UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Petitioner, Civil No. 11-cv-1042 SRN/FLN

v.

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 Morrisset,
Reynold Sundstrom, and Dot Anderson,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT DOT ANDERSON'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Dot Anderson ("Anderson") submits this Memorandum in Support of her Motion For Summary Judgment. In this action, the Receiver asserted fraudulent transfer and unjust enrichment claims against Anderson, who at the age of eighty-nine made a $102,000 investment in Relief Defendant Basel. Anderson invested in mid-June 2009 just before Cook's scheme collapsed. Just weeks later, after reading a newspaper article about a lawsuit filed against Cook and others, Anderson decided to close her investment account. She filled out the appropriate paperwork and submitted the completed form, as

the account opening documents instructed her to do. In response, Basel, the entity into which Anderson had made the investment, closed her account and wired her $102,000. Anderson did not profit from her brief investment. She received only her principal investment back – to which she was entitled as a matter of law.

The Receiver claims that the return to Anderson of her principal was "preferential." But preferences are a matter for bankruptcy courts – the Minnesota Fraudulent Transfer Act permits preferential payments to legitimate creditors. The Receiver is attempting to do what Cook, Kiley, and the other crooks were unable to do in furtherance of the Ponzi scheme – take Anderson's money from her and give it to other investors.

The Receiver's claims fail both factually and legally. The law of fraudulent transfers is designed to make sure that legitimate creditors such as Anderson are paid with available funds – it is not designed to pick and chose which creditors get paid. There is no evidence that Anderson's decision to close her account was an effort by Cook (or anyone else) to defraud others or evade any creditors. Without such evidence, the fraudulent transfer claim fails. And the Receiver does not represent a "creditor" under the Minnesota Fraudulent Transfer Act. Minnesota's fraudulent transfer statute grants a cause of action to defrauded creditors – it does not empower the Receiver who represents the debtor entity that made the transfer to undo the transaction.

Anderson received her funds in good faith. She did not know of the Ponzi scheme when she requested her money back, nor could she have uncovered it. Although her grandson Grant Gryzbowski worked for Cook, Gryzbowski was kept in the dark about

Cook's illegal actions. Gryzbowski did not know there was a Ponzi scheme being operated. Indeed, Gryzbowski never withdrew his own funds, his father's investment, or his mother's best friend's investment with Cook. Gryzbowski did not handle his grandmother's investment any differently than any other investor.

Nor could Anderson have learned of Cook's schemes. Chief Judge Davis addressed the issue of what information was knowable at the time Anderson received her funds, in the context of the government's attempt to claw back payments made to the lawyers representing Cook and others. Judge Davis concluded that when:

> [t]he fee retainer agreements were entered into, the SEC's and CFTC's investigations had only begun, and no criminal investigation had commenced. The same is true for the civil [Phillips] lawsuit. In July 2009, the record in the civil suit contained only pleadings and limited evidence. Under these circumstances, the Court will not find that counsel knew or should have known that the source of the funds paid were from a fraudulent scheme.

Case 0:09-cv-03332, Document 186, p. 8. Judge Davis correctly concluded that counsel defending Cook could not have known their retainers were fruits from a fraudulent scheme -- but the Receiver apparently maintains that 89-year-old Anderson should have been able to uncover what Cook's own lawyers did not know.

Anderson was not unjustly enriched when she received only the principal amount of her investment back. She had a contractual right to the funds. And investors in Ponzi schemes have a claim for restitution or rescission against the defrauding entity in the amount of the principal they invested. One is not unjustly enriched by receiving what they have a legal right to claim. Nor do the facts justify the Receiver's claim that Anderson was "enriched" when compared to other investors, (even if that were the

relevant standard). Indeed, the Receiver has allowed more than a 100 "winning investors" who profited from the Ponzi scheme to pay back only their profits, and keep the principal payments they received. Anderson should be treated no differently. Summary judgment is appropriate.

BACKGROUND FACTS

1. Anderson's June 15, 2009 Investment With Basel.

Anderson made her investment with "Basel Institutional" on June 15, 2009. *See* Declaration of Adam S. Huhta ("Huhta Dec") Ex. 3 (Anderson Depo.) at 44. Anderson provided $102,000 to her grandson Grant Gryzbowski, who worked for a Receivership Entity, to be invested with Basel. *Id.* at 43. Anderson provided a $102,000 cashier's check to Gryzbowski to be invested. *See* Declaration of Adam S. Huhta Containing Confidential Documents ("Huhta Confidential Dec.") Ex. 10 (Anderson Depo. Ex. 4) at IR 003224. To make her investment, Anderson filled out a Basel Customer Agreement.

The account opening documents Anderson signed gave her the right to request her funds back at any time. *See* Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 185-86. That agreement provided that Anderson could terminate the agreement at any time: "The client or Basel Institutional may terminate the customer Agreement with immediate effect by giving notice to the other party at any time." Huhta Confidential Dec. Ex. 11(Anderson Depo. Ex. 1) at IR 003237 (section 3.1). Upon termination, Basel was required to provide the remaining account balance to Anderson. *Id.* at IR 003237. Anderson also signed a "Customer Order Authorization and Limited the Power of Attorney" granting Oxford Global Partners authority to trade her account. Huhta Confidential Dec. Ex. 12

(Anderson Depo. Ex. 2). Anderson also executed a "Management Agreement" with Oxford Global Partners that provided:

> [either] party may terminate this Agreement upon written notice. The advisor shall follow clients instructions for liquidating Clients positions upon any such termination.

