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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

R. WAYNE KLEIN, as Receiver,

Plaintiff - Appellee,

v.

JANET L. ROE, an individual,

Defendant - Appellant.

No. 21-4065

R. WAYNE KLEIN, as Receiver,

Plaintiff - Appellee,

v.

JEAN R. ARMAND, an individual,

Defendant - Appellant.

No. 21-4071

R. WAYNE KLEIN, as Receiver,

Plaintiff - Appellee,

v.

ROGER HAMBLIN, an individual; DIGITAL WAVE ENERGY, LLC, a Utah limited liability company,

Defendants - Appellants.

No. 21-4075

R. WAYNE KLEIN, as Receiver, Plaintiff - Appellee, v. JOHN HOWELL, an individual; ROCKING H ENTERPRISES INC., a Texas corporation, Defendants - Appellants.	No. 21-4076
R. WAYNE KLEIN, as Receiver, Plaintiff - Appellee, v. CAREY HADDERTON, an individual, Defendant - Appellant.	No. 21-4077
R. WAYNE KLEIN, as receiver, Plaintiff - Appellee, v. REINHOLD FINKES, an individual, Defendant - Appellant.	No. 21-4090

Appeals from the United States District Court
for the District of Utah
(D.C. No. 2:19-CV-00719-DN)
(D.C. No. 2:19-CV-00779-DN)

(D.C. No. 2:19-CV-00783-DN)
(D.C. No. 2:19-CV-00705-DN)
(D.C. No. 2:19-CV-00704-DN)
(D.C. No. 2:19-CV-00761-DN)

Steven R. Paul (Denver C. Snuffer, Jr. with him on the briefs), Nelson, Snuffer, Dahle & Poulsen, Sandy, Utah, for Defendants-Appellants.

Jeffery A. Balls, Parr Brown Gee & Loveless, P.C., Salt Lake City, Utah, on the brief for Plaintiff-Appellee.

Before **HOLMES**, Chief Judge, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

HOLMES, Chief Judge.

Appellants,[1] salespersons who sold solar lenses to investors on behalf of RaPower-3, LLC ("RaPower"), International Automated Systems, Inc., ("IAS"), LTB1, LLC, ("LTB1"), their subsidiaries and affiliates (collectively with RaPower, IAS, and LTB1, the "Receivership Entities"),[2] Neldon Johnson, and R. Gregory Shepard (collectively with Receivership Entities, the "Receivership Defendants"), appeal from the district court's grant of summary judgment to R. Wayne Klein, the

[1] On February 23, 2022, counsel for Roger Hamblin and Digital Wave Energy, LLC, informed the court of Mr. Hamblin's death. In a subsequent filing, counsel indicated that a personal representative would *not* be appointed on behalf of Mr. Hamblin. As such, we **dismiss** this appeal as to Mr. Hamblin.

[2] The subsidiaries and affiliated entities are: Solco I, LLC; XSun Energy, LLC; Cobblestone Centre, LC; LTB O&M, LLC; U-Check, Inc.; DCL16BLT, Inc.; DCL-16A, Inc.; N.P. Johnson Family Limited Partnership; Solstice Enterprises, Inc.; Black Night Enterprises, Inc.; Starlite Holdings, Inc.; Shepard Energy; and Shepard Global, Inc.

court-appointed Receiver ("Receiver"), who now controls the Receivership Entities. In an ancillary action, the government brought suit against Receivership Defendants for allegedly operating a fraudulent and unlawful solar energy tax scheme, in which they encouraged investors to take federal tax deductions for purchasing defunct solar technology. The district court enjoined these entities from continuing to promote the scheme, ordered disgorgement of their gross receipts, and appointed Mr. Klein as the Receiver of the Receivership Entities with full control of their assets and business operations.

Thereafter, the Receiver initiated lawsuits against individuals and entities—including Appellants—that were paid commissions for selling the Receivership Defendants' solar lenses to investors. Among other claims, the Receiver brought claims for avoidance of a fraudulent transfer under the Uniform Voidable Transactions Act ("UVTA"), offer and sale of unregistered securities, and offer and sale of securities by an unregistered broker-dealer or agent. The district court granted summary judgment to Mr. Klein on these claims.

Appellants now appeal the district court's decision. Among other things, they assert that the district court erred in granting summary judgment on the Receiver's UVTA claim, as Appellants allegedly gave reasonably equivalent value for the commissions that they received. They also claim that the district court improperly ordered disgorgement of the commissions paid to Appellants. Having carefully considered all of Appellants' arguments for relief, and exercising jurisdiction under 28 U.S.C. § 1291, we **affirm** the district court's judgment.

