IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL.	§	
Plaintiff,	§	Case No. 03:09-CV-0724-N
v.	§	
JAMES R. ALGUIRE, ET AL.	§	
Defendants.	§	

BRIEF IN SUPPORT OF RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE MAGNESS DEFENDANTS

BAKER BOTTS L.L.P.
Kevin M. Sadler
Texas Bar No. 17512450
kevin.sadler@bakerbotts.com
Robert I. Howell
Texas Bar No. 10107300
robert.howell@bakerbotts.com
David T. Arlington
Texas Bar No. 00790238
david.arlington@bakerbotts.com
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4039
(512) 322-2500
(512) 322-2501 (Facsimile)

Timothy S. Durst
Texas Bar No. 00786924
tim.durst@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6500
(214) 953-6503 (Facsimile)

ATTORNEYS FOR RECEIVER RALPH S. JANVEY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Ralph S. Janvey, in his capacity as Receiver of Stanford International Bank, Ltd. ("SIB") and other Stanford entities, moves for partial summary judgment against Defendants Gary D. Magness, as trustee of The Gary D. Magness Irrevocable Trust, Magness Securities LLC, and GMAG LLC (collectively, the "Magness Defendants") for recovery of the amounts that they each received from SIB in excess of their investments (their "net winnings").[1] As a matter of law, such payments are voidable fraudulent transfers under the Texas Uniform Fraudulent Transfer Act (TUFTA), TEX. BUS. & COMM. CODE ANN. §§ 24.001-.010 (Vernon 2009).[2]

Many thousands of SIB CD investors lost most or all of their investments. The Magness Defendants, however, did not suffer that fate. They recovered the full amount of their investments *plus* more than $8.5 million in purported interest payments. These payments, however, were not from earnings on SIB's investment of CD proceeds (SIB's ostensible business model). SIB was a Ponzi scheme; the money it paid to existing investors came overwhelmingly from the sale of CDs to new investors. Decisions from the Fifth Circuit, from this District, and indeed from courts all across the nation hold that, irrespective of the transferee's good faith, payments from a Ponzi scheme that exceed the amount of the transferee's investment are, as a matter of law, fraudulent transfers that are subject to recovery by the Receiver of the Ponzi entity.

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[1] The Receiver also has claims for recovery of transfers that supposedly represented repayments of the "principal" amounts of the Magness Defendants' investments. The "return of principal" claims are not, however, the subject of this motion.

[2] "Courts have routinely applied UFTA to allow receivers or trustees in bankruptcy to recover monies lost by Ponzi-scheme investors." *Donell v. Kowell,* 533 F.3d 762, 767 (9th Cir. 2008); s*ee also Warfield v. Carnie*, Civil Action No. 3:04-cv-633-R, 2007 WL 1112591, at *9 (N.D. Tex. Apr. 13, 2007) ("A receiver of an alleged Ponzi scheme may sue under the UFTA to recover funds paid from the entity in receivership."); *In re Wiand*, 2007 WL 963165, at *2 (M.D. Fla. Mar. 27, 2007) (receiver has standing under the Florida UFTA); *Quilling v. Cristell*, No. Civ. A. 304cv252, 2006 WL 316981, at *5-6 (W.D.N.C. Feb. 9, 2006) (receiver has standing under either North Carolina or Florida's UFTA).

I. The summary judgment standard.

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)(2). Furthermore, a plaintiff is entitled to summary judgment as to any claim it can establish as a matter of law. As this Court has held,

> [a] plaintiff is entitled to judgment as a matter of law where it present[s] sufficient summary judgment evidence to establish each element of its cause of action. Once the movant has met its burden, the non-movant must show that summary judgment is not appropriate. This burden is not satisfied with some metaphysical doubt as to material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. Instead, the non-moving party must come forward with specific facts showing that there is a *genuine issue for trial*.

Barrington Group Ltd., Inc. v. Classic Cruise Holdings S. de R.L., Civil Action No. 3:08-cv-1813-B, 2010 WL 184307, at *5 (N.D. Tex. Jan. 15, 2010) (internal citations and quotation marks omitted).

