UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. Zayed, In His Capacity
As Court-Appointed Receiver
For Oxford Global Partners, LLC,
Universal Brokerage FX, and Other
Receiver Entities,

Plaintiff Case No: 013-cv-1896 SRN/ SER

v.

David and Dao Allen, Judith Averett, Patricia and Jasper Calandra, Rose Furner, Mark Hanby, Adel ("A.K.") Hilal, Geraldine Jackman, Norma Johnson, Willis Wayne King, Don and Pamela Labbee, Andrew Lyon, Jeffrey Lyon, Jeffrey Maki, Steven Perkins, Richard Plantan, Douglas Reed, David Sherman, John Sterback, Mark Stoltenberg, Jane Wamsley as trustee for the Glen Van Lehn Living Trust, Michael ("Bruce") Wu, Robert and Dianne Birk, Margaret Anderson, Mary Francoeur, George and Shirley Janssen, Joseph Koehnen, and Katherine Sobieck,

Defendants.

REPLY IN SUPPORT OF RECEIVER'S
MOTION FOR SUMMARY JUDGMENT

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I. Janssens

On May 9, 2014, Defendants Janssen filed a Notice of Non-Opposition to the Receiver's Motion for Summary Judgment. (Docket 153.) The Receiver therefore requests the Court grant his motion and enter judgment against the Janssens in the amount of $10,250.00.

II. Birks

In their Response Defendants Robert and Dianne Birk raise no genuine issues of material fact that would defeat summary judgment. In fact the Birks agree that they received fraudulent transfers and were unjustly enriched. The Birks merely attempt to cloud the matter with previously adjudicated issues. The arguments raised by the Birks are contrary to the law and the facts of the case and attempt to undermine prior decisions of the Court. Summary judgment in favor of the Receiver is therefore appropriate.

The Birks claim they provided value to the Receivership that offsets all but $23,302.85[1] of the $300,459.65 they received from the Ponzi Felons in four ways: 1) cash transfers to Receivership Entities;[2] 2) "personal property of the Birks sold by the Receiver;" 3) "money the Birks spent to improve the 'little house';" and 4) "reimbursements of expenses to the Birks." (Docket 148.)

As noted in the Receiver's Motion for Summary Judgment, Chief Judge Michael J. Davis has previously addressed #2 and #3. (Docket 141 at 20.) Public hearings were

[1] This amount is undisputed by the parties and judgment of at least that amount is appropriate.
[2] The Receiver does not dispute the Birks made a purported investment in the Ponzi Scheme in the amount of $187,779.36.

held concerning any disposition of property seized by the Receiver, and the Receiver acted in accordance to federal statutes and with Court approval. 28 U.S.C. 2004; 28 U.S.C. 2001; Beckman Docket 124 (Jun. 23, 2011); Beckman Docket 209 (Sep. 16, 2011); Beckman Docket 210 (Sep. 16, 2011). Jurisprudence dating back to the Roman Empire has consistently held that decisions by a court of competent jurisdiction concerning property rights cannot be subsequently disputed. *See Southern P. R. Co. v. United States*, 168 U.S. 1, 49 (1896); *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 336-337 (U.S. 2005) . As the Receiver has noted repeatedly, attempts by the Birks to raise these issues again are untimely and moot. *See, e.g.*, Beckman Docket 204 (Sep. 14, 2011).

More importantly the Birks have never shown any ownership interest in this property, and even if they did those efforts provided no value to the Receivership.[3] *See* Beckman Docket 214 (Sep. 21, 2011) ("Given the fact that Beckman purchased the property for $167,000, and the current sale price is $112,500, no value was actually added to the property. … [T]he Birks have not demonstrated a cognizable interest in the Golf Drive property."). The purported facts alleged by the Birks have been previously considered and dismissed by Chief Judge Davis, and the Court's prior decisions conclusively establish that the Birks had no ownership interest in the real or personal property. *Id.*; Beckman Docket 105 ¶ 26 (Jun. 3, 2011) (regarding ownership interests in

[3] In fact, the Birks' changes may have decreased the value of the Golf Drive property by removing handicap-accessible features of the property. (*See* Docket 142-7 at 12 (trial testimony of Dianne Birk explaining the Golf Drive remodeling included the removal of handicap-accessible features).)

personal property to be liquidated); Beckman Docket 175 ¶ 13 (Sep. 2, 2011); Beckman Docket 163 ¶ 6 (Aug. 24, 2011) (regarding ownership interests in the Golf Drive property); *Southern P. R. Co.*, 168 U.S. at 48-9 (holding that a fact put in issue and directly determined by the Court must be taken as conclusively established). Had the Birks been able to demonstrate a cognizable interest in any of the claimed personal (or real) property the time to do so was when the Court held public hearings on the Receiver's publicly filed motions and subsequently ordered the liquidation of that property, not three years later in a separate proceeding. Allowing the Birks to repeatedly raise unsupported claims to this property undermines the Court's prior decisions and ultimately its authority. Arguments 2 and 3 therefore do not meet the "reasonably equivalent value" prong of the Birks' affirmative defense.

