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

MARK W. RASMUSSEN, RECEIVER FOR ARISEBANK,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
RICHARD SMITH, JR., and KURT F. MATTHEW, JR.,	§	**Civil Action No. 3:18-cv-1034-M**
	§	
Defendants.	§	
	§	

RECEIVER'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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Mark W. Rasmussen, the Court-appointed Receiver for AriseBank and its affiliates in No. 3:18-cv-186-M, *Securities and Exchange Commission v. AriseBank, et al*., pending in the United States District Court for the Northern District of Texas (the "SEC Case"), submits this Brief in Support of his Motion for Summary Judgment in this matter.

I. INTRODUCTION

In this action, the Receiver seeks to recover funds from Defendant Richard Smith, Jr. and Defendant Kurt F. Matthew, Jr., that are, or ought to be, part of the AriseBank Receivership estate and, as a result, available for return to defrauded AriseBank contributors and other claimants. The funds were originally transferred to Smith on January 10, 2018. On that day, AriseBank sent 95,000 coins in the PIVX cryptocurrency[1] to Smith as a deposit for the purchase of what Smith and Matthew had described to AriseBank as an "FDIC-insured bank." Smith then transferred a portion of the deposited funds to Matthew. As of the date of the original transfer to Smith, the 95,000 PIVX coins were valued at $1,320,500; that value represented about 10% of the purported purchase price for the so-called "bank." As discussed below in more detail, however, this purported sale never closed. In fact, the parties never proceeded past the term-sheet stage, never executed a contract for the sale of the "bank," and no bank was ever bought by AriseBank. Just two weeks after AriseBank's PIVX transfer to Smith, AriseBank's operations were shut down after the SEC sued and this Court entered, among other orders, the Order Appointing Receiver.

[1] The Court may recall that the Receiver filed a motion to show cause in the SEC Case related to a contribution of 75,539 PIVX coins. (SEC Case Dkt. 25) Those coins were liquidated and the proceeds turned over to the Receiver by Rice's counsel. The 95,000 PIVX coins addressed in this Motion were a separate contribution.

That fact alone—that AriseBank received nothing because no sale ever took place—is enough to establish the Receiver's right to return of the deposited funds; simply put, Smith and Matthew can assert no legal grounds to claim ownership or the right to retain possession of the deposited funds. Thus, in accordance with this Court's Receivership Order, Smith and Matthew should have returned the funds after the Receiver requested them in January 2018. They did not do so. Their refusal caused the Receiver to make further inquiries into the purported "bank" sale. As he did so, he learned that the circumstances surrounding Defendants' refusal to return the funds were far worse than they appeared on the surface.

This purported transaction not only never happened; it *never could have happened*. From the beginning, it was shot through with fraudulent intent on all sides. Among other problems, when making the deposit of PIVX coins, AriseBank knew it had *nowhere close* to the purported 12-million-euro (or perhaps 12-million-dollar) purchase price for the "bank," as the amounts contributed to its ICO fell far short of that figure. Most striking, *there was never any real bank for sale*. Matthew, who represented himself to AriseBank as the purported bank owner, admitted in deposition that he falsely represented that he owned the "bank": in truth, Matthew had never owned a bank and had no authority to sell one.

In these circumstances, as this Motion and supporting materials make clear, continued retention of the deposited funds by Smith and Matthew amounts, as a matter of law, to unjust enrichment and conversion. In addition, and also as a matter of law, the transfers of value to Smith, and from Smith on to Matthew, constitute fraudulent transfers under section 24.005(a) of the Texas Uniform Fraudulent Transfer Act ("TUFTA").[2] In summary, Smith and Matthew can

[2] Tex. Bus. & Comm. Code Ann. §§ 24.001-24.013.

assert no plausible argument for retaining funds they received as a deposit for a purchase that never could have taken place for a purported "bank" that never existed.

