

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

---

R.J. ZAYED, IN HIS CAPACITY AS  
COURT- APPOINTED RECEIVER FOR  
TREVOR G. COOK, ET AL.,  
Petitioner,

Case No. 11-CV-01042 SRN/FLN

vs.

DAVID BUYSSE, STEVEN AND  
PAMELA CHENEY, WALTER DEFIEL,  
JOHN DZIK, TERRY FRAHM,  
STEVEN AND JENENE FREDELL,  
WILLIAM HARRIS, MICHAEL HEISE,  
MICHAEL AND CYNTHIA HILLESHEIM,  
LARRY HOPFENSPIRGER, STEVEN  
KAUTZMAN, JAMES MCINTOSH,  
GEORGE AND KAREN MORISSET,  
AND REYNOLD SUNDSTROM, AND  
DOT ANDERSON,

Respondents.

---

**REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS DAVID  
BUYSSE, STEVEN AND PAMELA CHENEY, WALTER DEFIEL, TERRY FRAHM,  
STEVEN AND JENENE FREDELL, MICHAEL HEISE, MICHAEL AND CYNTHIA  
HILLESHEIM, LARRY HOPFENSPIRGER, STEVEN KAUTZMAN, JAMES  
MCINTOSH, GEORGE AND KAREN MORISSET AND REYNOLD  
SUNDSTROM'S ("LENDERS") MOTION FOR SUMMARY JUDGMENT**

---

## TABLE OF CONTENTS

INTRODUCTION .....	1
A. The Receiver’s Response Memorandum Cites Numerous “Facts” Which Are Either Not Contained in the Record or Are Simply False. ....	1
B. The Receiver’s Response Memorandum Contains Numerous Material Factual Misstatement Related to Each Lender. ....	5
C. The Receiver Misstates the Summary Judgment Standard.....	12
D. The Receiver’s Agency Argument is Barred. ....	13
E. The Receiver Completely Misstates the Case-Law on “Good Faith” Under the UFTA. ....	14
F. The Receiver’s “Law of the Case” Argument To Support His Unjust Enrichment Claim Is Absurd.....	24
G. Unjust Enrichment Claims Are Routinely Dismissed in Clawback Actions Because There is Nothing “Unjust” About an Investor Receiving Back Her Investment. ....	25
CONCLUSION.....	26

## INTRODUCTION

The Receiver's Response Memorandum is replete with a raft of factual misstatements and inaccurate legal arguments. Conspicuously absent from the Receiver's voluminous Response Memorandum is any discussion of the central issue – whether a diligent investigation by a reasonable non-professional investor would have uncovered evidence of the Cook Entities' fraud or insolvency. The Receiver has submitted no evidence to contradict Lenders' evidence that any diligent investigation would have been futile.

Moreover, the Receiver's analysis of what constitutes a "red flag" completely misstates the applicable law. Only facts specifically pointing to "fraud or insolvency" of a ponzi scheme may be used to negate an investor's "good faith" under the UFTA. The Receiver provides no case-law support for his argument that any "unusual circumstance" – including typos on an account statement – constitutes a "red flag" under the UFTA.

Furthermore, the Receiver is barred from raising his legally and factually unsupportable agency theory.

Finally, the Receiver refuses to relinquish his argument that Lenders were unjustly enriched by "preferential transfers." Simply put, the Receiver's only route for recovering preferential transfers is through bankruptcy.

The Lenders' Motion for Summary Judgment should be granted.

**A. The Receiver's Response Memorandum Cites Numerous "Facts" Which Are Either Not Contained in the Record or Are Simply False.**

The Receiver's Response Memorandum repeats a variety of factual

misrepresentations that have already been addressed in the Lenders' previously filed Response Memorandum of Law. However, several misrepresentations are so material they deserve to be highlighted.<sup>1</sup>

First, with regard to the Receiver's argument that Cook had an agreement with Berg to liquidate the Lenders' accounts if "problems" occurred, Cook specifically testified that the Lenders' withdrawals were processed pursuant to a legitimate withdrawal request, and not due to some "insider" agreement. *Cook Deposition*, p. 180. The Receiver has no evidence contradicting Cook's testimony.

Second, Cook never told Berg that the SEC investigation involved the Cook Currency Entities much less fraud - *Cook Deposition*, pp. 78-79 - as corroborated by uncontradicted evidence that Berg told the Lenders the investigation related to Bo Beckman's unrelated equity-trading entity. *See, e.g. S.Fredell Deposition*, p. 75. There is no evidence Berg knew the SEC fraud investigation related to fraud or the Cook Currency Entities.

Third, although the Receiver argues that the Cook Currency Entities' written agreements required written notice for withdrawals, the Receiver ignores undisputed evidence from his own witnesses that the Cook Currency Entities had a course of dealing honoring oral withdrawal requests. *S. Phillips Deposition*, p. 75, Magnuson Declaration, Exhibit 30; *Howard Phillips Deposition Transcript*, p. 53, attached as Exhibit 31 to the Magnuson Declaration.

---

<sup>1</sup> The Receiver argument that the Phillips did not receive payment until June 6 not July 6 is directly contradicted by the Receiver's responses to discovery. [Document No. 191, Ex. 18].

