NO. 013-35341

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. WAYNE KLEIN, the Court Appointed Receiver of Trigon Group, Inc., and for the assets of Daren L. Palmer
Plaintiff/Appellee
v.
DOYLE BECK, an individual,
Defendant/Appellant

Appeal from the United States District Court for the District of Idaho

Honorable Judge Edward J. Lodge, United States District Judge, Presiding

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APPELLEE'S BRIEF

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I.

STATEMENT OF JURISDICTION

Appellee R. Wayne Klein, the court-appointed receiver for Trigon Group, Inc. and for the assets of Daren L. Palmer, agrees with the Statement of Jurisdiction in Appellant Doyle Beck's Opening Brief ("OB").

II.

STATEMENT OF THE ISSUES

1. Did the District Court correctly deny Beck's Rule 50(a) & (b) Motions and his objection to Jury Instruction No. 32A, each of which was premised on Beck's argument that the Idaho Legislature displaced claims for unjust enrichment when it adopted the Idaho Uniform Fraudulent Transfer Act?

2. Did the District Court abuse its discretion by rejecting Beck's various arguments that he could not have been and had not been unjustly enriched, which arguments followed a jury verdict that he had been unjustly enriched and which were raised for the first time in Beck's post-trial motions?

III.

STATEMENT OF THE CASE

Through Trigon Group, Inc. ("Trigon"), Daren L. Palmer ("Palmer") operated a multi-million dollar Ponzi scheme from 1997 through 2008, and numerous innocent investors lost tens of millions of dollars when Trigon collapsed. Palmer's brother-in-law, Duane Yost ("Yost") solicited many of those individuals

to invest in Trigon, often pooling their funds for investment, and he received a commission from Palmer for bringing investors into Trigon. ER 157-163.

In 2006, Doyle Beck ("Beck") loaned $500,000 to Yost. Beck was not an investor in Trigon, his loan to Yost was a personal loan, and the money he loaned Yost did not go to Trigon. ER 43-44, 98, 148, 170-171. Beck relied on his impressions of Yost's wealth in determining to lend him money, and he looked solely to Yost for repayment of the loan. ER 72-73, 149.

Over the next 13 months, while Trigon was still an active Ponzi scheme, Yost repaid Beck the entire $500,000 principal amount of the loan plus $105,000 in interest, all but $50,000 of which was paid with Trigon funds that Yost received from Trigon and, on the same day he cashed the Trigon checks, paid over to Beck. ER 35, 78-80, 94-97, 189-197, 199-200, 201-203. The other $50,000 was paid with monies that Yost had received from an individual for investment in Trigon but diverted to Beck rather than forward to Trigon. ER 143-144, 204-208.

In late 2008, the Trigon Ponzi scheme collapsed, and the United States District Court for the District of Idaho ("District Court") appointed R. Wayne Klein ("Receiver") as the receiver for Trigon and for Palmer's assets. ER 172-173. Pursuant to his charge to recover monies for Trigon's innocent investors, the Receiver sought the return of Trigon investor funds that had been diverted to third parties. ER 174-175.

Among the lawsuits filed by the Receiver to recover Trigon investor funds was the complaint filed against Beck on February 18, 2010 for the return of the $555,000 in Trigon funds that had been paid to him by Yost. In the Complaint, the Receiver alleged claims for relief under the Idaho Uniform Fraudulent Transfer Act ("IUFTA") and for unjust enrichment. ER 105.

At trial, Beck moved under Rule 50(a) of the Federal Rules of Civil Procedure for judgment on the Receiver's unjust enrichment claim on one ground only: whether, as a matter of law, the IUFTA precluded the Receiver from bringing a claim for unjust enrichment in addition to the fraudulent transfer claims ("Rule 50(a) Motion"). ER 46-48.[1] The District Court denied the motion. ER 22-23.

The jury found that $555,000 of the monies paid by Yost to Beck were received from or belonged to Trigon. ER 35. But because the jury found that Yost was an "initial transferee" under the IUFTA and that Beck had acted in good faith and given "value" to Yost, the jury found in favor of Beck on the Receiver's IUFTA claims. ER 36-39.

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[1] Beck also moved under Rule 50(a) for judgment regarding an additional issue that is not before this Court. ER 49.

The jury also found that Trigon provided a benefit to Beck, that Beck accepted that benefit, and that, under the circumstances, it would be unjust for Beck to retain the benefit without compensating the Receiver for its value. ER 40. As a result, the jury found in favor of the Receiver on his unjust enrichment claim in the amount of $55,000. ER 41.