Huhta Confidential Dec. Ex. 13 (Anderson Depo. Ex. 3) at IR 003638 (section VII B).

2. Anderson's Request to Close Her Account.

Shortly after making her investment, Anderson saw an article addressing the lawsuit filed by the Phillips' -- Ohio investors who had invested in Crown Forex. Huhta Dec. Ex. Ex. 2 (Gryzbowski Depo.) at 119-121; *Id* at Ex. 8 (Gryzbowski Depo. Ex. 6 – July 9 Star Tribune article). The lawsuit was against Cook and other Receivership Entities (but not Basel into which Anderson had invested). *See* CASE 0:09-cv-01732-MJD-FLN Doc. No. 1 Filed 07/07/09 (Phillips Complaint).

Anderson contacted Gryzbowski for guidance on what to do. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 120-121. Gryzbowski indicated he did not know what was going on. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 122. Gryzbowski told her what he had been telling other investors - to do what she thought was right. *Id.* at 121.

After another article was printed, Anderson decided to close her account. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 121-22. On July 14, she signed the necessary paperwork to close her account. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 233-34; Huhta Confidential Dec. Ex. 14 (Anderson Depo. Ex. 8) at IR003221. Gryzbowski provided the paperwork to Cook. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 138-39. Cook then asked Julia Smith, the authorized signatory on the Basel bank account at Associated Bank, to

authorize the wire transfer. Huhta Confidential Dec. Ex. 15 (July 15 e-mails requesting wire transfer); Huhta Confidential Dec. Ex. 16 at IR012613 (Depository Declaration).

Although a later article indicated that Judge Davis had frozen funds in Receivership Entity bank accounts, Gryzbowski was not concerned, believing that the client funds were at Crown Forex or Basel, and not in Cook's bank accounts. *Id*. at 130-31. Additionally, Gryzbowski was led to believe that the Phillips were hedge fund customers who wanted to make a withdrawal, but the hedge fund requirements only allowed withdrawals at quarterly endpoints. *Id.* at 203-204.

Cook was not involved in Anderson's decision to close her account. Huhta Dec. Ex. 1 (Cook Depo.) at 125. When assisting his grandmother, Gryzbowski was not trying to prevent other investors from getting their money. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 217. At that time, he was not aware that various Receivership Entities were a Ponzi scheme. *Id.; Id.* at Ex. 1 (Cook Depo.) at 124-25. It wasn't until November 2009 that Gryzbowski suspected a problem with his employer. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 217. The SEC's investigation was not a factor influencing Gryzbowski to assist his grandmother in closing her account. *Id.* at 202.

Gryzbowski did not ask anyone to handle his grandmother's withdrawal differently than any other account. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 186. The funds were withdrawn from the "Basel" account into which Anderson's deposit was made. Huhta Confidential Dec. Ex. 17 (Associated Bank Financial Statement of Accounts) at IR012617. After the wire to Anderson closing her account, Basel's bank account at Associated Bank had $302,682.45 in it. *Id* at IR012617. At that time, Basel had only

five remaining investors, who had provided funds totaling $327,625. Huhta Confidential Dec. Ex. 18 (Spreadsheet excerpts) at IR025816.[1]

“Basel” was apparently being set up given the bankruptcy involving the Crown Forex entities. Cook intended to run it legitimately. Huhta Dec. Ex. 1 (Cook Depo.) at 122. Basel was not able to get the trading platform set up. According to Cook “It never got started.” Huhta Dec. Ex. 1 (Cook Depo) at 122-123. “Her [Anderson’s] money was just sitting there and it wasn’t being managed or it wasn’t being traded or anything.” Huhta Dec. Ex. 1 (Cook Depo.) at 122-123; *see also* Huhta Confidential Dec. Ex. 17 (Associated Bank Statements) at IR012616-617. Cook testified that if a withdrawal request was made, they were all honored up to a certain day. Huhta Dec. Ex. 1 (Cook Depo.) at 123-124.

Cook was not involved in Anderson’s decision to close her account. *Id.* at 125. Anderson never spoke with Cook. Huhta Dec. Ex. 3 (Anderson Depo.) at 17; *Id.* at Ex. 1 (Cook Depo.) at. 114. Basel’s payment to Anderson was not made to induce other investors to invest in any Receivership Entity. *Id.* at Ex. 1 (Cook Depo.) at 126. **Cook testified that the return of Anderson’s funds by Basel was not done in furtherance of the Ponzi scheme.** *Id.* at 126.

Anderson did not profit from her brief investment. *Id.* at 126-27. She put in $102,000, and received $102,000 back. *Id.*

[1] One purported investor listed on the SEC’s spreadsheet provided a $75,000 check that bounced. *See* Huhta Dec. Ex. 17 at IR) 12617, noting a $75,000 withdrawal for “Deposit Return Item 5814” and IR012625 (copy of check No 5814 for $75,000 that apparently had insufficient funds in the account.