Fourth, the Receiver conflates the unique circumstances surrounding each Lender's receipt of funds from the Cook Entities stating that Berg delivered "each of the [Lenders'] checks," and explained "that he [i.e, Berg] had 'closed their accounts,'" and Berg informed each of an investigation or audit. Each of these statements is indisputably false as set forth in Lenders' initial Memorandum. Berg only hand-delivered some of the checks, while others were mailed or delivered by other persons. Berg did not tell every Lender that he had "closed their account" and did not tell every Lender of the unrelated Bo Beckman investigation.

Fifth, the Receiver admits that many investors received funds in July, 2009, but characterizes these transfers as "lulling payments." However, the issue in this UFTA case is whether each Lender knew or should have known that the Cook Entities were either fraudulent or insolvent at the time of the transfers. Each of these transfers were in the ordinary course of business and would have indicated to transferees and people aware of the transfers that the Cook Currency Entities were operating functionally and not as either a fraud or as insolvent.

Sixth, contrary to the Receiver's arguments, the "Prime Rate" has no effect on the returns available to currency traders, and changes to the Prime Rate would not change what constituted a reasonable return for a note product related to currency trading entity. Steve Adams Declaration, p. 4.

Seventh, the Receiver argues the cashier's checks the Lenders' received identified the check purchaser citing to the Receiver's "credit copies" of those checks rather than the checks themselves. Unsurprisingly, the credit copy provided to the purchaser of the

check would contain the purchaser's name whereas the actual check delivered to the Lenders did not. *See, e.g. Wells Fargo Cashier's Checks* attached as Exhibit 2 to the Erickson Declaration. Lenders never had any indication who purchased the cashier's checks; thus, to the best of the Lenders' knowledge, Berg could have been delivering cashier's checks either Entrust or Millennium purchased.

Eighth, the Receiver acknowledges its own confusion regarding which documents granted the Cook Currency Entities the power to liquidate and return Lenders' funds. The powers of attorney and agreements Lenders signed gave both Crown Forex and the Cook Currency Entities the power to liquidate and return Lenders' funds. *See, e.g. Jansen Exs. 45, 47, 67, 68, 70, 106, 107, 118, 119, 123, 138, 139, 162, 163, and 175*, pages 5-8. Thus, the Cook Currency Entities' unilateral liquidation and return of Lenders funds **pursuant to contract** cannot be a red flag.

Finally, Lenders have not argued the extent of their reasonable investigation into the Receiver's alleged "red flags" because (i) the Receiver's alleged "red flags" were not "red" and (ii) any such investigation would have been futile. Moreover, Lenders recognize that the reasonableness of their investigation is a question of fact. However, Lenders have certainly not "admitted" that they did not conduct a reasonable investigation, and the evidence shows that Lenders were diligent in following up on every circumstance requiring inquiry. What is most noteworthy is that the Receiver has not provided any evidence that any type of reasonable investigation would have revealed the Cook Entities' fraud – as demonstrated by the fact that the SEC failed to uncover the

fraud with all of the investigative tools at its disposal until months after the Lenders received the return of their funds.

**B. The Receiver's Response Memorandum Contains Numerous Material Factual Misstatement Related to Each Lender.**

The Receiver makes a variety of factual misstatements specific to each Lender.<sup>2</sup>

**1. Buyse.**

Contrary to the Receiver's arguments, Buyse was not concerned by any lack of a receipt for his \$50,000 cash investment as Buyse delivered the cash to Cliff Berg, the Cook Currency Entities' employee, and expected to see the cash reflected on the account statement which indeed it was. *Buyse Deposition*, p. 92-93. The Receiver's own expert failed to identify this fact as a "red flag" in his report. The Receiver also argues, for the first time, that immaterial "rounding errors" (\$3.11 per month) demonstrate Buyse's lack of good faith. The Receiver's argument is not supported by his own expert's report and the Receiver is foreclosed from citing this "fact" because of his failure to disclose this "fact" in his allegedly "exhaustive" discovery responses. [Document No. 210, Ex. 1].

**2. Cheney.**

Contrary to the Receiver's arguments, Cheney did not testify that he believed he would receive preferential treatment. Berg's relationship to Cook gave Cheney greater confidence in Cook not because of Berg's status, but because Cheney believed that Berg's involvement was a strong indicator that the Cook Currency Entities were a

---

<sup>2</sup> The Receiver states that several of the Lenders' allegations are unsupported in the record. This is false. The Lenders have cited to exhibits and deposition testimony supporting their fact references in both Memoranda filed on the cross summary judgment motions.

legitimate organization. *S.Cheney Deposition*, p. 110-111. In addition, while Cheney testified that he and John Dzik discussed concerns about having to repay transfers they received, those discussions were held in July after Cheney received those transfers. *Id.*, pp. 64-65. This conversation is not material to good-faith under the UFTA because it occurred after the Cheneys “took” their funds.

Finally, again contrary to the Receiver’s arguments, the Cheneys never noticed any “rounding errors” on their monthly statements or final payments nor did they notice the source of the statements or monthly payments they received.

