier's checks to Cheney's office.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup> 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 subsumed

---

<sup>172</sup> *Id.* at 91, 162.

<sup>173</sup> *Id.* at 98–99.

<sup>174</sup> *Id.* at 90.

<sup>175</sup> *Id.* at 105–06.

<sup>176</sup> Jansen Ex. 81 at 59.

<sup>177</sup> Jansen Ex. 16.11; Ex. 16.10; Ex. 16.4; Ex. 95 at 125.

<sup>178</sup> Jansen Ex. 16.11; Ex. 16.10.

in the check made out to Steve Cheney.<sup>179</sup> Berg did not provide any account closing documents, receipts, or final statements with these cashier's checks.<sup>180</sup>

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.<sup>181</sup> Cheney testified that "people started calling each other after we got our money."<sup>182</sup>

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.<sup>183</sup> 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.<sup>184</sup>

**b. Berg Was the Cheney's 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.<sup>185</sup> The Cheney's 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

---

<sup>179</sup> Jansen Ex. 81 at 100.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 48.

<sup>182</sup> *Id.* at 60.

<sup>183</sup> *Id.* at 63–64.

<sup>184</sup> *Id.* at 65.

<sup>185</sup> 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 no reasonable jury could conclude that Berg, the Cheneys' agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**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."<sup>186</sup> As one of Berg's biggest customers, he enjoyed a certain "comfort level" with the Cook companies.<sup>187</sup>

The undisputed facts at the end of June 2009 are replete with red flags—the most obvious one being that *Cook told Cheney there was a problem with the Cook companies*.<sup>188</sup> 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.

Not only did Cheney know about problems with the company, he knew his dealings were outside the bounds of the contract he signed. Each of the Cheney members had contracts requiring 30 days' advance written notice to close an account, yet no such notice was provided on either side of the transaction, much less in writing. Moreover,

---

<sup>186</sup> Jansen Ex. 81 at 111.

<sup>187</sup> *Id.* at 109–10.

<sup>188</sup> Jansen Ex. 81 at 91–93.

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 their 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.

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 was admittedly 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 undisputed facts would be more than enough to put a reasonable person on inquiry notice of fraud or insolvency. Any contention that it was not is belied by the fact that Cheney and many of the Berg Investors were calling each other as soon as they got their money out and wondering whether they might have to return it. No reasonable jury could find that the Cheneys can meet their burden of proving the good faith affirmative defense. They must return the \$1,636,300 they received in fraudulent transfers to the Receiver for equitable distribution to Cook's victims.

#### 4. Larry Hopfenspirger

##### a. Facts

Hopfenspirger has been an investment partner and friend of Respondent Steve Cheney for over 30 years.<sup>189</sup> In early 2008, Cheney brought Hopfenspirger to a meeting at Cook's headquarters to learn more about Cook's currency investment program.<sup>190</sup> At the meeting, which Berg also attended, Bo Beckman encouraged potential investors to stay away from the equity market and instead invest with Cook.<sup>191</sup> Hopfenspirger understood Cook and Beckman's business relationship to be that of "two people living under one house."<sup>192</sup> At a second meeting at Cook's headquarters, Hopfenspirger was promised a guaranteed 12% rate of return generated by "riskless transaction[s]."<sup>193</sup>

Hopfenspirger has degrees in business and economics from the University of Minnesota, and has made his living by investing full-time since 1997 with seven employees.<sup>194</sup> To him, Cook's program sounded like "Monopoly, free parking."<sup>195</sup> Hopfenspirger viewed the currency program as an alternative to a savings account, only at 24 times the rate of return: "In 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

---

<sup>189</sup> Jansen Ex. 95 at 30, 31.

<sup>190</sup> *Id.* at 33.

<sup>191</sup> *Id.* at 39.

<sup>192</sup> *Id.* at 42.

<sup>193</sup> *Id.* at 30, 188, 51.

<sup>194</sup> *Id.* at 17–20, 22.

<sup>195</sup> *Id.* at 84.

did here because that was the Franklin Bank there.”<sup>196</sup> Hopfenspirger did not do any due diligence on Cook or his purported currency strategy.<sup>197</sup>

On March 17, 2008 Hopfenspirger gave \$600,500 to Oxford Global Advisors.<sup>198</sup> 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.<sup>199</sup> 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.<sup>200</sup> 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.<sup>201</sup> 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.”<sup>202</sup>

Hopfenspirger received monthly payments ranging from \$2,000 to \$6,000 from the scheme in purported “interest.”<sup>203</sup> The initial payments came from Oxford Global Advisors, the entity with which he had signed agreements, but later payments came from

---

<sup>196</sup> *Id.* at 38.

<sup>197</sup> *Id.* at 214.

<sup>198</sup> Jansen Ex. 36.

<sup>199</sup> Jansen Ex. 98.

<sup>200</sup> Jansen Ex. 97.

<sup>201</sup> *Id.*; Ex. 95 at 60–61.

<sup>202</sup> Jansen Ex. 95 at 195.

<sup>203</sup> Jansen Ex. 36.

Crown Forex—an entity with which he did not have any relationship at all.<sup>204</sup>

Hopfenspirger did not inquire about the change.<sup>205</sup> He also made two separate withdrawals of \$200,000 each, one in October 2008 and one in December 2008.<sup>206</sup>

Hopfenspirger specifically requested each of these withdrawals.<sup>207</sup>

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” and that Cheney was taking his money out.<sup>208</sup> Cheney then asked “Larry, would you like me to . . . get your money and send it to you?” and Hopfenspirger said yes.<sup>209</sup> 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.<sup>210</sup>

Berg delivered Hopfenspirger’s cashier’s check to Cheney, who in turn mailed it to Hopfenspirger.<sup>211</sup> The cashier’s check was written for an even \$202,000 from UBS Diversified LLC—yet another entity with which Hopfenspirger had no agreement—giving Hopfenspirger a net profit of \$59,000 from the scheme.<sup>212</sup> Hopfenspirger did not

---

<sup>204</sup> Jansen Ex. 36; Ex. 96–98.

<sup>205</sup> Jansen Ex. 95 at 200.

<sup>206</sup> Jansen Ex. 36.

<sup>207</sup> Jansen Ex. 95 at 112, 115.

<sup>208</sup> *Id.* at 124–25, 127; Jansen Ex. 81 at 98–99.

<sup>209</sup> Jansen Ex. 95 at 132.

<sup>210</sup> *Id.* at 129.

<sup>211</sup> *Id.* at 125.

<sup>212</sup> Jansen Ex. 36.

receive any account closing documents, receipts, final statements, or paperwork of any kind reflecting that his account had been closed.<sup>213</sup>

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.”<sup>214</sup> 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.<sup>215</sup>

**b. Berg Was Hopfenspirger’s Agent.**

Berg was Hopfenspirger’s agent with respect to Cook’s scheme. The only reason that Hopfenspirger received his money after the scheme’s collapse was underway is that he was Berg’s client, and Cook honored his father-in-law’s request to get money out for those clients. Unlike previous payments he received from the Cook companies, Berg hand-delivered Hopfenspirger’s check to Respondent Cheney. Hopfenspirger then ratified Berg’s action as his agent by accepting the benefit of the cashier’s check for \$202,000. As his agent, Berg’s knowledge is imputed to Hopfenspirger. Because no reasonable jury could conclude that Berg, Hopfenspirger’s agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

---

<sup>213</sup> Jansen Ex. 95 at 137.

<sup>214</sup> *Id.* at 130–31, 194.

<sup>215</sup> *Id.* at 130.

**c. Hopfenspirger Was on Inquiry Notice.**

Hopfenspirger is a professional investor. The unusual circumstances surrounding his dealings with the scheme were many, and would have caused a reasonable person of his sophistication, education, and experience to inquire whether the Cook companies were legitimate.

First, Hopfenspirger 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 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."<sup>216</sup>

In addition, many of Hopfenspirger's monthly interest payments came from an entity with which he had no written agreement. Then, in June 2009, his friend and investment partner, Respondent Cheney, told Hopfenspirger about an investigation of the scheme. Cheney, another knowledgeable and experienced investor with whom Hopfenspirger had a close relationship and shared business deals, was concerned enough that, despite making consistent, double-digit returns, he was closing all of his family's accounts with Cook's program. Hopfenspirger admitted that he wanted his money out because of the information conveyed by Cheney.<sup>217</sup>

---

<sup>216</sup> *Id.* at 84.

<sup>217</sup> *Id.* at 124–25, 127.

The uncontroverted circumstances surrounding Hopfenspirger's receipt of that money remove any doubt that Hopfenspirger was on inquiry notice of a fraudulent purpose underlying the transfer. According to Hopfenspirger, his account was closed by Cheney, someone who had no relationship to his account, much less authority to withdraw funds from it. Hopfenspirger agreed that a legitimate company would not simply close one client's account based on a third party's unauthorized request. The transfer violated the written policies of Oxford Global Advisors and should have been yet another warning sign to Hopfenspirger. Perhaps 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.

The cumulative facts above lead to only one reasonable inference: by the time he received the payment in the summer of 2009, Hopfenspirger was on inquiry notice that the Cook companies were either fraudulent or insolvent. He must return the \$202,000 received in fraudulent transfers to the Receiver for equitable distribution to Cook's victims.

## **5. Walter Defiel**

### **a. Facts**

Defiel also knows Berg through the carpet business.<sup>218</sup> Defiel managed a company owned by Respondent Cheney and was a co-worker and friend of Respondent Dzik.<sup>219</sup> Defiel knew that Dzik and Cheney had invested with Cook, and Defiel told Dzik

---

<sup>218</sup> Jansen Ex. 99 at 19–20.

<sup>219</sup> *Id.* at 11–12, 17, 21, 23.

that he wanted in on the deal.<sup>220</sup> Defiel then met with Berg and was told that his rate of return—12%, dropping down to 10.5 or 10.25%—was guaranteed.<sup>221</sup> This was in comparison to the 1% Defiel was earning at the time.<sup>222</sup> 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.<sup>223</sup> Defiel knew that Berg was Cook’s father-in-law.<sup>224</sup>

Before he invested with Cook, Defiel talked to his financial advisor about the program.<sup>225</sup> Defiel’s advisor told him “not to do it” because he “didn’t think it was legit.”<sup>226</sup> Defiel’s advisor further stated, “If it sounds too good, looks too good, something like it just isn’t going to happen.”<sup>227</sup>

Against his financial advisor’s advice, Defiel sent \$80,000 to Oxford Global Advisors.<sup>228</sup> Defiel signed an agreement with Oxford Global Advisors requiring the party terminating the account to provide 30 days’ written notice to the other party.<sup>229</sup> 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

---

<sup>220</sup> *Id.* at 25.

