

**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.

**MEMORANDUM OF LAW IN SUPPORT OF LENDERS' MOTION FOR
SUMMARY JUDGMENT**

TABLE OF CONTENTS

Introduction 1

Statement of Undisputed Facts 3

 A. The Cook Entities’ Currency Trading Business 3

 B. Each Lender’s Loan to the Cook Entities 5

 1. David Buysse 5

 2. Steven and Pamela Cheney 6

 3. Terry and Jean Frahm 8

 4. Steven and Jenene Fredell 10

 5. Michael and Jennifer Heise 12

 6. James McIntosh 14

 7. Walter Defiel 15

 8. Michael and Cynthia Hellesheim 16

 9. Larry Hopfenspirger 17

 10. Steven Kautzman 18

 11. George and Karen Morisset 19

 12. Reynold and Judith Sundstrom 20

 C. The Account Opening Documents 21

 D. The Cook Currency Entities Performed According to the Contracts 23

 E. SEC Investigation 24

 F. The Cook Entities’ Contractually Authorized Transfers of Lenders’ Funds 25

 1. David Buysse 25

 2. Steven and Pamela Cheney 26

 3. Walter Defiel 26

4. Terry Frahm	27
5. Steven and Jenene Fredell.....	28
6. Michael Heise	29
7. Michael and Cynthia Hillesheim	29
8. Larry Hopfenspirger.....	30
9. Steven Kautzman	31
10. James McIntosh	31
11. George and Karen Morisset	32
12. Reynold Sundstrom.....	32
13. Phillips Litigation.....	33
14. Institution of the Receivership.....	34
15. The Alleged “Red Flags”	35
a. Some Lenders Received the Return of Funds Without Requesting Them.....	36
b. Berg Promised to Monitor the Cook Currency Entities	37
c. Lenders Knew Cook was Berg’s Son-in-Law.....	37
d. Lenders Knew Berg Was Not an Investment Advisor	38
e. Lenders Did Not Receive Written Account Closure Documents.....	39
f. Lenders Were Not Charged Fees For Account Closure.....	39
g. Some Lenders Knew of the Existence of an Investigation	40
h. Lenders Received Money Directly From Cook Entities	42
i. Lenders Continued to Receive IRA Statements.....	43
j. Discrepancies in the Account Statements and Documents	43
k. Additional Specific “Red Flags”	44

1. Additional Red Flags Identified By the Receiver’s Expert.....	45
i. Rate of Return and Stated Risk.....	46
m. Most Purported Red Flags Were Available to All Cook Investors.....	48
16. Lenders’ Expert.....	49
Argument.....	50
A. Summary Judgment Standard.....	50
B. The Receiver’s Unjust Enrichment Claim Must Be Dismissed	51
C. The Receiver’s Fraudulent Transfer Claim Must Be Dismissed.....	53
1. The Minnesota Fraudulent Transfer Act.....	53
2. The “Ponzi Scheme Presumption” Does Not Apply Here Because The Transfers Were Made After The Cook Currency Entities Stopped Taking New Investors.....	56
3. Each of the Lenders Received The Repayment of Their Respective Loans in “Good Faith” under the Uniform Fraudulent Transfer Act	57
a. “Good Faith” Under Minnesota Law	57
b. “Good Faith” Under the Bankruptcy Code and the Uniform Fraudulent Transfer Act	58
D. Each Lender Has Established He or She Received Any Amounts From the Cook Currency Entities In “Good Faith”	61
1. Case Law Interpreting “Red Flags”	62
2. Flags Not Held to Be “Red” as a Matter of Law	63
3. What Is a Red Flag?.....	65
4. The Specific Flags Alleged By the Receiver Are Not “Red”	67
a. The Rates of Return or Risk Were Not a Red Flag.....	67
b. The Account Documents and Statements Were Not a “Red Flag”	68
c. The Manner in Which Lenders Received Their Funds Was Not a “Red Flag”	69

d. No Information About Cliff Berg Constitutes a Red Flag	71
e. The Cashier’s Checks Themselves Were Not Red Flags.....	72
f. The SEC Investigation Was Not a “Red Flag”	73
g. The NFA Action or UBS Litigation Were Not “Red Flags”	76
h. Overview for Each Lender	776
i. Lender David Buysse	76
ii. Steven and Pamela Cheney	77
iii. Walter Defiel.....	78
iv. Terry Frahm	79
v. Steven and Jenene Fredell.....	81
vi. Michael Heise	82
vii. Michael and Cynthia Hillesheim	83
viii. Larry Hopfenspirger.....	84
ix. Steven Kautzman	85
x. James McIntosh.....	86
xi. George and Karen Morisset	87
xii. Reynold Sundstrom.....	88
xiii. Other Investors.....	89
i. The Law Of the Case Establishes That Lenders Were Not on Inquiry Notice of Fraud or Insolvency	90
E. No Investigation Could Possibly Have Uncovered Evidence of Fraud	91
1. If a Diligent Inquiry Would Not Have Uncovered Fraud, the Receiver May Not Recover.....	91
2. No Non-SEC Investigation Could Have Uncovered Evidence of Fraud or Insolvency	93

a. An Analysis Of a Diligent Investigation Into the Purported “Red Flags”	94
i. Investigation into Cliff Berg	94
ii. Investigation into the Stated Risk and Return	95
iii. Investigation into the Account Documents and Statements	96
iv. Investigation Regarding the Return of Funds	97
v. Investigation of the SEC Inquiry	98
F. Additional Information Demonstrating Good Faith.....	101
G. Lenders Are Entitled to Retain the Interest Earned From Their Loans	103
Conclusion.....	105

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 (hereinafter collectively “Lenders”) submit the following Memorandum of Law in Support of their Motion for Summary Judgment.

INTRODUCTION

The Receiver commenced this action as a classic “clawback” action arising out of the collapse of a currency trading ponzi scheme individuals operated by Trevor Cook who has since been convicted of several federal crimes. “Clawback” actions seek the recovery of funds a ponzi scheme transferred to individuals prior to the collapse of the ponzi scheme by arguing that these transfers were fraudulent under state fraudulent transfer laws. However, the Receiver ultimately must prove that the individuals receiving the funds *objectively knew or should have known they were receiving funds from a ponzi scheme or from an insolvent entity prior to their receipt of such funds*. There are numerous “clawback” actions pending around the country after ponzi schemes collapsed in the wake of the 2008-2009 financial crisis resulting in a further development of case law surrounding “clawback” actions. Not surprisingly, as set forth below, numerous courts have been dismissing “clawback” actions against innocent investors and lenders who had no objective basis to determine that they were involved in a ponzi scheme.

In this case, Trevor Cook operated a securities and foreign currency scheme in the Twin Cities. With respect to the foreign currency scheme, Cook would raise money to trade in the foreign currency markets by offering individuals the opportunity to loan

money to Cook's entities evidenced by promissory notes at fixed annual return rates between 10%-12%. Cook represented that Cook would use the funds to make foreign currency trades where Cook would not only earn profits sufficient to pay the 10-12% interest rate on the loans, but also additional profits for the Cook entities themselves. However, unlike many investment ponzi schemes, Cook's "investors" were in fact lenders – the transactions were structured as loans on which Cook was obligated to pay regardless of the performance of Cook's currency trading operation.

The Lenders all made loans to one of Cook's entities in amounts varying from \$85,000 to over \$1,000,000 evidenced by notes. Each of the Lenders learned of the Cook entities through Cook's father in law, Clifford Berg. Berg had been a salesman in the carpet industry. With the exception of one Lender, each of the Lenders was involved in the carpet industry either as an owner or employee of a carpet business. In late June, 2009, prior to any revelation that the Cook entities were a ponzi scheme, the Cook entities repaid each of Lender's loans including earned interest.

The Receiver commenced these "clawback" actions against the Lenders arguing that because the Lenders were introduced to the Cook entities through Cook's father in law, Berg, the Lenders must have had notice that Cook was operating a ponzi scheme. As set forth below, none of the Lender Respondents were aware of any facts demonstrating that Cook was operating a ponzi scheme.

The Receiver has asserted two claims against the Lenders: (i) unjust enrichment and (ii) violation of the Uniform Fraudulent Transfers Act. The unjust enrichment claim fails as a matter of law because the Lenders were merely paid back their loans pursuant to

written contracts: i.e., there was no “unjust enrichment. Under the Fraudulent Transfer Act, the Receiver cannot demonstrate that the Lenders had knowledge of any facts demonstrating that the Cook entities were insolvent or operated as a ponzi scheme. In fact, the Receiver’s own expert admitted that the “red flags” the Receiver identified as evidence of fraud or insolvency were not actually evidence of a ponzi scheme. The Lenders’ Motion for Summary Judgment should be granted.

STATEMENT OF UNDISPUTED FACTS

A. The Cook Entities’ Currency Trading Business.

The ponzi scheme at issue was primarily operated by Trevor Cook through a number of related companies, in cooperation with his partners Bo Beckman, Pat Kiley, Gerald Durand and Chris Pettengill. *Trevor Cook Deposition, p. 71*, attached as Exhibit 1 to the James Magnuson Declaration. Cook focused on operating several currency trading entities, including Universal Brokerage Services Diversified and Oxford Global (collectively the “Cook Currency Entities”). *Id.* Beckman operated the equity trading entities through the “Private Client Group.” *Id* at p. 52. Others operated hedge funds. *Id* at p. 53. Cook had little involvement with the equity trading entity, Private Client Group, which performed legitimate stock trading. *Id* at p. 72.

Cook’s methodology for attracting “investors” was based on what Cook represented was his ability to make money on what is known as the “carry trade” in the foreign currency markets. *Id* at p. 37. The “carry trade” consists of borrowing (or selling short) currencies with low interest rates (e.g. the Japanese yen) and purchasing

(or going long) instruments denominated in currencies where higher interest rates are available (e.g. the British pound). *Id* at pp. 36-37. The purchaser of these two currencies pays the interest amount and collects the high interest amount thereby earning a profit equal to the difference between the two interest rates. *Id*. The risk on the carry trade is that there will be a significant change in the interest rates or the values of the currencies. *Steven Adams Deposition, pp. 151-152*, attached as Exhibit 2 to the Magnuson Declaration. Cook represented to investors that he could greatly reduce this risk through a sophisticated trading strategy where his entities would buy and sell currency positions frequently. *Id* at p. 361. This strategy would result in small profits on each trade but would greatly ameliorate the risk from holding these currency positions for a significant period of time. *Id* at p. 361. Cook further represented that the trading strategy would be implemented by a proprietary computerized trading program purchased for millions of dollars from Swiss software developers which removed any subjective judgment in the trading. *Id*. Finally, Cook represented that he would be able to earn greater returns from leveraging (i.e., borrowing to increase) the monies used to make these significant currency trades short term to increase the returns proportionally with the leverage. *Brochure, p. 3*, attached as Exhibit 3 to the Magnuson Declaration.

Cook obtained the monies to make these currency trades through “Structured Notes.” Structured Notes are nothing more than loans. *Adams Deposition, p. 226*. The “investors” in the cook Entities would purchase these structured notes and earn a fixed rate of interest on the notes for a period of time which would then adjust based upon interest rate variation between the G-5 currencies – in the case of the Lenders these rates

were between 10-12%. *Steven Adams Expert Report*, p. 6, attached as Exhibit 4 to the Magnuson Declaration. The Cook Entities were obligated to pay this interest regardless of the performance of the Cook's currency trading performance. *Adams Deposition*, p. 224. Cook would earn money if the amount of profits his entities earned from the currency trading exceeded the 10-12% interest cook was obligated to pay the purchaser's of the Structured Notes. *Adams Report*, p. 11.

As set forth in the Lender's expert Steve Adams' report, none of this is out of the ordinary. *Id*, pp. 22-23. In fact, the 10-12% interest rates Cook offered were well within the amount Cook would earn from his levered carry trades. *Id*, p. 11. The Cook Entities received favorable coverage in the Star Tribune, a farm journal, and various other media outlets. *Star Tribune Article*, attached as Exhibit 5 to the Magnuson Declaration; *Steven Fredell Deposition*, pp. 21, 187-188, attached as Exhibit 6 to the Magnuson Declaration. The Cook Entities were headquartered out of the imposing Van Dusen Mansion in Minneapolis, which contained many computer screens showing active currency trades. *Larry Hopfenspirger Deposition*, pp. 31, 214, attached as Exhibit 7 to the Magnuson Declaration. One of Cook's partners was a member of the Kroger grocery chain family. *Id*, p. 214. The Cook Entities appeared to be completely legitimate.

B. Each Lender's Loan to the Cook Entities.

1. David Buysse.

Lender David Buysse ("Buysse") has owned a small carpeting business, Malmquist Home Furnishings, since 1983. *David Buysse Deposition*, pp. 6-7, attached as Exhibit 8 to the James Magnuson Declaration. While operating his carpeting business,

Buyse became acquainted with Cliff Berg (“Berg”), who worked as a sales representative for a carpet manufacturer. *Id.*, p. 8. Berg was the father in law of Trevor Cook. In 2007, Berg told Buyse on several occasions about the Cook Entities FOREX lending opportunity. *Id.*, p. 11. Buyse was a very conservative investor and had previously invested primarily in bonds and certificates of deposit. *Id.*, p. 47. Buyse ultimately agreed to meet with Cook at the Van Dusen Mansion in Minneapolis, headquarters of the Cook Currency Entities. *Id.*, p. 56. At the meeting, Cook explained the Cook Currency Trading strategy stating that Buyse would receive an interest rate between 10% and 12% on his money with very little risk. *Id.*, pp. 41, 76. Buyse also read an article in the Star Tribune that gave a glowing review of Cook and his Currency Trading Entities. *Id.*, p. 62.

Buyse made his first \$85,311.27 loan to the Cook Currency Entities on December 4, 2007, earning a 12% return for the first year which loan would adjust annually based on the interest rate spread in the G5 Currency Pairs. Buyse subsequently made a total of \$320,128.15 in loans to the Cook Currency Entities.

2. Steven and Pamela Cheney.

Steven and Pamela Cheney own retail and wholesale carpet businesses including Cheney Carpet and Vroomen Carpet. *Steven Cheney Deposition*, p. 7, attached as Exhibit 9 to the Magnuson Declaration. Through their carpeting businesses, the Cheneys knew Cliff Berg who worked as a carpet manufacturer’s sales representative. *Id.*, p. 43. With the referral of John Dzik, one of Steve Cheney’s employees who had also made loans to the Cook Currency Entities, Berg approached Steve Cheney about the Cook Entities

FOREX lending opportunity. *Id.*, pp. 15-16. As a result, Steven Cheney attended a seminar hosted by Cook and his principals at the Van Dusen Mansion in Minneapolis. *Id.*, pp. 15-16. Cheney is a very experienced investor in real estate. *Id.*, p. 21. He also brought his friend Larry Hopfenspirger to the meeting, who is a professional investor in real estate and experienced investor in public and non-publicly traded securities. *Id.*, pp. 17-18. At the meeting¹, Trevor Cook explained the Cook Currency Trading strategy to Steve Cheney, in part, by showing him a bank of computer monitors showing active currency trading by the Cook Currency Entities. *Id.*, pp. 30-31. Cook informed Cheney he would earn 12% on his loan and that the risk that the Cook Entities could not repay the loans was minimized through use of a sophisticated computerized foreign currency trading system. *Id.*, pp. 30, 31, 50. Cook was very persuasive and very knowledgeable about foreign currency trading to Cheney and Hopfenspirger. *Id.*, p. 34; *Hopfenspirger Deposition*, p. 45.

Cheney was so convinced by Cook's presentation that he not only borrowed \$1,000,000.00 to make the loan to the Cook Entities, Cheney also asked his wife Pamela, along with his children and his sister in law, to also make loans to the Cook entities. *Id.*, p. 37. When considering whether or not to make a loan to the Cook Currency Entities, Pamela Cheney asked Holly Hill, Pamela's investment advisor at Wells Fargo, about Hill's impressions of the structured notes offered by the Cook Currency Entities. *Pamela Cheney Deposition*, pp. 10-11, attached to the Magnuson Declaration as Exhibit 10. In

¹ In addition, Bo Beckman also gave a presentation regarding the Cook Entities' equity trading business which was also run out of the Van Dusen Mansion by an entity separate from, but related to, the Cook Currency Entities. *Id.*, p. 19.

fact, Hill, a Wells Fargo banker, had also attended a seminar at the Van Dusen Mansion with friends and been impressed with the Cook Currency Entities. *Id.* While Hill did not invest because she did not possess the minimum amount necessary to invest, a number of her friends did. *Id.*, p. 10-11, 21. Hill, who had sold certificates of deposit to Cheney, did not see any “red flags” with the structured notes the Cook Currency Entities sold. *Id.* After speaking with her husband and Hill from Wells Fargo, Pamela Cheney decided to purchase the Cook Currency Entities’ structured notes. *Id.*, p. 11. The Chenneys ultimately loaned \$1,636,000.00 in total to the Cook Currency Entities.

3. Terry and Jean Frahm.

Jean Frahm worked as a hygienist at a dental office frequented by Cliff Berg and his wife Ellen. *Jean Frahm Deposition Transcript, p. 10*, attached as Exhibit 11 to the Magnuson Declaration. Cliff and Ellen were longtime clients at Jean’s dental office. *Id.* Jean was present when Cliff Berg discussed his son-in-law’s currency trading program with the dentist she worked for. *Id.*, p. 14. The dentist advised that he had recently undergone a divorce and had no money to invest. *Id.* Since Jean knew that she and her husband Terry were unhappy with the investment performance and their current investment advisor, she asked Berg if she could take some of Berg’s promotional materials. *Id.*

Terry Frahm reviewed the promotional materials of the Cook Currency Entities. *Terry Frahm Deposition Transcript, p. 10*, attached as Exhibit 12 to the Magnuson Declaration. Terry was unhappy with the current service he was receiving from his investment firm and was concerned about the state of the equity markets in 2008. *Id.*, pp.

28, 35. Since the structured notes the Cook Currency Entities sold advertised a complete departure from the equity markets, the investment was attractive to the Frahms. *Id*, pp. 27-28. The Frahms met with Cook on multiple occasions including at the Van Dusen Mansion to learn more about the structured notes the Cook Currency Entities sold. *Id*, p. 57. Similarly to the other Lenders, Cook explained Cook's use of its sophisticated computerized foreign currency trading system and the 10-12% annual return on the structured notes. *Id*, p. 66. The Frahms found the currency strategy persuasive. *Id*, p. 67. Cook consistently maintained that the currency trading markets had no correlation to the equity markets. Terry Frahm was extremely concerned that the equity markets were in the midst of a prolonged downswing, and that the Frahms could lose the money they had worked to accumulate. *Id*, p. 38. Cook maintained that the structured notes would provide a conservative safe haven from the swings of the equity markets during this economic downturn. *Id*, pp. 47-48. Terry Frahm also read the very favorable Star Tribune newspaper article lauding Cook and the Cook Currency Entities. *Id*, 28-29.

Cook described his currency trading strategies as "boring," utilizing sophisticated computer software purchased for \$6,000,000.00 to make small profits on numerous currency trades while arbitraging the differences in prime interest rates and currency values between two different countries (e.g. the prime rates offered by Japan and the United Kingdom). *Id*, p. 81. The computer software, in conjunction with his purported "low risk-multiple small profit" strategies provided the opportunity for sustained stable returns. *Id*, p. 82. Cook appeared to be extremely knowledgeable about currency trading and was able to alleviate all of the Frahms' concerns about the structured notes. *Id*, pp.