Even if the Court were inclined to entertain the Birks' assertion concerning personal property despite the preclusive effect of the Chief Judge Davis's prior Orders, the Birks have again failed to provide any proof of ownership in any of the property. They also provide no detail on its value beyond a vague statement purporting a value of 'approximately $15,000.' (Docket 147 ¶ 5.)

Similarly, for their fourth argument the Birks have not provided receipts or any other form of documentation to support the "accounting" in their Affidavit and no evidence supporting their assertions was found in the files seized by the Receiver. (Docket147 ¶ 3.) The law is clear that it is the Birks' burden to produce evidence more persuasive than typically required to survive summary judgment. *California Arch. Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) ("if the

non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate"). The Birks cannot rely on unsupported allegations but rather must raise more than "some metaphysical doubt" as to a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The Birk Affidavit includes no supporting materials and clearly does not meet this standard. The Birk Affidavit merely cites a handful of transactions from the Receiver's accounting of fraudulent transfers to the Birks from the Ponzi Felons. (Docket 147; Docket 142-10.)

Even if the Birks had added value to either of the Texas properties, equity requires that value be offset by the thousands of dollars in rent the Beckmans failed to collect from the Birks. *See* Beckman Docket 204 § IV. A 2011 study on the McAllen/Mission area estimated the average rent for a single family home at $0.66 per square foot.[4] The Golf Drive property, acquired by the Beckmans in September 2008 and seized by the Receiver in March 2011, has approximately 1552 square feet. Beckman Docket 163-2 at 2-3 (Aug. 24, 2011). Thirty months of rent-free living at the Golf Drive property would be valued at roughly $30,729.60. Similarly, in addition to compensation for work that they never performed, the Birks were further unjustly enriched beyond that compensation by at least $19,917.20 in medical and dental benefits they received at the expense of

[4] http://recenter.tamu.edu/mreports/2011/McAllenEdMiss.pdf (last accessed May 21, 2014).

defrauded investors. (Docket 142-7 at 5-6, 10-11, 22 (testimony of Dianne Birk regarding "services" contemplated but not performed); Docket 142 ¶15.) Even if the Birks had met their evidentiary burden on some of the $40,071.44 they claim was for "reimbursement of expenses," which they have not, they were still unjustly enriched in an amount far greater.

The Receiver does not contend that the Birks were active participants in the fraud. He need not to prevail on his claims under the law. And neither law nor equity allows the Birks to profit from this fraud based on age or financial circumstance. In that regard, the Birks are no different than the majority of the over 700 victims of the scheme. Indeed, the average age of the victims is 67 and over 90% of the victims are over the age of fifty.[5] The Birks are no different than the victims or the almost 200 other winning investors who returned the Ponzi proceeds to the Receiver despite their age and financial hardships.

Finally, what the Birks ultimately fail to address is their own admission that they received $101,997.94 as "gifts." (Docket 142-9.) By definition there can be no value provided for a gift received. Therefore the Birks cannot meet the "reasonably equivalent value" prong of their affirmative defense for at least $101,997.94 regardless of any other arguments. Because their receipt of these gifts is undisputed, summary judgment in favor of the Receiver is appropriate in at least that amount.

Because the Birks have not met their evidentiary burden and have therefore failed to demonstrate any genuine dispute as to any material fact relevant to their receipt of

[5] http://www.cookkileyreceiver.com/demogage.cfm (last accessed May 23, 2014).

funds in excess of any consideration given to the Receiver Estates, the Receiver is entitled to summary judgment.

III. Hilal

In his Response, Defendant Hilal claims to raise "genuine issues of fact," however he misstates the standard for summary judgment, which requires a genuine dispute as to a *material* fact. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). More to the point, the facts raised by Defendant Hilal are irrelevant to the Receiver's claims. (*See* Docket 141 § VI.G.) Finally, although he claims to have done so, Defendant Hilal provides no evidence of any reasonably equivalent value provided to any Receivership Entity beyond his initial $49,000 investment.