<sup>221</sup> *Id.* at 30.

<sup>222</sup> *Id.* at 57.

<sup>223</sup> *Id.* at 31–32.

<sup>224</sup> *Id.* at 41, 47, 55.

<sup>225</sup> *Id.* at 36, 64–65.

<sup>226</sup> *Id.* at 35.

<sup>227</sup> *Id.* at 35.

<sup>228</sup> *Id.* at 35, 49, 54; Ex. 36.

<sup>229</sup> Jansen Ex. 101.

date.<sup>230</sup> Defiel received statements not only from Oxford Global Advisors, the only Cook entity with which he had an agreement, but also from The Oxford.<sup>231</sup>

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?”<sup>232</sup> Defiel called the number on a business card he had been given to ask these questions.<sup>233</sup> Nobody could answer his questions and he was told to call back the next day.<sup>234</sup> Although he did not get “the answers [he] was looking for at the time,” Defiel did not call back to follow up.<sup>235</sup>

On or about June 29, 2009, Respondent Dzik<sup>236</sup> handed Defiel a cashier’s check—which he had gotten from Berg—for a round \$94,950 (\$14,950 more than Defiel had invested).<sup>237</sup> 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.<sup>238</sup> Defiel had not requested that his account be closed and never completed any withdrawal paperwork.<sup>239</sup> 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

---

<sup>230</sup> Jansen Ex. 102.

<sup>231</sup> Jansen Ex. 103; Ex. 99 at 90–91.

<sup>232</sup> Jansen Ex. 99 at 33.

<sup>233</sup> *Id.* at 32–33.

<sup>234</sup> *Id.* at 33.

<sup>235</sup> *Id.* at 34.

<sup>236</sup> 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.

<sup>237</sup> Jansen Ex. 99 at 59.

<sup>238</sup> *Id.* at 48, 59, 74.

<sup>239</sup> *Id.* at 60–61.

Defiel's check. Despite the agreements he signed, Defiel was not charged any fees whatsoever when his account was closed.<sup>240</sup>

**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 no reasonable jury could conclude that Berg, Defiel's agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**c. Defiel Was on Inquiry Notice.**

Defiel admits 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 program was legitimate.<sup>241</sup> Berg's representations of a guaranteed 10–12% rate of return, with no risk to principal, struck Defiel as “too good 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.”<sup>242</sup> This red flag would be sufficient to raise the suspicion of a reasonable person, but Defiel—who was earning 1% interest in a savings count 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

---

<sup>240</sup> *Id.* at 61, 85.

<sup>241</sup> *Id.* at 17–35.

<sup>242</sup> *Id.* at 35, 49.

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.

In light of these undisputed facts, the only reasonable inference a jury could make is 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 and that he cannot meet his burden of proving good faith. He must return the \$94,950 to the Receiver for equitable distribution to Cook's victims.

## **6. George and Karen Morisset**

### **a. Facts**

The Morissets learned about the Cook scheme from their lifelong friend, Walter Defiel.<sup>243</sup> Before investing, the Morissets met with Cook employee Ryan Moeller, who

---

<sup>243</sup> Jansen Ex. 104 at 16; Ex. 99 at 47–48.

promised them a return of 10% and that they could get their money out at any time.<sup>244</sup>

Karen Morisset has worked as a loan officer and at a credit union for the past thirteen years.<sup>245</sup> The highest rate of return she had heard of for an investment product prior to the Cook strategy was 6%.<sup>246</sup>

In July of 2008, the Morissets sent \$55,734.26 of qualified IRA money to the scheme through custodian Entrust.<sup>247</sup> The Morissets signed a Crown Forex agreement requiring the party terminating the account to give written notice to the other party.<sup>248</sup> The agreement provided specific directions for withdrawing funds: “to request a withdrawal, fill in the related form and fax it or email it to us.”<sup>249</sup> The agreement showed where the form was available online.<sup>250</sup> During the year they were invested in the scheme, the Morissets never received any account statements.<sup>251</sup>

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.<sup>252</sup> Yet in late June of 2009, Respondent Defiel called and said that he “had the checks.”<sup>253</sup> Morisset went to Defiel’s house and picked up two cashier’s

---

<sup>244</sup> Jansen Ex. 104 at 45; Ex. 105 at 18–19.

<sup>245</sup> Jansen Ex. 105 at 8.

<sup>246</sup> *Id.* at 18.

<sup>247</sup> Jansen Ex. 104 at 110–11; Ex. 105 at 62–63; Ex. 110; Ex. 111.

<sup>248</sup> Jansen Ex. 106 at 17; Ex. 107 at 17.

<sup>249</sup> Jansen Ex. 106 at 9; Ex. 107 at 9.

<sup>250</sup> *Id.*

<sup>251</sup> Jansen Ex. 104 at 59–60.

<sup>252</sup> *Id.* at 77; Ex. 105 at 38–40.

<sup>253</sup> Jansen Ex. 104 at 72.

checks: \$22,000 (to George Morisset) and \$39,050 (to Karen Morisset).<sup>254</sup> In total, the Morissets received \$5,315.74 more from the scheme than they put into it. Karen Morisset thought it was “odd” that they got these checks without requesting them or signing any paperwork.<sup>255</sup> She called Cook’s headquarters the next day to try to find out what was going on, but was unable to reach anyone.<sup>256</sup>

**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 benefit of Berg’s action—the cashier’s checks for \$61,050 that were delivered to them via Respondents Dzik and Defiel. As their agent, Berg’s knowledge is imputed to the Morissets. Because no reasonable jury could conclude that Berg, the Morissets’ agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**c. The Morissets Were on Inquiry Notice.**

The Morissets never asked for their accounts to be closed, nor did they provide or receive the written notice required by the Crown Forex agreement they signed. Karen Morisset admitted that she found it “odd” that cashier’s checks payable to them and purporting to liquidate their Crown Forex accounts were given to their friend, Respondent Defiel, out of the blue.<sup>257</sup> Indeed, neither Defiel nor Dzik were signators or

---

<sup>254</sup> *Id.* at 69, 72; Ex. 15.2; Ex. 15.3.

<sup>255</sup> Jansen Ex. 105 at 23.

<sup>256</sup> *Id.* at 40–41.

<sup>257</sup> *Id.* at 23.

otherwise authorized on the Morissets' accounts. Unsolicited checks purporting to close accounts given to an unauthorized and unrelated party in and of themselves would put a reasonable person on inquiry notice of the possible insolvency of the scheme or fraudulent nature of the transfer. In fact, Karen Morisset did call Cook's headquarters the next day to determine why this unusual event had happened, proving that she was aware of enough red flags to prompt further inquiry.<sup>258</sup> Despite not getting answers to her questions, the Morissets went ahead and cashed the checks and hoped for the best.

Their previous dealings with the scheme only bolster the conclusion that the Morissets were on inquiry notice. 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. In addition, the fact that the Morissets never received any statements or other documentation from the scheme—even when their accounts were supposedly closed—was a red flag. Finally, the fact that the Morissets' qualified IRA money bypassed the custodian with which they had invested was yet another sign that the checks they received were not the product of a legitimate, arms-length transaction.

Taken together, a reasonable jury must conclude that the facts known to the Morissets put them on inquiry notice of the potentially fraudulent purpose of the transfers they received in the summer of 2009 and the possible insolvency of the scheme. Thus, even independent of Berg's knowledge being imputed to them, the Morissets cannot meet their burden to establish the good faith affirmative defense. They must return the

---

<sup>258</sup> *Id.* at 40.

\$61,050 they received in fraudulent transfers to the Receiver for equitable distribution to Cook's victims.

## 7. Reynold Sundstrom

### a. Facts

Reynold Sundstrom, another of Berg's carpet customers, has known Berg both professionally and as a friend for many years.<sup>259</sup> Berg told Sundstrom about the 10% returns he was getting from the Cook scheme, and gave Sundstrom a brochure about the program.<sup>260</sup> Realizing that 10% "sounded awful good," Sundstrom asked his attorney to look into the opportunity to see "if there's something wrong with it."<sup>261</sup> Sundstrom never heard back from his attorney, but Berg "talked [him] into" investing when the two met again.<sup>262</sup> 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.<sup>263</sup> At the time, Sundstrom was not aware of any other investment opportunities that were paying even 6%.<sup>264</sup> The Sundstroms knew that Berg was Cook's father-in-law, which gave them additional comfort in the Cook companies.<sup>265</sup> Sundstrom trusted Berg would "watch out for" him.<sup>266</sup>

---

<sup>259</sup> Jansen Ex. 112 at 31, 33.

<sup>260</sup> *Id.* at 37, 39.

<sup>261</sup> *Id.* at 38–39.

<sup>262</sup> *Id.* at 60.

<sup>263</sup> *Id.* at 72, 75, 77.

<sup>264</sup> *Id.* at 78.

<sup>265</sup> *Id.* at 47, 58.

<sup>266</sup> *Id.* at 113.

Sundstrom sent checks to Oxford Global Advisors (\$60,000) and Crown Forex (\$15,000) in January of 2008 and January of 2009, respectively.<sup>267</sup> He signed agreements with Oxford Global Advisors and Crown Forex requiring the party terminating the account to give written notice to the other party.<sup>268</sup> Sundstrom also signed an agreement providing for a “contingent deferred sales charge” if the account were closed within four years of the opening date.<sup>269</sup>

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.<sup>270</sup> 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.<sup>271</sup> Berg further told Sundstrom that Cook was moving his business to Charles Schwab and that Sundstrom could reinvest “when things cool down.”<sup>272</sup> Berg then sent Sundstrom a cashier’s check for an even \$85,450 (\$10,450 more than Sundstrom had put into the scheme) drawn from the Crown Forex LLC account at Associated Bank.<sup>273</sup> According to Sundstrom, he trusted Berg to “watch out for” him, and that is what Berg was doing when he sent this money.<sup>274</sup> Sundstrom assumed that Berg acted because he was concerned

---

<sup>267</sup> Jansen Ex. 36.

<sup>268</sup> Jansen Ex. 115; Ex. 113; Ex. 117.

<sup>269</sup> Jansen Ex. 112 at 144; Ex. 113; Ex. 116.

<sup>270</sup> Jansen Ex. 112 at 151.

<sup>271</sup> *Id.* at 198, 200.

<sup>272</sup> *Id.* at 200.

<sup>273</sup> Jansen Ex. 15.10.