40-41. The fact that their funds were to be in segregated accounts and were available “on demand” was very appealing to the Frahms. *Id.*, pp. 73, Cook’s demonstration of actual currency trades on an extensive bank of computer monitors was impressive to the Frahms. *Id.*, p. 83. Terry Frahm also met with Beckman, whom Frahm understood to be working for a company distinct from, but sharing a building with, the Cook Currency Entities. *Id.*, p. 94. Eventually, the Frahms purchased structured notes. The Frahms became more confident in the structured notes as they received statements reflecting payment of the agreed interest on the structured notes. As a result, the Frahms purchased additional investments structured notes for a total of \$785,162.44. *Id.*, pp. 37-38. Frahm also *invested* funds with Bo Beckman’s equity trading entity. *Id.*, p. 89.

4. Steven and Jenene Fredell.

Steven and Jenene Fredell have been best friends with Cliff and Ellen Berg since high school. *S.Fredell Deposition*, p. 40. During the Fredells’ repeated social interactions with the Bergs, Cliff told the Fredells of his son in law’s currency trading program. *Id.*, pp. 44-45. The Bergs advised the Fredells that they were heavily invested in the structured notes the Cook Currency Entities sold and were very happy with the interest rates paid under the structured notes. *Id.*

The Fredells trusted the Bergs implicitly because of their long standing friendship, so they reviewed the promotional materials of the Cook Currency Entities after many months of encouragement from Cliff Berg. *Id.*, pp. 45-46. The Fredells were unhappy with the performance of the equity markets in 2008 and their retirement funds had dropped significantly over a period of ten months. *Id.* Because the structured notes the

Cook Currency Entities sold were a complete departure from the equity markets, the Fredells decided to meet with Cook at the Van Dusen Mansion to learn more about the structured notes.

The Fredells met multiple times with Cook and reviewed Cook's promotional materials. *Id*, p. 54. The Fredells were attracted to Cook's description of his currency strategy. *Id*, p. 53. Cook consistently maintained that the currency trading markets had no correlation to the equity markets. The Fredells were primarily concerned with a steady, low-risk investment. *Id*, p. 61. Cook told the Fredells that the structured notes would provide a conservative safe haven from the swings of the equity markets during the economic downturn. *Id*.

In both formal and informal presentations, Cook described his currency trading strategies as utilizing a sophisticated \$6,000,000 computer software designed in Switzerland to make small profits on numerous currency trades arbitraging the differences in prime interest rates and currency values between two different countries (e.g. Japan and the United Kingdom). *Id*, p. 53. The proprietary computer software, in conjunction with his purported "low risk-multiple small profit" strategies provided the opportunity for sustained stable returns. *Id*, pp. 53-54. Cook appeared to be extremely knowledgeable about currency trading and was able to alleviate all of the Fredells' concerns about the structured notes. *Id*, p. 146. The fact that their funds were to be in segregated accounts and were available "on demand" was very appealing to the Fredells. *Id*, p. 58. Cook demonstrated actual currency trades on an extensive bank of computer monitors. *Id*, p 53. Eventually, the Fredells became confident enough in Cook's program

to purchase \$245,381.63 in structured notes. Berg also advised his friends that if they chose to purchase structured notes from the Cook Currency Entities Berg would monitor the performance of the Cook Currency Entities and would repay the notes if any issues caused any concern to Berg. *Id.*, p. 73.

5. Michael and Jennifer Heise.

Michael and Jennifer Heise have been in the carpet industry for many years and have met with Cliff Berg for over 20 years at least on a monthly basis. *Michael Heise Deposition Transcript*, pp. 12, 24, attached as Exhibit 13 to the Magnuson Declaration. In early 2007, Cliff Berg told Michael about Cook's currency trading business. *Id.*, p. 30. Michael Heise had little interest in currency trading when the subject was initially broached, but as the equity markets began to have difficulty and the credit markets began to tighten and returns on fixed income investments like Certificates of Deposit and Savings accounts began to decrease, Heise became interested in the structured notes offered by the Cook Currency Entities. *Id.*, p. 60. Michael Heise attended a presentation by Trevor Cook at the Van Dusen Mansion to learn more about the structured notes offered by the Cook Currency Entities. *Id.*, p. 32. At the presentation, he ran into John Dzik, a former colleague with whom he had worked at Steve Cheney's carpet distributorship, Vroomen Carpet. *Id.*

Through Heise's contact with Dzik, he became aware that Steve Cheney had purchased the structured notes offered by the Cook Currency Entities. *Id.*, p. 34. Heise had significant respect for the financial acumen of both Dzik and Steve Cheney and their involvement with the Cook Currency Entities had a great effect on his eventual decision

to purchase the structured notes. *Id.*

The returns on the structured notes Cook described in their multiple meetings and promotional materials were based upon a currency trading strategy. *Id.*, pp. 35-36. Heise found the strategy attractive based on the fact that the currency trading markets have no correlation to the equity markets as Heise was concerned about the performance of the equity markets and was interested in a low-risk investment. *Id.*, p. 60. Cook told Heise that the Cook Currency Entities had historically been able to pay annual fixed returns of 10% on the structured notes. *Id.*, p. 38.

In both formal and informal presentations, Cook described his currency trading strategies as utilizing sophisticated computer software designed in Switzerland to make small profits on numerous currency trades by arbitraging the differences in prime interest rates and currency values between two different countries (e.g. the prime rates offered by Japan and the United Kingdom). *Id.*, p. 250. The sophisticated computer software, in conjunction with his purported “low risk-multiple small profit” strategies provided the opportunity for sustained stable returns. *Id.* Cook was extremely knowledgeable about currency trading and was able to answer Heise’s questions about the structured notes. *Id.*, pp. 36-37. The fact that their funds were to be in segregated accounts and were available “on demand” was appealing to Heise. *Id.*, pp 254. Eventually, the Heises became confident enough in Cook’s program to purchase structured notes in the amount of \$752,133.00. Heise directed Berg to monitor the performance of the Cook Currency Entities and repay the notes if there were any issues of any remote concern to Berg. *Id.*, p. 69.

6. James McIntosh.

James McIntosh knew Clifford Berg from his involvement in the carpet industry for over twenty years, during which time they became good friends. *James McIntosh Deposition Transcript, p. 34*, attached as Exhibit 14 to the Magnuson Declaration. Berg informed McIntosh about the Cook Currency Entities' structured notes and sent McIntosh written materials. *Id.*, p. 39.

McIntosh trusted Berg implicitly because of their long standing friendship and reviewed the promotional materials. *Id.*, p. 77. McIntosh was unhappy with the equity markets and the performance of his retirement funds had dropped significantly. *Id.*, pp. 77-78. McIntosh was interested because the structured notes the Cook Currency Entities offered represented a complete departure from the equity markets. McIntosh met with Cook and others at the Van Dusen Mansion to further investigate the structured notes. *Id.*, p. 44. Cook described that the fixed interest rate returns on the structured notes in their multiple meetings and promotional materials were based upon a currency trading strategy. Cook accurately noted that the currency trading markets had no correlation to the equity markets. The equity markets were struggling in 2008 which influenced McIntosh's decision to loan money to the Cook Currency Entities. *Id.*, p. 80. Cook's representation that the structured notes would provide a conservative safe haven from the swings of the equity markets was attractive to McIntosh. *Id.*, p. 80.

In both formal and informal presentations, Cook described his currency trading strategies as utilizing sophisticated computer software designed in Switzerland to make small profits on numerous currency trades by arbitraging the differences in prime interest

rates and currency values between two different countries (e.g. Japan and the United Kingdom). *Id.*, pp. 80-81. The sophisticated computer software, in conjunction with his purported “low risk-multiple small profit” strategies provided the opportunity for sustained stable returns. *Id.* Cook was extremely knowledgeable about currency trading and able to alleviate all of McIntosh’s concerns regarding the structured notes. *Id.* The fact that the McIntosh’s monies were to be in segregated accounts and available “on demand” was very appealing to McIntosh. *Id.*, pp. 203-204. McIntosh also found that Cook’s demonstration of actual currency trades on an extensive bank of computer monitors further evidence of legitimacy of Cook’s trading strategy. *Id.*, pp. 212-213. Eventually, McIntosh became confident enough in Cook’s structured note products to purchase \$250,000.00 in structured notes. McIntosh understood from his interactions with Berg if that he chose to purchased structured notes from the Cook Currency Entities that Berg would monitor the performance of the Cook Currency Entities and would repay the notes if there were any issues of any concern to Berg. *Id.*, p. 214.

7. Walter Defiel.

Lender Walter Defiel learned of the opportunity to loan funds to the Cook Currency Entities through John Dzik and Clifford Berg. *Walter Defiel Deposition Transcript*, p. 20, attached as Exhibit 15 to the Magnuson Declaration. Defiel knew others who also loaned monies to the Cook Currency Entities, including Cheney and Dzik, whom he considered to be very sophisticated investors. *Id.* Defiel was a very inexperienced investor and decided it would be in his best interest to mirror the investment decisions of those investors who he believed possessed greater knowledge and investment

sophistication. *Id.* Defiel decided to loan \$80,000.00 he had received by inheritance to one of the Cook Currency Entities on November 23, 2007. *Id.*, p. 56-57. Defiel was informed that his money would be kept in a separate, segregated account and that he would be able to have his loan repaid on demand. *Id.*, pp. 96-97.

8. Michael and Cynthia Hillesheim.

Michael and Cynthia Hillesheim were introduced to the Cook Currency Entities by Clifford Berg. *Michael Hillsheim Deposition Transcript, p. 21*, attached as Exhibit 16 to the Magnuson Declaration. Cynthia Hillesheim worked at the Design Home Center in New Ulm and Berg marketed carpet to her employer. *Cynthia Hillsheim Deposition Transcript, p. 12*, attached as Exhibit 17 to the Magnuson Declaration. The Hillesheims reviewed the promotional materials of the Cook Currency Entities and after many months decided to consider the investment. *Id.*, pp. 17-18. The Hillesheims, who are farmers, also saw glowing articles about Cook in a farm journal and the Star Tribune. *M.Hillesheim Deposition, pp. 21-22*. Because the structured notes the Cook Currency Entities sold represented a complete departure from the equity markets, the Hillesheims met with Cook at the Van Dusen Mansion to learn more information regarding the structured notes. *Id.*

The annual interest rate returns earned on the structured notes Cook described both in their multiple meetings and promotional materials was based upon a currency trading strategy. Cook stated noted the fact that the currency trading markets had no correlation to the equity markets. The Hillesheims were concerned about losing money in the volatile equity markets; therefore, the fact that the structured notes offered returns non-

correlated to the equity markets was very attractive. *Id.*, p. 25. Berg and Cook maintained that the structured notes would provide a conservative safe haven from the swings of the equity markets. *Id.*

Cook told the Hillesheims that Cook's currency trading strategies utilized sophisticated computer software to make small profits on numerous currency trades arbitraging the differences in prime interest rates and currency values between two different countries (e.g. Japan and the United Kingdom). *Id.*, p. 24. The sophisticated computer software, in conjunction with his purported "low risk-multiple small profit" strategies, provided the opportunity for sustained stable returns. *Id.*, p. 25. Cook was extremely knowledgeable about currency trading and was able to alleviate all of the Hillesheims' concerns about the structured notes. *Id.* The fact that the Hillesheims' funds would be in segregated accounts and available "on demand" was very appealing to the Hillesheims. *C.Hillsheim Deposition*, p. 21. Cook's demonstration of actual currency trades on an extensive bank of computer monitors was also very impressive to the Hillesheims. *M.Hillsheim Deposition*, p. 190. The Hillesheims purchased \$220,385.28 in structured notes. Berg advised that if the Hillesheims purchased structured notes from the Cook Currency Entities, Berg would monitor the performance of the Cook Currency Entities and would repay the notes if Berg was ever concerned. *C.Hillsheim Deposition*, p. 31.

9. Larry Hopfenspirger.

Larry Hopfenspirger was introduced to the Cook Currency Entities through Steven Cheney. *Hopfenspirger*, pp. 30-31. Cheney brought Hopfenspirger to one of the Cook

Currency Entities' presentation of the structured notes because Cheney valued Hopfenspirger's input on investment matters. *S.Cheney Deposition*, pp. 17-18. At the meeting², Cook explained the Cook Currency Trading strategy to Cheney and Hopfenspirger, in part, by showing them a bank of computer monitors showing active currency trading by the Cook Currency Entities. *Hopfenspirger Deposition*, p. 214. Hopfenspirger learned the Cook Currency Entities would pay a 12% interest rate on the structured notes and that the risk of the Cook Currency Entities' inability to payback the structured notes was minimized by a proprietary computer software package. *Id.*, pp. 30, 41, 206. Cook was very knowledgeable about currency trading. *Id.*, pp. 43-44. Hopfenspirger was also very impressed by the fact that a member of the wealthy Kroger grocery chain family was a partner in the Cook Currency Entities. *Id.*, p. 34. Hopfenspirger fully understood that the risk of non-payment on a structured note rested with the entity and not directly with the entity's investment. *Id.*, p. 40. The Cook Currency Entities' apparent success convinced Hopfenspirger there was very little risk of non-payment of the structured note. *Id.*, p. 41. As a result, Hopfenspirger purchased made 600,500.00 in structured notes. *Id.*, p. 212.

10. Steven Kautzman.

Cliff Berg introduced Steven Kautzman to the Cook Currency Entities' structured notes. *Steven Kautzman Deposition Transcript*, p.19, attached as Exhibit 18 to the Magnuson Declaration. Although Kautzman owned a carpet sale business, Berg was not

² A presentation was also given by Bo Beckman relating to the equity trading business also headquartered at the Van Dusen Mansion. *S.Cheney Depo.*, p. 19.

his sales representative. *Id.*, p. 16. Kautzman was introduced to the opportunity to invest in the Cook Currency Entities at a trade show which the two of them attended. *Id.*, pp. 23-24. Kautzman had known Berg since approximately 1980 through numerous contacts at various trade shows. *Id.* Berg had an excellent reputation in the carpet industry. *Id.*, p. 34.

Berg informed Kautzman of the opportunity to purchase the structured notes which would pay between 10-12%. *Id.*, p. 30. Berg advised Kautzman that the head of the Cook Currency Entities was his son-in law and that Berg had also invested in the structured notes for years and been very pleased with the results. *Id.* Kautzman was interested in any investment offering a positive return, because he had recently lost approximately 50% of his investments in the stock market downturn at American Express. *Id.*, p. 22. Kautzman's main objective in an investment was a stable safe return because of the losses he had recently suffered. *Id.*, p. 33. Berg assured him that he would help keep his investment safe and that Berg's own investment had performed well. *Id.*, p. 54. Kautzman was confident in the investment opportunity partly based on Berg's familial connection to Cook. *Id.*, p. 158-159. Kautzman later met with Ryan Moeller, a Cook Currency Entity employee, at the Van Dusen mansion and ultimately decided to purchase \$116,469.30 in structured notes. *Id.*, pp. 37-38.

11. George and Karen Morisset.

George Morisset is Walter Defiel's best friend. *George Morisset Deposition Transcript, p.16*, attached as Exhibit 19 to the Magnuson Declaration. George was introduced to the structured notes offered by the Cook Currency Entities by Defiel. *Id.*, p.

21. Defiel advised George that his boss Steven Cheney, a very successful businessman, was invested in the structured notes, which interested George. *Id.*, pp. 22-23. George was not very wealthy or sophisticated in terms of investments and decided it would be prudent to follow the investment decisions of those whom he believed were more successful in business or investment terms than him. *Id.*, p. 24. After reviewing a pamphlet describing the currency trading investment in the structured notes provided by Defiel, and in light of the fact that two investors he believed to be knowledgeable were invested in the product, the Morissetts decided to invest in the structured notes offered by the Cook Currency Entities. *Id.*, p. 27. George had also heard radio programs mentioning the Cook Currency Entities which also influenced his decision to purchase the structured notes. *Id.*, p. 30.

12. Reynold and Judith Sundstrom.

Reynold Sundstrom has owned a carpet sale business for over forty-four years and Cliff Berg called upon him as a salesperson for a period in excess of twenty years. *Reynold Sundstrom Deposition Transcript, p.31*, attached as Exhibit 20 to the Magnuson Declaration. Sundstrom saw Berg between 10 and 12 times per year and socialized at numerous carpet sale conventions. *Id.*, pp. 32-33. Sundstrom considered Berg to be a personal friend. *Id.*, p. 34. Sundstrom had previously invested in stocks and mutual funds through brokers at Wells Fargo and Edward Jones. *Id.*, p. 24. Berg described an opportunity to Sundstrom in which Sundstrom could receive a fixed 10 to 12% return on his money. *Id.*, p. 37. Sundstrom is a risk-averse investor. *Id.*, p. 140. Sundstrom reviewed brochures he received from Berg, and believed the opportunity was a good one. *Id.*, p. 14. In the interests of caution, Sundstrom gave the brochure to his attorney, and

asked him to look into the Cook Currency Entities and inform Sundstrom if there was something wrong with the investment. *Id.*, p. 39. Sundstrom's attorney did not convey any negative information to Sundstrom. *Id.*, p. 40.

Sundstrom understood that he was making a loan to the Cook Currency Entities. *Id.*, p. 41. Sundstrom was informed that he would earn a fixed annual interest rate, which would adjust based on benchmarks at the end of each year. *Id.*, p. 60. Sundstrom could remove his money from the Cook Currency Entities at any time by simply calling and requesting a withdrawal. *Id.*, p. 73. This was because Sundstrom's money would be kept in a segregated account. *Id.*, p. 147. Sundstrom also was aware that Cheney, Heise, and Kautzman had lent money to the Cook Currency Entities. Sundstrom trusted each these individuals' investment judgment. *Id.*, p. 48-49.

Sundstrom met with Cook at the Van Dusen Mansion to learn more about the Cook Currency Entities. *Id.*, p. 67. Sundstrom was very impressed by the bank of computer monitors in Cook's office showing active currency trades. *Id.*, pp. 195-196. Cook described the Cook Currency Entities' proprietary currency trading software that allowed the purchase and sale of currencies. *Id.*, p. 187.

As a result, Sundstrom purchased two structured notes from the Cook Currency Entities: A \$60,000.00 structured note in January, 2008 paying a 12% interest rate and a \$15,000 structured note in January, 2009 paying an approximately 10% interest rate. *Id.*, pp. 83-87.

C. The Account Opening Documents.

Some of the individuals who "invested" in the Cook Currency Entities purchased

the structured notes while others actually invested in a hedge fund operated by UBS Diversified. *Cook Deposition*, p.62. However, it is undisputed each of the Lenders purchased notes, which obligated the Cook Currency Entities to pay a fixed interest rate of 12%, to adjust annually to 2.7 times the largest spread between the G5 currencies, less 1.5 basis points. *See Representative Note of David Buysse*, Exhibit 21 to the Magnuson Declaration. Each Lender signed a structured note, which obligated the Cook Currency Entities to pay back the amount of the loan on demand. *See Representative Crown Forex Agreement of Terry Frahm*, p. 14, Exhibit 22 to the Magnuson Declaration. Lenders signed a Power of Attorney, which gave the Cook Currency Entities the right to give orders related to Lenders' accounts just as Lenders could, including liquidation and transfers to Lenders. *See Representative Crown Forex Power of Attorney of Reynold Sundstrom*, p. 1, Exhibit 23 to the Magnuson Declaration. Cook has testified that the documents used by the Cook Currency Entities were purchased from a corporation which used attorneys to draft form documents for hedge fund type investments, other account opening documents were obtained from the Cook Currency Entities' service providers, and the "Capital Guaranteed Structured Note" was drafted from a form Structured Note obtained from Saxo Bank. *Cook Deposition*, p. 69. Lenders' expert witness Steve Adams, who was a principal and general counsel of a Five-Billion Dollar private equity fund in Minnesota, Wayzata Investment Partners, testified in his expert report that a reasonable investor could not determine that these form documents, which were based upon legitimate hedge fund and service provider documents, were an indication of fraud or insolvency. *Adams Report*, pp. 12 -16.