I

A

These appeals arise from actions ancillary to *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115 (D. Utah 2018). In that case, Mr. Johnson claimed to have invented a solar energy technology, which involved placing arrays of solar lenses on towers. *See United States v. RaPower-3, LLC*, 960 F.3d 1240, 1244 (10th Cir. 2020). To generate income for the project, Mr. Johnson sold the solar lenses to prospective investors. *See id.* Specifically, through a multi-level marketing model, "buyers would purchase lenses from one of Mr. Johnson's entities, IAS or RaPower-3 . . . for a down payment of about one-third of the purchase price." *Id.* In return, the Receivership Defendants promised investors substantial returns and tax benefits.

When customers purchased lenses, they also signed operations and maintenance agreements with LTB1, with LTB1 agreeing to operate and maintain the customers' lenses to produce revenue. *See id.* LTB1 was supposed to make quarterly payments to the lens purchasers, representing a portion of the revenues earned from the electricity generated from the solar lenses.

No customer ever leased her solar lens to an entity other than LTB1. *See* Aplts.' App., Vol. VII, at 5 (District Ct. Mem. Decision and Order Granting in Part Receiver's Mot. for Summ. J., filed Apr. 16, 2021). Furthermore, customers never took direct physical possession of their lenses. *See id.* The Receivership Defendants did not even track which lenses belonged to which customer; thus, there was no means for a customer to know which specific lens she owned.

As such, Mr. Johnson's entities retained the lenses and controlled what happened to them. *See id.* at 6. Indeed, "[t]he Receivership Defendants emphasized how little any customer would have to do with respect to 'leasing out' their lenses: '[s]ince LTB[1] install[ed], operate[d] and maintain[ed] your lenses for you.'" *Id.* (second and third alterations in original). However, it was soon determined that Mr. Johnson's purported solar energy technology never had been—and never would be—"a commercial-grade solar energy system that converts sunlight into electrical power or other useful energy." *RaPower-3*, 960 F.3d at 1244 (quoting *RaPower-3*, 343 F. Supp. 3d at 1150).

Accordingly, the government brought suit against Receivership Defendants, alleging that they were operating a fraudulent and unlawful solar energy tax scheme by encouraging investors to take federal tax deductions for their purchase of defunct solar technology. *See id.* at 1243. After a bench trial, the district court enjoined the Receivership Entities from continuing to promote the scheme and ordered disgorgement of their gross receipts. *See id.* The court further ordered the entities to turn over their assets and business operations to Mr. Klein—who now serves as the Receiver of the Receivership Entities. *See id.* at 1254.

B

In his role as Receiver, Mr. Klein initiated lawsuits against individuals and entities that were paid commissions for selling the Receivership Defendants' solar lenses to investors. Of relevance here, Appellants acted as salespersons for the Receivership Defendants, selling solar lenses to prospective investors. In exchange

for their services, Appellants received commissions from the Receivership Defendants.

The Receiver alleged that Appellants were not licensed under state or federal securities laws to sell securities, and that the lens purchase program was not registered—as it should have been—with the U.S. Securities and Exchange Commission or the Utah Division of Securities as a security. As such, the Receiver sought to recover the commissions that Receivership Defendants paid to Appellants, as those commissions were allegedly obtained pursuant to illegal contracts and in violation of securities laws.

The Receiver brought:

> three (3) claims for Avoidance of a Fraudulent Transfer under Utah Code Ann. § 25-6-5(1), § 25-6-8, § 25-6-202(1)(a) and § 25-6-303 (First, Second and Third Claims); a claim for unjust enrichment (Fourth Claim); a claim for Fraud in Offer and Sale of Securities (Fifth Claim); Offer and Sale of Unregistered Securities (Sixth Claim); and Offer and Sale of Securities by an Unregistered Broker-Dealer-Agent (Seventh Claim).

Aplts.' Opening Br. at 9.[3]

After discovery, the Receiver filed a motion for summary judgment on his First, Second, Third, Sixth, and Seventh claims against Appellants. The district court granted summary judgment in favor of the Receiver and against all Appellants on the

[3] Utah renumbered Utah Code Ann. §§ 25-6-5 and 25-6-8 as §§ 25-6-202 and 25-6-303, respectively. *See* Utah Code Ann. § 25-6-5 ("Renumbered as § 25-6-202 by Laws 2017, c. 204, § 7, eff. May 9, 2017."); Utah Code Ann. § 25-6-8 ("Renumbered as § 25-6-303 by Laws 2017, c. 204, § 11, eff. May 9, 2017.").

Receiver's First, Sixth, and Seventh claims brought under Utah Code Ann. § 25-6-202(1)(a) (actual fraud); § 61-1-3 (improper licensure to sell securities); and § 61-1-7 (lack of proper registration for securities), and corresponding federal securities laws. *See, e.g.*, Aplts.' App., Vol. VII, at 2; *id.* at 31 (District Ct. Mem. Decision and Order Granting in Part Receiver's Mot. for Summ. J., filed Apr. 27, 2021). It then found the Receiver's Second, Third, Fourth, and Fifth claims to be moot. *See id* at 2. This appeal followed.