On August 15, 2012, Beck filed a paper entitled "Renewed Rule 50(a) Motion Under Rule 50(b) and Motion to Alter or Amend Judgment Pursuant to Rule 59(e)" asserting a variety of arguments in opposition to the jury verdict in favor of the Receiver on the unjust enrichment claim ("Post-Trial Motions"). ER 31-32. Because Beck's Rule 50(a) Motion was based only on one ground -- that the unjust enrichment claim was precluded by the IUFTA claim, see ER 46-48 -- the Post-Trial Motions were proper under Rule 50(b) of the Federal Rules of Civil Procedure as to that issue only. Beck raised the remaining issues in the Post-Trial Motions -- namely, whether Beck was not unjustly enriched because he was a bona fide purchaser for value and because Idaho's statutory prejudgment interest rate is twelve percent -- for the first time.

The District Court denied Beck's Post-Trial Motions in all respects. ER 4-10. Beck appealed. ER 24. On appeal, Beck argues, for the first time, that the Receiver failed to establish the first element of an unjust enrichment claim, that the plaintiff conferred a benefit on the defendant. OB at 39-41.

IV.

STATEMENT OF THE FACTS

Beck's Statement of the Facts, *see* OB at 6-9, is mostly accurate, but it omits certain immaterial facts and is imprecise about others. In the interest of economy, the Receiver's Statement of the Facts will not restate those facts discussed by Beck with which he agrees or that are immaterial.

Palmer did not act alone in perpetuating the Trigon Ponzi scheme. *See* OB at 6. While Palmer was the founder and mastermind behind Trigon, Yost solicited dozens of individuals into Trigon, and Palmer paid Yost commissions on those individuals' investments. ER 142, 157-163.

Beck's statement that "Yost took Beck's $500,000 loan and put the money into Trigon," *see* ER at 8, is inaccurate. The evidence at trial established that Yost did not put that money into Trigon but rather moved it into various accounts he controlled. ER 164, 176-188,198, 209-230.

Beck's discussion of the payments from Yost to Beck, *see* OB at 8, omits key facts. Of the four payments to Beck, each of the final three, totaling $555,000, was made with Trigon funds. In fact, each was made on the same day that Yost deposited a check from Trigon that made the payments to Beck possible. On July 9 and November 14, 2007, Yost deposited a check from Trigon and, the same day, wrote a check to Beck drawing on the same account into which he deposited the

Trigon checks. ER 94, 96, 189-193, 195-197, 201, 203. In both cases, Yost's account balance was insufficient to cover the amount of the check to Beck prior to the deposit of the Trigon check. ER 189-193. Yost made the October 16, 2007 payment by converting a check from Trigon into, among other things, the cashier's check to Beck. ER 95, 193-194, 202. The checks from Trigon to Yost that preceded the payments to Beck were written by Palmer with the understanding and for the purpose of paying Beck. ER 156. Each of the payments from Trigon to Yost was made by a check drawn on Trigon's Bank of America account, the account into which Palmer deposited monies received from innocent investors. ER 153-155.

The first payment from Yost to Beck, in the amount of $50,000 on April 3, 2007, was made with funds that Yost had received from a third-party Trigon investor, and those funds were supposed to be invested in Trigon. ER 143-144.

At the same time that Yost was ensuring that Beck got paid the entire amount of his principal and interest, Yost was strongly discouraging at least one Trigon investor from taking any money out of Trigon, threatening that investor that if he withdrew his money, he would not be let him back in. ER 166. That investor, Scott Hillam, lost all of his nearly $1,000,000 in retirement funds that he had invested in Trigon. ER 165, 167-168. As of the time of trial, Mr. Hillam had

been repaid, through the Receivership, approximately 23% of his lost investment. ER 168.

Trigon's innocent investors lost at least 22 million dollars when the Ponzi scheme collapsed. ER 85-86. At the time of trial, the Receiver had distributed approximately 4.1 million dollars back to those investors. ER 86.

Beck's claim that "the Receiver did not consider Beck an investor and did not give Beck credit for his $500,000 loan to Yost" is misleading. The Receiver initially assumed, based upon the fact that the financial records showed a payment from Beck to Yost followed by payments from Trigon to Yost to Beck, that Beck was an investor, and on that basis, he requested that Beck return the interest payments. ER 150-151. Beck adamantly insisted, both before and during trial, that he had not invested in Trigon but merely made a personal loan to Yost. ER 145-147. As a result, and after further investigation, the Receiver determined that Beck was not an investor and thus not entitled to a credit. ER 151.