Over one thousand investors invested in the Cook Currency Entities, and were provided similar documents to the ones signed by Lender. Trevor Cook and Ryan Moeller (two parties with direct knowledge of the client intake procedures of the Cook Currency Entities) testified that few of the investors in the Cook Currency Entities structured notes asked any questions regarding the account opening forms, and, to their knowledge, not one single investor failed to invest based upon concerns raised from the form account opening documents of the Cook Currency Entities. *Cook Deposition*, p. 81; *Ryan Moeller Deposition Transcript*, p. 42, attached as Exhibit 24 to the Magnuson Declaration. Thus, over one thousand investors, including many professional investors³, were unable to identify any “red flags” from the account opening documents for the Cook Currency Entities.

D. The Cook Currency Entities Performed According to the Contracts.

Lenders received their rate of return of a simple interest on their variable rate loans between 10.5% to 12% over the course of their loans to the Cook Currency Entities.⁴ The Lenders were paid on time, and in the correct amount, and any questions Lenders

³ For example, Ed Padon, a professional investor operating a hedge fund invested in the Cook Currency Entities. *Cook Deposition*, p. 108. In addition, Kelly Lenti, Jeff Timberlake, and Brian Luftman are professional traders who were traders at the Chicago Board of Trade. *Internet Search Results*, attached as Exhibit 25 to the Magnuson Declaration.

⁴ As the Receiver’s expert admits, the returns in currency markets are not correlated to equity market returns. *Golberg Deposition*, p. 158. Thus, any suggestion by the Receiver that it would be unusual for the return on a currency investment to differ greatly from the returns available in the slumping equity markets amounts to a purposeful attempt to mislead the Court in the hope that the Court is not familiar with this undisputed fact..

had were answered promptly and fully. The Lenders were fully satisfied with the Notes they purchased from the Cook Currency Entities and many purchased additional notes from the Cook Currency Entities. Each Lender received monthly statements stating the principal amount of the loan and amount of interest earned. During the course of each Lender's relationship with the Cook Currency Entities, no Lender was made aware of a single fact which would indicate that the Cook Currency Entities were insolvent, or were engaging in fraudulent transfers. In the words of Steve Cheney, when asked he was ever concerned that the Cook Currency Entities were being mismanaged, "No. It – it worked very smoothly. The payments were made when they were supposed to." *S.Cheney Deposition*, p. 33.

At no point did any employee of the Cook Currency Entities, or indeed, any person other than the principals of the Cook Currency Entities, have any knowledge or even suspicion that Cook was operating a fraudulent enterprise. Further, the Receiver's own expert testified that "there was nothing that [Lenders] received from the Cook entities that would have indicated the Cook entities were insolvent." *Eric Golberg Deposition Transcript*, p.81, attached as Exhibit 26 to the Magnuson Declaration.

E. SEC Investigation.

On June 22, 2009, the SEC appeared at the headquarters of the Cook Currency Entities to begin a non-public civil investigation. Before that time, the employees of the Cook Currency Entities had no knowledge of any problems with the Cook Currency Entities. *Moeller Deposition*, pp. 27-28. Cook informed all of his employees that it was a routine audit or investigation, and that there was nothing to be concerned about. *Id.*, pp.

135-136. Cook's employees kept their personal investments with the Cook Currency Entities based on the persuasiveness of Cook's explanation. *Id.*, p. 120-121; *Grzybowski Deposition Transcript*, p. 187; attached as Exhibit 27 to the Magnuson Declaration. At some point after June 23, 2009, Berg heard that the SEC had appeared at the Cook Currency Entities' headquarters, and called Cook to inquire further. Cook informed Berg that it was not a routine audit, but pled ignorance regarding the subject or scope of the investigation. *Cook Deposition*, pp. 78-79. Cook never communicated to Berg that the investigation was targeting the Cook Currency Entities, nor any fraudulent activity. *Id.* Without informing the Lenders, Clifford Berg decided to pay off the Lenders' loans. *Id.*

F. The Cook Entities' Contractually Authorized Transfers of Lenders' Funds.

1. David Buysse.

In June, 2009, Buysse received a phone call from Berg. *Buysse Deposition*, p. 14. Berg informed Buysse that the Cook Currency Entities were no longer taking deposits, that Buysse's account was being closed, and that his funds would be returned to him. *Id.* At some point before July 1st, 2009, Buysse received a cashier's check dated June 29, 2009, in the amount of \$360,700.00, the remaining balance of his account at the Cook Currency Entities. At the time Buysse received his check, he had no suspicions about the Cook Currency Entities. *Id.*, p. 107. Buysse did not learn until months later that the Cook Currency Entities were being accused of engaging in fraudulent activity. *Id.*, p. 17. Berg did not tell Buysse of any investigation into the Cook Currency Entities. *Id.*, p. 16. Buysse was surprised that the fund had closed, but was not surprised by the return of his funds. *Id.*, p. 107. Cook testified that Lenders' withdrawals were processed like any

other investor's withdrawals. *Cook Deposition*, p. 87.

2. Steven and Pamela Cheney.

On June 28, 2009, Trevor Cook informed Steven Cheney that an investment entity that was not "involved" with the Cook Currency Entities, but was part of the Cook's investment group was having a problem. *S.Cheney Deposition*, p. 91. Cheney does not recall Cook mentioning a government or SEC investigation, but simply, a "problem." *Id.*, p. 95. Cook assured Cheney that his funds were not at risk because they were in a segregated account at the Cook Currency Entities, which were "rock solid." *Id.*, p. 92. Cook claimed that he was moving the currency trading business to Charles Schwab. *Id.* Cheney was very risk-averse, as he had encouraged his family to invest with the Cook Currency Entities. *Id.*, p. 93. Thus, Cheney requested that Cook liquidate his account and return his funds as the Structured Notes allowed Cheney to do. *Id.* However, Cheney specifically told Cook that Cheney was interested in investing with Cook after Cook completed his move to Charles Schwab. *Id.*, p. 92. Cheney even offered to give Cook a recommendation in connection with Cook's move to the Charles Schwab. *Id.*, p. 102. In compliance with Cheney's demand, Berg delivered two checks to Cheney on June 29, 2009 for the balance of Cheney and his wife's loans of \$1,636,000.00. *Id.*, pp. 85, 87. Cheney did not closely examine the checks, except to make sure that the amounts were correct. *Id.*, p. 89. The Cheney's had also received interest payments over the course of the loan of \$162,120.00.

3. Walter Defiel.

Berg had John Dzik deliver to Walter Defiel a cashier's check for \$94,500.00 on

or about July 28, 2009 in accordance with the terms of the Structured Notes. *Defiel Deposition*, pp. 31-32. When Dzik delivered the check to Defiel, Dzik told Defiel that the Cook Currency Entities were moving their currency trading business to Schwab. *Id.*, p. 60. Defiel was satisfied by the explanation, and did not ask any further questions. *Id.* Defiel had no knowledge of any investigation into the Cook Currency Entities at the time he received his loan repayment. *Id.*, p. 106.

4. Terry Frahm.

Terry Frahm was experienced in investing in the equity markets, and had always intended to reinvest in the equity markets at some point. *T.Frahm Deposition*, p. 100. In April, 2009, Frahm called Cook and requested the return of his funds. *Id.*, p. 101-102. Cook requested that Frahm notify him in writing of his request to liquidate Frahm's account with the Cook Currency Entities. *Id.*, p. 105. Frahm did so, by letter, dated May 5, 2009. *Id.*, p. 106. Frahm requested that his non-qualified funds be returned directly to him, and that his IRA funds either be rolled over to his PCG IRA, or returned directly to him. *Frahm Letter*, p. 1, Exhibit 28 to the Magnuson Declaration. Frahm requested that the Cook Currency Entities process the liquidation within 60 days. *Id.* In late June, 2009, Berg came to the Frahms' residence and delivered two cashier's checks for the balance of the Frahms' structured notes: one to Terry Frahm for \$793,370.00 and one to Jean Frahm for \$123,000.00. *J.Frahm Deposition*, pp. 17-18. **After** giving Jean Frahm the checks, Berg engaged Jean Frahm in conversation, during which he informed her that there was an "audit" into Bo Beckman's business. *Id.*, p. 48. Jean Frahm questioned whether the "audit" had anything to do with the checks Berg had given her, and Berg

assured her that the funds she had received were unconnected with Beckman's business. *Id.*, pp. 48-49. Berg did not mention any investigation. *Id.*, pp. 49-50. The Frahms did not think an audit into Beckman's business was cause for concern, because "audits happen all the time" in the securities industry (an undeniable fact). *Id.*, p. 50.

5. Steven and Jenene Fredell.

Berg had told the Fredells, with whom he had been friends for many years, that he would liquidate their accounts and return their funds if there were ever any problems with the program. *S.Fredell Deposition*, p. 72. Steven Fredell had built up a "lifetime of trust" with Berg, based on Berg's reputation of honesty and trustworthiness. *Id.*, pp. 73-74. In late June, Berg and his wife visited the Fredells at their home, and dropped off cashier's checks repaying the Fredells' principal and interest. *Id.*, pp. 74-75. Combined with a small cashier's check the Fredells received in the mail on July 1, 2009, the Fredells received \$280,950.00. Berg informed the Fredells that their accounts had been liquidated, as per their agreement, that he would liquidate their account based on any problem "big or little." *Id.*, p. 75. When questioned further, Berg told the Fredells about an SEC investigation into Bo Beckman's equity trading entity. *Id.* The Fredells inquired about reinvesting with Cook. *Id.* In a telephone conversation a week later, Berg informed Steven that Cook was moving the currency trading business to Charles Schwab, and that they would be free to reinvest, though at lower rates. *Id.* The Fredells were planning on reinvesting with Cook, but never heard further details from Berg regarding the move to Charles Schwab, and so they invested elsewhere. *Id.*, p. 76. The Fredells did not question as to whether Millenium or Entrust were, or should have been, the purchaser

of the cashier's checks that they received, but simply checked to make sure that they were for the correct amounts. *Id.*, p. 84.

6. Michael Heise.

Michael Heise was fishing when Clifford Berg called Jennifer Heise and informed her that the Heises' accounts at the Cook Currency Entities were being "cashed out." *Jennifer Heise Deposition Transcript*, p.26, attached as Exhibit 29 to the Magnuson Declaration. Jennifer Heise instructed Berg to return the checks to the Heises' daughter. *Id.* Berg did so on around June 29, 2009. *Id.* Michael Heise had understood that Cliff Berg was his account executive. *M.Heise Deposition*, p. 38. Further, Heise had requested that Berg liquidate his account if the account "began to go backwards." *Id.*, p. 77. When Heise got back from his fishing trip and **after the check had been deposited**, he had a phone conversation with Berg. *Id.*, p. 79. Berg informed him that there was an investigation into Bo Beckman's equity trading entity, which prompted Berg to liquidate the account and return the Heises' funds. *Id.* Heise received a third check for the balance of his funds from Cliff Berg on approximately July 1, 2009. *Id.*, p. 96. At the time Heise received the third check for \$67,211.53 Heise does not specifically remember requesting or receiving additional information about the investigation into Beckman, mostly because he believed that it did not affect his transfer. *Id.*, pp. 95-96. The three checks the Heises received totaled \$795,911.53.

7. Michael and Cynthia Hillesheim.

Clifford Berg called Cynthia Hillesheim and informed her that the Hillesheims' notes were being paid back by check. *C.Hillesheim Deposition*, p. 62. Berg had an

understanding with the Hillesheims that he would have their loans paid back if it ever appeared that the returns were uncertain. *Id.*, p. 64. After receiving the checks, Cynthia Hillsheim called Berg to ask for advice on where to invest the money that had been returned. *Id.*, p. 64. Berg informed her about the Cook currency trading business's imminent move to Charles Schwab, and that the Hillesheims would be able to invest with Cook at Charles Schwab when the business had been set up. *Id.* At that point, Berg also informed her that there was an investigation. *Id.*, p. 66. Cynthia believed that the investigation was in Switzerland. *Id.* All told, the Hillesheims received checks totaling \$256,150.00 in the mail.

8. Larry Hopfenspirger.

Larry Hopfenspirger made an oral request to be repaid \$200,000.00 on October 9, 2008. *Hopfenspirger Deposition*, p. 112. Ryan Moeller delivered a check to Hopfenspirger's office. *Id.* Hopfenspirger made another oral request for repayment of an additional \$200,000.00 on December 1, 2008, in order to lend the funds to his business partner which was also honored. *Id.*, p. 114. Hopfenspirger directly requested the money from Trevor Cook in person, and Cook wrote a check to Hopfenspirger. *Id.*, p. 115. Hopfenspirger received the remainder of his principal in late June, 2009. Steve Cheney told Hopfenspirger that there was an "inquiry" being made into Bo Beckman's brokerage, and that although the "inquiry" had nothing to do with the Cook Currency Entities, Cheney was going to withdraw his funds. *Id.*, pp. 124-125. Hopfenspirger requested that Cheney also obtain repayment for Hopfenspirger, which Cheney did. Hopfenspirger's main motivation was that he needed the funds to repay a line of credit with Associated

Bank, which he did repay with the funds. *Id.*, pp.128-129. Hopfenspirger assumed that Cheney would be able to obtain the check for Hopfenspirger from the Cook Currency Entities, and was not surprised when he received his check. *Id.*, p. 130. Hopfenspirger received a total of \$657,500.00 from the Cook Currency Entities.

9. Steven Kautzman.

Berg left Steven Kautzman a voicemail while Kautzman was in Canada on a fishing trip informing Kautzman that there were “problems” with one of Cook’s partners, and that Kautzman’s money was being returned. *Kautzman Deposition*, pp.52; 163.

Kautzman received a cashier’s check in the amount of \$119,500.00. *Id.*, p. 53. After Kautzman received his money, he had a phone conversation with Berg, in which Berg informed him that Cook was moving his currency trading business to Charles Schwab. *Id.*, p. 54. Kautzman was interested in investing with Cook when he completed the move to Charles Schwab. *Id.*, p. 57. Kautzman was never informed about an investigation into Cook or the Cook Currency Entities.

10. James McIntosh.

James McIntosh received a phone call from Berg while McIntosh was in California. *McIntosh Deposition*, p. 162. Berg told McIntosh that there was an investigation into Bo Beckman and Berg recommended that McIntosh withdraw his money. *Id.*, p. 163. McIntosh agreed, and requested that his account be liquidated, and his funds returned to him. *Id.* Berg told McIntosh that he would put a check in the mail. *Id.* McIntosh received a cashier’s check in the amount of \$250,000.00 thereafter in the mail. *Id.*, p. 166. McIntosh had been told that his funds were being held in a segregated

account, so McIntosh believed the funds he received were not implicated by any investigation, even if the investigation had been into the Cook Currency Entities. *Id.*, pp. 218-219.

11. George and Karen Morisset.

George and Karen Morisset are close friends with Walter Defiel, but are not familiar with Cliff Berg. *K.Morisset Deposition.*, p. 35. John Dzik delivered the cashier's checks for George and Karen Morisset to Defiel, along with Defiel's check. *Id.*, p. 34. The Morissets did not request the return of their funds. *G.Morisset Deposition*, p. 67. Defiel called George and informed him that he had the Morissets' checks. *Id.*, p. 69. Thereafter, George visited Defiel's house, and picked up two cashier's checks. *Id.*, p. 72. The Morissets received cashier's checks totaling \$61,050.00 from the Cook Currency Entities. Karen called up Ryan Moeller, her contact at the Cook Currency Entities, after receiving the checks to ascertain whether the Morissets were required to sign any closing paperwork, but was unable to reach him. *K.Morisset Deposition*, p. 23.

12. Reynold Sundstrom.

Cliff Berg called Reynold Sundstrom and told him that Cook was transferring the Cook Currency Trading business to Charles Schwab because of an investigation. *Sundstrom Deposition*, p. 112. Berg also informed Sundstrom that Cook would be moving to Charles Schwab, so Sundstrom believed that Cook was not implicated in the investigation. *Id.*, p. 201. Sundstrom trusted Berg, because he had always found Berg to be honest. *Id.*, p. 46. Sundstrom checked the amount of the cashier's check he received, which was \$85,450.00, and found it to be correct. *Id.*, p. 115. Sundstrom did not find it

odd that fees were deducted, as he believed that the Cook Currency Entities had waived the fees and penalties associated with the return of the funds, because the funds would be moved over to Charles Schwab in short order. *Id.*, p. 116. Sundstrom fully intended on investing with Cook once the Cook Currency Trading business had moved to Charles Schwab. *Id.*, p. 117.

13. Phillips Litigation.

On July 7 2009, after all Lenders had received the return of their funds, Howard and Sharon Phillips, with other investors, filed a lawsuit which alleged that they had been unable to withdraw funds from the Cook Currency Entities. The Phillips have testified that they were unaware of any problems with the Cook Currency Entities until they requested their money back and were refused on June 4, 2009. *Sharon Phillips Deposition, p. 69*, attached as Exhibit 30 to the Magnuson Declaration. The Phillips received a transfer of \$52,500.00 from the Cook Currency Entities on July 8, 2009, after filing the lawsuit. Lenders did not have any knowledge of this lawsuit until after it was filed, nor that investors had been unable to obtain repayment from Cook. Cook has testified that the Phillips and other investors were unable to receive the return of their funds because they were clients of Jerry Durand's, who absconded with the documentation necessary to return the Phillips' money. *Cook Deposition, p. 198*. Cook further testified that all other withdrawals were being processed normally at the time Lenders received their funds, and that roughly 100 investors received complete withdrawals of principal and/or interest around the time Lenders received transfers. *Cook Deposition, p. 186*.

14. Institution of the Receivership.

The SEC and CFTC filed separate lawsuits against Trevor Cook and his entities on November 23, 2009 – four months after the Lenders had all been fully paid their loans. The Court appointed the Receiver on November 23, 2009. In connection with the SEC investigation, Cook and the other principals of the Cook Currency Entities hired attorneys. Cook had made substantial payments to his attorneys on June 23, 2009, June 24, 2009, July 7, 2009, and August 19, 2009 which are both before and after the repayment of Lenders' loans. At every point, Cook's attorneys were fully informed about the purpose and scope of the SEC investigation, as well as an undisclosed CFTC investigation, various newspaper articles alleging the presence of fraud, and a lawsuit filed by the Phillips alleging fraud and non-payment of investor funds. The SEC and the CFTC moved to force Cook's attorneys to disgorge the fees they had received, because they were on notice that the source of the funds they had received were defrauded customers of Cook. The Court disagreed, finding "[w]hen the fee retainer agreements were entered into the SEC and CFTC's investigations had only begun, and no criminal investigation had commenced. The same is true for the civil lawsuit. In July 2009, the record in the civil suit contained 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 came from a fraudulent scheme." Case 0:09-cv-03332, Document 186, p. 8. The standard Judge Davis used in determining whether to allow Cook's attorneys to keep the funds Cook paid is essentially the same as the standard the Court must use in this case in determining whether the Lenders can keep transfers from Cook.

The Receiver interviewed and obtained documents from each Lender prior to beginning this litigation, including documentation regarding the current location of Lenders' assets. Lenders cooperated with the Receiver. The Receiver's counsel Peter Kohlhepp informed at least one Lender, "[s]orry for wasting your time, and you're clearly not our target." *T.Frahm Deposition, p. 299*. In connection with his investigation, the Receiver sent a letter demanding the return of Lenders' funds, relying on a 2008 bankruptcy court decision which has since been reversed.

