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.

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

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INTRODUCTION

This is the Receiver's Amended Motion for Summary Judgment pursuant to the Court's March 10, 2015 Order (ECF No. 175).

This case stem from the second largest Ponzi Scheme in Minnesota history. The masterminds of this fraud, Trevor Cook, Jason Bo-Alan Beckman, Patrick Kiley, Gerald Durand and Christopher Pettengill ("Ponzi Felons"), stole over $160 million from more than 700 investors in a foreign currency program that was entirely fake. As with any Ponzi Scheme, early "investors" in the scheme were paid with money that was taken from later "investors."

Chief Judge Michael J. Davis appointed R.J. Zayed as the Receiver ("Receiver") to recover and return the stolen assets to defrauded investors. As part of his investigation, the Receiver identified nearly 200 investors who were paid more than they invested in this Ponzi Scheme ("Winning Investors"). The vast majority of Winning Investors returned the Ponzi profits when the Receiver reached out to them to explain that the money they received was stolen from others. *See, e.g.,* Sixteenth Public Receiver Report at 4, *SEC v. Cook, et al.*, 09-cv-3333 (D. Minn.), ECF No. 1122 (explaining that as of April 4, 2014, Winning Investors had repaid $1,011,175.75 in profits they received from this Ponzi Scheme).

Only a handful of Winning Investors refused to return their Ponzi profits, forcing the Receiver to file the present action. The Receiver's complaint, filed July 15, 2013, alleges two alternative causes of action: (1) fraudulent transfer under Minnesota's version of the Uniform Fraudulent Transfer Act ("MUFTA") Minn. Stat. §513.41 *et seq.*;

and (2) unjust enrichment. On April 18, 2014, the Receiver filed a Motion for Summary Judgment against the six defendants who remained in this action. The motion was fully briefed and argued before the Court on June 2, 2014. (ECF Nos. 139, 141, 142, 147, 148, 153, 155, 156, 158, 160, 161.)

On February 18, 2015, while the Receiver's Motion for Summary Judgment was still pending, the Minnesota Supreme Court issued its opinion in *Finn v. Alliance Bank*, ___, N.W.2d ___, 2015 WL 672406 (Minn. Feb. 18, 2015). Although federal and state courts around the county, including those in Minnesota, have long held that the existence of a Ponzi Scheme establishes the element of fraudulent intent under the Uniform Fraudulent Transfer Act, the *Finn* court took the opposite view. *See id.* at *7-8. Given that *Finn* was decided after the Receiver's motion had been fully briefed and argued, the Court's March 10, 2015 Order denied the motion, but allowed the parties leave to file amended dispositive motions. This motion is submitted in accordance with that Order. (ECF No. 175 at 19.)

Under the Minnesota Supreme Court's decision in *Finn*, MUFTA no longer applies to the defendants who remain in this case and the Receiver has no adequate remedy at law. Accordingly, in this amended motion the Receiver respectfully moves for summary judgment on his claim for unjust enrichment against the following Winning Investors who remain as defendants in this action: Mark Stoltenberg, Adel ("A.K.") Hilal, and Robert and Dianne Birk (collectively "Winning Investor Defendants"). The

claims against all other defendants have been resolved by settlement, dismissal or default judgment.[1]

There are no material fact disputes and the law is clear that each of these remaining Winning Investor Defendants was unjustly enriched with fraudulent proceeds from this Ponzi Scheme. By stark contrast, over 700 people from whom this money was stolen, lost everything. Those Ponzi proceeds must now be returned to the Receiver for equitable distribution to all victims. The Winning Investor Defendants' defenses to the Receiver's claims fail as a matter of law.

I. FACTS

A. Procedural History

Beginning by at least January 1, 2007, the Ponzi Felons perpetrated a massive fraud on hundreds of innocent victims premised on a fictional foreign currency investment program. *See* Information, *United States v. Cook*, 10-cr-75, ECF No. 1. In June 2009, a group of investors filed suit when the Ponzi Felons refused to return the investors' funds. *Phillips et al. v. Cook et al.*, 09-cv-1732 (D. Minn.). As a result of that lawsuit, the Court froze bank accounts that were known at the time to be associated with the fraud. *Id*. at ECF No. 37.

Government action soon followed. On the civil side, in November 2009, the United States Securities and Exchange Commission ("SEC") and the United States Commodities Futures Trading Commission ("CFTC") filed lawsuits against Cook, Kiley,

[1] Defendants George and Shirley Janssen, who did not oppose the Receiver's original summary judgment motion, settled with the Receiver and were dismissed from the action on November 18, 2014. (ECF No. 174.)

and various entities controlled by them. Complaint, *SEC v. Cook, et al.*, 09-cv-3333, ECF No. 1; Complaint, *CFTC v. Cook et al.*, 09-cv-3332, ECF No. 1. In March 2011, the SEC filed a lawsuit against Beckman and his entities for his role in the scheme. Complaint, *SEC v. Beckman et al.*, 11-cv-574, ECF No. 1.