**3. Walter Defiel.**

The Receiver argues that Defiel’s testimony that he was unable to get answers on general questions regarding his IRA and 401k “indisputably refut[es]” Lenders contention that their questions were answered fully and promptly. However, Defiel was not concerned by this customer service issue or he would have inquired further. The Receiver’s characterization that “nobody working [at the Cook Currency Entities] could answer even the most basic question on [retirement accounts]” is a complete misrepresentation, as the record shows that Cook and Moeller were always able to clearly and completely answer Lenders’ questions. *Cook Deposition*, p. 81; *Moeller Deposition*, p. 42.

The Receiver also argues Defiel believed the Cook Currency Entities to be “too good to be true.” On the contrary, Defiel testified that he believed the Cook Currency Entities were “on the level,” and thus he told his best friend George Morisset about the investment opportunity. *Defiel Deposition*, p. 50. Defiel’s investment advisor, Craig Le

Vesseur, did not tell him that the Cook Currency Entities were “too good to be true,” but simply that the stated return and risk could be puffery, as Le Vessuer did not understand that the currency markets were not correlated with the equity markets. *Le Vesseur Declaration* p. 2.

#### 4. Frahm.

The Receiver once again paints Frahm’s concern about taxation as a personal distrust of Cook which is absolute nonsense. The Receiver has no evidentiary support for his claim that “Frahm’s earlier statements indicated that... Frahm felt uneasy because of Cook’s demeanor.” Frahm consistently testified that his concern was that his payments would be taxable as ordinary income, decreasing his potential return. *T.Frahm Deposition, p. 101.* The Receiver has no evidentiary support for his contention that Frahm did not make a valid, written request for the return of his funds. Contrary to the Receiver’s arguments, Berg never “explained to the Frahms that ***he had closed their account*** because there was an ‘investigation’ or ‘audit’ going on” and never said that “he had closed the Frahms’ account.” Rather, the Frahms believed that they were receiving money pursuant to their request for their funds. *J.Frahm Deposition, p. 49.* Berg told Jean Frahm about an audit into Bo Beckman as part of “small talk,” and not as an explanation as to why she was receiving funds. *Id, p. 48.* Frahms never believed “Berg had closed their account” because of an “investigation” or even an “audit.” Frahm’s written request gave the Cook Currency Entities the option of either liquidating his funds, or rolling them over to Bo Beckman’s entity, and thus, Frahm’s receipt of funds pursuant to his written request cannot be a red flag.

**5. Fredells.**

Berg told the Fredells of an investigation into Bo Beckman *after* Berg delivered the checks but later during the same visit. *S.Fredell Deposition, p. 74-75.* To the extent the Court even includes this conversation in the analysis (after the Fredells had already “taken” in good faith), the record shows that Beckman was not related to the Cook Currency Entities, and thus any investigation into his equity trading entity had no bearing on the Fredells’ funds. Further, the Fredells did not testify that Berg liquidated the Fredells’ funds because of a “problematic” investigation with “Cook’s companies.” In fact, the Fredells testified that they did not “jump to the conclusion” that there was anything problematic, and that Berg was simply fulfilling the Fredells’ agreement with the Cook Currency Entities that their funds be returned in the face of “any problem,” including if “a spider fell out of the ceiling.” *Id p. 205-206.*

**6. Heises.**

Michael Heise’s concern about the typographical error on one of his account statements was immediately and conclusively cleared up by the Cook Currency Entities, as the Receiver admits. Receiver’s Memorandum, p. 79. The Receiver’s reliance on this typo is troubling, as it further illustrates the Receiver’s position that anything and everything is a red flag allowing the Receiver to claw-back funds from innocent investors.

**7. Hillesheims.**

The Receiver continues to conflate two conversations between Berg and the Hillesheims. Berg first informed the Hillesheims that their account was being closed and

their funds returned in a phone call to Cynthia Hillesheim. *C.Hillesheim Deposition*, p. 61. Subsequent to this telephone conversation and more than a week after receiving the cashier's check, Cynthia Hillesheim called Berg again. Berg then told her of an investigation into Bo Beckman. *Id*, p. 64. There is no evidence whatsoever that Berg ever expressed fear that the Hillesheims' money would be "locked up," but if Berg did use the term, it was in the second conversation, which, being a week after the Hillesheims "took" their transfers, is not relevant to the good-faith analysis as a matter of law. *Id*, p. 149.

The Receiver also alleges the Hillesheims still "trusted Berg" because he had "just managed to get them money out of an insolvent scheme," which explains why the Hillesheims were still interested in investing with Cook after moving to Schwab. Receiver's Memorandum, p. 88. There is no factual support for this argument and it is absurd on its face - no investor would request investment advice from a man who had involved them in a ponzi scheme.

**8. Hopfenspirger.**

Contrary to the Receiver's argument that Berg's hand-delivery of Hopfenspirger's check was "in marked contrast" to how Hopfenspirger received previous checks, Hopfenspirger specifically testified he had received previous checks by hand-delivery from Cook and Moeller. *Hopfenspirger Deposition*, pp. 112, 114-115. Further, Hopfenspirger did not consider that Cheney may have been contractually barred from retrieving Hopfenspirger's funds until his deposition, and never considered Cheney's delivery to be a red flag. *Id*, p. 130. Finally, there is no evidentiary support that

Hopfenspirger “thought the promises were ‘too good to be true,’” indeed, the Receiver’s citation to “free parking” was Hopfenspirger describing “parking” the money with the Cook Currency Entities until Hopfenspirger was ready to obtain higher returns in the equity markets. *Id.*, p. 85.