3. The SEC Investigation.

On June 22, 2009, the SEC appeared at the Receivership Entities' offices for a non-public investigation. Before then, the employees of the Receivership Entities had no knowledge of any problems with their employer. Huhta Dec. Ex. 4 (Moeller Depo.) at 27-28. During that investigation, Cook represented to his employees that the investigation was a routine audit that should not concern them. Huhta Dec. Ex. 4 (Moeller Depo.) at 135-136. Indeed, Gryzbowski and Moeller, both of whom had invested with the Receivership Entities, kept their own personal funds invested with Cook! Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 187; *Id.* at Ex. 4 (Moeller Depo.) at 120-121. Gryzbowski also made no effort to withdraw his father's investment, or his mother's best friend's investment with Cook. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 187-188. As of October 2009, the SEC had not made any determination that any Receivership Entities were involved in wrongdoing. To the contrary, the SEC, in response to investors' requests, was informing investors that the mere fact of the investigation should not be construed as an indication that any violation of law has occurred, or as an adverse reflection on any person, entity, or security. *See* Huhta Confidential Dec. Ex. 19 (October 2009 Letter from SEC Division of Enforcement).

4. Chief Judge Davis Concluded That The Attorneys Representing Cook Neither Knew, nor Should Have Known, their Retainers were from Fraudulent Funds.

Chief Judge Davis addressed the issue of what information was knowable at the time Anderson received her funds, in the context of the government's attempt to claw back payments made to the lawyers representing Cook and others. Both the SEC and the

CFTC asked the Court to find that the lawyers representing Cook and the Receivership Entities not be allowed to retain the fees paid because the source of the retainers were likely the fruits of Cook's and Kiley's fraud. *See* Case 0:09-cv-03332, Document 186. The government argued that counsel knew or should have known that such funds were likely obtained by fraud. *Id*. In support of the argument, the government highlighted the fact of the SEC's surprise walk-in of Cook's offices in mid June 2009, the CFTC subpoena to Oxford Global Partners in June 2009, the fact that a civil lawsuit was filed in July 2009 against Cook, Kiley and others alleging fraud, and the fact that numerous newspaper articles appeared detailing the alleged fraud. Based on these facts, the CFTC and the SEC argue that counsel was aware of sufficient facts to put them on notice that the source of the fees paid were from defrauded customers. Judge Davis disagreed, and found:

> When the fee retainer agreements were entered into, the SEC's and CFTC's investigations had only begun, and no criminal investigation had commenced. The same is true for the civil [Phillips] lawsuit. In July 2009, the record in the civil suit contained only pleadings and limited evidence. Under these circumstances, the Court will not find that counsel knew or should have known that the source of the funds paid were from a fraudulent scheme.

Case 0:09-cv-03332, Document 186 at 8. Judge Davis correctly concluded that counsel defending Cook could not have known their retainers were fruits from a fraudulent scheme -- but the Receiver apparently maintains that 89-year-old Anderson should have been able to uncover what Cook's own lawyers did not know.

The Phillips – the Ohio investors who initially filed suit, whose lawsuit received the newspaper coverage seen by Anderson -- received hundreds of thousands of dollars in

principal payments before Cook's scheme collapsed. The Phillips' received a $52,500 distribution from the Receivership Entities on July 8, 2009 *after* they filed their lawsuit against Cook and others, and within a week of Anderson's request to close her account, but have not had to disgorge those funds. Huhta Confidential Dec. Ex. 18 (spreadsheet excerpts).

And there are others who profited from the scheme the Receiver intends to allow to keep 100% of the principal they received from the Receivership Entities. In December 2010, the Receiver sent out 150 demand letters to investors who received more money from Receivership Entities than they invested. The demand letters asked these 150 "winning investors" for the "profit" back, but allowed them to keep the principal. *See* 0:09-cv-03333-MJD –FLN Document 658, (Seventh Status Report Of Receiver) for a discussion of the letters sent to "winning" investors.

ARGUMENT

I. ANDERSON IS ENTITLED TO SUMMARY JUDGMENT ON THE FRAUDULENT TRANSFER CLAIM.

A. The Summary Judgment Standard.

The Court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The moving party bears the burden of establishing the basis of its motion. *Celotex,* 477 U.S. at 323. Once the moving party

discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986).

B. The Minnesota Fraudulent Transfer Act.

The purpose of the Minnesota Fraudulent Transfer Act, Minn. Stat. § 513.41, *et seq.,* is to prevent debtors from putting property which is available for payment of their debts beyond the reach of their creditors. *In re Wintz Companies.*, 230 B.R. 848, 859-60 (Bankr. 8th Cir. 1999). The typical fraudulent transfer scenarios involve debtors conveying property to friends whom the debtor expects will use the property in a way that benefits the debtor, debtors transferring property to family members or friends without consideration, or debtors exchanging assets a creditor might readily reach for assets that are difficult to seize. *See generally Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1508-09 (1st Cir. 1987). But fraudulent conveyance law does not seek to void transfers characterized as "preferences" – when one legitimate creditor is paid leaving insufficient funds to pay other creditors. *Id.* at 1508. As Justice Breyer wrote while sitting on the First Circuit, '[t]he basic object of fraudulent conveyance law is to see that the debtor uses his limited assets to satisfy some of his creditors; it normally does not try to chose among them." *Id.* at 1509.; *see also Thompson v. Schiek*, 213 N.W. 911, 912 (Minn. 1927) ("Payment of an honest debt is not fraudulent . . .although it operates as a preference, the rule being that a preference by an insolvent debtor of one of his creditors can be avoided only by appropriate proceedings under the bankruptcy law and is

not open to attack in an action brought by another creditor.")(cited with approval in *Johnson v. O'Brien*, 144 N.W.2d 720, 722 (Minn. 1966)). "Even the preferential repayment of pre-existing debts to some creditors does not constitute a fraudulent conveyance, whether or not it prejudices other creditors…." *In re Sharp Int'l Corp.*, 403 F.3d 43, 54 (2d Cir. 2005).

