# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-14-00515-CV**

**Salvatore Magaraci and Estate Protection Planning Corporation, Appellants**

**v.**

**Eduardo S. Espinosa in his Capacity as Receiver of Retirement Value, LLC, Appellee**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT**
**NO. D-1-GN-14-001581, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING**

**NO. 03-14-00518-CV**

**James Poe and Senior Retirement Planners, LLC, Appellants**

**v.**

**Eduardo S. Espinosa in his Capacity as Receiver of Retirement Value, LLC, Appellee**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT**
**NO. D-1-GN-14-001582, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

Appellants Estate Protection Planning Corporation; Estate Protection Planning's principal, Salvatore Magaraci; Senior Retirement Planners, LLC; and Senior Retirement Planners'

principal, James Poe[1] filed these appeals complaining of the judgments entered against them in the underlying receivership proceeding, in which the trial court refused to apply a settlement credit to the damages awarded against them. We affirm the trial court's judgments.

## Factual and Procedural Background

According to the pleadings filed in the underlying proceeding, from April 2009 through March 2010, Retirement Value, LLC ("RV") sold securities based on life insurance policies, seeking investors to fund the purchase of the life insurance policies. In each case, the person insured was not the policy's beneficiary; instead, RV was the "policy owner purchasing the death benefit" at a discount. An investor loaned funds to RV that were used to purchase a particular life insurance policy; pay administrative costs, fees, and commissions; and maintain a premium reserve to pay premiums until the insured's death.[2] As a return on investment, the investor was to receive the original loan proceeds plus 16.5% interest per year for the insured's life expectancy; for example, an investor who provided $10,000 would receive back $18,800 if the insured's life expectancy was sixty-four months. If the insured died earlier than the projected life expectancy, the investor was also to receive back unpaid premiums. If the insured outlived the life expectancy by more than twenty-four months, however, the investor would have to pay future premiums or forfeit all of his past investments in the policy. The investments were obtained through sales agents who sold the securities

[1] When necessary, we will refer to Magaraci and Estate Protection Planning together as "Magaraci," to Poe and Senior Retirement Planners as "Poe," and to the four appellants collectively as "appellants."

[2] The premium reserve was determined by using a life expectancy calculated by a company called Midwest Medical, plus twenty-four months. RV informed its investors that the insureds were "typically of advanced age with a Life Expectancy . . . of between 3 and 10 years."

or recruited other agents to sell the securities to investors ("the Licensees"). In total, more than 900 investors loaned about $77 million to RV.

In 2010, the State sued RV, alleging that RV's investment scheme violated the Texas Securities Act.[3] The trial court appointed appellee Eduardo S. Espinosa as receiver for RV. Espinosa was given the authority and responsibility of gathering RV's assets and liquidating all assets other than the life insurance policies; Espinosa was to maintain the policies through the deaths of the insureds to the extent that assets were available and to maintain "adequate reserves" to pay anticipated premiums in the future. The State eventually obtained a partial summary judgment finding that RV had engaged in fraud and ordering it to repay $77.6 million to its investors.

Acting on behalf of RV, Espinosa filed third-party claims against James Settlement Services, LLC and three individuals associated with James Settlement Services ("the James Defendants"),[4] and the Licensees, who sold the securities or recruited other sales agents; appellants were among the Licensees sued by Espinosa. He alleged that the Licensees had knowingly participated in the fraudulent scheme or, at best, ignored signs that the scheme was fraudulent and that, in return

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[3] The alleged problems included: that Midwest Medical's life expectancy estimates were unreliable, with the result that RV "significantly misrepresented the insureds' likelihood of outliving their calculated life expectancy"; that Midwest Medical had a "very poor reputation and a history of regulatory problems," including past accusations of falsifying life expectancies in order to fraudulently sell life insurance policies, and that RV knew or should have known of those issues; that calculations performed as part of the State's investigation resulted in life expectancy estimates more than twice as long as those provided by Midwest Medical; that RV diverted millions of dollars to its officers and to another company owned by RV officers; that the money diverted to the other company was intended to reimburse investors in a "Ponzi scheme"; and that the invested funds were not held in escrow as promised but instead were commingled and used to pay across policies.

[4] The James Defendants were alleged to have promoted the fraudulent scheme to RV and to have participated in or had the right to participate in controlling RV.

for their work selling the securities, the Licensees were paid "extraordinarily high" commissions. Espinosa asserted the following claims against the James Defendants and the Licensees jointly and severally: breach of fiduciary duty, conspiracy to breach fiduciary duty, aiding and abetting breach of fiduciary duty, breach of the licensee agreement, and various violations of state securities law. Espinosa also alleged claims for fraudulent transfer under the Uniform Fraudulent Transfer Act ("UFTA"), specifying the commissions paid to each Licensee and asking to have the various commission payments voided. *See* Tex. Bus. & Com. Code §§ 24.001-.013. The James Defendants eventually settled with Espinosa for $5.5 million ("the James Settlement").[5]