**9. Kautzman.**

Contrary to the Receiver’s argument, Kautzman’s interest in reinvesting with Cook at Schwab a week after receiving his funds supports rather than refutes Kautzman’s argument that he believed Cook’s currency trading business was legitimate. *Kautzman Deposition*, p. 54, 57. Unlike the Receiver’s conflation of the two Hillesheim conversations, Kautzman’s later belief in Cook’s legitimacy is still relevant to a good-faith analysis.

**10. McIntosh.**

The Receiver’s citation to McIntosh’s changes to his Entrust agreement to somehow demonstrate the Cook Entities could not unilaterally liquidate McIntosh’s account is immaterial. The undisputed facts show that McIntosh requested the return of his funds from the Cook Currency Entities prior to their return; therefore, the Cook Entities did not unilaterally liquidate McIntosh’s account. *McIntosh Deposition*, p. 163. McIntosh’s receipt of continuing monthly distributions from Entrust occurred after McIntosh received his funds. The Receiver also raises, for the first time, a minor calculation error on McIntosh’s statements which the Receiver again failed to disclose in discovery. Nor does the Receiver have testimony from his expert that this minor miscalculation is a “red flag.”

**11. Morissets.**

The Receiver argues the Morissets never “received any account statements.” This is misleading. The Morissets were informed that their account statements were available online, but were not technologically proficient enough to retrieve them, and never recalled specifically requesting paper statements. *G.Morisset Deposition*, pp. 59-60. The Morissets were surprised by the return of their funds, but never “suspected something was improper about the transfer” they received. In fact, Karen Morisset testified that it was not until publication of the Star Tribune article in July that she “first had an idea that something was going wrong.” *K.Morisset Deposition*, p. 24. The Receiver’s circular argument that the Morissets’ phone call after the Morissets had received the return of the funds they invested could be a “red flag” triggering a duty to inquire into an investment in which they were no longer involved is absurd.

**12. Sundstrom.**

Sundstrom never “knew from the beginning that Cook’s scheme was ‘too good to be true.’” The Receiver rests simply on Sundstrom’s informal request that his attorney investigate the Cook Currency Entities and inform him of any problems. Sundstrom acted with reasonable diligence in turning the brochure over to his lawyer, and was reasonable in assuming that his attorney had not discovered any problems with the Cook Currency Entities. *Sundstrom Deposition*, pp. 39-40. Once again, the Receiver posits a “catch-22” test for good faith which is impossible to fulfill. If an investor asks any questions about any aspect of his investment it is evidence the investor was acting in bad faith because of the knowledge which generated the request and if an investor does not

ask such questions it is evidence of willful blindness to the fraud scheme, and thus, bad faith.

**C. The Receiver Misstates the Summary Judgment Standard.**

The Receiver consistently complains that the Lenders are attempting to shift the burden of proof onto the Receiver on Lenders' good faith defense. However, once the Lenders make a prima facie showing of good faith, it is incumbent upon the Receiver to demonstrate the existence of material fact for trial. Fed. R. Civ. P. 56(c). In a fraudulent transfer action, a transferee meets its burden of proof on the issue of "good faith" if the transferee submits evidence demonstrating the investor (i) had no actual knowledge of any facts which an objective reasonable non-professional investor would consider as evidence of the transferor's fraud or insolvency ("red flags") and (ii) if the investor had actual knowledge of any such "red flags," a diligent inquiry by a reasonable non-professional investor into such facts would not have revealed the fraud or insolvency. Once the Lenders as transferees come forward with such evidence, the Lenders are "entitled to summary judgment unless the non-moving party comes forward with probative evidence that would demonstrate the existence of a triable issue of fact." *In re Bressman*, 327 F.3d 229, 238 (3d Cir. 2003). Because the Lenders have met their burden, the Receiver must submit admissible evidence showing that each individual Lender (i) had actual knowledge of facts an objective reasonable non-professional investor would consider as evidence of the transferor's fraud or insolvency and if the Lender had such actual knowledge and the facts are "red flags, (ii) an objective diligent inquiry by a reasonable non-professional investor into such facts would have revealed the fraud or

insolvency. The Lenders are entitled to summary judgment because (i) the Receiver failed to introduce evidence that several of the Lenders had actual knowledge of the Receiver's alleged "red flags" primarily because the Receiver conflated facts regarding those Lenders with other Lenders, (ii) the Receiver's alleged "red flags" are not "red" - an objective reasonable non-professional investor would not consider the alleged "red flags" as evidence of the Cook Entities' fraud or insolvency and (iii) the Receiver has submitted no evidence that an objectively diligent inquiry by a reasonable non-professional investor into such "red flags" would have revealed the Cook Entities' fraud or insolvency. As a result, the Lenders are entitled to summary judgment.