The Court also entered Asset Freeze Orders in conjunction with the Receivership Orders. Ex Parte Statutory Restraining Order, *CFTC v. Cook et al.*, 09-cv-3332, ECF No. 21-1 ("Cook CFTC Asset Freeze Order"); Order on Motion and Order of Preliminary Injunction, Asset Freeze, and Other Ancillary Relief, *SEC v. Cook et al.*, 09-cv-3333, ECF No. 51 ("Cook SEC Asset Freeze Order"); Order Imposing Asset Freeze and Other Ancillary Relief, *SEC v. Beckman et al.*, 11-cv-0574, ECF No. 9 ("Beckman Asset Freeze Order"). These Orders freeze all assets of the Ponzi Scheme, including all "funds, accounts, and other assets to which Defendants' offering can be traced or which were acquired with the proceeds of the Defendants' offering." Beckman Asset Freeze Order at 5; Cook SEC Asset Freeze Order at 5; *see also* Cook CFTC Asset Freeze Order at 9 (ordering return to the Receiver of "all funds and other assets[] belonging to customers or commodity pool participants as described in the complaint.").

In addition, the Court appointed R.J. Zayed as Receiver in all three civil cases. The Receivership covers the estates of the individual defendants, as well as their fraudulent Ponzi entities, including UBS Diversified Growth, LLC d/b/a UBS Diversified, Market Shot, LLC, Oxford Global Advisors, LLC, Oxford Global Partners, LLC, Oxford Global FX, LLC, Oxford FX Growth, L.P., The Oxford Private Client Group, LLC, and various other entities controlled by them (collectively, the "Receiver

Estates"). Order Appointing Receiver, *SEC v. Cook et al.*, 09-cv-3333, ECF No. 13; *Ex Parte* Statutory Restraining Order, *CFTC v. Cook et al.*, 09-cv-3332, ECF No. 21; Second Amended Order Appointing Receiver, *SEC v. Cook et al.*, 09-cv-3333, ECF No. 68; Order Continuing Appointment of the Temporary Receiver, *CFTC v. Cook et al.*, 09-cv-3332, ECF No. 96; Order Appointing Receiver, *SEC v. Beckman et al.*, 11-cv-0574, ECF No. 10. The Receiver's mandate is to marshal, preserve, account for, and liquidate the assets of the Receivership and return them to the victims of this fraud. *See, e.g.*, Order Continuing Appointment of Temporary Receiver at 3, *CFTC v. Cook et al.*, 09-cv-3333, ECF No. 96.

Criminal actions followed and proceeded in parallel with the civil suits and the Receivership. The criminal cases resulted in guilty pleas or guilty verdicts for all five of the Ponzi Felons, each of whom are now serving lengthy prison terms.[2]

B. The Scheme

During its heyday, the Ponzi Felons pitched a fictional foreign currency trading program featuring steady and guaranteed profits gained by leveraging minute differentials in the foreign currency market. The program was a Ponzi Scheme from inception. The currency trading program never existed. Every dollar that was "invested" was stolen the minute it was handed over to the Ponzi Felons and their entities. Amended Judgment,

[2] Cook and Pettengill pleaded guilty in connection with the scheme. *See United States v. Cook*, 10-cr-75, ECF No. 7; *United States v. Cook*, 10-cr-75, ECF No. 17; *United States v. Pettengill*, 11-cr-192, ECF No. 6; *United States v. Pettengill*, 11-cr-192, ECF No. 35. Kiley, Beckman and Gerald Durand were convicted by a jury on several counts stemming from the scheme. *See* Jury Verdicts, *United States v. Beckman et al.*, 11-cr-228, ECF No. 303, 305 & 307.

United States v. Cook, 10-cr-00075, ECF No. 28; Amended Judgment, *United States v. Pettengill*, 11-cv-00192, ECF No. 35; Guilty Verdicts, *United States v. Beckman et al.*, 11-cr-00228, ECF Nos. 303, 305, 307.

The Ponzi Felons set up a number of shell companies and bank accounts to perpetuate the scheme under variations of familiar names, such as, UBS Diversified Growth, LLC d/b/a UBS Diversified, Oxford Global Advisors, LLC, Oxford Global Partners, LLC, Oxford Global FX, LLC, Oxford FX Growth, L.P. Declaration of Scott J. Hlavacek ¶¶ 5, *SEC v. Cook et al.*, 09-cv-3333, ECF No. 4 ("Hlavacek Decl."). Through these entities and accounts, the Ponzi Felons knowingly and intentionally created, devised, executed, and attempted to execute a scheme and artifice to defraud, and to obtain money and other things of value, by means of materially false and misleading statements and representations. Amended Judgment, *United States v. Cook*, 10-cr-00075, ECF No. 28; Amended Judgment, *United States v. Pettengill*, 11-cv-00192, ECF No. 35; Guilty Verdicts, *United States v. Beckman et al.*, 11-cr-00228, ECF Nos. 303, 305, 307. And they succeeded; despite taking in almost $200 million, their scheme left next to nothing for over 700 victims of the fraud. *See* Hlavacek Decl. Ex. A; Declaration of Luz M. Aguilar ¶ 11, *SEC v. Beckman et al.*, 11-cv-0574, ECF No. 4 ("Aguilar Decl."). Indeed, when the Receiver was appointed, a mere $1.8 million remained in the bank accounts of the Receiver Estates. Second Status Report of Receiver § D, *SEC v. Cook et al.*, 09-cv-3333, ECF No. 219.