II

Appellants appeal from the district court's judgment, first arguing that the Receiver "failed to allege sufficient material facts to establish the essential elements of a fraudulent conveyance." Aplts.' Opening Br. at 21. Alternatively, Appellants contend that even if the transfers were fraudulent, Appellants met the requirements to invoke the good faith defense—as they took the transfers in good faith and for reasonably equivalent value. *See id.* at 26. As such, Appellants claim that the transfers were not voidable under the UVTA. Second, Appellants assert that the district court improperly ordered disgorgement of the commissions that they were paid for selling the solar lenses.

The Receiver first argues that "Appellants have not identified any disputed issues of material fact that would preclude summary judgment in favor of the Receiver" on his UVTA claim. Aplee.'s Resp. Br. at 14. The Receiver further contends that Appellants cannot rely on the good faith defense, as they "did not provide reasonably equivalent value to the Receivership Entities in exchange for the

payments of commissions to Appellants." *Id.* at 15. Finally, the Receiver asserts that the district court did not err in ordering disgorgement, as "Appellants [were] not entitled to retain the payments they received for violating [securities] laws pursuant to an illegal contract." *Id.* at 33.

After rejecting Appellants' threshold standing arguments, we conclude that the district court (1) properly granted summary judgment to the Receiver on his UVTA claim, and (2) did not abuse its discretion in ordering disgorgement of the commissions paid to Appellants, as the commissions were obtained in violation of state and federal securities laws.[4] Accordingly, we uphold the district court's judgment.

III

"We review the district court's summary judgment decision de novo, applying the same standards as the district court." *Punt v. Kelly Servs.*, 862 F.3d 1040, 1046 (10th Cir. 2017). "Summary judgment is proper if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Peterson v. Martinez*, 707 F.3d 1197, 1207 (10th Cir. 2013). However, the "mere existence of

[4] In an unpublished order and judgment, acting as a panel of our court, we recently resolved another appeal relating to the same solar lens program and involving the same Receiver; the appellant in that case, proceeding pro se, also sold solar lenses for the Receivership Entities. *See Klein v. Shepherd*, No. 21-4064, 2023 WL 4542160, at *1 (10th Cir. July 14, 2023) (unpublished). The appellant in *Shepherd* advanced some arguments for reversal that are similar to those presented here. *See, e.g.*, *id.* at *6–8. We concluded that all of the appellant's arguments in *Shepherd* lacked merit and affirmed the district court's judgment. *See id.* at *3.

some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)); *see N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1171–72 (10th Cir. 2021) ("To survive a motion for summary judgment, the nonmoving party must show more than '[t]he mere existence of a scintilla of evidence in support of the [nonmoving party's] position . . . there must be evidence on which the jury could reasonably find for the [nonmoving party].'" (alterations and omission in original) (quoting *Anderson*, 477 U.S. at 252)).

To determine whether a "genuine issue" as to a material fact exists, we consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52; *accord SEC v. GenAudio Inc.*, 32 F.4th 902, 920 (10th Cir. 2022). Furthermore, "[m]ere allegations unsupported by further evidence . . . are insufficient to survive a motion for summary judgment." *Potts v. Davis Cnty.*, 551 F.3d 1188, 1192 (10th Cir. 2009) (quoting *Baca v. Sklar*, 398 F.3d 1210, 1216 (10th Cir. 2005)); *accord James v. Wadas*, 724 F.3d 1312, 1319–20 (10th Cir. 2013).

IV

A

Appellants first challenge the Receiver's standing to sue under the UVTA. *See* Aplts.' Opening Br. at 21–25. Specifically, Appellants contend that, under the UVTA, the Receiver "had to establish that *a creditor* had a claim before or after the debtor made the transfer with the actual intent to hinder, delay or defraud any creditor of the debtor." *Id.* at 22. Here, however, Appellants claim that the Receiver "failed to" identify an appropriate creditor in this case. *Id.* More specifically, Appellants argue that the UVTA does not empower the Receiver (i.e., the named creditor) to bring claims on behalf of the Receivership Entities.

The Receiver responds by claiming that he "identified the creditor in his pleadings." Aplee.'s Resp. Br. at 19. More specifically, he contends that "the Receiver, standing in the shoes of the defrauded Receivership Entities, *is* the creditor." *Id.* (emphasis added). This, he argues, is consistent with our standing analysis in *Klein v. Cornelius*, 786 F.3d 1310 (10th Cir. 2015), in which we "recognized that a business entity abused by a fraudulent scheme qualifies as a defrauded creditor" and that a receiver could "assert the claims of the [entities] that were defrauded." Aplee.'s Resp. Br. at 19–20. As such, the Receiver contends that he "has standing to assert the claims under the UVTA." *Id.* at 21. In our view, the Receiver has the better of this argument.