Here, the Receiver alleges the return to Anderson of the money she invested was "preferential." But as a legitimate investor, Anderson was entitled to the return of her principal investment at her request. It is against this backdrop that the Receiver's claims alleging fraudulent "preferential" transfers must be assessed.

To avoid a transfer through an actual fraud claim under 513.44 (a)(1), a creditor must prove that the debtor made the transfer "with actual intent to hinder, delay or defraud any creditor of the debtor." Minn. Stat. 513.44 (a)(1). The relevant intent is that of the *debtor* who made the transfer – the intent of other parties or the transferee is irrelevant. *In re McLaren*, 236 B.R. 882, 899 (Bankr. D.N.D. 1999); *In re Marketxt Holdings Corp.*, 361 B.R. 369, 395 (Bankr. S.D.N.Y. 2007) (plaintiff must establish the intent of the transferor/debtor).

Given the rarity of direct evidence of fraudulent intent, courts typically evaluate actual fraud claims using circumstantial indicia of intent called "badges of fraud." *In re Northgate Computer Sys., Inc.*, 240 B.R. 328, 360 (Bankr. D. Minn. 1999). Inferring fraudulent intent is proper if a creditor establishes a "confluence" of "several" badges of fraud. *Kelly v. Armstrong*, 141 F.3d 799, 802 (8th Cir. 1998); *Northgate*, 240 B.R. at 364 (a single badge is not enough, "no matter the strength of its evidence").

The Receiver may attempt to invoke a limited exception to the badges of fraud analysis, the so-called "Ponzi presumption," that may permit an inference of actual intent to defraud in the Ponzi scheme context. The seminal decision in *Indep. Clearing House Co*. explained:

> One can infer an intent to defraud future [investors] from the mere fact that the debtor was running a Ponzi scheme. Indeed, no other reasonable inference is possible. A Ponzi scheme cannot work forever. The investor pool is a limited resource and will eventually run dry. The perpetrator must know that the scheme will eventually collapse as a result of the inability to attract new investors. . . . He must know all along, from the very nature of his activities, that investors at the end of the line will lose their money. Knowledge to a substantial certainty constitutes intent in the eyes of the law . . . and a debtor's knowledge that future investors will not be paid is sufficient to establish his actual intent to defraud them.

In re Indep. Clearing House Co., 77 B.R. 843, 860-61 (D. Utah 1987). "The perpetrator nevertheless makes payments to present investors, which, by definition, are meant to attract new investors. He must know all along, from the very nature of his activities, that investors at the end of the line will lose their money." *Id.* The Utah District Court held, "if at the time the debtors made transfers to earlier undertakers they had the actual intent to hinder, delay or defraud later undertakers, transfers to earlier undertakers may be fraudulent within the meaning of section 548(a)(1)." *Id.* In other words, courts assume fraudulent intent because payments made to old investors in an ongoing Ponzi scheme are presumed to be fraudulent because they are for the purpose of convincing new investors to invest. The Eighth Circuit has never recognized this exception.

Courts invoking the Ponzi presumption require trustees and receivers to establish two elements: (1) "the *debtor* was indeed operating a Ponzi scheme"; and (2) the transfer

at issue was "in furtherance" of that Ponzi scheme. *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 13 (S.D.N.Y. 2007); *In re Lake States Commodities, Inc.*, 272 B.R. 233, 241 (Bankr. N.D. Ill. 2002). The presumption does not apply here.

C. The Transfer Was Not "In Furtherance" Of The Ponzi Scheme.

If the Receiver establishes that Basel was operated as part of the Ponzi scheme, he must next demonstrate that the transfer to Anderson was made "in furtherance" of that scheme. A transfer is "in furtherance" of a Ponzi scheme if it is "essential to the continuation of the scheme" and necessary for the scheme "to survive." *Manhattan*, 397 B.R. at 13; *In re IFS Fin. Corp.*, 417 B.R. 419, 439 n.15 (Bankr. S.D. Tex. 2009) (transfer must be "necessary for continuation of the fraud"). The "in furtherance" element necessarily restricts the scope of the Ponzi presumption -- some transfers are legitimate. The presumption applies only to those deemed necessary to continue the fraud. *See In re Sheetex, Inc.*, No. 98-52263-JDW, 1999 WL 739628, at *17 (M.D. Ga. Sept. 21, 1999) ("[I]t might be possible for a Ponzi scheme to make at least some legitimate transfers," such as "compensation for legitimate services . . . performed in the employ of Debtor"); *In re World Vision Ent., Inc.*, 275 B.R. 641, 658 (Bankr. M.D. Fla. 2002) ("Simply because a debtor conducts its business fraudulently does not make every single payment by the debtor subject to avoidance"); *see also In re Manhattan*, 397 B.R. at 11 ("[C]ourts must be sure that the transfers sought to be avoided are related to the scheme"). Indeed, Judge Davis' ruling on the attorneys fees issue applies a similar analysis. If the Receiver establishes that Basel was a Ponzi scheme, transfers by the debtor that the Receiver can

show were "in furtherance of," *i.e.*, necessary for, the continuation of the scheme may be avoided by Basel's creditors.