While telling their victims various stories about how their money would be safely invested, the Ponzi Felons recklessly spent it, squandering tens of millions of dollars on

everything from high risk trading ventures to personal entertainment and luxuries. The Ponzi Scheme generated substantially all of the income for the Ponzi Felons and their myriad entities and pursuits. Hlavacek Decl., ¶¶ 7-8 & Exs. 1-19; Aguilar Decl., ¶¶ 23-25 & Ex. 4.

When the Ponzi Felons did engage in trading, they accumulated substantial losses. Hlavacek Decl. ¶ 50 (tracing $35.2 million lost through trades at PFG Best, Inc.); Aguilar Decl. ¶ 12 (detailing $68.3 million lost in trading activities). Not only were the Ponzi Felons decidedly unsuccessful traders, they spent tens of millions of investor funds on personal indulgences including high-end real estate, gambling, luxury cars, travel, country club memberships, other forms of personal entertainment and "support gifts" to friends and family members. *See* Hlavacek Decl. ¶ 39; Aguilar Decl. ¶ 26. The Ponzi Felons also funneled millions of stolen investor funds into their personal accounts. Hlavacek Decl. ¶ 17 & Ex. 3 at 31-32 (detailing $7.6 million transferred to Ponzi Felon Cook's personal accounts); Aguilar Decl. ¶¶ 23-25 (detailing $7.8 million transferred to Ponzi Felon Beckman's personal accounts, which was comingled with and far exceeded funds from other sources).

Despite substantial losses and lavish personal expenditures, to keep up with the appearance of success the Ponzi Felons also gave over $50 million of stolen funds to others, including the remaining Winning Investor Defendants. Hlavacek Decl. ¶ 38; Aguilar Decl. ¶ 12. In classic Ponzi style, when paying out "profits" and other favors to these individuals, the Ponzi Felons simply used the money they had stolen from others.

C. Transactions with the Defendants

During the course of the fraud, each of the remaining Winning Investor Defendants were unjustly enriched with Ponzi profits exceeding any value they provided to the Receiver Estates. The details as to each remaining Winning Investor are summarized below:

Defendant	Transfers From Defendant to Receiver Estates (Investments)	Transfers To Defendant from Receiver Estates (Returns)	Excess (Ponzi Profits)
Mark Stoltenberg	-	$3,500.00	$3,500.00
Adel ("A.K.") Hilal	$49,000.00	$56,201.14	$7,201.14
Robert and Dianne Birk	$187,779.36	$300,459.65	$112,680.29

Table 1.[3]

1. Stoltenberg

Defendant Mark Stoltenberg never made an investment in this Ponzi Scheme. Nevertheless, on or around April 2, 2008, Receivership Entity UBS Diversified Growth LLC transferred $3,500.00 to Defendant Stoltenberg. (Kaczrowski Decl. ¶ 2.) There is no dispute that Defendant Stoltenberg received $3,500.00 in Ponzi profits and that the money he received was stolen from other investors in the scheme.

In this motion, the Receiver asks the Court to enter summary judgment that Defendant Stoltenberg was unjustly enriched in the amount of $3,500.00.

[3] Declaration of Joseph M. Kaczrowski, ECF No. 142 ("Kaczrowski Decl."), ¶¶ 2-3, 5-7, 12-14. All citations to the Kaczrowski Decl. in this memo are to ECF No. 142 filed in support of the Receiver's original motion for summary judgment in this action. The Kaczrowski Decl. and supporting exhibits are submitted in support of the Receiver's Amended Motion for Summary Judgement as if re-filed herewith.

2. Hilal

On or about May 8, 2007, Defendant Adel ("A.K.") Hilal gave $49,000.00 to the Receivership entity UBS Diversified Growth LLC. (Kaczrowski Decl. ¶ 4.) On or about April 7, 2009, UBS Diversified Growth LLC transferred $56,201.14 to Defendant Hilal. (*Id.* at ¶ 3.) There is no dispute that Defendant Hilal received $7,201.14 in Ponzi profits and that the money he received was stolen from other investors in the scheme.[4]

In this motion, the Receiver asks the Court to enter summary judgment that Defendant Hilal was unjustly enriched in the amount of $7,201.14.

3. Birks

Defendants Robert and Dianne Birk are Hollie Beckman's parents. Ms. Beckman is married to Ponzi Felon Bo Beckman and is personally named as a Relief Defendant in *SEC v. Beckman et al.*, 11-cv-574 (D. Minn.).

The Birk Defendants received at least $300,459.65 from this Ponzi Scheme.[5] (Kaczrowski Decl. ¶ 12 and Ex. 10.) The Receiver does not dispute that the Birk

[4] Defendant Hilal claims he did not invest with the Ponzi Felons. (ECF No. 59.) However, Defendant Hilal signed an agreement with Crown Forex, received statements from Receiver Estates including "The Oxford," "UBFX Diversified," and "UBS Diversified," and his statements from Millennium Trust, the third party administrator through which he made his investments, show a $49,000 position in UBS Diversified FX Growth, yet another Receiver Estate. (Kaczrowski Decl. ¶ 4.)