Appellants correctly note that the UVTA provides rights and remedies for defrauded creditors. *See* Utah Code Ann. §§ 25-6-202, 25-6-303. However, as we

made clear in *Cornelius*, a business entity abused by a fraudulent scheme qualifies as a defrauded creditor for purposes of the UVTA. *See* 786 F.3d at 1316. In reaching that conclusion, we adopted the reasoning of *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), which held that defrauded corporations were creditors "because the corporations had been 'evil zombies' under the defendant's 'spell,' [and accordingly] had been injured." *Cornelius*, 786 F.3d at 1317 (quoting *Scholes*, 56 F.3d at 754). Furthermore, we have consistently endorsed the view that the receiver of such defrauded entities has standing to recover fraudulent transfers under the UVTA. *See id.*; *see also Wing v. Dockstader*, 482 F. App'x 361, 363 (10th Cir. 2012) (unpublished) (concluding that a receiver had standing to bring claims on behalf of the defrauded corporation under the UVTA);[5] *cf. Donell v. Kowell*, 533 F.3d 762, 776–77 (9th Cir. 2008) (holding that a receiver had standing to bring claims on behalf of a defrauded entity under the California Uniform Fraudulent Transfer Act); *cf. Eberhard v. Marcu*, 530 F.3d 122, 132–33 (2d Cir. 2008) (analyzing *Scholes* and other relevant Seventh Circuit authority on receiver standing, and reasoning that the receiver "lacks standing" because he is not a receiver for the defrauded entity). As such, our precedent forecloses Appellants' legal argument—*viz.*, that a receiver may

[5] We rely occasionally for support on persuasive nonprecedential decisions of our court and other courts, fully aware that these decisions do not bind us. *See* FED. R. APP. P. 32.1; 10TH CIR. R. 32.1.

not bring claims on behalf of a defrauded entity to recover fraudulent transfers under the UVTA.

Here, the Receiver stands in the shoes of the Receivership Entities. These entities were "evil zombies" under Mr. Johnson's spell and were used to advance Mr. Johnson's personal ends. More specifically, Mr. Johnson used the Receivership Entities to perpetuate and expand his fraudulent solar energy tax scheme. Accordingly, the Receivership Entities were injured and are considered defrauded creditors under the UVTA. Thus, once Mr. Johnson was removed, and the Receiver was put in place, the Receiver could assert the claims of the defrauded Receivership Entities. As such, we conclude that the Receiver had standing to assert the present claims under the UVTA.

B

Next, Appellants claim that the Receiver "failed to allege sufficient material facts to establish the essential elements of a fraudulent conveyance." Aplts.' Opening Br. at 21. Specifically, Appellants contend that the "clear majority of the facts alleged by [the Receiver] were not material and in no way related to any individual Appellant." *Id.* at 20. Furthermore, Appellants assert "those facts which were alleged[ly] material to Appellants [were] by themselves insufficient to meet the elements of any of the asserted claims." *Id.*

Although the Receiver acknowledges that many of the alleged "facts [did] not relate directly to the Appellants or their conduct," he nonetheless contends that those facts "relate [to] the Receiver's claims in this lawsuit." Aplee.'s Resp. Br. at 18. In

particular, the Receiver claims that the alleged facts establish "that the Receivership Entities were operating a fraudulent tax scheme, that Receivership Entities made the transfers with the intent to hinder, delay, or defraud their creditors, and that the sale of the solar lenses and associated management contracts constituted securities." *Id.* The Receiver further notes that "Appellants did not attempt to dispute many of the undisputed material facts" in the district court proceedings or on appeal. *Id.* As such, the Receiver claims that Appellants "have failed to demonstrate that . . . the undisputed facts are insufficient to" establish the essential elements of a fraudulent conveyance. *Id.* at 18–19. We agree.

Under the UVTA, a transfer is voidable if the debtor (i.e., the Receivership Defendants) made the transfer with the "actual intent to hinder, delay, or defraud any creditor of the debtor." Utah Code Ann. § 25-6-202(1)(a). Here, the undisputed facts show that the Receivership Defendants made the relevant transfers to Appellants in exchange for Appellants selling solar lenses to investors. More specifically, the district court found that Appellants "acted as [salespersons] for the Receivership Entities and sold solar lenses for depreciation deductions or solar energy tax credits" and "received commissions from the Receivership Entities for these sales." Aplts.' App., Vol. VII, at 10–11. Significantly, the sale of these solar lenses was the primary means of *advancing* the Receivership Defendants' fraudulent tax scheme. Thus, it ineluctably follows that the Receivership Defendants made the relevant transfers to Appellants for the purpose of perpetuating and expanding the fraudulent scheme. Accordingly, the transfers are voidable under the UVTA.