II. FACTUAL BACKGROUND

A. AriseBank's ICO and Bank "Acquisition," and the SEC's Lawsuit

Since the start of its Initial Coin Offering ("ICO") in late 2017, AriseBank had represented itself as "one of the largest cryptocurrency platforms built to date" and purported to offer a "completely decentralized banking product." (Rasmussen Decl. ¶ 4 & ex. 7 (App. at 3, 28-30)) The company touted a "streamlined banking experience" with ATM functionality and VISA cards. (*Id.*) By mid-January 2018, AriseBank claimed that it had already raised $600 million through its ICO, with a target of becoming "the first $1 billion ICO." (*Id.*) On January 18, 2018, AriseBank announced the "first-ever acquisition of traditional banks by a crypto platform." According to the press release, "AriseBank now holds 100 percent of the equity in both KFMC Bank Holding Company, a 100 year-old commercial bank, and TPBG, a 25 year-old investment banking and management firm." (*Id.*) The acquisitions, AriseBank claimed, would allow it to "offer its customers FIDC-insured accounts and transactions." (*Id.*)

A week later, on January 25, 2018, the SEC filed suit against AriseBank, Jared Rice Sr., and Stanley Ford, alleging, among other things, that the AriseBank ICO was a fraudulent and unregistered securities offering. (SEC Dkt. 2[3]) The same day, this Court entered a Temporary Restraining Order shutting down the ICO and freezing assets of Rice and Ford. (SEC Dkt. 11) At the same time, the Court entered the Receivership Order, which appointed Mark Rasmussen as Receiver for AriseBank and affiliates. (SEC Dkt. 12) The SEC later filed an amended complaint (SEC Dkt. 21), and the Court entered separate preliminary injunctions against Rice and Ford.

[3] Docket entries in the SEC Case are identified herein as "SEC Dkt."

(SEC Dkt. 61, 69) Eventually, the SEC reached agreements with Rice and Ford and, on November 29, 2018, filed an unopposed motion to enter consent judgments against each defendant. (SEC Dkt. 95) The Court granted that motion and, on December 11, 2018, entered final judgment against Rice and Ford. (SEC Dkt. 96)

B. The Receivership Order

In the Receivership Order, this Court determined that appointment of a receiver for AriseBank and affiliates was "necessary and appropriate for the purposes of marshaling and preserving all assets, tangible and intangible, that are owned, controlled, or possessed by Defendant AriseBank." (SEC Dkt. 12, at 1) To accomplish those purposes, the Order provided that the Court would take "exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated," of AriseBank. (*Id.* ¶ 1) The Receivership Order also provided as follows:

- All Receivership Assets in the hands of any person other than the Receiver were ordered frozen, and all persons with "direct or indirect control over any Receivership Assets" were ordered to "relinquish such control to the Receiver." (*Id.* ¶ 3)
- The Receiver was authorized to take "custody, control, and possession of all Receivership Property," including by bringing suit to do so if necessary. (*Id.* ¶ 7(C))
- All persons and entities having control, custody, or possession of any Receivership Property were directed "to turn such property over to the Receiver." (*Id.* ¶ 14)
- All persons with "possession, custody or control of any assets or funds held "by, in the name of, or for the benefit of, directly or indirectly, the Receivership Entities," and who received actual notice of the Receivership Order, were prohibited from liquidating, selling or disposing of such assets (*id.* ¶ 16(A)) or refusing to transfer such assets to the Receiver's control (*id.* ¶ 16(B)). Instead, such persons were directed to "cooperate expeditiously in … transferring funds, assets, and accounts to the Receiver." (*Id.* ¶ 16(A))

C. The Term Sheet for Sale of the Bank

On December 11, 2017, Smith sent Rice a draft "term sheet" offering 100% of the equity in "KFMC Bank Holding Company" and "TPBG." (Smith Dep.[4] at 51:23-52:7 (App. at 68-69); Rasmussen Decl. exs. 1, 2 (App. at 11, 13-15)) The document described KFMC as a "100 year-old commercial bank in USA" and TPBG as a "25 year-old investment bank and investment management company." (*Id.*) Matthew, though not identified as a party in the term sheet, had drafted the document earlier in 2017 and given it to Smith to present to potential sources, like Rice, for funding the purchase of the bank. (Matthew Dep.[5] at 39:22-40:15 (App. at 110-11)) According to Matthew, he drafted the term sheet as "the foundation, the reference point for his negotiations with Mr. Rice and … AriseBank and all of the other entities and individuals." (Matthew Dep. at 40:4-6 (App. at 111)). Two days after Smith sent Rice the Matthew term sheet, both Smith and Rice signed it. (Rasmussen Decl. ex. 3 (App. at 19)).