II. The evidence conclusively establishes that SIB was a Ponzi scheme and that the Magness Defendants received substantial net winnings from their SIB CDs.

A. SIB was a Ponzi scheme.

"Generically, a Ponzi scheme is a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors." *In re Bonham*, 229 F.3d 750, 759 n.1 (9th Cir. 2000). "The fraud consists of funneling proceeds received from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating an illusion that a legitimate profit-making business opportunity exists and inducing further investment." *Donell v. Kowell,*

533 F.3d 762, 767 n.2 (9th Cir. 2008) (quoting *In re United Energy Corp*., 944 F.2d 589, 590 n.1 (9th Cir. 1991)).

The evidence conclusively establishes that SIB was a Ponzi scheme. Karyl Van Tassel, an experienced Certified Public Accountant and a Senior Managing Director of FTI Consulting, Inc., one of the firms the Receiver engaged to assist him in his investigations and asset searches, has given a declaration in which she reaches this conclusion. She summarizes her findings as follows:

> [M]y findings are consistent with the SEC's allegations and [James] Davis's admission [that SIB was a Ponzi scheme]. SIB was insolvent (*i.e.*, its liabilities exceeded the fair value of its assets) from at least 2004 and probably for much longer, yet it continued selling CDs to the end. It induced investors to buy CDs by offering substantially above-market rates, issuing financial statements and other data that significantly overstated its earnings and assets, and misrepresenting its business model, investment strategy, financial strength, the safety and nature of its investments and other facts important to investors. SIB incentivized Stanford-affiliated financial advisors to convince their clients to purchase SIB CDs over other kinds of investments by paying the financial advisors above-market commissions and other compensation tied to CD sales. SIB's actual (as opposed to reported) earnings and assets, however, were insufficient to meet its CD payment obligations. SIB could only keep the scheme going by selling yet more CDs and using the proceeds to pay redemptions, interest and operating expenses. Significant sums were also diverted to finance Allen Stanford's opulent life style of yachts, jet planes, travel, multiple homes, company credit cards, etc. Davis, Holt and other insiders were paid handsomely for their complicity.[3]

Ms. Van Tassel then goes on to describe in more detail how SIB's assets and earnings were fraudulently overstated; how SIB relied on new CD sales to pay interest, redemptions and operating expenses; and how the Ponzi scheme began to unravel beginning in October 2008, when new CD sales fell below the amount necessary to pay interest and redemptions. The

[3] Ex. 1 (Decl. of Karyl Van Tassel regarding the Magness Defendants) at ¶ 8 (App. 5-6).

resulting cash flow crisis caused a rapid liquidation of most of SIB's investment portfolio, which to begin with was only a small fraction of the size reported to the public.[4]

Ms. Van Tassel's findings are corroborated by James Davis's guilty plea to charges that he conspired with Allen Stanford and others in running a Ponzi scheme in violation of federal securities laws.[5] In the factual statement to his plea agreement, Davis, SIB's Chief Financial Officer, admitted that SIB was a "massive Ponzi scheme whereby CD redemptions ultimately could only be accomplished with new infusions of investor funds."[6] As Davis tells the story, the scheme began in the 1980's, with SIB's predecessor, Guardian International Bank, Ltd., which was based in the Caribbean island nation of Montserrat. Even more than twenty years ago, Allen Stanford was instructing Davis, then Guardian's controller, to falsify reported revenues and asset balances.[7] When Montserrat regulatory scrutiny became too intense, the business was moved to Antigua and re-named SIB. Davis was initially SIB's controller and then

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4 *Id.* at ¶¶ 9-25 (App. 6-12).