Appellants fail to challenge any of the district court's factual findings, let alone identify any record evidence demonstrating the findings' falsity. *See Potts*, 551 F.3d at 1192 ("Mere allegations unsupported by further evidence . . . are insufficient to survive a motion for summary judgment." (quoting *Baca*, 398 F.3d at 1216)). Instead, Appellants simply claim that they "had no knowledge of the fraudulent scheme or any wrongdoing by the Receivership Defendants." Aplts.' Opening Br. at 23. However, as our precedent makes clear, "nothing in the [UVTA] requires that a transferee be aware of the fraud." *Cornelius*, 786 F.3d at 1320–21. Rather, our focus is on the intent of the transferor. *See id.*

Stated otherwise, the Receiver provided undisputed material facts which showed that the transfers were made to the Appellants with the "actual intent to hinder, delay, or defraud" creditors—*viz.*, the Receivership Defendants, through the Receivership Entities, made transfers to the Appellants in order to advance and expand their fraudulent scheme. As such, the district court did not err in concluding that the undisputed material facts established the essential elements of a fraudulent conveyance.

C

1

Notably, Appellants claim that "even if the transfers were [made] for the purpose to hinder, delay or defraud the Receivership Entities, the good faith defense applies if Appellant[s] (a) took the transfer in good faith and (b) for reasonably equivalent value." Aplts.' Opening Br. at 26. Appellants note that the Receiver does

not contest the first prong of the good faith defense. *See id.* And, with respect to the second prong, Appellants assert that they provided reasonably equivalent value, given "that they expended substantial energy and time in marketing the solar lenses." *Id.* Furthermore, Appellants allege that the "income generated from the sale of the solar lenses was the reasonably equivalent benefit received [by] the Receivership Defendants." *Id.* As such, Appellants believe that the district court's "conclusion that the defense failed as a matter of law was clearly erroneous." *Id.*

The Receiver concedes that the first prong of the good faith defense is not at issue in this appeal. *See* Aplee.'s Resp. Br. at 21. However, the Receiver contends that "Appellants failed to present any evidence below or on appeal that the Receivership Entities received reasonably equivalent value from the payment of commissions to Appellants." *Id.* at 22. Indeed, although Appellants assert that they expended substantial time and energy in marketing the solar lenses, the Receiver claims that is not "the relevant inquiry; the germane question is not what value Appellants gave, but what value Receivership Defendants received in exchange for the transfers." *Id.* Furthermore, the Receiver contends that—even if Appellants provided income to the Receivership Defendants—"[c]ourts have consistently held that commissions paid to parties that promote a fraudulent scheme constitute fraudulent transfers and the recipients of the commission payments do not give reasonably equivalent value." *Id.* at 24. As such, the Receiver argues that "[b]ecause the Receivership Entities did not receive any reasonably equivalent value . . . the

district court correctly entered summary judgment in favor of the Receiver on his UVTA claim." *Id.* at 24–25. We agree with the Receiver.

"The [UVTA] provides: 'A transfer or obligation is not voidable under Subsection 25-6-[202](1)(a) against a person who took in good faith and for a reasonably equivalent value . . . .'" *Dockstader*, 482 F. App'x at 365 (omission in original) (quoting Utah Code Ann. § 25-6-9(1) (current version at Utah Code Ann. § 25-6-304(1)). There is no dispute here as to whether Appellants took the transfers in good faith; consequently, our inquiry centers on whether reasonably equivalent value was provided.

"[I]n determining whether reasonably equivalent value was given, the focus is on whether the *debtor received* reasonably equivalent value from the transfer. In other words, the question is not whether [the transferee] 'gave reasonably equivalent value; it is whether [the transferor] received reasonably equivalent value.'" *Miller v. Wulf*, 84 F. Supp. 3d 1266, 1276 (D. Utah 2015) (footnote omitted) (quoting *In re Lucas Dallas, Inc.*, 185 B.R. 801, 807 (B.A.P. 9th Cir. 1995)), *aff'd*, 632 F. App'x 937 (10th Cir. 2015) (unpublished); *see also Klein v. Michelle Tuprin & Assocs., P.C.*, No. 2:14-CV-00302, 2016 WL 3661226, at *7 (D. Utah July 5, 2016).

As an initial matter, Appellants' assertion that they expended substantial energy and time in marketing the solar lenses is irrelevant to the present inquiry. As noted *supra*, in determining whether reasonably equivalent value was given, our focus is solely on whether the *debtor* (i.e., the transferor) received reasonably equivalent value. *See Miller*, 84 F. Supp. 3d at 1276; *Klein v. King & King & Jones*,

571 F. App'x 702, 704 (10th Cir. 2014) (unpublished) ("The district court concluded that to satisfy [the reasonably equivalent value] requirement, [the transferee] must have provided 'reasonably equivalent value' *to* [*the transferor*]. . . . We agree."); *cf. In re Lucas Dallas, Inc.*, 185 B.R. at 807 ("The question is not . . . whether the [transferee] *gave* reasonably equivalent value; it is whether the debtor *received* reasonably equivalent value."). Thus, it does not matter what efforts or time Appellants expended in marketing the solar lenses.