The Receiver filed his "Petition" on July 23, 2010. The Receiver stated claims against Lenders under the Minnesota Fraudulent Transfer Act, and for Unjust Enrichment. The Receiver claimed that each Lender had received transfers which the Lenders knew or had reason to know were fraudulent. The Receiver further claimed that Lenders were "unjustly enriched by the receipt of preferential transfers." Despite the fact that preferential transfers are only voidable under the Bankruptcy Code (11 U.S.C. § 547), and despite believing that Lenders had received a preference, the Receiver failed and refused to institute bankruptcy proceedings to recover the alleged preferences.

15. The Alleged "Red Flags."

The Receiver has identified numerous alleged "red flags," i.e., facts which would have caused an objective retail investor on "inquiry notice" that Cook Currency Entities were insolvent or the funds they received were obtained through fraud. As set forth below, none of these facts, which are all less "red" than the glaring "red" flags Cook's attorneys had notice of, defeat in any way the Lender's "good faith" in receiving the return of their loans.

a. **Some Lenders Received the Return of Funds Without Requesting Them.**

The Receiver's expert Eric Golberg testified that the distribution to Lenders could have been evidence of insolvency. *Golberg Deposition*, p. 90.⁵ This is absurd. To begin, the Crown Forex agreements the Lenders signed expressly provided that the Cook Currency Entities and/or Crown Forex could repay the Lenders' loans at any time at their discretion. *Cook Deposition*, p. 297; *Crown Forex Agreement*, p. 14. Each Lender signed an agreement or multiple agreements with the Cook Currency Entities which allowed the Cook Entities to pay back the loans at any time, and return the funds by wire or check. *Id*; *Cook Deposition*, p. 297. Second, as Adams testified, hedge funds frequently close and liquidate accounts for clients without their permission. *Adams Report*, p. 21. Adams testified that his personal accounts had been liquidated and funds returned without his request on numerous occasions. *Adams Deposition*, p. 294. In the absence of a contractual provision to the contrary, a "manager can make distributions of funds to their investors if they wish, and frequently do in a private investment context." *Id*, p. 300. Thus, no experienced investor would believe that the return of their funds without a specific request would be a "red flag" indicating that the entity was insolvent, or engaged in fraudulent activity. *Id*, p. 329. Third, Cook testified that he had received distributions of capital from hedge funds without his knowledge or consent, and that it was not unusual in the investment industry for this happen. *Cook Deposition*, pp. 53-54.

⁵ Golberg testified that he has never personally been invested in a hedge fund, nor has he been involved in the mechanics or decision making behind distributing funds back to investors, nor has Golberg ever made a currency trade. *Golberg Deposition*, pp. 40-41, 71-72, 154. Consequently, it is clear that Golberg has no idea what is "normal" in the context of distributing funds back to investors in a currency trading context.

The method by which Lenders received their funds is not a red flag indicating fraud or insolvency. At his deposition, Golberg testified that this alleged “red flag” was based on Golberg’s assumption that the Lenders’ funds could only be returned for three reasons: (i) retirement of a principal, (ii) lack of performance, and (iii) fraud. *Id.*, p. 108. To the extent this extraordinary statement even requires a response, the explanation furnished to most Lenders that the Cook Currency Entities were moving to Charles Schwab is clearly a reasonable explanation for the liquidation of Lenders’ funds.

Finally, the undisputed facts establish that Lenders Terry Frahm, James McIntosh, Larry Hopfenspirger, and Steven and Pamela Cheney all made requests for the return of their funds. *S.Cheney Deposition*, p. 93; *T.Frahm Deposition*, p. 106; *Hopfenspirger Deposition*, pp. 124-125; *McIntosh Deposition*, p. 163. The Cook Currency Entities had a course of dealing to allow for oral requests for liquidation of accounts and return of funds. *S. Phillips Deposition*, p. 75; *Howard Phillips Deposition Transcript*, p. 53, attached as Exhibit 31 to the Magnuson Declaration. The return of the Lenders would not suggest fraud or insolvency to a reasonable investor.

b. Berg Promised to Monitor the Cook Currency Entities.

The Receiver’s identification of Berg’s promise to monitor the accounts as a “red flag” showing insolvency or fraudulent purpose is frankly staggering. Any investment advisor would perform the same function. This is not a red flag.

c. Lenders Knew Cook was Berg’s Son-in-Law.

Berg’s relationship to Trevor Cook did not operate as a red flag indicating that the

Cook Entities were a fraudulent entity or insolvent.⁶ Otherwise, investors in a business without a strict anti-nepotism policy would be put on notice that said business was operating a fraud. Such a contention is patently absurd on its face. In direct contrast to the Receiver's position, the Receiver's own expert acknowledged that it is common for investors to pursue investment opportunities with friends or family members.⁷ *Golberg Deposition*, pp. 189-190. The Receiver's allegation that Lenders trusted Berg to provide preferential treatment is similarly baseless. Lenders trusted Berg because of his reputation throughout the carpet industry as an honest person. *See, e.g., Kautzman Deposition*, p. 34. Some Lenders did not have time to carefully monitor each of their investments, but trusted Berg to have more information regarding the performance of the Cook Currency Entities because of his relationship to Trevor Cook. *See, e.g., M.Heise Deposition*, p. 262. Further, Lenders trusted that Cook would not defraud his own father-in-law, which gave them confidence in the legitimacy of the investment. *See, e.g., S.Cheney Deposition*, p. 111.

d. Lenders Knew Berg Was Not an Investment Advisor.

The Lenders knew Berg as a scrupulously honest man. *See, e.g., Kautzman*

⁶ Lenders George and Karen Morisset were not aware of Berg's relationship with Cook. *G.Morisset Deposition*, p. 20.

⁷ Many Lenders purchased their structured notes relying on what is known as the "herd instinct" in the investment industry. The "herd instinct" is an accepted understanding based on investment psychology that investors tend to group together with other investors they know and trust. *Adams Report*, p. 18. The "herd instinct" is most famously demonstrated by those who invest in Berkshire Hathaway following a herd led by Warren Buffet, despite often having only an imperfect understanding of the actual business of Berkshire Hathaway.

Deposition, p. 34. Lenders did not trust Berg's word as an investment expert, but as a trustworthy person who personally experienced good returns from the Cook Currency Entities. *See, e.g., S.Fredell Deposition*, p. 51. The Lenders who believed that Berg was an employee of the Cook Currency Entities understood that Berg was not tasked with currency trading, or anything other than customer service. Berg's working relationship with the Cook Currency Entities was not a red flag.

e. Lenders Did Not Receive Written Account Closure Documents.

As Steven Adams has testified, account closure documents are usually produced *after* the investors funds are returned and the account is closed. *Adams Deposition*, p. 295. Thus, an objective retail investor would understand that they could receive their monies prior to signing any closure documents. Even investors who were experienced enough to expect account closure documents would not have noticed the absence of such documents until weeks later. This cannot be a red flag as a matter of law, because it was not information available at the time Lenders received the repayment of their loans.

f. Lenders Were Not Charged Fees For Account Closure.

Most of the Lenders understood that Trevor Cook was intending to transfer his Currency Trading Entities to Charles Schwab, to separate from Bo Beckman. The few Lenders who gave any thought to the issue of fees believed that the fees had been waived due to the upcoming move to Charles Schwab. *See, e.g., Sundstrom Deposition*, p. 116. Trevor Cook processed Berg's withdrawals in the ordinary course of business. *Cook Deposition*, p. 89. The lack of penalty fees would not indicate fraud or insolvency to a reasonable investor, as there are many reasonable explanations besides fraud or

insolvency for a waiver of fees. The fact that the Lenders received cashier's checks for the full amount of their loans is a strong indication of solvency.

g. Some Lenders Knew of the Existence of an Investigation.

Golberg testified that knowledge of an investigation into the Cook Currency Entities could act as evidence of insolvency and fraud. *Golberg Deposition*, pp. 90, 109. To begin, Golberg's testimony is inapplicable – the investigation was of the Beckman entities – not the Cook Currency Entities. Moreover, Golberg admitted that knowledge of an investigation into Bo Beckman's entity would not be "cause for concern" to Lenders who had not invested with Beckman. *Id.*, pp. 174-175. Buysse, the Hillesheims, Terry Frahm, the Morissets, the Heises, and Defiel did not have any notice of an investigation until after they received the return of their funds. McIntosh was told that the SEC had begun to investigate Beckman, but that McIntosh would not be affected as Beckman's business was unrelated to the Currency Trading Entities. *McIntosh Deposition*, p. 162. Kautzman was informed that there was a problem with Cook's partner, but that a new opportunity to loan money would occur when Cook had moved to Charles Schwab. *Kautzman Deposition*, p. 52. Steve Cheney was informed of a "problem" with or "inquiry into" an entity operated by Beckman that was unrelated to the Cook Currency Entities, whose operations would be transferred to Schwab. *S.Cheney Deposition*, p. 91. Cheney informed Hopfenspirger of this fact. *Hopfenspirger Deposition*, pp. 124-125. Sundstrom was informed that Cook was moving his business to Charles Schwab because of an investigation into one of Cook's partners in an unrelated business. *Sundstrom Deposition*, p. 112. Steve and Jenene Fredell were informed after

they received their money that the transfer was prompted by an SEC investigation into Beckman's business, which was unrelated to Cook's Currency Trading Entities.

S.Fredell Deposition, pp. 74-75. Receiver's expert Golberg testified that if Lenders were informed that the investigation was into Beckman, and Lenders did not have money with Beckman, "there would be no other cause for concern." *Golberg Deposition*, p. 174.

No Lender knew the details of the SEC investigation. No Lender knew that the SEC investigation was into the Cook Currency Entities or involved Cook directly. No Lender knew that the SEC investigation was into allegations of fraud. Steve Adams testified that "an investigation of a different manager and different investment program ... [is not] a red flag...." *Adams Deposition*, p. 345. Howard Phillips, another investor in the Cook Currency Entities, has testified that he would not interpret even an investigation specifically into the Cook Currency Entities as a red flag until the investigation had substantially progressed. *H.Phillips Deposition*, pp. 174-175. Golberg admitted that many SEC investigations do not end in any findings of wrongdoing. *Golberg Deposition*, p. 172.

The focus and scope of the SEC investigation is relevant, as SEC visits are frequently a formality. Even full-scale SEC investigations often involve allegations of "churning," or insider trading, or other activities which would not indicate fraud or insolvency to a reasonable investor. *Adams Deposition*, p. 355. Golberg testified that an SEC visit to a business could indicate a normal review, a response to an investor complaint, or an investigation into suspicions of insider trading. *Golberg Deposition*, p. 171.

However, most importantly, any diligent inquiry the Lenders would have attempted to undertake would have been futile because SEC investigations are confidential. SEC regulations prohibit disclosure of information regarding non-public investigations. 17 C.F.R. § 203.2. Investors in the Cook Currency Entities 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). This letter would have completely supported the explanations of Berg and Cook.

h. Lenders Received Money Directly From Cook Entities.

This “red flag” is simply not based in fact as Lenders received cashier’s checks, most of which included no notation regarding the purchaser of the cashier’s checks. *See Representative Cashier’s Checks to Cynthia Hillesheim*, attached as Exhibit 33 to the Magnuson Declaration. Lenders could not have assumed that the cashier’s checks had been purchased by the Cook Currency Entities rather than third-party custodians. Further, most Lenders were inexperienced in the liquidation of qualified IRA funds, and were not aware of IRS regulations stating that funds were to be returned through third-party custodians. Steven Adams has testified that the receipt of a cashier’s check from an entity rather than the intermediary in the case of an IRA would not indicate the presence of fraud or insolvency to a reasonable investor. *Adams Deposition*, pp. 338-339.

i. Lenders Continued to Receive IRA Statements.

Lenders continued to receive IRA statements after receipt of their funds, even though their IRA accounts had been liquidated and returned to them. Red flags which arise after the transfer are not probative to the issue of good faith. The confusion of the few Lenders who received such IRA statements has no bearing on whether Lenders received transfers in good faith.

j. Discrepancies in the Account Statements and Documents.

Golberg testified that discrepancies in the account opening documents constituted red flags, including that some account opening documents noted that currency trading was “risky,” while Lenders had been told that the loan was low risk, or no risk. *Golberg Deposition*, pp. 149-150; cf. *Adams Deposition*, pp. 258, 288 (notes were not described as “no risk,” nor returns guaranteed). Golberg further testified that the fact that some Lenders did not receive an account report for six months after his initial loan could have been evidence of insolvency. *Golberg Deposition*, p. 90. Steve Adams has testified that non-professional investors generally do not carefully scrutinize account opening documents and paperwork. *Adams Deposition*, pp. 156-157. Adams further opined that no reasonable investor would find the account opening documents or statements to be red flags indicating fraud or insolvency. *Adams Report*, pp. 12-16. Cook testified that the account opening documents and statements were either professionally prepared forms made for hedge funds, or were drafted based on forms from Saxo Bank. *Cook Deposition*, pp. 68-70. Over one thousand investors, including institutional and professional investors, invested in the Cook Currency Entities and reviewed the

documents available to Lenders, without having any serious concerns about the account documents. *Cook Deposition*, p. 81; *Moeller Deposition*, p. 42.

k. Additional Specific “Red Flags.”

Karen Morisset stated that she believed it “kind of odd” that they received their checks directly from Defiel, and attempted to contact Ryan Moeller for more information. *K. Morisset Deposition*, p. 23. Karen further testified that she never had any idea that “something was going wrong” until a newspaper article in early July informed her about the Phillips litigation. *Id.*, 24. Investors are not on inquiry notice based on circumstances that appear “kind of odd,” but rather on specific information suggesting fraud or insolvency. The Morissets’ failed attempt to investigate further indicates that any investigation conducted by the Lenders would have been futile.

Terry Frahm was not familiar with the name Crown Forex at his deposition, but he does not dispute that he signed an account agreement with Crown Forex. *T. Frahm Deposition*, p. 281. Frahm’s unfamiliarity with Crown Forex is not a red flag. In his letter requesting withdrawal of his funds, Frahm authorized payment directly to Frahm. *Frahm Letter*, p. 1. Frahm’s receipt of a direct transfer is therefore not a red flag. The additional “red flags” cited by the Receiver are either related to Frahm’s investment with Bo Beckman, which funds are not the subject of this action, or are related to Frahm’s concern that returns from the Cook Currency Entities would be taxed as ordinary income, based on information supplied by Cook. Frahm attempted to prod Cook into supplying tax advice, which Cook properly refused to do, but dropped hints that it might be taxed as ordinary income, which concerned Frahm as it lowered his net monetary return

substantially. *T.Frahm Deposition*, pp. 103-104.

Sundstrom's attempt to verify the Cook Entities through his attorney is evidence of good faith, not a red flag. Sundstrom did not receive negative feedback from his attorney, so he "assumed everything was okay." *Sundstrom Deposition*, p. 38.

Sundstrom further testified that he did not find the investment opportunity to be in any way "odd." *Id.*, p. 43. Sundstrom simply asked his attorney to investigate and to "see what he thought." *Id.*, p. 39. Sundstrom assumed that his attorney would contact him if there were any problems that Sundstrom had missed.

Hopfenspirger requested that Cheney liquidate his account for him. *Hopfenspirger Deposition*, p. 131. Hopfenspirger believed Cheney would be able to do so, and was not surprised when his funds were actually returned. *Id.* In his deposition, Hopfenspirger was asked to interpret a specific contractual term, which Hopfenspirger acknowledged could be interpreted to have prohibited Cheney from withdrawing Hopfenspirger's funds. *Id.*, pp. 193-194. Hopfenspirger's inexpert legal interpretation of the contract language is not evidence of a red flag, as Hopfenspirger testified that he wished to have his funds returned, and that he did not have notice about any problems stemming from his request that Cheney retrieve his funds. *Id.*, p. 131.

I. Additional Red Flags Identified By the Receiver's Expert.

The Receiver's expert supported the Receiver's contention that the manner in which Lenders received their funds, either by unexpected liquidation, or after notice of an investigation was "evidence of insolvency." *Golberg Deposition*, p. 90. Golberg also agreed that discrepancies in the account statements and account documents were

“evidence of insolvency.” However, Golberg did not testify that Berg’s relationship to Cook, Berg’s lack of investment experience, the purchaser of the cashier’s checks, or statements received from Millennium and Entrust after the receipt of funds were red flags. Golberg did identify two additional red flags not identified by the Receiver.

i. Rate of Return and Stated Risk.

Golberg claimed that the claimed rate of return was unreasonably high, given the allegedly low risk nature of the investment, and that the rate of return, when combined with low stated risk, could be evidence of insolvency. *Golberg Deposition*, p. 90-91. As Steve Adams has testified, the returns in question were not out of line with the historical return on currency trading. *Adams Deposition*, pp. 334-335. As Adams further testified, historical returns would be extremely difficult to come by. *Adams Report*, p. 7.

However, if Lenders had obtained access to historical data, they would have found that the currency trading strategy outlined by Cook could be expected to produce returns between 13.26% and 17.37%, allowing for repayment of Lenders’ loans with the remainder being earnings for the Cook Entities. *Adams Report*, p. 11. A return between 10% and 12% would not be unreasonable, nor a red flag indicating fraud or insolvency. Golberg criticized the historical data used by Adams, but admitted that his critique was not based on any data, or testimony from managers carrying out a similar strategy, but simply on his own experience in the investment industry (which did not include actual currency trading). *Golberg Deposition*, pp. 161-162. Golberg also testified that it was 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. *Id.*, pp. 237-238.

Each Lender was assured that their investment was safe, and that their return was established by the terms of the structured notes. Even to the extent a reasonable investor would not believe Cook as to the amount of risk inherent in the transaction, the reasonable investor would suspect merely that Cook was confident in his investment strategy, and was optimistic about the strength of the Cook Currency Entities. Adams testified that although a reasonable non-professional investor might be skeptical about a “guaranteed return” of 10-12%, a reasonable non-professional investor would ascribe the “guarantee” to “puffery.” *Adams Deposition*, pp. 190-191. In addition, a reasonable investor would be aware that Cook had over a thousand investors and hundreds of millions of dollars under his control. Had Lenders investigated this rate of return, they would not have found cause to be suspicious of returns of 10% and 12%.

Golberg posited that the existence of a UBS trademark infringement action against the Cook Currency Entities and an NFA fine of Trevor Cook would be a red flag. It is undisputed that no Lender knew about the UBS litigation or the NFA proceeding. This information cannot constitute a red flag. If Golberg is suggesting that Lenders should have obtained this information, Golberg is placing an unreasonable burden on the “reasonable investor.” NFA proceedings are not available to an average non-professional investor, who would not even know of the existence of the NFA. *Adams Deposition*, p. 58. Although professional investors have the expertise necessary to access NFA discipline records, it would be unreasonable to expect an unprofessional investor to know how or where to make such a search. *Id.*, p. 58. Not only was the UBS trademark action

settled, with no finding of wrongdoing, but the average investor would not have been able to find record of this litigation, as the average retail investor does not have access to PACER, or a similar docket database. *Adams Deposition*, p. 58. Golberg specifically testified that the UBS litigation would only raise concerns about “character,” not insolvency. *Golberg Deposition*, pp. 119-120.

m. Most Purported Red Flags Were Available To All Cook Investors.

Other investors in the Cook Currency Entities were aware of the vast majority of the purported “red flags” the Receiver identified. Even the employees of the Cook Currency Entities, many of whom had personally invested in the Cook Currency Entities, did not withdraw their own funds as a result of the SEC investigation or any other purported “red flag.” Not one of the nearly 1,000 investors, including sophisticated professional investors in the Cook Currency Entities, which included operators of hedge funds and three traders on the Chicago Board of Trade, was deterred by any of the supposed “red flags” of 10-11% rates of return, low risk, minor discrepancies in the account opening documents, and account statements, nor believed that they indicated insolvency or fraud. Howard and Sharon Phillips have testified that Trevor Cook was exceptionally deft in dealing with investor concerns.