By its own text, and by the testimony of both Smith and Rice, the term sheet envisioned further negotiation and agreements on important terms before it could become a legally binding deal:

- Matthew, though the putative owner of the bank, was not a party to the term sheet and did not sign it.
- The term sheet lacked important information that would be necessary for a binding agreement, including the name of the bank being sold. (Rasmussen Decl. ex. 3, at 1 (App. at 17); Rice Dep.[6] at 70:20-71:5 (App. at 90-91); Matthew Dep. at 72:13-17 (App. at 113))

[4] Deposition of Richard Smith in the SEC Case (excerpts attached as Exhibit 15 to the Rasmussen Declaration) (App. at 48-80).

[5] Deposition of Kurt Matthew in the SEC Case (excerpts attached as Exhibit 17 to the Rasmussen Declaration) (App. at 98-116).

[6] Deposition of Jared Rice in the SEC Case (excerpts attached as Exhibit 16 to the Rasmussen Declaration) (App. at 82-94).

- The term sheet contains two different "options" for important terms of the transaction. One option involves "lend[ing] €12.000.000 (twelve million Euros) in exchange for" a list of "compensation and awards"; the other option appears to involve "cash" in exchange for "Preferred Stock issued at a minimum of 10% per annum. (Rasmussen Decl. ex. 3, at 2 (App. at 18))

- The term sheet expressly states that it reflects only "preliminary terms and conditions described in the above Term Sheet," includes a 30-day diligence period, and requires that "the sale will be completed in 30 calendar days (unless Buyer and Seller mutually agree to an extension." (*Id. at* 3 (App. at 19))

- Smith agreed that the term sheet was "a preliminary term sheet, but not binding in the event that various things don't happen the way they're set down here" (Smith Dep. at 63:23-64:3 (App. at 70-71)), including if the transaction does not close in 30 days as stated, (Smith Dep. at 63:2-5 (App. at 70))

- Rice did not believe that the term sheet obligated AriseBank to move forward with the transaction, and it would be entitled to get its deposit back, if Rice became dissatisfied with the due diligence on the bank he was buying. (Rice Dep. 80:21-81:16 (App. at 92-93))

D. The Transfer by AriseBank of 95,000 PIVX Coins as a Deposit for the Bank's Purchase

On Christmas Day of 2017, about two weeks after the term sheet was signed, Smith wrote Rice an email requesting that AriseBank make "a due diligence deposit towards the transaction." (Smith Dep. at 69:2-5 (App. at 72); Rasmussen Decl. ex. 4 (App. at 21)) According to Smith, he and Rice discussed the matter and agreed that AriseBank would send 95,000 PIVX coins to Smith as the due-diligence deposit. (Smith Dep. at 69:24-70:7 (App. at 72-73)) On January 6, 2018, Smith sent Rice a cryptocurrency wallet address to use when AriseBank was ready to send the deposit; Smith had generated the wallet address himself using the cryptocurrency exchange *coinexchange.io*. (Smith Dep. at 19:13-20:4; 70:11-16 (App. at 57, 73); Rasmussen Decl. ex. 5 (App. at 24)) Two days later, on January 8, 2018, Rice began the process of transferring the coins. Using a procedure the two had discussed in advance, Rice first sent a test transaction of one PIVX coin. (Smith Dep. at 21:20-22:5; 71:13-72:3 (App. at 59-60, 74-75)) Then, on January 10, 2018, after Smith had confirmed receipt of that test transaction,

Rice made the intended transfer of 95,000 PIVX coins. Smith confirmed with Rice that he had received the 95,000 PIVX coins as a deposit on the bank transaction. (Smith Dep. at 21:4-22:5 (App. at 59-60))