Other transfers made by Cook or the Receivership Entities in no way bear on whether Basel's payment to close Anderson's account was fraudulent -- each transfer must be considered independently. *See In re Churchill Mortgage Inv. Corp*, 256 B.R. 664, 677-78 (Bankr. S.D.N.Y. 2000) ("The focus of the inquiry . . . is the specific transaction the trustee seeks to avoid"); *In re Carrozzella & Richardson*, 286 B.R. 480, 490 (D. Conn. 2002) ("[T]he proper focus of a fraudulent transfer inquiry is on the transfer itself, not the overall business practices of the Debtor").

Cook himself testified that the payment to Anderson was not in furtherance of the Ponzi scheme or done to induce others to invest. Huhta Dec. Ex. 1 (Cook Depo.) at 126. The Receivership Entities had stopped taking new investments by the time Anderson decided to close her account. Huhta Dec. Ex. 4 (Moeller Depo.) at 29. David Austrum and Richard Ostrom, the investigators hired by the Receiver, both testified that their investigation did not uncover any facts that the transfer to Anderson was an attempt to evade creditors.

> Q: You're not aware of any facts that come up in the course of your investigation, in your interview of Grant Gryzbowski, that showed that transfer to Dot Anderson of her $102,00 when she asked for her for her account to be closed was an attempt to evade creditors?
>
> A: Again, I don't' know all the facts.
>
> Q: I'm asking do you know of any facts in the course of your investigation that showed that?
>
> A: No.

Huhta Dec. Ex. 5 (Ostrom Depo.) at 139. David Austrum, another investigator hired by the Receiver, also found no evidence Anderson's account closure was an attempt by anyone to evade Receivership Entity creditors. Huhta Dec. Ex. 6 (Austrum Depo.) at 103-105, 109.

Anderson, not Cook, made the decision to close her account. Anderson, not Cook, had the paperwork prepared to effectuate the account closing. And Julia Smith, the appropriate signatory on the Basel account, not Cook, contacted Associated Bank to authorize the wires to Anderson closing her account. Huhta Confidential Dec. Ex. 15 (E-mails to Smith). The Receiver has no evidence that the payment to Anderson, at her request, was made with the intent to defraud any of Basel's creditors. Here, the Receiver cannot establish that Basel made the transfer to Anderson, at her request, to frustrate, hinder, or delay creditors. Anderson made a legitimate request to close her account, which Basel was contractually obligated to fulfill. Indeed, Cook testified that the payment to Anderson, at her request, was not done in furtherance of the Ponzi scheme. Huhta Dec. Ex. 1 (Cook Depo.) at 126. The payment to Anderson, at her request, was not a fraudulent transfer. The Receiver has no evidence that the processing of Anderson's request to close her account was made with the actual intent to defraud.

Because the presumption of actual intent to defraud does not apply, the court must consider the factors set forth in Minn. Stat. 513.44 to assess Basel's payment to Anderson to close her account. Those factors are whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;
(3) the transfer or obligation was disclosed or concealed;
(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(5) the transfer was of substantially all the debtor's assets;
(6) the debtor absconded;
(7) the debtor removed or concealed assets;
(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Minn. Stat. § 513.44.

These factors weigh against a finding of an intent to defraud. Anderson is not an insider – she is not a director, officer, or person in control of Basel. Minn. Stat. § 513.41(7)(ii). Neither Basel, nor any other person or entity retained control of the funds transferred. Basel had not been sued. Although the Phillips had instituted a suit against Cook and Oxford, Basel, the entity Anderson had invested with, was not a named defendant. There closure of Anderson's account was not hidden. And Basel received reasonably equivalent value from Anderson - Basel received a dollar-for-dollar forgiveness of its contractual debt to Anderson. *See In re Carrozzella & Richardson*, 286 B.R. 480, 491 (D. Conn. 2002) ("In exchange for the interest paid to the Defendants, the Debtor received a dollar-for-dollar forgiveness of a contractual debt. This satisfaction of an antecedent debt is 'value,' … and in this case 'reasonably equivalent value.'") *See also In re Bayou Group, LLC*, 439 B.R. 284, 309 (S.D.N.Y.

2010). *see also Jobin v. McKay (In re M&L Bus. Mach. Co.*), 84 F.3d 1330, 1340-41 (10th Cir. 1996) (holding that because the debtor's payments to investors reduced the amount of the investors' claims for rescission and restitution, the payments were for reasonably equivalent value); *In re United Energy Corp.*, 944 F.2d 589, 595 (9th Cir. 1991))(holding that investors exchanged reasonably equivalent value when their rights to restitution were proportionately reduced by. payments received); *Jobin v. Cervenka (In re M&L Bus. Mach. Co.*), 194 B.R. 496, 501 (D. Colo. 1996) ("[C]ases addressing the issue have held that a defrauded investor in a Ponzi scheme gives 'value' to the debtor in the form of a dollar-for-dollar reduction in the investor's restitution claim against the Ponzi scheme."). And there is no evidence that Basel was insolvent – after the transfer was made, its bank account had $302,682.45. Huhta Confidential Dec. Ex. 17 (Associated Bank account statement) at IR012617. Only six other investors had provided funds to Basel for investment. Huhta Confidential Dec. Ex. 18 (spreadsheet excerpts).

