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,	**Civil No. 13-CV-1896 (SRN/SER)**
Plaintiff,	**MEMORANDUM OPINION AND ORDER**
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.	

R.J. Zayed, Dorsey & Whitney LLP, 50 South Sixth Street, Suite 1500, Minneapolis, Minnesota 55402; Tara C. Norgard, Russell J. Rigby, and Brian W. Hayes, Carlson, Caspers, Vandenburgh & Lindquist & Schuman, PA, 225 S. Sixth Street, Minneapolis, Minnesota, 55402, for Plaintiff

James R. Behrenbrinker, Behrenbrinker Law Firm, 412 South Fourth Street, Suite 1050, Minneapolis, Minnesota 55415, for Defendant Hilal

Mark Stoltenberg, Pro Se, 1517 West Jacinto Avenue, Mesa, Arizona 85202

Karl L. Cambronne, Chestnut Cambronne, PA, 17 Washington Avenue North, Suite 300, Minneapolis, Minnesota 55401, for Defendants Robert and Dianne Birk

---

SUSAN RICHARD NELSON, United States District Court Judge

This matter is before the Court on the Plaintiff's Amended Motion for Summary Judgment [Doc. No. 176]. For the reasons set forth herein, Plaintiff's Motion is denied in part and granted in part.

I. BACKGROUND

A. Factual Background

The specific factual background of this matter is set forth in the Court's Order of March 10, 2015, which is incorporated by reference. (Order of 3/10/15 at 1-12 [Doc. No. 175].) In brief, the Court appointed Plaintiff R.J. Zayed ("the Receiver") to preserve and apportion to fraud victims any assets involved in a Ponzi scheme operated by Trevor Cook and his colleagues Jason Bo-Alan Beckman, Patrick Kiley, Chris Pettengill, and Gerald Durand. (See Order of 11/23/09 at 7, CFTC v. Cook, 09-CV-3332 [Doc. No. 21]; Order of 3/8/11, Beckman SEC, 11-CV-574 [Doc. No. 10].) Toward that end, the Receiver filed this suit in July 2013 seeking the return of alleged receivership assets from certain "investors" in Cook's fabricated foreign currency trading program. In Count I of the Complaint, Plaintiff asserts a fraudulent transfer claim under the Minnesota Uniform Fraudulent Transfer Act (the "MUFTA"), Minn. Stat. § 513.41, et seq., and, in Count II, a

common law unjust enrichment claim. (Compl. ¶¶ 122-27; 128-32 [Doc. No. 1].)

Most Defendants settled their claims with the Receiver. The instant motion is brought against the four remaining Defendants: Adel ("A.K.") Hilal, Mark Stoltenberg, and Robert and Dianne Birk. The Receiver alleges that these Defendants invested in the Ponzi scheme and received amounts in excess of the amount of their original investments. (Id. ¶¶ 120-32.) Through this litigation, the Receiver seeks to recover these excess amounts.

In April 2014, the Receiver moved for summary judgment against the remaining four Defendants on both of his claims. (Pl.'s Mot. for Summ. J. [Doc. No. 139].) As to the fraudulent transfer claim, Plaintiff's sole argument in support of summary judgment was that actual fraudulent intent could be inferred by application of the "Ponzi scheme presumption." (Pl.'s Mem. Supp. Mot. for Summ. J. at 14-20 [Doc. No. 141].) A number of courts have approved this method of inferring fraudulent intent in cases involving Ponzi schemes, see Wagner v. Pruett (In re Vaughan Co., Realtors), 477 B.R. 206, 218 (Bankr. D. N.M. 2012) (collecting cases), finding that "transfers made in the course of a Ponzi scheme could have been made for no other purpose other than to hinder, delay or defraud creditors." In re Manhattan Inv. Fund Ltd., 359 B.R. 510, 517-18 (Bankr. S.D.N.Y. 2007), rev'd in part, 397 B.R. 1 (S.D.N.Y. 2007). Alternatively, the Receiver sought summary judgment on his unjust enrichment claim. (Pl.'s Mem. Supp. Mot. for Summ. J. at 21-25 [Doc. No. 141].) In addition, the Receiver moved for

summary judgment on Defendants' defenses, arguing that they failed as a matter of law. (Id. at 26-30.)