5 In fraudulent transfer suits arising from a Ponzi scheme, guilty pleas are competent summary judgment evidence for the existence of the Ponzi scheme. This was the holding of the Ninth Circuit in *In re Slatkin*, 525 F.3d 805, 811-12 (9th Cir. 2008), an appeal from a summary judgment granted in favor of a bankruptcy trustee for recovery of profit payments made to investors of a failed investment company. The investors argued on appeal that the trial court improperly considered the guilty plea of the investment firm's owner, in which he conceded that he and the firm had been involved in a Ponzi scheme. *Id*. The Ninth Circuit affirmed the summary judgment, holding that "the plea agreement is admissible under Federal Rule of Evidence 807, and . . . the bankruptcy court did not, therefore, abuse its discretion when it considered the plea agreement in granting summary judgment." *Id.* at 812. *See also Scholes v. Lehmann,* 56 F.3d 750, 762 (7th Cir. 1995) (the trial court properly admitted a Ponzi fraudster's plea agreement as evidence that the entity in receivership had been operated as a Ponzi scheme.); *Armstrong v. Collins*, Nos. 01 Civ. 2437(PAC), 02 Civ. 2796(PAC), 02 Civ. 3620(PAC), 2010 WL 1141158, at *24 (S.D.N.Y. Mar. 24, 2010) ("Yagalla's testimony that he ran a Ponzi scheme, *the fact he pled guilty to conduct amounting to a Ponzi scheme*, that he did not contest the SEC's allegations that he ran a Ponzi scheme, and Fleisher's conclusion that Yagalla indeed ran a Ponzi scheme, lead to the inevitable conclusion that Yagalla did, in fact, run a Ponzi scheme . . .") (emphasis added); *In re Manhattan Inv. Fund Ltd*., 397 B.R. 1, 12 (S.D.N.Y. 2007) ("There is ample support in the record for [the existence of a Ponzi scheme]. For example, the criminal information to which Berger pled guilty set forth that Berger continuously falsified the Fund's performance, sent account statements to current investors that reflected significant gains, concealed the Fund's true state from its auditors, and used his falsified records to attract new investors.").

6 Ex. 2 (James M. Davis's Plea Agreement) at ¶ 17(n) (App. 114).

7 *Id.* at ¶ 17(a) (App. 111).

CFO for both it and its parent company Stanford Financial Group.[8] Stanford, Davis and others regularly misrepresented SIB's revenue, asset values, investment allocation, strategy, liquidity, and safety. Each year, SIB's financial statements—compiled by Davis and others, at Allen Stanford's direction—falsely represented that SIB had strong revenue and held more assets than the year before. Revenue figures, however, were "reverse engineered" to match whatever fictitious return on investment Stanford, Davis, and others decided to show.[9] Asset values were inflated as necessary to offset liabilities to CD holders.[10] Reported assets climbed from $1.2 billion in 2001 to $8.5 billion at the end of 2008.[11] Unknown to the public, SIB's assets included approximately $2 billion in notes receivable from Allen Stanford and $3.2 billion in real estate. These values were largely fictitious in that Stanford's wealth consisted of a group of deeply insolvent companies engaged in a Ponzi scheme and the $3.2 billion in real estate was raw land in Antigua that had just been purchased earlier in the year for only $65 million.[12] The purpose of overstating SIB's earnings, revenue, and assets was to falsely assure investors that SIB was financially strong and that SIB CDs were attractive low-risk investments.[13] The true state of affairs, though, was much different: SIB was insolvent and losing money, which made it dependent on bringing in new CD investor funds to keep the charade going. To avoid exposure by regulators, Stanford, using investor proceeds, bribed key officials of the Antiguan Financial Services Regulatory Commission (the "FSRC"), the Antiguan agency charged with regulating

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8 *Id.* at ¶ 17(a)-(b) (App. 111-112); *see also* Ex. 1 (Decl. of Karyl Van Tassel regarding the Magness Defendants) at ¶ 8 (App. 5).

9 Ex. 2 (James M. Davis's Plea Agreement) at ¶ 17(l) (App. 114).

10 *Id.* at ¶ 17(k) (App. 114).

11 *Id.* at ¶ 17(n) (App. 114-115).