V.
SUMMARY OF ARGUMENT

Despite not investing in Trigon and relying only on Yost's ability to repay his loan, Beck received $555,000 in Trigon monies through Yost, funds that belonged to Trigon's innocent investors who collectively lost millions of dollars. But because of the particularities of the IUFTA's treatment of initial and subsequent transferees and the fact that the Trigon checks were made out to Yost

rather than him, the jury determined that Beck successfully asserted an affirmative defense to the IUFTA, and he avoided liability under that statute. The jury found against Beck on the Receiver's unjust enrichment claim, however, but it required Beck to give back to Trigon's investors merely the portion of his interest that he received from Trigon through Yost.

Nevertheless, Beck challenges the jury verdict through two different sets of arguments, only one of which is procedurally proper, and neither of which is convincing.

Beck first argues that that the District Court erred by submitting the Receiver's unjust enrichment claim to the jury. Although that argument was properly raised in the District Court, it is substantively unavailing because it is based upon the unsupportable premise that the Idaho legislature intended, by adopting the IUFTA, to displace common law and equitable claims, including claims for unjust enrichment. Beck's argument ignores and is contrary to the plain language of the IUFTA, which expressly provides that the statute does not displace "principles of law and equity," as well as Idaho's long-standing canons of statutory construction that counsel against changes to the common law in the absence of explicit preemption. Beck's argument is also contrary to the weight of authority from inside and outside this Circuit interpreting similar statutory language and

canons of interpretation in other states and holding that the UFTA does not displace or preempt common law or equitable claims.

Beck instead relies on his assertion that the Receiver's unjust enrichment claim is precluded because he had an adequate legal remedy under the UFTA. Idaho case law discussing that principle demonstrates, however, that Beck's reliance is misplaced, not least because the Idaho Supreme Court has held that a defendant's successful assertion of an affirmative defense to a legal claim does not preclude a claim for unjust enrichment. In light of those authorities, the District Court correctly rejected Beck's argument that the IUFTA displaces claims for unjust enrichment.

Beck also asserts several distinct arguments that were either improperly raised or not raised at all in the District Court. Beck contends that he was a bona fide purchaser for value and that he was entitled to statutory prejudgment interest. But Beck raised those arguments for the first time in his Post-Trial Motions, and although Beck seeks to cloak them under Rule 59(e), they are actually challenges to the jury's verdict and seek judgment as a matter of law notwithstanding that verdict. Because Beck failed to raise those arguments in a Rule 50(a) motion, they are not proper under Rule 50(b), and the District Court's rejection of those arguments is reviewed, if at all, with extraordinary deference and is upheld if *any* evidence supports the jury's verdict. The record in this case contains much more

than merely *any* evidence supporting the jury's verdict on unjust enrichment, including evidence that Beck received $555,000 that belonged to innocent Trigon investors who had, at the time of trial, recovered only about 25% of their millions of dollars in losses. As a result, Beck's "bona fide purchaser" and "statutory interest" arguments miss the mark.

Beck also argues, for the first time on appeal, that the Receiver did not prove the first element of his unjust enrichment claim. As Beck failed to raise that argument below, he is precluded from making it to this Court. And even if not precluded, his argument fails because it ignores the evidence about the payments to Beck and the jury finding that he received $555,000 in Trigon funds.

VI.

ARGUMENT

A. The District Court Correctly Denied Beck's Rule 50(a) Motion, His Rule 50(b) Motion, and His Challenge to Jury Instruction No. 32A Because the IUFTA Does Not Displace Claims for Unjust Enrichment.

Beck argues variously about his Rule 50(a) Motion, his objection to Jury Instruction No. 32A, and his Rule 50(b) Motion, but the substance of his argument is the same as to all three: Beck contends that the District Court erred by submitting the Receiver's unjust enrichment claim to the jury. *See* OB at 12-34.

Although he does not state it as clearly in his brief to this Court as he did to the District Court, Beck's argument is based upon the premise that the Idaho

legislature intended, by adopting the IUFTA, to displace common law and equitable remedies, including claims for unjust enrichment. *See* ER 130. That argument ignores the plain language of the IUFTA, which expressly provides that it does not displace "principles of law and equity," as well as Idaho's long-standing canons of statutory construction that counsel against changes to the common law in the absence of explicit preemption, and it is contrary to the weight of authority from inside and outside this Circuit interpreting similar statutory language and canons of interpretation in other states and holding that the UFTA does not displace or preempt common law or equitable claims.

