# APPENDIX

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*Appendix A*

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 17-11526

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RALPH S. JANVEY, in his capacity as court-appointed receiver for the STANFORD INTERNATIONAL BANK LIMITED et al.,

*Plaintiff-Appellant*,

v.

GMAC, L.L.C.; MAGNESS SECURITIES, L.L.C.; GARY D. MAGNESS; MANGO FIVE FAMILY INCORPORATED, in its capacity as a trustee for the GARY D. MAGNESS IRREVOCABLE TRUST,

*Defendants-Appellees*.

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Filed: Oct. 8, 2020

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Before: STEWART, DENNIS, and WILLETT, *Circuit Judges.*

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OPINION

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CARL E. STEWART, *Circuit Judge*:

This case requires us to determine whether the Texas Uniform Fraudulent Transfer Act's—or TUFTA's—good faith affirmative defense allows Defendants-Appellees to retain fraudulent transfers received while on inquiry notice of a Ponzi scheme. We

initially held it does not. We then vacated that decision so that the Supreme Court of Texas could clarify whether good faith requires a transferee on inquiry notice to conduct an investigation into the fraud, or, alternatively, show that such an investigation would have been futile. Having received an answer to our question, we once again hold that the Defendants-Appellees' good faith defense must fail. We therefore REVERSE the district court's judgment and RENDER judgment in favor of Plaintiff-Appellant.

## I. FACTS & PROCEDURAL HISTORY

The Securities and Exchange Commission ("SEC") uncovered the Stanford International Bank ("SIB") Ponzi scheme in 2009. For close to two decades, SIB issued fraudulent certificates of deposit ("CDs") that purported to pay fixed interest rates higher than those offered by U.S. commercial banks as a result of assets invested in a well-diversified portfolio of marketable securities. In actuality, the "returns" to investors were derived from new investors' funds. The Ponzi scheme left over 18,000 investors with $7 billion in losses. The district court appointed Plaintiff-Appellant Ralph S. Janvey (the "Receiver") to recover SIB's assets and distribute them to the scheme's victims.

Defendants-Appellees are Gary D. Magness and several entities in which he maintains his wealth (collectively, the "Magness Parties"). Magness was among the largest U.S. investors in SIB. Between December 2004 and October 2006, Magness purchased $79 million in SIB CDs. As of November 2006, Magness's family trust's investment committee

monitored Magness's investments (including the SIB CDs). In July 2008, Bloomberg reported that the SEC was investigating SIB. On October 1, 2008, the investment committee met and, given its perceived risk associated with continued investment in SIB, persuaded Magness to take back, at minimum, his accumulated interest from SIB. Magness's financial advisor, Tom Espy, then approached SIB for a redemption of Magness's investments. SIB, however, informed Espy that redemption would not be possible at that time since, "given the general market decline, SIB[] wanted to keep the asset value of the CDs on its balance sheet." This statement contradicted SIB's public claims of liquidity and strong financial health. On October 10, 2008, SIB agreed to loan Magness $25 million on his accumulated interest. Between October 24 and 28, 2008, Magness borrowed an additional $63.2 million from SIB. In total, Magness received $88.2 million in cash from SIB in October 2008.

The Receiver sued the Magness Parties to recover funds under theories of (1) fraudulent transfer pursuant to TUFTA and (2) unjust enrichment. The Receiver obtained partial summary judgment as to funds in excess of Magness's original investments, and Magness returned this $8.5 million to the Receiver. The Receiver then moved for partial summary judgment, seeking a ruling that the remaining amounts at issue were fraudulent transfers. The Magness Parties also moved for summary judgment on a good faith defense under TUFTA and the Receiver's unjust enrichment claims. On December 21, 2016, the district court granted the Receiver's motion and denied the Magness Parties' motions.

The case proceeded to trial in January 2017. Right before trial, the district court sua sponte reconsidered its denial of summary judgment on the Magness Parties' unjust enrichment claims and concluded that there had been no unjust enrichment. Thus, the only issue presented to the jury was whether the Magness Parties received the $79 million, already determined to be fraudulent transfers, in good faith. After the Magness Parties presented their case-in-chief, the Receiver moved for judgment on the grounds that (1) the Magness Parties were estopped from claiming that they took the transfers in good faith and (2) no reasonable jury could conclude that the Parties established the TUFTA good faith defense. The district court did not rule on the motion. The jury found that the Magness Parties had inquiry notice in October 2008 that SIB was engaged in a Ponzi scheme, but not actual knowledge. The jury also found that further investigation by the Magness Parties into SIB would have been futile.

The Receiver moved for entry of judgment on the verdict, arguing that the jury's finding of inquiry notice meant that, as a matter of law, Magness could not have acted in good faith. The Receiver also renewed his motion for judgment as a matter of law. The district court denied the Receiver's motions and held that the Magness Parties had satisfied their good faith defense. The Receiver renewed his post-trial motions and moved for a new trial. The district court denied these motions and issued its final judgment that the Receiver take nothing aside from his prior receipt of $8.5 million.

Appealing that judgment, the Receiver argued that (1) the Magness Parties were estopped from contesting their actual knowledge of SIB's fraud or insolvency; (2) the jury's finding of inquiry notice defeated the Magness Parties' TUFTA good faith defense as a matter of law; (3) the district court's jury instructions were erroneous and reduced the Parties' burden to establish good faith; and (4) the district court erred by granting the Parties' motion for summary judgment on the Receiver's unjust enrichment claims.

On January 9, 2019, we decided this case on the second argument. Relying on the text of TUFTA and caselaw from the Texas lower courts, this court, and the district courts in this Circuit, we reversed the trial court's judgment and rendered judgment in favor of the Receiver. *See Janvey v. GMAG, L.L.C.*, 913 F.3d 452, 458 (5th Cir. 2019). Magness then filed petitions for panel rehearing and rehearing en banc, in which he argued that we should certify a question to the Supreme Court of Texas regarding the proper test for determining TUFTA good faith. Because the Texas courts to consider TUFTA good faith had not considered whether it includes a diligent investigation requirement or a futility exception, we, on May 24, 2019, vacated our prior opinion and certified the following question to the Supreme Court of Texas: "Is the [TUFTA] 'good faith' defense against fraudulent transfer clawbacks … available to a transferee who had inquiry notice of the fraudulent behavior, did not conduct a diligent inquiry, but who would not have been reasonably able to discover that fraudulent activity through diligent inquiry?" *See Janvey v. GMAG, L.L.C.*, 925 F.3d 229 (5th Cir. 2019).

On December 20, 2019, the Supreme Court of Texas answered our question in the negative and held that "[a] transferee on inquiry notice of fraud cannot shield itself from TUFTA's clawback provision without diligently investigating its initial suspicions [of fraud]—irrespective of whether a hypothetical investigation would reveal fraudulent conduct." *Janvey v. GMAG, L.L.C.*, 592 S.W.3d 125, 133 (Tex. 2019). The Supreme Court of Texas, however, declined to clarify "under what circumstances a diligent investigation by a transferee on inquiry notice of fraud will be sufficient to establish good faith." *Id.* at 132. It also took no position on whether the Magness Parties performed a diligent investigation into their initial suspicions of SIB's Ponzi scheme. *Id.* at 128 n.1.

Because this case is resolved by our TUFTA good faith analysis, we once again only reach the second of the Receiver's arguments.

## II. STANDARD OF REVIEW

We review de novo a renewed motion for judgment as a matter of law. *Montano v. Orange County*, 842 F.3d 865, 873 (5th Cir. 2016). If "there is no legally sufficient evidentiary basis for a reasonable jury to find for [a] party," judgment as a matter of law is proper. *Id.* (quoting *Williams v. Hampton*, 797 F.3d 276, 282 (5th Cir. 2015)). Evidence is viewed "in the light most favorable to the nonmovant." *Id.*

## III. DISCUSSION

The Magness Parties offer several arguments for affirming the district court's judgment. For the reasons that follow, we reject each one.

TUFTA allows a transferee who receives a transfer in good faith and in exchange for reasonably equivalent value to avoid a clawback action by the defrauded creditor. Tex. Bus. & Com. Code § 24.009(a). The transferee bears the burden of proving TUFTA's good faith affirmative defense. *Flores v. Robinson Roofing & Constr. Co.*, 161 S.W.3d 750, 756 (Tex. App.—Fort Worth 2005, pet. denied). Under TUFTA, good faith means that "[a] transferee must show that its conduct was honest in fact, reasonable in light of known facts, and free from willful ignorance of fraud." *GMAG*, 592 S.W.3d at 129. Texas courts evaluating a TUFTA good faith defense consider whether a transferee received fraudulent transfers with actual knowledge or inquiry notice of fraud or insolvency. *See, e.g.*, *Citizens Nat'l Bank of Tex. v. NXS Constr., Inc.*, 387 S.W.3d 74, 85 (Tex. App.—Houston [14th Dist.] 2012, no pet.). A transferee on inquiry notice of fraudulent behavior cannot satisfy the good faith defense without first diligently investigating his or her initial suspicions of fraud. *GMAG*, 592 S.W.3d at 133.

### A. Record Evidence

The Magness Parties first argue that we should affirm the district court's judgment in favor of them because the Parties presented extensive evidence at trial that they "reasonably" investigated their initial suspicions of SIB's fraud.

Even assuming, without deciding, that "reasonably" equates to "diligently" for the purposes of

TUFTA good faith,[1] we are not persuaded by the Magness Parties' argument. The question we must answer for the purposes of the Parties' good faith defense is whether they diligently investigated their initial suspicions of SIB's Ponzi scheme during the time period—October 2008—the jury found them to be on inquiry notice. Yet they assert:

> Shortly after it was formed [in *2006*], and as part of its fiduciary obligations to Magness, [the investment committee] investigated the Stanford CDs because they were the investments about which the [] committee had the least existing knowledge. Then, in *2007*, [the investment committee] asked a third-party consultant (Chuck Wilk), who was familiar with non-traditional investments, to further investigate the investment . . . . As the world economy roiled in the beginning of the mortgage crisis, [the Magness Parties] again investigated Stanford in *March 2008* by arranging for a phone conversation with [SIB's] President, Juan Rodriguez-Tolentino—who later turned out to be a figurehead that did not know Stanford was a Ponzi scheme—to assess SIB's investments' exposure to the mortgage markets. And, even *after* receiving the

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[1] Since, as discussed below, the Magness Parties have not shown that they diligently investigated SIB's Ponzi scheme while on inquiry notice, we leave for another day the discussion of what actions a party must take to show that they diligently investigated fraud for the purposes of a TUFTA good faith defense.

> October 2008 loan transfers at issue here, because [the Magness Parties] still held their investments in SIB CDs, and had millions of [their] dollars on deposit, in *January 2009*, [they] arranged a further meeting with Stanford executives to discuss the health of SIB.

As indicated by the above-quoted passage, the Magness Parties investigated Magness's investments prior to and after October 2008. And instead of investigations into suspected fraud, they were merely inquires by the investment committee to inform itself of the nature and health of Magness's investments. The record does not show the Parties accepted the fraudulent transfers in good faith.

### B. Receiver's Statements

Next, the Magness Parties argue that the Receiver has conceded that they diligently investigated their initial suspicions of SIB's fraud. The Magness Parties rely on two statements from opposing counsel that purportedly show that they conducted such an investigation during the relevant time period. The first statement was made during the Receiver's opening statement in which counsel said that the Magness Parties asked SIB's president in March 2008: "What exactly is this bank investigated in?" and "What strategies is this bank involved in that backs up these certificates of deposit?" But, as indicated above, the statement refers to questions that the Magness Parties posed to SIB's president in March 2008, which predated the period during which the jury found them to be on inquiry notice by seven months. The second statement was made in the Receiver's

objections to the Magness Parties' proposed jury instructions in which counsel asserted: "[T]he undisputed facts in this case show that the Magness Defendants … did investigate the facts that put them on notice of SIB's fraud or insolvency." But the statement does not conclusively show that this investigation occurred when the Magness Parties were found to be on inquiry notice (or whether it was conducted diligently). In sum, neither of the cited statements demonstrate that they diligently investigated their initial suspicions of SIB's Ponzi scheme while on inquiry notice.