12 *Id.* at ¶ 17(cc) (App. 118).

13 *Id.* at ¶ 17(c) (App. 112).

SIB and regularly examining its records.[14] Stanford's purchase of the FSRC's cooperation was so complete that the FSRC's CEO permitted Stanford's attorneys to draft the FSRC's response to an inquiry from the SEC that suggested SIB was a "possible Ponzi scheme."[15] Stanford also bribed SIB's outside auditor by paying him, over and above his billed professional fees, substantial sums from a secret Swiss bank account.[16]

This evidence establishes conclusively that SIB was a Ponzi scheme. In fact, the Court recently found, based on essentially the same evidence, that the Stanford fraud was indeed a Ponzi scheme. [*See* Doc. 456 at 2 ("The Stanford scheme operated as a classic Ponzi scheme, paying dividends to early investors with funds brought in from later investors."), at 11 ("[T]he Receiver presents ample evidence that the Stanford scheme . . . was a Ponzi scheme."), and at 13 ("The Court finds that the Stanford enterprise operated as a Ponzi scheme . . . .")] The Magness Defendants have not disputed this conclusion. [*See* Doc. 422.]

B. The Magness Defendants received substantial net winnings from their investments in SIB CDs.

Karyl Van Tassel's declaration establishes that the Magness Defendants each received from SIB not only full repayment of their invested principal, but also significant amounts in excess of their investments, as follows:[17]

Name of Defendant	**Amount in Excess of Investment**
The Gary D. Magness Irrevocable Trust	$4,491,442.93
Magness Securities LLC	$879,734.30
GMAG LLC	$3,144,779.91

[14] *Id.* at ¶¶ 17(o)-(s) (App. 115-116).

[15] *Id.* at ¶ 17(t) (App. 116).

[16] *Id.* at ¶ 17(q) (App. 115).

[17] Ex. 1 (Decl. of Karyl Van Tassel regarding the Magness Defendants) at ¶¶ 28-30 (App. 13-14).

As described in detail above and in Ms. Van Tassel's declaration, however, SIB was not a legitimate bank and did not pay interest out of earnings—it was a Ponzi scheme that relied on new CD proceeds to pay existing investors.[18] The Receiver seeks recovery of the Magness Defendants' net winnings in the amounts noted above, so that such funds may be equitably distributed among all victims of the Stanford Ponzi scheme.

III. As a matter of law, the payments of net winnings to the Magness Defendants were fraudulent under TUFTA and, therefore, subject to recovery by the Receiver.

Section 24.005(a) of TUFTA[19] specifies when a transfer is fraudulent:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> > (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

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[18] *Id.* at ¶ 31 (App. 14).

[19] The Texas Uniform Fraudulent Transfer Act applies. A federal court exercising pendent jurisdiction over a state law claim applies the choice of law rule of the state in which it sits. *Carnie*, 2007 WL 1112591, at *7. A fraudulent transfer suit sounds in tort. *Id.*; *In re The Heritage Org., L.L.C.*, 413 B.R. 438, 462 (Bankr. N.D. Tex. 2009). In tort actions, Texas courts apply the "most significant relationship to the occurrence and the parties" test set out in section 145 of the Restatement (Second) of Conflict of Laws. *Gutierrez v. Collins,* 583 S.W.2d 312, 318-9 (Tex. 1979); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984). Texas is the state with the most significant relationship to the occurrences and parties of this case. It is where Stanford's global empire was headquartered and where SIB's sales efforts and strategy were directed. More than any other state, it was the focal point of the Stanford fraud. Although Gary Magness resides in and the Magness Defendants are managed from Colorado—a state that, like Texas, has adopted the UFTA—the thousands of defrauded creditors who were harmed by the fraudulent transfers that the Magness Defendants received reside all across the United States and, indeed, all over the world. The Receiver represents the interest of those defrauded investors in recovering fraudulent transfers. *S.E.C. v. Cook*, No. CA 3:00-CV-272-R, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001) ("[A] receiver represents not only the entity in receivership, but also the interests of its creditors. . . . Thus, while the debtor would not be entitled to set aside a transfer in fraud of his creditors . . . the receiver acting for the creditors may attack it."). The Receiver resides in and conducts the Receivership's business from Texas. And, importantly, Texas is the venue of this Receivership.