1. **Standard of Review.**

This Court reviews *de novo* the denial of a renewed motion for judgment as a matter of law under Rule 50(b), at least with respect to those issues that were initially asserted in the Rule 50(a) motion. *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009). "In entertaining a motion for judgment as a matter of law, the court may not make credibility determinations or weigh the evidence." *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)). Rather, this Court "must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. The test applied is whether the evidence permits

only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Id.* (quoting *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir. 2006)).

Here, Beck made only one argument in his Rule 50(a) motion: that the Receiver's claim for unjust enrichment was precluded by the IUFTA as a matter of law. ER 4, 46-49. As a result, that is the only issue afforded *de novo* review.[2]

2. **The IUFTA Does Not Preempt a Claim for Unjust Enrichment in Idaho.**

Beck's argument regarding his Rule 50(a) Motion, his Rule 50(b) Motion, and his objection to Jury instruction No. 32A are each premised upon the notion that the IUFTA has displaced common law actions in Idaho, including actions for unjust enrichment. That argument is unavailing in light of express language of the IUFTA, court decisions interpreting such language, and canons of statutory construction.

a) Idaho Statutes Displace Idaho Common Law only When the Words of the Statute Clearly Indicate a Legislative Intent to Do So.

Unless the Idaho Legislature clearly expresses an intent to change or displace common law by adopting a statute, the common law that predated the statute survives. It has long been the law in Idaho that"[t]he rules of common law

[2] The standard of review of the other issues raised by Beck is discussed infra at Section VI.B.

are not to be changed by doubtful implication." *Moon v. Bullock*, 65 Idaho 594, 607, 151 P.2d 765, 771 (1944) (quoting *Congdon v. Congdon*, 160 Minn. 343, 200 N.W. 76, 82 (1924)), superseded on other grounds by statute, I.C. § 5-327, as recognized in *Doggett v. Boiler Eng'g & Supply Co.*, 93 Idaho 888, 890, 477 P.2d 511, 513 (1970). To be sure, "the legislature has the power to abrogate the common law," and "[w]here the clear implication of a legislative act is to change the common law rule," Idaho courts recognize such modifications. *McCann v. McCann*, 152 Idaho 809, 818, 275 P.3d 824, 833 (2012) (quoting *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 583, 513 P.2d 627, 635 (1973)). But "changes in the common law by the adoption of a statute may not be presumed, nor may such changes be accomplished by legislation of doubtful implication." *Industrial Indem. Co. v. Columbia Basin Steel & Iron*, 93 Idaho 719, 723, 471 P.2d 574 (1970). *See Hancock v. Halliday*, 65 Idaho 645, 665, 150 P.2d 137 (1943) ("changes in the common law by the adoption of a statute are not to be presumed, unless an intent appears to accomplish that purpose"). For this reason, "[n]o statute is to be construed as altering the common law farther than its words and circumstances import." *Moon*, 65 Idaho at 607.

In short, it is "presume[d] that the legislature did not intend to change the common law unless the language of a statute clearly indicates the legislature's intent to do so." *Thomson v. City of Lewiston*, 137 Idaho 473, 478, 50 P.3d 488

(2002) (citing *Williams v. Blakley*, 114 Idaho 323, 325, 757 P.2d 186 (1988)). *See Williams*, 114 Idaho at 325-326 ("Estoppel is a creature of the common law, and statutory changes purporting to abolish it are not presumed but must be shown by a clear intent to alter or oppose the common law or to change the common law by necessary implication."). As a result, the Idaho Supreme Court "will not interpret a statute as abrogating the common law unless it is evident that was the Legislature's intent." *Pioneer Irrigation Dist. v. City of Caldwell*, 153 Idaho 593, 602, 288 P.3d 810 (2012) (citing *Statewide Constr., Inc. v. Pietri*, 150 Idaho 423, 429, 247 P.3d 650, 656 (2011)). And neither will this Court, when interpreting Idaho law. *See Peterson v. Bonneville Joint Sch. Dist. No. 93*, 832 F. Supp. 2d 1217, 1220 (D. Idaho 2011) ("A federal court should interpret state law by using the same method and approach that the state's highest court would use.") (citing *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 930 (9th Cir. 2004)).

b) In Enacting the IUFTA, the Idaho Legislature Expressed an Intent That Claims for Unjust Enrichment Are Not Displaced.