### C. Remand for Retrial

The Magness Parties additionally argue that a remand for retrial is necessary since the district court erroneously instructed the jury to determine whether an investigation into SIB's fraud would have been futile instead of whether the Parties diligently investigated their initial suspicions of the Ponzi scheme.[2] They contend that "the record evidence is more than sufficient for a reasonable jury to conclude that the [Magness Parties'] investigation was diligent . . . ." But, as discussed above, that evidence is nowhere to be found. Not only do the Magness Parties' citations to the record and the Receiver's statements not support a conclusion that they diligently investigated their initial suspicions of SIB's fraud while on inquiry notice, but other parts of the record also support an opposite conclusion. For instance, when asked whether he requested additional

[2] Curiously, the Magness Parties argue that a new trial is needed because the district court erred in providing a futility instruction even though the Parties requested that instruction.

information from SIB between October and December 2008, Magness testified, "I don't think so." And Magness's witnesses testified that they did not see a need to inquire into whether SIB was committing fraud until several months after the Magness Parties were found to be on inquiry notice. The Magness Parties have therefore not shown that there is any evidentiary basis for a reasonable jury to find that they diligently investigated their initial suspicions of SIB's fraud while on inquiry notice.[3] Thus, any error that the district court committed in instructing the jury on a futility exception was harmless. *See Rubinstein v. Adm'rs of Tulane Educ. Fund*, 218 F.3d 392, 404 (5th Cir. 2000) ("Even if an instruction erroneously states the applicable law or provides insufficient guidance, [we] will not disturb the judgment unless the error could have affected the outcome of the trial.")

For this reason, we also reject the Magness Parties' argument that a new jury trial is warranted since the Supreme Court of Texas's response to our certified question "is a new pronouncement of Texas

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[3] The Magness Parties assert that we erroneously concluded in a prior opinion that the Parties "did not undertake an investigation prior to accepting the transfers." *See GMAG*, 925 F.3d at 233. They observe that we predicated this conclusion on a statement that "[d]efendants did not perform any inquiry before redeeming their CDs" from SIB, *id.* (quoting *Janvey v. Alguire*, No. 09-CV-0724, 2016 WL 11271878, at *4 (N.D. Tex. Dec. 21, 2016)), but that the "[d]efendants" referenced there do not include the Magness Parties. Regardless of our reliance on *Alguire*, the Parties have still not shown that they diligently investigated their initial suspicions of SIB's fraud while on inquiry notice.

law that departs from the law the parties and the district court considered in crafting the jury instructions." In support of their argument, the Parties rely on *Lang v. Texas & Pacific Railway Company*, in which we reversed the district court because we found that it had erred in refusing to give an instruction in a wrongful death action. 624 F.2d 1275, 1280 (5th Cir. 1980). "[R]elying upon the settled law in this circuit, the district court [in *Lang*] refused the proffered charge. However, … subsequent to the trial and while the appeal was pending, the Supreme Court," in another case, "effectively changed the law in this area." *Id.* at 1279 (internal citation omitted). Given this intervening Supreme Court precedent, we therefore held a new trial was warranted on the issue of damages. *Id.* at 1280. The Magness Parties' reliance on *Lang*, however, is misplaced because we implicitly concluded there that the district court's error in refusing to give the requested jury instruction was harmful. That is not the case here. Nor does the Magness Parties' reliance on *Robinson v. Heilman*, 563 F.2d 1304 (9th Cir. 1977), compel a different result. *Robinson* addressed an unrelated issue, namely whether the defendant's failure to object to a jury instruction prevented the defendant from arguing on appeal that the instructions violated intervening Supreme Court caselaw. *Id.* at 1307.

Furthermore, the Magness Parties have not convinced us that depriving them of a second jury trial would violate their Seventh Amendment and due-process rights. In support of their argument, the Parties rely on three Supreme Court cases. Yet each of these cases is inapposite.

The first case, *Granfinanciera, S.A. v. Nordberg*, held that parties who have not submitted a claim against a bankruptcy estate under § 548 of the Bankruptcy Code have a Seventh Amendment right to a jury trial when sued by a bankruptcy trustee to recover an allegedly fraudulent monetary transfer. 492 U.S. 33, 64 (1989). To the extent that TUFTA is analogous to § 548 of the Bankruptcy Code,[4] *Granfinanciera* stands at most for the proposition that actions to recover fraudulent transfers are entitled to be tried before a jury. But our inquiry here is not whether the Receiver and the Magness Parties had a right to have this case tried by a jury in the first instance. Rather, it is whether the Parties are entitled to another jury trial on a specific issue—whether they diligently investigated their initial suspicions of SIB's Ponzi scheme while on inquiry notice—when the record indicates that no reasonable jury could find for the Parties on that issue. We conclude that they are not. The Seventh Amendment does not require us to remand for a new trial when the verdict cannot be sustained on the trial record. *See Weisgram v. Marley Co.*, 528 U.S. 440, 449-50 (2000).

The second case relied upon by the Magness Parties, *Byrd v. Blue Ridge Rural Electric Co-op., Inc.*, observes that the Seventh Amendment "assigns the decisions of disputed questions of fact to the jury." 356 U.S. 525, 537 (1958). But, as noted above, we have no

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[4] A proposition that itself is questionable. *See GE Capital Commercial, Inc. v. Worthington Nat'l Bank*, 754 F.3d 297, 312 n.21 (5th Cir. 2014) ("Certain authorities indicate that § 548 is not necessarily substantively congruent with state-law counterparts, despite a common ancestry.").

disputed question of fact on whether the Parties diligently investigated their initial suspicions of SIB's fraud while on inquiry notice.

The third case upon which the Magness Parties rely—*Philip Morris USA v. Williams*—notes that due process provides parties with "an opportunity to present every available defense." 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Yet the Parties have had an opportunity to establish the affirmative defense available to them—good faith—and so we would not violate the Parties' due-process rights in forgoing a second jury trial.

Consequently, the Magness Parties have not shown that the Seventh Amendment or due process requires us to remand for another jury trial.

### D. Completeness of the Existing Record

Finally, the Magness Parties contend that we cannot render a decision in favor of the Receiver without a jury finding "as to when [the Magness Parties] first—or initially—had suspicions [of SIB's fraud] or when [they] became charged with inquiry notice." Yet requiring a jury to make these additional findings is not needed for us to adjudicate this case. As the Magness Parties concede, "the determination of whether one is on inquiry [notice] is measured by all things known at the time of transfer." *See GMAG*, 592 S.W.3d at 130 ("Whether inquiry notice exists is determined at the time of the transfer . . . ."). The Parties do not dispute—nor could they—that the fraudulent transfers at issue occurred in October 2008. So, the relevant finding, which we have, is that the Magness Parties were on inquiry notice during this time period. And the Magness Parties have not

shown that they diligently investigated their suspicions (initial or otherwise) of SIB's Ponzi scheme while on inquiry notice. Hence, they have not demonstrated that, as a matter of law, we cannot render a decision in favor of the Receiver based on the existing record.

## IV. CONCLUSION

For the foregoing reasons, we REVERSE the district court's judgment and RENDER judgment in favor of the Receiver.

*Appendix B*

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 17-11526

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RALPH S. JANVEY, in his capacity as court-appointed receiver for the STANFORD INTERNATIONAL BANK LIMITED et al.,

*Plantiff-Appellant*,

v.

GMAC, L.L.C.; MAGNESS SECURITIES, L.L.C.; GARY D. MAGNESS; MANGO FIVE FAMILY INCORPORATED, in its capacity as a trustee for the GARY D. MAGNESS IRREVOCABLE TRUST,

*Defendants-Appellees*.

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Filed: Feb. 23, 2021

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Before: STEWART, DENNIS, and WILLETT, *Circuit Judges.*

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ORDER

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PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled

on Rehearing En Banc (Fed. R. App. P. and 5TH Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5TH Cir. R. 35), the Petition for Rehearing En Banc is DENIED.*

* Judge Gregg Costa, did not participate in the consideration of the rehearing en banc.

*Appendix C*

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 17-11526

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RALPH S. JANVEY, in his capacity as court-appointed receiver for the STANFORD INTERNATIONAL BANK LIMITED ET AL.,

*Plaintiff-Appellant*,

v.

GMAC, L.L.C.; MAGNESS SECURITIES, L.L.C.; GARY D. MAGNESS; MANGO FIVE FAMILY INCORPORATED, in its capacity as a trustee for the GARY D. MAGNESS IRREVOCABLE TRUST,

*Defendants-Appellees*.

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Filed: Jan. 9, 2019

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Before: STEWART, DENNIS, and WILLETT, *Circuit Judges.*

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OPINION

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CARL E. STEWART, *Circuit Judge*:

This case, arising out of the Stanford International Bank Ponzi scheme, requires us to determine whether the Texas Uniform Fraudulent Transfer Act's good faith affirmative defense allows Defendants-Appellees to retain fraudulent transfers

received while on inquiry notice of the Ponzi scheme. We hold it does not. We REVERSE the district court's judgment and RENDER judgment in favor of the Plaintiff- Appellant.

## I. BACKGROUND

The SEC uncovered the Stanford International Bank ("SIB") Ponzi scheme in 2009. For close to two decades, SIB issued fraudulent certificates of deposit ("CDs") that purported to pay fixed interest rates higher than those offered by U.S. commercial banks as a result of assets invested in a well-diversified portfolio of marketable securities. In fact, the "returns" to investors were derived from new investors' funds. The Ponzi scheme left over 18,000 investors with $7 billion in losses. The district court appointed Plaintiff-Appellant Ralph S. Janvey ("the receiver") to recover SIB's assets and distribute them to the scheme's victims.

Defendants-Appellees are Gary D. Magness and several entities in which he maintains his wealth (collectively, "Magness"). Magness was among the largest U.S. investors in SIB. Between December 2004 and October 2006, Magness purchased $79 million in SIB CDs. As of November 2006, Magness's family trust's investment committee monitored his investments, including the SIB CDs.

Bloomberg reported in July 2008 that the SEC was investigating SIB. At an October 2008 meeting, the investment committee persuaded Magness to take back, at minimum, his accumulated interest from SIB. The receiver asserts this decision was the result of mounting skepticism about SIB. Magness asserts it

was because he was experiencing significant liquidity problems given the tumbling stock market.

Later that month, Magness's financial advisor approached SIB for a redemption. On October 9, 2008, SIB instead agreed to loan Magness $25 million on his accumulated interest. SIB applied Magness's outstanding "accrued CD interest" to repay most of this loan. In other words, Magness repaid $24.3 million of the $25 million loan with "paper interest" and $700,000 with cash. Between October 24 and 28, 2008, Magness borrowed an additional $63.2 million from SIB. In total, Magness received $88.2 million in cash from SIB in October 2008.

The receiver sued Magness to recover funds under theories of (1) fraudulent transfer pursuant to the Texas Uniform Fraudulent Transfer Act ("TUFTA") and (2) unjust enrichment. The receiver obtained partial summary judgment as to funds in excess of Magness's original investment, and Magness returned this $8.5 million in fraudulent transfers to the receiver.

The receiver moved for partial summary judgment, seeking a ruling that the remaining amounts at issue were also fraudulent transfers. Magness moved for summary judgment on his TUFTA good faith defense and the receiver's unjust enrichment claim. The district court granted the receiver's motion and denied Magness's motion.

Just before trial, the district court *sua sponte* reconsidered its denial of Magness's motion for summary judgment and rejected the receiver's unjust enrichment claim. Thus, the only issue presented to

the jury was whether Magness received $79 million,[1] already determined to be fraudulent transfers, in good faith. After Magness's case-in-chief, the receiver moved for judgment on grounds that (1) Magness was estopped from claiming he took the transfers in good faith and (2) no reasonable jury could conclude Magness established TUFTA's good faith defense. The district court did not rule on the motion.