E. Contributions to AriseBank

Since his appointment, the Receiver has been charged by the Court with identifying, assessing, and collecting the assets of AriseBank and its affiliates, including identifying all contributions and other items of value owned or disposed of by AriseBank. (Rasmussen Decl. ¶ 6 (App. at 4)) In the course of that work, the Receiver engaged Kroll Cyber Security to perform forensic accounting services relating to the contributions and other items of value collected by AriseBank during the course of its ICO. (*Id.*) Using records and other information obtained from AriseBank, the Receiver and Kroll were able to identify those assets with reasonable detail and certainty. (*Id.* ¶ 7 (App. at 4)) Based on that analysis, AriseBank collected contributions in fiat currencies, as well as BitShares, PIVX, Ether, Bitcoin, BitUSD, NEM, and DogeCoin, for a total value of approximately $4.3 million. (Rasmussen Decl. ¶¶ 8-10 (App. at 4-5)) The only other assets of value recovered by the Receiver were computer and telephone equipment valued at no more than $10,000. (*Id.*) Based on the Receiver's investigation, AriseBank obtained and possessed no other assets of significant value. (*Id.*)

F. Smith's Liquidation of PIVX Coins, Payment of $123,000 to Matthew, and Retention of the Remaining Proceeds

After receiving the PIVX coins from AriseBank, Smith began to liquidate them, converting them at least in part into better-known cryptocurrencies such as Bitcoin and Ether and then into cash. On the date of the transfer, the 95,000 PIVX coins were valued at $1,320,500 based on market aggregation data. (Rasmussen Decl. ¶ 8 (App. at 4)) Smith himself acknowledged the coins were worth about $1 million. (Smith Dep. at 34:24-35:11 (App. at 63-

64)) Despite this acknowledgement, when asked at his deposition how much he was able to obtain from the PIVX coins, Smith claimed: "Not as much as you would think." (Smith Dep. at 30:19-24 (App. at 61)) Instead, he asserted, he obtained only about $200,000 in cash proceeds. (Smith Dep. at 31:12-14 (App. at 62))

From the cash proceeds after liquidating the PIVX coins, Smith sent $123,000 by wire transfers to Matthew. (Smith Dep. at 72:12-73:18 (App. at 75-80)) This amount represented a "1 percent deposit" for purchase of the bank, as calculated by Matthew from the purchase price of the bank. (*Id.*; Rasmussen Decl. ex. 6 (App. at 26)) Smith said he made no other transfers of funds to anyone other than Matthew in connection with the bank purchase. (Smith Dep. at 36:10-20 (App. at 65)) Smith admitted that he "retained probably $70,000 or $80,000, whatever the remainder is" of the $200,000 in cash for his "personal business," which included "[b]ills and different payments on things." (*Id.*) To be clear, Smith acknowledged that, except for what he sent to Matthew, he "kept and retained and used as [his] own funds all the remaining proceeds from the 95,000 PIVX." (Smith Dep. at 36:25-27:7 (App. at 65))

G. The Receiver's Demand for Return of the Funds, and Smith and Matthew's Refusal to Comply

1. Communications with Smith

On January 27, 2018, two days after his appointment, the Receiver sent a copy of the Receivership Order to Smith by email and asked Smith to call the Receiver. (Rasmussen Decl. ¶ 14 & ex. 8 (App. at 6, 32)) That evening Smith emailed his response, acknowledging receipt of the Receiver's email and agreeing to a call. (*Id.* ¶ 14 & ex. 9 (App. at 6, 34) On January 28, 2018 and again on January 29, 2018, the Receiver and Smith spoke by telephone. In these conversations, Smith made, among others, the following statements:

- He acknowledged receiving a deposit of 95,000 PIVX coins from Jared Rice Sr., CEO of AriseBank, in connection with the term sheet for purchase of the bank;

- He agreed that the PIVX coins were valued on exchanges at that time at about $950,000;
- He had spent some of the funds on "legal fees" and other expenses, but still had "several hundred thousand dollars" of value remaining from that deposit, including Bitcoins held in several coin exchanges, and additional amounts in dollars; and
- He still had left about 10,000 in PIVX coins from the original AriseBank transfer.