The plain language of the IUFTA demonstrates that, far from "clearly indicat[ing]" a legislative intent to displace claims for unjust enrichment and other elements of the common law, the Idaho Legislature actually meant to preserve such claims. In discerning the Legislature's intent in adopting the IUFTA, the best guide "is the words of the statute itself." *State v. Yzaguirre*, 144 Idaho 471, 475,

163 P.3d 1183 (2007) (quoting *In re Permit No. 36-7200*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992)). The words of the IUFTA contain no language of preemption; to the contrary, the IUFTA contains an anti-displacement provision that makes clear that the IUFTA was not intended to displace common law actions or principles of law and equity:

> Unless displaced by the provisions of this act, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

Idaho Code § 55-919 (emphases added).

Although Idaho appellate courts have not directly addressed section 55-919, they have found no preemption even in statutes containing no similar anti-displacement language. For example, as acknowledged by the District Court, *see* ER 8-9, the Idaho Supreme Court recognized in *McCann* that "Idaho Code § 30-1-1430 does not contain any explicit language on whether it preserves or abrogates any common law," and that although the statute "lays out the guidelines and procedures for judicial dissolution of a corporation, [] it neither clearly nor obviously implies a change in the common law except as the common law may pertain to corporate dissolution." 152 Idaho at 818. As a result, the *McCann* court preserved equitable remedies, holding that "the elements of I.C. § 30-1-1430(2)(b)

do not control the application of an equitable remedy not enumerated or implicated by the Idaho Business Corporation Act, in an action unrelated to corporate dissolution." *Id.* Similarly, in *Williams*, the Idaho Supreme Court rejected the argument that a statute of limitations abrogated the common law doctrine of equitable estoppel on grounds that the statutory language "demonstrates no clear intent to repeal or abolish the doctrine of equitable estoppel, nor do we view the language of the statute as containing a necessary implication that the doctrine of estoppel be repealed or abolished," even though the language of the statute "indicates that the limitation is not to be extended by any continuing relationship." 114 Idaho at 325-326.

As a result, even without the statutory directive against displacement in Section 55-919, the absence of language of preemption in the IUFTA demonstrates that the Idaho legislature did not intend to displace common law actions, including actions for unjust enrichment. *See Hancock*, 65 Idaho at 665 ("We must construe these sections in view of the principle that changes in the common law by the adoption of a statute are not to be presumed, unless an intent appears to accomplish that purpose."); *Fleet Nat'l Bank v. Valente (In re Valente)*, 360 F.3d 256, 261(1st Cir. 2004) ("to find broad preemption in the UFTA, in the absence of language of preemption, would be at odds with the presumption that statutes should not be construed to alter common law principles absent an explicit statement of legislative

intent to do so."); *id.* ("Where there is any doubt about statutes meaning or intent they are given the effect which make the least rather than the most change in the common law.") (quoting 3 Norman J. Singer, Statutory Construction § 61:1 (2001 Revision)). Section 55-919 makes the problems with Beck's argument that much clearer.

Not surprisingly, courts interpret the analog of section 55-919 in other states' versions of the Uniform Fraudulent Transfer Act ("UFTA") to be a "clear statement of policy and purpose of the UFTA as a cumulative and additional remedy." *Macedo v. Bosio*, 86 Cal. App. 4th 1044, 1049 (2001) (discussing same provision in California UFTA) (quoting *Cortez v. Vogt*, 52 Cal.App.4th 917, 937 (1997)). Indeed, section 55-919 "demonstrates a desire by the drafters to preserve the common law as a supplement to the UFTA unless precluded by the terms of the Act." *Valente*, 360 F.3d at 261 (discussing same provision in Rhode Island UFTA). *See, e.g., Freitag v. McGhie*, 133 Wn.2d 816, 823-824 (1997) ("within the UFTA itself lies a mandate to apply the common law to the extent it is not inconsistent with the provisions of the act"); *Cortez*, 52 Cal.App.4th at 930 ("Legislative and decisional history of the UFTA makes clear its remedies are cumulative to preexisting remedies for fraudulent conveyance.").