The jury determined that Magness had inquiry notice that SIB was engaged in a Ponzi scheme, but not actual knowledge. Inquiry notice was defined in the jury instructions as "knowledge of facts relating to the transaction at issue that would have excited the suspicions of a reasonable person and led that person to investigate." The jury also determined that an investigation would have been futile. A futile investigation was defined in the jury instructions as one where "a diligent inquiry would not have revealed to a reasonable person that Stanford was running a Ponzi scheme."

The receiver moved for entry of judgment on the verdict, arguing that the jury's finding of inquiry notice defeated Magness's TUFTA good faith defense as a matter of law. The receiver also renewed his motion for judgment as a matter of law. The district court denied the receiver's motions and held that Magness satisfied his good faith defense. The receiver renewed his post-trial motions and moved for a new trial. The court denied these motions and issued its

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[1] Magness originally invested $79 million in SIB. He borrowed $88.2 million in cash from SIB, but he paid $700,000 back to SIB in cash and has already ceded $8.5 million to the receiver. The $79 million "loaned" to Magness from SIB remains in dispute.

final judgment that the receiver take nothing aside from his prior receipt of $8.5 million.

On appeal, the receiver argues that (1) Magness was estopped from contesting his actual knowledge of SIB's fraud or insolvency; (2) the jury's finding of inquiry notice defeated Magness's TUFTA good faith defense as a matter of law; (3) the district court's jury instructions were erroneous and reduced Magness's burden to establish good faith; and (4) the district court erred by granting Magness's motion for summary judgment on the receiver's unjust enrichment claim. Because this case is resolved by our TUFTA good faith analysis, we reach only the second of the receiver's arguments.

## II. DISCUSSION

### A.

**[1-3]** We review de novo a renewed motion for judgment as a matter of law. *Montano v. Orange County*, 842 F.3d 865, 873 (5th Cir. 2016). If "there is no legally sufficient evidentiary basis for a reasonable jury to find for [a] party," judgment as a matter of law is proper. *Id.* Evidence is viewed "in the light most favorable to the nonmovant." *Id.*

### B.

**[4]** Texas, like most states, has adopted a version of the Uniform Fraudulent Transfer Act ("UFTA"). UFTA was designed "to prevent debtors from transferring their property in bad faith before creditors can reach it." *BMG Music v. Martinez*, 74 F.3d 87, 89 (5th Cir. 1996). TUFTA allows the recovery of property transfers made "with actual intent to hinder, delay, or defraud any creditor of the debtor."

Tex. Bus. & Com. Code § 24.005(a)(1) (2017). Recipients of fraudulent transfers can prevent clawback actions by proving they received property "in good faith and for a reasonably equivalent value." *Id.* § 24.009(a). Such recipients bear the burden of proving TUFTA's good faith defense. *Flores v. Robinson Roofing & Constr. Co., Inc.*, 161 S.W.3d 750, 756 (Tex. App.—Fort Worth 2005, pet. denied).

**[5]** The term good faith is not defined by TUFTA or UFTA and has not been interpreted by the Supreme Court of Texas. Lower courts analyzing TUFTA good faith have overwhelmingly adopted an objective definition: "A transferee who takes property with knowledge of such facts as would excite the suspicions of a person of ordinary prudence and put him on inquiry of the fraudulent nature of an alleged transfer does not take the property in good faith and is not a bona fide purchaser." *Hahn v. Love*, 321 S.W.3d 517, 527 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *see also GE Capital Commercial, Inc. v. Worthington Nat'l Bank*, 754 F.3d 297, 313 (5th Cir. 2014) (describing *Hahn* as "the most thorough and well-reasoned Texas case applying TUFTA's 'good faith' defense"). Courts evaluating TUFTA good faith consider whether a transferee received fraudulent transfers with actual knowledge or inquiry notice of fraud or insolvency. *See, e.g.*, *Citizens Nat'l Bank of Tex. v. NXS Constr., Inc.,* 387 S.W.3d 74, 85 (Tex. App.—Houston [14th Dist.] 2012, no pet.). A finding of either defeats good faith. *Id.*

**C.**

**[6]** The receiver contends that the district court impermissibly grafted a novel "futility exception" onto the TUFTA good faith defense. The futility exception arises from bankruptcy law. The Bankruptcy Code's fraudulent transfer section contains an affirmative defense that mirrors TUFTA good faith. 11 U.S.C. § 548(c) (2017) (A transferee "that takes for value and in good faith … may retain any interest transferred … to the extent that such transferee … gave value to the debtor in exchange for such transfer."). Courts interpreting § 548(c)'s good faith defense permit transferees to "rebut" a finding of inquiry notice by demonstrating that they conducted a "diligent investigation" into their suspicions. *See, e.g.*, *Templeton v. O'Cheskey*, 785 F.3d 143, 164 (5th Cir. 2015). Some courts permit defendants to rebut inquiry notice in another way. They allow a transferee on inquiry notice who did not investigate to retain good faith, provided the transferee proves the fraudulent scheme's complexity would have rendered any investigation futile. *See, e.g.*, *Christian Bros. High Sch. Endowment v. Bayou No Leverage Fund, LLC*, 439 B.R. 284, 317 (S.D.N.Y. Sep. 17, 2010) ("*Bayou IV*").

In a motion for summary judgment, Magness argued that this futility exception applies to TUFTA good faith. The district court agreed, relying on its analysis of the issue in a *Janvey v. Alguire*[2] order denying summary judgment. To accept the futility

[2] This case was severed from *Janvey v. Alguire*, No. 3:15-CV-00724-N (N.D. Tex.).

exception, the district court applied *O'Cheskey's* diligent investigation requirement to TUFTA good faith. It acknowledged that neither TUFTA nor Texas courts describe a duty to investigate as a required part of TUFTA's good faith defense, citing to *Hahn*, but it concluded that the Supreme Court of Texas would adopt the diligent investigation requirement. To support this decision, the district court observed that the Bankruptcy Code "may be used to interpret UFTA or its Texas equivalent." *Janvey v. Democratic Senatorial Campaign Comm'n, Inc.*, 712 F.3d 185, 194 (5th Cir. 2013) ("*DSCC*"). The district court also noted that neither party was opposed to applying *O'Cheskey*'s diligent investigation requirement to TUFTA good faith.

The district court next determined that the diligent investigation requirement obligated a futility exception. The district court based its decision on a lack of binding authority requiring the conclusion that a transferee on inquiry notice who fails to investigate lacks good faith. Both the parties and the district court considered cases analyzing bankruptcy good faith rather than TUFTA good faith. Ultimately, the district court held that a transferee with inquiry notice must conduct a diligent investigation into the facts that put the transferee on inquiry notice to retain TUFTA good faith. In the alternate, a transferee could satisfy TUFTA good faith by proving that such an investigation would have been futile.

Because the district court denied Magness's motion for summary judgment on TUFTA good faith, the questions of notice and futility were left to the jury. While the jury determined Magness was on

inquiry notice of SIB's Ponzi scheme, it also determined that an investigation into thescheme would have been futile. The district court thus determined that Magness retained good faith. The receiver asks this court to reject the district court's application of the futility exception to TUFTA good faith and find that, under *Hahn*, the jury's finding of inquiry notice defeats Magness's TUFTA good faith defense as a matter of law.

**D.**

**[7]** The Supreme Court of Texas has not addressed whether TUFTA good faith requires a diligent investigation or a corresponding futility exception, so we must make an "*Erie* guess" as to the exception's applicability. *SMI Owen Steel Co., Inc. v. Marsh USA, Inc.*, 520 F.3d 432, 437 (5th Cir. 2008); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). We rely on the state lower courts and other persuasive authorities to guide our inquiry. *GE Capital*, 754 F.3d at 311.

Texas lower courts and federal district courts considering TUFTA good faith rely on *Hahn* to hold that transferees found to have actual knowledge or inquiry notice of fraud cannot claim TUFTA's good faith defense. *Citizens Nat'l*, 387 S.W.3d at 84-86 (upholding jury's finding that transferee had either actual or inquiry notice, which defeated TUFTA good faith defense); *Vasquez v. Old Austin Rd. Land Tr.*, No. 04-16-00025-CV, 2017 WL 3159466, at *3 (Tex. App.—San Antonio 2017, pet. denied) (concluding that the trial court erred by granting transferee TUFTA good faith on summary judgment because of evidence that the transferees were on inquiry notice);

*SEC v. Helms*, No. A-13-CV-1036 ML, 2015 WL 1040443, at *14 (W.D. Tex. Mar. 10, 2015) (ordering TUFTA good faith defeated in the absence of actual knowledge of fraud because of evidence that "would have led a reasonable investor to believe the transfer was fraudulent"); *see also Hahn*, 321 S.W.3d at 527-29 (denying motion for summary judgment on TUFTA good faith because of evidence supporting a finding of actual knowledge or inquiry notice).

We have previously approved of *Hahn*'s conception of TUFTA good faith and upheld a district court's *Hahn*-based jury instructions. *GE Capital*, 754 F.3d at 313 (relying on *Hahn* to determine that TUFTA good faith requires an objective analysis). The jury instructions stated in relevant part: "To establish that it acted in good faith, [the transferee] must prove by a preponderance of the evidence that it lacked actual and [inquiry] knowledge of the debtor's fraud." *Id.* at 301. The instructions did not ask the jurors to determine whether an investigation would have been futile. *Id*. And in fact, no court has considered extending TUFTA good faith to a transferee on inquiry notice who later shows an investigation would have been futile.

The court below is the first to supplement *Hahn*'s TUFTA good faith analysis with interpretations of Bankruptcy Code good faith. 11 U.S.C. § 548(c). We have in prior decisions relied on § 548 to interpret various TUFTA provisions because TUFTA is based on UFTA, which itself is based on § 548. *See, e.g.*, *DSCC*, 712 F.3d at 194 (applying an analysis of § 548(a)(1) to an analysis of TUFTA § 24.005(a)(1)). However, we have previously declined to rely on

§ 548(c) to interpret TUFTA good faith. *GE Capital*, 754 F.3d at 312 n.21 ("We do not base our *Erie* guess on bankruptcy jurisprudence … Certain authorities indicate that § 548 is not necessarily substantively congruent with state-law counterparts, despite a common ancestry.").

**[7]** Our prior disinclination to rely on § 548(c) to interpret TUFTA good faith is reinforced by the fact that neither § 548(c)'s text nor its legislative history defines good faith. *Jimmy Swaggart Ministries v. Hayes*, 310 F.3d 796, 800 (5th Cir. 2002). As a result, courts applying the good faith defense disagree "as to what conditions ought to allow a transferee this defense." *Id.* Even courts that agree on certain conditions disagree as to the meanings of those conditions. For example, this court has agreed with others that a transferee on inquiry notice "must satisfy a 'diligent investigation' requirement" to succeed on a § 548(c) good faith defense. *Templeton*, 785 F.3d at 164 (quoting *Horton v. O'Cheskey*, 544 F. App'x 516, 520 (5th Cir. 2013)). But we have not had the opportunity to define this requirement, and "the case law is not clear" as to its nature. *Bayou IV*, 439 B.R. at 312. Courts also disagree as to whether § 548(c) permits a futility exception. *Compare id.* at 317 (articulating the futility exception), *with Zayed v. Buysse*, No. 11-CV-1042 (SRN/FLN), 2012 WL 12893882, at *22-23 (D. Minn. Sep. 27, 2012) (rejecting the futility exception). This lack of conformity counsels against relying on § 548(c) interpretations to construe TUFTA good faith.

**[9]** Even if we relied on § 548(c) as guidance for applying TUFTA good faith, the futility exception's

inquiry does not implicate TUFTA good faith's central question: whether, at the time he receives property, a transferee has knowledge that "would excite the suspicions of a person of ordinary prudence and put him on inquiry" of that property's fraudulent nature. *Hahn*, 321 S.W.3d at 527. Regardless of the intricate nature of a fraud or scheme, failing to inquire when on inquiry notice does not indicate good faith. *Helms*, 2015 WL 1040443, at *14.