<sup>274</sup> Jansen Ex. 112 at 113.

about the investigation.<sup>275</sup> Sundstrom was not charged any fees for closing the account even though it was closed within four years of its opening.<sup>276</sup>

**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 no reasonable jury could conclude that Berg, Sundstrom's agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**c. Sundstrom Was 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.”<sup>277</sup> 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 to Berg and Berg's connection to Cook—which admittedly gave him additional “comfort”—and to abandon further due diligence.<sup>278</sup>

---

<sup>275</sup> *Id.* at 113, 133.

<sup>276</sup> *Id.* at 145.

<sup>277</sup> *Id.* at 39.

<sup>278</sup> *Id.* at 63, 65, 190.

The circumstances surrounding the transfer in question make it impossible for a reasonable jury to conclude that Sundstrom did not have enough clues to merit further investigation. In June 2009, Berg called Sundstrom and told him point blank that there was an investigation and 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.<sup>279</sup>

When Sundstrom received the cashier's check for \$85,450, reflecting his initial investment, plus over \$10,000 in fictitious "interest," it was unaccompanied by any receipt, final statement, or other documentation. In contravention of the written agreements he had with the Cook companies, Sundstrom was not charged an early redemption fee and had not received written notice of the account closure. The transfer did not bear any resemblance to a legitimate transaction, and leaves no doubt that Sundstrom was on inquiry notice of the fraudulent nature of the transfer. Thus, Sundstrom cannot bear his burden of establishing the good faith affirmative defense. He must return the \$85,450 to the Receiver for equitable distribution to Cook's victims.

## **8. Steven Kautzman**

### **a. Facts**

Kautzman is another of Berg's carpet customers and has known Berg for over eleven years.<sup>280</sup> Berg told Kautzman that his son-in-law was involved with an investment

---

<sup>279</sup> *Id.* at 113, 197.

<sup>280</sup> Jansen Ex. 120 at 25.

opportunity that offered a 10–12% rate of return.<sup>281</sup> Kautzman then met with Cook employee Ryan Moeller at Cook’s headquarters, and decided to send IRA funds to the scheme in March 2009.<sup>282</sup> He routed his IRA funds through custodian Entrust.<sup>283</sup> Kautzman signed agreements with Crown Forex and Oxford Global Advisors requiring the party terminating the account to provide written notice to the other party.<sup>284</sup> 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.<sup>285</sup>

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.”<sup>286</sup> 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.”<sup>287</sup> According to Kautzman, Berg “performed” on this agreement when he sent funds back to Kautzman.<sup>288</sup>

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.<sup>289</sup> 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

---

<sup>281</sup> *Id.* at 30, 40.

<sup>282</sup> *Id.* at 42.

<sup>283</sup> Jansen Ex. 120 at 18; Ex. 126.

<sup>284</sup> Jansen Ex. 121; Ex. 122

<sup>285</sup> Jansen Ex. 121.

<sup>286</sup> Jansen Ex. 120 at 19.

<sup>287</sup> *Id.* at 55–56, 160.

<sup>288</sup> *Id.* at 160, 161, 53–56.

<sup>289</sup> *Id.* at 43, 60, 95.

they were mailing the check” to Kautzman.<sup>290</sup> Kautzman received a cashier’s check dated June 29, 2009 for an even \$119,550 (\$3,080.70 more than he had put into the scheme) by FedEx.<sup>291</sup> Despite the agreement he signed, Kautzman was not charged any fees for this transaction.

**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.<sup>292</sup> Berg “performed” on those instructions by getting money out of the scheme for Kautzman, illustrating not only that there was trouble, but that he was acting as Kautzman’s agent in accordance with Kautzman’s instructions. As Kautzman’s agent, Berg’s knowledge is imputed to Kautzman. Because no reasonable jury could conclude that Berg, Kautzman’s agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**c. Kautzman Was on Inquiry Notice.**

According to Kautzman, he instructed Berg to “protect” him and “make darn sure” that Kautzman got his money back “if there’s ever anything going on.”<sup>293</sup> Kautzman admits that Berg “performed” on that agreement when he sent funds to Kautzman in the summer of 2009.<sup>294</sup> Berg told Kautzman that one of Cook’s partners was “having some

---

<sup>290</sup> *Id.* at 52.

<sup>291</sup> *Id.* at 53; Ex. 15.4.

<sup>292</sup> Jansen Ex. 120 at 160.

<sup>293</sup> *Id.* at 19, 54.

<sup>294</sup> *Id.* at 161.

issues,” and was obviously concerned enough that he had closed Kautzman’s account.<sup>295</sup>

A reasonable person under these circumstances would question and whether the Cook companies were insolvent or involved in illegitimate operations.

Moreover, Kautzman had not provided or received any withdrawal forms or written notice as required by the agreements he had signed. The cashier’s check that Berg sent to Kautzman was unaccompanied by any receipts, final statements, or any documentation whatsoever. 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. All of these red flags lead to only one reasonable conclusion: Kautzman remained willfully ignorant of the illegitimacy and insolvency of the scheme. Thus, Kautzman cannot meet his burden to establish the good faith affirmative defense. He must return the \$119,550 he received in a fraudulent transfer to the Receiver for equitable distribution to Cook’s victims.

## **9. Cynthia and Michael Hillesheim**

### **a. Facts**

Cynthia Hillesheim has known Berg for seventeen years through the carpet business.<sup>296</sup> Berg told Hillesheim about Cook’s program and arranged for her and her husband, Michael, to visit Cook at his headquarters.<sup>297</sup> Berg and Cook promised the

---

<sup>295</sup> *Id.* at 52.

<sup>296</sup> Jansen Ex. 128 at 15.

<sup>297</sup> *Id.* at 20–21.

Hillesheims a guaranteed 10% rate of return with no risk to their principal.<sup>298</sup> The Hillesheims knew that Berg was Cook's father-in-law.<sup>299</sup>

Between June of 2007 and May of 2008, the Hillesheims gave \$220,079.18 to Cook.<sup>300</sup> Funds invested in October 2007 and April 2008 consisted of qualified IRA money, and were sent to the scheme through custodian Millennium.<sup>301</sup> The Hillesheims 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.<sup>302</sup> 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."<sup>303</sup> The agreement showed where the form was available online.<sup>304</sup>

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."<sup>305</sup>

During the time they were invested in the scheme, the Hillesheims were getting the returns they had been promised.<sup>306</sup> 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,

---

<sup>298</sup> *Id.* at 21–23.

<sup>299</sup> *Id.* at 15–16.

<sup>300</sup> Jansen Ex. 36

<sup>301</sup> Jansen Ex. 127 at 117.

<sup>302</sup> Jansen Ex. 129–134; Ex. 137–140.

<sup>303</sup> Jansen Ex. 140 at 7.

<sup>304</sup> *Id.*

<sup>305</sup> Jansen Ex. 127 at 83,193; Ex. 128 at 31, 71–72.

<sup>306</sup> Jansen Ex. 36, Jansen Ex. 149; Jansen Ex. 127 at 133–38.

Berg suddenly and unexpectedly called Cynthia Hillesheim at work to inform her that he had cashed the Hillesheims out.<sup>307</sup> Berg seemed “worried” on the telephone, and told Hillesheim that there was an investigation.<sup>308</sup> Berg said that he did not want the Hillesheims’ money to be “locked up” in the investigation.<sup>309</sup>

The Hillesheims then received cashier’s checks for an even \$256,150—\$36,070.82 more than they had put into the scheme.<sup>310</sup> There was no receipt, closing statement, or other paperwork delivered with the checks.<sup>311</sup> Contrary to the forms they signed, a check purporting to contain their retirement funds was given to them without involving custodian Millennium at all.<sup>312</sup>

Cynthia Hillesheim assumed that Berg had some “concerns” about the Cook companies and was acting on the “understanding” that Berg had with the Hillesheims.<sup>313</sup> 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].”<sup>314</sup>

**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.<sup>315</sup> The Hillesheims explicitly granted Berg the authority to act on their behalf to “get their

---

<sup>307</sup> Jansen Ex. 128 at 61.

<sup>308</sup> *Id.* at 64–66.

<sup>309</sup> Jansen Ex. 128 at 148–50.

<sup>310</sup> Jansen Ex. 36; Ex. 15.8; Ex. 15.9; Ex. 16.6; Ex. 16.8; Ex. 16.9.

<sup>311</sup> Jansen Ex. 127 at 80.

<sup>312</sup> Jansen Ex. 15.8; Ex. 15.9; Ex. 16.6; Ex. 16.8; Ex. 16.9; *see also* Ex. 141; Ex. 142.

<sup>313</sup> Jansen Ex. 128 at 63,138.

<sup>314</sup> *Id.* at 197, 151.

<sup>315</sup> *Id.* at 197.

money out of there” if they failed to get the interest rate they had been promised or if Berg had any “concerns.”<sup>316</sup> 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 Hillesheim’s authority as their agent. As their agent, Berg’s knowledge is imputed to the Hillesheims. Because no reasonable jury could conclude that Berg, the Hillesheims’ agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**c. The Hillesheims Were on Inquiry Notice.**

According to the Hillesheims, their instructions to Berg were to close their accounts in the event that Berg had any concerns. Cynthia Hillesheim admitted that she believed Berg had acted on that agreement—that he had some “concerns”—when he called her out of the blue to inform her that he had checks for them.<sup>317</sup> Hillesheim was under the impression that Berg was worried about an investigation that was so serious it could have “locked up” the Hillesheims’ money. A reasonable person under these circumstances would have reason to investigate further into whether the scheme was insolvent or fraudulent.

The Hillesheims did not fill out any withdrawal forms and they did not receive the written notice required by the agreements they had signed. The cashier’s checks that Berg mailed to the Hillesheims were unaccompanied by any receipts, final statements, or any documentation whatsoever. Although the Hillesheims had invested qualified IRA

---

<sup>316</sup> Jansen Ex. 127 at 83, 193.

<sup>317</sup> Jansen Ex. 128 at 138.

money through third party custodian Millennium, all of the money they received came directly from the scheme and bypassed the custodian. All of these red flags lead to only one reasonable inference: the Hillesheims remained willfully ignorant of the illegitimacy and insolvency of the scheme. Thus, even independent of Berg's bad faith, the Hillesheims cannot meet their burden to establish the good faith affirmative defense. They must return the \$256,150 they received in fraudulent transfers to the Receiver for equitable distribution to Cook's victims.

## **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.<sup>318</sup> In early 2008, Berg told McIntosh that he had invested with his son-in-law, Cook, and that he was getting a very good return on the money.<sup>319</sup> Berg set up a meeting between McIntosh and Cook at the VanDusen mansion in June or July of 2008.<sup>320</sup> McIntosh was told that there would be no risk to his principal because of Cook's proprietary software.<sup>321</sup>

McIntosh had previously invested in mutual funds, individual stock equities (both independently and through a broker), bond funds, and real estate.<sup>322</sup> Because the returns he was getting on his IRA money "weren't exactly at the same levels" as the returns

---

<sup>318</sup> Jansen Ex. 150 at 33–35.