For that reason, numerous courts have held that the UFTA does not preempt or displace common law or equitable remedies. *E.g.*, *Valente*, 360 F.3d at 260-262

(rejecting the argument that adoption of the UFTA preempts common law remedies relating to fraudulent transfers and holding that although the bankruptcy court correctly concluded that the plaintiff could not recover under the UFTA, it erred by failing to "look beyond the UFTA" to evaluate the plaintiff's claim under common law); *Fidelity National Title Ins. Co. v. Schroeder*, 179 Cal. App. 4th 834, 849 (2009) ("California recognizes that common law causes of action are not preempted by the UFTA and remain available remedies"); *Jhaveri v. Teitelbaum*, 176 Cal. App. 4th 740, 755 (2009) (holding that "a suit under the UFTA is not the exclusive remedy by which fraudulent transfers may be attacked"); *Nickless v. Clemente (In re Clemente)*, 2009 Bankr. LEXIS 2759, *1 n.1 (Bankr. D. Mass. Sept. 8, 2009), rev'd on other grounds by *Clemente v. Nickless*, 434 B.R. 202 (D. Mass. 2010) (noting that "The UFTA does not preempt state common law remedies…Therefore the equitable remedy of an implied trust, whether constructive or resulting, is not barred."). Simply put, it is an "unmistakable" rule that "the UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked." *Macedo*, 86 Cal. App. 4th at 1051.

Notably, both common law actions for fraudulent conveyance and equitable remedies have survived the passage of the UFTA. For example, the *Cortez* and *Macedo* courts concluded that a creditor could take advantage of a statute of limitations in pre-UFTA law applicable to common law fraudulent conveyance

actions notwithstanding the express statute of limitations in the UFTA. *Macedo*, 86 Cal. App. 4th at 1051-1052; *Cortez*, 52 Cal. App. 4th at 929-937. Both courts relied on the "contemporaneous legislative adoption of the clear statements of policy and purpose of the UFTA as a cumulative and additional remedy." *Macedo*, 86 Cal. App. 4th at 1049; *Cortez*, 52 Cal. App. 4th at 937. Their conclusion, that a fraudulent conveyance may be "attacked by…a common law action" for fraudulent conveyance in addition to the UFTA, *Macedo*, 86 Cal. App. 4th at 1051, demonstrates that the UFTA does not displace even those common law actions that are most similar to it and target the same conduct -- in other words, the common law actions that would logically be most likely to be displaced. Moreover, the *Schroeder* and *Valente* courts each held that equitable relief, in the form of a resulting trust, remained available despite the UFTA. *Schroeder*, 179 Cal. App. 4th at 850; *Valente*, 360 F.3d at 266.

Like post-UFTA common law claims for fraudulent conveyance, unjust enrichment claims have survived the adoption of the UFTA. While few courts have directly addressed the question whether the UFTA displaces unjust enrichment claims, there is ample persuasive authority for the proposition that the two can coexist. Two cases have discussed the issue under Idaho law.

First, in *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 813-814 (9th Cir. 1994), the plaintiff/debtor-in-possession sought recovery of assets

transferred from a corporation to a controlling shareholder, and the magistrate judge awarded damages under the UFTA, as well as under the plaintiff's "alternative theory of common-law restitution." The Ninth Circuit affirmed, relying on Idaho law regarding unjust enrichment and the magistrate judge's determination that, under Idaho law, "Acequia does not even have to prove fraudulent intent" to prevail "under the theory of unjust enrichment." *Id*. at 814-15.

Second, in *Vanderford Company, Inc. v. Knudson*, 144 Idaho 547, 165 P.3d 261 (2007), the Idaho Supreme Court held that the evidence supported the jury's finding that one of the defendants had been unjustly enriched and that the trial court erred by refusing to give a fraudulent conveyance instruction. The court remanded for a new trial so that the unjust enrichment claim "may be considered together with the other jury issues[,]" including fraudulent conveyance. *Id*. at 557-559.

Analysis from out-of-state decisions is in accord. In *Donell v. Keppers*, 835 F. Supp. 2d 871, 878-79 (S.D. Cal. 2011), the court held that a Ponzi scheme receiver's particular unjust enrichment action was barred by the seven-year statute of limitations in the California UFTA, Cal. Civ. Code § 3439.09(c), but the court's analysis demonstrates the viability of an unjust enrichment claim in the circumstances of this case. The court analyzed whether a receiver of a Ponzi