The TUFTA good faith affirmative defense is an exception to the rule that fraudulent transfers must be returned. No prior court considering TUFTA good faith has applied a futility exception to this exception, and we decline to hold that the Supreme Court of Texas would do so. Transferees seeking to retain fraudulent transfers might offer up evidence of undertaken investigations to prove a reasonable person's suspicions would not have been aroused when the transfer was received. *Id.* at *14. But the fact that a fraud or scheme is later determined to be too complex for discovery does not excuse a finding of inquiry notice and does not warrant the application of TUFTA good faith. Because the jury determined Defendants-Appellees were on inquiry notice when they received $79 million in fraudulent transfers, their TUFTA good faith defense is defeated.

## III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's judgment and RENDER judgment in favor of the receiver.

*Appendix D*

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 17-11526

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RALPH S. JANVEY, in his capacity as court-appointed receiver for the STANFORD INTERNATIONAL BANK LIMITED et al.,

*Plaintiff-Appellant*,

v.

GMAC, L.L.C.; MAGNESS SECURITIES, L.L.C.; GARY D. MAGNESS; MANGO FIVE FAMILY INCORPORATED, in its capacity as a trustee for the GARY D. MAGNESS IRREVOCABLE TRUST,

*Defendants-Appellees*.

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Filed: May 24, 2019

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Before: STEWART, *Chief Judge*, DENNIS, and WILLETT, *Circuit Judges*.

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ORDER

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PER CURIAM:

The original opinion in this case was filed on January 9, 2019. *Janvey v. GMAG, LLC*, 913 F.3d 452 (5th Cir. 2019). There, we held that a transferee on inquiry notice of a transfer's fraudulent nature is not entitled to the Texas Uniform Fraudulent Transfer

Act's ("TUFTA") good faith affirmative defense. Because the jury determined that the Defendants-Appellees were on inquiry notice of the fraudulent nature of transfers received from a Ponzi scheme, we reversed the district court's judgment and rendered judgment in favor of the Plaintiff-Appellant. Defendants-Appellees submitted a petition for panel rehearing and a petition for rehearing en banc, which are now pending before the court. In these petitions, Defendants-Appellees requested, in the alternative, that we certify a question to the Supreme Court of Texas on grounds that interpreting TUFTA's good faith defense is a significant issue of first impression, and the panel's interpretation differs from that of other jurisdictions to analyze their own Uniform Fraudulent Transfer Act ("UFTA") good faith defenses.

The petition for panel rehearing is GRANTED, the original opinion is VACATED, and the panel substitutes the following opinion certifying a question to the Supreme Court of Texas.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF TEXAS, PURSUANT TO THE TEXAS CONSTITUTION ART. 5 § 3–C AND TEXAS RULE OF APPELLATE PROCEDURE 58.1.

## I. BACKGROUND

The SEC uncovered the Stanford International Bank ("SIB") Ponzi scheme in 2009. For close to two decades, SIB issued fraudulent certificates of deposit ("CDs") that purported to pay fixed interest rates higher than those offered by U.S. commercial banks as

a result of assets invested in a well-diversified portfolio of marketable securities. In fact, the "returns" to investors were derived from new investors' funds. The Ponzi scheme left over 18,000 investors with $7 billion in losses. The district court appointed Plaintiff-Appellant Ralph S. Janvey ("the receiver") to recover SIB's assets and distribute them to the scheme's victims.

Defendants-Appellees are Gary D. Magness and several entities in which he maintains his wealth (collectively, "Magness"). Magness was among the largest U.S. investors in SIB. Between December 2004 and October 2006, Magness purchased $79 million in SIB CDs. As of November 2006, Magness's family trust's investment committee monitored his investments, including the SIB CDs.

Bloomberg reported in July 2008 that the SEC was investigating SIB. At an October 2008 meeting, the investment committee persuaded Magness to take back, at minimum, his accumulated interest from SIB. The receiver asserts this decision was the result of mounting skepticism about SIB. Magness asserts it was because he was experiencing significant liquidity problems given the tumbling stock market.

Later that month, Magness's financial advisor approached SIB for a redemption. On October 9, 2008, SIB instead agreed to loan Magness $25 million on his accumulated interest. SIB applied Magness's outstanding "accrued CD interest" to repay most of this loan. In other words, Magness repaid $24.3 million of the $25 million loan with "paper interest" and $700,000 with cash. Between October 24 and 28, 2008, Magness borrowed an additional $63.2 million

from SIB. In total, Magness received $88.2 million in cash from SIB in October 2008.

The receiver sued Magness to recover funds under theories of (1) TUFTA fraudulent transfer and (2) unjust enrichment. The receiver obtained partial summary judgment as to funds in excess of Magness's original investment, and Magness returned this $8.5 million in fraudulent transfers to the receiver.

The receiver moved for partial summary judgment, seeking a ruling that the remaining amounts at issue were also fraudulent transfers. Magness moved for summary judgment on his TUFTA good faith defense and the receiver's unjust enrichment claim. The district court granted the receiver's motion and denied Magness's motion.

Just before trial, the district court *sua sponte* reconsidered its denial of Magness's motion for summary judgment and rejected the receiver's unjust enrichment claim. Thus, the only issue presented to the jury was whether Magness received $79 million,[1] already determined to be fraudulent transfers, in good faith. After Magness's case-in-chief, the receiver moved for judgment on grounds that (1) Magness was estopped from claiming he took the transfers in good faith and (2) no reasonable jury could conclude that Magness established TUFTA's good faith defense. The district court did not rule on the motion.

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[1] Magness originally invested $79 million in SIB. He borrowed $88.2 million in cash from SIB, but he paid $700,000 back to SIB in cash and has already ceded $8.5 million to the receiver. The $79 million "loaned" to Magness from SIB remains in dispute.

The jury determined that Magness had inquiry notice that SIB was engaged in a Ponzi scheme, but not actual knowledge. Inquiry notice was defined in the jury instructions as "knowledge of facts relating to the transaction at issue that would have excited the suspicions of a reasonable person and led that person to investigate." The jury also determined that an investigation would have been futile. A futile investigation was defined in the jury instructions as one where "a diligent inquiry would not have revealed to a reasonable person that Stanford was running a Ponzi scheme."

The receiver moved for entry of judgment on the verdict, arguing that the jury's finding of inquiry notice defeated Magness's TUFTA good faith defense as a matter of law. The receiver also renewed his motion for judgment as a matter of law. The district court denied the receiver's motions and held that Magness satisfied his good faith defense. The receiver renewed his post-trial motions and moved for a new trial. The court denied these motions and issued its final judgment that the receiver take nothing aside from his prior receipt of $8.5 million.

On appeal, the receiver argued that (1) Magness was estopped from contesting his actual knowledge of SIB's fraud or insolvency; (2) the jury's finding of inquiry notice defeated Magness's TUFTA good faith defense as a matter of law; (3) the district court's jury instructions were erroneous and reduced Magness's burden to establish good faith; and (4) the district court erred by granting Magness's motion for summary judgment on the receiver's unjust enrichment claim.

We initially decided this case on the second issue. Relying on the text of TUFTA and interpretations by the Texas lower courts, our court, and our circuit's district courts, we reversed the district court's judgment and rendered judgment in favor of the receiver. Magness filed petitions for panel rehearing and rehearing en banc, in which he raised the argument that we should certify the question of TUFTA good faith to the Supreme Court of Texas. Because the Texas courts to consider TUFTA good faith have not considered whether it includes a diligent investigation requirement or a futility exception, we certify the question—whether TUFTA good faith requires a transferee on inquiry notice to conduct an investigation or show such an investigation would have been futile—to the Supreme Court of Texas. *See In re Katrina Canal Breaches Litig.*, 613 F.3d 504, 509 (5th Cir. 2010) (quoting *Free v. Abbott Labs.*, 164 F.3d 270, 274 (5th Cir. 1999)) ("[C]ertification may be advisable where important state interests are at stake and the state courts have not provided clear guidance on how to proceed.").

## II. DISCUSSION

Texas, like most states, has adopted a version of UFTA, which was designed "to prevent debtors from transferring their property in bad faith before creditors can reach it." *BMG Music v. Martinez*, 74 F.3d 87, 89 (5th Cir. 1996). Like UFTA, TUFTA allows the recovery of property transfers made "with actual intent to hinder, delay, or defraud any creditor of the debtor." Tex. Bus. & Com. Code § 24.005(a)(1). Recipients of fraudulent transfers can prevent clawback actions by proving they received property "in

good faith and for a reasonably equivalent value." *Id.* § 24.009(a). Such recipients bear the burden of proving TUFTA's good faith defense. *Flores v. Robinson Roofing & Constr. Co., Inc.*, 161 S.W.3d 750, 756 (Tex. App.—Fort Worth 2005, pet. denied).

The term good faith is not defined by TUFTA or UFTA and has not been interpreted by the Supreme Court of Texas. The most prominent definition of TUFTA good faith requires that to retain good faith, a transferee cannot possess either actual or inquiry notice of a transfer's fraudulent nature. *Hahn v. Love*, 321 S.W.3d 517, 527 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("A transferee who takes property with knowledge of such facts as would excite the suspicions of a person of ordinary prudence and put him on inquiry of the fraudulent nature of an alleged transfer does not take the property in good faith and is not a bona fide purchaser."); *see also GE Capital Commercial, Inc. v. Worthington Nat'l Bank*, 754 F.3d 297, 313 (5th Cir. 2014) (describing *Hahn* as "the most thorough and well-reasoned Texas case applying TUFTA's 'good faith' defense"); *Tex. Pattern Jury Charges—Bus., Consumer, Ins. & Emp't* § 105.29 (2016 ed.) ("A party takes an asset … in good faith if the party (1) had no actual notice of the fraudulent intent of the debtor and (2) lacked knowledge of such facts as would cause a person of ordinary prudence to question whether the debtor had fraudulent intent.").

There is no dispute that Magness was on inquiry notice of the fraudulent nature of SIB's transfers. The jury made this finding. We also know that Magness did not undertake an investigation prior to accepting the transfers. As the court below explained in a pre-

judgment order, "[t]he parties agree that the Defendants [Magness] did not perform any inquiry before redeeming their CDs. However, the Defendants argue that they are excused from this requirement because any investigation would have been futile and would not have led to discovery of Stanford's fraudulent purpose." This brings us to the crux of this case: does TUFTA good faith require a transferee on inquiry notice to conduct an investigation, and if so, can that transferee retain the good faith defense if he does not conduct an investigation but later convinces the factfinder that such an investigation would not have turned up the fraudulent purpose?

The lower court answered yes to both questions. It acknowledged that "[n]either TUFTA nor Texas courts explicitly describe a duty to investigate as a required part of TUFTA's good faith defense. *See, e.g.*, *Hahn*, 321 S.W.3d at 526-27." However, the court, "in making an *Erie* guess as to how Texas law would apply," found it reasonable to adopt the approach taken by the Fifth Circuit in interpreting the Bankruptcy Code's mirror image good faith defense to fraudulent transfer. *See* 11 U.S.C. § 548(c) (A transferee "that takes for value and in good faith … may retain any interest transferred … to the extent that such transferee … gave value to the debtor in exchange for such transfer."). The Fifth Circuit, like many other courts interpreting § 548(c) good faith, permits transferees to "rebut" a finding of inquiry notice by demonstrating that they conducted a "diligent investigation" into their suspicions. *In re Am. Hous. Found.*, 785 F.3d 143, 164 (5th Cir. 2015). Neither Magness nor the receiver disputed this case's application. Thus, the lower court decided that a

transferee on inquiry notice must conduct a diligent investigation to retain the TUFTA good faith defense.