The Phillips, who were allowed to keep the principal payments they received from the Cook Currency Entities, were aware of a number of additional facts that Lenders were not, that Howard Phillips distrusted Cook because of his response to withdrawal attempts in April of 2009 (*Id.*, p. 44), and despite the Phillips’ understanding that money would be available on oral demand within 24 hours by check, Cook did not immediately process

their withdrawal request (*Id.*, p. 54). Despite this, the Phillips still requested, received, and have been allowed to retain a \$50,000.00 withdrawal from May, 2009. *Id.*, p. 59. At this time, the Phillips were also aware of the stated risk, the return, the account opening documents and statements, and most of the other purported red flags known by Lenders.

In fact, Gerald Durand told Howard Phillips' brother (who communicated it to the Phillips) about an investigation into Trevor Cook that would "break apart the company," on June 4, 2009. *Id.*, p. 64. However, Lenders were clients of Berg, not Durand. Even after the Phillips knew of this information, and had filed their lawsuit on July 7, 2009, they received transfers of over \$52,000.00 from the Cook Entities. Obviously, as of July 8, 2009, the Phillips knew every "red flag" Lenders knew, with the addition of a large amount of additional information. The Receiver never requested that the Phillips repay the \$52,500.00 payment, and the Phillips have self-interestedly cooperated with the Receiver in his attempt to claw-back funds from Lenders. *H.Phillips*, p. 164.

16. Lenders' Expert.

Steve Adams has testified that before lending money to a company like the Cook Currency Entities, most reasonable non-professional investors would not search the SEC, CFTC, NFA, or PACER databases for a history of enforcement proceedings against the Cook Currency Entities, as the most that could be expected of a reasonable non-professional investor in the "best circumstances" would be to search the SEC website which would have disclosed nothing. *Adams Deposition*, pp. 62-63. A reasonable, non-professional investor's due diligence would further extend to an internet search, discussion with previous or current investors, review of media reports, and reports on the

strategy being offered. *Id.*, p. 65. Adams further testified that he was not aware of anything in the record that would “cause a reasonable, non-professional investor to believe that [that the Cook entities were being operated as a fraud or a Ponzi scheme or insolvent].” *Id.*, p. 352. In short, Adams, after reviewing all of the information available to Lenders, including all information identified by the Receiver or his expert as red flags, concluded that this information would not “provide notice to a reasonable investor of fraud or insolvency on the part of the Cook Entities.” *Adams Report*, p. 22. Thus, Lenders received the return of their funds “in good faith.” *Adams Report*, p. 23.

ARGUMENT

A. 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). Only disputes over facts that might affect the outcome will properly preclude summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In a fraudulent transfer action, once a transferee meets its burden of proof by showing that it received the transfer in good faith, “it is 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).

B. The Receiver's Unjust Enrichment Claim Must Be Dismissed.

The Receiver's unjust enrichment claim against Lenders must be dismissed. The transfer to Lenders was pursuant to a valid contract between Lenders and the Cook Currency Entities. Thus, the Receiver has no valid claim for unjust enrichment against Lenders. *See Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 126 (Minn.App.1998) ("The existence of an express contract between the parties precludes recovery under the theories of quasi-contract, unjust enrichment, or quantum meruit.") (citation omitted); *see also Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Can., Ltd.*, 552 N.W.2d 254, 268 (Minn.App.1996) (stating that "equitable relief cannot be granted where the rights of the parties are governed by a valid contract") (quotation omitted), *review denied* (Minn. Sept. 20, 1996). A Minnesota Dakota County District Court analyzing unjust enrichment claims in a ponzi scheme context found that where "each of the transfers was made as payments for contractual debts, the Receiver's claims for unjust enrichment fail as a matter of law." *Finn v. Alliance Bank*, 2011 WL 5006458, No. 19HA-CV-11-2856 (Dakota County Dist. Ct., August 16, 2011).

In addition, the undisputed case law demonstrates that Lenders is not unjustly enriched by the return of his principal. To prove a claim of unjust enrichment, a claimant must establish that (1) a party knowingly received something of value to which he or she was not entitled and (2) the circumstances are such that it would be unjust for that party to retain the benefit. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn.App.2001). In this case, Lenders were legally entitled to the full return of their principal, by virtue of the agreement between and the Cook Currency Entities. Thus,

repayment of Lenders' principal was for reasonably equivalent value, in that it extinguished Lenders' legal claims against the Cook Currency Entities. *In re M & L Bus. Mach. Co., Inc.*, 84 F.3d 1330, 1342 (10th Cir. 1996). Lenders were not, and could not have been, unjustly enriched by the return of their principal, because they were not enriched, as a matter of law. The Receiver's claim that Lenders were unjustly enriched should be dismissed, as to Lenders' receipt of the return of their principal.

Lenders also had no reason to believe that they was not entitled to the interest earned as provided in their contracts with the Cook Currency Entities and as further set forth in the numerous account statements supplied to them. Lenders are entitled to a contractual set interest rate for the use of their money, because such return should "be considered value or fair consideration to support the payment of reasonable contractual interest simply because the bankrupt entity receiving the use (loan) of the funds was engaged in a 'Ponzi' scheme," unless otherwise specified by Congress. *In re Unified Commercial Capital, Inc.*, 260 B.R. 343, 350 (Bankr. W.D.N.Y. 2001) *aff'd sub nom. In re Unified Commercial Capital*, 01-MBK-6004L, 2002 WL 32500567 (W.D.N.Y. June 21, 2002).

In short, this Court should not ignore "the universally accepted fundamental commercial principal that, when you loan an entity money for a period of time in good faith, you have given value and are entitled to a reasonable return." *Id.* Any other result would be the equivalent of interpreting "fraudulent conveyance statutes as 'super preference' statutes," contrary to any direction from Congress. *In re Carrozzella & Richardson*, 286 B.R. 480, 489 (D. Conn. 2002). The Receiver has consistently argued

that Lenders received a preferential transfer, but has never made a claim in bankruptcy that would allow a preferential transfer to be recovered. Lenders provided reasonably equivalent value for the funds they received, including the contractual interest. Thus, Lenders were not unjustly enriched by the receipt of said funds. The Receiver's unjust enrichment claim must be dismissed.

C. The Receiver's Fraudulent Transfer Claim Must Be Dismissed.

The Receiver's Fraudulent Transfer Claim must be dismissed because, as set forth below, there are no set of facts demonstrating that an objective reasonable non-professional investor would have been aware of any facts putting said investor on inquiry notice that the Cook Currency Entities were either insolvent or a fraudulent ponzi scheme.

1. The Minnesota Fraudulent Transfer Act.

Minnesota has adopted the Uniform Fraudulent Transfer Act at Minn. Stat. §513.43, et seq. The Minnesota Fraudulent Transfer Act creates two separate causes of action: One for constructive fraud at Minn. Stat. §§ 513.44(a)(2) and 513.45 and a second for actual fraud at Minn. Stat. § 513.44(a)(1).

There is no question in this case that no "constructive fraud" occurred because under either Minn. Stat. §§ 513.44(a)(2) or 513.45 the Receiver must prove that the Cook Entities did not receive "reasonably equivalent value" when the Cook Currency Entities paid back the Lenders' loans. However, because the Cook Currency Entities received a dollar for dollar reduction of the Lenders' rights under the structured notes, the Cook Currency Entities received reasonably equivalent value for the repayment of the Lenders'

loans. *See, e.g. In re Bayou Group, LLC*, 439 B.R. 284, 309 (S.D.N.Y. 2010). “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.’” *In re Carrozzella & Richardson*, 286 B.R. 480, 491 (D. Conn. 2002). Minn. Stat. §514.45 likewise exclusively applies to transfers for which the transferor did not receive “reasonably equivalent value.” Thus, to the extent the Receiver has a fraudulent transfer claim in this case, it is limited to a claim for actual fraud under Minn. Stat. § 513.44(a)(1).

Under Minn. Stat. §513.44 (a)(1), a transfer may be avoided if the transferor (in this case the Cook Currency Entities) made the transfer with actual intent to defraud creditors. In the context of a ponzi scheme, actual fraud is presumed because the ponzi scheme operator’s transfer of funds to current investors is intended to defraud new investors by convincing those new investors that the investment is legitimate. *In re Indep. Clearing House Co.*, 77 B.R. 843, 860 (D. Utah 1987). However, the Minnesota Fraudulent Transfer Act provides the transferee (in this case the Lenders) with an affirmative defense if the transferee received the transfer in “good faith:” “[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.” Minn. Stat. § 513.48. Good faith under the Uniform Fraudulent Transfer Act is an affirmative defense and Lenders bear the burden of proof. *In re Cohen*, 199 B.R. 709, 718 (B.A.P. 9th Cir. 1996). It is important to note that the relevant time frame for a good faith analysis is when the transferee “took,” not “retained” the transfer. The good faith

analysis examines the knowledge or notice of a transferee at the time of the transfer, not at any time thereafter. *See, e.g., In re Sherman*, 67 F.3d 1348, 1356 (8th Cir. 1995) (analyzing the information to transferees at the time of the transfer before finding that the transferees “did not take the transfer ... in good faith.”)

Fraudulent transfer analysis is distinct from preferential transfer analysis. “The 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 choose among them.” *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1509 (1st Cir. 1987). Justice (then Judge) Breyer in *BTG* uses the following useful example, “a debtor owes A \$10,000 and B \$20,000. He has only \$8000, which he uses to satisfy his debt to A. This conveyance may be unfair to B, but it is not a ‘fraudulent conveyance’ because it satisfies a debt owed to a person who is, at least, a legitimate creditor. B must find a remedy in bankruptcy, or in some other, law.” *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1508 (1st Cir. 1987). “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).

As set forth below, the Receiver cannot establish either actual intent or the Lender’s lack of good faith. More specifically, because the undisputed facts demonstrate that the Cook Currency Entities were winding down at the time of the transfers and not taking any new investors, the presumption of fraud in a ponzi scheme does not exist in this case. Moreover, the Receiver cannot point to any facts demonstrating that any of the

Lenders lacked good faith at the time of the transfer as the Receiver's own expert admitted.

2. The "Ponzi Scheme Presumption" Does Not Apply Here Because The Transfers Were Made After The Cook Currency Entities Stopped Taking New Investors.

While Courts presume actual intent to defraud based on the existence of a ponzi scheme, the reasoning behind such a presumption does not exist in this case:

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."

In re Indep. Clearing House Co., 77 B.R. 843, 860 (D. Utah 1987). Thus, the *Clearing House* Court concluded in this seminal case, "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 per se fraudulent, as they are for the purpose of convincing new investors to invest. However, that presumption does not apply given these facts.

Cook had ceased to take investments from new investors before Lenders received the transfers of their funds. *Moeller Deposition*, p. 29. Thus, the payments to Lenders on June 29, 2009 were not made to further a ponzi scheme, but were simply withdrawals in due course. *Cook Deposition*, p. 89. The payments to Lenders were simply the repayment of a legitimate antecedent debt, and were not meant to induce more money

from new investors, but were simply processed like any other withdrawal. *Id.* The Receiver has no evidence that the payments to Lenders were made with actual intent to defraud.

Thus, the Receiver cannot establish that the transfers at issue were made with actual intent to defraud. Transfers made in the context of an ongoing ponzi scheme are per se fraudulent transfers because they are meant to induce further investment, while transfers made (like the repayments of Lenders structured notes) when a ponzi scheme has shut down are merely preferential to other legitimate creditors which can be avoided by placing the entities in bankruptcy which the Receiver refused to do.

3. Each of the Lenders Received The Repayment of Their Respective Loans in “Good Faith” under the Uniform Fraudulent Transfer Act.

Even if the Court finds that there are questions of material fact regarding Cook’s actual intent, or whether the Cook Currency Entities were still operating an ongoing ponzi scheme as of June 29, 2009, the Receiver may still not void the transfers received by Lenders “good faith.” The undisputed facts demonstrate that each Lender received the repayment of his or her respective loans in good faith under the Uniform Fraudulent Transfer Act. As a result, the Receiver’s fraudulent transfer claims must be dismissed.

a. “Good Faith” Under Minnesota Law.

Minnesota courts have not conducted a meaningful examination of good faith in a ponzi scheme context. However, in “normal” fraudulent transfer cases, a transferee may receive a transfer in good faith even if he has knowledge of the transferor’s insolvency, as long as the transferee gave adequate consideration. *Schlecht v. Schlecht*, 209 N.W. 883,

886 (Minn. 1926). In other cases, Minnesota courts have described good faith as a lack of “notice of the fraudulent intent of the [transferor].” *Leqve v. Smith*, 65 N.W. 121, 121 (Minn. 1895). Put another way, “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).

In this case, under Minnesota law, Lenders had no notice of fraudulent intent underlying transfers to Lenders. Even if the Court looks outside the borders of Minnesota for a definition of good faith, the Court will find that Lenders are entitled to summary judgment as a matter of law.

b. “Good Faith” Under the Bankruptcy Code and the Uniform Fraudulent Transfer Act.

In the absence of extensive precedential Minnesota case law analyzing “good faith” under the fraudulent transfer statute, it is necessary to examine other precedent applying the Uniform Fraudulent Transfer Act because “Minnesota uniform laws are to be interpreted in accordance with the uniform laws of other states.” Minn. Stat. § 645.22. This Court may also examine cases interpreting the Bankruptcy Code’s fraudulent transfer provision, 11 U.S.C. § 548(c), which also allows transferees to retain funds they received in “good faith” because “when drafting the Uniform Fraudulent Transfer Act, the authors looked to the federal Bankruptcy Code for guidance.” *Fid. Bond & Mortg. Co. v. Brand*, 371 B.R. 708, 719 (E.D. Pa. 2007); *Armstrong v. Collins*, 01CIV.2437(PAC), 2010 WL 1141158 (S.D.N.Y. Mar. 24, 2010) (“Since the UFTA is

similar to the fraudulent transfer provisions of the Bankruptcy Code, courts also look to cases interpreting the Bankruptcy Code in applying the UFTA.”)

Good faith under the Bankruptcy Code is to be determined on a case-by-case basis. *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995). 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” or when the transaction does not carry the earmarks of an “arms-length bargain.” *Id.* “[I]f the circumstances would place a reasonable person on inquiry of a debtor's fraudulent purpose, and a *diligent* inquiry would have discovered the fraudulent purpose, then the transfer is fraudulent.” *In re M & L Bus. Mach. Co., Inc.*, 84 F.3d 1330, 1338 (10th Cir. 1996) (quotations omitted, emphasis in original). However, information suggesting general “problems” with the transferor does not constitute a red flag, even if said problems are related to the honesty of management or the finances of transferor. *In re Bayou Group, LLC*, 439 B.R. 284, 314 (S.D.N.Y. 2010) (“*Bayou IV*”). Rather, it is only “information suggesting insolvency or a fraudulent purpose in making a transfer that triggers inquiry notice.” *Id.*

In addition, red flags indicating fraud must generally indicate a fraudulent purpose *underlying the transaction at issue*, not indications that the transferor itself is engaged in fraud. *Id.* at 311; *see also, In re M & L Bus. Mach. Co., Inc.*, 84 F.3d 1330, 1336 (10th Cir. 1996).

“A transferee that lacks the information necessary to support an inference of knowledge need not start investigating on his own.” *Bonded Fin. Services, Inc. v. European Am. Bank*, 838 F.2d 890, 898 (7th Cir. 1988). Once the transferee is aware of

sufficient information regarding fraud or insolvency, the transferee must satisfy the second prong, a showing that a diligent inquiry would not have uncovered the fraudulent purpose of the transferor. *In re Bayou Group*, 439 B.R. at 312; *In re M & L Bus. Mach. Co., Inc.*, 84 F.3d 1330, 1338 (10th Cir. 1996). Thus, even if the transferee is on inquiry notice, the transferee will still prevail if it can show that a diligent investigation would not have led to discovery of the fraud. *In re Bayou Group, LLC*, 439 B.R. at 317.

Under the Uniform Fraudulent Transfer Act, a transferee may even keep reasonable interest payments paid by the ponzi scheme, if the transferee is in good faith. *In re Carrozzella & Richardson*, 286 B.R. 480, 491 (D. Conn. 2002); *see also In re Unified Commercial Capital*, 01-MBK-6004L, 2002 WL 32500567 (W.D.N.Y. June 21, 2002). This is the case when transferees received fixed returns, such as interest on loans to the organization, rather than “profits.” *In re Carrozzella*, 286 B.R. at 491. As formulated by the courts, interest payments are the legitimate returns realized pursuant to contract for the benefit conferred upon the transferor. *Id.* “Profits,” in a ponzi scheme context, are simply the fraudulent redistribution of funds from one investor to another, and reasonable investors understand that the returns are speculative. As Lenders fall under the clear case law of *Carrozzella* and subsequent cases regarding the interest on loans, rather than the cases involving “profits,” Lenders are entitled to retain the interest payments received from the Cook Currency Entities.

Finally, this “good faith” test is measured against an objective standard which posits a reasonable investor in the same class of expertise as the transferee – i.e., in this case, what a reasonable non professional investor as experienced a transferee as Lenders

should have known based on the facts at issue in this case. *In re Bayou Group, LLC*, 439 B.R. 284, 310 (S.D.N.Y. 2010).

D. Each Lender Has Established He or She Received Any Amounts From the Cook Currency Entities In “Good Faith.”

A facial examination of the facts underlying the Receiver’s case demonstrates how difficult the Receiver’s task is in establishing that a reasonable non professional investor, under the facts of this case, (i) would have been on inquiry notice of (a) the fraudulent purpose of the transfer or (b) the Cook Currency Entities’ insolvency and (ii) a diligent inquiry would have revealed such fraudulent purpose or insolvency. Over one thousand investors, including sophisticated hedge fund investors who would possess more knowledge than the hypothetical “reasonable non-professional investor,” purchased the Structured Notes from the Cook Currency Entities. The behavior of these one thousand investors, including sophisticated hedge fund investors who would possess more knowledge than the “reasonable non-professional investor,” unequivocally establishes that a “reasonable non professional investor” possessing knowledge of the facts the Lenders possessed would not have had a clue that the transfers they received were either for a fraudulent purpose or that the Cook Currency Entities were insolvent. Simply put, if a “reasonable non professional investor” knew this, they would not have invested.

The Receiver in discovery identified all of the red flags the Receiver alleges triggered Lenders’ inquiry notice. In what should be a rather odd admission, the Receiver’s expert identified a list of red flags which differs from the Receiver’s list.

Nonetheless, these “red flags” are insufficient to put, as set forth above, the Lenders on inquiry notice of fraud or insolvency of the Cook Currency Entities.

1. Case Law Interpreting “Red Flags.”

The case law on what constitutes a “red flag” in a ponzi scheme is highly fact-specific. However, as outlined in the leading case of *In re Bayou Group, LLC*, courts have generally agreed on the following basic principles. The first issue “is whether the transferee had information that put it on inquiry notice that the transferor was (i) insolvent or (ii) 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 “problems” or “infirmities” unrelated to (i) or (ii) are not relevant to a transferee’s inquiry notice. *Id* at p. 314. In evaluating red flags, “a court should focus on the circumstances specific to the transfer at issue—that is, whether a transferee reasonably should have known ... of the fraudulent intent underlying the transfer.” *Id* at 311 (quotation omitted). Only after it is established that “a transferee reasonably should have known ... of the fraudulent intent underlying the transfer” will the court then evaluate whether “*diligent* inquiry would have discovered the fraudulent purpose” of the transfer.” *Id* at 312 (emphasis in original).