**D. The Receiver's Agency Argument is Barred.**

The Receiver's argument that Lenders' Memorandum "omits a critical discussion of the law of agency" is highly risible considering that the Receiver failed to (i) allege agency in his Complaint (i.e., Petition) or (ii) identify Berg's alleged agency in the Receiver's allegedly "exhaustive" interrogatory responses. The Advisory Committee Notes to the LR 7.1 contemplates "that the discovery record will allow the initial summary judgment submission to anticipate and address the responding party's factual claims.... It is improper to withhold information - either from discovery or from initial moving papers - in order to gain an advantage." As more fully described in Lenders' Response Memorandum, the Receiver is barred from arguing that Berg's knowledge may be imputed to Lenders as their agent because the Receiver (i) has previously taken the position before this Court that Berg's knowledge was "not critical to resolving whether or not the Respondents took the money they received from Cook's entities in objective good

faith” (Document 89, p. 7) and (ii) failed to identify the agency allegation in response to Lenders’ Interrogatories. Thus, the Receiver is estopped from raising Berg’s alleged agency. Nonetheless, Berg was not the Lenders’ an agent as set forth in the Lenders’ Response Memorandum, pages 43-48. Moreover, even if Berg were the Lenders’ agent, Berg’s knowledge cannot be imputed to them because of the fraud exception. Lenders’ Response Memorandum, pages 48-53. The Receiver’s lengthy agency argument is factually and legally unsupported and may not be used as a basis to deny Lenders’ Motion for Summary Judgment.

**E. The Receiver Completely Misstates the Case-Law on “Good Faith” Under the UFTA.**

The Receiver completely misstates the case-law interpreting “good faith” under the UFTA. The Receiver argues (i) any business infirmity, including typos in documents, could be evidence of the Cook Entities’ fraud or insolvency regardless of how tenuous the linkage of such fact is to the Cook Entities’ fraud or insolvency and (ii) that whether a diligent investigation would have revealed the Cook Entities’ fraud or insolvency is not relevant because the Lenders failed to present evidence they conducted such an investigation. The Receiver is wrong on both accounts as more fully argued below. The most significant recent ponzi scheme case, *In re Bayou Group, LLC*, 439 B.R. 284 (S.D.N.Y. 2010) dispensed with both arguments. “[T]he great weight of authority holds that it is information suggesting insolvency or a fraudulent purpose in making a transfer that triggers inquiry notice.” *Id.* at 314, ftnt. 23. In addition, if “the transferee can meet its burden of demonstrating that a diligent investigation would not have led to discovery

of the fraud, it may prevail on [the diligent inquiry] prong of the good faith affirmative defense.” *Id* at 317.

The Lenders’ evidence demonstrates that they had no actual knowledge of facts “suggesting insolvency or a fraudulent purpose in [the Cook Entities] making [the] transfer,” the correct standard, as opposed to the Receiver’s admitted position which alleged facts that possibly suggest insolvency or fraudulent purpose. Moreover, it is undisputed that the Receiver has no evidence that a transfer “demonstrating that a diligent investigation would ... have led to discovery of the fraud.” To get around this problem, the Receiver cites facts which neither any court or even his own expert have found would suggest fraud or insolvency. Instead, the Receiver cites to a number of cases and exhibits in the hopes that the Court will not actually check the Receiver’s citations for accuracy.

First, the Receiver argues that because only *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995) applies in this case, the test is whether transferees were “on inquiry notice” and there is no reasonable investigation prong. There are three problems with this argument. One, *Sherman* only addressed the “red flag” issue and not whether a diligent inquiry would have revealed fraud or insolvency based on those “red flags.” Two, if the Receiver believes that *Sherman* is controlling, Lenders are entitled to summary judgment because *Sherman* states that a transferee does not act in good faith “when he has sufficient knowledge to place him on inquiry notice of the debtor’s possible insolvency” as opposed to fraud and the Receiver has no evidence that Lenders were apprised of any facts indicating the Cook Entities’ “insolvency.” *Id.*, at 1355 (emphasis

added). Three, *Sherman* never addressed the issue of whether the futility of a reasonable investigation would demonstrate the transferee's good faith.

Second, contrary to the Receiver's arguments, a transferee fails to demonstrate "good faith" under the UFTA in a ponzi-scheme case if the transferee had actual knowledge of (i) "the circumstances [placing] a reasonable person on inquiry of a debtor's fraudulent purpose and [(ii)] a diligent inquiry would have discovered the fraudulent purpose." *In re Agric. Research & Tech. Group, Inc.*, 916 F.2d 528, 536 (9th Cir. 1990) (emphasis added). "[T]he great weight of authority holds that it is information suggesting insolvency or a fraudulent purpose in making a transfer that triggers inquiry notice." *In re Bayou Group, LLC*, 439 B.R. 284, 314, ftnt. 23 (S.D.N.Y. 2010) (collecting cases). The 8<sup>th</sup> Circuit BAP recently cited *Bayou* as a leading case on fraudulent transfer law in the context of Ponzi schemes. *In re Petters Co., Inc.*, 455 B.R. 166, 176 (B.A.P. 8th Cir. 2011). Thus, if a diligent inquiry would have been futile, the Receiver's UFTA must be dismissed.

Finally, at page 18 of his Response Memorandum, the Receiver states (without citation) that "any fact that suggests 'possible' fraud or insolvency – in other words, any fact that would suggest to a reasonable person that fraud or insolvency might be among the possible explanations for the fact – is a red flag that contributes to inquiry notice." The Receiver's argument contradicts *Bayou*, *Petters* and numerous other cases and for good reason. *Bayou* specifically rejected a Receiver's argument that any "business infirmity" could be a "red flag:"

In holding that information suggesting any “infirmity in Bayou or [in] the integrity of its management” is sufficient to trigger inquiry notice, the Bankruptcy Court significantly expanded the scope of information prior courts have found sufficient to require inquiry. \*\*\* The phrase is so broad as to be undefinable.