The lower court next determined that the diligent inquiry requirement obligated a futility exception. While the court found no controlling Texas or Fifth Circuit law on point, it was persuaded that a transferee meets the diligent inquiry requirement if he shows that an investigation would have been futile. Because the district court denied Magness's motion for summary judgment on TUFTA good faith, the questions of inquiry notice and futility were presented to the jury. While the jury determined Magness was on inquiry notice of SIB's Ponzi scheme, it also determined that an investigation into the scheme would have been futile. The district court thus determined that Magness retained good faith. On appeal, the receiver asked this court to reject the district court's application of the futility exception to TUFTA good faith and find that, under *Hahn*, the jury's finding of inquiry notice defeats Magness's TUFTA good faith defense as a matter of law.

In our prior opinion, we agreed with the receiver and held that "[r]egardless of the intricate nature of a fraud or scheme, failing to inquire when on inquiry notice does not indicate good faith." *GMAG*, 913 F.3d at 458. Our holding aligns with other decisions interpreting TUFTA good faith. *See Citizens Nat'l Bank of Tex. v. NXS Constr., Inc.*, 387 S.W.3d 74, 84-86 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (upholding jury's finding that transferee had either actual or inquiry notice, which defeated the TUFTA good faith defense); *Vasquez v. Old Austin Rd. Land Tr.*, No. 04-16-00025-CV, 2017 WL 3159466, at *3

(Tex. App.—San Antonio 2017) (concluding that the trial court erred by granting the transferee TUFTA good faith on summary judgment because of evidence that the transferees were on inquiry notice); *SEC v. Helms*, No. A-13-CV-1036 ML, 2015 WL 1040443, at *14 (W.D. Tex. Mar. 10, 2015) (denying TUFTA good faith in the absence of actual knowledge of fraud because of evidence that "would have led a reasonable investor to believe the transfer was fraudulent"); *Hahn*, 321 S.W.3d at 531 (denying motion for summary judgment on TUFTA good faith because of evidence supporting a finding of actual knowledge or inquiry notice).

In *Citizens National*, a Texas court of appeals evaluated a jury's rejection of a TUFTA good faith defense. 387 S.W.3d at 85-86. The jury instructions were pulled directly from *Hahn*'s definition of good faith: they instructed that good faith was defeated on grounds of actual or inquiry notice. *Id.* The court upheld the jury's finding that one transferee had either actual or inquiry notice and thus did not prove the TUFTA good faith defense. *Id.* Magness argues this case is not on point because the court found the transferee "knew the transfer was fraudulent as to some creditors," and thus had actual notice—not inquiry notice. *Id.* at 86. However, another Texas case relied on the same principle to find inquiry notice sufficient to defeat the TUFTA good faith defense. *See Vasquez*, 2017 WL 3159466, at *3 (holding that the trial court erred in granting transferee TUFTA good faith on summary judgment because of evidence "sufficient to raise a genuine issue of material fact as to whether the appellees had [inquiry] notice that the appellants had a claim or interest in the property").

Federal courts have adhered to the *Hahn* standard as well. The Fifth Circuit, evaluating whether the TUFTA good faith defense required an objective or subjective analysis, upheld a district court's *Hahn*-based jury instructions. *GE Capital*, 754 F.3d at 313. The jury instructions stated in relevant part: "To establish that it acted in good faith, [transferee] must prove by a preponderance of the evidence that it lacked actual and [inquiry] knowledge of the debtor's fraud." *Id.* at 301. The instructions did not consider whether the transferee investigated his suspicions or whether such an investigation would have been futile. *Id.* A federal district court, relying on *Hahn*, similarly held that though it believed two transferees received transfers without actual knowledge of fraud, their TUFTA good faith defense was defeated because "there was significant evidence that should have led [transferee] to investigate [transferor] and the purported security interest it sought to acquire, and would have led a reasonable investor to believe the transfer was fraudulent." *Helms*, 2015 WL 1040443, at *14. In other words, inquiry notice defeated the TUFTA good faith defense.

Magness does not offer cases interpreting TUFTA good faith differently. Instead, he argues that the Supreme Court of Texas has interpreted inquiry notice differently in the real property context. The Supreme Court of Texas previously held that a party who purchases land while on inquiry notice "is charged with notice of all the occupant's claims the purchaser might have reasonably discovered on proper inquiry." *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001). But under Texas law, purchasers are subject to a preceding duty to "search the records, for

they are the primary source of information as to title." *Strong v. Strong*, 98 S.W.2d 346, 348 (Tex. 1936). This duty does not arise from the definition of inquiry notice—it informs it. And while there is a diligent investigation requirement, there is no futility exception: "[t]he purchaser cannot say, and cannot be allowed to say, that he made a proper inquiry, and failed to ascertain the truth." *Id.* (citation omitted).

Magness also relies on the fact that other state courts have interpreted their UFTA provisions to include a diligent inquiry requirement for transferees on inquiry notice. *See, e.g.*, *Carey v. Soucy*, No. 1 CA-CV 17-0533, 2018 WL 5556454, at *5 (Ariz. Ct. App. Oct. 30, 2018). However, we found no example of a court applying the diligent inquiry requirement to hold that a transferee retains good faith when he was on inquiry notice and did not investigate prior to accepting a transfer. In fact, three courts applying this requirement held that transferees in this position did not act in good faith. *In re Christou*, Nos. 06-68251-MHM, 06-68376-MHM, 06-68251-MHM, 2010 WL 4008191, at *3-4 (Bankr. N.D. Ga. Sept. 24, 2010); *Walro v. Hatfield*, No. 1:16-cv-3053-RLY-DML, 2017 WL 2772335, at *7 (S.D. Ind. June 27, 2017); *Klein v. McGraw*, No. 2:12-cv-00102-BSJ, 2014 WL 1492970, at *2, *8 (D. Utah Apr. 15, 2014).[2] But, notwithstanding these congruent outcomes, we recognize that other states have adopted a standard that the Texas courts have yet to consider. While the

[2] Reviewing these decisions, it appears that the jury's findings that Magness was on inquiry notice but would not have uncovered the Ponzi scheme had he investigated may sit in tension.

Texas courts have interpreted TUFTA good faith, they have not discussed the applicability of either the diligent inquiry requirement or the futility exception. Given that other states' UFTA good faith defenses have taken on a standard not considered by the Texas courts, we CERTIFY the following question to the Supreme Court of Texas:

> Is the Texas Uniform Fraudulent Transfer Act's "good faith" defense against fraudulent transfer clawbacks, as codified at Tex. Bus. & Com. Code § 24.009(a), available to a transferee who had inquiry notice of the fraudulent behavior, did not conduct a diligent inquiry, but who would not have been reasonably able to discover that fraudulent activity through diligent inquiry?

"We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the question certified." *Janvey v. Golf Channel, Inc.*, 792 F.3d 539, 547 (5th Cir. 2015).

[SEAL]
A True Copy
Certified May 24, 2019
[handwritten: signature]
Clerk, U.S. Court of
Appeals, Fifth Circuit

*Appendix E*

**THE SUPREME COURT OF TEXAS**

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No. 19-0452

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RALPH S. JANVEY, in his capacity as court-appointed receiver for the STANFORD INTERNATIONAL BANK LIMITED et al.,

*Appellants*,

v.

GMAC, L.L.C.; MAGNESS SECURITIES, L.L.C.; GARY D. MAGNESS; MANGO FIVE FAMILY INCORPORATED, in its capacity as a trustee for the GARY D. MAGNESS IRREVOCABLE TRUST,

*Appellees*.

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Filed: Dec. 20, 2019

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OPINION

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JUSTICE BUSBY delivered the opinion of the Court.

The Texas Uniform Fraudulent Transfer Act (TUFTA) is "designed to protect creditors from being defrauded or left without recourse due to the actions of unscrupulous debtors." *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 89 (Tex. 2015). Creditors may invoke TUFTA to "claw back" fraudulent transfers from their debtors to third-party transferees. Yet even if a transfer is fraudulent, the statute does not always require the transferee to relinquish the transferred

asset. If the transferee proves as an affirmative defense that it acted in good faith and the transfer was for a reasonably equivalent value, it may keep the transferred asset.

The U.S. Court of Appeals for the Fifth Circuit has requested our guidance on what constitutes good faith under TUFTA. Specifically, the Fifth Circuit asks whether a transferee on inquiry notice of fraudulent intent can achieve good faith without investigating its suspicions. Without comprehensively defining the contours of TUFTA's good-faith defense, we answer the question no. When a transferee on inquiry notice attempts to use TUFTA's affirmative defense to shield the transfer from the statute's clawback provision, it must show at minimum that it investigated its suspicions diligently. The investigation may not turn up additional evidence of fraud that should be imputed to the transferee, but that result does not negate the suspicions that a transferee on inquiry notice has at the time of the transfer. An investigation is an opportunity for the transferee to demonstrate its good faith, and requiring proof of an investigation negates any incentive transferees may have to remain willfully ignorant of fraud.

## BACKGROUND

Stanford International Bank, Ltd. (the Bank) ran a highly complex Ponzi scheme for almost two decades that attracted over $7 billion in investments. The Bank sold fraudulent certificates of deposit and issued "returns" to its old investors with money procured from new investors. The Bank deceived over 18,000 investors before the Securities and Exchange Commission (SEC) uncovered the scheme in 2009.

Appellee Gary D. Magness and several entities through which Magness invested his funds (collectively, Magness) were among the investors deceived by the Bank. Magness was one of the largest investors, purchasing $79 million of the fraudulent certificates of deposit. Magness withdrew his investments from the Bank sometime after news of the SEC's investigation became public. In 2008, Magness recovered $88.2 million through loans from the Bank: his original investment of $79 million and $9.2 million of "accrued interest" credited to his account with the Bank. He later repaid $700,000 to the Bank, so his net return was $8.5 million.

Once the SEC discovered the Bank's Ponzi scheme, a federal district court appointed appellant Ralph S. Janvey (the Receiver) to recover the Bank's assets and distribute them among the investors equitably. The Receiver sought return of Magness's net payout from the Bank.

The Receiver sued Magness in federal district court to recover these funds, alleging (1) Magness's withdrawal from the Bank should be avoided because it constituted a fraudulent transfer under TUFTA, and (2) Magness was unjustly enriched. *Janvey v. GMAG, L.L.C.*, 913 F.3d 452, 454 (5th Cir. 2019), *vacated and superseded on reh'g*, 925 F.3d 229 (5th Cir. 2019). Magness responded that he satisfied TUFTA's good-faith defense, thus preventing the Receiver from avoiding the Bank's transfer to Magness. The district court granted the Receiver's motion for partial summary judgment for the net amount Magness received from the Bank in excess of his investment; Magness subsequently paid the

Receiver this $8.5 million. *Id.* The district court left to the jury, however, whether the Receiver was entitled to claw back Magness's original $79 million investment. *Id.* The district court also denied Magness's motions for partial summary judgment regarding his defense of good faith and the Receiver's claim of unjust enrichment. *Id.*

Following trial, the jury found Magness had inquiry notice of the Ponzi scheme. *Id.* at 454-55. The jury charge provided: "Inquiry notice is knowledge of facts relating to the transaction at issue that would have excited the suspicions of a reasonable person and led that person to investigate." *Id.* at 454. The next question in the charge asked whether "a diligent inquiry would … have revealed to a reasonable person that Stanford was running a Ponzi scheme." *Id.* at 455. The jury found that "an investigation [would] have been futile." *Id.* The district court denied the Receiver's motion for entry of judgment on the verdict and renewed motion for judgment as a matter of law, holding that Magness satisfied his good-faith affirmative defense. *Id.*

The Receiver appealed to the Fifth Circuit, raising several issues. *Id.* As relevant here, the Receiver contended "the jury's finding of inquiry notice defeated Magness's TUFTA good faith defense as a matter of law." *Id.* The Fifth Circuit agreed and reversed the district court's judgment, rendering judgment for the Receiver. *Id.* at 458. Specifically, the Fifth Circuit determined that Magness failed to satisfy TUFTA's good-faith affirmative defense and that there is no "futility exception" to that defense. *Id.*

Following the Fifth Circuit's decision, Magness sought rehearing. He urged the Fifth Circuit to certify the good-faith question instead of relying on its *Erie* guess. The Fifth Circuit vacated its prior opinion and certified the following question, which we accepted:

> Is the Texas Uniform Fraudulent Transfer Act's "good faith" defense against fraudulent transfer clawbacks, as codified at Tex. Bus. & Com. Code § 24.009(a), available to a transferee who had inquiry notice of the fraudulent behavior, did not conduct a diligent inquiry, but who would not have been reasonably able to discover that fraudulent activity through diligent inquiry?