<sup>319</sup> *Id.* at 38, 41.

<sup>320</sup> *Id.* at 43.

<sup>321</sup> *Id.* at 198.

<sup>322</sup> *Id.* at 31.

Cook was offering—in fact, he had realized a -0.79% rate of return for the last quarter before he invested with Cook.<sup>323</sup>

Berg’s connection to Cook was a primary 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.”<sup>324</sup> Berg promised McIntosh that Berg would watch out for him, and McIntosh “trusted [Berg] was acting in [McIntosh’s] best interest.”<sup>325</sup> McIntosh decided to roll \$250,000 of qualified IRA money into Cook’s scheme in August 2008.<sup>326</sup> To do so, McIntosh opened up a self-directed IRA account with Entrust.<sup>327</sup> 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.<sup>328</sup> Under the terms of the agreement, McIntosh was the only person with the authority to command 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.<sup>329</sup> McIntosh also agreed to a 0.5% “termination” fee upon closure of his Entrust account.<sup>330</sup>

McIntosh also signed agreements with Crown Forex and Oxford Global Advisors. These agreements required the party terminating the purported account to provide written

---

<sup>323</sup> *Id.* at 130.

<sup>324</sup> Jansen Ex. 150 at 61.

<sup>325</sup> *Id.* at 165, 214, 216.

<sup>326</sup> *Id.* at 56, 130.

<sup>327</sup> Jansen Ex. 154; Ex. 155.

<sup>328</sup> Jansen Ex. 154 at 3. *See also* Ex. 155 at 4; Ex. 155 at 6; Ex. 155 at 8–9; Ex. 155 at 11.

<sup>329</sup> Jansen Ex. 155 at 7.

<sup>330</sup> Jansen Ex. 155 at 3.

notice to the other party.<sup>331</sup> 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.<sup>332</sup> 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.”<sup>333</sup> The agreement showed where the form was available online.<sup>334</sup>

McIntosh had filled out and signed a written “Distribution Form,” directing Entrust to send him \$2,188 every month from the Cook companies.<sup>335</sup> And between September 2008 and June 2009, McIntosh received at least 11 monthly “interest” payments from the scheme.<sup>336</sup> Each of these distributions came in the form of a conventional check, payable from the account of “Entrust Midwest, LLC.”<sup>337</sup>

On or about June 30, 2009, Berg called McIntosh to share the news of the investigation into Cook’s scheme.<sup>338</sup> Specifically, Berg stated that Bo Beckman was being investigated, and said that McIntosh should “get out” to avoid the chance of his money being “tied out.”<sup>339</sup> 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

---

<sup>331</sup> Jansen Ex. 151; Ex. 152.

<sup>332</sup> Jansen Ex. 151.

<sup>333</sup> Jansen Ex. 152 at 9.

<sup>334</sup> *Id.*

<sup>335</sup> Jansen Ex. 155 at 1–2. *See also* Ex. 156; Ex. 157.

<sup>336</sup> Jansen Ex. 34 at 13; Ex. 36; Ex. 156; Ex. 157.

<sup>337</sup> *See, e.g.*, Jansen Ex. 157.

<sup>338</sup> Jansen Ex. 150 at 217.

<sup>339</sup> *Id.* at 162–64.

getting.<sup>340</sup> Nevertheless, several days later he received a cashier's check directly from Crown Forex (rather than Entrust) for an even \$250,000.<sup>341</sup> Contrary to the agreements he signed, McIntosh was not charged any fees from the Cook companies or Entrust.<sup>342</sup> Moreover, 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.<sup>343</sup>

**b. Berg Was McIntosh's Agent.**

Berg brought his friend McIntosh into the Cook scheme, and 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. When Berg acted in late June 2009 to cash McIntosh out of the scheme, he was acting with McIntosh's consent and for McIntosh's benefit. McIntosh accepted the benefit of Berg's action—a \$250,000 cashier's check. As McIntosh's agent, Berg's knowledge must be imputed to McIntosh. Because no reasonable jury could conclude that Berg, McIntosh's agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**c. McIntosh Was on Inquiry Notice.**

Like the other Berg Investors, McIntosh had plenty of indications that the \$250,000 cashier's check Berg mailed to him was something other than the product of an arms-length transaction. The circumstances of this check were highly unusual and would

---

<sup>340</sup> Jansen Ex. 150 at 118, 166–67, 186.

<sup>341</sup> *Id.* at 166, 118.

<sup>342</sup> *Id.* at 120.

<sup>343</sup> Jansen Ex. 156; Ex. 157.

have caused a reasonable person to inquire further into the nature of the transfer. For one thing, Berg called McIntosh—his personal friend—to tell him that there was an investigation into Cook’s scheme and that there was a risk of money being “tied out.” Berg, the person McIntosh trusted not because of his investment expertise but because of his inside connection to Cook, was concerned enough about this investigation that he recommended “getting out.”<sup>344</sup> Berg then did get McIntosh out—without the forms, written notice, or early redemption fees required by the agreements McIntosh had signed.

Moreover, the cashier’s check that Berg sent to McIntosh came alone, without any receipt, final statement, or other documentation. Any reasonable person with even 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.

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, gave written direction to Entrust to send monthly distributions. And Entrust did so, even after Berg had closed McIntosh’s account. In stark 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.

---

<sup>344</sup> Jansen Ex. 150 at 162–64.

All of these red flags lead to only one reasonable conclusion: even independent of Berg's bad faith, as a matter of law McIntosh cannot meet his burden to establish the good faith affirmative defense. He must return the \$250,000 that he received in a fraudulent transfer to the Receiver for equitable distribution to Cook's victims.

## 11. David Buysse

### a. Facts

Buysse owns a home furnishing store.<sup>345</sup> Berg has sold him carpet for at least 20 years and does approximately \$5,000 to \$10,000 worth of business with Berg annually.<sup>346</sup> Berg approached Buysse about investing with Cook and then arranged a meeting between Cook and Buysse at Cook's headquarters.<sup>347</sup> Berg told Buysse that Buysse would be "guaranteed" a 10% return on his investment with no risk.<sup>348</sup> Buysse knew that Berg was Cook's father-in-law.<sup>349</sup>

From November 2007 through July 2008, Buysse claims he sent \$320,128.15 to Cook's scheme.<sup>350</sup> Included in this amount is one \$50,000 deposit that Buysse contends he made in the form of 500 one-hundred dollar bills given to Berg. Buysse never received a receipt for this cash deposit.<sup>351</sup>

---

<sup>345</sup> Jansen Ex. 158 at 6.

<sup>346</sup> *Id.* at 20, 52.

<sup>347</sup> *Id.* at 8, 42–44.

<sup>348</sup> *Id.* at 11.

<sup>349</sup> *Id.* at 20, 21.

<sup>350</sup> Jansen Ex. 36; Ex. 34 at 10–13.

<sup>351</sup> Jansen Ex. 158 at 93.

Buysse signed agreements with Oxford Global Advisors and Crown Forex requiring the party terminating the account to provide written notice to the other party.<sup>352</sup> 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.<sup>353</sup>

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.<sup>354</sup> 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).<sup>355</sup> The check was the only item in the envelope; there were no accompanying account closing documents, receipts, final statements, or paperwork of any kind. Buysse had never requested that his account be closed, in writing or otherwise, and did not complete any withdrawal paperwork.

**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 no reasonable jury could conclude that Berg, Buysse's agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

---

<sup>352</sup> Jansen Ex. 159; Ex. 160; Ex. 162.

<sup>353</sup> Jansen Ex. 164; Ex. 158 at 70–74.

<sup>354</sup> Jansen Ex. 158 at 14.

<sup>355</sup> Jansen Ex. 15.11.

**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 investigate further. Buysse apparently 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 clear and recognized 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. Buysse never inquired about this inconsistency.

Finally and most striking, 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 without a receipt, final statement, or any other paperwork. A reasonable person would certainly question the legitimacy of an entity that sends 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. The only reasonable inference is that Buysse was on inquiry notice as to the fraudulent nature of the transfer or the insolvency of Cook's scheme—consequently he cannot meet his burden to prove good faith. Buysse must return the

\$360,700 he received from the scheme to the Receiver for equitable distribution to Cook's victims.

## 12. Terry Frahm

### a. Facts

Jean Frahm is Berg's dental hygienist.<sup>356</sup> During one of Berg's appointments, she overheard him talking about the Cook program and asked Berg for a brochure.<sup>357</sup> Her husband, Terry Frahm, reviewed the brochure, which promised a guaranteed 12% return, and underlined the portions guaranteeing "zero fluctuation of principal."<sup>358</sup> Terry Frahm works as a global sales representative and considers himself to be an "experienced investor."<sup>359</sup> 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.<sup>360</sup>

The Frahms met with Cook and Berg on at least two occasions and knew that Berg was Cook's father-in-law.<sup>361</sup> 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.<sup>362</sup> 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.<sup>363</sup> Terry Frahm signed an agreement with Crown

<sup>356</sup> Jansen Ex. 166 at 10, 11.

<sup>357</sup> Jansen Ex. 165 at 22–23.

<sup>358</sup> Jansen Ex. 180.

<sup>359</sup> Jansen Ex. 165 at 85–86, 191; Jansen Ex. 170.

<sup>360</sup> Jansen Ex. 165 at 14, 15–17, 85–86.

<sup>361</sup> Jansen Ex. 166 at 19–22, 13, 23, 26; Jansen Ex. 165 at 43.

<sup>362</sup> Jansen Ex. 34 at 22–23; Jansen Ex. 165 at 231, 184.

<sup>363</sup> Jansen Ex. 36.

Forex providing specific directions for withdrawing funds: “to request a withdrawal, fill in the related form and fax it or email it to us.”<sup>364</sup> The agreement showed where the form was available online.<sup>365</sup> 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.<sup>366</sup> 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%.”<sup>367</sup>

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 gave him and “felt uncomfortable with Cook.”<sup>368</sup> Frahm claims that he sent 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.<sup>369</sup> Frahm disposed of the computer he allegedly used to write the letter shortly thereafter and did not keep an electronic copy.<sup>370</sup>

In late June 2009 Berg called the Frahms and told Jean her he had some checks for her.<sup>371</sup> 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

---

<sup>364</sup> Jansen Ex. 174 at 5.

<sup>365</sup> *Id.*

<sup>366</sup> Jansen Ex. 173; Ex. 167; Ex. 168.

<sup>367</sup> Jansen Ex. 180 at 6.