Indeed, Appellants' efforts and time were in service of an illegal and fraudulent scheme. In this regard, Appellants' reliance on the income generated from the sale of the solar lenses is unavailing. That is because any income generated from Appellants' actions were products of an illegal and fraudulent undertaking. As discussed *supra*, in effect, Appellants received these transfers for expanding and prolonging the Receivership Defendants' fraudulent scheme. "Those who receive money for bringing new investors to a [fraudulent] scheme have not provided reasonably equivalent value within the meaning of the [UVTA]." *Wing v. Holder*, No. 2:09-CV-118, 2010 WL 5021087, at *2 (D. Utah Dec. 3, 2010); *see also Miller v. Taber*, No. 1:12-CV-74, 2014 WL 317938, at *2 (D. Utah Jan. 29, 2014) ("Those who receive money for bringing new investors to a scheme have not given reasonably equivalent value within the meaning of the [UVTA], and must return the money.").

Indeed, "[i]t takes cheek to contend that in exchange for the payments [Appellants] received, [Receivership Defendants] benefitted from [their] efforts to extend the fraud by securing new investments." *Warfield v. Byron*, 436 F.3d 551,

560 (5th Cir. 2006); *see also Taber*, 2014 WL 317938, at *2; *Dockstader*, 482 F. App'x at 365–66. Accordingly, we conclude that the district court did not err when it ruled that Appellants did not provide reasonably equivalent value, and consequently, that the good faith defense did not apply.[6]

2

Moreover, even assuming *arguendo* that Appellants conferred a benefit upon the Receivership Entities by soliciting investors for the fraudulent scheme, that would still be insufficient to reverse the district court's decision. That is because the district court provided a second ground for rejecting Appellants' good faith defense. Specifically, the district court stated that "reasonably equivalent value was not provided because the payments to [Appellants] were illegal since [Appellants were]

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[6] Appellants claim that the district court's decision is in tension with our recently published decision in *Georgelas v. Desert Hill Ventures, Inc.*, 45 F.4th 1193 (10th Cir. 2022). In *Georgelas*, the defendant was compensated for providing basic administrative services to Bliss Enterprises—*viz.*, a Ponzi scheme. The receiver brought suit, seeking to recover the wages the defendant was paid. In rejecting the receiver's claim, we reasoned that the value of the defendant's "work was no different from that of a janitorial company paid to clean [Bliss Enterprise's] office, and those funds would not be recoverable from the janitorial company under the [UVTA]." *Id.* at 1199. Thus, we concluded that the funds the defendant received from Bliss Enterprises were similarly not recoverable under the UVTA. *See id.* at 1200.

However, in reaching that conclusion, we explicitly "decline[d] to weigh in on the general propriety of the referral-fee exception [i.e., reasonably equivalent value is not provided where transfers are paid to solicit individuals to invest in a fraudulent scheme] under the [UVTA] . . . because it [was] simply not presented by these facts." *Id.* Specifically, we noted that the defendant was not soliciting investors to join the fraudulent scheme; instead, he was simply performing basic administrative tasks for the defrauded entity. Consequently, neither the district court's decision nor our preceding analysis *supra* is in tension with *Georgelas*.

not licensed to sell securities." Aplts.' App., Vol. VII, at 22. Indeed, "[u]nder Utah law it is unlawful for any person to transact business as a broker-dealer or agent unless licensed by the state." *Dockstader*, 482 F. App'x at 366 (citing Utah Code Ann. § 61-1-3(3)). As such, the district court concluded that Appellants could not "assert any right to payment founded upon an illegal contract and for this reason reasonably equivalent value was not provided." Aplts.' App., Vol. VII, at 22; *see also Dockstader*, 482 F. App'x at 366 ("The [Appellants] cannot assert any right founded upon an illegal contract."); *Taber*, 2014 WL 317938, at *3 ("[T]he Defendants must return the commissions and salaries because they obtained them illegally. The Defendants have never been licensed to sell securities. Utah . . . law[] make[s] it unlawful for any person to transact business in the state as a broker-dealer, agent, investment advisor, or investment advisor representative unless the person is licensed. . . . The Defendants participated in a violation of law by selling . . . securities without being properly licensed. They should not be allowed to benefit from the transactions.").

"Because [Appellants] did not challenge this basis for the district court's opinion [in either their Opening Brief or Reply Brief], the issue is [waived]." *Dockstader*, 482 F. App'x at 366; *see Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007) ("Federal Rule of Appellate Procedure 28(a)(9)(A) requires appellants to sufficiently raise all issues and arguments on which they desire appellate review in their opening brief. An issue or argument insufficiently raised in the opening brief is deemed waived."); *Anderson v. U.S. Dep't of Lab.*, 422 F.3d 1155, 1174 (10th Cir.

2005) ("The failure to raise an issue in an opening brief waives that issue."). Accordingly, Appellants cannot prevail on their good faith defense.

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In sum, for the foregoing reasons, we conclude that the district court properly granted summary judgment to the Receiver on his UVTA claim. Next, we address whether the district court properly ordered disgorgement of the commissions paid to Appellants for allegedly violating state and federal securities laws.