(Rasmussen Decl. ¶ 14 & ex. 11 (App. at 6, 38)) On January 29, 2018, the Receiver sent an email confirming his understanding of these statements from Smith and notifying Smith that, under the Receivership Order, "all remaining funds from the AriseBank deposit belong to the receivership estate …. [Y]ou are obligated to provide them to us … [and] are not authorized to dispose of these funds further in any way." (Rasmussen Decl. ¶ 15 & ex. 11 (App. at 7, 38))

Smith initially suggested he might return the 10,000 PIVX coins, but later added conditions for the return, including withdrawal of the Receiver's deposition subpoena *duces tecum*, which the Receiver was unwilling to accept. (Rasmussen Decl. ¶ 15 & ex. 13 (App. at 7, 43)) To date, Smith has returned no funds or other property to the Receivership Estate. (Rasmussen Decl. ¶ 17 (App. at 7))

In these communications with the Receiver, Smith never offered any purported legal basis for his refusal to return the funds. The closest he came to such a rationale took place during his deposition, when he characterized the term sheet as including not only a bank sale but also a license for his high-frequency trading software:

> Q. What was your role [in the term sheet]?
>
> A. … [I]f Kurt was selling a bank, he was selling his investment company. I was not selling my company. I was offering compiled access [to my software], which right now online is $10 million a year for a license for my software. So I simply was selling something to make the bank profitable. So that was my role. So basically the way things happened was Jared paid me a down payment for the bank, and I sent him the software in January.

> And I sent Kurt the down payment, or the 1 percent he wanted to start with.
>
> Q. How [did] you send the software?
>
> A. By email.

(Smith Dep. at 47:6-24 (App. at 66)) Based on this exchange, Smith presumably intends to argue that he delivered valuable software to AriseBank, which somehow entitled him to keep and use the remaining funds from AriseBank's deposit. While Smith claims his software is valued at "$10 million a year," he admitted in deposition that he has *no actual paying customers*. (Smith Dep. at 49:8-19 (App. at 67))

After his deposition, Smith provided an email to the Receiver purporting to document his sending his software to Rice. (Rasmussen Decl. ¶ 16 & ex. 14 (App. at 7, 46-47)) That email, however, is dated January 29, 2018—four days after the Receiver's appointment in this case, two days after Smith acknowledged receipt of the email providing actual notice of the Receivership Order, and after two telephone conversations, as described above, in which the Receiver explained Smith's obligation to return AriseBank's deposited funds. (*Id.*) In any case, the Receiver has never received any such software from Smith and has not located any such software in any of the collected assets of the Receivership. (*Id.* ¶ 16 (App. at 7))

2. <u>Communications with Matthew</u>

On Sunday, January 28, 2018, three days after his appointment, the Receiver emailed Matthew a copy of the Receivership Order. The Receiver's email stated: "I have reason to believe that assets of AriseBank totaling $123,000 were recently transferred to you through Richard Smith. Those assets are now part of the receivership in accordance with the order, and they may not be disposed of but must be transferred into my custody." (Rasmussen Decl. ¶ 18 & ex. 10 (App. at 7, 36))

On Wednesday, January 31, 2018, Matthew responded to this communication. (Rasmussen Decl. ¶ 19 & ex. 12 (App. at 8, 40)) Matthew acknowledged receipt of the communication from the Receiver, but did not agree to provide any funds. (*Id.*) Later on, at his deposition, Matthew acknowledged receiving the $123,000 deposit for purchase of the bank. (Matthew Dep. at 30:4-14 (App. at 106)) The purpose of the deposit, Matthew acknowledged, was to provide "a one percent good faith deposit for the ultimate purchase price [of the bank]." (*Id.* at 30:15-18 (App. at 106)) It was clear to Matthew that the deposited money came from AriseBank and Rice. (*Id.* at 32:18-25 (App. at 107)) Matthew also acknowledged that he had refused the Receiver's request to return the deposit. (*Id.* at 33:19-34:2 (App. at 108-09)) To date, despite the Receiver's demands, Matthew has also refused to return any funds or other property to the Receivership Estate. (Rasmussen Decl. ¶ 20 (App. at 8))

Matthew has also never offered a clear explanation for his refusal to return the funds. In the January 31, 2018 email to the Receiver, Matthew claimed that "we took the businesses off the market, in expectation of Mr. Smith following through on his bona-fide offer and payment of good-faith consideration." (Rasmussen Decl. ex. 12 (App. at 40)) Presumably, Matthew intended this claim to support an argument that he was entitled to keep the deposit because he had detrimentally relied on some promise of Smith's by taking his bank "off the market" for some period.