Espinosa moved for partial summary judgment against the Licensees on his claims of fraudulent transfer, and appellants filed no-evidence motions as to all of Espinosa's claims. The trial court granted Espinosa's motion as to his UFTA claims and granted appellants' motions as to the rest of Espinosa's claims. Appellants then asked the trial court to apply a settlement credit to any sums that would be assessed against them on the UFTA claims, noting that the James Settlement did not allocate the settlement funds to claims brought against the James Defendants alone. Because the James Settlement funds exceeded the commissions received by appellants, they argued, the court should enter take-nothing judgments against them. The trial court denied the requested settlement credit and entered judgments against appellants. Salvatore Magaraci and Estate Protection Planning were determined to be jointly and severally liable for $271,658.55, plus interest and attorney's fees; Estate Protection Planning was found individually liable for an additional $116,930.56, plus interest

[5] In all, it appears that Espinosa settled with various defendants for a total of more than $8 million. The James Settlement made up the largest portion of those settlement funds.

and attorney's fees; and James Poe and Senior Retirement Planners were found jointly and severally liable for $485,564.13, plus interest and attorney's fees.

**General Receivership Principles**

A receiver is an "officer of the court, the medium through which the court acts. He is a disinterested party, the representative and protector of the interests of all persons, including creditors, shareholders and others, in the property in receivership." *Security Trust Co. v. Lipscomb Cty.*, 180 S.W.2d 151, 158 (Tex. 1944). In asserting or suing for an entity's claims, the receiver essentially stands in the shoes of that entity and has no greater rights than if it were the entity itself. *See El Paso Elec. Co. v. Texas Dep't of Ins.*, 937 S.W.2d 432, 436 (Tex. 1996); *Forex Capital Mkts., LLC v. Crawford*, No. 05-14-00341-CV, 2014 WL 7498051, at *3 (Tex. App.—Dallas Dec. 31, 2014, pet. denied) (mem. op.); *Webb v. Reynolds Transp., Inc.*, 949 S.W.2d 364, 367 (Tex. App.—San Antonio 1997, no writ). "As a general rule, a receiver may sue only for claims of the entities in receivership, and may not assert claims for injuries directly suffered by the investors." *Forex Capital Mkts.*, 2014 WL 7498051, at *3. In other words, "a receiver does not have an unfettered right to represent creditors and shareholders of a corporation" and "may represent creditors and shareholders only to the extent that the cause of action seeks to preserve or recover corporate assets." *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. E Court, Inc.*, No. 03-02-00714-CV, 2003 WL 21025030, at *5 (Tex. App.—Austin May 8, 2003, no pet.) (mem. op.) (citing *Cotten v. Republic Nat'l Bank*, 395 S.W.2d 930, 941 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.)).

## Discussion

Appellants argue that they were entitled to settlement credits that should have resulted in take-nothing judgments against them. Poe additionally argues that the trial court erred in granting summary judgment on Espinosa's UFTA claims. He attacks the court's decision to overrule Poe's objections to Espinosa's summary judgment evidence, contends that there were genuine issues of material fact as to at least one element of each of the UFTA theories, and asserts that Espinosa lacked standing to bring the claims. Because the issue of settlement credits arises only if summary judgment was properly granted on the UFTA claims, we address Poe's individual arguments first.

### *Poe's objections to Espinosa's summary judgment evidence*

Poe objected to portions of two affidavits by Espinosa and the affidavit by S. Todd Burchett, a certified public accountant hired by Espinosa to provide litigation consulting services and to conduct analyses related to RV. Poe asserted that Espinosa and Burchett did not establish their qualifications to offer expert opinions; used incorrect calculations of RV's assets and liabilities; used a different discount rate to value RV's liabilities than to value its insurance-policy assets, thus violating accounting principles; relied on inadequate and untested information provided by Lewis & Ellis, Inc., the actuarial firm hired by Espinosa to conduct an independent valuation of RV's policies and portfolio; parroted the work of others or applied calculations to work done by others; and set out opinions that were impermissible conclusions. Poe also asserted that Lewis & Ellis relied on unverified data. The trial court overruled Poe's objections. We will review the trial court's decision to overrule Poe's objections for an abuse of discretion. *See Allbritton v. Gillespie, Rozen,*

*Tanner & Watsky, P.C.*, 180 S.W.3d 889, 892 (Tex. App.—Dallas 2005, pet. denied); *Perez v. Blue Cross Blue Shield of Tex., Inc.*, 127 S.W.3d 826, 830-31 (Tex. App.—Austin 2003, pet. denied).

*Summary of the affidavits*

In his July 2011 affidavit, Espinosa explained that he had been licensed to practice law since 1996 and had in the past worked as an Enforcement Attorney for the federal Securities and Exchange Commission, handling cases involving anti-fraud provisions of federal securities law. He stated that after his appointment as receiver, he investigated and concluded that RV was insolvent. He explained that RV owed $125 million in debt, mostly to its investors, who were owed $77.6 million in principal and $47.2 million in interest. As far as its assets, RV had $29 million in cash, a portfolio of policies with an estimated liquidation value of $5.7 million, and claims against various licensees, officers, and others. Espinosa explained that RV had represented that it would repay its debts by holding the policies to maturity and using the insurance proceeds to repay investors but had set aside only $15.3 million in reserves, whereas reliable life expectancy estimates indicated that the reserves should have been $58 million. Thus, RV was short $42.7 million in reserves necessary to reach each policy's maturation. Espinosa averred that most policies were "significantly under-reserved," that many had either already exhausted or were soon to exhaust their reserves, and that it would impossible for RV to keep the policies in force using the funds reserved for each policy.