*Janvey v. GMAG, L.L.C.*, 925 F.3d 229, 235 (5th Cir. 2019).

## ANALYSIS

May a transferee on inquiry notice of a fraudulent transfer satisfy TUFTA's good-faith defense without conducting a diligent investigation? We conclude that the answer is no. If a transferee has actual knowledge of facts that would lead a reasonable person to suspect the transfer is voidable under TUFTA but does not investigate, the transferee may not achieve good-faith status to avoid TUFTA's clawback provision—regardless of whether the transferee reasonably could have discovered the fraudulent activity through diligent inquiry.

### I. Standard and scope of review

"The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with

determinative questions of Texas law having no controlling Supreme Court precedent." Tex. R. App. P. 58.1; *accord* Tex. Const. art. V, § 3-c(a). The question certified requires us to interpret section 24.009 of the Texas Business and Commerce Code. *GMAG*, 925 F.3d at 235. We are asked to determine how a transferee found to be on inquiry notice can prove good faith to qualify for section 24.009's affirmative defense, which is a question of law. *Id.*

Although the Fifth Circuit certified its question without limiting this Court's response, we typically "provide answers solely as to the status of Texas law on the questions asked." *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 620 (Tex. 2004). This certified question is narrow and assumes the transferee did not investigate the suspicious circumstances initially raising concern.[1] We limit our holding to this question.

## II. TUFTA protects creditors but provides an affirmative defense for transferees.

The Uniform Fraudulent Transfer Act (UFTA) was created to ensure defrauded creditors attain similar remedies. *See* Unif. Fraudulent Transfer Act Prefatory Note, 7A pt. II U.L.A. 4-7 (2006). Creditors may circumvent transfers made or obligations incurred by their debtors in certain circumstances, including where the transfer was made or obligation

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[1] "How our answer is to be applied to the facts of this case is the province of the certifying court." *Interstate Contracting Corp.*, 135 S.W.3d at 620 (citing *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 798 (Tex. 1992)). Therefore, although Magness asserted in his briefing and at oral argument that he actually investigated his suspicions, we express no opinion on that issue.

incurred with the intent to hinder, delay, or defraud any creditor. *Id.* § 7. Because "the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof," UFTA provides badges of fraud on which creditors and courts can rely. *Id.* at Prefatory Note. UFTA allows defrauded creditors to "obtain … avoidance of the transfer or obligation to the extent necessary to satisfy" their claims. *Id.* § 7(a)(1).

At least twenty-five jurisdictions have adopted some version of UFTA. *Id.* at Prefatory Note. Texas joined that group in 1987. Tex. Bus. & Com. Code ch. 24. TUFTA's purpose mirrors UFTA's and is designed "to prevent debtors from prejudicing creditors by improperly moving assets beyond their reach." *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 566 (Tex. 2016). TUFTA provides its own badges of fraud in "a list of eleven, nonexclusive indicia of fraudulent intent." *Id.* Similar to UFTA, TUFTA's badges provide guidance in determining whether a transfer was made or obligation incurred with actual intent to hinder, delay, or defraud a creditor. Bus. & Com. Code § 24.005(b). If so, a creditor may invoke TUFTA's clawback provision to avoid the transfer or obligation, or to obtain certain other remedies. *Id.* § 24.008.

Avoidance is not unbridled, however. TUFTA protects a transferee against avoidance of a fraudulent transfer (or an obligee against avoidance of a fraudulent obligation) if it can prove it "took in good faith and for a reasonably equivalent value." *Id.* § 24.009(a). We have previously considered the "reasonably equivalent value" prong of this defense.

*See generally Golf Channel*, 487 S.W.3d 560. Today, we address the "good faith" prong.

## III. The "good faith" prong of the transferee's defense includes concepts of inquiry notice, honesty in fact, and lack of willful ignorance.

TUFTA does not define good faith. *Cf.* Bus. & Com. Code § 24.002 (listing defined terms). UFTA, which we have used previously to interpret TUFTA,[2] similarly fails to define good faith. When a statute does not define a word or phrase, we look to its plain or common meaning. *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015). Mindful of TUFTA's instruction that "principles of law and equity … supplement its provisions," Bus. & Com. Code § 24.011, we also consider the common law in determining the meaning of good faith.

Good faith has been defined as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing . . . , or (4) absence of intent to defraud or to seek unconscionable advantage." *Good Faith*, Black's Law Dictionary (11th ed. 2019).[3] We have explained that good faith "requires conduct that is honest in fact and is free of both improper motive and willful ignorance of the facts at hand." *Gulf Energy*,

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[2] *Cf. Golf Channel*, 487 S.W.3d at 572-73 (using UFTA to construe TUFTA's "reasonably equivalent value" prong).

[3] *See R.R. Comm'n of Tex. v. Gulf Energy Expl. Corp.*, 482 S.W.3d 559, 568 (Tex. 2016) (using dictionary to give undefined term in Natural Resources Code its plain meaning).

482 S.W.3d at 569 (defining good faith in the Texas Natural Resources Code when the Railroad Commission mistakenly plugged an offshore well). And we have recognized "reasonableness" as a component of good faith. *Wichita County v. Hart*, 917 S.W.2d 779, 786 (Tex. 1996) (combining "honesty in fact" with "reasonableness" to define what constitutes good faith under the Whistleblower Act).

We conclude that the meaning of good faith under TUFTA is consistent with these principles. A transferee must show that its conduct was honest in fact, reasonable in light of known facts, and free from willful ignorance of fraud. In applying this standard, Texas courts have considered "whether a transferee received fraudulent transfers with actual knowledge or inquiry notice of fraud." *GMAG*, 913 F.3d at 455-56 (citing *Citizens Nat'l Bank of Tex. v. NXS Constr., Inc.*, 387 S.W.3d 74, 85 (Tex. App.—Houston [14th Dist.] 2012, no pet.)). The Fifth Circuit's certified question presumes, and the jury found, that Magness was on inquiry notice. We therefore focus our analysis on how a transferee with inquiry notice of fraud can prove good faith.

Inquiry notice is "[n]otice attributed to a person when the information would lead an ordinarily prudent person to investigate the matter further." *Inquiry Notice*, Black's Law Dictionary (11th ed. 2019). A person is on inquiry notice when he or she is "aware of facts that would have prompted a reasonable person to investigate." *Id.* Whether inquiry notice exists is determined at the time of the transfer, not with the benefit of hindsight. *See Golf Channel*, 487

S.W.3d at 569 (reaching same conclusion as to value and reasonable equivalency components of defense).

As one court of appeals has explained, a transferee is on inquiry notice when it "takes property with knowledge of such facts as would excite the suspicions of a person of ordinary prudence" regarding "the fraudulent nature of an alleged transfer." *Hahn v. Love*, 321 S.W.3d 517, 527 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). A transferee on inquiry notice knows facts that are, or should be, suspicious: red flags that a reasonable person would have investigated prior to engaging in the transfer.[4]

There are at least two types of knowledge a transferee has when on inquiry notice: (1) actual knowledge of facts that raise a suspicion of fraud, and (2) constructive knowledge of what the transferee could have uncovered in an investigation. Understanding the distinction between these types of knowledge helps to explain why a transferee on inquiry notice of the debtor's fraudulent intent cannot prove good faith without conducting a diligent investigation—regardless of what that investigation would reveal.

In the context of inquiry notice, actual knowledge means "[k]nowledge of information that would lead a reasonable person to inquire further." Actual Knowledge, Black's Law Dictionary (11th ed. 2019). As we have recognized, actual knowledge of suspicious

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[4] *Quilling v. Stark*, No. 3-05-CV-1976-BD, 2007 WL 415351, at *3 (N.D. Tex. Feb. 7, 2007) (holding transferee's attempt to prove TUFTA's good-faith defense failed as matter of law because a reasonable person would have investigated legitimacy of transfer).

facts shifts a transferee's status from taking in good faith to being on inquiry notice of fraud. *See Blum v. Simpson*, 17 S.W. 402, 403 (Tex. 1886) ("Taking all these circumstances in connection, it does seem that there was enough to arouse a suspicion in the mind of any prudent man that there was an intention on the part of [debtor] to dispose of his property in such a way that, if he had any creditors, … they would be deprived of all power to enforce their claims against him.").[5]

If a diligent inquiry could have uncovered facts showing fraudulent intent, Texas common law imputes knowledge of those additional facts to the transferee as well. *Woodward v. Ortiz*, 237 S.W.2d 286, 289 (Tex. 1951). Constructive knowledge is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Constructive Knowledge*, Black's Law Dictionary (11th ed. 2019). The transferee can be charged with this knowledge in hindsight so long as it reasonably could have been discovered at the time of the transfer. *Ruebeck v. Hunt*, 176 S.W.2d 738, 739 (Tex. 1943) ("Knowledge of facts that would cause a reasonably prudent person to make inquiry, which if pursued would lead to a discovery of fraud, is in law equivalent to knowledge of the fraud.").

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[5] *Blum* was decided under a predecessor fraudulent transfer statute providing that a purchaser with "notice" of the debtor's fraudulent intent could not keep the transfer. *See* Tex. Rev. Civ. Stat. Ann. art. 2465 (1879).

## IV. A transferee on inquiry notice of fraud must conduct a diligent investigation to prove good faith.

As framed by these legal principles regarding good faith and inquiry notice, the question we must decide is: how can a transferee prove good faith when it has actual knowledge of facts raising a suspicion that the transfer is voidable under TUFTA but lacks constructive knowledge of facts showing fraudulent intent? The jury found that Magness was on inquiry notice because he or his agents had actual "knowledge of facts relating to the transaction at issue that would have excited the suspicions of a reasonable person and led that person to investigate." In this circumstance, a transferee seeking to prove good faith must show that it investigated the suspicious facts diligently. A transferee who simply accepts a transfer despite knowledge of facts leading it to suspect fraud does not take in good faith. *See Blum*, 17 S.W. at 403 ("Yet [transferee] made no inquiry . . . . This showed a disposition on his part to make the trade, and get possession of the property at a low figure, no matter how much the seller's creditors might suffer thereby.").

Magness responds by pointing out that the jury also found "a diligent inquiry would not have revealed to a reasonable person that Stanford was running a Ponzi scheme." Because any investigation would have been fruitless, he contends knowledge of the Bank's fraudulent intent cannot be imputed to him, and therefore he took in good faith.

We agree with Magness's premise, but we reject his conclusion. Whether a transferee lacks

constructive knowledge of the debtor's fraudulent intent does not, by itself, determine good faith. Magness's proposed rule does not acknowledge his actual knowledge of facts that raised a suspicion of fraud. Nor does it acknowledge that choosing to remain willfully ignorant of any information an investigation might reveal is incompatible with good faith.

A transferee cannot show good faith in this situation because, irrespective of what a hypothetical investigation could reveal, the facts giving rise to a reasonable suspicion of fraud have not been confronted. Even if the fraud is inherently undiscoverable, the transferee still has actual knowledge of facts at the time of the transfer that would lead a reasonable person to suspect fraud and investigate. If the transferee fails to demonstrate its good faith and avoid willful ignorance by conducting a diligent investigation, it cannot be characterized as acting with honesty in fact.