If that was Matthew's intention in January 2018, he had abandoned it by March 2018 when his deposition was taken. There, he refused to answer questions on this subject, purporting to rely on the attorney-client privilege. (*E.g.* Matthew Dep. at 34:3-23 (App. at 109)) Matthew did admit, however, that he had never owned a bank for sale:

> Q. Do you own any banks?
>
> A. No, sir.

> Q. Have you ever owned a bank?
>
> A. No, sir.
>
> Q. Have you ever told anybody that you owned a bank?
>
> A. Yes, sir.
>
> Q. And what were the circumstances when you told somebody that you owned a bank?
>
> A. It was in my conversations with Mr. Richard Smith, who became, you know, my colleague, client, and he voiced an interest, I believe it was January 24 of 2017, in acquiring a bank….

(Matthew Dep. at 20:12-24 (App. at 101); *see also id.* at 22:14-23:3 (App. at 103-04)) When asked to explain why he had falsely represented to Smith that he owned a bank, Matthew said he had been negotiating to buy a certain bank for seven long years; this gave him "sweat equity," Matthews felt, and he "saw it as mine" even though "[l]egally, it was not mine." (*Id.* at 24:2-11 (App. at 105))

III. ARGUMENT

A. The Standard for Awarding Summary Judgment

Courts "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). This general standard, however, does not require a court to sift through the record in search of triable issues. *Adams v. Travelers Indem. Co. of Conn.,* 465 F.3d 156, 164 (5th Cir. 2006). Instead, while the moving party bears the *initial burden* of informing the court of the basis for its argument that there is no genuine issue for trial, *Celotex Corp. v. Catrett*, 477 U.S. 317,

323 (1986), once it has done so the burden *shifts to the nonmovant* to establish that there is a genuine issue of material fact so that a reasonable jury might return a verdict in its favor, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986). In addition, a party opposing summary judgment must proffer more than "[c]onclusory allegations, speculation, and unsubstantiated assertions." *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1429 (5th Cir. 1996) (*en banc*). A court can conclude that a factual controversy prevents summary judgment "'only when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts.'" *Olabisiomotosho v. City of Houston*., 185 F.3d 521, 525 (5th Cir. 1999) (quoting *McCallum Highlands, Ltd. v. Wash. Capital Dus, Inc*., 66 F.3d 89, 92 (5th Cir. 1995)).

B. The Receiver Is Entitled to Summary Judgment for Unjust Enrichment

The Receiver has lodged claims of unjust enrichment against both Smith and Matthew. Unjust enrichment "characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances that give rise to an implied or quasi-contractual obligation to repay." *Foley v. Daniel*, 346 S.W.3d 687, 690 (Tex. App.—El Paso 2009, no pet.) (citing *Walker v. Cotter Props., Inc*. 181 S.W.3d 895, 900 (Tex. App.—Dallas 2006, no pet.)).[7] Unjust enrichment is not a claim for breach of contract; instead, it is based on *quasi-contract*, which is an "obligation imposed by law to do justice even though it is clear that

[7] Texas law applies to the Receiver's claims. This Court, sitting in Texas and adjudicating state-law claims, should apply the Texas choice-of-law rules. Texas courts would use the "most significant relationship test" set forth in section 145 of the Restatement (Second) of Conflict of Laws to adjudicate these noncontractual claims. *Gutierrez v. Collins*, 583 S.W.2d 312, 318-9 (Tex. 1979); *Duncan v. Cessna Aircraft Co*., 665 S.W.2d 414, 420-21 (Tex. 1984). Texas is the state with the most significant relationship to the occurrences and parties of this case and the underlying SEC Case. It is the state in which AriseBank's offices and operations were located, from which AriseBank communicated about the term sheet for the purported bank purchase, and from which AriseBank sent out the funds that are the subject of this action.

no promise was ever made or intended." *Fortune Prod. Co. v. Conoco, Inc.,* 52 S.W.3d 671, 683-84 (Tex. 2000).