V

A

Appellants first claim that "the Receiver lacked standing to assert disgorgement of commissions from the sale of the solar lenses." Aplts.' Opening Br. at 32. Specifically, Appellants assert that "[i]n the instant case, the Receiver lacked both constitutional and prudential standing." *Id.* at 31. As with their UVTA standing claim, in discussing constitutional standing, Appellants again assert that "[t]he Receiver cannot claim an injury in fact when the injury was caused by the Receivership Entities in their capacity as the debtor." *Id.* In other words, Appellants contend that the Receiver—standing in the shoes of the Receivership Entities—is not a creditor with constitutional standing to raise the present securities claims or to seek disgorgement of the commissions from the sale of solar lenses.

Furthermore, as to prudential standing, Appellants argue that the Receiver failed to satisfy the requirements of prudential standing because Utah Code Ann. § 61-1-22—*viz.*, the statute that the Receiver *allegedly* brought his securities claims

under—only "allows the purchasers of such unlicensed securities to bring an action." Aplts.' Opening Br. at 31. Accordingly, Appellants contend that "[d]isgorgement of commissions to a third party such as the Receiver is not contemplated by the statute." *Id.* at 31–32. We are unpersuaded.

As we have already discussed *supra*, the Receiver had constitutional standing because the Receivership Entities, in whose shoes the Receiver now stands, suffered an injury in fact through the actions of Mr. Johnson—who caused Receivership property to be paid to Appellants pursuant to illegal contracts and in violation of securities laws. Accordingly, the Receiver is asserting the Receivership Entities' rights to recover the payments made pursuant to an illegal contract. Thus, in accordance with our precedent, we conclude that the Receiver had constitutional standing to seek disgorgement of the commissions paid to Appellants. *See Cornelius*, 786 F.3d at 1316–17; *see also Janvey v. Brown*, 767 F.3d 430, 437 (5th Cir. 2014) ("The 'knowledge and effects of the fraud of the principal of a Ponzi scheme in making fraudulent conveyances of the funds of the corporations under his evil coercion are not imputed to his captive corporations.' Because this knowledge is not imputed to the [receivership] entities, 'the corporations in receivership, through the receiver, may recover assets or funds that the principal fraudulently diverted to third parties without receiving reasonably equivalent value.'" (footnote omitted) (quoting *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013))).

The Receiver also had prudential standing. *See generally Hill v. Warsewa*, 947 F.3d 1305, 1309 (10th Cir. 2020) (discussing the doctrine of prudential standing and noting that "we continue to analyze third party standing as an element of prudential standing"). As an initial matter, Appellants are mistaken regarding the foundation for the Receiver's action. The Receiver did *not* seek disgorgement pursuant to Utah Code Ann. § 61-1-22—the statute upon which Appellants predicate their argument. In other words, the Receiver did not bring a claim to recover assets on *behalf of the purchasers* of the unlicensed securities. Instead, as the district court correctly noted, the Receiver sought disgorgement *of the commission payments* made to Appellants *by the Receivership Entities* pursuant to illegal contracts between the Receivership Entities and Appellants, and the Receiver was legally authorized to assert the rights of the Receivership Entities. *See* Aplts.' App., Vol. VII, at 27 ("A receiver can recover commissions the defendant obtained illegally as a result of violations of securities laws. '[Where t]he [d]efendants participated in a violation of law by selling [] securities without being properly licensed[, t]hey should not be allowed to benefit from the transactions.'" (alterations in original) (footnote omitted) (quoting *Taber*, 2014 WL 317938, at *3)). Thus, the Receiver had prudential standing because he was *asserting the rights of the Receivership Entities*, not any distinct, third-party rights of purchasers of the solar lenses.

B

Next, Appellants appear to the challenge the district court's determination that the "solar lens purchase program constitute[d] a security because it [was] an

investment contract." *Id.* at 23 (bold-face font omitted). Specifically, Appellants contend that they "sold a product [i.e., solar lenses]," rather than "an investment of money." Aplts.' Opening Br. at 29. As such, Appellants appear to assert that the solar lens purchase program was not a security and did not require registration. Accordingly, Appellants claim they did not violate Utah or federal securities laws, and the district court erred in ordering disgorgement of the commission payments on that basis.

To the contrary, the Receiver claims that, in accordance with *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946), "the district court correctly held, as a matter of law, that the solar lens scheme was an investment contract subject to securities laws." Aplee.'s Resp. Br. at 32–33. Accordingly, the Receiver contends that "Appellants were required to be licensed to sell securities and the securities were required to be registered in accordance with securities laws. Because they were not, Appellants' sale constituted a violation of Utah and Federal securities laws." *Id.* at 33. We believe the Receiver has the better of this argument.

In order to determine whether a scheme constitutes an investment contract—and is subject to securities laws—we apply the three-part test outlined in *Howey*. *See* 328 U.S. at 298–99. A scheme constitutes an investment contract if it involves (1) an investment of money; (2) in a common enterprise; (3) with profits derived solely from the efforts of others. *See id.* at 301 ("The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."). "[T]he ultimate question of whether an instrument is a security is

'a question of law and not of fact.'" *SEC v. Thompson*, 732 F.3d 1151, 1160 (10th Cir. 2013) (quoting *Ahrens v. Am.-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970)).