Espinosa concluded that RV's policy portfolio had to be either restructured or liquidated. Liquidation, though simple and quick, would result in little return for investors because the current fair market value for the policies was between $4.3 million and $7.1 million. The other option was to hold the policies until maturation, which should result in the investors recouping their

original investment, albeit with little or no interest, and restructure the method by which investors received payments, paying the investors on a pro rata basis up to the amount of their initial investments as funds became available instead of tying an investor's payments to the proceeds of any particular policy.

Espinosa averred that to reach his conclusions, he had hired a number of professionals to assist him, including Lewis & Ellis and Insurance Strategies Services, LLC ("ISC"), a provider of life expectancy calculations recommended to him by Lewis & Ellis, and that he and his agents had interviewed various individuals involved in RV's operation and reviewed voluminous documents, accounting files, and financial records. Because ISC's life expectancy calculations closely aligned with the estimates provided by at least two other firms hired as part of the State's investigation, Espinosa concluded that ISC's estimates were reliable, whereas Midwest Medical had significantly understated the various insureds' life expectancies. As affidavit exhibits, Espinosa attached reports he had prepared in July 2010 and April 2011.

In Espinosa's July 2010 report, he recited the facts underlying the State's filing suit and his appointment. He stated he had hired his law firm, Lewis & Ellis, accounting firm BKD, LLC, and a portfolio management firm to assist him in managing his receivership duties and conducting the investigation, which was "well under way" but not yet complete. Espinosa and his agents had interviewed most of RV's employees and officers, many investors and licensees, representatives of RV's banks, and representatives of the insurance companies that issued the relevant insurance policies. They had also gathered more than 230 gigabytes of data (roughly equivalent to 14 million pages of documents) and had reviewed RV's accounting, banking, and other

financial records, as well as recordings of RV's monthly sales meetings and calls with licensees. Espinosa's report set out details about how RV handled investor funds, how and to whom various sums of cash were distributed, and specific ways in which RV had violated assurances it had made to its investors. The report detailed how RV misrepresented insureds' life expectancies and described the unsavory history of Midwest Medical and its owner. Espinosa's report provided details about the qualifications of the firms he had hired to assist him in his investigation and receivership duties.

In his April 2011 report, Espinosa explained settlements he had reached with various individuals involved in running RV. He also explained that RV had significantly overpaid for the life insurance policies because it had used improper life expectancy estimates and that "there is no easily available market price for life settlement insurance policies." Thus, Espinosa explained, the policies were valued for purposes of determining their current market value based on "the net present value of their anticipated cash flows," meaning the present values of expected premiums (using reputable life expectancies) were subtracted from the present values of the expected proceeds of each policy. Lewis & Ellis had done various projections and probability calculations and had determined that RV's portfolio of policies was worth between $5.3 million and $8.3 million. Because of the low return to investors that would result from liquidation, Espinosa concluded it would be better to maintain the policies through maturation, using insurance proceeds to continue premium payments on policies still in effect and repaying RV's debts to its investors as the policies matured.

In addition to his reports, Espinosa also attached Lewis & Ellis's analysis report, which included a statement of Lewis & Ellis's qualifications. Lewis & Ellis explained that it relied on life expectancy estimates provided by ISC, "a life expectancy provider generally considered to be reliable." It also stated that its work was based on data provided by Espinosa and the portfolio

management company and that it did not do a detailed review of the data but had reviewed the data "for overall appropriateness and reasonableness" and concluded it was "appropriate for use." Lewis & Ellis explained in detail how an insurance portfolio's "actuarial value" was determined and concluded that RV's portfolio's actuarial value was "$6,667,066 with an 18% discount rate."

In his May 2013 affidavit, Espinosa averred that his investigation revealed that RV sold its securities to investors by using a network of licensees, who received commissions of up to 18% and who "played a vital role in the RV scheme, as they were the ones who convinced the victims to invest." He further stated that "[s]ome of the Licensees recruited 'Sub-licensees' who worked under them in a pyramid-type sales organization," and that Licensees received "override commissions" on their sub-licensees' sales. Espinosa summarized the investment scheme as "functionally a note requiring RV to repay the investors their initial investment plus interest at the rate of 16.5% per annum," stating that RV raised more than $77 million, obligating itself to repay the investors a total of $125 million. Espinosa went on to again explain that RV agreed to maintain reserves sufficient to pay policy premiums for the life expectancies of the insureds but that, as of May 5, 2010, the reserve accounts were short "for the fully subscribed[[6]] policies on a net basis" by about $272,160. When policies that were not fully subscribed were included, the reserves were short by $14.2 million. Espinosa concluded, "Taking into account reserves allocated for policies not acquired and for $2.6 million of investor money that was never placed into reserve accounts, the total

[6] A policy is "fully subscribed" when enough investors have chosen that policy that their investments have funded the costs of purchasing and maintaining the policy through the life expectancy period plus twenty-four months. RV allegedly took funds dedicated to one policy's maintenance to pay for other, not fully subscribed policies, in violation of the investment agreement.

reserve shortfall (from the [life expectancy] + 24 level) is approximately $3 million." Espinosa referred to an attachment to his July 2011 affidavit for the calculations of reserve shortfalls.