Neither the Bankruptcy Court nor Bayou has cited any case law suggesting that the scope of triggering information is as broad as that announced by the Bankruptcy Court here.

\*\*\*

In applying the “some infirmity” standard, the Bankruptcy Court committed legal error.

*Bayou*, at 314-15.

As *Bayou* held, fraud or insolvency is a “possible explanation” for almost any business infirmity. Investors could never receive funds in good faith, and thus, investment would be considerably less worthwhile if any investment return could result in personal judgments against an innocent transferee.

**1. The Receiver’s “Red Flags” Are Not “Red.”**<sup>3</sup>

The Receiver cites a few cases supporting his argument that various facts constituted “red flags” and for good reason – the overwhelming weight of authority holds that the Receiver’s “red flags” are not “red.”

First, while the Receiver cites one new case, *Armstrong v. Collins*, 2010 WL 1141158 (S.D.N.Y. Mar. 24, 2010), *Armstrong* never held or stated that “receipt of payments from an entity other than the one invested in” is a “red flag.” The Receiver

---

<sup>3</sup> The Receiver’s argument to exclude the Lenders’ expert’s testimony demonstrates that the Receiver wishes to keep the Court and potentially the jury completely in the dark as to the experience and information available to a reasonable non-professional investor. Simply put, it is unlikely that the jurors in this case are active investors in either the stock market or the currency markets and, as such, expert testimony is necessary.

then blatantly misstates *Armstrong's* holding, arguing *Armstrong* “determined that there came a point after the investors’ initial deposits in a Ponzi scheme and before the scheme’s perpetrator admitted to them that he was using investor funds to trade for himself after which the investors ‘could no longer safely turn a blind eye to the mounting evidence that [the transferor] was not engaged in legitimate business.’” This statement from *Armstrong* is false. Rather, *Armstrong* stated:

[the transferor] told the [transferees] that he was using investor funds to trade for himself and had ‘experienced significant losses,’” that the transferees were “hard pressed to argue that after learning this they received any future transfers in objective good faith.”

*Id at* \*27 (emphasis added).

The transferor’s statement to the transferee in *Armstrong* that he had fraudulently traded the transferee’s monies for the transferor’s own personal account and had suffered significant losses from such trading is a far cry from a typo in an account document.

Second, the Receiver has cited not one case to supporting his alleged “red flags”:  
(i) minor discrepancies in the account documents or statements, (ii) an annual return of 12%, (iii) statements of low risk, (iv) knowledge of an SEC investigation into an unrelated entity, (v) use of cashier’s checks to pay investors or (vi) return of funds without request. While the Receiver argues that under *Sherman* the Receiver can somehow aggregate non red flags to create a red flag, *Sherman* held no such thing. In fact, *Sherman's* “red flags” were:

Karen Sherman's recent illness caused the debtors to incur substantial medical debts; the Shermans knew about the debtors' indebtedness to Benson and Benson's impending lawsuit against the debtors; and the Shermans were aware that the

debtors were behind in mortgage payments to the Bank and that the Bank was planning to commence foreclosure proceedings.

*In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995).

Once again, the facts in *Sherman*, all of which directly relate to insolvency, are a far cry from typos in account documents.

Contrary to the Receiver's arguments, "red flags" are not "unusual circumstances," or "oddities." *Bayou*, at p. 314. Rather, as set forth in the cases both Lenders and the Receiver have cited to the Court, "red flags" are:

- (i) promised returns of 120% to 468% (*Jobin*, 84 F.3d at 1338–39);
- (ii) transfers grossly in excess of value provided, (*In re Agric. Res. & Tech. Grp.*, 916 F.2d at 539);
- (iii) knowledge of significant losses while reporting 20% profits (*In re Manhattan Inv. Fund III*, 397 B.R. at 23–24);
- (iv) knowledge that transferor was unlicensed, had a history of failed business ventures, defaults on loans, hundreds of thousands of dollars in credit card debt, and a previous arrest for securities violations, (*Quilling v. Stark*, 2007 WL 415351 (N.D. Tex. Feb. 7, 2007)); and
- (v) returns ranging from 12% per month to 10% per week, lack of written financial information and requests to hold checks for days before deposit, (*In re M & L Bus. Mach. Co., Inc.*, 198 B.R. 800, 810 (D. Colo. 1996)).

In fact, courts have found that knowledge of an SEC investigation alleging fraud, suspicions of wrongdoing on the part of a principal, payments made in cash or checks signed over from third parties, numerous changes of corporations, and various other suspicious circumstances were not red flags. *In re Hannover Corp.*, 310 F.3d 796, 801 (5th Cir. 2002).

While the Receiver identifies what he calls “unusual circumstances,” he fails to demonstrate that these “unusual” circumstances would put a reasonable non-professional investor on notice of fraud or insolvency. For instance, neither Berg’s relationship to Cook, minor typographical errors in account statements, return of funds by cashier’s check, or Berg’s lack of investment experience are indicators of fraud or insolvency. The Receiver’s attempts to use minor customer service issues as part of his “red flag” analysis is unavailing as no reasonable investor would believe these to be evidence of fraud or insolvency and the Receiver points to no case-law suggesting otherwise.