Magness contends that our decision in *Wethered's Administrator v. Boon* supports his position that when a reasonable inquiry could not have revealed the true facts, a finding of inquiry notice is inappropriate.[6] But the transferee in *Wethered's Administrator*

[6] 17 Tex. 143, 150 (1856) ("The general doctrine is, that whatever puts a party upon an inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty … and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding.").

investigated his suspicions diligently,[7] so that case is not instructive in answering the certified question. We are not asked to define under what circumstances a diligent investigation by a transferee on inquiry notice of fraud will be sufficient to establish good faith, and we express no view on that issue. Instead, we are simply asked whether an investigation is necessary—that is, whether a transferee on inquiry notice of fraud may achieve good faith without any investigation at all. We conclude that in this situation, a transferee wishing to take advantage of the defense must show it conducted a diligent investigation.

The parties and amici also dispute whether *Humphries v. Freeman*, 22 Tex. 45 (1858), supports the proposition that a transferee can take in good faith despite its initial suspicions of fraud when a diligent investigation would not have revealed the fraud. Applying a predecessor statute to TUFTA,[8] we explained in *Humphries*:

> It is not necessary that [transferee] should have been influenced in what he did, by a like fraudulent intent, in order to avoid the assignment as to him also; or that he should have intended to assist [debtor] to defraud his creditors; or that he should have had actual

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[7] *See id.* at 148-49, 151 (reversing judgment based on jury finding of inquiry notice where transferee conducted diligent investigation).

[8] *See* Act approved Jan. 18, 1840, 4th Cong., R.S., § 2, 1840 Repub. Tex. Laws 28, 29, *reprinted in* 2 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 202, 203 (Austin, Gammel Book Co. 1898) (providing fraudulent transfer was void unless "possession shall really and bona fide remain with the donee").

> knowledge that such, in fact, was the intention of [debtor]. It is sufficient to affect him with notice, if by ordinary diligence he might have known. If he had a knowledge of such facts, as were calculated to create a suspicion that such was the purpose of [debtor], and to put him upon inquiry; if, in a word, he had reason to know or believe that such was the intention of [debtor], it is sufficient to avoid the assignment as to him, as effectually as if he had actually known it.

*Id.* at 50.

The Receiver relies on the last sentence to argue that a transferee on inquiry notice cannot achieve good faith. But according to the University of Miami as amicus, the second sentence suggests that a transferee on inquiry notice can still take in good faith unless a hypothetical diligent investigation would reveal fraud, as the transferee only has constructive knowledge of what the investigation would reveal. Under this view, Magness would not be responsible for the knowledge that initially raised his suspicions of fraud because the jury found an investigation would have been futile, and he may invoke TUFTA's good-faith defense successfully.

We conclude that *Humphries* does not affect our answer to the certified question. That case addressed whether a creditor seeking to void a transfer must show that the transferee had fraudulent intent or actual knowledge of fraud, or whether a lesser standard of notice is also sufficient. We concluded that notice is sufficient and reversed a jury's verdict for the

transferee as contrary to the evidence, which showed the facts known to the transferee

> were certainly sufficient to put him on inquiry, and to affect him with notice; and consequently, to affect the property, in his hands, with the fraud of his assignor. The evidence ought to have been decisive in the minds of the jury, that the assignment was fraudulent and void under the statute, as having been made with the intent to delay, hinder and defraud the creditors of [debtor].

*Id.* at 51. We went on to observe that the jury should have been instructed actual knowledge was not required, *id.* at 53, but we had no occasion to parse the concepts of inquiry notice and constructive knowledge to provide a detailed analysis of what proof would be sufficient to avoid the transfer.

Magness also cites a litany of cases he argues "consistently recogniz[e] that a party may be charged with notice only of 'those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed.'"[9] The cases cited decide whether an individual may be charged with constructive knowledge, which is not the question before us. Rather, we are asked to decide how a transferee on inquiry notice can prove good faith to invoke TUFTA's defense.

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[9] Quoting *Woodward*, 237 S.W.2d at 289; *see also Flack v. First Nat'l Bank of Dalhart*, 226 S.W.2d 628 (Tex. 1950); *Ruebeck*, 176 S.W.2d at 739-40; *Ron Carter, Inc. v. Kane*, No. 01-10-00815-CV, 2011 WL 5100903 (Tex. App.—Houston [1st Dist.] Oct. 27, 2011, pet. denied) (mem. op.).

## CONCLUSION

A transferee on inquiry notice of fraud cannot shield itself from TUFTA's clawback provision without diligently investigating its initial suspicions—irrespective of whether a hypothetical investigation would reveal fraudulent conduct. To hold otherwise rewards willful ignorance and undermines the purpose of TUFTA. We answer the certified question no.

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J. Brett Busby
Justice

**OPINION DELIVERED:** December 20, 2019

*Appendix F*

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

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No. 15-cv-00401

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RALPH S. JANVEY, RECIEVER,

*Plaintiff*,

v.

GMAC, L.L.C., et al.,

*Defendants*.

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Filed: Sept. 14, 2017

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ORDER

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This Order addresses Plaintiff Ralph S. Janvey's (the "Receiver") motions for judgment as a matter of law, [243] and [251], and motion for entry of judgment [260]. Because the jury had a legally sufficient evidentiary basis for its verdict, GMAG, LLC, Magness Securities, LLC, Gary D. Magness, and Mango Five Family, Inc., in its capacity as trustee for the Gary D. Magness Irrevocable Trust, (collectively, the "Magness Defendants") are entitled to judgment and the Court denies the Receiver's motions.

## I. The Origins of the Motions

This case was tried to a jury beginning January 9, 2017. The jury found (1) that the Magness Defendants

did not have actual knowledge of R. Allen Stanford's Ponzi scheme, (2) that the Magness Defendants did have inquiry notice of Stanford's Ponzi scheme, and (3) that further investigation of the Magness Defendants' suspicions would have been futile. Court's Charge to the Jury 7-9 [256], Verdict of the Jury [257]. Thus, the Magness Defendants prevailed at trial on their good-faith defense under the Texas Uniform Fraudulent Transfer Act. The Receiver moves for judgment as a matter of law under Rule 50 on the grounds that (1) the Magness Defendants are estopped from asserting their good-faith defense and (2) the evidence was insufficient to support the verdict. The Receiver also moves for entry of judgment on the jury's verdict on the ground that the jury's finding on inquiry notice is sufficient to require judgment for the Receiver.

## II. The Court Denies the Receiver's Rule 50 Motions

### A. The Magness Defendants Are Not Estopped From Asserting Good Faith

The Receiver argues that the Magness Defendants made sworn statements on Internal Revenue Service tax forms about their state of mind regarding Stanford and that those statements are incompatible with their good-faith defense. Specifically, the Receiver cites the statement that the Magness Defendants were "concerned" that their certificate of deposit ("CD") "principal was in jeopardy" based on "the investigation of Stanford that was active in 2008." The Receiver argues that the Magness Defendants took a "completely contrary" position in

this litigation and that such a "bait-and-switch tactic" is not allowed.

The Magness Defendants' tax form statements are insufficient to preclude their good-faith defense as a matter of law. The Receiver relies on several authorities for the proposition that sworn statements on federal tax returns bind the maker to that position in later judicial proceedings. But given the timing of the transfers (October 2008), Magness Defendants' Stanford Advisor Tom Espy's testimony about when his concerns arose (December 2008), and the time at which the tax form statements were made (September and October 2009), it is reasonable to conclude that the tax form statements do not contradict the Magness Defendants' position that the October 2008 transfers were taken in good faith. Thus, estoppel doctrines do not require judgment for the Receiver. Moreover, these statements do not establish actual knowledge as a matter of law, nor do they override the jury's finding that investigations of the Magness Defendants' concerns would have led to such knowledge. Consequently, even if the Magness Defendants' tax form statements conclusively established that they were concerned about losing their investment based on a Securities and Exchange Commission investigation of Stanford International Bank, Ltd. ("SIBL"), such a concern would not require the Court to set aside the jury's verdict.

### B. The Jury's Verdict Is Reasonable Based on the Evidence

Based on the evidence in the record, the jury's answers to the Court's questions are reasonable. The Receiver argues that no reasonable jury could have

found for the Magness Defendants regarding whether the Magness Defendants had (1) actual notice or (2) inquiry notice of Stanford's Ponzi scheme. Because the jury found that the Magness Defendants were on inquiry notice, the Court addresses only the Receiver's argument on actual notice.

The Receiver argues that the Magness Defendants had actual knowledge of SIBL's fraud or insolvency based on SIBL's refusal to allow the Magness Defendants to redeem their CDs, which contrasted with SIBL's public claims of financial strength. But the jury also heard evidence from a variety of witnesses showing that the Magness Defendants did not have actual knowledge of SIBL's fraud or insolvency. The jury is "the sole judge[] of the credibility … of each witness and the weight … to be given to the witness's testimony." Court's Charge to the Jury 3 [256]. Based on the evidence, a reasonable jury could determine that the Magness Defendants did not have actual notice of SIBL's fraud or insolvency. Accordingly, the Receiver is not entitled to judgment as a matter of law on this question.

## III. The Court Denies the Receiver's Motion for Entry of Judgment

Neither is the Receiver entitled to judgment on the jury's verdict. The Receiver argues that the jury's finding that the Magness Defendants were on inquiry notice of Stanford's Ponzi scheme is alone sufficient to require judgment for the Receiver. The Court addressed the good-faith analysis in *Janvey v. Alguire*, Civil Action No. 3:09-CV-0724-N (N.D. Tex). In that case, and again in briefing in this case, the Receiver argued that *In re American Housing Foundation*, 785

F.3d 143 (5th Cir. 2015), provided the correct two-step framework for analyzing good faith. Under that framework, the Court examines (1) "whether the transferee had information that put it on inquiry notice that the transferor was insolvent or that the transfer might be made with a fraudulent purpose" and (2) whether, having been put on inquiry notice, the transferee "satisf[ied] a 'diligent investigation' requirement." *Id.* at 164. In *Alguire*, the Court not only adopted the two-step framework, but also concluded that the second step could be rebutted if the jury concluded that further investigation would be futile. The Receiver now argues that the two-step analysis for which he argued is actually a one-step analysis resulting in victory for him. The Court will not revisit its previous rulings on this question. Accordingly, the Court denies the Receiver's motion and, by separate document, renders judgment for the Magness Defendants.

**CONCLUSION**

The Court denies the Receiver's motions for judgment as a matter of law under Rule 50. The Court also denies the Receiver's motion for judgment on the jury verdict under Rule 58. By separate document, the Court renders judgment on the verdict for the Magness Defendants.

Signed September 14, 2017.

[handwritten: signature]
David C. Godbey
United States District Judge

*Appendix G*

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

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No. 15-cv-00401

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RALPH S. JANVEY,

*Plaintiff*,

v.

GMAC, L.L.C., et al.,

*Defendants*.

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Filed: Dec. 14, 2017

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ORDER

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This Order addresses Plaintiff Ralph S. Janvey's (the "Receiver") renewed motion for entry of judgment as a matter of law [282], motion for new trial [280], and motion to amend or correct the judgment [280]. For the reasons below, the Court denies the Receiver's renewed motion for entry of judgment as a matter of law and motion for new trial and grants the motion to amend or correct the judgment.

## I. The Origins of the Motions

This case was tried to a jury beginning on January 9, 2017. On January 18, 2017, the jury found that (1) GMAG, LLC; Magness Securities, LLC; Mango Five Family, Inc., in its capacity as trustee for the

Gary D. Magness Irrevocable Trust; and Gary D. Magness (collectively, the "Magness Defendants") did not have actual knowledge of R. Allen Stanford's Ponzi scheme, (2) the Magness Defendants did have inquiry notice of Stanford's Ponzi scheme, and (3) further investigation of the Magness Defendants' suspicions would have been futile. Court's Charge to the Jury 7–9 [256]; Verdict of the Jury [257]. Thus, the Magness Defendants prevailed at trial on their good-faith defense under the Texas Uniform Fraudulent Transfer Act ("TUFTA"). Upon denying the Receiver's previous motions for judgment as a matter of law and motion for entry of judgment, the Court entered final judgment for the Magness Defendants on September 14, 2017. Final Judgment [269]. The Receiver now again moves for judgment as a matter of law under Federal Rule of Civil Procedure 50. The Receiver alternatively moves for a new trial under Rule 59 and further moves to amend or correct the judgment under Rule 59 or 60.