> (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Subsection (a)(1) is referred to as the "actual fraud" ground,[20] and subsection (a)(2) is referred to as the "constructive fraud" ground. *Donell*, 533 F.3d at 770; *Armstrong*, 2010 WL 1141158, at *19-22. If either the (a)(1) or (a)(2) ground is proven, then the Receiver is entitled to a judgment against the transferee "for the value of the asset transferred." TEX. BUS. & COMM. CODE ANN. §§ 24.008(a)(1), 24.009(a).[21] In this case, the summary judgment evidence conclusively proves both grounds.

A. The Magness Defendants are liable for their net winnings under section 24.005(a)(1), the "actual fraud" provision of TUFTA.

The intent at issue in subsection 24.005(a)(1) is that of the "debtor"—in this case, SIB—and not that of the investor who received the transfer. "The statute focuses on the intent of the transferor rather than the transferee." *In re IFS Fin. Corp.*, 417 B.R. 419, 438 (Bankr. S.D. Tex. 2009). In fact, "'the transferees' knowing participation is irrelevant under [UFTA]' for purposes of establishing the [actual fraud] premise …." *SEC v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir. 2007) (quoting *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006)).

Moreover, if, as in this case, the transferor was engaged in a Ponzi scheme or similar fraud, then actual intent is conclusively presumed. "Under the UFTA, transfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is,

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[20] "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, *including* amounts which could be considered 'return of principal.' However, there is a 'good faith' defense that permits an innocent winning investor to retain funds up to the amount of the initial outlay." *Donnell*, 533 F.3d at 771 (emphasis in original). Although the Receiver's suit against the Magness Defendants includes claims for return of principal, as previously noted, those claims are not at issue in this motion.

[21] A creditor's ability to obtain a fraudulent transfer judgment is subject to certain defenses set forth in section 24.009 of TUFTA. However, none of those defenses is available to the Magness Defendants under the conclusively established facts of this case. The only section 24.009 defense that could even facially apply to a Ponzi investment scheme is discussed in section III(A) of this Brief, *infra*.

as a matter of law, insolvent from inception." *Quilling v. Schonsky*, 247 F. App'x 583, 586 (5th Cir. 2007). "In [the Fifth] circuit, proving that [the debtor] operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made." *Res. Dev. Int'l, LLC*, 487 F.3d at 301.[22] The Ponzi fraudster makes payments to prior investors "to keep the fraud going by giving the false impression that the scheme is a profitable, legitimate business." *Donnell*, 533 F.3d at 777. Therefore, "transfers made in the course of a Ponzi scheme could have been made for no purpose other than to hinder, delay or defraud creditors." *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 8 (S.D.N.Y. 2007) (citation omitted).[23]

Section 24.009(a) of TUFTA provides a defense to transferees "who took in good faith and for a reasonably equivalent value." As this Court has held, "[a] defendant invoking this defense has the burden to show *both* objective good faith and reasonable equivalence of consideration." [Doc. 456 at 13 (emphasis in original).] The "good faith" element requires the transferee to establish *objective* good faith; the relevant inquiry is whether the transferee "objectively knew or should have known" that the transfer was fraudulent as to other creditors. *Warfield v. Byron*, 436 F.3d 551, 559-60 (5th Cir. 2006).[24] The "reasonably equivalent value"

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[22] "The Fifth Circuit's reasoning applies whether the organization neatly fits within a judicially constructed definition of Ponzi scheme or was a fraudulent scheme that had some, but perhaps not all, attributes of the traditional Ponzi scheme. When an organization perpetuating a fraud makes a transfer necessary for continuation of the fraud, the transfer is made with actual intent to defraud." *In re IFS Fin. Corp.*, 417 B.R. at 439 n.15. For example, "[t]he fact that the scheme may have contained some revenue-generating businesses is not sufficient to defeat a finding of fraudulent intent where the revenue-generating businesses could not have reasonably been expected to fund the operations. " *Id*. at 440. As Karyl Van Tassel states in her declaration, the earnings from SIB's legitimate investments were negligible in comparison to its obligations to CD claimants. *See* Ex. 1 (Decl. of Karyl Van Tassel regarding the Magness Defendants) at ¶¶ 20, 31 (App. 11, 14).