The Receiver also argues that facts which arose after the Lenders received their funds could constitute “red flags.” This is nonsense because ultimately every investor learns that the ponzi scheme was fraudulent. Nonetheless, UFTA expressly provide that good faith is examined when the transferee “took” the transfer and not at any point thereafter. Second, Lenders have found no case relying on the transferee’s actual knowledge of a fact *after* the transfer in examining good faith. Thus, information Lenders received after the receipt of their funds, whether regarding an investigation, third-party custodians, or Berg’s concerns is irrelevant to a good-faith inquiry. Similarly, only information actually known by Lenders may constitute a red flag. Information “available” to Lenders, but not known by them, including minor rounding errors on various account statements, typographical errors, and the purchaser of the cashier’s checks, may also not be considered in a good-faith analysis.

The Receiver’s remaining “red flags” are either not “red flags” legally or are not supported in the record. With regard to the Receiver’s argument that a 12% rate of return

was unreasonable, the Receiver offers no case-law or expert testimony to support this argument. The Receiver's comparison of the prime rates in 1998 and 2008 is bizarre and irrelevant. Lenders' expert has set forth uncontroverted evidence that the Cook Currency Entities' strategy produced returns between 13.26% and 17.37% for the preceding six years. *Adams Report*, pp. 10-11. Therefore, the Cook Entities could generate the returns necessary to pay the 12% interest rate. More importantly, the Receiver's own expert acknowledged it is not unusual for investment professionals to "pitch" an investment program to investors by informing them of a new computerized trading strategy which would provide risk-protection. *Golberg Deposition*, pp. 237-238. A stated return of 10-12%, combined with risk protection provided by a new computerized trading program, would not be a red flag.

With respect to the Cook Entities closing the Lenders' accounts, Lenders' expert testified that hedge funds rely on the ability to quickly liquidate and return client funds while providing documentation for the transfer afterwards because of the need to trade in and out of accounts quickly. *Adams Deposition*, p. 300. This is why the Lenders' agreements specifically allowed the Cook Currency Entities to unilaterally liquidate and return the Lenders' funds. *See, e.g. Jansen Exs. 47, 70, 119*. No reasonable investor would conclude that return of funds in an industry-standard manner, and as allowed by contract, was a red flag.

In addition, while some Lenders were aware of an SEC investigation, they believed that SEC investigation only involved Bo Beckman. Moreover, the Receiver's own expert admitted SEC investigations are commonplace, often involve issues unrelated

to fraud, insolvency or any wrongdoing, and therefore would not be a “cause for concern.” *Golberg Deposition*, pp. 171, 174-175.

Furthermore, *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006) did not hold that “knowledge of an investigation has been held time and again to be a powerful red flag.” Rather, *Warfield* made *no finding on good faith*, and simply affirmed *a default* summary judgment based on a transferee’s failure to exchange reasonably equivalent value. In fact, another Fifth Circuit decision found that knowledge of an SEC investigation alleging fraud, suspicions of wrongdoing on the part of a principal, and payments made in cash or checks signed over from third parties, numerous changes of corporations, and various other suspicious circumstances were not “red flags.” *In re Hannover Corp.*, 310 F.3d 796, 801 (5th Cir. 2002). The Receiver has not even attempted to distinguish *Hannover* besides noting that the *Hannover* transferees performed an investigation.

Finally, none of the Receiver’s alleged “red flags” suggest fraud or insolvency. Thus, the Receiver crafted a new unsupported standard whereby any fact which could *possibly suggest* fraud or insolvency may be a red flag. However, this new standard would swallow the “good faith” affirmative defense because *any fact* could “*possibly*” suggest anything including fraud or insolvency. Every investment necessarily involves circumstances for which at least one “possible explanation” is fraud or insolvency because any circumstances in a business could be explained by a lack of money. Thus, the courts uniformly hold that the “red flags” necessary to defeat good faith must be directly linked to fraud or insolvency.

2. **If a Diligent Inquiry Would Not Have Revealed Cook's Fraud or Insolvency to a Reasonable Non-Professional Investor, The Receiver's Claims Must Be Dismissed.**

The Receiver argues that he need not demonstrate a diligent inquiry would have revealed Cook's fraud or insolvency to a reasonable non-professional investor because none of the Lenders undertook such an inquiry. As the overwhelming majority of the cases involving Ponzi schemes hold, if a diligent inquiry would not have revealed the fraud or insolvency, the UFTA claim must be dismissed. *Bayou*, at 316-317.

In support of his argument, the Receiver twists *Bayou* beyond all recognition. In fact, the District Court in *Bayou* reversed the Bankruptcy Court decision on this exact issue. *Id.* Simply put, *Bayou* specifically held that if "the transferee can meet its burden of demonstrating that a diligent investigation would not have led to discovery of the fraud, it may prevail on [the diligent inquiry] prong of the good faith affirmative defense." *Id.* at 317. More importantly, *Bayou* specifically rejected the Receiver's argument that an investor who fails to conduct any investigation is foreclosed from asserting the good faith defense because this "will inevitably require an analysis of the transferee's subjective reactions to the information it received and its follow-up interactions with the transferor" thereby undermining the objective test of good faith. *Id.*, p. 317. Finally, the Receiver's argument makes no sense – why impose a duty to investigate if the investigation would be futile?