A court’s analysis of “whether 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. Further, a court may examine the reaction and responses of other investors to alleged red flags to determine whether a reasonable investor would believe them to be indicative of fraud or insolvency. “The response of other similarly situated investors is not irrelevant, however, to a factual

determination of whether alleged “red flag” information would put a reasonable hedge fund investor on notice of insolvency or fraudulent purpose.... In determining what weight a reasonably prudent institutional hedge fund investor would have given the alleged “red flag” information, the fact finder may consider the reaction and responses of such investors who did in fact receive the information.” *Id* at 315.

Lender’s expert witness, Steve Adams, and the Receiver’s expert witness, Eric Golberg had different definitions of “red flag.” Golberg defined “red flag” as “something to make an investor cautions – or concerned – I should say concerned – about their investment and concerned about possible fraud.” *Golberg Deposition*, 85. Golberg restated his definition as “something that would cause an investor concern about performance of their investment and potential fraud.” *Id*, p. 88. Steve Adams’ definition is “circumstances that would cause a reasonable, non-professional investor to be put on some sort of inquiry notice of the existence of a Ponzi scheme or insolvency... things that would put a reasonable, non-professional investor on inquiry notice of the existence of fraud or insolvency.” *Adams Deposition*, pp. 172-173. Adams’ definition is legally correct. Golberg’s definition is incorrect. Golberg’s test is too broad, and includes as red flags facts that would cause concern about “performance,” not simply “fraud or insolvency.” Thus, Golberg’s testimony regarding “red flags” known to Lenders is based upon a faulty definition, and is facially suspect because it applies the improper standard.

2. Flags Not Held to Be “Red” as a Matter of Law.

In interpreting what constitutes a “red flag” as opposed to merely a flag, courts have been required to make very fact-specific findings. Courts have found that

knowledge of a lawsuit against the transferor is insufficient to constitute a red flag. *Rucker v. Steelman*, 619 S.W.2d 5, 7 (Tex. Civ. App. 1981). A court deemed the following alleged red flags as 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], [the transferor’s] inconsistent statements about who was responsible for preparing NAVs, and [the transferor’s] ultimate disclosure that a related entity, 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*). Another Court determined that a mortgage lender who received many checks from homeowners that were all from a single account of the ponzi schemer, rather than the separate accounts of each homeowner, did not trigger inquiry notice. *In re Image Masters, Inc.*, 421 B.R. 164, 182 (Bankr. E.D. Pa. 2009).

A court in dismissing claims for fraudulent transfer in bankruptcy, found as a matter of law that a transferee who made loans to “a seemingly legitimate enterprise which... apparently paid its obligations on time” was not in bad faith, despite knowledge that the principal of the transferor was diverting funds to his own use, that the cash flow of the transferor was insufficient to support its operations, that the principal had substantial IRS liability problems, that the principal had been late on payments, and that

the principal had made misrepresentations on his financial statements. *In re Dreier LLP*, 453 B.R. 499, 513 (Bankr. S.D.N.Y. 2011). The Court concluded that although the lender may have had reason to question the principal's honesty and the source of funds used by the transferor, this could not add up as a matter of law to actual constructive knowledge that the transferor was a ponzi scheme. *Id.* This is because in analyzing red flags, "the Court must focus on knowledge relating to the transfer at issue, and not on knowledge that the transferor (*i.e.*, the debtors) was engaged generally in fraudulent activity." *In re M. Fabrikant & Sons, Inc.*, 447 B.R. 170, 192 (Bankr. S.D.N.Y. 2011).

The 5th Circuit has reviewed facts with greater negative implications than the ones at Lenders' disposal and ruled in favor of the transferee. In *In re Hannover Corp.*, 310 F.3d 796, 801 (5th Cir. 2002), the 5th Circuit affirmed a bankruptcy court judgment finding 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.

3. What Is a Red Flag?

Although red flags are situation specific, they are usually deeply grounded in common sense. *See, e.g., Jobin*, 84 F.3d at 1338–39 (investor promised 120% to 468% annual return, use of postdated checks to pay investors, check to investor returned for insufficient funds); *In re Sherman*, 67 F.3d at 1355 (transferees on inquiry notice of insolvency where they knew that debtors had incurred substantial medical debts, were the subject of an impending suit for non-payment, were behind in their mortgage payments,

and were facing foreclosure proceedings); *In re Agric. Res. & Tech. Grp.*, 916 F.2d at 539 (transfer received “was grossly in excess of the value” transferee had provided); *In re Manhattan Inv. Fund III*, 397 B.R. at 23–24 (knowledge that transferor was simultaneously suffering huge losses and reporting 20% profit to investors); *Quilling v. Stark*, 3-05-CV-1976-BD, 2007 WL 415351 (N.D. Tex. Feb. 7, 2007) (knowledge that transferor was an unlicensed securities dealer selling futures, commodities and foreign currency trades, had a history of failed business ventures, defaults on loans, hundreds of thousands of dollars in credit card debt, and had previously been arrested for fraudulent securities); *In re M & L Bus. Mach. Co., Inc.*, 198 B.R. 800, 810 (D. Colo. 1996) (returns ranging from 12% per month to 10% per week, lack of written financial information, requests to hold checks for days before deposit).

Red flags are signals which strongly suggest to a transferee that the transferor is insolvent, or that the transfer is being made with fraudulent purpose. Courts do not find that “strange” or “odd” circumstances put a transferee on inquiry notice. *In re Bayou Group, LLC*, 439 B.R. at p. 314. The good faith defense in a ponzi scheme context is intended to act as a bar against transferees who are attempting to “game the system.” In an ancient Supreme Court case regarding fraudulent transfer in a bankruptcy construct, the Court found that a transferee did not receive his transfer in good faith as “he had such notice and information as made it his duty to inquire further, and that the slightest effort by him in that direction would have discovered the whole fraud.” *Harrell v. Beall*, 84 U.S. 590, 591 (1873).

As the Court can readily ascertain from the undisputed evidence, Lenders are not clever investors, sneaking their money out the back door of a collapsing enterprise as law enforcement comes in the front. Most Lenders did not even request their money back. The “red flags” test was instituted to punish people who intentionally shut their eyes to evidence of fraud or insolvency in an attempt to recover more assets than is due them, intentionally harming similarly situated creditors. Even the Receiver cannot pretend that Lenders fit this description.

4. The Specific Flags Alleged By the Receiver Are Not “Red.”

a. The Rates of Return or Risk Were Not a Red Flag.

The Receiver claims that a 10-12% annual interest rate should have triggered notice that the Cook Currency Entities were ponzi schemes because a 10-12% interest rate is not commercially reasonable as a matter of law. This argument is absurd on its face. The interest received by Lenders is commercially reasonable as a matter of law. *See In re Unified Commercial Capital*, 01-MBK-6004L, 2002 WL 32500567 (W.D.N.Y. June 21, 2002) (interest of up to 12% annually found to be commercially reasonable); *Carrozzella & Richardson*, 270 B.R. at 97 (holding that an annual interest rate of 15% was commercially reasonable). Further, even a high rate of return does not put a defendant on notice of fraud if “a legitimate [program utilizing the same methodology] could have supported the promised rate of return....” *In re Indep. Clearing House Co.*, 77 B.R. 843, 862 (D. Utah 1987) (analyzing a 96% annual return). In fact, when “the debtors paid the promised returns, at least initially, a defendant may have had no reason to suspect that the debtors were insolvent.” *Id.*

The returns received by Lenders are reasonable as a matter of undisputed fact. Lender's expert, Steve Adams, who is expert on hedge fund investing, has opined that returns between 10% and 12% would not put any investor, reasonable or unreasonable, on inquiry notice of fraud. *Adams Report*, pp. 10-11. Adams' expert report states that currency trading indices demonstrate that the currency trading strategy that Cook described had returns between 13.26% and 17.37% for the preceding six years. *Adams Report*, pp. 10-11. Since actual returns of currency trading during the same time period exceeded the 12% returns the Cook Currency Entities promised, those returns cannot constitute a red flag suggesting insolvency or fraud as a matter of law.

b. The Account Documents and Statements Were Not a "Red Flag."

The Receiver and his expert witness has suggested that discrepancies in the account opening documents and account statements operated as a "red flag." This is exactly the type of irrelevant "problem" *Bayou IV* held was not relevant to the good faith inquiry because the account opening documents and account statements do not in any way point to either the fraudulent purpose of the transfers to the Lenders or the Cook Currency Entities' insolvency. Minor discrepancies between the various account opening documents are the natural outcome of having multiple service providers, and are perfectly normal in investment situations. Lenders, inexperienced in currency trading, could not have been expected to notice any technical misstatements in the account opening documents or statements.

Nonetheless, Cook testified that the documents were drafted using forms from respected hedge funds, and forms banks use to set up currency trading. *Cook Deposition*,

p. 68. Over 1,000 investors reviewed the account documents, including sophisticated, professional investors. *Id.*, p. 96. Cook testified that not a single investor deemed the documents to be a red flag, or express any concerns about inconsistencies in the account documents. *Id.*, p. 81. Ryan Moeller similarly testified that nobody ever failed to invest because of concerns regarding the account documents. *Moeller Deposition*, p. 42. The fact that over 1,000 investors, including some professional investors, reviewed the documents available to Lenders and did not object is strong evidence that the account statements and documents are not red flags. *In re Bayou Group, LLC*, 439 B.R. 284, 315 (S.D.N.Y. 2010).

c. The Manner in Which Lenders Received Their Funds Was Not a “Red Flag.”

The Receiver has attempted to put a malevolent spin on the manner in which some Lenders received repayment, specifically, the fact that many Lenders received their funds without having requested them.⁸ The Receiver has further suggested that the fact that Lenders were not required to fill out a written withdrawal form or pay fees was indicative of fraud or insolvency. As a matter of undisputed fact, a reasonable non-professional investor would know that hedge funds and other firms engaged in levered transactions depend on the ability to quickly liquidate their clients’ accounts and positions. Steve Adams has testified that his own personal investments are routinely liquidated and returned to him without notice and that this is normal in private investment vehicles.

⁸ Lenders Cheney, Frahm, Hopfenspirger, and McIntosh requested the return of their funds, and received them, so the manner in which they received funds cannot constitute a red flag. *S.Cheney Deposition*, p. 93; *T.Frahm Deposition*, p. 106; *Hopfenspirger Deposition*, pp. 124-125; *McIntosh Deposition*, p. 163.

Adams Report, p. 21. Cook testified that he received distributions of capital from a hedge fund investment regularly without his knowledge or consent, and that such a distribution was commonplace with hedge funds. *Cook Deposition*, pp. 54-55. However, most importantly to this case, the actual contracts between the Lenders and the Cook Currency Entities specifically provided that Crown Forex had the ability to liquidate Lenders' accounts and return their funds without notice to the Lenders. *See, e.g., Frahm Crown Forex Agreement*, p. 14. If the contract documents between the Lenders and the Cook Currency Entities allowed the Cook Currency Entities to repay the Structured Notes without notice, a common feature in any loan, this fact cannot possibly constitute a "red flag."

Moreover, closing statements are usually provided days or weeks after closure of an account, and closing fees are often waived. *Adams Deposition*, p. 295. This is because most businesses are eager to retain their customers. Many Lenders were aware of Cook's plans to move his currency trading business to Charles Schwab, a respected brokerage, and suspected that the waiver of closing fees was an attempt to secure further business. One representative Lender believed that fees were waived because of Cliff Berg's influence. *Sundstrom Deposition*, p. 116.

In addition, many Lenders did not know that funds were being returned to them until they received the cashier's checks. The duty to investigate terminates at the time of the transfer. What does the Receiver expect a reasonable investor to do upon receipt of a cashier's check for the precise amount in his account? No reasonable investor would conclude that the return of his funds was evidence of insolvency or fraud, as how could a

cashier's check be evidence of insolvency when the purchase of cashier's checks must be made with cash? No reasonable investor could be expected to investigate an entity they no longer had an investment in, and no reasonable investor would return the check upon receipt as the Receiver's expert admits. *Golberg Deposition*, p. 107. The manner in which Lenders received the return of their funds are not "red flags" as a matter of law.

d. No Information About Cliff Berg Constitutes a Red Flag.

The Receiver has identified Cliff Berg's relationships to Cook and the Lenders as a red flag. The Receiver's expert specifically did not identify this relationship as a red flag because the contention is absurd. Berg is Cook's father-in-law. Berg is not a particularly savvy investor. Most Lenders were aware of these facts.⁹ The Lenders who knew Berg did not place their trust in Berg's relationship to Cook, but in Berg's reputation, built over many years, of scrupulous honesty. Steve Adams has testified that a reasonable non-professional investor would not conduct an investigation into the background of Cliff Berg, under the circumstances. *Adams Deposition*, pp. 276-277.

As a matter of common sense, knowledge that Berg was Cook's son in law or that Berg was not an investment advisor could not possibly suggest to any reasonable investor that Cook was making transfers for fraudulent purposes, or that the Cook Currency Entities were insolvent. Lenders interpreted the fact that Berg had invested in his son-in-law's business, and the relationship between the two, as clear evidence that Cook would not engage in fraudulent activity such as embezzlement. *S.Cheney Deposition*, p. 111.

⁹ With the exception of George and Karen Morisset and Terry Frahm, who did not deal with Cliff Berg.

If the Receiver is arguing that as Cliff Berg agreed to “watch over” the funds of certain Lenders and return their money if the Cook Currency Entities ever experienced problems, and thus, that Lenders should have been on “notice” of problems when their money was returned, this argument is similarly unavailing. Not only did the Cook Currency Entities have the contractual power to liquidate Lenders’ accounts and return their money at any time, this is a common occurrence in the industry. In addition, information indicating “problems” does not constitute a red flag, unless the information specifically indicates fraud or insolvency relating to the transfer in question. *In re Bayou Group, LLC*, 439 B.R. 284, 310 (S.D.N.Y. 2010). Lenders cannot be held to be on notice of either fraud or insolvency from the simple fact that their funds were returned. Lenders could reasonably conclude, even if they knew that Berg was transferring money to them due to an ongoing and unrelated investigation into Bo Beckman, that Berg’s actions were motivated by: (i) a concern that Cook would be distracted by problems with Beckman; (ii) an interest in facilitating a move to Charles Schwab; or (iii) a complete misunderstanding about SEC procedure. *Adams Deposition*, pp. 356-357. The actions or representations of Berg did not put Lenders on notice of fraud or insolvency.

e. The Cashier’s Checks Themselves Were Not Red Flags.

The Receiver’s expert report did not identify the cashier’s checks themselves as red flags. Most Lenders, as unsophisticated investors, were not aware that custodians of IRA funds are required to process rollovers and liquidations by the IRS. Even seasoned investors (such as Lender’s expert who was general counsel and principal of a Five-Billion dollar private equity fund) are not aware of the IRS regulations in question.

Adams Deposition, p. 283. However, even if Lenders had been aware of this fact, most of the checks to Lenders could facially have been purchased by the Cook Currency Entities, Berg personally, or Entrust Midwest and Millennium Trust. *See, e.g. Cynthia Hillesheim Cashier's Check*. By the time Lenders ascertained the true source of the funds, they already were in receipt of their funds in good faith. As has already been shown, Lenders did not have a duty to show that they “retain the funds in good faith,” merely that they received them in good faith. The receipt of cashier’s checks, even for IRA accounts, would not suggest the existence of fraud or insolvency to a reasonable investor, especially investors like Lenders who had specific contractual provisions allowing payment by check. *Adams Deposition*, pp. 295-296. In fact, the cashier’s checks were evidence that the Cook Currency Entities were solvent and not operating fraudulently because cashier’s checks must be purchased with cash. Lenders had been assured that their funds were kept in segregated accounts, and were liquid upon request. The Lenders who requested their funds received said funds by cashier’s check in short order. A failure to receive the return of funds upon request could conceivably constitute a red flag. The prompt return of funds by cashier’s check simply does not.

f. The SEC Investigation Was Not a “Red Flag.”

The Receiver’s only “red flag” which has even facial relevance to fraud or insolvency was the existence of an SEC investigation.¹⁰ However, courts have found that

¹⁰ Lenders Buysse, the Hillesheims, Terry Frahm, the Morissets, the Heises, and Defiel had no knowledge of an investigation until after receiving their funds. As a matter of law, information about an investigation received after the receipt of their funds could not be a red flag.

even knowledge of an SEC investigation is insufficient to obviate good faith. *In re Hannover Corp.*, 310 F.3d 796, 801 (5th Cir. 2002). In this case, the factual record conclusively demonstrates that a reasonable non-professional investor could not have interpreted the information available to Lenders as a “red flag.” Howard Phillips, against whom the Receiver has not instituted clawback proceedings, testified that “an investigation...does not indicate guilt,” and that he did not believe that knowledge of such an investigation would vitiate good faith. *H.Phillips Deposition*, pp. 167-168. The employees of the Cook Currency Entities were assured that “nothing’s wrong, everything’s fine.” *Moeller Deposition*, p. 37. This so reassured at least one employee that he opted to not even request withdrawal of his own money from the Cook Currency Entities. *Grzybowski Deposition*, p. 187.

A reasonable non-professional investor who was informed about the existence of an SEC investigation into Beckman’s equity trading entity would have had no reason to be concerned by the information. The Lenders believed that their money was being held in segregated accounts at the Cook Currency Entities. The Lenders were also aware that Cook had several partners who ran different entities which were affiliated with Cook, but were unrelated to the business of the Cook Currency Entities. The Lenders were assured that the investigation into Bo Beckman’s Equity Trading Firm was distinct from the Cook Currency Entities. Berg told Lenders that their money was at no risk as a result of the investigation. Lenders never had any idea about the scope or seriousness of the investigation.

Most importantly, the Receiver's own expert acknowledged that knowledge of an investigation into Bo Beckman would not be "cause for concern" to Lenders who had not invested with Bo Beckman. *Golbeg Deposition*, p. 174. Other investors testified they would not be concerned by an investigation or lawsuit demanding the return of funds. *H. Phillips Deposition*, pp. 174-175. Some employees of the Cook Currency Entities, who were more expert at trading strategies, more knowledgeable about investments, and far more informed about the target and scope of the investigation than Lenders, were so confident that it posed no threat to their investment that they did not withdraw their own funds. *Grzybowski Deposition*, p. 187.

Knowledge of investigation into an unrelated entity run by a principal's partner cannot operate to put a transferee on notice that the transfer he received from an entity not under investigation was made with fraudulent purpose. Even if this absurdly broad standard of good faith were applied, Lenders were advised that Cook was unhappy with Bo Beckman, and wanted to escape the stigma associated with the investigation by transferring his unrelated currency trading business to Charles Schwab, a highly respected brokerage. *See, e.g., Sundstrom Deposition*, p. 112. To Lenders, this was a response indicating unimpeachable honesty. Any suspicion a reasonable investor may have had upon hearing the term "investigation" would have been immediately and conclusively allayed by Cook's very reasonable explanation and proposed course of action.

g. The NFA Action or UBS Litigation Were Not “Red Flags.”

As Steve Adams testified, “a non-professional investor is not even going to know that any such thing as a National Futures Association even exists.” *Adams Deposition*, p. 56. There is no evidence that any Lender was aware that the NFA had fined Trevor Cook, nor that UBS had filed a trademark infringement action against the Cook Currency Entities. Facts that Lenders were not aware of cannot operate as “red flags” to prompt inquiry notice, especially since a reasonable non-professional investor would not have been aware of said facts. Further, as the Receiver’s expert testified, the UBS lawsuit would not be evidence of insolvency, but simply a “red flag in terms of character.” *Golberg Deposition*, p. 119. This illustrates the problem with applying a faulty legal standard. Only red flags related to fraud or insolvency are relevant to a “good faith” inquiry, and Golberg’s categorization of the NFA and Trademark actions as red flags is simply legally incorrect.

h. Overview for Each Lender.