[5] During the criminal trial, Ponzi Felon Beckman and the Government stipulated to the SEC's accounting of Birk transactions: total receipts of $286,305.04, $99,525.68 of which is in excess of any transfers to Receivership Entities. (*See* Kaczrowski Decl. Ex. 7 at 30-31.) In response to the Receiver's subpoena, which is included as Exhibit 9 to the Kaczrowski Decl., the Birks admit to having received at least $287,063.11 from Ponzi Felon Beckman. (*See id.* at ¶ 11 & Ex. 9.) Transfers to the Birks shown in the Receiver Estates' bank records are summarized in Exhibit 10 to the Kaczrowski Decl. and total $300,459.65. (*Id.* at ¶ 12 & Ex. 10.)

Defendants made a purported investment in this Ponzi Scheme in the amount of $187,779.36. (*See id*. at ¶ 14.) However, the Birks do not contend, and there are no documents to suggest, that they ever withdrew any funds from their investment account. Nevertheless, the Receiver's original motion detailed the money that the Birks received from this fraud and credited the amount of their investment, leaving a balance of $112,680.29 that the Receiver asked the Birks be ordered to return. (ECF No. 141 at 17-21; Kaczrowski Decl. ¶¶ 8-15 & Exs. 7-12; ECF No. 160 at 1-6.) The Receiver incorporates by reference that argument and supporting evidence in this amended motion for summary judgment of unjust enrichment.

In the alternative, this amended motion requests summary judgment in of unjust enrichment in the amount of $101,997.94 against the Birks, which is the amount of Receiver assets that the Beckmans gifted to the Birks after the Ponzi Scheme was shut down by the Court but before the Beckmans' personal Wells Fargo account, which funded the gifts, was frozen. *See* Aguilar Decl. at ¶¶ 23-25 & Ex. 4 (detailing the millions in Receivership assets that funded the Beckmans' personal Wells Fargo account); Kaczrowski Decl. Ex. 10 at 2 (detailing transfers to Robert and Dianne Birk from the Hollie J and Jason B Beckman Wells Fargo account #XXX-8793 from November 29, 2009 through February 9, 2011); *id*. at ¶ 11 & Ex. 9 at 69-126 (bank statements produced by Robert and Dianne Birk with their handwritten notations of "support gifts" from the Beckmans).

II. LEGAL ARGUMENT

A. Standards for Summary Judgment

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

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

If the non-moving party fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, summary judgment must be granted. *Reed v. ULS Corp.*, 178 F.3d 988, 990 (8th Cir. 1999). Summary judgment is mandated—even on typically fact-intensive issues—when the facts and the law support only one reasonable conclusion. *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707, 708 (8th Cir. 1994) (citing *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337 (1991)). Although ambiguities must be resolved in the light most favorable to the nonmoving party, summary judgment cannot be denied based on conjecture, surmise, "metaphysical doubt," or self-serving conclusory statements. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Smith v. Int'l Paper Co.*, 523 F.3d 845, 848 (8th Cir. 2008).

B. The Law of Unjust Enrichment

Unjust enrichment requires the plaintiff to prove that a defendant "knowingly received something of value, not being entitled to the benefit, and under circumstances that would make it unjust to permit its retention." *SEC v. Brown*, 643 F. Supp. 2d 1077, 1083 (D. Minn. 2009) (quoting *Southtown Plumbing, Inc. v. Har-Ned Lumber Co.*, 493 N.W.2d 137, 140 (Minn. App. 1992)). An action for unjust enrichment may be based on the failure of consideration, fraud, or mistake or in "situations where it would be morally wrong for one party to enrich himself at the expense of another." *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. App. 1984) (citations omitted), *review denied* (Minn. Nov. 8, 1984).

Unjust enrichment does not require proof that the defendant committed a wrong. *Hartford Fire Ins. Co. v. Clark*, 727 F. Supp. 2d 765, 777–78 (D. Minn. 2010); *Brown*, 643 F. Supp. 2d at 1083; *Kranz v. Koenig*, 484 F. Supp. 2d 997, 1001 (D. Minn. 2007); *United States v. Dieter*, Civ. No. 01-1435, 2003 U.S. Dist. LEXIS 6391, *48-49 (D. Minn. Apr. 11, 2003); *Honeywell/Alliant Techsystems Fed. Credit Union v. Buckhalton*, C2-99-1194, 2000 Minn. App. LEXIS 66, *8-9 (Minn. App. Jan. 25, 2000). On this point, *United States v. Dieter* is instructive. In *Dieter*, Cory O'Toole gave the proceeds from the sale of his home as a gift to his grandparents, John and Theresa Dieter. 2003 U.S. Dist. LEXIS 6391 at 22. Unbeknownst to the Dieters, the transaction that produced their grandson's gift was the result of his false representations to the purchasers of the home. *Id.* at 40-41. The Court granted summary judgment on the purchasers' claim of the unjust enrichment against the Dieters, finding that although it appeared they were

entirely innocent of any bad faith or wrongdoing, it would be unjust for them to retain the gifted proceeds from the sale of the home when the sale was the product of their grandson's misrepresentations. *Id.* at 48-49.