Defendants opposed Plaintiff's original summary judgment motion, primarily asserting the defense of good faith and reasonably equivalent value in response to Plaintiff's fraudulent transfer claim brought under the MUFTA.[1] (See generally Birks' Opp'n Mem. at 2 [Doc. No. 148]; Hilal Opp'n Mem. at 2 [Doc. No. 155]; Stoltenberg Opp'n Mem. at 5-8 [Doc. No. 158].)

While Plaintiff's motion was under advisement, however, the Minnesota Supreme Court ruled that the Ponzi scheme presumption does not apply to fraudulent transfer claims under the MUFTA. Finn v. Alliance Bank, 860 N.W.2d 638, 652-53 (Minn. 2015). Because the parties here lacked the guidance of Finn at the time of the dispositive motion hearing, the Court denied without prejudice Plaintiff's motion for summary judgment and permitted the parties to submit amended dispositive motions. (Order of 3/10/15 at 18 [Doc. No. 175].) While Finn foreclosed the use of the Ponzi scheme presumption to establish a fraudulent transfer, this Court noted that actual fraud could still be established through a traditional "badges-of-fraud" analysis. (Id. at 19) (citing Brown

[1] Stoltenberg, who is pro se, captioned his response to the Receiver's summary judgment motion as a "Motion to Dismiss and Opposition to Summary Judgment F.R. Civ. P. 12(b)(6)" [Doc. No. 157]. The Court construed Stoltenberg's filing as a memorandum in opposition to summary judgment, and not as a motion to dismiss, because Stoltenberg filed the document long after he had filed an answer in October 2013, and because he was entitled to a more deferential standard of review as a party opposing summary judgment. (See Order of 3/10/15 at 19-20 [Doc. No. 175].)

v. Third Nat'l Bank (In re Sherman), 67 F.3d 1348, 1353-54 (8th Cir. 1995)). The Court also denied summary judgment without prejudice on Plaintiff's unjust enrichment claim and Defendants' affirmative defenses, because the relief sought in any amended motions on Plaintiff's MUFTA claim might affect the viability of the unjust enrichment claim or Defendants' defenses. (Id. at 19-20.)

B. Plaintiff's Amended Motion for Summary Judgment

In Plaintiff's Amended Motion for Summary Judgment, the Receiver seeks summary judgment only on his unjust enrichment claim and Defendants' affirmative defenses, stating, "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." (Pl.'s Mem. Supp. Am. Mot. for Summ. J. at 2 [Doc. No. 177].)

Hilal and the Birks filed responses in opposition to the Receiver's amended motion, arguing that material issues of fact preclude summary judgment. (Hilal Opp'n Mem. to Pl.'s Am. Mot. for Summ. J. at 3-4 [Doc. No. 180]; Birks' Opp'n Mem. to Pl.'s Am. Mot. for Summ. J. at 4 [Doc. No. 179].) Stoltenberg did not submit a response in opposition to Plaintiff's amended summary judgment motion, but he opposed the original motion. Because the Court deferred ruling on any defenses in its Order of March 10, 2015 [Doc. No. 175], the Court considers Stoltenberg's earlier arguments here.

II. DISCUSSION

A. Standard of Review

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Enter. Bank v. Magna Bank, 92 F.3d 743, 747 (8th Cir. 1996). However, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Id. at 323; Enter. Bank, 92 F.3d at 747. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts in the record showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). On a motion for summary judgment, the Court views the facts in the light most favorable to the nonmoving party. Davison v. City of Minneapolis, 490 F.3d 648, 651 (8th Cir. 2007).