The “red flags” the Receiver asserts put Lender on “inquiry notice” are not red flags at all, and as a matter of law, should be held to be insufficient to put Lenders on inquiry notice.

i. Lender David Buysse.

Buysse did not know about an investigation at the time of the transfer. The only “red flag” that applies to Buysse, besides those common to all investors in the Cook Currency Entities, was the manner in which he received his money. Berg called Buysse, told him that the Cook Currency Trading program was being shut down, and that his

account was being liquidated, and that Buysse would receive a check. Buysse later received a cashier's check for the correct amount. This is a commonplace occurrence, not a red flag. The account documents state that the Cook Currency Entities had the power to liquidate accounts and return funds. A reasonable investor of Buysse's expertise would not suspect fraud or insolvency from the contractually valid return of his funds.

ii. Steven and Pamela Cheney.

Steven Cheney is a relatively experienced investor, but with no expertise in currency trading. Cheney affirmatively requested that his funds be returned. As set forth above, any red flags arising from rates or return, risk, account documents or statements were common to all investors, and do not even approach the legal definition of "red flags." Cook personally informed Cheney regarding a "problem" with a business in Cook's "group," specifically, an inquiry into Bo Beckman. Cheney was assured that the problem would not affect the Cook Currency Entities, which were "rock solid." Cheney was also informed that Cook was moving the currency trading business to Schwab. Cheney was so impressed with Cook's explanation regarding his honesty that he intended to reinvest with Cook when the Cook Currency Trading program reopened as part of Charles Schwab. *S.Cheney Deposition*, p. 158. In fact, Cheney even offered to provide a reference for Cook if he needed one when transferring to Schwab. *Id*, p. 158. Cheney called Cook approximately two weeks after receiving his money to ascertain whether Cook had completed his move to Schwab, and was ready to accept investment. *Id*, p. 158.

Cheney had a relationship with Berg, and Cheney lent money in part, because of his trust of Berg. However, Cheney specifically testified that he was not trusting Berg to engage in oversight of the operations of the business to give him preferential treatment, but that his trust was based on the assumption that Trevor Cook would not embezzle from his own father-in-law. *Id.*, p. 111. Cheney did not believe he had ever received preferential treatment. *Id.*, p. 110. Cheney had received far greater returns on his money in other investments, and did not find the rate to be unreasonably high.

Cheney was not aware of any red flags that would put him on notice of fraud or insolvency. He received full and satisfactory explanations for any issue which concerned him. He understood that he was lending money pursuant to a demand note, he received prompt answers to his questions, and he was firmly convinced of the suitability of Trevor Cook's currency trading strategy, to the extent that he was even willing to act as a reference for Cook's move to Charles Schwab. Cheney was not charged fees in connection with his investment, as he had negotiated with Trevor Cook. This was also not a red flag, as Cheney understood that the Cook Currency Entities made money by receiving a greater than 12% return on their currency trading strategy. Cheney was not on notice of fraud or insolvency, and he received the return of his funds in good faith.

iii. Walter Defiel.

Walter Defiel was never informed about the existence of an investigation. Defiel is an extremely inexperienced investor who received a cashier's check from John Dzik, while informing Defiel that Cook's currency trading business was moving to Charles Schwab.

Defiel was convinced that the Cook Currency Entities were legitimate opportunities in part by the fact that John Dzik and Steven Cheney, both of whom he respected as knowledgeable investors, had lent money to the Cook Currency Entities. *Defiel Deposition*, pp. 25-26. Defiel was never informed about an investigation into the Cook Currency Entities. Defiel was not on inquiry notice that the Cook Currency Entities were engaged in fraudulent activity, as he never received information indicating fraud or insolvency in association with the repayment of his loan.

iv. Terry Frahm.

Terry Frahm was an experienced investor in the equity markets, but had rarely ventured into currency trading. Frahm requested the return of his funds by letter in May, 2009. Frahm received the cashier's check repaying his investment in June, 2009. Frahm was not informed about an investigation until after receiving the checks. Thus, the investigation is not probative of Frahm's good faith. After the fact, Frahm was informed that the investigation was into Bo Beckman's equity trading entity, and was not related to the funds Frahm had received.

The Receiver has identified several quotes out of context which the Receiver believes constitute red flags specifically against Terry Frahm. Frahm testified at his deposition that he did not remember the name Crown Forex. Frahm's imperfect recollection of all the various Cook entities is not indicative of his state of mind when he received the return of his funds. Acceptance of account statements showing that Frahm's money was being held at Crown Forex would not constitute a red flag to somebody who had signed an authorization to transfer his funds to Crown Forex.

Frahm's initial request that his IRA account be "rolled over" to Bo Beckman's business is extremely persuasive evidence that Frahm had no knowledge of any fraud or insolvency. Why wouldn't Frahm have moved his funds from Beckman if he thought that he was involved in illegal activity? Frahm's eventual written request for funds indicated a preference for a rollover, but indicated that Frahm would be satisfied with the direct return of both Frahm's IRA and non-qualified funds. Thus, Frahm was not at all surprised when he received the cashier's checks, either from the form of the cashier's checks or the method of delivery.

Frahm retrieved his money not because he was "uncomfortable" or "got a bad feeling" from Cook, but because he was eager to reinvest in the equities market. Frahm only "got a bad feeling" and was "uncomfortable" because Cook refused to give a direct opinion on the tax consequences of the investment, instead, telling him to consult his accountant. Frahm's bad feeling, as he explained to the Receiver, was that the returns would be taxed as ordinary income, which would considerably lessen Frahm's net return. The Receiver's citation to interview notes prepared by the Receiver's counsel in preparation for litigation is misleading, and does not suggest the presence of any red flag.

Finally, the "red flag" the Receiver cites in an email string between Terry Frahm and an employee of Bo Beckman's equity trading entity does not represent a red flag, but simply a misunderstanding that was completely cleared up to the parties' satisfaction, even if it related to the funds at issue, rather than funds Frahm held at Beckman's entity. Terry Frahm was concerned about whether his funds could be proven to the IRS to have been rolled over to a qualified account, and whether this account had seen a loss. Eric

Erickson, a director of the Oxford Private Client Group was able to explain the rollover to Frahm's entire satisfaction. This email chain could not possibly in good faith even be identified as evidence of fraud or insolvency, even if it had been related to the transfer at issue in this litigation.

Frahm requested his money back, received as per his request, and had no notice of an investigation. The "red flags" available to Frahm were, according to the Receiver, discrepancies in the account statements and agreements, the lack of penalty fees, and the "unreasonably high return and low risk." If these are red flags indicating fraud or insolvency, then the Court may as well do away with the good faith test, which would be nothing but a sham. Terry Frahm is entitled to summary judgment.

v. Steven and Jenene Fredell

The Fredells were long-time friends of Cliff Berg, who convinced them to lend money to the Cook Currency Entities. The Fredells received the return of their funds from Berg, who, after delivering the money, explained that there was an investigation into Bo Beckman by the SEC. Berg told them that he was returning the money because the Fredells had requested that he return their money if there was ever any problem, big or small. Berg informed the Fredells that Cook was moving his currency trading fund to Charles Schwab, and that they would have an opportunity to reinvest. The Fredells were interested in reinvested with Cook at Schwab, but never heard more about the move, and invested the money elsewhere until they could move their funds to Schwab to avoid tax liability.

The Fredells, who are relatively inexperienced investors, had no information that would put them on notice of fraud or insolvency. The Fredells were not told of an investigation until after they received their money. In addition, the lack of account closure documents, and the confusion with Entrust and Millenium also occurred after the return of the funds. At the time the Fredells received their funds, all they knew, or “should have known,” was that Berg was returning their money, and that he had agreed to watch out for their money and return it if there was ever a “problem, big or small” with the Cook entities.

These are not red flags, as courts have specifically rejected a test which makes information regarding non-specific “problems” a red flag. *In re Bayou Group, LLC*, 439 B.R. 284, 310 (S.D.N.Y. 2010). The Fredells did not have any notice of any red flags indicating fraud or insolvency. Although the Fredells were informed after Berg had delivered the cashier’s checks of an SEC investigation into Bo Beckman, this also is not a red flag. An SEC investigation into an affiliated entity and a different manager cannot possibly constitute a red flag indicating fraud or insolvency connected with the Cook Currency Entities. The Fredells’ interest in reinvesting with Cook at Charles Schwab demonstrates that they were not aware of any red flags suggesting that Trevor Cook was engaged in fraudulent activity, or that the Cook Currency Entities were insolvent.

vi. Michael Heise

Cliff Berg informed the Heises by telephone that their funds were being returned. Berg dropped cashier’s checks off at the Heises’ business. The Heises were not aware of an investigation when they received the checks returning their funds. The only red flags

that the Heises could have been aware of would be that their money had been returned without their written request. However, the Heises had an agreement with Berg whereby he would return their funds if there were ever problems with the fund. The only “problems” sufficient to raise inquiry notice are information indicating fraud or insolvency. The Heises had no information suggesting either fraud or insolvency. Michael Heise specifically testified that problems of any kind were to result in withdrawal, an instruction Heise had given to all of his investment managers. *M.Heise Deposition*, 264.

Michael Heise was informed about the existence of an investigation after receiving the bulk of the Heises’ funds, but before receiving one final check from the Cook Currency Entities. Heise was assured that the investigation was into Beckman’s equity trading entity, and had nothing whatsoever to do with the Cook Currency Entities. Heise was satisfied with Berg’s explanation. Knowledge of an investigation into a related, but unconnected entity cannot constitute a red flag indicating that a transfer from an entity into which there is no investigation was made with a fraudulent purpose. The Heises had notice of no facts indicating fraud or insolvency related to the transfer of their funds.

vii. Michael and Cynthia Hillesheim

Clifford Berg called Cynthia Hillesheim and told her that the accounts were being closed, and the money returned. After receiving their checks, Cynthia Hillesheim called Berg and requested advice on where to reinvest the money, because the Cook Currency Entities had been successful, an indisputable sign that the Hillesheims were not aware of fraud or insolvency. *C.Hillesheim Deposition*, p. 63. Berg informed the Hillesheims at

that time that there was an investigation prompting Berg's liquidation of the Hillesheims' accounts. The Hillesheims did not have knowledge of an investigation before receiving transfers. Information they received after receiving their funds, including regarding the existence of an investigation, is irrelevant to their good faith.

The Hillesheims received cashier's checks in the mail. Although Michael Hillesheim understood that qualified funds must be returned through a third party custodian, the Hillesheims had no way of knowing whether the cashier's checks had been purchased by the Cook Currency Entities or a third-party custodian such as Entrust or Millennium. The Hillesheims have testified that they believed that Berg had liquidated their accounts because of an adjustment on the rate of return. All of the other red flags the Hillesheims had knowledge of were common to all investors in the Cook Currency Entities. The unsolicited return of funds is a common situation, and was specifically provided for in the agreements with the Cook Currency Trading Entities. It is not a "red flag" which would awaken suspicions in any investor.

The loan operated according to the Hillesheims' expectations. The Hillesheims were paid on time, and received the return of their funds as provided in the Hillesheims' agreement. The Hillesheims received their funds in good faith, because they were not aware of any red flags whatsoever involving the Cook Currency Entities.

viii. Larry Hopfenspirger

Larry Hopfenspirger had previously made two oral requests for repayment, and received checks from Ryan Moeller and Trevor Cook, respectively. At these times, no investigation had taken place. In June of 2009, Steven Cheney, who is Hopfenspirger's

friend, informed him of his conversation with Trevor Cook, that Bo Beckman was under investigation, and that Cook was moving his currency trading business to Charles Schwab. Hopfenspirger had to repay the balance on two term notes, so he requested that Cheney retrieve the remainder of his funds as well. Hopfenspirger assumed that the Cook Currency Entities would give Cheney a check to deliver to him, and was not surprised by the return of his funds. Hopfenspirger did not recall any contractual provisions which would have inhibited Cheney from communicating Hopfenspirger's request for repayment and receiving Hopfenspirger's check.

As a matter of law, Hopfenspirger received the first two transfers of \$200,000.00 in good faith. Hopfenspirger requested his money, and it was repaid to him. Further, Hopfenspirger has testified that he did not request the return of his remaining \$200,000.00 because of an investigation, but because he wanted to use the funds to repay a line of credit that was coming due. Hopfenspirger was informed that the investigation was into Beckman's equity trading business, and that the Cook Currency Entities were not affected. A reasonable investor would not be on notice of fraud. Hopfenspirger made a request as he had done before, albeit through the medium of Steven Cheney, and the funds were returned promptly by check, as they had been before. At no point did Hopfenspirger have notice of possible fraud or insolvency.

ix. Steven Kautzman

Steven Kautzman received a voicemail from Cliff Berg informing Kautzman that there were problems with one of Cook's partners, and that other Lenders were having their loans repaid, and that Cook was moving his currency trading business to Charles

Schwab to escape a “temporary glitch” and “red tape.” After receiving the return of his funds, Kautzman inquired further about investing with Cook when he had completed the return to Charles Schwab.

Kautzman did not know of any information which indicated that the Cook Currency Entities were insolvent, or were engaged in fraudulent activity. Kautzman did not even know of an investigation, but simply a “problem” with one of Cook’s partners. Under *Bayou IV*, only information suggesting fraud and insolvency put a transferee on inquiry notice. Every other “red flag” arose after Kautzman had received his money, or were red flags that were common to every investor or lender to the Cook Currency Entities. As a matter of law, Kautzman received his funds in good faith, and he is entitled to summary judgment.

x. James McIntosh

Cliff Berg contacted James McIntosh by telephone, and informed him of an investigation by the SEC into Bo Beckman’s equity trading firm. Berg recommended that he withdraw his money, so McIntosh requested the withdrawal. McIntosh then received a cashier’s check as requested. McIntosh also testified that he requested that Berg “watch out” for him, including by informing him of problems with the Cook Currency Entities. All other purported red flags were common to all Lenders.

The investigation into an entity at which McIntosh had no investment cannot possibly be a red flag implicating fraud or insolvency on the part of the Cook Currency Entities. Courts have made clear that only red flags implicating insolvency or fraud regarding the specific transfer are to be considered. McIntosh was not on notice of any

red flags indicating fraud or insolvency. If the return on McIntosh's investment, or the account documents or statements, or any other purported red flag McIntosh was aware of at the time he received his transfer truly are red flags, each and every person who received a transfer from the Cook Entities must be required to repay said transfer. McIntosh is entitled to summary judgment.

xi. George and Karen Morisset

George and Karen Morisset received their check from Walter Defiel. They had no knowledge of an investigation prior to receiving their funds. The Morissets were curious as to why their accounts had been liquidated, and called Ryan Moeller regarding the account liquidation, but were unable to get hold of him. The Receiver has cited this as evidence of a red flag, when it in fact conclusively demonstrates good faith. The Morissets did not request their funds as a result of "red flags." When they received their account liquidation in the manner provided by their agreement with the Cook Currency Entities, they attempted to investigate to ascertain the reason for the liquidation of the accounts, an action they would not take if they knew they had received an improper transfer.

Any other "red flags" would be common to all investors or lenders to the Cook Currency Entities. The Receiver is relying solely on the fact that the Morissets received their funds without requesting them as evidence that they were on notice of fraud or insolvency, in comparison with all other investors in the Cook Currency Entities. This is a common industry practice, and was provided for in the contract between the Morissets and the Cook Currency Entities. Performance of a contractual duty cannot operate to put

a transferee on notice of fraud or insolvency. The Morissets are entitled to summary judgment.

xii. Reynold Sundstrom

Reynold Sundstrom was informed by Cliff Berg that Cook was moving his currency trading business to Charles Schwab, and that there was an investigation of some kind which did not affect Cook's Currency Entities. Berg told Sundstrom that Cook was moving to get away from the situation that had led to the investigation. Berg also assured Sundstrom that the investigation would not affect Sundstrom's funds. Sundstrom, who is not a sophisticated investor, trusted Berg and his judgment, and was planning on investing with Cook at Charles Schwab. However, Berg informed Sundstrom that Cook would only be able to give 8% return while at Charles Schwab. Sundstrom believed any fees associated with the withdrawal had been waived.

An inexperienced investor in Sundstrom's position would not be aware of any red flags suggesting fraud or insolvency. The Cook Currency Entities had the power to liquidate Sundstrom's account and return his funds, and Sundstrom received a reasonable explanation for the liquidation. Furthermore, this liquidation did not involve any fraud or insolvency on the part of the Cook Currency Entities. Sundstrom did not find anything unusual about the return of his funds, as he believed that any associated fees or penalties had been waived because of the move to Charles Schwab. Sundstrom's determination to reinvest with Schwab indicates that he was not suspicious about the Cook Currency Entities, and that he received his funds in good faith. In short, Reynold Sundstrom

received his funds in good faith and with no knowledge indicating fraud or insolvency. Sundstrom is entitled to summary judgment.

xiii. Other Investors.

The Receiver has opted not to pursue amounts received by the Phillips, and the over 150 other investors who received all or some of their principal. The Phillips were aware of an SEC investigation, that it could “break up” the Cook Entities, that Cook had refused to repay them despite multiple requests, and that they had been forced to institute litigation against Cook. In addition, they were aware of the same “discrepancies” in the account statements and documents, statements of risk and return as Lenders, and they received transfers without written request. The factual record conclusively shows that the Phillips were aware of every “red flag” Lenders collectively knew (though no Lender was aware of every “red flag” described by Receiver and his expert). The Phillips knew additional information that would cause far more concern to a reasonable investor than the knowledge possessed by Lenders. Nevertheless, either because the Phillips were not Cliff Berg’s friends, or because they have offered to self-interestedly assist the Receiver in his attempts to divest Lenders of their retirement funds, the Receiver has never requested the return of these funds. *H.Phillips Deposition*, p. 164. The fact that the Receiver’s main investor witnesses have been allowed to keep transfers, despite knowing many more “red flags” than Lenders, illustrates the problems with a test that gives a Receiver such broad discretion.

i. The Law Of the Case Establishes That Lenders Were Not on Inquiry Notice of Fraud or Insolvency.

Finally, if the Court is still torn on whether the information available to Lenders put them on inquiry notice as a matter of law, the Court may turn to the law of the case analyzing the “red flags” at issue based on Judge Michael Davis’ denial of the Receiver’s Motion seeking disgorgement of Cook’s attorney fees from his attorneys. As Judge Michael Davis held on January 27, 2010, detailed knowledge of the SEC’s investigation, the CFTC’s subpoena, and the lawsuit filed by investors against the Cook Currency Entities was insufficient to put Trevor Cook’s criminal lawyers on notice of the fact that fees were being paid from funds obtained by fraud. This is a far greater universe of negative information than was available to any of the Lenders when they received transfers. The retainer agreements at issue were agreed upon on June 23, June 24, July 3, July 7, 2009, and August 19, and the fees the Receiver sought to retrieve were paid before the Court’s asset freeze order on November 23, 2009. During this time, the Court recognized that Trevor Cook’s lawyers had notice of the SEC and CFTC investigations, and the lawsuit against Trevor Cook. However, the Court held that 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 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.

Cook's criminal attorneys knew every "red flag" Lenders knew, and were additionally aware of the CFTC investigation, and the lawsuit by the Phillips. Thus, if Cook's attorneys were not held to have been made aware of sufficient facts to place them on inquiry notice that they were receiving a fraudulent transfer, it is impossible to hold that Lenders were aware of sufficient red flags to place them on inquiry notice.

Judge Davis has found that a reasonable white collar defense criminal attorney such as William Mauzy should not have known at the moment Trevor Cook transferred monies to Mauzy to defend Cook regarding allegations related to a ponzi scheme. It would be entirely unreasonable to find that Lenders, who are far less sophisticated, and were aware of far less information than Mauzy, should have been notice of fraud or insolvency.