<sup>368</sup> Jansen Ex. 189 at 53. *See also* Jansen Ex. 165 at 101–02, 131.

<sup>369</sup> Jansen Ex. 181; Jansen Ex. 165 at 172–74.

<sup>370</sup> Jansen Ex. 190 at 6–7.

<sup>371</sup> Jansen Ex. 166 at 48.

\$793,370, purportedly consisting of Frahm's nonqualified funds.<sup>372</sup> Berg explained to the Frahms that he had closed their account because there was an "investigation" or "audit" going on.<sup>373</sup> As Jean Frahm recalled, Berg told her "that Bo's [Beckman] side of the business, that there was an audit going on. . . . There was an audit. They were possibly going to look at the books."<sup>374</sup>

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<sup>375</sup> Berg did not provide Frahm with a receipt, final statement, or any other written confirmation that Frahm's accounts had been closed.<sup>376</sup> 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, the undisputed facts show that Cook actually acted on *Berg's* demand to cash his clients out, not the unsigned letter that may or may not have been received.<sup>377</sup> 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 by accepting the money that Berg got for him. As his agent, Berg's knowledge is imputed to Frahm.

---

<sup>372</sup> Jansen Ex. 16.5; Ex. 16.7.

<sup>373</sup> Jansen Ex. 165 at 114–16; Jansen Ex. 166 at 48.

<sup>374</sup> Jansen Ex. 166 at 48.

<sup>375</sup> Jansen Ex. 165 at 160, 162.

<sup>376</sup> Jansen Ex. 165 at 237.

<sup>377</sup> 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.)

Because no reasonable jury could conclude that Berg, Frahm's agent, acted in objective good faith, summary judgment in favor of the Receiver is proper.

**c. Frahm Was on Inquiry Notice.**

Even independent of Berg's knowledge, Frahm was on inquiry notice of the insolvency or fraudulent nature of Cook's scheme. Frahm, a self-proclaimed "experienced investor," admits that the facts he learned—even before receiving the checks from Berg under strange and suspicious circumstances—were sufficient to put him on inquiry notice. Frahm "got a bad feeling" from the answers Cook gave him regarding tax questions, and felt "uncomfortable" with Cook. Frahm questioned whether the qualified IRA money he had invested was actually in a qualified account. The undisputed facts surrounding Frahm's receipt of the two cashier's checks on June 29, 2009 only reinforce the conclusion that Frahm was on inquiry notice.

First, Berg felt the need to tell the Frahms *why* he was hand-delivering cashiers' checks, explaining that there was an "investigation" or "audit" going on.<sup>378</sup> If Berg were simply delivering checks per Terry Frahm's request, this explanation would have been particularly out of place. Yet despite this unsolicited and odd justification, Frahm did not inquire further.

Second, the contents—or lack thereof—of Berg's delivery were unusual. 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

---

<sup>378</sup> Jansen Ex. 166 at 48.

brochure describing them.<sup>379</sup> Moreover, the cashiers' 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.

Third, the cashiers' checks ostensibly included qualified IRA money. Frahm claims he requested that these IRA funds be rolled directly over into Oxford PCG equities program,<sup>380</sup> 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.<sup>381</sup> 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.<sup>382</sup> Yet Frahm was never charged this fee. Thus the delivery of a cashiers' check consisting of Frahm's IRA money—without any fees taken out, without any interaction with Entrust, and without any explanation—should have caused a reasonable person of Frahm's experience level and sophistication to inquire further.

Fourth, 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

---

<sup>379</sup> Jansen Ex. 165 at 125-26; Jansen Ex. 180.

<sup>380</sup> Jansen Ex. 165 at 120.

<sup>381</sup> Jansen Ex. 179 at 3.

<sup>382</sup> *Id.* at 4.

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.<sup>383</sup>

Frahm was an experienced, hands-on, and sophisticated investor. He watched his investments intently, read the agreements closely, and asked questions when he had them. 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 as to the fraudulent nature or the insolvency of Cook's scheme. Frahm cannot meet his burden of proving good faith. He must return the \$916,570 to the Receiver for equitable distribution to Cook's victims.

**V. Summary Judgment on the Receiver's Fraudulent Transfer Claim Against Dot Anderson Must Be Granted.**

**A. Basel Group LLC Was Used to Perpetrate the Cook Ponzi Scheme.**

Basel Group LLC existed only as a name on a bank account that was used in Cook's Ponzi scheme; it was never formally organized under the laws of any state.<sup>384</sup> The account was opened on June 9, 2009, with Pat Kiley and Julia Smith as signators.<sup>385</sup> Although not a signator on the Basel Group account, Cook controlled the money going in and out of it. He specifically instructed all new investors' money to be deposited into this Basel Group account.<sup>386</sup> Over the next month, the account was used to collect and commingle over \$500,000 from investors.<sup>387</sup> On July 13, 2009, Cook transferred

---

<sup>383</sup> Jansen Ex. 174 at 5.

<sup>384</sup> Jansen Ex. 2 at ¶ 15.

<sup>385</sup> Jansen Ex. 191; Jansen Ex. 2 at ¶ 5(a).

<sup>386</sup> Jansen Ex. 13 at 65–66, 68, 69.

<sup>387</sup> Jansen Ex. 2 at ¶ 58; Jansen Ex. 3; Hlavacek Ex. I; Jansen ¶ 200.

\$350,000 of investor funds from another one of his companies, Oxford Global FX LLC, into the Basel Group account.<sup>388</sup> Cook also directed \$102,000 from this commingled account to be wired to Respondent Anderson.<sup>389</sup> Anderson was the only investor who got money out of the Basel Group account.<sup>390</sup>

It cannot be reasonably disputed that the Basel Group account at Associated Bank was part of the Ponzi scheme. Cook used the Basel Group account like all other accounts he controlled: as a single pool of resources to keep the scheme afloat. Investor funds were deposited and comingled there. Investor funds from another Ponzi scheme account, Oxford Global FX, were transferred there as well. The account was used to pay an earlier investor (Anderson) as well as for illegitimate, non-investment purposes such as attorney fees, marketing costs, and transfers to other companies.<sup>391</sup> These are clear hallmarks of a Ponzi scheme. *E.g. In re Bonham*, 229 F.3d 750, 759 n.1 (9th Cir. 2000); *Agric. Research & Tech.*, 916 F.2d at 536. These transactions inextricably link the Basel Group account to the larger Ponzi scheme. *See Warfield v. Carnie*, No. 3:04-cv-633-R 2007 U.S. Dist. LEXIS 27610, at \*31–32 (N.D. Tex. Apr. 13, 2007).

#### **B. Anderson’s Involvement with Cook’s Scheme**

Anderson learned of an “investment” opportunity with Cook because her grandson, Grant Grzybowski, worked for Cook as a salesman.<sup>392</sup> Grzybowski gave his grandmother a brochure and told her she would earn a 10.5% return—there was no

---

<sup>388</sup> Jansen Ex. 2 at ¶ 15; Hlavacek Ex. I.

<sup>389</sup> Hlavacek Ex. I.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> Jansen Ex. 182 at 11.

mention of any risk.<sup>393</sup> On June 12, 2009, Anderson sent a check for \$102,000 to a company called “Basel International.”<sup>394</sup> The amount represented a \$100,000 principal “investment” and a \$2000 charge to set up the account. Anderson signed agreements imposing this 2% entry fee as well as a 4% “redemption fee” or “contingent deferred sales charge” if she closed the account within one year of opening it.<sup>395</sup>

On July 8, 2009 Cook warned Grzybowski that there would be an article in the paper the following day about investors who had filed suit because they could not get money out of the currency program.<sup>396</sup> When this article was published in the Star Tribune on July 9, 2009, Grzybowski’s phone “blew up” with calls from concerned investors.<sup>397</sup> Cook would not give Grzybowski a straight answer about “what was going on, why these people weren’t getting their money back.”<sup>398</sup>

Sometime on or before July 15, 2009, Anderson read a Star Tribune article “in regards . . . to the Ponzi scheme.”<sup>399</sup> She immediately called her grandson Grzybowski and told him “I think you know why I’m calling . . . I just read the article in the paper.”<sup>400</sup> Anderson then asked Grzybowski to close her account.<sup>401</sup> Grzybowski specifically explained to Anderson that she would be charged the 4% early withdrawal

---

<sup>393</sup> *Id.* at 13, 15.

<sup>394</sup> Jansen Ex. 183; Ex. 182 at 38–40.

<sup>395</sup> Jansen Ex. 13 at 86–88; Ex. 184; Ex. 186; Ex. 187.

<sup>396</sup> Jansen Ex. 13 at 108–09.

<sup>397</sup> *Id.* at 111.

<sup>398</sup> *Id.* at 184.

<sup>399</sup> Jansen Ex. 182 at 45.

<sup>400</sup> Jansen Ex. 13 at 119.

<sup>401</sup> Jansen Ex. 182 at 44, 45.

fee, and she indicated that she was okay with that.<sup>402</sup> Grzybowski had his grandmother sign a withdrawal form, which he turned in to Cook.<sup>403</sup> On July 15, 2009, Cook directed his assistant to send Anderson two wires, \$101,000 and \$1,000 respectively, from the Basel Group account at Associated Bank.<sup>404</sup> Either that same day or the next day Grzybowski called Anderson back and told her that he was able to get the money out.<sup>405</sup> Grzybowski also told Anderson that if she had called six hours later, she would not have been able to do so.<sup>406</sup> Indeed, accounts under Cook's control were frozen by court order on July 15, 2009.<sup>407</sup> Cook himself also called Grzybowski to confirm that Anderson had received the wired funds.<sup>408</sup>

Anderson received a total of \$102,000 from the fraud. Her up-front sales charge was refunded and no early withdrawal fees were assessed.<sup>409</sup> Anderson was also the only one of Grzybowski's clients—and, in fact, the only investor in Cook's scheme—whose account was closed after the July 9, 2009 Star Tribune article was published.<sup>410</sup>

**C. The Transfer to Anderson Was Fraudulent Under Minnesota Uniform Fraudulent Transfer Act.**

As shown in Part IV.A, it cannot be disputed that Cook perpetuated a massive Ponzi scheme. And, as shown in Part III.A, it cannot be disputed that the Basel Group

---

<sup>402</sup> Jansen Ex. 13 at 185.

<sup>403</sup> *Id.* at 113, 123, 139.

<sup>404</sup> Jansen Ex. 192; Jansen Ex. 36.

<sup>405</sup> Jansen Ex. 182 at 52-53.

<sup>406</sup> *Id.* at 55; Jansen Ex. 187.

<sup>407</sup> Jansen Ex. 21 at 2-3.