Anderson had the contractual right to request and receive her funds back under the account opening documents. And as Cook testified, account withdrawals were regularly processed. Huhta Dec. Ex. 1 (Cook Depo.) at 123-124. Her decision to close her account was not made with the intent to defraud any creditor. All she received were funds to which she was entitled. Nothing more.

D. ANDERSON ACTED IN GOOD FAITH WHEN SHE ASKED TO CLOSE HER ACCOUNT.

Anderson acted in good faith – a reasonable person in her position would have had no reason to know of a fraudulent purpose behind the agreement to close her account, or to believe that Basel (or any other Receivership Entity) was near insolvency. Basel received value in closing Anderson's account and extinguishing its obligation to her.

1. Law Governing The Good Faith Defense.

If a creditor establishes a voidable fraudulent transfer under the fraudulent transfer statute (which Anderson disputes) the transferee can retain the transfer if she establishes the "good faith" defense. Minn. Stat. 513.48 provides: "A transfer or obligation is not voidable under section 513.44(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee."

Under Minnesota law, a transferee may take in good faith even knowing that the transferor is insolvent, as long as the transferee gave consideration. *Schlecht v. Schlecht*, 168 Minn. 168, 174, 209 N.W. 883, 886 (1926). Good faith is a lack of "notice of the fraudulent intent of the [transferor]." *Leqve v. Smith*, 63 Minn. 24, 26, 65 N.W. 121, 121 (1895). On the other hand, "a transaction is not done in good faith if the earmarks of an arms-length transaction are missing." *In re Am. Lumber Co.*, 5 B.R. 470, 477 (D. Minn. 1980). The Receiver cannot demonstrate that Anderson hade notice of any alleged fraudulent intent – Anderson, not anyone else, initiated the request to close her account. She had provided Basel $102,000 for investment, and received $102,000 back after she

signed the appropriate paperwork. And neither she nor her grandson Gryzbowski knew or suspected that an alleged Ponzi scheme was being operated.

The Bankruptcy Code likewise does not define good faith, leaving courts to determine it on a case-by-case basis. *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995). Generally, "courts look to what the transferee 'knew or should have known' rather than examining the transferee's actual knowledge from a subjective standpoint." *Id.* Courts also consider whether "the transaction carries the earmarks of an arms-length bargain." *Id.* Other courts look first to whether the transferee had sufficient knowledge to place the transferee on "inquiry notice" of: (a) "the *debtor's* fraudulent purpose"; or (b) "the *debtor's* . . . possible insolvency." *In re M & L Bus. Mach. Co., Inc.*, 84 F.3d 1330, 1336-1338 (10th Cir. 1996); *In re Bayou Group, LLC*, 439 B.R. 284, 314 (S.D.N.Y. 2010).

In *Bayou*, the Southern District of New York recently rejected the Bankruptcy Court's holding that evidence of any "infirmity in [the debtor] or [in] the integrity of its management" was sufficient to place a transferee on inquiry notice. *Id.* (quotations omitted). The District Court re-affirmed the general rule that the first prong of the good faith test concerns whether the transferee had notice of the debtor's (i) possible insolvency or (ii) fraudulent purpose. *Id.* And, significantly, with respect to fraudulent purpose, the court "should focus on the *circumstances specific to the transfer at issue*," as opposed to whether "the transferee has information indicating that the transferor's activities in general might be fraudulent." *Id.* at 314. Cases often look to whether the transferee was on "inquiry notice." *See e.g. In re M&L Bus. Co.*, 84 F.3d at 1336-38 (good faith analysis focuses on whether transferee had "inquiry notice" of "the *debtor's*

fraudulent purpose" or the *debtor's* "possible insolvency"). As the *Bayou* court noted, the court "should focus on the *circumstances specific to the transfer at issue*," as opposed to whether "the transferee has information indicating that the transferor's activities in general might be fraudulent." 2010 WL 3839277, at *19. The first step is to determine "whether the transferee had information that put it on inquiry notice that the transferor was insolvent or that the transfer might be made with a fraudulent purpose." *In re Bayou Group, LLC*, 439 B.R. 284, 310 (S.D.N.Y. 2010). Notice of other "problems" is irrelevant. *Id.* at 314. "[W]hether a transferee is on inquiry notice is informed by the standards, norms, practices, sophistication, and experience generally possessed by participants in the transferee's industry or class." *Id.* at 313. *See also In re Lockwood Auto Group, Inc.*, 428 B.R. 629, 636 (Bankr. W.D. Pa. 2010) (notice of transferor's fraudulent purpose, transferor's unfavorable financial condition, or improper nature of a transaction preclude a finding of good faith). If the transferee is on inquiry notice, the transferee must then demonstrate that a diligent inquiry would not have uncovered the transferor's fraud. *In re Bayou Group, LLC*, 439 B.R. 284, 317 (S.D.N.Y. 2010); *In re Manhattan Inv. Fund II,* 359 B.R. at 523–24; *In re World Vision Entm't, Inc.,* 275 B.R. at 659.

1. Anderson Acted In Good Faith – She Had No Knowledge Of, Or Reason To Suspect, Any Fraudulent Activity Or That Basel Was Near Insolvency.