The case law in this matter is clear: the Ponzi Scheme Presumption conclusively establishes that all transfers to the defendants from the Receiver Estates were made with actual intent to hinder, delay or defraud, and the criminal convictions of the Ponzi Felons precludes litigation on the existence of the Ponzi scheme. (Docket 141 § III.A.) The defendant then bears the burden of proving ***both*** that he took in objective good faith ***and*** that he provided consideration of a reasonably equivalent value for the transfer. (*Id.* § III.B.) Defendant Hilal has not, and cannot meet this burden. Defendant Hilal transferred $49,000.00 to the Receiver Estates and received $56,201.14 in return. (Docket 142-4; Docket 142-2.) Whatever convicted fraudster Bo Beckman may have told Defendant Hilal is irrelevant and does not change the nature of the transactions at issue. Ponzi schemes are insolvent from inception and produce no profits. *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. Tex. 2006) (citing *Cunningham v. Brown*, 265 U.S. 1,

7-8 (1924)). Defendant Hilal profited with funds stolen from other victims of the Ponzi scheme and he must return those funds.

Because there is no genuine issue as to any material fact relating to Defendant Hilal's receipt of the excess $7,201.14, the Receiver is entitled to summary judgment in that amount.

IV. Stoltenberg

In his Response, Defendant Stoltenberg misstates the law about who now bears the burden in this matter. The Receiver has supported his Complaint with not only enough facts to survive a motion to dismiss but also enough to justify a summary judgment in his favor.

Defendant Stoltenberg's "Motion to Dismiss" is not a proper dispositive filing under the Federal Rules. However, should the Court construe the arguments made in Stoltenberg's filing as made in opposition to the Receiver's motion for summary judgment, the Receiver will address those arguments here.[6]

A. Defendant Stoltenberg's 'Motion to Dismiss' Should be Denied.

As a procedural matter, Defendant's Stoltenberg's Motion to Dismiss should be denied as untimely. Under Rule 12, a motion to dismiss for failure to state a claim must be brought before any responsive pleading is made. Fed. R. Civ. P. 12(b). Defendant Stoltenberg filed his Answer on October 1, 2013. (Docket 34.) Similarly, a limitations argument is an affirmative defense under Rule 8 that must be affirmatively stated in a

[6] If the Court allows Defendant Stoltenberg's filing to stand as an independent motion to dismiss, the Receiver requests the opportunity to fully brief the issue in accordance with the federal and Local Rules.

responsive pleading. Fed. R. Civ. P. 8(c); *see also Day v. McDonough*, 547 U.S. 198, 202 (2006). Again, Defendant Stoltenberg's Answer, which included a number of other affirmative defenses, failed to do so. (Docket 34.)

In analyzing the adequacy of a complaint under Rule 12(b)(6), the Court must construe the complaint liberally and afford the plaintiff all reasonable inferences to be drawn from those facts. *See Turner v. Holbrook*, 278 F.3d 754, 757 (8th Cir. 2002). For the purpose of a motion to dismiss, facts in the complaint are assumed to be true. *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 738 (8th Cir. 2002). The Court may consider the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits attached thereto in deciding the motions to dismiss. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007).

The Receiver's complaint includes sufficient facts to establish all of the elements of both his fraudulent transfer claim under the Minnesota Uniform Fraudulent Transfers Act and his Unjust Enrichment claim. Further, as evidenced by the Receiver's Motion for Summary Judgment, the record is clear that there is no genuine dispute as to any material fact relating to the Receiver's claims.

Defendant Stoltenberg argues the Receiver's complaint is time-barred. (*See* Docket 158 § I.) However, the Receiver's complaint contains two claims, not just fraudulent transfer. Defendant Stoltenberg does not address the Receiver's unjust

enrichment claim in his Motion to Dismiss, and this claim must therefore necessarily survive.

Defendant Stoltenberg challenges the Receiver's fraudulent transfer claim as untimely under Arizona law. However, the Receiver's fraudulent transfer claim is brought under Minnesota's Uniform Fraudulent Transfer Act, which not only sets the statute of limitation at six years but also tolls that period until the discovery of the fraud. Minn. Stat. § 541.05 subd. 1(6); *see also Bergquist v. Vista Dev. (In re Quality Pontiac Buick, GMC Truck)*, 222 B.R. 865 (Bankr. D. Minn. 1998). Under Minnesota law, claims brought under the laws of this state are subject to the limitation period set by Minnesota. Minn. Stat. § 541.31 subd. 1(b). Moreover, whether the cause of action originates in federal or state law, when there is federal question jurisdiction, as there is here, the limitations provisions of the forum state – Minnesota – apply. *See Kansas Pub. Emples. Retirement Sys. v. Reimer & Koger Assocs.*, 61 F.3d 608, 611 (8th Cir. Mo. 1995).