<sup>408</sup> Jansen Ex. 13 at 142.

<sup>409</sup> Jansen Ex. 188.

<sup>410</sup> Jansen Ex. 13 at 144.

LLC account was part of that scheme and therefore was insolvent from its inception. *See Warfield*, 436 F.3d at 558. Thus, the Ponzi scheme presumption applies: all transfers made from the Basel Group LLC account were made with actual intent to hinder, delay, or defraud. Minn. Stat. § 513.44(a)(1); *see, e.g. Donell*, 533 F.3d at 770. Further, it is not disputed that Anderson received \$102,000 from the Basel Group LLC account; thus this transfer was fraudulent as a matter of law under the MUFTA. This transfer must be avoided unless Anderson can meet her burden of proving both good faith and reasonably equivalent value.

Even if Basel Group were somehow considered to be independent of Cook's larger Ponzi scheme, the transfer to Anderson would still be fraudulent under the MUFTA. Basel Group LLC was controlled by Cook and functioned in the same fraudulent manner as his other entities. The transactions over the short life of the Basel Group account show that it was used to take investors' money and to then divert those funds for non-investment purposes. Basel Group LLC was insolvent when Cook sent the \$102,000 to Anderson because it could not pay the debts it owed. As of July 15, 2009, the moment before the transfer to Anderson, the Basel Group LLC account had a cash balance of \$404,725 after taking in \$504,625 from investors—a deficit of \$99,900.<sup>411</sup> Fraudulent intent can thus be presumed as a matter of law: the undisputed facts show that investors' money was commingled in the Basel Group account; that the account was rendered insolvent by using investors' money for non-investment purposes; and that the wires to Anderson only worsened the deficit, leaving every other investor with catastrophic losses.

---

<sup>411</sup> Hlavacek Ex. I.

**D. Anderson Lacked Good Faith.**

The undisputed facts also show that Anderson's good faith defense fails because she was on inquiry notice of the insolvency or fraudulent nature of Cook's scheme when she received the payout.

First, she read about the fraud and not only asked about it, she demanded that her grandson, who worked for the fraud, get her money back. At a minimum, knowledge of a lawsuit by other investors put Anderson on inquiry notice that the subsequent transfer to her was not made in good faith. *Sherman*, 67 F.3d at 1355–56. A clearer red flag is difficult to imagine—a reasonable person in Anderson's position would have inquired further about the funds she received. Anderson admits that the news prompted her to act immediately. But once the funds were wired to her bank account, she did no further investigation.

Second, at the time Anderson received the \$102,000 she was or should have been aware of facts indicating that this was not an ordinary business transaction. Anderson's interactions with Cook's scheme—her initial investment, her later demand for money after reading the Star Tribune article, and finally the telephone call confirming that money had been wired to her account—were all informal and exclusively through her grandson Grzybowski. Moreover, Anderson was never charged any of the fees specified by the agreements she signed. When Anderson called to close her account after reading the Star Tribune article, Grzybowski specifically explained that she would be charged the 4% early termination fee. But then later that same day she was sent the full \$102,000.

Third, Anderson's contact with Cook's scheme was marked by many other "unusual circumstances" that would cause a reasonable person in her position to investigate further. Anderson recalled that when Grzybowski called to say that the money had been wired to her bank, he told her that if she had called only 6 hours later, she would not have been able to get the money.<sup>412</sup> Anderson did not ask Grzybowski why this was or make any further inquiry whatsoever.<sup>413</sup> Anderson was also promised a 10.5% return with no risk. This rate was over three times the 3% return she was making in the savings account at her bank.<sup>414</sup> And Anderson's payout came from Basel Group, even though she believed that she had invested with a company called "Oxford."<sup>415</sup> Anderson did not inquire about any of these issues.

In view of these facts, a reasonable jury could come to only one conclusion—that Anderson was on inquiry notice that Cook's scheme was either fraudulent or insolvent and that she chose to bury her head in the sand and get her money from it rather than inquiring further. Thus, Anderson did not take the money Cook sent to her in objective good faith and cannot establish the affirmative defense. Cook's fraudulent transfer to Anderson must be voided and the funds returned to the Receivership for equitable distribution.

---

<sup>412</sup> Jansen Ex. 182 at 55.

<sup>413</sup> *Id.* at 56.

<sup>414</sup> *Id.* at 16.

<sup>415</sup> *Id.* at 18, 39, 72.

## **VI. All Respondents Were Unjustly Enriched by the Transfers in Question.**

The Receiver has also stated a claim against Respondents for unjust enrichment. The material facts are not in dispute; the Receiver respectfully requests that the Court grant summary judgment in the Receiver's favor as a matter of law.

### **A. Legal Background**

Unjust enrichment requires the plaintiff to prove that a defendant "knowingly received something of value, not being entitled to the benefit, and under circumstances that would make it unjust to permit its retention." *Brown*, 643 F. Supp. 2d at 1083 (quoting *Southtown Plumbing, Inc. v. Har-Ned Lumber Co.*, 493 N.W.2d 137, 140 (Minn. App. 1992)). The theory of unjust enrichment supports recovery in situations of fraud "where it would be morally wrong for one party to enrich himself at the expense of another." *Id.* at 1083.

Unjust enrichment does not require that the defendant committed a wrong. *Id.*; *Hartford Fire Ins. Co. v. Clark*, 727 F. Supp. 2d 765, 777–78 (D. Minn. 2010); *Kranz v. Koenig*, 484 F. Supp. 2d 997, 1001 (D. Minn. 2007). For example, in *Brown*, a Ponzi scheme operator used fraudulently obtained investor funds to pay the mortgage on his personal residence. 643 F. Supp. 2d at 1079. The defendant mortgage company, which had received proceeds of the fraud pursuant to an arm's length, straight-forward mortgage loan, was not alleged to have done anything illegal, immoral, or wrong in any way. *Id.* at 1083. But the court found this to be irrelevant to the adequacy of the receiver's claim; "an unjust enrichment claim does not require a defendant to commit a wrong, but only requires that the defendant benefit from another's wrong." *Id.* Other

districts are in accord with Minnesota on this point. *See, e.g., Missal v. Washington*, No. 97-982, 1998 U.S. Dist. LEXIS 6016, at \*14 n.6 (D.D.C. Apr. 17, 1998) (“Unjust enrichment does not depend so much on the culpability of the person who received the property, but on the right of some other person to that property.”); *Goldberg v. Chong*, No. 07-20931, 2007 U.S. Dist. LEXIS 49980 (S.D. Fla. July 11, 2007) (granting summary judgment to receiver on claims of both fraudulent transfer and unjust enrichment where perpetrator of fraud paid employee an exorbitant salary when millions of dollars were owed to defrauded investors).

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). However, in the present case, there are no valid contracts—the currency program was a sham, as were the documents investors signed when they gave their money to Cook. Contracts obtained through fraud, like those in this Ponzi scheme, violate public policy and 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).

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 v. Adam*, 512 F. Supp. 2d 1330, 1342 (N.D. Ga. 2007) (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*, 2007 U.S. Dist. LEXIS 49980, at \*29–30 (granting summary judgment to Receiver on unjust enrichment despite defendant's compensation agreement).

**B. The Berg Investors Were Unjustly Enriched.**

**1. The Berg Investors Knowingly Received Something of Value.**

There is no question that the Berg Investors knowingly received something of value from this Ponzi scheme: Berg handed them cashier's checks representing the full amount they had put into the scheme, plus profits as high as 19%.<sup>416</sup> The value of these transactions was extraordinary—especially when compared to those who were not beneficiaries of Cook and Berg's inside deal. While the Berg Investors realized handsome profits, everyone else lost everything, eventually recovering less than 3% from

---

<sup>416</sup> The cashier's check Berg gave to Respondent Defiel was 119% more than what Defiel gave to Cook. *Jansen Ex. 36, Ex. 34* at 12–13.

the Receiver.<sup>417</sup> The \$7 million that Cook withdrew for Berg and his friends depleted the funds available to pay those victims and contributed to the meagerness of their recovery. Berg went so far as to tell his clients about the value he was delivering. He explained that he had cashed out their accounts because of an investigation and to avoid any risk of their funds being “locked up” as a result.<sup>418</sup>

**2. The Berg Investors Were Not Entitled to the Money that Was Funneled to Them in the Summer of 2009 and It Would Be Unjust for Them to Keep It.**

The Berg Investors are not entitled to the money that was funneled to them in the final days of the scheme. There is no legitimate distinction between them and over 700 losing investors who were left with nothing. Both groups thought they were investing in a foreign currency program.<sup>419</sup> They were all promised safety and the same double-digit returns.<sup>420</sup> They signed the same account documents with the same terms and they received the same fictional account statements.<sup>421</sup> Millions of dollars from all of them were commingled in the same Crown Forex, UBS Diversified Growth, and Oxford Global Advisors bank accounts.<sup>422</sup> The only difference between the Berg Investors and the losing investors was Berg and the inside deal he had with his son-in-law.

---

<sup>417</sup> Jansen ¶ 206.

<sup>418</sup> *E.g.*, Jansen Ex. 128 at 148–50.

<sup>419</sup> Jansen Ex. 29. For example, compare Ex. 67 with Ex. 29.2; Ex. 167 with Ex. 29.19.

<sup>420</sup> Jansen Ex. 29. For example, compare Ex. 116 with Ex. 29.21; Ex. 102 with Ex. 29.22.

<sup>421</sup> Jansen Ex. 29.

<sup>422</sup> Over \$79 million in investor money was transferred to Crown Forex LLC, including \$1.4 million from the Berg Investors; over \$76 million in investor money was transferred to UBS Diversified Growth LLC, including \$738,500 from the Berg Investors; and over

Moreover, the cashier's checks that the Berg Investors received did not consist of "their money," as they like to say. As a matter of law, the Berg Investors' money was stolen the minute they handed it over to Cook—the scheme was insolvent from inception. *Warfield*, 436 F.3d at 558. The Berg Investors never had any segregated accounts—in fact, they never had any accounts at all.<sup>423</sup> The documents they signed were not valid contracts, they were tools of a fraud. *Cummings*, 715 F. Supp. 2d at 911; *TCS Holdings*, 2007 U.S. Dist. LEXIS 56275, at \*14–15. The statements they received were pure fiction and the calculation of their so-called interest was simple arithmetic that had nothing to do with currency trading.<sup>424</sup>

Other than Gryzbowski getting money out for his grandmother, Berg was the only one able to cash out his clients after the SEC began its investigation in the summer of 2009. But he was not the only one who asked. In stark contrast to the Berg Investors (who never asked Berg for the money), at least 166 other investors tried unsuccessfully to get money from Cook's scheme during the summer of 2009.<sup>425</sup> This includes 152 investors who, on or after June 22, 2009, submitted the "withdrawal forms" or "sell direction letters" required by their agreements with the Cook companies.<sup>426</sup> Not a single one was honored.<sup>427</sup> Even before Berg cashed out his clients, other investors had been unsuccessfully trying to close their "accounts" for quite some time. For example, Kim

---

\$23 million in investor money was transferred to the Oxford Global Advisors, including \$3.2 million from the Berg Investors. Hlavacek ¶ 4–6; Jansen Ex. 36.