Anderson acted in good faith. The account opening documents gave her the unrestricted right to close her account. Huhta Confidential Dec. Ex. 11 at IR003237; *Id.* at Ex. 13 (Anderson Depo. Ex. 2) at IR003638. There is no evidence that Anderson

"knew or should have known" of any fraud, let alone fraud with respect to her decision to close her account. Nor is there any evidence that Anderson had reason to suspect Basel was on the brink of insolvency.

Here, the Receiver here does not allege that Anderson was on inquiry notice of any fraudulent intent. In discovery, Anderson asked the Receiver to identify all facts upon which the Receiver relied for the assertion that Anderson did not take her funds in good faith. In response to that interrogatory, the Receiver only indicated that Anderson know of the lawsuit filed by the Phillips, and then decided to close her account. Huhta Dec. Ex. 7 (Receiver's First Supplemental Objections And Responses To Investor Respondent Dot Anderson's First Set Of Interrogatories) at No. 11. At no point did the Receiver allege Anderson was on inquiry notice of any issue, so should not now be able to argue otherwise.

But even under an inquiry notice analysis, Anderson acted in good faith and a diligent inquiry would not have illustrated Basel's insolvency or any fraud. Indeed, as Chief Judge Davis concluded, even Cook's sophisticated defense attorneys -- who could ask Cook questions under the protections of the attorney-client privilege -- neither knew nor should have known of Cook's fraudulent scheme. Case 0:09-cv-03332, Doc. 186, at 8. Yet the Receiver apparently maintains that 89-year-old Anderson could have concluded what Cook's own lawyers did not know.

Knowledge of a lawsuit against the transferor has been held insufficient to preclude a finding of good faith. *Rucker v. Steelman*, 619 S.W.2d 5, 7 (Tex. Civ. App.

1981). Thus, the mere fact that the Phillips had filed suit is not sufficient to preclude a finding of good faith.

The Court's findings in *Bayou IV* are instructive – there, the court held that the following were insufficient to prompt an inquiry notice as a matter of law: "(1) allegations [S.E.C. violations, and criminal activity] made in a lawsuit filed against the transferor by former [principal of the transferor]; (2) [the transferor's] delay in providing net asset values ("NAVs") for [the transferor] in March and April 2004, [the transferor's] inconsistent statements about who was responsible for preparing NAVs, and [the transferor's] ultimate disclosure that a related entitity], rather than an offshore administrator, was calculating NAVs for the [transferor], and (3) negative information [related to significant litigation and concerns about the transferor's integrity] concerning [transferor and its principal] set forth in two background investigation reports." *In re Bayou Group, LLC*, 439 B.R. 284, 318 (S.D.N.Y. 2010) (*Bayou IV*). The fact that the SEC was investigating various Receivership Entities is also insufficient to preclude a finding of good faith. *See In re Hannover Corp.*, 310 F.3d 796, 801 (5th Cir. 2002) (reversing District Judge, and finding transferee's good faith, even with knowledge of SEC investigation alleging fraud, payments of cash or checks signed over from third parties, suspicions of principal's wrongdoing numerous, among other suspicious circumstances). Indeed, even had Anderson contacted the SEC, she would not have been informed of any potential issues. The SEC was informing investors, as late as October 2009, that neither the Commission nor its staff had concluded there were any violations of the securities laws. Moreover, they indicated that the existence of their investigation

should not be construed as an indication by the Commission that any violation of law had occurred, or as an adverse reflection upon any person, entity, or security. *See* Huhta Confidential Dec. Ex. 19 (SEC Enforcement Division letter).

Grant Gryzbowski and Ryan Moeller both testified they had no knowledge that any Receivership Entity was operating a Ponzi scheme. Huhta Dec. Ex. 4 (Moeller Depo.) at 28-29. Gryzbowski left his own money, his father's money, and his mother's best friend's money invested with Cook. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 187. There is no evidence that Anderson could have discovered any alleged fraud by Basel, or any claimed insolvency. Because she received her funds in good faith, summary judgment is appropriate.

E. The Receiver Is Not A Creditor Under The Fraudulent Transfer Act.

The fraudulent transfer claim against Anderson is not brought by a creditor of the Receivership Entities, and fails as a matter of law. Claims for fraudulent transfer under the Minnesota Uniform Fraudulent Transfer Act, Minn. Stat. § 513.41, *et seq.,* ("MUFTA") necessarily involves a three part arrangement: (1) **a creditor with a claim** against a debtor; (2) **a debtor that makes a transfer** to a third party, which renders the debtor unable to pay the creditor's claim; and (3) **a third party that receives the transfer** from the debtor/transferor. The remedy to avoid the transfer is available only to the creditor. *See* Minn. Stat. § 513.47 ("Remedies of Creditors").

A receiver stands in the place of the entities for which he was appointed receiver and is only permitted to bring any claim in their place. *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1514-16 (1st Cir. 1987); s*ee also SEC v. Holt*, 2007 WL

2332584, at *2-3 (USDC D.Ariz. August 13, 2007); *Stenger v. World Harvest Church*, 2006 WL 870310, at *5-6 (N.D.Ga. 2006). While the goal of a receivership is to protect the assets to preserve them for creditors, a receiver is empowered to bring only those causes of action that actually belong to the entities that have been placed in receivership, and is without power to pursue causes of action owned by the creditors of those entities. "The general rule is that a receiver acquires no greater rights in property than the debtor had and that, except as to liens in existence at the time of the appointment, the receiver holds the property for the benefit of general creditors under the direction of the court." *Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 625 (6th Cir. 2003). "Accordingly, when a receiver is appointed over a corporation, the receiver may only assert claims that could have been asserted by the corporation, and the receiver lacks standing to institute action on behalf of investors in the corporation." *Liberte Capital Group, LLC v. Capwill*, 248 Fed.Appx. 650, 656 (6th Cir. 2007). Here, Basel, as the debtor/transferor, could not assert a fraudulent transfer claim against Anderson. Nor can the Receiver assert such a claim for Basel.