[23] *See also In re Bayou Group, LLC* , 362 B.R. 624, 634 (Bankr. S.D.N.Y. 2007) ("redemption payments of . . . wholly-fictitious profits, as reflected on fraudulent financial statements, were made to earlier investors requesting redemption using funds invested by subsequent investors. Indeed, it is impossible to imagine any motive for such conduct other than actual intent . . . ."); *Drenis v. Haligiannis,* 452 F. Supp. 2d 418, 429 (S.D.N.Y. 2006) ("Plaintiffs' complaint adequately pleads fraudulent intent on the part of the transferor—namely, the defrauding defendants—who are alleged elsewhere in the complaint to be perpetrators of a Ponzi scheme. In such cases, courts have found that the debtor's intent to hinder, delay or defraud is presumed to be established.").

[24] In addressing the objective good faith element, "courts typically assess whether the investors ignored 'red flags' revealing the true nature of the challenged investment. . . . If a winning investor should have known his or her

element requires the transferee to show that he exchanged "reasonably equivalent value" for what he received. *Res. Dev. Int'l, LLC,* 487 F.3d at 302. Both elements are assessed as of the time of the transfer. *See Slone v. Lassiter,* 406 B.R. 778, 805 (Bankr. S.D. Ohio 2009) ("The critical time to determine whether a debtor receives reasonably equivalent value is the time of the transfer."); *Armstrong*, 2010 WL 1141158, at *19 (Objective good faith does not exist if "the facts would have caused a reasonable transferee to inquire into whether the transferor's purpose in effectuating the transfer was to delay, hinder, or defraud the transferor's creditors.").

The Court need not consider the good faith element, however, because the Magness Defendants are unable, as a matter of law, to show that they exchanged reasonably equivalent value for their net winnings. "The vast majority of courts that have considered the issue have held that a debtor does not receive reasonably equivalent value for any payments made to investors that represent false profits." *Carnie*, 2007 WL 1112591, at *12 (citing *In re Hedged-Investors Assocs., Inc.*, 84 F.3d 1286, 1290 (10th Cir. 1996)); *Scholes,* 56 F.3d at 757-58. "[I]nvestors in illegal Ponzi schemes have only provided reasonably equivalent value up to the portion of their actual investment in the scheme. The false profits they may have gained from the illegal scheme are not reasonably equivalent value." *Carnie*, 2007 WL 1112591, at *12.

> Payments of amounts up to the value of the initial investment are not . . . considered a "return of principal," because the initial payment is not considered a true investment. Rather, investors are permitted to retain these amounts because they have claims for restitution or rescission against the debtor that operated the scheme up to the amount of the initial investment. Payments up to the amount of the initial investment are considered to be exchanged for "reasonably equivalent value," and thus not fraudulent, because they proportionally reduce the investors' rights to restitution. If

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investment was 'too good to be true,' the court will void the return of principal to that investor." *SEC v. Forte*, Civil Nos. 09-63, 09-64, 2010 WL 939042, at *6 (E.D. Pa. Mar. 17, 2010).

> investors receive more than they invested, "[p]ayments in excess of amounts invested are considered fictitious profits because they do not represent a return on legitimate investment activity."

Donnell, 533 F.3d at 772 (internal citations omitted).