S. Todd Burchett provided an affidavit in which he stated that he had been hired by Espinosa to provide litigation consulting services and to perform analyses related to RV. He averred that he had been a certified public accountant since 1992, and that his opinions were based on his "years of experience" and on "reliable and applicable accounting principles." One of the attachments to his affidavit was a true and correct copy of his expert report, which he prepared for Espinosa and "incorporated [into his affidavit] by reference as if set out in full." That report included a copy of his curriculum vitae, which states that he is a partner in BKD's Forensics & Valuation Services division, is a certified public accountant, holds various field-specific accreditations and certifications, has more than twenty years of experience, and is a member of various professional groups and boards.

Burchett averred that he reviewed RV's financial information as prepared for Espinosa by BKD and that BKD obtained RV's records and "reconciled the accounts and corrected the accounting entries in order to make the financial information accurate" and in accordance with generally accepted accounting principles. Burchett's review showed "that management paid out all of the available cash soon after it came in," leaving RV insolvent. Cash dispersals included salaries and distributions made to "insiders" and commissions paid to the Licensees "up front." According to Burchett's affidavit, after management, the Licensees, and the James Defendants "took their cut," there was not enough money left to pay premiums to keep the policies in force. Burchett averred that RV owed $80.1 million in liabilities, had $26 million in cash, and had total assets of $31.5 million.

Burchett further stated that RV's assets consisted almost entirely of the insurance policies and that he relied on Lewis & Ellis's valuations in assessing the portfolio's market value. Burchett stated that Lewis & Ellis's records "are of a type that are reasonably relied upon by experts in my field in forming opinions" and that he had also interviewed one of the people who prepared the Lewis & Ellis report. Burchett included a list of the exact commissions paid to each Licensee and attached various copies of RV's financial records; the Lewis & Ellis report, including pages providing the extensive professional experience and qualifications of the individuals who prepared the report; and a copy of the expert report he prepared for Espinosa, in which he stated that he had relied on information supplied to him. Basing his conclusions on the Lewis & Ellis report, Burchett stated that RV's premium reserves were underfunded and that the only way to cure the deficiencies would have been for RV to obtain new investors or for RV's owners to pay in capital themselves. Burchett averred that RV was "insolvent from its inception" because its debts were always greater than its assets at a fair value and that it became increasingly insolvent each month it was in operation. As he explained it:

> RV's assets at all times were unreasonably small in relation to its business and the transactions it entered into. Its assets were limited to the policies that it purchased and the cash that was reserved to pay premiums to keep those policies in force. Therefore, management would not have been able to liquidate any assets in order to make the company solvent. RV's business as structured would have been unable to reach solvency.

*Analysis*

Poe asserts that Espinosa and Burchett's affidavits did not establish their qualifications to testify as experts. We disagree.

"Whether a witness is qualified to offer expert testimony is a matter committed to the trial court's discretion." *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997). A person may give expert testimony if he "is qualified as an expert by knowledge, skill, experience, training, or education" and if his "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Tex. R. Evid. 702; *see Longoria*, 938 S.W.2d at 30. The burden of establishing that a witness is qualified as an expert is on the offering party. *Longoria*, 938 S.W.2d at 31. A trial court does not abuse its discretion unless it acts without reference to any guiding rules or principles. *Id.*

Burchett stated in his affidavit that he had been a certified public accountant since 1992. *See Floyd v. Shindler* (*In re Rodriguez*), 204 B.R. 510, 514 (Bankr. S.D. Tex. 1995), *aff'd*, 95 F.3d 54 (5th Cir. 1996) ("as a competent CPA, the affiant may give expert opinion testimony on the insolvency of debtors [and] the potential distribution to creditors upon liquidation of the estate"). Further, he incorporated by reference his report, which included his curriculum vitae, showing his extensive professional qualifications in performing financial analyses.[7] Espinosa stated that he had been an attorney since 1996 and had worked on anti-fraud securities cases for the SEC.[8] He went on to explain that he had engaged the services of several other experts to conduct his investigation, and his and Burchett's affidavit attachments provided further detail as to the various experts' qualifications. *See* Tex. R. Evid. 703 (expert may base opinion on data provided by others if such

[7] Poe has not provided any authority to support the proposition that an expert must fully set out his experience and education in the body of an affidavit and may not refer to an attached copy of a resume or curriculum vitae.