B. MUFTA Fraudulent Transfer Claim

In this Court's previous order on Plaintiff's original summary judgment motion, the Court noted that a claim for equitable relief will not lie if a party has an adequate remedy at law. (Order of 3/10/15 at 19 [Doc. No. 175]) (citing In re Levaquin Prods. Liab. Litig., 752 F. Supp. 2d 1071, 1081 (D. Minn. 2010)). While the Receiver now refers to his fraudulent transfer claim as "withdrawn" (Pl.'s Mem. Supp. Am. Mot. for Summ. J. at 24 [Doc. No. 177]), the claim remains in the Complaint and no stipulation or ruling indicates otherwise. Rather, the Receiver declares, without explanation, that in light of Finn, the "MUFTA no longer applies to the defendants who remain in this case and the Receiver has no adequate remedy at law." (Id. at 2.)

As noted, in Finn, the Minnesota Supreme Court rejected the Ponzi scheme presumption as a means of establishing actual fraudulent intent, but Finn did not do away with clawback actions involving claims of actual fraudulent transfer. Instead, the impact of Finn is that plaintiffs asserting a claim of actual fraudulent transfer must utilize a badges-of-fraud analysis in order to prove the elements of their claim. See Finn, 860 N.W.2d at 645 (citing Citizens State Bank Norwood Young Am. v. Brown, 849 N.W.2d 55, 60 (Minn. 2014)). Because direct evidence of fraud is rare, id., badges of fraud are essentially "a list of circumstantial factors that a court may use to infer fraudulent intent." In re Sholdan, 217 F.3d 1006, 1009-10 (8th Cir. 2000). While Minn. Stat. § 513.55(b) lists particular badges of fraud that may be considered, courts are free to consider any factors deemed relevant to the issue of fraudulent intent. Ritchie Cap. Mgmt., LLC v.

Stoebner, 779 F.3d 857, 863 (8th Cir. 2015) (citing Sholdan, 217 F.3d at 1009-10)). "Once a [plaintiff] has proven that a transfer was made with fraudulent intent, the transferee may still defeat liability by establishing the affirmative defense in Minn. Stat. § 513.48, which protects transferees 'who took [the transfer] in good faith and for a reasonably equivalent value.'" Finn, 860 N.W.2d at 645 (quoting Minn. Stat. § 513.48(a)).

Again, Plaintiff's fraudulent transfer claim remains pending before the Court, and to the extent that Plaintiff chooses to continue to prosecute this claim, he may do so under a badges-of-fraud analysis.

C. Unjust Enrichment

In United States v. Bame, 721 F.3d 1025, 1030 (8th Cir. 2013), the Eighth Circuit Court of Appeals considered, in dicta, the viability of the plaintiff-government's equitable unjust enrichment claim where the government also pleaded legal claims under the MUFTA and the Federal Debt Collection Procedure Act. The court noted that the government sought the same damages under both legal and equitable theories and also failed to indicate why the fraudulent transfer statutes were an inadequate remedy at law. Id. at 1031. The court rejected the government's argument that a party is only precluded from recovering under unjust enrichment if it failed to pursue an adequate remedy at law. Id. at 1031. Stating that it is the existence of a legal remedy that precludes an equitable remedy, not the fact that a plaintiff fails to pursue a legal remedy, id. (emphasis added), the court observed that it would be anomalous to allow unjust enrichment recovery

"merely because the plaintiff fashioned the pleadings a certain way." Id. at 1032. Because the Court found that genuine issues of material fact precluded summary judgment, it reversed and remanded, noting that "all matters relating to the unjust enrichment claim are for the district court's further consideration on remand." Id.

While Bame's discussion of unjust enrichment is dicta, it was relied upon in In re Petters, where the Bankruptcy Court in this District considered whether a bankruptcy trustee could simultaneously maintain claims for fraudulent transfer and unjust enrichment.[2] 499 B.R. 342, 374-75 (Bankr. D. Minn. 2013). The court noted that "[u]nder Bame's reasoning, only one ruling is possible and only one ruling is necessary;" the court concluded that the trustee's unjust enrichment claim must be dismissed because of the primacy of the trustee's legal remedy. Id.