Because the reasonably equivalent value element of the section 24.009(a) defense is absent as a matter of law, it would not matter if the Magness Defendants had received their net winnings in objective good faith (which the Receiver disputes). They still would have no defense. *Byron*, 436 F.3d at 560 ("We need not draw a conclusion on good faith, however, as his defense would still fail because he did not receive the transfers from RDI in exchange for reasonably equivalent value."); *Carnie*, 2007 WL 1112591, at *12 ("[T]he mere fact that the transferee acted in good faith, without any intent to assist the debtor to defraud or evade creditors, is insufficient to relieve the transferee of liability if the transfer was exchanged for less than reasonably equivalent value.")

B. The Magness Defendants are liable for their net winnings under section 24.005(a)(2), the "constructive fraud" provision of TUFTA.

The Magness Defendants are also liable as a matter of law under section 24.005(a)(2) of TUFTA, the constructive fraud provision. Under this provision, a transfer is deemed fraudulent in law if the debtor—SIB, in this case—(1) made it "without receiving a reasonably equivalent value in exchange" and (2) either knew or should have known that it would be left with unreasonably small capital or was incurring debts beyond its ability to pay. TEX. BUS. & COMM. CODE ANN. § 24.005(a)(2).

The first element is conclusively established because, as discussed in the preceding section, an investor in a Ponzi scheme does not give reasonably equivalent value for transfers that he receives in excess of the amount of his investment.

The second element is also conclusively proved because it is presumed, as a matter of law, that a debtor engaged in a Ponzi scheme has unreasonably small capital or is incurring debts he will be unable to pay. "[A] Ponzi scheme … is, as a matter of law, insolvent from its inception." *Byron*, 436 F.3d at 559. A finding that the debtor "was engaged in a Ponzi scheme—and thus was insolvent from the inception of its business [and therefore unable to pay its debts]—likewise compels the conclusion that the [d]ebtor was operating with unreasonably small capital at the time the transfers in question were made." *In re Canyon Systems Corp*., 343 B.R. 615, 650 (Bankr. S.D. Ohio 2006). Stating the presumption in the language of UFTA,

> [p]roof that transfers were made pursuant to a Ponzi scheme generally establishes that the scheme operator "[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," . . . or "[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due."

Donnell, 533 F.3d at 770-71; *see also Armstrong,* 2010 WL 1141158, at *21 (collecting authorities).

Thus, because SIB is conclusively presumed to have known that it had unreasonably small capital and was unable to pay its debts, and because the Magness Defendants, as a matter of law, did not give reasonably equivalent value for their net winnings, section 24.005(a)(2) provides a second basis upon which the Receiver should be granted summary judgment.

CONCLUSION AND PRAYER

For the foregoing reasons, the Receiver requests that the Court grant partial summary judgment that the Receiver recover from the Magness Defendants their net winnings in the following amounts; prejudgment and post-judgment interest thereon; and costs and attorneys'

fees, as permitted by section 24.013 of the Texas Business and Commerce Code, in an amount to be determined at a later date.

Name of Defendant	**Amount in Excess of Investment**
The Gary D. Magness Irrevocable Trust	$4,491,442.93
Magness Securities LLC	$879,734.30
GMAG LLC	$3,144,779.91

The Receiver also requests such other and further relief to which he may be justly entitled.

Dated: June 22, 2010

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Kevin M. Sadler

Kevin M. Sadler
Texas Bar No. 17512450
kevin.sadler@bakerbotts.com
Robert I. Howell
Texas Bar No. 10107300
robert.howell@bakerbotts.com
David T. Arlington
Texas Bar No. 00790238
david.arlington@bakerbotts.com
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4039
(512) 322-2500
(512) 322-2501 (Facsimile)

Timothy S. Durst
Texas Bar No. 00786924
tim.durst@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6500
(214) 953-6503 (Facsimile)

ATTORNEYS FOR RECEIVER RALPH S. JANVEY

CERTIFICATE OF SERVICE

On June 22, 2010, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. I hereby certify that I will serve all counsel of record electronically or by other means authorized by the Court or the Federal Rules of Civil Procedure.

/s/ Kevin M. Sadler
Kevin M. Sadler