[8] Nor does Poe provide authority for the proposition that, because Espinosa's second affidavit did not restate his experience and qualifications, the content in it should be disregarded.

data would be reasonably relied upon by experts in the field). Poe did not show that it was not reasonable to rely upon the data provided by other professionals.

Both affidavits adequately establish the affiants' qualifications to provide opinions as experts. Further, Espinosa as receiver was qualified to provide straightforward valuation evidence about RV's financial status as set out in its records. *See Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 852-53 (Tex. 2011) (property owner is generally qualified to testify about value of property even if he is not expert); *Cotten*, 395 S.W.2d at 941 (receiver's suit to recover assets lost through fraud is brought by receiver *as representative of entity* and its creditors and shareholders). Poe has not shown that the trial court abused its discretion in overruling his objection to Espinosa's and Burchett's "competence," an objection made almost in passing and without further explanation.[9]

Poe next argues that Espinosa did not explain why the policy portfolio was valued at only $5 million while debts that were not due until years in the future were kept at face value; that Espinosa did not explain why he applied "a huge discount rate" to RV's assets and no discount rate to its debts and used "unexplained manipulation of discount rates" to determine that the portfolio made up of policies with face values totaling $135 million was worth $5.7 million; that Espinosa's averred opinions were conclusory and "simply wrong," asserting that Espinosa was incorrect in determining that RV had not reserved enough money for future premiums because the investors were responsible for paying premiums if an insured lived more than twenty-four months beyond the

[9] Poe's objection to Burchett's and Espinosa's qualifications was, in whole, as follows: "they lack competence to render these opinions." He did not attempt to argue how Burchett or Espinosa were unqualified to provide expert testimony.

Midwest Medical estimate of life expectancy; that Burchett did not apply a discount rate to RV's liabilities but admitted in a deposition that a fair valuation should have included such a discount; and that Burchett simply parroted the discount rate used to reach the portfolio's $5.7 million valuation.

We disagree that either affidavit is merely conclusory. Although some of the statements made by Espinosa and Burchett were simply statements summarizing their opinions, when the affidavits and their exhibits are viewed together, the summaries are fully explained, the underlying calculations and methodologies are provided, and Poe has not shown that the methodologies were incorrect or unreliable. *See Perez*, 127 S.W.3d at 831 (expert's affidavit specified sources relied upon, including standards relied upon by actuarial profession; "We cannot say that these documents were not of the type reasonably relied upon by experts in his field."). The affidavits and exhibits explained in detail how RV's reliance on Midwest Medical's erroneous life expectancies led RV to overpay for the policies, providing a contrast between Midwest Medical's estimates and estimates provided by three other reputable companies. Espinosa and Burchett were entitled to rely on data and calculations provided by other qualified companies, and such reliance is not "merely parroting" the work of others. *See* Tex. R. Evid. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed."); *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007); *Great Am. Ins. Co. v. Hamel*, 444 S.W.3d 780, 805 (Tex. App.—El Paso 2014, pet. filed) (expert can base opinions and conclusions on "facts and data of which he had no first-hand knowledge"). Finally, as to Poe's complaints related to the discount applied to RV's portfolio but not its debts, Burchett and Espinosa explained that, in reaching the $5.7 million sum, they were viewing the portfolio as if it were to be

liquidated right now in an attempt to pay the more than $77 million in debts currently owed to the investors. Espinosa explained that because the portfolio, if sold today, would bring in such a small sum, it would be better to hold the portfolio until the policies could mature, in which case they would be worth their face value. The experts demonstrated how RV started from insolvent and just fell further into the red with each passing month, explaining that solvency would require additional capital from RV's owners or premium payments from the investors, who had been deliberately misled into believing that such payments would be unlikely. The affidavits and attachments explained the application of a discount rate to the portfolio but not to the debts.

Poe has not shown that the trial court abused its discretion in overruling his objections to the summary judgment evidence. We overrule Poe's second issue on appeal.

***Propriety of summary judgment on Espinosa's UFTA claims***

Espinosa sought UFTA relief under sections 24.005(a)(1), 24.005(a)(2), and 24.006(a),[10] and Poe asserts that the trial court erred in granting summary judgment on any of those claims. Specifically, he contends that Espinosa lacked standing to bring UFTA claims to recover

[10] A transfer made is fraudulent as to a creditor whose claim arose before or within a reasonable time after the transfer was made if the transfer was made "with actual intent to hinder, delay, or defraud any creditor of the debtor," Tex. Bus. & Com. Code § 24.005(a)(1), or without receiving a reasonably equivalent value in exchange for the transfer and if the debtor "was engaged or was about to engage in a business or a transaction for which the remaining assets . . . were unreasonably small in relation to the business or transaction" or "intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due," *id.* § 24.005(a)(2). As for a creditor whose claim arose before the transfer was made, the transfer is fraudulent as to that creditor if "the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." *Id.* § 24.006(a).

on behalf of the investors or to recover their investments; that there were no qualifying creditors' claims under UFTA because the investors did not have claims until the policies matured, which would occur well after Poe and the other Licensees were paid their commissions[11]; that Espinosa did not prove that RV was insolvent and thus did not show his entitlement to summary judgment under section 24.006(a)[12]; that there were fact issues as to whether RV received a reasonably equivalent value in exchange for the commissions[13]; that Espinosa did not prove RV paid the commissions with the "actual intent" to hinder, delay, or defraud a creditor[14]; and that the trial court did not make a specific finding that RV was operating a Ponzi scheme.[15] In evaluating Poe's claims, we ask whether Espinosa established that there were no issues of material fact as to at least one of his UFTA claims and that he was therefore entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). "[W]e take as true all competent evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Rubio*, 185 S.W.3d at 846.