The SEC and CFTC filed suit and the Receiver was appointed in November 2009, until which time the Ponzi Felons were in control of the shell companies and actively perpetuating the fraud. The fraud could not be discovered until the Ponzi Felons were removed from control of the entities. Thus the Receiver's complaint was filed well within the six-year statute of limitations.

B. The Receiver's Motion for Summary Judgment Should be Granted.

As a procedural matter, Defendant's Stoltenberg's Response is untimely and not in accordance with the Local Rules. Under Local Rule 7.1, Defendant Stoltenberg's Response must be filed within twenty-one days after the filing of Receiver's summary judgment motion, which was filed on April 18, 2014. L.R. 7.1(c)(2). Defendant Stoltenberg's Response, which was due on May 9, 2014, was mailed to the Receiver on May 17, to the Court by FedEx on May 19, and filed on the Court's ECF system on May 20, 2014. (Docket 159; Docket 159-1; Docket 158.) While *pro se* litigants are given some leeway by the Court, they are not excused from complying with substantive and procedural law.[7] *American Dairy Queen Corp. v. Blume*, 2013 U.S. Dist. LEXIS 59394 (D. Minn. Jan. 11, 2013) (quoting *Brown v. Frey*, 806 F.2d 801, 804 (8th Cir. 1986)).

In his Response, Defendant Stoltenberg attacks the Receiver's "investigation." However, again Defendant Stoltenberg misstates the law. To prove his fraudulent transfer claim, the Receiver need only show the transfer was made with actual intent to hinder, delay or defraud. Minn. Stat. §513.44. It is then Defendant Stoltenberg's burden to prove he took that transfer both in good faith and for reasonably equivalent value. Minn. Stat. § 513.48. The case law in this matter is clear: the Ponzi Scheme Presumption conclusively establishes that all transfers from the Receiver Estates were made with actual intent to hinder, delay or defraud, and the criminal convictions of the Ponzi Felons

[7] Additionally, as the Court is no doubt aware, Defendant Stoltenberg was offered free representation through the Court's *Pro Se* Project but chose not to avail himself of that option. (Docket 130.)

precludes litigation on the existence of the Ponzi scheme. (Docket 141 § III.A.) The defendant then bears the burden of proving ***both*** that he took in objective good faith ***and*** that he provided consideration of a reasonably equivalent value for the transfer. (*Id.* § III.B.) Defendant Stoltenberg has not, and cannot meet this burden. Defendant Stoltenberg focuses on the term of art "winning investor" rather than the legal basis for the Receiver's claims. Defendant Stoltenberg's memorandum includes no evidence he provided any reasonably equivalent value to any Receiver Estate. Both the Receiver's and the SEC's investigation showed no consideration provided by Defendant Stoltenberg to any Receiver Estate. (Docket 141 § IV(B)(1)); SEC Docket 4-2 at 24 (Nov. 23, 2009). The crux of Defendant Stoltenberg's argument is that the Receiver failed to prove his affirmative defense for him.

Because there is no genuine issue as to any material fact relating to Defendant Stoltenberg's receipt of $3,500.00, the Receiver is entitled to summary judgment in that amount.

Because the Receiver's Complaint contains a sufficient factual basis and his claims are pled with the requisite specificity, and because there is no genuine issue as to any material fact relating to Defendant Stoltenberg's receipt of $3,500.00 from the Receiver Estates, Defendant Stoltenberg's Motion to Dismiss should be denied and the Receiver's Motion for Summary Judgment should be granted.

CONCLUSION

Because there is no genuine issue as to any material fact relating to the remaining Winning Investor Defendants, the Receiver's Motion for Summary Judgment should be granted.

Dated: May 23, 2014

Respectfully submitted,

s/ Joseph M. Kaczrowski

Tara C. Norgard (MN Bar No. 307,683)
Russell J. Rigby (MN Bar No. 323,652)
Brian W. Hayes (MN Bar No. 294,585)
Joseph M. Kaczrowski (MN Bar No. 387,843)
Carlson, Caspers, Vandenburgh,
Lindquist & Schuman, P.A.
225 S. 6th Street, Suite 4200
Minneapolis, MN 55402
Telephone: (612) 436-9600
Facsimile: (612) 436-9605
tnorgard@carlsoncaspers.com
jkaczrowski@carlsoncaspers.com

R.J. Zayed (MN Bar. No. 309,849)
Dorsey & Whitney, LLP
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
Tel: (612) 492-6711
Fax: (612) 573-6650
Email: zayed.rj@dorsey.com

Attorneys for Plaintiff R.J. Zayed, in his capacity as court-appointed Receiver for Oxford Global Partners, Universal Brokerage FX, and other Receivership Entities