Similarly, in *Brown*, a Ponzi Scheme operator used fraudulently obtained investor funds to pay the mortgage on his personal residence. 643 F. Supp. 2d at 1079. The defendant mortgage company, which had received proceeds of the fraud pursuant to an arm's length, straight-forward mortgage loan, was not alleged to have done anything illegal, immoral, or wrong in any way. *Id.* at 1083. But the Court found this to be irrelevant to the adequacy of the receiver's claim; "an unjust enrichment claim does not require a defendant to commit a wrong, but only requires that the defendant benefit from another's wrong." *Id.*

Other courts in Minnesota and elsewhere are in accord. *See, e.g.*, *Honeywell/Alliant Techsystems*, 2000 Minn. App. LEXIS 66 at 8-9 ("[D]espite the absence of proof of fraud or illegal conduct on the part of appellants, because of equity, they are not entitled to the money."); *see also Missal v. Washington*, No. 97-982, 1998 U.S. Dist. LEXIS 6016 at *14 n.6 (D.D.C. Apr. 17, 1998) ("Unjust enrichment does not depend so much on the culpability of the person who received the property, but on the right of some other person to that property."). Indeed, summary judgment of unjust enrichment is particularly appropriate where the money at issue was derived from innocent investors' payments to a fraudulent Ponzi Scheme, not actual investment gains. *Klein v. Georges*, 2:12-cv-00076, 2014 U.S. Dist. LEXIS 165154, *10 (D. Utah Nov. 24, 2014); *see also Goldberg v. Chong*, No. 07-20931, 2007 U.S. Dist. LEXIS 49980 (S.D.

Fla. July 11, 2007) (granting summary judgment to receiver on claims of both fraudulent transfer and unjust enrichment where perpetrator of fraud paid employee an exorbitant salary when millions of dollars were owed to defrauded investors).

C. The Defendants Were Unjustly Enriched With Proceeds From This Ponzi Scheme

1. The Defendants Knowingly Received Something of Value

There is no question that the remaining Winning Investor Defendants knowingly received something of value: each received thousands of dollars – if not hundreds of thousands of dollars – from this Ponzi Scheme. By stark contrast, over 700 of their fellow investors are left with 6.9 cents for every dollar the Ponzi Felons stole. Declaration of Tara Norgard ¶ 3, Dec. 12, 2014, *SEC v. Cook et al.*, 09-cv-3333, ECF No. 1172.

Defendant Stoltenberg literally received something for investing nothing in this Ponzi Scheme. He made $3,500 in Ponzi profits without ever even having made an investment with the Receiver entity.

Defendant Hilal made a purported investment with Receivership Entity UBS Diversified Growth LLC, along with hundreds of others. However, unlike the others, Defendant Hilal gained substantial value with $7,201.14 in Ponzi profits.

The Birks received over $300,000.00 and other benefits from this Ponzi Scheme. Among other things, the Birks received $101,997.94 in "gifts", rent-free living in a vacation home in Texas, a $9,332.00 monthly salary for golfing with prospective Ponzi Scheme investors, as well as full medical and dental benefits. (Kaczrowski Decl. ¶11,

Ex. 9; *id*. ¶13, Ex. 11) Even considering the money they invested, the Birks still gained well over $100,000.00 from this Ponzi Scheme.

2. The Defendants Were Not Entitled to the Money that was Transferred to Them and It Would Be Unjust for Them to Keep It

Defendant Stoltenberg has no basis upon which to claim entitlement to the $3,500.00 in Ponzi profits he received. He never even made an investment with a Receiver entity.

Defendant Hilal did make an investment with the Receiver estates. However, Defendant Hilal's money was stolen by the Ponzi Felons the moment he gave it to them. The currency program never existed. The documents Defendant Hilal signed were not valid investment contracts; they were tools of a fraud. Mem. Op. and Order at 91, *Zayed v. Buysse*, 11-cv-0142 (D. Minn.), ECF No. 260 (finding that "the contracts were obtained through fraud, as instruments of the Ponzi Scheme."); *see also Cummings v. Paramount Pictures*, 715 F. Supp. 2d 880, 911 (D. Minn., 2010); *TCS Holdings, Inc. v. Onvoy, Inc.*, No. 07-1200, 2007 U.S. Dist. LEXIS 56275, at *14–15 (D. Minn. Aug. 1, 2007). The statements he received were pure fiction and the calculation of his so-called interest was simple arithmetic that had nothing to do with trading of any kind. *See* Plea Agreement, *United States v. Pettengill*, 11-cr-192, ECF No. 6 at ¶ (i).