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[11] *See id.* §§ 24.005(a), .006(a) (creditor's claim must have arisen before or within reasonable time after fraudulent transfer occurred).

[12] *See id*. § 24.006(a); *see also id.* § 24.003(a) (debtor is insolvent if debts are greater than assets "at a fair valuation").

[13] *See id.* §§ 24.005(a)(2), .006(a).

[14] *See id*. § 24.005(a)(1).

[15] *See Goldstein v. Mortenson*, 113 S.W.3d 769, 773 n.1 (Tex. App.—Austin 2003, no pet.) ("Ponzi scheme" is investment fraud in which investors are promised extremely high returns or dividends over short period of time and are paid from funds obtained from later investors rather than profits of underlying venture).

*Standing and ripeness of creditors' claims*

Espinosa, acting as a representative of RV and its creditors, sought to recover the commissions paid under the fraudulent investment scheme in order to preserve RV's portfolio into the future so that RV could pay its debts as the policies matured. As receiver, Espinosa had standing to bring this UFTA suit. *See Meyers v. Moody*, 693 F.2d 1196, 1206 (5th Cir. 1982) (quoting *Cotten*, 395 S.W.2d at 941) (receiver has standing to sue as representative of corporation and corporation's creditors to preserve and recover corporation's assets); *Janvey v. Alguire*, 846 F.Supp.2d 662, 668 (N.D. Tex. 2011) (receiver has "hybridized powers" to stand in shoes of corporation and represent creditors in recovery efforts); *Securities & Exch. Comm'n v. Cook*, No. CA 3:00-CV-272-R, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001) (receiver has standing to represent entity and interests of its creditors and may sue to avoid fraudulent transfers on behalf of corporation's creditors); *E Court, Inc.*, 2003 WL 21025030, at *5 (quoting *Guardian Consumer Fin. Corp. v. Langdeau*, 329 S.W.2d 926, 934 (Tex. Civ. App.—Austin 1959, no writ)) (receiver has same powers as corporation except that he may act to protect innocent creditors, in which case he acts in "dual capacity, as a trustee for both the stockholder and the creditors"; as trustee for creditors, receiver may sue for fraud upon creditors even though corporation would not be able to do so); *Cotten*, 395 S.W.2d at 941 (receiver has standing to sue to preserve corporation's assets and to recover assets disposed of through fraud and is acting as representative of "corporation and its creditors, stockholders and policyholders"; receiver may not sue for fraud claims that "are by their nature personal to each creditor, or each stockholder, or each policyholder"). Further, as for whether there were any claims for which Espinosa could seek UFTA relief, UFTA defines a creditor's claim to

include unmatured rights to payment. *See* Tex. Bus. & Com. Code § 24.002(3). Thus, the investors had UFTA claims at the time Poe and the other Licensees were paid their commissions.

*UFTA elements*

Finally, we turn to whether Espinosa established his right to UFTA relief under sections 24.005(a)(1), 24.005(a)(2), or 24.006(a). If he established all the essential elements of one of those claims, the trial court did not err in granting summary judgment under UFTA.

RV was determined by summary judgment to have "engaged in fraud or fraudulent practices." It perpetrated its fraudulent scheme through its network of Licensees, who obtained investors for RV. In return, the Licensees received commissions. Thus, there can be no dispute that the commissions paid to the Licensees were part of the fraudulent scheme. The intent of Poe and the other Licensees is not relevant under UFTA; only RV's intent matters in determining whether the commissions were paid with actual intent to defraud the investors. *See Stettner v. Smith* (*In re IFS Fin. Corp.*), 669 F.3d 255, 264 (5th Cir. 2012) (UFTA focuses on transferor's intent, not transferee's intent); *Securities & Exch. Comm'n v. Resource Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir. 2007) (quoting *Warfield v. Byron*, 436 F.3d 551, 558-59 (5th Cir. 2006)) (transferees' knowing participation is irrelevant; UFTA only requires fraudulent intent on debtor's part).