Moreover, in a similar setting involving an unjust enrichment claim brought by a receiver, this Court held that the MUFTA provided an adequate legal remedy and precluded recovery under the equitable claim of unjust enrichment. Kelley v. Coll. of St. Benedict, 901 F. Supp. 2d 1123, 1132-33 (D. Minn. 2012). The fact that the statute of limitations for the statutory claim had passed was irrelevant to the determination of whether the receiver had an adequate legal remedy, as this Court stated, "it makes no difference that Kelley did not timely avail himself of the statute." Id. at 1132 (citing

[2] While recognizing that Bame's discussion of unjust enrichment was dicta, given the Eighth Circuit's "careful," "firm, principled, and supported" observations in Bame, the Bankruptcy Court commented, "one might say colloquially, there is dictum, and there is dictum." Id. Dictum of the type in Bame "should be heeded." Id.

Arena Dev. Grp, LLC v. Naegele Commc'ns, Inc., No. 06-cv-2806 (ADM/AJB), 2007 WL 2506431, at *11 (D. Minn. Aug. 30, 2007) (dismissing an unjust enrichment claim despite the argument that if plaintiff's fraudulent transfer claims failed, they would not have an adequate legal remedy); Mon-Ray, Inc. v. Granite Re, Inc., 677 N.W.2d 434, 440 (Minn. Ct. App. 2004) (holding that even though a legal remedy was unavailable due to strict time restrictions, plaintiffs failed to avail themselves of it and could not seek relief under the equitable theory of unjust enrichment); Drobnak v. Andersen Corp., 561 F.3d 778, 787 (8th Cir. 2009) (affirming dismissal of unjust enrichment claim where plaintiffs would have had an adequate legal remedy had they adhered to Rule 9(b) pleading requirements)).

As for what constitutes an "adequate" legal remedy, this Court has noted that an adequate remedy must be "'practical and efficient.'" Kelley, 901 F. Supp. 2d at 1132 (quoting Munshi v. J-I-T Servs., Inc., No. A06-346, 2007 WL 92852, at *2 (Minn. Ct. App. Jan. 16, 2007)). In Kelley, even though the fraudulent transfer claim was not available, it was nevertheless deemed an adequate legal remedy. Id. at 1133. This Court reached the same conclusion, albeit in the context of a different type of statutory claim, in Frank v. Gold'n Plump Poultry, Inc., No. 04-CV-1018 PJS/RLE, 2007 WL 2780504, at *12 (D. Minn. Sept. 24, 2007). In Frank, this Court found that the plaintiffs' unjust enrichment claims could not stand alongside legal claims involving the same facts and same requested relief under the laws of Minnesota and Wisconsin. Id. The plaintiffs argued that because the defendant denied liability under Wisconsin labor law, the

plaintiffs could not establish that a statutory remedy displaced their claim of unjust enrichment. Id. The Court rejected this argument, stating, "But whether plaintiffs can prevail on their statutory claims is irrelevant. What matters is that Wisconsin's labor laws provide a remedy for the wrong that plaintiffs allege they have suffered, and thus plaintiffs cannot resort to equity to remedy that same wrong." Id.

In the Complaint, the Receiver alleges the same facts in support of his fraudulent transfer claim and his unjust enrichment claim. He also seeks the same relief. However, the Receiver has not demonstrated why his legal remedy is inadequate; he merely self declares that he has no adequate remedy at law. (Pl.'s Mem. Supp. Am. Mot. for Summ. J. at 2 [Doc. No. 177].) Granted, some pre-Bame decisions permitted plaintiffs to plead an available remedy at law and to also pursue alternative remedies in equity, see, e.g., In re Levaquin, 752 F. Supp. 2d at 1081; Mem. Op. & Order at 90-91 [Doc. No. 260], Zayed v. Buysse, 11-CV-1042 (SRN/FLN) (D. Minn. Sept. 27, 2012)), while other decisions rejected dual alternative theories, see Arena Dev. Grp., 2007 WL 2506431, at *11. But Bame, decided in 2013, makes clear that the existence of an adequate legal remedy under Minnesota law precludes recovery under the equitable theory of unjust enrichment. 721 F.3d at 1031.