Although there is a sound argument that it is unjust for Defendant Hilal to retain any of the Ponzi proceeds he received, in this motion the Receiver is not seeking the return of the $49,000.00 principle that Defendant Hilal was paid. Even with summary judgment of unjust enrichment in the amount of $7,201.14, Defendant Hilal still will

retain a 100% recovery from this fraud. In other words, Defendant Hilal is and will remain miles ahead of his fellow investors who did not get any money out of this scheme; they are left with a mere 6.9% recovery.

The Birks received over $100,000.00 in Ponzi proceeds that they are not entitled to keep. The Birks admit at least $101,997.94 of the Ponzi profits they received were "gifts." (Kaczrowski Decl. ¶ 11, Ex. 9 at 68-126 (Birk handwritten notations of "support gifts" on bank statements).) Where a gift is the product of the fraud, summary judgment of unjust enrichment is appropriate. *United States v. Dieter*, 2003 U.S. Dist. LEXIS 6391 at 48-49; *Klein v. Georges*, 2014 U.S. Dist. LEXIS 165154 at 10; *Honeywell/Alliant Techsystems*, 2000 Minn. App. LEXIS 66 at 8-9. There is no question that the gifts the Birks received were products of the Ponzi Scheme. The gifts came from the Beckmans' personal Wells Fargo account, which was funded with money stolen from investors. Aguilar Decl. at ¶¶ 23-25 & Ex. 4; Kaczrowski Decl. Ex. 10 at 2; *id* at ¶ 11 & Ex. 9 at 69-126.

The timing of these transactions further illustrates why it would be unjust for the Birks to keep the Ponzi proceeds that the Beckmans gave to them as gifts. On November 23, 2009, the Court shut down the Ponzi Scheme and froze all accounts then known to be associated with the fraudulent individuals and entities. At this point, there were no more prospective investors for the Birks to entertain and the bank accounts that had funded their salaries were frozen. Undeterred by the Court's Orders, the Beckmans simply began providing regular "gifts" to the Birks from the Beckmans' private Wells Fargo bank account, which had not yet been identified as part of the fraud. Kaczrowski Decl. at

Ex. 10 at 2 (listing transfers from Hollie J and Jason B Beckman Wells Fargo account #XXX-8793 to Robert and Dianne Birk from November 29, 2009 to February 9, 2011). In other words, as the Receiver was working to identify and preserve stolen funds for the benefit of the victims of this Ponzi Scheme, the Beckmans continued to send those funds to the Birks as gifts.

In response to the Receiver's original motion, which credited the amount of the Birks' investment and requested judgment for the balance of the $112,680.29 in Ponzi proceeds they received, the Birks argued that they were entitled to offset all but $23,302.85.[6]

Specifically, the Birks argued that their overages should be offset by "approximately" $15,000.00 because they contend personal property belonging to them was in the Beckmans' homes when the Receiver seized and sold the contents of those properties. Every piece of personal property that has been seized and sold by the Receiver has been in full accordance with all applicable laws and pursuant to public motions hearings and orders of the Court. The Birks were given every opportunity to prove their ownership of any items that were in the Beckman's seized homes.

Specifically, pursuant to 28 U.S.C. §2001 and 28 U.S.C. §2004, the Receiver filed a motion with the Court to sell personal property found in the Plymouth Home. *SEC v. Beckman*, ECF Nos. 102-106. The motion and supporting papers were not only served on the Beckmans, they were posted on the Receiver's public website.

[6] This amount is undisputed by the parties and judgment of at least that amount is appropriate.

http://www.cookkileyreceiver.com/receiver.reports.cfm. The motion was accompanied by a detailed affidavit listing each item the Receiver proposed to sell and the estimated value of each of the 126 items that were proposed for sale. Declaration of Brian Hayes at Ex. 1, *SEC v. Beckman*, 11-cv-0574, ECF Nos. 105. The Birks did not oppose the motion. The Court approved the Receiver's sale of the items from the Plymouth Home after a full public hearing and opportunity for all to be heard. Order Granting Receiver's Motion for Sale of Certain Personal Property in His Possession, *SEC v. Beckman et al.*, 11-cv-0574, ECF No. 124.

The Receiver also sold the "Big House" in Texas and its contents with the guidance and approval of the Court and in full accordance with 28 U.S.C. §2001 and 28 U.S.C. §2004. *SEC v. Beckman*, 11-cv-0574, ECF Nos. 174-177. The Receiver's motion to sell this real and personal property, which also was filed on the public docket, served on the Beckmans, and posted on the Receiver's public web site, also included a detailed appraisal of the personal property in the six-bedroom, six and one-half bathroom, 12,000 square foot home. Declaration of Brian Hayes at Ex. D, *SEC v. Beckman*, ECF No. 175-6. The Birks failed to oppose the sale of these items, as well. Here again, Chief Judge Davis approved the sale of these items, after a full hearing and opportunity for all to be heard. Order Confirming Sale of Paseo Del Lago Property, *SEC v. Beckman*, 11-cv-0574, ECF No. 209.