Here, the first element of the *Howey* test is satisfied. Contrary to Appellants' assertion, investors were not merely purchasing solar lenses for their own personal use. Instead, by acquiring the solar lenses, the investors were purchasing the right (1) to receive tax credits and deductions and (2) to share in the profits from future electricity sales. Indeed, as Appellants themselves acknowledge, "the purchaser would lease the lenses to one of the Receivership Defendants who would then pay lease payments back to the owner of the lens[es]." Aplts.' Opening Br. at 29. Accordingly, it follows that the purchasers were investing money in the scheme with the expectation of future returns.

Furthermore, the purchasers were investing money in "a common enterprise." As the district court correctly noted, the solar lenses would not be economically feasible, operating in isolation; instead, to eventually earn profits from the sale of electricity, investors needed the broader scheme to succeed. *See* Aplts.' App., Vol. VII, at 26 (noting that the "fortunes of the investors were tied to the fortunes of the promoter in a common enterprise"). The Receiver also presented evidence showing that the Receivership Defendants "retained the lenses and controlled what happen[ed] to them (if anything)." *Id.*, Vol. I, at 158 (Receiver's Mot. for Summ. J., filed Nov. 24, 2020); *see also id.*, Vol. VII, at 6. Indeed, it is undisputed that investors did not even know which specific lens they owned—which severely undercuts Appellants'

contention that investors were simply purchasing a product for their own personal use. In sum, the scheme was marketed as "an opportunity to contribute money and to share in the profits of a large [solar energy] enterprise managed and partly owned by [Receivership Defendants]." *Howey*, 328 U.S. at 299.

Appellants attempt to avoid this conclusion by arguing that purchasers were *not obligated* to lease the lenses to the Receivership Defendants and, accordingly, could use the lenses however they wished. However, Appellants failed to identify record evidence showing that any customers took direct physical possession of their solar lenses. *See* Aplts.' App., Vol. VII, at 5 ("Customers never took direct physical possession of their lenses."); *id.*, Vol. III, at 94 (Def. Janet Roe's Opp'n to the Receiver's Mot. for Summ. J., filed Jan. 22, 2021). Furthermore, our conclusion would remain "unaffected by the fact that some purchasers [chose] not to accept the full offer of an investment contract by declining to enter into a service contract with the [Receivership Defendants]." *Howey*, 328 U.S. at 300–01. As such, the second element of the *Howey* test is satisfied.

Finally, the third element is also easily met—*viz.*, profits derived solely from the efforts of others. It is undisputed that the "Receivership Defendants emphasized how little any customer would have to do with respect to 'leasing out' their lenses: '[s]ince LTB[1] install[ed], operate[d], and maintain[ed] [their] lenses for [them].'" Aplts.' App., Vol. VII, at 6 (first and second alterations in original). Furthermore, the district court found—and Appellants do not contest—that the investors "[did] not have special expertise in the solar energy industry." *Id.* Thus, we may naturally

conclude then that the profits from this scheme derived solely from the efforts of the Receivership Defendants.

Accordingly, because all three elements of the *Howey* test are met, we conclude that the district court correctly determined that the solar lens scheme was an investment contract subject to securities laws. Thus, Appellants were required to be licensed to sell the securities and the securities were required to be registered in accordance with securities laws. Because neither of these requirements was met, Appellants' sales violated Utah and federal securities laws.

C

Finally, we find no error in the district court's decision to order disgorgement of the commission payments. Indeed, district courts have broad discretion to order disgorgement. *See SEC v. Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006) ("The district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474–75 (2d Cir. 1996))); *cf. SEC v. Vescor Cap. Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) ("It is generally recognized 'that the district court has broad powers and wide discretion to determine . . . relief in an equity receivership.'" (omission in original) (quoting *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372–73 (5th Cir. 1982))).

Here, the district court found that Appellants obtained commission payments from the Receivership Defendants pursuant to illegal contracts and in violation of securities laws. Surely then, disgorgement—*viz.*, the act of returning payments or

transfers illegally obtained—was an appropriate remedy that the district court could order in this case. *See Sender v. Simon*, 84 F.3d 1299, 1307 (10th Cir. 1996) ("[C]ourts generally will not enforce an illegal contract based upon 'the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.'" (quoting *In re Indep. Clearing House Co.*, 77 B.R. 843, 857 (D. Utah 1987))); *Taber*, 2014 WL 317938, at *3 ("The Defendants participated in a violation of law by selling . . . securities without being properly licensed. They should not be allowed to benefit from the transactions."). Accordingly, we conclude that the district court appropriately ordered disgorgement of the commissions paid to Appellants, as the commissions were obtained in violation of state and federal securities laws.

VI

For the foregoing reasons, we **AFFIRM** the district court's judgment.