Because he may not pursue the equitable remedy of unjust enrichment where an adequate legal remedy exists, the Receiver's motion for summary judgment on his unjust enrichment claim is denied.

D. Order to Show Cause

Defendants did not file amended motions for summary judgment. Thus no motion is pending before the Court seeking the entry of judgment against the Receiver's unjust enrichment claim. While a court may grant summary judgment *sua sponte*, the party against whom judgment will be entered must receive sufficient notice and an opportunity to demonstrate why summary judgment should not be granted. Hubbard v. Parker, 994 F.2d 529, 531 (8th Cir. 1993) (citing Interco Inc. v. Nat'l Sur. Corp., 900 F.2d 1264, 1269 (8th Cir. 1990)). Accordingly, Plaintiff shall have until December 7, 2015 to show cause why summary judgment should not be granted to Defendants on the unjust enrichment claim. Defendants shall have until December 21, 2015 to file a response to the Receiver's submission.

E. Defenses

Primarily in their Answers, Defendants have asserted various affirmative defenses for which the Plaintiff seeks summary judgment.

1. Statute of Limitations

In opposition to Plaintiff's original summary judgment motion, Stoltenberg asserted that Plaintiff could not maintain a fraudulent transfer action against him because the statute of limitations had expired. (Stoltenberg Opp'n Mem. to Pl.'s Mot. for Summ. J. at 4 [Doc. No. 158].) In support of this argument, Stoltenberg, an Arizona resident, cited the four-year limitations period applicable to Arizona's Uniform Fraudulent Transfer Act, Ariz. Rev. Stat. § 44-1009.

As a general principle, in federal cases arising under diversity jurisdiction, such as this, the forum state's statute of limitations law governs. Kansas Pub. Emps. Ret. Sys. v. Reimber & Koger Assocs., Inc., 61 F.3d 608, 611 (8th Cir. 1995). More specifically, Plaintiff's fraudulent transfer claim is asserted under the Minnesota statute, Minn. Stat. § 513.41. (Compl. ¶ 122-27 [Doc. No. 1].) Actual-fraud claims brought under the MUFTA are subject to Minnesota's six-year statute of limitations, Minn. Stat. § 541.05, subd. 1(6), which is further tolled until discovery of the fraud by the aggrieved party. Finn, 860 N.W.2d at 657-58. Stoltenberg received the transfer on or about April 2, 2008 (Stoltenberg Transfer, Ex. 1 to Kaczrowski Decl. [Doc. No. 142-1]; Transfers to Winning Investors at 1, Ex. A to Compl. [Doc. No. 1-1]), the Receiver was appointed in November 2009 after the filing of the SEC and CFTC suits, see Order of 11/23/09 at 7, CFTC v. Cook, 09-CV-3332, ECF No. 21; Order of 11/23/09, SEC v. Cook, 09-CV-3333, ECF No. 13, and the Complaint in this action was filed on July 15, 2013. Even using the earliest of those dates – April 2, 2008 – this action was timely filed within the six-year period. Plaintiff is entitled to summary judgment on this defense.

2. Pleading Fraud / "No Evidence of Wrongdoing"

Defendants variously contend that the Receiver's claim fails because they were not involved in the fraud underlying the Ponzi scheme, nor did they have any knowledge of it. Invoking Fed. R. Civ. P. 9(b), the Birks contend that Plaintiff failed to "establish the requirements of a 'fraud' pertaining to us." (Birks' Answer at 3 [Doc. No. 54].) Similarly, Stoltenberg also contends that Plaintiff "sued him without sufficient evidence

of wrongdoing, without performing due diligence, and without a good faith basis for suing [him]." (Stoltenberg Answer at 5-6 [Doc. No. 34].) Defendant Hilal likewise claims that he never participated in a Ponzi scheme and has nothing in common with the other Defendants, presumably because he was an innocent investor. (Hilal Answer at 1 [Doc. No. 59].)