Here, the summary judgment evidence establishes that Smith and Matthew have been unjustly enriched through wrongfully retaining the AriseBank funds. It is undisputed that Rice, on behalf of AriseBank, transferred 95,000 PIVX coins to Smith, worth approximately $1.3 million at that time, and that Smith then transferred $123,000 of funds derived from the original deposit to Matthew. It is also undisputed that both transfers were made as down payments or deposits in connection with AriseBank's purchase of a bank. At the time the funds were transferred, there was no understanding or agreement that Smith or Matthew would have the right to retain the funds in the event the transaction was not consummated. Indeed, there was no binding contract for the purchase of the bank at all, as AriseBank and Smith had signed only the nonbinding term sheet. Because the transaction was never consummated, Smith and Matthew have no basis for retaining the deposits and allowing them to do so would be wrong and unjust.

Courts have sustained claims for unjust enrichment when one party has made a deposit, down payment, overpayment, or other payment to another party in expectation of consummating a transaction, but the transaction never takes place, or never fully takes place, leaving the other party in possession of unearned and unmerited gains. In *Foley v. Daniel*, for example, clients hired lawyers to make a "citizens'" presentation to a grand jury and gave the lawyers a $25,000 retainer, but the clients terminated the representation when the lawyers did not act quickly enough in the clients' view. *Id.* at 690. The clients then sued for breach of contract and unjust enrichment for return of unearned fees. The court of appeals affirmed the trial court's rejection of a claim of breach of contract because there was no governing agreement, but it reversed the dismissal of the claim for unjust enrichment because the lawyers "performed some work under

the contract but did not complete it," entitling the clients to a refund of all unearned fees. *Id; see also Mobil Producing Tex. & N.M., Inc. v. Cantor*, 93 S.W.3d 916, 919-20 (Tex. App.—Corpus Christi 2002, no pet.) (affirming an award of summary judgment on unjust enrichment to Mobil when it had mistakenly overpaid royalties not called for by the parties' agreement); *see generally Southwestern Elec. Power Co. v. Burlington N. R.R. Co*., 966 S.W.2d 467, 469-70 (Tex. 1998) ("In some circumstances, overpayments under a valid contract may give rise to a claim for restitution or unjust enrichment.")

There also is no factual basis for a claim that either Smith or Matthew provided valuable goods or services to AriseBank in exchange for retaining the deposits. The principal problem with any such claim, of course, is that AriseBank never received ownership of the purported bank or anything else of value. With respect to Smith's software, the evidence demonstrates that it was completely useless to AriseBank since it was purportedly delivered, if at all, only after AriseBank had ceased operations, the Receiver was appointed, and the Receiver had asked Smith to return the deposited funds.

C. The Receiver Is Entitled to Summary Judgment for Conversion

The Receiver has also brought claims of conversion against both Smith and Matthew. Conversion is the unauthorized and unlawful assumption and exercise of dominion and control over the personal property of another to the exclusion of the owner's rights. *Waisath v. Lack's Stores, Inc*., 474 S.W.2d 444, 446 (Tex. 1971). The elements of conversion are:

- the plaintiff owned or had possession of the property or entitlement to possession;
- the defendant unlawfully and without authorization assumed and exercised control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner;
- the plaintiff demanded return of the property; and
- the defendant refused to return the property.

Khorshid, Inc. v. Christian, 257 S.W.3d 748, 759 (Tex. App.—Dallas 2008, no pet.).

When the claim is for payment of money, a conversion action will ordinarily not lie unless "identification of the money is possible and there is a breach of an obligation to deliver the specific money in question or to otherwise treat specific money." *Southwest Indus. Inv. Co. v. Berkeley House Inv's*, 695 S.W.2d 615, 617 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (*citing Jones v. Hunt*, 658, 12 S.W. 832, 833 (1889)). By the same logic, however, a conversion action *will* lie when one person has delivered money to another and has "designated a particular use" for the sum delivered; then "those proceeds count as 'specific money,' … capable of identification and capable of conversion." *Southwest Indus.,* 695 S.W.2d at 617 (affirming a judgment for conversion against a mortgage holder that received payments designated for property taxes but instead used the funds for its own general business purposes); *see also Texas State Title Co. v. Sawicki,* No. 1-94-15-CV, 1995 WL 555853 at *2 (Tex. App.—Houston [1st Dist.], Sep. 21, 1995, no pet.) (upholding a directed verdict for conversion against a second lienholder that received funds from a title company to pay off a first lien but instead took them for its own use); *cf. North Tex. Opport. Fund L.P. v. Hammerman & Gainer Int'l, Inc.*, 107 F. Supp. 3d 620, 637 (N.D. Tex. 2015) (Solis, J.) (citing *Southwest Industries* and refusing to dismiss a conversion claim for money when the plaintiff alleged that the defendants had converted identifiable profits that should have been delivered to plaintiffs).