<sup>423</sup> Jansen Ex. 2 at ¶ 21.

<sup>424</sup> Jansen Ex. 4 at ¶ (i).

<sup>425</sup> Jansen ¶¶ 24–25; Ex. 23; Ex. 24.

<sup>426</sup> Jansen Ex. 23.

<sup>427</sup> Jansen ¶ 26; Ex. 25.

and Joel Von Ende began trying to close their account as far back as June 1, 2009; Howard, Sharon and David Phillips began trying to close their accounts on June 4, 2009; and Kenneth and Judy Hale began trying to close their account on June 24, 2009.<sup>428</sup> All told, the 166 investors who tried unsuccessfully to withdraw money in the summer of 2009 lost a total of over \$56 million in the scheme.<sup>429</sup>

The undisputed fact is that Cook took money that other investors had given to him and in the summer of 2009 handed \$7 million of it to a chosen few: Berg and his friends. No principal of law or justice entitles the Berg Investors to profit from a deal between insiders while everyone else is left holding an empty bag. It would be manifestly unfair to allow a personal connection to the mastermind of the fraud to determine who should get paid and who should lose everything.

### **C. Anderson Was Unjustly Enriched.**

#### **1. Anderson Knowingly Received Something of Value.**

Anderson similarly received value from this Ponzi scheme. With the help of her grandson, Gryzbowki, she got an amount equal to every penny she had “invested.”<sup>430</sup> This money had obvious face value. It was all the more valuable in view of the circumstances. Anderson asked Gryzbowki to get her money back after reading about a lawsuit filed by other investors who could not.<sup>431</sup> Gryzowski succeeded—and told his

---

<sup>428</sup> Jansen Ex. 198; Ex. 5 at 25–27.

<sup>429</sup> Jansen ¶ 26; Ex. 25.

<sup>430</sup> Jansen Ex. 183; Ex. 188.

<sup>431</sup> Jansen Ex. 182 at 44–45; Ex. 13 at 119.

grandmother how lucky she was: if she had called only six hours later, he would not have been able to get money out for her.<sup>432</sup>

**2. Anderson Was Not Entitled to the Money that Was Funneled to Her in the Summer of 2009 and It Would Be Unjust for Her to Keep It.**

Anderson’s “investment” was no different than that of others’ in Cook’s scheme. Anderson’s money went into the Basel Group account at Associated Bank, along with over \$400,000 from at least seven other investors.<sup>433</sup> Anderson signed the same agreements, with the same terms, as those other investors.<sup>434</sup> The only difference is that those other seven investors never got any money back from Cook—each has submitted a claim to the Receiver for the entire amount he or she “invested” and so far recovered less than three cents on the dollar.<sup>435</sup>

Like Anderson, other people also read the newspaper articles about the fraud. But they were not as lucky. Grzybowski testified that immediately after the July 9, 2009 Star Tribune article about the investor suit, his phone “blew up” with calls from panicked investors.<sup>436</sup> Other employees of the Cook scheme were also deluged by calls from investors demanding that their accounts be closed.<sup>437</sup> From July 9, 2009 through July 14, 2009, the Cook scheme received over 152 written requests and signed withdrawal forms

---

<sup>432</sup> Jansen Ex. 182 at 55.

<sup>433</sup> Hlavacek Ex. I.

<sup>434</sup> Jansen Ex. 30.

<sup>435</sup> Jansen ¶ 205.

<sup>436</sup> Jansen Ex. 13 at 111.

<sup>437</sup> Jansen Ex. 22.

from investors demanding that their accounts be closed.<sup>438</sup> None were honored. By way of just one example, at 7:50 a.m. the morning the July 9, 2009 Star Tribune article came out, one losing investor began frantically emailing and faxing Grzybowski to stop payment on a \$50,000 check that he had mailed just two days before.<sup>439</sup> Cook cashed his check anyway, and the \$50,000 was never returned.

It is undisputed that Cook gave preferential treatment to Anderson. It is also undisputed that he gave her other people's money. Although equal to the amount she had given him earlier, the money Cook wired to Anderson on July 14, 2009, was taken from an account in which other investors' money was comingled.<sup>440</sup> Indeed, the transaction that immediately preceded the \$102,000 wire out to Anderson was a \$101,000 into that same account from another investor.<sup>441</sup>

The only material difference between Anderson and the other losing investors in Cook's scheme was Anderson's connection to Grzybowski and the preferential treatment Cook gave her because of it. Cook went so far as to follow up with Gryzbowki to make sure his grandmother got the money.<sup>442</sup> This connection should not give Anderson a superior right to the funds that remained in the Basel Account in July 2009. Fairness and equity demand that Anderson receive no more than the other defrauded investors who did not have an inside track to get out of the scheme.

---

<sup>438</sup> Jansen Ex. 23.

<sup>439</sup> See Jansen Ex. 201.

<sup>440</sup> Hlavacek Ex. I.

<sup>441</sup> *Id.*

<sup>442</sup> Jansen Ex. 13 at 142.

**D. “Equality Is Equity”: Each Respondent Is Entitled Only to His or Her *Pro Rata* Share of the Funds Recovered**

Under the unique circumstances of this action, each Respondent is entitled only to his or her share of the *pro rata* distribution of any money recovered. Anything more would be unjust and contrary to the principals of equity, rewarding proximity to the mastermind of the fraud.

The agreements Respondents signed with Cook do not entitle them to keep the money that was preferentially given to them in the summer of 2009. Those same agreements did not allow the other 700 losing investors to make a full recovery, and they should not be used as a rationalization for allowing Respondents to keep these stolen funds. Moreover, there is no dispute that Respondents’ agreements were procured by fraud as part of Cook’s massive Ponzi scheme. The agreements (and the misrepresentations in them) were not valid contracts, they were tools Cook used to recruit more investor victims into his scheme. Thus, the exception to the *U.S. Fire* rule in the context of a fraud or Ponzi scheme, discussed in Part IV.A, applies here. The agreements Respondents signed do not bar recovery on the Receiver’s unjust enrichment claim and certainly do not entitle them to the windfall they received.

The seminal Ponzi scheme case of *Cunningham v. Brown* is illustrative. In that case, a bankruptcy trustee brought an action to recover funds preferentially paid to six investors in Charles Ponzi’s fraudulent scheme. 265 U.S. 1, 7–9 (1924). These six investors had successfully withdrawn their investments in the “scramble” following a public announcement that Ponzi’s office was under investigation. *Id.* at 13–14. The

Court forced the investors to return the money. The Court explained that the victims of Ponzi's scheme were "all of one class," and thus under the circumstances "equality is equity." *Id.* at 13. Although *Cunningham* concerned preferences under the bankruptcy statute rather than an unjust enrichment claim, the principle is a powerful one: in a Ponzi scheme, unfair preferences among same-situated investors should not be allowed to stand.

Here, the undisputed facts are even more egregious than those considered by *Cunningham*. Respondents did not simply win "the race of diligence;" they did not even participate in it. Berg, a scheme insider and the agent for the Berg Investors, was able to get money for the Berg Investors before anyone lacking an insider connection even knew about the race. Moreover, for everyone else the race was futile. ***Nobody***, with the exception of Anderson, who had her own insider, won the race of diligence after news of the lawsuit against Cook's entities became public. And Anderson was nowhere near the first in line. She was simply the only remaining investor who had an inside connection. After funneling money out for his wife, the Bergs, Berg's clients, and Anderson, Cook ignored all other requests.

The judgment the Receiver seeks is one founded in justice and equity: that a small group of preferred individuals not be allowed to benefit while everyone else suffers catastrophic losses. But for a single fact—their connection to an insider—Respondents would be in the same position as all of the other investors defrauded by this sad scheme. The only reasonable conclusion is that it would be unjust to allow Respondents to keep their windfall. Accordingly, the Receiver respectfully requests that the Court enter

summary judgment on his unjust enrichment claim and order Respondents to return the money that they unfairly received in the summer of 2009 as this Ponzi scheme was collapsing.

## **VII. Respondents' Other Defenses Fail as a Matter of Law.**

Respondents have collectively asserted nearly 20 different affirmative defenses throughout this litigation.<sup>443</sup> The Receiver sought to learn the basis of these numerous defenses in contention interrogatories. Respondents' final amended interrogatory answers, served on October 24, 2011 for Dot Anderson, and November 29, 2011 for the Berg Investors, make clear that despite their numerosity, none of these defenses can survive summary judgment.

### **A. Failure to State a Claim**

In the Berg Investors' one-sentence basis for this defense, and Anderson's lengthier version, they assert that the Receiver does not state a claim because (a) there was no unjust enrichment; and (b) their receipt of funds was in good faith and there was reasonably equivalent value given so there was no fraudulent transfer. Neither contention establishes the defense of failure to state a claim; indeed, Respondents' answer shows both of the Receiver's claims—unjust enrichment and fraudulent transfer. Denying as a

---

<sup>443</sup> The Berg Investors have indicated that certain defenses remain only to "preserve them for appeal," as this Court has already rejected them in their respective motions to dismiss. As such, the Receiver will not further address the following defenses: (1) subject matter jurisdiction; (2) personal jurisdiction; and (3) lack of standing to assert a fraudulent transfer claim. Jansen Ex. 34 at 46. Dot Anderson has asserted (3), but not (1) or (2). Jansen Ex. 200 at 20.

factual matter that unjust enrichment occurred and that there has been no fraudulent transfer is not sufficient to establish a failure to state a claim.

**B. Estoppel, Waiver, and Laches**

To explain their combined defenses of estoppel, waiver, and laches, Respondents state only that the Receiver could have filed for bankruptcy, but did not do so, and this fact “bars him from recovering on a preferential transfer theory.” Nowhere do Respondents explain why filing for bankruptcy protection is necessary, or even desirable, to assert unjust enrichment or fraudulent transfer claims—the two Counts alleged against each Respondent. Likewise, there is no explanation of how failure to file bankruptcy could establish any type of estoppel or waiver.