To the extent that the pleading of fraud is contested, the Court finds that Plaintiff has sufficiently pleaded the fraud element of fraudulent transfer, as "[f]raudulent transfer law focuses on the intent of the debtor[-transferor]." Ritchie, 779 F.3d at 862. While Rule 9(b)'s heightened pleading standards apply to state common law claims in federal court sounding in fraud, see SEC v. Brown, 643 F. Supp. 2d 1077, 1084 (D. Minn. 2009) (citing Russo v. NCS Pearson, Inc., 462 F. Supp. 2d 981, 1003 (D. Minn. 2006)), the Complaint here satisfies the "who, what, where, when, and how" requirements of pleading fraud consistent with Rule 9(b). Exhibit A to the Complaint lists every payment at issue, the bank accounts in question, the date of the transfers, the amount of the transfers, and the name of the transferees. (Ex. A to Compl. [Doc. No. 1-1].) The Kaczrowski Declaration and attached exhibits, submitted in support of Plaintiff's original summary judgment motion and relied upon in support of his amended motion, also identifies the transfers made to Defendants as well as the amount of funds invested. (Kaczrowski Decl. ¶¶ 1-5; 8-15 [Doc. No. 142] & Exs. 1-4; 7-12.)

However, to the extent that Defendants argue that there is no evidence of their wrongdoing, this defense remains a relevant issue of fact and may be considered in

determining whether the circumstantial evidence establishes actual fraudulent intent. Accordingly, to the extent that any Defendant asserts a defense of this nature, summary judgment is inappropriate on such a defense.

3. Laches

Stoltenberg's Answer also contains a one-word defense of "laches," without further elaboration. (Stoltenberg Answer at 5 [Doc. No. 34].) "Laches is an equitable doctrine applied to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." Martin v. Dicklich, 823 N.W.2d 336, 340 (Minn. 2012) (citations omitted). There is no evidence of any neglect or delay in bringing suit. As Plaintiff has documented, in December 2010, the Receiver contacted nearly 200 "winning investors," and attempted to resolve the Receiver's claims without litigation. (See Fifteenth Status Report of Receiver at 7-8, CFTC v. Cook, 09-CV-3332 [Doc. No. 1039].) After nearly three years of these efforts, the Receiver filed the instant action, waiting 45 days before serving the Complaint in an effort to attempt to settle the claims. (Id. at 8.) To the extent that Stoltenberg was prejudiced by the passage of time because he claims to have destroyed his investment records, any decision to do so was Stoltenberg's. A laches defense is inapplicable here and the Receiver is entitled to summary judgment on this defense.

4. Accord and Satisfaction

Stoltenberg also asserts a defense of accord and satisfaction, without further elaboration. (Stoltenberg Answer at 5 [Doc. No. 34].) Stoltenberg received a transfer of

$3,500 from UBS Diversified Growth LLC, one of the entities used in connection with Cook's Ponzi scheme. (Stoltenberg Transfer, Ex. 1 to Kaczrowski Decl. [Doc. No. 142-1].) No records demonstrate that Stoltenberg made an investment in Cook's foreign currency scheme, although Stoltenberg asserts that he invested $3,500, which is the amount that the Receiver seeks to recoup. (Stoltenberg's Opp'n Mem. to Pl.'s Mot. for Summ. J. at 6 [Doc. No. 158]; Pl.'s Mem. Supp. Am. Mot. for Summ. J. at 8 [Doc. No. 177].)

"Under Minnesota law, an accord and satisfaction may occur 'when a creditor accepts part payment of an unliquidated debt which the debtor tenders in full satisfaction of the debt . . . and the creditor accepts that offer.'" W. Petroleum Co. v. Strategic Bio Energy, LLC, No.12-CV-2999 (PAM/TNL), 2013 WL 6175184, at * 4 (D. Minn. Nov. 25, 2013) (quoting Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc., 111 F.3d 1386, 1391 (8th Cir.1997)). It arises

> when a party against whom a claim of breach of contract is asserted proves that (1) the party, in good faith, tendered an instrument to the claimant as 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 as full satisfaction of the claim; (3) the amount of the claim was unliquidated or subject to a bona fide dispute; and (4) the claimant obtained payment of the instrument.