Even if the Receiver's "red flags" were "red," any investigation of these alleged "red flags" would have been futile. First, inquiries directed to Cook would have been meaningless as (i) Cook would have lied and (ii) Cook's own employees were unaware of

the fraud and maintained their own personal investments in the currency trading.

*Grzybowski Deposition*, p. 187; *see also Golberg Deposition*, pp. 198-199. Second, as set forth in the initial Memorandum, any SEC inquiry would have been completely futile because the SEC is barred by law from disclosing any information regarding its investigations. Investors who made inquiries received letters as late as October of 2009 stating that “neither the Commission nor its staff **has concluded that any violations of the securities laws have occurred. The existence of this investigation should not be construed as an indication by the Commission that any violation of law has occurred, or as an adverse reflection upon any person, entity, or security.**” *SEC Letters*, p. 1, attached as Exhibit 32 to the Magnuson Declaration (emphasis added).

The Lenders have shown that any investigation, no matter how diligent, could not have uncovered the fraud or insolvency of Cook. The Receiver essentially admits that any investigation would have been futile by not producing any evidence to the contrary. As a result, because the Lenders have demonstrated “that a diligent investigation would not have led to discovery of the fraud,” the Lenders “prevail” on their “good faith affirmative defense.” *In re Bayou Group, LLC*, 439 B.R. 284, 317 (S.D.N.Y. 2010).

**F. The Receiver’s “Law of the Case” Argument To Support His Unjust Enrichment Claim Is Absurd.**

The Receiver’s argument that this Court’s statement in denying Respondent Anderson’s Motion to Dismiss – “[t]he Court cannot say as a matter of law that it is not unjust enrichment for one investor in a ponzi scheme to recover the full amount of her investment and for others to recover nothing” – is absurd and wrong on its face. It is

black letter law that “denials of motions to dismiss... do not constitute the law of the case.” *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir. 1994).

**G. Unjust Enrichment Claims Are Routinely Dismissed in Clawback Actions Because There is Nothing “Unjust” About an Investor Receiving Back Her Investment.**

The Receiver’s arguments to support his unjust enrichment claim do not work for the simple reason that there is nothing “unjust” in the Lenders receiving their money back from Cook as set forth in the case law Lenders cited in their initial Memorandum.

Simply put, under Minnesota law, unjust enrichment does not occur when a defendant “is enriched by what he is entitled to under a contract or otherwise.” *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 554 (8th Cir. 2008)(emphasis supplied). Although contracts obtained by fraud are voidable, occasionally allowing unjust enrichment claims against the fraud-feasor, the victim of fraud has the ability to enforce the terms of the contract. *Kirby v. Dean*, 159 Minn. 451, 453 (1924). Thus, Lenders’ relinquishment of their contractual claims for damages against the Cook Currency Entities was full and fair consideration for the payments they received. *In re M & L Bus. Mach. Co., Inc.*, 84 F.3d 1330, 1342 (10th Cir. 1996); *In re Unified Commercial Capital*, 01-MBK-6004L, 2002 WL 32500567 (W.D.N.Y. June 21, 2002); *Carrozzella & Richardson*, 270 B.R. at 97.

The Receiver’s claims against the Lenders are only cognizable (though insupportable) under the UFTA. The Receiver may not make a claim for unjust enrichment. Otherwise, every transfer the Cook Currency Entities made to anyone would be presumptively unjust enrichment, and the Receiver would be violating the Court’s orders by not clawing each transfer back. Over 150 investors received the full amount of

their principal back and the Receiver has allowed them to keep these funds. Under the Receiver's unique unjust enrichment test, unsupported by existing law, each of these payments unjustly enriched the recipients. However, the Receiver has only attempted to recover Respondents' principal on his unjust enrichment claims. If "equality is equity," as the Receiver is fond of proclaiming, Lenders must be treated like every other investor who received the return of their principal.

As set forth in the Lenders' other Memoranda, the Receiver is attempting to recover on a naked preferential transfer theory in unjust enrichment. The Receiver simply may not do so outside of a bankruptcy context, and the Receiver has no case-law to support a claim for unjust enrichment based on a preferential transfer theory.

### **CONCLUSION**

For all the foregoing reasons, Lenders' Motion for Summary Judgment must be granted.

Dated: January 30, 2012

MOHRMAN & KAARDAL, P.A

s/William F. Mohrman

William F. Mohrman (#168816)

Gregory M. Erickson (#276522)

James R. Magnuson (#389084)

33 South Sixth Street, Suite 4100

Minneapolis, MN 55402

Telephone: (612) 341-1074

Facsimile: (612) 341-1076

*Attorneys for David Buysse, Steven and  
Pamela Cheney, Walter Defiel,*

*Terry Frahm, Steven and Jenene Fredell,*

*Michael Heise, Michael And Cynthia*

*Hillesheim, Larry Hopfenspirger, Steven*

*Kautzman, James McIntosh, George and*

*Karen Morisset, and Reynold Sundstrom*