The trial court found as a matter of law that RV engaged in fraud or fraudulent practices, and evidence that RV was a fraudulent enterprise is evidence of its actual intent to defraud investors. *See Stettner*, 669 F.3d at 265 ("Evidence that a company operated as a fraudulent enterprise at the time of the transfer, moreover, may be sufficient to establish actual intent."); *Smith v. Suarez* (*In re IFS Fin. Corp.*), 417 B.R. 419, 439 (Bankr. S.D. Tex. 2009), *aff'd*, 669 F.3d 255

("Evidence of a fraudulent scheme is sufficient circumstantial evidence to establish actual intent with respect to transfers made in furtherance of the fraudulent scheme."). Further, Espinosa presented evidence that RV and its officers had actual intent to defraud its investors, attaching marketing materials that contained false or misleading statements about the viability of RV's structure and the life expectancies of the insureds.[16] *See* Tex. Bus. & Com. Code § 24.005(b) (factors that may be considered in determining actual intent to defraud include whether: transfer was to insider; debtor retained possession or control of property after transfer; transfer was concealed; debtor had been sued or threatened with suit before transfer; transfer was of substantially all debtor's assets; debtor absconded; debtor removed or concealed assets; consideration received was reasonably equivalent to value of transferred asset; debtor was insolvent or became insolvent shortly after transfer was made; transfer occurred shortly before or after substantial debt was incurred; or debtor transferred essential business assets to a lienor who then transferred assets to debtor's insider); *see also Hinsley v. Boudloche* (*In re Hinsley*), 201 F.3d 638, 643 (5th Cir. 2000) (quoting *BMG Music v. Martinez*, 74 F.3d 87, 90 (5th Cir. 1996)) (intent to defraud can be decided as matter of law).

Espinosa also presented copious evidence that RV was insolvent from the beginning and continually required new investors to cover already incurred debts.[17] We have already overruled

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[16] Espinosa also provided emails and other evidence between RV's officers that indicated an awareness that RV at the very least had an outward appearance of being a "Ponzi scheme."

[17] Although the trial court did not explicitly state that RV was in fact a Ponzi scheme, the structure of the company certainly had many of the markings of such a scheme. *See id*. Further, it is not necessary that an investment scheme be formally declared a Ponzi scheme in order for UFTA's claw-back provisions to apply. *See Smith v. Suarez* (*In re IFS Fin. Corp.*), 417 B.R. 419, 439 n.15 (Bankr. S.D. Tex. 2009), *aff'd*, 669 F.3d 255 (5th Cir. 2012) ("The Fifth Circuit's reasoning [in *Securities & Exchange Commission v. Resource Development International, LLC*, 487 F.3d 295 (5th Cir. 2007), and other cases discussing Ponzi schemes] applies whether the organization neatly fits

Poe's complaints related to Espinosa's and Burchett's affidavits explaining the insolvency and unfeasibility of the corporation from its inception. We hold, therefore, that Espinosa established as a matter of law that RV paid the sales commissions to the Licensees with actual intent to defraud the investors.[18] Espinosa, as receiver for RV, was therefore entitled to judgment allowing him to avoid the payment of those commissions. *See* Tex. Bus. & Com. Code § 24.005(a)(1).[19]

We overrule Poe's third issue on appeal and hold that the trial court did not err in granting summary judgment against the Licensees under UFTA. *See Rubio*, 185 S.W.3d at 846.

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within a judicially constructed definition of Ponzi scheme or was a fraudulent scheme that had some, but perhaps not all, attributes of the traditional Ponzi scheme. When an organization perpetuating a fraud makes a transfer necessary for continuation of the fraud, the transfer is made with actual intent to defraud."); *Walker v. Anderson*, 232 S.W.3d 899, 914 (Tex. App.—Dallas 2007, no pet.) (no particular "badge of fraud" under UFTA is conclusive or necessary).

[18] *See Cobalt MultiFamily Inv'rs I, LLC v. Arden*, No. 06 Civ. 6172(KMW)(MHD), 2010 WL 3791040, at *3 (S.D.N.Y. Sept. 9, 2010), *adopted* 2010 WL 3790915 (S.D.N.Y. Sept. 28, 2010) ("As for the further question of whether there is a viable basis for recovery of commissions from the sales personnel, that does not appear to be in serious doubt. They were paid corporate funds for assisting in a fraudulent scheme to extract money from potential investors—funds that were then steered through the corporation into the pockets of the ringleaders of the fraud. The salespeople are plainly not entitled to retain such commission payments, and the receiver appears to be a proper person to pursue those funds on behalf of the Cobalt estate, which in turn will presumably be held responsible for the ultimate reimbursement of the shareholders.").

[19] Even if Espinosa had not established actual intent to defraud, it is difficult, if not impossible, to see how the Licensees provided reasonably equivalent value to RV in exchange for the commissions. *See Stanley v. U.S. Bank Nat'l Ass'n* (*In re TransTexas Gas Corp.*), 597 F.3d 298, 306 (5th Cir. 2010) (reasonably equivalent value for transfer is judged from creditors' standpoint, focusing on effect of transfer on debtor's estate); *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006) (in analyzing exchange of value for transfer, courts should look to degree to which transferor's net worth was preserved; "It takes cheek to contend that in exchange for the payments he received [in exchange for recruiting new investors], the RDI Ponzi scheme benefitted from his efforts to extend the fraud by securing new investments."); *see also Bowman v. El Paso CGP Co.*, 431 S.W.3d 781, 788 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (to determine whether consideration's value is reasonably equivalent, courts should view circumstances surrounding transfer with emphasis on net effect to debtor's estate).