E. No Investigation Could Possibly Have Uncovered Evidence of Fraud.

1. If a Diligent Inquiry Would Not Have Uncovered Fraud, the Receiver May Not Recover.

Even if the Court were to determine that Lenders have not established the absence of "red flags" as a matter of law, Lenders are still entitled to summary judgment, because the Receiver will be unable to show that a diligent investigation would have unearthed Trevor Cook's fraud. It took the SEC, the entity most capable at investigating and uncovering fraudulent schemes, at least two multi-day site visits over the course of two years, and an approximately five-month, exhaustive investigation to uncover Trevor Cook's ponzi scheme. Lenders did not have the resources or the ability to uncover any evidence of fraud or insolvency. Because Lenders have met their burden in

demonstrating that no diligent investigation could have uncovered the fraud, Lenders are entitled to summary judgment.

Lenders did not have a “general duty to inquire,” and were under no duty to investigate unless faced with information strongly suggesting insolvency or fraudulent purpose underlying the transfers to them. “Some facts strongly suggest the presence of others; a recipient that closes its eyes to the remaining facts may not deny knowledge. But this is not the same as a duty to investigate, to be a monitor for creditors' benefit when nothing known so far suggests that there is a fraudulent conveyance in the chain... A transferee that lacks the information necessary to support an inference of knowledge need not start investigating on his own.” *In re Bressman*, 327 F.3d 229, 237 (3d Cir. 2003), *citing* *Bosco v. Serhant*, 836 F.2d 271[, 276-78] (7th Cir.1987).

The Receiver has no evidence that Lenders could have uncovered evidence of fraudulence or insolvency, even through a diligent investigation. The Receiver, in his letter to Lenders, demanding the return of their funds, relied upon a since overruled bankruptcy case, which stated that upon the occurrence of certain red flags, a transferee was in per se bad faith if he failed to actually make an investigation, whether or not said investigation could possibly have uncovered wrongdoing. *In re Bayou Group, LLC*, 396 B.R. 810, 844 (Bankr. S.D.N.Y. 2008) *aff'd in part, rev'd in part*, 439 B.R. 284 (S.D.N.Y. 2010). This case, *Bayou IV* properly overruled *Bayou III*.

The court in *Bayou IV*, in overruling *Bayou III*, expressed the grave concern that a test stating that good faith requires an investigation, no matter how futile, “when combined with its expanded inquiry notice standard—render the good faith defense

largely illusory whenever a transferor is actually engaged in fraud or is insolvent.” *In re Bayou Group, LLC*, 439 B.R. 284, 316 (S.D.N.Y. 2010). *Bayou IV* further noted that a requirement that a “reasonable investigation” be undertaken would naturally require the Court to engage in exactly the sort of “subjective” analysis that has been expressly rejected in analyzing good faith under fraudulent transfer law. *Id.* Although the purpose of requiring a diligent investigation is to assist the law in ferreting out fraudulent schemes, when “a diligent investigation would not have led to discovery of the transferor's fraudulent purpose or insolvency, however, it is not apparent how this societal value is served in invariably permitting a debtor to avoid the transfer.” *Id.* at 317. Thus, 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 this prong of the good faith affirmative defense.” *Id.*

2. No Non-SEC Investigation Could Have Uncovered Evidence of Fraud or Insolvency.

The Receiver has no evidence that a reasonable investigation could have uncovered fraudulent activity or insolvency. In fact, the evidence overwhelmingly demonstrates that a reasonable investigation into the information the Receiver describes as indicative of fraud or insolvency would have been futile. The SEC had previously appeared at the Cook Entities to make an inquiry into Bo Beckman’s equity trading entity in the summer of 2008, without the knowledge of Berg or Lenders, and found nothing. *R.Moeller Deposition*, p. 168. The employees of the Cook Currency Entities were unaware of fraud or insolvency until the ponzi scheme was publicized, and the SEC

investigation did not put them on notice of fraudulent activity. *Id.*, pp. 27-28. If the SEC, with all the resources at its disposal, was not able to discern the existence of fraud or insolvency in its first investigation, and required months, if not years, of careful investigation before concluding that Cook was conducting a ponzi scheme, Lenders are entitled to summary judgment.

a. An Analysis Of a Diligent Investigation Into the Purported “Red Flags.”

i. Investigation into Cliff Berg.

The Receiver’s claims that Berg’s lack of expertise as an investor, Berg’s relationship with Trevor Cook, and Berg’s promises to some Lenders to monitor the investments put Lenders on notice that the transfers were fraudulent are ridiculous upon their face. These are common circumstances in any investment entity. The Receiver’s expert was aware of the circumstances of this relationship and did not include it among his identified “red flags.” *Golberg Deposition*, pp. 90, 108-109. Even if Lenders had suspicions about Berg’s position with Cook, any investigation would have, at maximum, involved questioning Berg and Cook about the relationship. Any diligent investigation into the Cook Currency Entities that involved examining Cliff Berg would be futile, because as Cook has testified, Cliff Berg knew nothing about the existence of a ponzi scheme. *Cook Deposition*, p. 79.

Even if some Lenders were put on notice of some “problem” with the Cook Currency Entities simply by virtue of the return of their funds, an investigation into said return would have been satisfied by questioning Cliff Berg, or Trevor Cook, both of whom would have informed Lenders of the investigation into Bo Beckman’s equity

trading entity. Berg would have further assured the inquiring Lenders that said investigation was unrelated to the Cook Currency Entities, and that their money was being returned because Cook was transferring the currency trading business to Charles Schwab. No investigation into Berg could have unearthed evidence of fraud or insolvency, as is easily demonstrated by the fact that several Lenders *did* inquire further from Berg and Cook, and were entirely satisfied by the reasonable explanation they received.

ii. Investigation into the Stated Risk and Return.

The Receiver's claims that the interest rate and stated risk were indicative of a fraudulent venture are factually incorrect. If Lenders had done an in-depth investigation, they would have found, as a matter of law, that a fixed return of 12% to 15% is commercially reasonable, and is in no way evidence of fraud. *Carrozzella & Richardson*, 270 B.R. at 97. Lenders could potentially have learned that average returns using the strategy outlined by Trevor Cook for top currency traders was approaching 20% when levered. *Adams Report*, p. 11. Lenders could have further learned that leveraged currency trades are a common strategy. The most in depth due-diligence conducted by Lenders could not have uncovered any information suggesting insolvency or fraud based on the returns or the risk promised by Trevor Cook. In fact, a diligent investigation into historical returns would only have convinced Lenders of the Cook Currency Entities' bona fides.

The Receiver may not point to one single fact in the record which demonstrates that had Lenders investigated the rate of return and risk, they could have uncovered any

evidence whatsoever indicating fraud or insolvency. The Receiver's expert acknowledged that he could not point to any facts or data which Lenders could have discovered that would put them on notice that the return was unreasonably high. In addition, Cook's explanation for the low risk was reasonable to even professional and institutional investors. The most diligent of investors could not have discovered fraud or insolvency by the most exhaustive investigation into the rates of return offered by the Cook Currency Entities.

iii. Investigation into the Account Documents and Statements.

Even if Lenders had devoted themselves to finding each discrepancy in account documents and statements, and demanding that Trevor Cook explain each one, Cook would have been more than able to do so. Golberg testified that a reasonable investor, upon failure to receive account statements, or after noticing discrepancies in statements, would contact the Cook Currency Entities for an explanation, and after being satisfied by said explanation, the investor's duty of inquiry would be satisfied.¹¹ *Golberg Deposition*, p. 91. In Cook's testimony and Ryan Moeller's testimony, few investors had questions regarding discrepancies in their account opening documents, and every question was answered to the investors' satisfaction. *Cook Deposition*, p. 81; *Moeller Deposition*, p.

¹¹ Golberg also testified that Lenders should have hired an attorney before investing based on the account opening documents, but could not unequivocally testify that an investigation by an attorney would have uncovered fraud. *Golberg Deposition*, pp. 213-215. This is because it would be manifestly unreasonable to expect even a brilliant attorney, without access to Cook's books, and with only the information available to Lenders at his disposal, to have uncovered the massive ponzi scheme operated by Cook. In the hundreds of cases reviewed by the undersigned law firm in drafting this Memorandum, not a single case requires a reasonable investor to hire an attorney before making an investment to satisfy their good faith inquiry.

42. A diligent investigation could not have found evidence of fraud or insolvency, as diligent inquiry actually performed by other investors fully satisfied them as to the legitimacy of the Cook Currency Entities based on the account documents and statements.

The Receiver's expert suggested that the Lenders should have called the Cook Currency Entities to request further information on problems with monthly statements, but such an inquiry would certainly have been futile, as every investor who asked questions regarding account documents was satisfied with the explanations received. The evidence firmly establishes that Trevor Cook was a persuasive man, and was at a massive informational advantage over Lenders, who were inexperienced in currency trading. In Steve Adams' deposition, he noted several possible explanations for the minor apparent discrepancies found by the Receiver, which Cook could have used to reassure Lenders. *See, e.g. Adams Deposition*, p. 256-257. In short, the most diligent of investigations into the account opening documents and account statements could not possibly have revealed evidence of fraud or insolvency.

iv. Investigation Regarding the Return of Funds.

Even if the Court believes that there is a factual issue as to whether the manner in which Lenders received their funds was a red flag, there are no material facts to suggest that an investigation could have unearthed evidence of fraud or insolvency. Lenders had no more duty to inquire upon receiving their funds, as the good faith analysis concerns whether the transferee "took" the transfer in good faith, not retained. A reasonable investor, confronted with the return of his funds unexpectedly would perhaps wonder

about the circumstances surrounding the transfer, but cannot be expected to spend time and energy diligently investigating an investment he no longer has a financial interest in. The Receiver's expert testified that he would be suspicious, but would not seek to return the check representing the return of his funds. *Golberg Deposition*, p. 107.

Further, any investigation, no matter how diligent into the return of Lenders' funds would have been useless. If Lenders had reexamined their account documents, they would have found the contractual provision that allowed them to be cashed out. If Lenders had requested further information from Berg or Cook, they would have (and did) receive a reasonable explanation for why they had received their funds - that an investigation had commenced into Bo Beckman's equity trading entity and that Cook was planning to move his business to Schwab, at which point he would reopen for investment. A further inquiry into the investigation at issue would not have revealed any evidence of fraud or insolvency on the part of the Cook Currency Entities. This is the extent of the information Berg could possibly have imparted to Lenders, as Berg had no knowledge of fraud or insolvency. Cook would have misled Lenders had they inquired further to avoid the criminal consequences of his conduct. *Cook Deposition*, p. 115.

v. **Investigation of the SEC Inquiry.**

Each Lender who was informed of the SEC investigation was assured that the investigation was unrelated to their investment, and was into Bo Beckman's equity trading entity. Lenders were further informed that Trevor Cook was not implicated in the investigation, and that he was moving his business to Charles Schwab. Lenders had two options upon learning of the investigation, to request further information from Cook and

his employees, or directly from the SEC. The Receiver's own expert has acknowledged that knowledge of an investigation into Beckman's equity investment firm would not "directly indicate that there was any wrongdoing at the -- on the FX side of the business, but I would very much want to again review the investment and find out exactly what's going on." *Golberg Deposition*, p. 104-105. Golberg testified that a reasonable investigation would have included talking to Trevor Cook, talking to fellow investors, and contacting the SEC and CFTC, as well as doing another "due diligence" review of the account documents, and an attempt to verify with a third party that their funds were still with the Cook Currency Entities. *Golberg Deposition*, p. 201. Any investigation along these lines would have been completely and utterly futile, and there is not a single fact in the record to the contrary.

Even the exhaustive investigation proposed by the Receiver's expert, which included the additional steps of contacting other investors, reviewing account documents, and contacting third parties regarding the state of their funds, could not have uncovered the fraud. Golberg acknowledged that contacting other investors would be a dead-end, because other investors were extremely unlikely to have additional knowledge about the fraud. *Golberg Deposition*, p. 203. In this case, no Lender had any actual knowledge of fraud or insolvency, a fact which is undisputed. Golberg also acknowledged that there would be no additional need to contact a third party after Lenders received their cashier's checks representing the full amount of their principal and interest. *Id*, p. 204. Further, nothing in the account statements would give any guidance to Lenders on why the SEC was investigating Bo Beckman. *Id*, p. 203.

Cook has testified that Berg, Lenders' contact at the Cook Currency Entities, did not know about the existence of any ongoing fraudulent activity, or insolvency. *Cook Deposition*, pp. 79-80. Ryan Moeller, the only employee of the Cook Currency Entities besides Berg and Cook with which any Lender had ongoing contact, has testified that he had no knowledge that the Cook Currency Entities were a ponzi scheme until after reading it in the newspaper. *Moeller Deposition*, p. 28-29. In fact, at least one of the employees of the Cook Currency Entities, who had far more knowledge about the ongoing SEC investigation and other activities of the Cook Currency Entities, was so convinced by Trevor Cook's explanations that he did not withdraw his own money. *Grzybowski Deposition*, p. 187.

Only Cook and his partners knew, and it is impossible to believe that Cook would have been more forthcoming with Lenders than his own father-in-law. The Receiver does not have any evidence to suggest that requesting further information from Cook regarding the information would have uncovered evidence of fraud or insolvency. In fact, the reverse is true. The Receiver's own expert testified that "anyone in Trevor Cook's entity who was involved in the Ponzi scheme would have lied to any investor asking about it." *Golberg Deposition*, pp. 198-199. As a matter of common sense, Lenders could not be expected to possess the skill to unearth illegality with a few simple questions.

Golberg acknowledged that the only way Lenders could "definitively find out from another party that there was fraud going on" was to "contact the SEC and Commodity Futures Trading Commission." *Id.*, p. 204. Few Lenders were aware that the

SEC was responsible for the investigation. Nobody knew that the CFTC was involved. It is a matter of record what information Lenders would have received from the SEC. The SEC has regulations forbidding it from disclosing any information regarding a non-public investigation. 17 C.F.R. § 203.2. Thus, the SEC would have been barred from revealing the purpose for the investigation, any evidence found during the investigation, and even the suspicions that motivated the investigation. Lenders would have received, at most, the form letter that was being sent to inquirers as late as October of 2009, which stated 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 Letter, p. 1. A Lender receiving this letter would be confident in Cook’s explanation that the SEC was performing an investigation into Beckman’s equity trading entity.

F. Additional Information Demonstrating Good Faith.

Lenders are well aware that good faith is generally objective – what a transferee knew or should have known regarding the transferor’s fraud or insolvency. However, “[a]n investor's lack of actual knowledge of the transferor's fraudulent purpose is relevant to determining whether he received the conveyances in objective good faith,” though it is not dispositive. *Terry v. June*, 432 F. Supp. 2d 635, 641 (W.D. Va. 2006). In some districts, federal courts have suggested that subjective good faith be taken into account. “The recipient's good faith is irrelevant when the avoidance is based upon preferential

treatment or constructive fraud. If, though, the debtor intended to actually defraud his creditors in making that transfer, then it is the recipient's own honesty and integrity—i.e., his good or bad faith—that will determine how he will fare with the estate.” *In re Teleservices Group, Inc.*, 444 B.R. 767, 808 (Bankr. W.D. Mich. 2011). Whether Lenders’ lack of knowledge is dispositive, or merely relevant, it is clear that Lenders did not know that the Cook Currency Entities were a ponzi scheme, or were insolvent. The Receiver’s expert was not aware of any evidence that Lenders had actual knowledge of fraud or insolvency, with the good reason that no such evidence exists. *Golberg Deposition*, pp. 82-83.

Many Lenders intended to invest in Cook’s business at Charles Schwab. Any investor who had managed to retrieve funds from a ponzi scheme before its imminent collapse would hardly be anxious to reinvest with the principal of the ponzi scheme in a new venture. Steven Cheney, one of the most sophisticated Lenders, actually offered to act as a reference for Cook in his move to Charles Schwab. No investor who had just escaped a ponzi scheme would ever consider immediately reinvesting with the ponzi scheme’s principal. Nor would an investor who had knowingly received a fraudulent transfer from an insolvent entity be eager to reinvest with an entity promising to operate using the exact same strategy, but with a lower rate of return. Clearly, Lenders had no idea that Trevor Cook was operating a fraudulent enterprise.

Lenders invested with the Cook Currency Entities in subjective good faith. Lenders trusted Cook and Berg, and had good reason for doing so. Lenders invested in what they fully believed was a legitimate entity, because of their confidence in their

fellow investors, their belief in Berg's honesty, their acceptance of Cook's persuasive sales-pitch, their review of favorable news articles, and the compelling evidence furnished at the Van Dusen Mansion of a thriving, successful investment company, rather than a "fly-by-night" operation.

Lenders admit that these factors are not dispositive, but should be part of the Court's analysis, especially in light of the number of purely equitable arguments relied upon by the Receiver. Lenders are innocent, non-professional investors, who invested with confidence, received the return of their funds with no suspicion of wrong-doing, and were as flabbergasted as everybody else to learn that their trusted investment advisor turned out to be a fraudster. Lenders did not know they were receiving potentially fraudulent transfers, and should not be punished by a finding that they were somehow implicated by notice of Trevor Cook's scheme.

G. Lenders Are Entitled to Retain the Interest Earned From Their Loans.

Lenders received a contractual interest rate pursuant to their loan to the Cook Currency Entities. This contractual rate was reasonable. Lenders were not promised "profits," or "investment returns," but a contractual rate of interest. Under the contractual agreements between Lenders and the Cook Entities, the Cook Entities assumed all of the risks and the rewards of the trading strategy in which Trevor Cook expressed such confidence. Lenders simply made loans to the Cook Currency Entities at a commercially reasonable interest rate, for the Cook Currency Entities to invest as it saw fit. Thus,

Lenders may not be forced to disgorge as a fraudulent transfer the interest they received, as they provided value for such interest.

In a case almost identical to the case at bar, a court found that the ponzi schemer was not representing that it would return profits but that “it was selling ‘debentures’ and ‘certificates of deposit’ to investors with ‘guaranteed’ returns of twelve percent or more annually. Thus, the payments to [transferees] were not simply payments of nonexistent profits, but of a contractually provided-for, commercially reasonable rate of interest on what amounted to a loan by [ponzi schemer] to [transferee]. *In re Unified Commercial Capital*, 01-MBK-6004L, 2002 WL 32500567 (W.D.N.Y. June 21, 2002). *See also Carrozzella & Richardson*, 270 B.R. at 97 (since there was no contention or proof that Ponzi schemer transferred more than the contractually agreed 15% interest to defendant, debtor received, in exchange for transfers of principal and interest, “a dollar-for-dollar satisfaction of the Debt” owed to defendant, which “provided ‘reasonably’-indeed, perfectly-equivalent value in exchange for the Payments, and in particular, for the Challenged Transfers”).

Lenders, who received an identical or lesser interest rate than the lenders in *Carrozzella* or *Uniform Commercial Capital*, also provided value for the loans to the Cook Currency Entities. Any attempt by the Receiver to force Lenders to disgorge this contractual interest is simply an attempt to act as a bankruptcy trustee. The Receiver has not been granted this power under the Fraudulent Transfer Act, or by Congress under the Bankruptcy Code, and has no power to redistribute funds as he believes “equitable.” The Receiver has opted not to proceed in bankruptcy, where preferential transfers could be

avoided, but under Minnesota Fraudulent Transfer law. Because Lenders received the return of their funds in good faith, including the contractual interest, the Receiver is not entitled to the disgorgement of such funds. The Receiver's fraudulent transfer claim against Lenders must be dismissed, insofar as it relates to the interest paid to Lenders.

CONCLUSION

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

Dated: December 21, 2011

MOHRMAN & KAARDAL, P.A

s/Gregory M. Erickson

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*