## II. The Court Denies the Receiver's Renewed Motion for Entry of Judgment as a Matter of Law

The Receiver moves for entry judgment as a matter of law under Federal Rule of Civil Procedure 50 on the grounds that (1) the Magness Defendants are estopped from contesting notice of the fraudulent nature of the transfers, (2) no reasonable jury could conclude from the evidence that the Magness Defendants did not have inquiry notice in taking the transfers, and (3) the jury's finding on inquiry notice is sufficient to require judgment for the Receiver. But the Court has already rejected these very arguments,

*see* Order 2-4 [268], and will not revisit its previous ruling on these issues. Accordingly, the Court denies the Receiver's renewed motion for entry of judgment as a matter of law.

## III. The Court Denies the Receiver's Motion for New Trial

The Receiver alternatively moves for a new trial under Federal Rule of Civil Procedure 59 on the grounds that the Court (1) erroneously based the question of good faith in the jury instructions on notice that Stanford was engaged in a Ponzi scheme, (2) committed plain error by giving prejudicial instructions to the jury, (3) erroneously admitted evidence from defense witnesses concerning Gary Magness' state of mind, (4) erred by admitting the prior deposition testimony of James Davis and Juan-Rodriguez Tolentino, (5) improperly struck a juror for cause *sua sponte* during jury selection, and (6) erroneously granted summary judgment on the issue of unjust enrichment. For the reasons that follow, the Court rejects each of these grounds and denies the motion.

### A. The Court Did Not Err in Basing the Question of Good Faith in the Jury Instructions on Notice That Stanford was Engaged in a Ponzi Scheme

The Receiver first argues that the Court should grant a new trial because the jury instructions (1) incorrectly based the question of good faith on whether the Magness Defendants were on notice that Stanford was engaged in a Ponzi scheme, rather than on notice that Stanford was insolvent or a fraud, and (2) did not define the term 'Ponzi scheme.' Although

the Receiver claims that there was sufficient evidence at trial that the Magness Defendants were aware of Stanford's insolvence or fraud, the Court has already ruled that "the evidence in this case [does not] support[] anything other than a Ponzi scheme." Offic. Elec. Tr. of Trial (Volume 6) Procs. 255:4-5 [303]. The Court stands by its prior ruling. Because no reasonable jury could find that the Magness Defendants were on notice of Stanford's insolvence or fraud but not on notice that Stanford was engaged in a Ponzi scheme, the Court's jury instructions on good faith were properly framed. Furthermore, the Court holds that it was not necessary to define 'Ponzi scheme' in the jury instructions given the jury's familiarity with the frequently-used term over the course of the seven day trial. *See Janvey v. Dillon Gage, Inc. of Dallas*, 856 F.3d 377, 389 (5th Cir. 2017) ("As a general matter, '[t]erms which are reasonably within the common understanding of juries, and which are not technical or ambiguous, need not be defined in the trial court's charge.'" (citing *United States v. Anderton*, 629 F.2d 1044, 1048-49 (5th Cir. 1980))). In any event, any error in not defining the term in the jury instructions was harmless given that the Court previously defined the term during trial. *See* Offic. Elec. Tr. of Trial (Volume 1) Procs. 10:19-24 [298]. Thus, a new trial is not warranted on this ground.

### B. The Court Did Not Commit Plain Error in Giving Instructions to the Jury

The Receiver next argues that the Court should grant a new trial because the jury instructions on the good faith question were confusing and the Court

improperly verbally advised the jury as to the legal effect of its answers to the questions in the jury charge. But the question at issue, despite being framed in the negative, was not unduly confusing and the Court properly gave "instructions and explanations necessary" for the jury to answer the questions submitted. Fed. R. Civ. P. 49(a)(2). Moreover, the Court did not err in informing the jury as to the legal effect of its answers to the jury charge questions, as "[f]ederal judges are free to tell the juries the effects of their answers." *Turlington v. Phillips Petroleum Co.*, 795 F.2d 434, 443 (5th Cir. 1986). Accordingly, this argument does not merit a new trial.

### C. The Court Did Not Erroneously Admit Evidence from Defense Witnesses Concerning Gary Magness' State of Mind

The Receiver further argues that the Court should grant a new trial because it erred in admitting evidence from several defense witnesses concerning Gary Magness' state of mind. In particular, the Receiver points to seven examples of defense witnesses allegedly speculating about what Gary Magness knew or believed, purportedly in violation of the Federal Rules of Evidence, Fifth Circuit case law, and the Court's own comments during pretrial conference. Yet the Receiver overlooks the Court's clarification during trial that when there is "foundation for the testimony" – if, for example, the witness was "there and heard things that allowed [her] to conclude what another person was thinking" – such evidence is admissible and in accordance with Fifth Circuit precedent. Offic. Elec. Tr. of Trial (Volume 3) Procs. 170:7-17 [300]; *see John*

*Hancock Mut. Life Ins. Co. v. Dutton*, 585 F.2d 1289, 1294 (5th Cir. 1978). Upon reviewing the testimony now contested by the Receiver, the Court holds that each piece of evidence had proper foundation and was rightly admitted. Consequently, the Receiver is not due a new trial on this ground.

### D. The Court Did Not Err in Admitting Prior Deposition Testimony of James Davis and Juan-Rodriguez Tolentino

The Receiver additionally argues that the Court should grant a new trial because it erroneously admitted deposition testimony of James Davis and Juan-Rodriguez Tolentino from prior legal actions. The Receiver claims that the prior deposition testimony was inadmissible because (1) the prior actions and the instant case involve different causes of action and (2) the incentive to contest the issues in the prior actions was not the same as that in the instant case. But these points are unavailing. First, the causes of action in the two suits need not be the same for deposition testimony from a prior action to be admitted in a later case. *See* McCormick on Evidence § 304 ("[N]either the form of the proceeding, the theory of the case, nor the nature of the relief sought need be the same between the proceedings. . . . The requirement has become, not a mechanical one of identity or even of substantial identity of issues, but rather that the issues in the first proceeding, and hence the purpose for which the testimony was offered, must have been such as to produce an adequate motive for testing on cross-examination the credibility of the testimony."). Second, the principal inquiry in admitting prior deposition testimony is

whether the party against whom it is later offered had a "similar motive" to develop it on, for example, cross-examination. Fed. R. Evid. 804(b)(1)(B). Yet "similar motive does not mean identical motive," *Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 552 (5th Cir. 2000), and the Court has already determined that the Receiver had "sufficiently adequate incentive to cross" the deponents at issue here, Offic. Elec. Tr. of Trial (Volume 4) Procs. 65:23 [301]. The Court thus holds that the prior deposition testimony was properly admitted pursuant to Federal Rule of Evidence 804(b)(1) and Federal Rule of Civil Procedure 32(a)(8). Hence, this argument does not merit a new trial.

### E. The Court Did Not Improperly Strike a Juror for Cause Sua Sponte During Jury Selection

The Receiver next argues that the Court should grant a new trial because it improperly struck a juror for cause *sua sponte*. During voir dire, Juror No. 12, the juror at issue, indicated that she had previously invested in a company that had "bottom[ed] out," resulting in investors losing "substantial amounts" of money. Offic. Elec. Tr. of Trial (Volume 1) Procs. 68:21-69:2 [298]. In response to the Court's question asking whether the similarity of her prior experience to the facts of the instant case would impact her ability to be a fair juror, Juror No. 12 stated:

> To be totally honest with you, I'll say it had a big impact on me, so I don't know if I could totally be honest, because I don't know what would be mentioned, you know, what would be said to relate to, you know, what I saw in

> the past. So I think that it would have some bearings on it, a lot of bearings on it really.

*Id.* at 69:13-18. Over the Receiver's objection, the Court then struck Juror No. 12 for cause, explaining that "given her personal financial loss and the factual similarities … she said [her prior experience] would affect her [ability to be a fair juror]." *Id.* at 71:23-72:1. The Receiver now claims that the Court's *sua sponte* dismissal of Juror No. 12 was improper because she did not unequivocally say she could not be fair. However, the Court's factual determination was within its discretion, as the juror's statements sufficiently demonstrated her inability to be impartial in the case. This ground thus does not warrant a new trial.

### F. The Court Did Not Erroneously Grant Summary Judgment on the Issue of Unjust Enrichment

The Receiver finally argues that the Court should grant a new trial because its grant of summary judgment for the Magness Defendants on the issue of unjust enrichment at the pretrial conference, after previously denying the motion via written order, was legally erroneous and thus constituted prejudicial error. As the Receiver himself recognizes, *see* Rec.'s Reply in Supp. of Mot. for New Trial and Fur. Alt. Mot. to Amend or Corr. the J. 3 [297], the Court's reconsideration of the original summary judgment ruling is indeed procedurally permissible, *see* Fed. R. Civ. P. 54(b); *Jackson v. Roach*, 364 Fed. App'x. 138, 139 (5th Cir. 2010). On the merits, as the Court explained at length at the pretrial conference, the Court's grant of summary judgment was legally

proper because the Receiver's theory of unjust enrichment "would be an extension under Texas law," the governing law on the issue. Offic. Elec. Tr. of Pretrial Conf. Procs. 5:8 [305].

The Receiver now argues that the question of good faith under the TUFTA and the question of whether the Magness Defendants were unjustly enriched are two separate questions that should have been presented to a jury. The Court, however, stands by its prior holding that "there[ is] [no] possible circumstance where the Receiver could lose on its TUFTA claim yet prevail on its unjust enrichment claim" and thus the second question need not have been submitted to the jury. *Id.* at 5:20-22. Specifically, the jury could not find unjust enrichment consistently with its findings that the Magness Defendants did not have actual knowledge of Stanford's Ponzi scheme and that any investigation would have been futile. Hence, "any error in [this] decision [is] harmless," thereby not warranting a new trial. *Id.* at 5:19. The Court additionally holds that any impact this decision had on the parties' preparation for trial was not prejudicial. Consequently, this ground is not an adequate basis for a new trial.

## IV. The Court Grants the Receiver's Motion to Amend or Correct the Judgment

The Receiver further moves to amend or correct the judgment under Federal Rule of Civil Procedure 59 or 60 on the grounds that the final judgment issued by the Court, *see* Final Judgment [269], is inconsistent with a prior Court order granting partial summary judgment to the Receiver for net winnings received by the Magness Defendants, *see* Order [909] *in Janvey v.*

*Alguire*, Case No. 3:09-CV-0724-N (N.D. Tex). Pursuant to Rule 60, a "court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). The "core idea" of the rule is that a judgment may be corrected where it "simply has not accurately reflected the way in which the rights and obligations of the parties have in fact been adjudicated." *Rivera v. PNS Stores*, Inc., 647 F.3d 188, 193 (5th Cir. 2011) (footnote omitted). The Fifth Circuit has clarified:

> Where the record makes it clear that an issue was actually litigated and decided but was incorrectly recorded in or inadvertently omitted from the judgment, the district court can correct the judgment under Rule 60(a), even where doing so materially changes the parties' positions and leaves one party to the judgment in a less advantageous position.

*Id.* at 199. Because the Court did indeed previously grant summary judgment for the Receiver on the issue of the Magness Defendants' net winnings but inadvertently omitted this ruling from the final judgment, the Court grants the Receiver's motion to amend or correct the judgment. The Court issues by separate document an amended final judgment that properly reflects this prior adjudication.

**CONCLUSION**

The Court denies the Receiver's renewed motion for entry of judgment as a matter of law and motion for new trial. The Court grants the Receiver's motion to amend or correct the judgment. By separate document, the Court issues an amended final

judgment for the Magness Defendants that correctly reflects the Court's prior grant of summary judgment to the Receiver with respect to the Magness Defendants' net winnings.

Signed December 13, 2017.

[handwritten: signature]
David C. Godbey
United States District Judge