***Were Licensees entitled to a settlement credit?***

Appellants argue that because the James Settlement did not allocate the settlement between damages for which solely the James Defendants were liable and those for which the James Defendants and the Licensees were jointly and severally liable, the Licensees were entitled to a $5.5 million credit against the commissions they were ordered to repay, resulting in take-nothing judgments against them. Whether we review the trial court's decision to deny the Licensees' request for a settlement credit for an abuse of discretion or de novo, *see Wein v. Sherman*, No. 03-10-00499-CV, 2013 WL 4516013, at *11 (Tex. App.—Austin Aug. 23, 2013, no pet.) (mem. op.) (discussing when settlement-credit decision is reviewed de novo and when it is reviewed for abuse of discretion), we hold that the trial court did not err in refusing to apply a settlement credit.

Espinosa asserted that the James Defendants and the Licensees were jointly and severally liable for the following claims: breach of fiduciary duty, conspiracy to breach fiduciary duty, and aiding and abetting the breach of fiduciary duty. He also asserted that the Licensees were liable for breach of the licensing agreement, sale of unregistered securities, and state securities fraud. Had that been all Espinosa had alleged, we might agree that appellants were entitled to a settlement credit. *See Cohen v. Arthur Andersen, L.L.P.*, 106 S.W.3d 304, 310 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (once defendant shows settlement has occurred, plaintiff must "tender a valid settlement agreement allocating the settlement between (1) damages for which the settling and nonsettling defendant are jointly liable, and (2) damages for which only the settling party was liable"). However, in asserting claims under UFTA, Espinosa specified the exact commissions paid to each Licensee, seeking to avoid each of those transfers and to have those sums returned. He did

not allege that the Licensees were jointly liable for the commissions paid to each of them and instead sought to have each Licensee ordered to repay the commissions received by that Licensee.[20]

The trial court granted summary judgment in favor of the Licensees on all of the causes asserted by Espinosa that would have held them jointly liable with the James Defendants. The only claims on which Espinosa won summary judgment against the Licensees were his UFTA claims. Under UFTA, a transfer that is fraudulent can be "clawed back" from the transferee, regardless of whether that transferee knew the transaction was fraudulent. *Stettner*, 669 F.3d at 265; *Resource Dev. Int'l*, 487 F.3d at 301; *Warfield*, 436 F.3d at 559; *see* Tex. Bus. & Com. Code § 24.009(b) (creditor may recover value of transferred asset from first transferee, person for whose

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[20] At the hearing related to the requested settlement credit, appellants argued that when Espinosa incorporated language from earlier in his petition into the section seeking UFTA damages, he essentially grafted joint and several liability allegations onto his UFTA claims. We disagree. Incorporation by reference is common in legal documents and does not have the effect of combining causes of action but instead allows the party to refer to factual allegations without fully restating them over and over. Espinosa stated that he was incorporating by reference the "allegations set forth in each and every preceding paragraph," but it would be nonsensical to interpret this as incorporating assertions of joint and several liability related to one cause of action into a section that was clearly differentiating which Licensee was paid which sum. Otherwise, it would have grafted breach-of-fiduciary-duty claims onto Espinosa's UFTA claims as well.

Appellants also quote language from Espinosa's petition in which he asserted that appellants, whom he included in a group he labeled "Conspiring Defendants," and the James Defendants were "jointly and severally liable for the full amount that RV has been ordered to pay in restitution to investors," whereas certain Licensees who were not alleged to have conspired in the fraud were liable "for the total amount of commission they received." Espinosa explained in the portion of his pleading asserting non-UFTA causes of action that the conspiring Licensees should be held liable for the bad acts of the James Defendants and other conspirators, not merely for their own breaches of fiduciary duty or the licensing agreement. Read in context of Espinosa's pleading as a whole, Espinosa's distinguishing between conspiring and non-conspiring Licensees meant only that he recognized that Licensees who had not conspired in the fraudulent scheme should not be held liable for the full $77 million in non-UFTA restitution damages, not that he pled to have the James Defendants and all of the conspiring Licensees held jointly liable for each Licensee's commissions.

benefit transfer was made, or subsequent transferee except for "a good faith transferee who took for value or from any subsequent transferee").

We conclude that Espinosa's UFTA claims against the Licensees were individual claims for the specific commissions paid to each Licensee and were not pled against the James Defendants as well. Thus, the damages awarded to Espinosa against appellants were not for claims asserted against appellants jointly and severally with the James Defendants. Because the UFTA claims were asserted against each Licensee separate from each other and from the James Defendants, appellants were not entitled to a credit for the James Settlement. We overrule appellants' issues related to a settlement credit.

**Conclusion**

We have overruled appellants' arguments. We therefore affirm the trial court's order granting summary judgment on Espinosa's UFTA claims and its judgments against appellants.

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David Puryear, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: March 4, 2016