The Birks go on to argue that their overages should also be discounted $34,306.00 for expenses they paid for the "little house" on Golf Drive in Texas. The "little house" was a vacation home located on Golf Drive in Mission, Texas, that the Beckmans

purchased for the Birks with proceeds from this Ponzi Scheme. Declaration of Brian Hayes at ¶ 6, *SEC v. Beckman et al.*, 11-cv-0574, ECF No. 163. The Birks lived in the Golf Drive home rent-free during the heyday of the scheme. The issue of the "little house" has also been fully litigated before and decided by Chief Judge Davis. When the Receiver filed a motion to sell certain Beckman real property, including the "little house", Mr. Beckman sought to intervene on behalf of the Birks based on the same argument they make here: that they invested their own money in the property. Motion to Intervene and Protect Interest of a Present Non-Party at 3, *SEC v Beckman*, 11-cv-0574, ECF No. 195. Chief Judge Davis denied Mr. Beckman's motion, finding "that the Birks have not demonstrated a cognizable interest in the Golf Drive property." Mem. Op. & Order at 2, *SEC v. Beckman*, 11-cv-0574, ECF No. 214. Moreover, the Court noted that "any equitable claim [the Birks] may have [in the Golf Drive property] would have to be offset by the rent Beckman failed to collect." *Id.* In addition, "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." *Id.* at 1-2.

Finally, the Birks contend that $40,071.44 of the Ponzi profits they received were "in the nature of" expenses for the properties in Texas. (Joint Birk Aff. at ¶ 3.) Their declaration in opposition to the Receiver's original motion provides nothing beyond check dates and amounts copied from the Receiver's opening declaration. (*Compare id.* with Kaczrowski Decl. Ex. 10). The payments the Birks ascribe to the "nature of" reimbursements are round numbers and regularly made. The law is clear that it is the Birks' burden to produce evidence more persuasive than typically required to survive

summary judgment. *Klehr v. Crafts*, 69 Fed. Appx. 818, 820 (8th Cir. 2003) ("Summary judgment is mandated when the non-moving party fails to introduce sufficient evidence to establish as essential element of the case for which the party would have the burden of proof at trial.") 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 Birks do not provide any supporting materials to support their argument about expenses for the properties in Texas and clearly do not meet the evidentiary threshold required to defeat summary judgment on this amount.

Even if the Court were to allow the Birks to re-litigate the issues that Chief Judge Davis has already decided as to personal property and reimbursements, or otherwise find material issues of disputed fact as to any of the Birks' claimed "offsets", the Birks fully admit that of the $300,459.65 they received from this Ponzi scheme, at least $101,997.94 was in the form of "gifts." There is no fact dispute as to this gifted amount. Nor is there any dispute that these gifts to the Birks were stolen from other investors in this Ponzi Scheme. Aguilar Decl. at ¶¶ 23-25 & Ex. 4 (detailing the flow of money stolen from investors to the Beckmans' personal Wells Fargo account, which in turn funded $101,997.94 in gifts to the Birks). Accordingly, summary judgment that the Birks were unjustly enriched by at least $101,997.94 is appropriate here. *United States v. Dieter*, 2003 U.S. Dist. LEXIS 6391 at 48-49; *Honeywell/Alliant Techsystems Fed. Credit Union*, 2000 Minn. App. LEXIS 66 at 8-9; *Klein v. Georges*, 2014 U.S. Dist. LEXIS

165154 at 10. If summary judgment is granted on either of these two grounds, the Birks will still retain at least 100% of the amount they invested in this scheme.

D. Defendants' Defenses Fail as a Matter of Law

The Winning Investor Defendants have collectively asserted a handful of affirmative defenses in their Answers. However, none of these defenses can survive summary judgment.

1. "No Evidence of Wrongdoing"

Defendant Stoltenberg asserts an affirmative defense claiming that the Receiver "sued him without sufficient evidence of wrongdoing, without performing due diligence, and without a good faith basis for suing [him]." (ECF No. 34 at 5-6.) As an initial matter, the Receiver's complaint includes detailed factual allegations to support his claims. More importantly, however, neither of the Receiver's claims requires any wrongdoing on the part of the Defendants. Therefore the Receiver's Complaint cannot fail for lack of "evidence of wrongdoing" because wrongdoing by the Defendant is not an element of either claim. Defendant Stoltenberg's affirmative defense therefore fails.

2. Laches

Defendant Stoltenberg also includes a one-word affirmative defense of "Laches." (ECF No. 34 at 5.) Defendant Stoltenberg cannot show any delay or corresponding prejudice. Beginning in December of 2010, the Receiver contacted Defendant Stoltenberg, along with 200 other "winning investors," and attempted to resolve the Receiver's claims against him without protracted litigation and cost. *See* Fifteenth Status Report of Receiver R.J. Zayed at 7-8, *CFTC v. Cook et al.*, ECF No. 1039. However,

after almost three years some of these "winning investors" rebuffed settlement attempts or defaulted on their settlement agreements. *Id.* The Receiver was then forced to file the instant action. *Id.* The Receiver waited forty-five days before serving the Complaint in a final effort to avoid further litigation, during which time he again attempted to settle his claims against Defendant Stoltenberg. *Id.* Despite the Receiver's repeated efforts, Defendant Stoltenberg refused to settle.