Even had Respondents explained this theory, it was soundly rejected by Judge Posner more than a decade and a half ago: “[c]orporate bankruptcy proceedings are not famous for expedition . . . and whatever advantages they may have over receiverships in a case such as this—*if any, and none has been pointed out to us*—are not ones that the defendants in these fraudulent conveyance claims should be heard to trumpet.” *Scholes*, 56 F.3d at 755 (emphasis added). In this district, Judge Montgomery made essentially the same point in the *Petters* litigation: “The less flexible forum of bankruptcy court is disfavored in circumstances such as these where the economic damage has been caused by fraud, because ‘the bankruptcy court would have less flexibility in determining the most equitable approach to distribute assets to victims.’” *United States v. Petters*, No. 08-5348, 2011 U.S. Dist. LEXIS 7206, at \*32–33 (D. Minn. Jan. 25, 2011).

As to laches, Respondents have failed to allege any delay sufficient to even discuss such a defense. They also failed to allege any prejudice, “an essential element of laches.” *Anderson v. First Nat’l Bank*, 303 Minn. 408, 413 (Minn. 1975). Similarly, to establish estoppel, the Supreme Court has instructed that “the party claiming the estoppel must have relied on its adversary’s conduct ‘in such a manner as to change his position for the worse[.]’” *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 59 (1984). Respondents fail to allege any such reliance.

As Respondents’ lone basis for asserting these three defenses fails as a matter of law, summary judgment is appropriate.

### **C. Failure to Mitigate, Election of Remedies**

In support of their “failure to mitigate” and “election of remedies,” defenses, the Berg Investors simply refer to their combined “estoppel, waiver, and laches” defense discussed above. Because those defenses cannot survive summary judgment, and because the Berg Investors have failed to provide any additional support for their “failure to mitigate” and “election of remedies,” defenses, they too fail at summary judgment.

### **D. Accord and Satisfaction<sup>444</sup>**

The defense of accord and satisfaction bears no relation to the circumstances of this case. The Receiver disputes Respondents’ oft-repeated characterization of themselves as “lenders;” they were, in fact, investors. However, solely to discuss this

---

<sup>444</sup> The Berg Investors also originally asserted the defense of the doctrine of novation in their answer, but failed to even discuss it in their contention interrogatory answer. Therefore, the Court should deem it withdrawn. To the extent not withdrawn, the analysis would closely resemble that of accord and satisfaction, and lead to the same result.

defense, the Receiver will refer to the conventional descriptions of the parties as debtors (the Cook entities) and creditors (the Respondents).

An accord is a contract in which one party, generally a debtor, offers a sum of money or some other stated performance, in exchange for which the other party, generally a creditor, promises to accept the performance in lieu of the original terms, which is generally a debt. *Webb Bus. Promotions, Inc. v. Am. Elecs. & Entm't Corp.*, 617 N.W.2d 67, 72 (Minn. 2000). The satisfaction then is the actual performance of the accord, most often the acceptance the newly agreed upon amount of money, which operates to discharge the debtor's duty as agreed to in the accord. *Id.* The purpose of accord and satisfaction is to allow parties to resolve their disputes without judicial intervention by discharging all rights and duties under a contract in exchange for a stated performance, usually a payment of a sum of money. *Id.* at 73.

To demonstrate an enforceable accord and satisfaction, a party against whom a breach of contract claim has been made must establish the following four elements: (1) the party, in good faith tendered an instrument to the claimant as full satisfaction of the claim; (2) the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim; (3) the amount of the claim was unliquidated or subject to a bona fide dispute; **and** (4) the claimant obtained payment of the instrument. *Id.* Whether there has been an accord and satisfaction is a question of fact. *Id.*

There is no genuine dispute of material fact as to at least the first three of the four required elements. As to element (1), the Cook entities that tendered checks to the

Respondents were, as a matter of law, not acting in good faith because they were part of a Ponzi scheme. *See* Parts IV.A, V.A. As to element (2), there was no written communication containing a conspicuous statement that it was being tendered as full satisfaction of any claim, nor was such a notation on the cashier's checks themselves. Finally, as to element (3), there was not even a present claim or dispute when Respondents received the checks, nor was there any dispute over the amount. Respondents must meet all four elements to establish accord and satisfaction, but cannot meet at least the first three; therefore, summary judgment is appropriate.

#### **E. Doctrine of Payment**

Respondents' "doctrine of payment" defense asserts that because they had contracts requiring an entity operating a Ponzi scheme to make payments, and because they received payments from the Ponzi scheme, the Ponzi-scheme entities cannot now claim that the amount owed was less than what was paid.

This defense misses the point and is yet another example of Respondents' refusal to recognize what the Court said in denying the motions to dismiss, namely "once a Ponzi scheme's operator is no longer in the picture, the entities are '[f]reed from his spell' and become 'entitled to the return of the moneys—for the benefit not of [the operator] but of innocent investors—that [the operator] had made the corporations divert to unauthorized purposes.' Thus, there can be no objection, either legal or practical, 'to the receiver's bringing suit to recover corporate assets unlawfully dissipated by [the scheme's operator].'" (Docket No.108 at 8 (quoting *Scholes*, 56 F.3d at 755).)

There is no dispute that the “payments” received by the Respondents were transfers from the Cook entities while they were still under Cook’s control. Those now-freed entities, and consequently the Receiver, are not bound by their actions and payoffs to those with an insider connection to mastermind of the Ponzi scheme. As there is no disputed issue of material fact as to Cook’s control of the entities when he made these transfers, and since the Receiver is not bound by the actions of the entities while they were under Cook’s control, summary judgment on this defense must be granted.

**F. Res Judicata, Collateral Estoppel, Merger and Bar**

Respondents explain that these three defenses are based on a single event: The Order from Judge Davis allowing Cook’s attorneys to keep fees Cook paid pursuant to retainer agreements. There is no discussion whatsoever of either *res judicata* or merger and bar.<sup>445</sup> On that basis alone, summary judgment should be granted on those two defenses.

As to *res judicata*, Respondents cannot establish the four required elements. “Res judicata applies as an absolute bar to a subsequent claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter. All four prongs must be met for *res judicata* to apply. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (internal quotations omitted).

---

<sup>445</sup> See Jansen Ex. 34 at 43–44.

As to element (1), the factual circumstances between payments of attorneys' fees are not the same as the Respondents' receipt of unsolicited cashier's checks. As to element (2), it is undisputable that the Respondents were not parties to the prior motion, nor were they in privity with the attorneys who were paid. Nor was the Receiver involved in the motion practice relating to those attorneys' fees. As to element (3), there was no final judgment. As to (4), the Receiver had no opportunity, nor any reason to litigate anything having to do with the Respondents in that proceeding.

The Receiver's claims against Respondents also are not stopped by Judge Davis's Order concerning attorneys' fees. To apply, collateral estoppel requires that an issue has already been decided; but the issues about the transfers to Respondents, their alleged good faith, or whether they have been unjustly enriched have never been decided, or even litigated.

The motions by the attorneys asked the Court to clarify that the Asset Freeze Order did not apply to payments made to them before that Order was entered; Judge Davis concluded that the Asset Freeze Order did not apply to those payments.<sup>446</sup> Judge Davis based his Order on Minnesota law that clearly recognizes non-refundable earned-upon-receipt fee agreements, which he found each attorney to have had in place before the Asset Freeze Order was entered.<sup>447</sup> The Receiver did not assert fraudulent transfer or

---

<sup>446</sup> Jansen Ex. 203 at 9.

<sup>447</sup> *Id.* at 5–6.

unjust enrichment claims against these attorneys—indeed, the Receiver did not participate in the motion practice involving the attorney fee issue.<sup>448</sup>

Moreover, Respondents’ defense requires a huge, unsupportable, logical leap—that because Judge Davis concluded that Cook’s attorneys were entitled to rely on Cook’s representations and did not know certain things, at a specific time, based on their specific interactions with Cook, then Respondents could not possibly have known other things, at earlier times, based on their specific interactions with Cook and his cohorts.

The legal and logical fallacy is apparent. Nowhere do Respondents allege *any* overlap, let alone complete overlap, between the facts known to Respondents and Cook’s attorneys. There is no allegation that the attorneys were ever involved in any conversation with any Respondent or vice versa. Neither of Cook’s attorneys was there when Cliff Berg showed up at various Respondents’ doors with unsolicited cashier’s checks and told them he cashed them out due to a government investigation—indeed, there is no allegation or even indication that the attorneys even knew of the transfers to Respondents. The lack of this overlap dooms Respondents’ collateral estoppel defense as a matter of law.

**G. Unclean Hands, *In Pari Delicto*, and Preceding Breach of Contract**

As with the discussion of Respondents’ “doctrine of payment” defense, their unclean hands and *in pari delicto* defenses fail because they fail to recognize the difference between the entities involved in the Ponzi scheme while under Cook’s control,

---

<sup>448</sup> *Id.* at 1.

and the entities once they were freed from Cook and placed under the Receiver's control. Respondents' "preceding breach of contract" theory suffers the same basic problem.

This Court has recognized that the Receivership Entities, once freed from Cook's control, are "like the defrauded investors," and are "tort creditors of Cook's Ponzi scheme." (Order, Docket No. 108 at 9.) No Respondent has ever pointed to any facts suggesting that any Receivership Entity has engaged in any action that would support a finding of unclean hands, applicability of the *in pari delicto* defense, or that the Receiver breached any contract with anyone since he was placed in control of the entities; therefore, summary judgment is appropriate on these defenses.

#### **H. Damages by Third Parties**

Respondents' defense shows a misunderstanding of the Receiver's claims. The Receiver does not seek compensation for Receivership Entities from some undefined harm arising from the Ponzi scheme; instead, the Receiver seeks to undo specific fraudulent transfers from the mastermind of the Ponzi scheme to the Respondents—transfers that they received solely due to their insider connections to Cook. The Respondents were not involved in the operation of the Ponzi scheme, but that has no bearing on the Receiver's claims in dispute—whether the transfers were fraudulent and whether the Respondents were unjustly enriched by these transfers.

#### **I. Good Faith, Minn. Stat. § 513.48(d), Recoupment and Setoff**

*See supra* Parts IV.C. and V.D. Anderson has asserted entitlement to a lien under Minn. Stat. § 513.48(d), and also the doctrines of recoupment and setoff. Her lack of good faith as discussed previously forecloses each of these as a matter of law.

## CONCLUSION

For all of the foregoing reasons, the Receiver's motion for summary judgment must be granted.

Dated: December 21, 2011

Respectfully submitted,

*s/ Tara C. Norgard*

---

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

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

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

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

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

Carlson, Caspers, Vandenburg & Lindquist

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

Minneapolis, MN 55402

Telephone: (612) 436-9600

Facsimile: (612) 436-9605

Email: tnorgard@ccvl.com