scheme could bring a claim for unjust enrichment in addition to his claims under the UFTA and concluded that "common law remedies remain available" to the receiver despite the passage of the UFTA." *Id.* at 879 (Plaintiff is correct that 'a suit under the UFTA is not the exclusive remedy by which fraudulent transfers may be attacked,' and common law remedies remain available.") (quoting *Jhaveri*, 176 Cal. App. 4th at 755). *See also Freeland v. Enodis Corp.*, 540 F.3d 721, 736 (7th Cir. 2008) (noting that the bankruptcy court found that the Trustee could recover transfers under theories of actual fraud and unjust enrichment); *Valente*, 360 F.3d at 265 ("The bankruptcy court erred in not providing this equitable relief."); *SEC v. Ross*, 504 F.3d 1130, 1134 n.3 (9th Cir. 2007) (discussing the fact that the district court accepted the receiver's unjust enrichment theory rather than addressing his "unpersuasive" fraudulent transfer theory);[3] *Nagle v. Nagle*, 799 A.2d 812, 820 n.3 (Pa. Super. Ct. 2002) (divorce court imposed a constructive trust on stock and ruled that the transfer of stock was a fraudulent transfer; appellate court affirmed imposition of constructive trust).

Other courts have addressed the interplay between the UFTA and unjust enrichment more directly. Most recently, in *Sender v. Dillow*, 2013 U.S. Dist.

[3] This Court vacated the *Ross* court's decision on grounds that the court lacked jurisdiction. 504 F.3d at 1151. The district court's discussion is, therefore, not precedential.

LEXIS 124184 (D. Kan. August 30, 2013), the court held, in light of anti-displacement language in the Illinois UFTA analogous to Idaho Code Section 55-919, that the statute does not preempt unjust enrichment claims relating to alleged fraudulent transfers. *Id.* at *16-17 (citing 740 ILL. COMP. STAT. 160/11). Notably, that court rejected the defendant's Beck-like argument that "the statutory action under the UFTA occupies the field" and precludes an independent action for unjust enrichment. *Id*. at *14. *See also Missal v. Washington*, 1998 U.S. Dist. LEXIS 6016, *14 (D. D.C. April 17, 1998) (holding that because receiver is entitled to complete relief under UFTA claims, the receiver "has a legal remedy, and it is not necessary to reach a decision on equitable remedies," but noting that the receiver "may indeed be entitled to relief" on his unjust enrichment claim "as well").

The jury's finding in Beck's favor on the Receiver's IUFTA claims based on Beck's affirmative defense does not foreclose the Receiver's unjust enrichment claim. *See Schroeder*, 179 Cal. App. 4th at 850 ("the fact that the transfer could not be set aside under the UFTA, notwithstanding the debtor's intent to defraud his creditor, does not mean that the creditor is without a remedy under the common law or equity"); *Acequia*, 34 F.3d at 814-815 (under Idaho law, "Acequia does not even have to prove fraudulent intent" to prevail "under the theory of unjust enrichment"). *See Warfield v. Alaniz*, 569 F.3d 1015, 1018-1019 (9th Cir. 2009)

(noting jury verdict for defendants on fraudulent transfer claims and for the plaintiff receiver on unjust enrichment claim; affirming judgment entered by court).

If the Idaho Legislature had actually intended the IUFTA to alter the common law and displace unjust enrichment actions, it could -- and presumably would -- have said so. Indeed, in enacting other uniform acts, the Legislature has done just that. For example, the Idaho Trade Secrets Act contains a displacement provision expressly providing that it "displaces" state law providing remedies for misappropriation of a trade secret. *See Chatterbox, LLC v. Pulsar Electroproducts, LLC*, 2007 U.S. Dist. LEXIS 34022, *5 (D. Idaho May 9, 2007) (citing I.C. § 48-806(1)). Relying on that statutory displacement provision, the *Chatterbox* court granted a motion to dismiss an unjust enrichment claim. *Id.* Here, the opposite is true about the IUFTA, and the opposite result should follow: far from including a statutory displacement provision, the IUFTA includes clear language of non-displacement.

3. **Beck's Arguments Do Not Withstand Scrutiny.**

Beck makes several assertions in support of his argument that the IUTFA displaces unjust enrichment claims, each of which ignores the principles of statutory construction, statutory language, and case authority cited above, and none of which withstands scrutiny.

a) The Idaho Supreme Court Narrowly Applies the General Principle that Equitable Claims do not Lie Where an Adequate Legal Remedy is Available.

Beck relies heavily on the general principle that equitable claims are not considered when an adequate legal remedy is available to argue that a claim for unjust enrichment cannot lie where a plaintiff has a UFTA claim. *See* OB at 13-14, 24-25, 27. But in addition to being contrary to the language of the IUFTA and to case law giving effect to that language, Beck's argument ignores how narrowly the Idaho Supreme Court has applied that principle. In fact, despite that general principle, the Idaho Supreme Court has frequently allowed unjust enrichment claims, even where the plaintiff also had a legal claim. And the court has significantly narrowed the one relatively clear circumstance in which unjust enrichment claims are precluded, thereby demonstrating by application just how narrow the principle is in practice.