Here, the summary judgment evidence conclusively establishes the elements of the Receiver's claims. The 95,000 PIVX coins had been contributed to and belonged to AriseBank. These coins were originally deposited with Smith as an (approximate) 10% down payment for purchase by AriseBank of the purported bank. In the same way, Matthew received his $123,000 deposit as an (approximate) 1% down payment on purchase of the purported bank. Neither Smith

nor Matthew ever had authority to assume ownership of this currency or to use it for their own purposes, or in any way other than as part of AriseBank's purchase of the bank. As a result, just as in *Southwest Industries* and the other cases cited, the deposit amounts count as "specific money," capable of identification and capable of conversion. Smith has already acknowledged using proceeds from the deposited amounts for his own business and personal uses. That, together with the refusal of both defendants to return these funds when demanded by the Receiver, makes each liable for conversion.

D. The Receiver Is Entitled to Summary Judgment Under TUFTA

Section 24.005(a) of TUFTA sets forth two separate grounds for concluding that a transfer is fraudulent: subsection (a)(1), which addresses actual intent to defraud; and subsection (a)(2), which addresses constructive fraud. Under the constructive-fraud grounds of subsection (a)(2), a "transfer made or obligation incurred by a debtor is fraudulent as to a creditor" if the transfer or obligation was made:

> without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor
>
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

A creditor who successfully establishes actual or constructive fraud under section 24.005(a) is entitled to avoid the transfer and to recover a judgment from the transferee—including any subsequent transferee beyond the first—for the "value of the asset transferred." TUFTA § 24.009(b)(1-2). That value is to be measured "at the time of the transfer." *Id.* § 24.009(c)(1). In addition, TUFTA authorizes an award of costs and reasonable attorneys' fees. *Id.* § 24.013.

The summary judgment evidence conclusively establishes each element of constructive fraud under TUFTA:

- The debtor, AriseBank, transferred a "down payment" of 95,000 PIVX coins to a creditor, Smith, on January 10, 2018;
- On that date, the 95,000 PIVX coins were valued at $1.3 million;
- AriseBank received no value at all in exchange for the transfer;
- At the time of the transfer,
    - AriseBank was engaged in a transaction—the sale of the bank—that would create a new debt of 12 million euros (more than $14 million at that date's exchange rate) or 12 million dollars;
    - AriseBank never had available to it assets totaling more than approximately $4.3 million in ICO contributions, including the 95,000 PIVX; and
    - the record of ICO contributions offered *no reasonable prospect* that AriseBank would be able to pay a debt of 12 million euros or dollars, which it intended to incur as part of the bank transaction.

These facts, all of which are undisputed on the summary judgment record, demonstrate each element of the constructive-fraud ground under TUFTA, and entitle the Receiver to a judgment against the original transferee, Smith, for the entire value of the asset transferred, and against Matthew, a subsequent transferee, for the entire value he received of $123,000, together with attorneys' fees and costs.[8]

IV. CONCLUSION

For these reasons, the Receiver requests that the Court grant summary judgment against Defendant Richard Smith, Jr. in the amount of $1,320,500, and against Defendant Kurt F.

[8] TUFTA provides a defense to "a person who took in good faith and for a reasonably equivalent value," *id.* § 24.009(a), but the summary judgment evidence does not permit either Smith or Matthew to make such a claim because, apart from their bad faith, neither provided *any value at all*, much less "reasonably equivalent" value.

Matthew, Jr. for $123,000, and against both defendants for prejudgment and post-judgment interest on the respective amounts, together with costs and attorneys' fees in an amount to be determined at a later date against both defendants as permitted under section 24.013 of the Texas Business and Commerce Code. The Receiver also requests such further relief to which he may show himself entitled.

Dated: March 8, 2019.

Respectfully submitted,

/s/ James A. Cox

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 8, 2019, the foregoing document was served on counsel of record for Defendants through the Court's electronic filing system.

/s/ James A. Cox
James A. Cox

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