Anderson is the third party alleged to have received the transfers. Basel is the debtor/transferor that made the transfer. The right to sue under MUFTA belongs to the creditors of the debtor/transferor that made the allegedly fraudulent transfer. *See* Minn. Stat. § 513.47. Under the facts here, the right to sue for fraudulent transfer belongs to the creditors of the Receivership Entities - not to the Receiver, who stands in the shoes of Basel - the debtor/transferor. Because no "creditor" is bringing the claim, it fails as a matter of law and summary judgment should be granted.

II. ANDERSON IS ENTITLED TO SUMMARY JUDGMENT ON THE UNJUST ENRICHMENT CLAIM.

The Petition's purported claim for unjust enrichment suffers the same defects as the fraudulent transfer claim. The Petition alleges that the Respondents' "retention of funds at the expense of other defrauded investors who did not receive a preference violates fundamental principles of justice, equity, and good conscience." Petition ¶ 45. The Petition makes no allegation that Anderson's return of her principle investment is unjust as it relates to any Receivership Entity represented by the Receiver. Accordingly, the Petition fails to state a claim upon which relief can be granted.

A. Anderson Had A Contractual Right To Receive Her Funds, So The Unjust Enrichment Claim Fails.

The Receiver also purports to assert a claim for unjust enrichment against Anderson because she received her principal investment back from the Receivership Entities, while other investors did not. To establish this claim under Minnesota law, the Receiver must prove that Anderson knowingly received or obtained something of value, was not be entitled to the benefit, and under circumstances that would make it unjust to retain what was received. *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137 140 (Minn. Ct. App. 1992).

The payment to Anderson was made under the obligations of a contract between Anderson and Basel. The Receiver's claim therefore fails – "The existence of an express contract between the parties precludes recovery under the theories of quasi-contract, unjust enrichment, or quantum meruit." *See Sterling Capital Advisors, Inc. v. Herzog,* 575 N.W.2d 121, 126 (Minn. Ct. App. 1998). Case law recognizes that investors in Ponzi

schemes have a claim for restitution or rescission against the scheme's operator for the return of their principal investment. *See Donnell v. Kowell*, 533 F. 3d 762, 771-73 (9th Cir. 2008); *see also Jobin v. McKay (In re M&L Bus. Mach. Co.*), 84 F.3d 1330, 1340-41 (10th Cir. 1996) (holding that because the debtor's payments to investors reduced the amount of the investors' claims for rescission and restitution, the payments were for reasonably equivalent value); *In re United Energy Corp.*, 944 F.2d 589, 595 (9th Cir. 1991))(holding that investors exchanged reasonably equivalent value when their rights to restitution were proportionately reduced by. payments received); *Jobin v. Cervenka (In re M&L Bus. Mach. Co.*), 194 B.R. 496, 501 (D. Colo. 1996) ("[C]ases addressing the issue have held that a defrauded investor in a Ponzi scheme gives 'value' to the debtor in the form of a dollar-for-dollar reduction in the investor's restitution claim against the Ponzi scheme.").

The Receiver here alleges nothing more than Anderson was repaid the amount of her principal investment. That is not enrichment under Minnesota law because she is entitled to the funds she received. The Receiver's claim fails because as a matter of law.

And Basel cannot show damages from the payment to Anderson. The payment to Anderson benefitted Basel, by decreasing the obligations it owed. While the Receiver is attempting to marshal resources to satisfy the other defrauded investors' restitution claims, had Anderson not received her investment back, she would have a contract claim and a claim for rescission or restitution against Basel up to the amount of her investment. Receiving back what she had a contractual and equitable claim to by definition cannot be "unjust enrichment." *Schaaf v. Residential Funding Corp*., 517 F.3d 544, 554 (8th Cir.

2008) ("Thus, unjust enrichment does not occur when a defendant 'is enriched by what he is entitled to under a contract or otherwise.'"). Anderson therefore respectfully requests that the Court dismiss Count II with prejudice.

CONCLUSION

The law of fraudulent transfers is designed to make sure that legitimate creditors such as Anderson are paid with available funds – it is not designed to equalize payments among creditors. There is no evidence that Anderson's decision to close her account was an effort by Basel, Cook, or anyone else, to defraud others or evade any creditors. Without such evidence, the fraudulent transfer claim fails. And the Receiver does not represent a "creditor" under the Minnesota Fraudulent Transfer Act. Minnesota's fraudulent transfer statute grants a cause of action to defrauded creditors – it does not empower the Receiver who represents the debtor entity that made the transfer to undo the transaction.

Anderson received her funds in good faith. She did not know of the Ponzi scheme when she requested her money back, nor could she have uncovered it.

And as a matter of law, Dot Anderson was not unjustly enriched when she received only the principal amount of her investment back. She received what she had a contractual right to claim. For these reasons, Anderson respectfully requests that the court grant her motion for summary judgment on each count and dismiss the Petition with prejudice.

Dated: December 21, 2011

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