The Receiver's Complaint was filed well within the statute of limitations and any delay was in an effort to avoid further litigation and cost, both to the Receiver and to Defendant Stoltenberg, and therefore not unreasonable under the circumstances. Defendant Stoltenberg has alleged no unreasonable delay or any prejudice, and Defendant Stoltenberg's laches defense therefore fails.

3. Accord and Satisfaction

Defendant Stoltenberg also attempts to assert the affirmative defense of accord and satisfaction. (ECF No. 34 at 5.) The defense of accord and satisfaction bears no relation to the circumstances of this case.

The affirmative defense of accord and satisfaction require four elements: 1) that the transferor, *in good faith*, tendered an instrument to the transferee in full satisfaction of the claim; 2) the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered in full satisfaction of the claim; 3) the amount of the claim was unliquidated or subject to a bona fide dispute; and 4) that the transferee obtained the payment of the instrument. *See Webb Bus. Promotions, Inc. v. Am. Elecs. & Entm't Corp.*, 617 N.W.2d 67, 73 (Minn. 2000).

Defendant Stoltenberg's attempt to assert this defense fails because at the time of the transfers there was not a dispute between the Receiver Estates and the Defendants (element 3) and, more importantly, the Ponzi Felons did not make the transfers in good faith (element 1). Defendant Stoltenberg's accord and satisfaction defense therefore fails.

4. Payment

Defendant Stoltenberg also asserts a one-word affirmative defense of "Payment." (ECF No. 34 at 5.) Although brevity in pleadings is favored by the courts, the affirmative defense Defendant Stoltenberg attempts to raise in this instance is unclear and should be dismissed on that basis alone. In no event can Defendant Stoltenberg's affirmative defense of "payment" preclude summary judgment here.

There is no dispute that the transfer received by the Stoltenberg from the Receiver Estates was made while the entities were still under the control of the Ponzi Felons. As there is no disputed issue of material fact as to Ponzi Felons' control of the entities when they made the transfers, and since the Receiver is not bound by the actions of the entities while they were under the Ponzi Felons' control, Defendant Stoltenberg's defense of "payment" must fail. *See, e.g.*, Order at 8, *SEC v. Beckman et al.*, 11-cv-1042, ECF No. 108 (quoting *Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995)).

5. Hilal's Alleged Facts are Irrelevant and Do Not Create a Material Issue of Disputed Fact on the Receiver's Claims

Defendant Hilal makes a number of unsupported assertions in his Answer. (ECF No. 59.) However, none of these "facts" are relevant to the Receiver's claims against him. Whatever story Defendant Hilal was told by the Ponzi Felons does not change the

fact that he was unjustly enriched in this fraud. Whether Defendant Hilal knew Trevor Cook or thought he was investing in the "Foreign Exchange Currency" does not alter the fact that he was unjustly enriched with $7,201.14 that was stolen from other investors.

Defendant Hilal also attempts to request a different venue for this matter, however this Court has jurisdiction and is the proper venue under a number of federal statutes and the Court's Orders. (ECF No. 1 ¶¶ 10-13); Order of Preliminary Injunction, Asset Freeze, and Other Ancillary Relief at 15, *SEC v. Cook et al.,* 09-cv-3333, ECF No. 51.

Defendant Hilal also asserts that he has nothing in common with the other Defendants in this action. However, Defendant Hilal is just like the other remaining Winner Investor Defendants in the only way that matters: he, like the other remaining Winning Investor Defendants, received fraudulent Ponzi profits and has refused to return them. Any factual distinctions between Defendant Hilal and the other remaining Winning Investor Defendants cannot defeat summary judgment in this action.

6. Failure to Plead Fraud with Specificity

In their Answer, the Birks claim the Receiver's MUFTA claim failed to include meet the specificity required by Federal Rule of Civil Procedure Rule 9(b). (ECF No. 54 at 3.) Because the Receiver has withdrawn his MUFTA claim, this defense as to that claim is moot. The defense does not apply to the Receiver's unjust enrichment claim, but even if it did, the Receiver's Complaint meets the elements of Rule 9(b). The Receiver's Complaint spelled out the who, what, why, where and when of the fraud and detailed the fraudulent nature of all of the proceeds the Winning Investor Defendants received.

Because the Receiver's Complaint includes the necessary specificity required by Rule 9(b), the Birks' affirmative defense fails.

CONCLUSION

The judgment the Receiver seeks against each of these defendants is one founded in justice and equity: that a small group of "winning investors" should not be allowed to profit with money stolen from others – especially when the others are left with catastrophic losses. But for sheer luck or an inside connection to the Ponzi Felons these remaining Winning Investor Defendants would be in the same position as all of the other investors defrauded by this sad scheme. The only reasonable conclusion is that it would be unjust to allow the Winning Investor Defendants to keep their windfall. Accordingly, the Receiver respectfully requests that the Court enter summary judgment on his unjust enrichment claim against Defendants Mark Stoltenberg, Adel ("A.K.") Hilal, and Robert and Dianne Birk.

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Respectfully submitted,

s/ Tara C. Norgard

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