Webb Bus. Promotions, Inc. v. Am. Elecs. & Entm't Corp., 617 N.W.2d 67, 72 (Minn. 2000) (citations omitted). Stoltenberg fails to provide any explanation as to how this defense applies to the Receiver's claim against him. As noted above, accord and satisfaction arises as a defense to a breach of contract claim, see id., which is not asserted

by the Receiver here. For all of these reasons, an accord and satisfaction defense fails as a matter of law and the Receiver is entitled to summary judgment on this defense.

5. "Payment"

Stoltenberg also asserts a one-word defense of "payment." (Stoltenberg Answer at 5 [Doc. No. 5].) Although this defense is pleaded in vague and sparse terms, the Court construes it to mean that Stoltenberg's transfer was received as the full and final payment of his investment. However, as discussed herein, there is no evidence of Stoltenberg's investment. There is only evidence that he received a transfer. For the reasons noted earlier, any defense based on "payment" fails.

6. Facts and Venue

Hilal asserts that he has nothing in common with the other Defendants, nor did he ever deal with Trevor Cook or his entities. (Hilal Answer at 1 [Doc. No. 59].) Instead, Hilal attests that his dealings were with "a separate Investment Advisor" and that he never participated in a Ponzi scheme. (Id.)

The facts, however, reveal that Hilal did invest in the Ponzi scheme. Documentation of Hilal's investments show that he signed an agreement with Crown Forex and received statements from the Receiver Estates including "The Oxford, "UBFX Diversified," and "UBS Diversified." (Hilal Investment Docs., Ex. 3 to Kaczrowski Decl. [Doc. No. 142-3].) In addition, documents from the third-party administrator through which Hilal made his investments, Millennium Trust, show investment in "UBS Diversified FX Growth" – another Receiver Estate. (Hilal Wire, Ex. 4 to Kaczrowski

Decl. [Doc. No. 142-4].) Moreover, Hilal himself acknowledges that Beckman – a central figure in this Ponzi scheme – was his financial advisor. (Hilal Aff. ¶ 5 [Doc. No. 156].) To the extent that Hilal attempts to plead good faith as a defense, he may continue to do so, but to the extent that this "facts" defense means anything else, Plaintiff is entitled to summary judgment.

Finally, in Hilal's one-page Answer, he requests that this case be heard in small claims court, in light of the amount in question and the costs of litigation. (Hilal Answer [Doc. No. 59].) To the extent that Hilal challenges venue and jurisdiction, any such argument fails. As noted, this Court appointed Plaintiff as the Receiver in the related SEC and CFTC cases against Cook and Beckman. (See Order of 11/23/09, SEC v. Cook, 09-CV-3333 [Doc. No. 13]; Order of 11/23/09 at 7, CFTC v. Cook, 09-CV-3332 [Doc. No. 21]; Order of 3/8/11, SEC v. Beckman, 11-CV-574 [Doc. No. 10].) The Court has retained jurisdiction over any claim brought by the Receiver in furtherance of his duties and authority. (Order of 12/8/09 at 15, SEC v. Cook, 09-CV-3333 [Doc. No. 51].) Venue and jurisdiction are entirely proper here.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Amended Motion for Summary Judgment [Doc. No. 176] is **DENIED in part** as to the unjust enrichment claim and any affirmative defenses asserting good faith and lack of wrongdoing; and **GRANTED in part** as to the defenses of statute of limitations, laches, accord and

satisfaction, "payment," "facts and venue," and the adequacy of Plaintiff's fraud allegations;

2. Plaintiff shall have until **December 7, 2015** to show cause why summary judgment should not be granted to Defendants on the unjust enrichment claim. Defendants shall have until **December 21, 2015** to file a response to the Receiver's submission; and

3. The parties are directed to contact the chambers of Magistrate Judge Steven E. Rau to schedule a settlement conference **within 90 days** of this ruling and in advance of trial.

Dated: November 16, 2015

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Court Judge