The one situation in which the Idaho Supreme Court has repeatedly stated that a claim for unjust enrichment is barred is the same situation in which the court has articulated the general principle of equitable preclusion: unjust enrichment claims are foreclosed where there is an express contract. *E.g., Iron Eagle Development, LLC v. Quality Design Systems, Inc.*, 138 Idaho 487, 492 (2003) ("When parties enter into an express contract, a claim based in equity is not allowed because the express contract precludes enforcement of the claim.").

In practice, however, the Idaho Supreme Court has significantly narrowed the "express contract" rule, and the court permits unjust enrichment claims even when an express contracts exists, precluding them only where the claim on the express contract provides adequate relief. Because even an express contract "cannot provide adequate relief when it is not enforceable," the existence of such an agreement is not sufficient to bar a claim for unjust enrichment; rather, "only when the express agreement is *found to be enforceable* is a court precluded from applying the equitable doctrine of unjust enrichment in contravention of the express contract.'" *Thomas v. Thomas*, 150 Idaho 636, 643 (2011) (quoting *Wolford v. Tankersley*, 107 Idaho 1062, 1064, 695 P.2d 1201, 1203 (1984)). *See Bates v. Seldin*, 146 Idaho 772, 776 (2009) ("The existence of an express agreement does not prevent the application of the doctrine of unjust enrichment."); *Vanderford*, 144 Idaho at 557-58 (permitting unjust enrichment claim because no enforceable express agreements existed between the parties); *Tomlinson Black North Idaho v. Kirk-Hughes*, 361 Fed. Appx. 712, (9th Cir. 2009) ("In Idaho, an express agreement bars recovery for unjust enrichment only if it is enforceable and covers the same subject matter.") (citing *Vanderford*, 144 Idaho 547). As a result, even when applying the singular bar to unjust enrichment claims, the Idaho Supreme Court has focused on whether the legal claim for breach of contract actually results in "adequate relief" for the plaintiff, and the mere fact that the

plaintiff has a claim for breach of contract does not preclude an action for unjust enrichment.

Notably, in the context of a contract claim, the Idaho Supreme Court has already rejected an argument very similar to Beck's. In *Bates*, 146 Idaho 772, the plaintiff sued for breach of contract, unjust enrichment and fraud. By special verdict, the jury found that the defendants had breached their contract with the plaintiffs, but that the defendants had proved an affirmative defense excusing the breach. *Id.* at 774. Despite finding that the defendants were not liable under the contract, the jury also found that defendants were unjustly enriched and awarded plaintiffs damages. *Id.* Like Beck, the plaintiffs moved for judgment notwithstanding the verdict, arguing that the jury instructions and special verdict were erroneous because "they permitted the jury to make a finding of unjust enrichment" despite the finding that the parties had entered into a contract. *Id.* at 775. The Idaho Supreme Court rejected that argument as "without merit." *Id.* at 776. Relying on the principle that unjust enrichment is precluded only in contravention of an express enforceable contract, the court stated that once the defendants had proved an affirmative defense, "the jury properly considered [plaintiffs'] claim of unjust enrichment." *Id.*

While that portion of the *Bates* court's opinion is *obiter dictum*, *see id.*, it is nonetheless persuasive and informative regarding the degree to which the Idaho

Supreme Court permits unjust enrichment claims, in general, and, in particular, how the court would likely view the issue raised by Beck in this case. Like the Receiver here, the plaintiff in *Bates* failed to prevail on his legal claim because the defendant prevailed on an affirmative defense but was nevertheless permitted to recover on his equitable unjust enrichment claim. Once the jury in this case determined that it would not find in favor of the Receiver on his IUFTA claim because Beck had proved an affirmative defense, the jury "properly considered" the Receiver's claim for unjust enrichment.

The fact that the Receiver sued Beck under the IUFTA does not preclude him from also bringing a claim for unjust enrichment. And neither does the fact that Beck successfully asserted an affirmative defense to the IUFTA claim. As *Bates* demonstrates, the Idaho Supreme Court's significant narrowing of the "express contract" rule demonstrates that the court is inclined to permit claims for unjust enrichment unless they are expressly foreclosed, an inclination that the court has also shown in other circumstances. *See Trees v. Kersey*, 138 Idaho 3, 10 (2003) (calling "persuasive" a Nevada Supreme Court ruling holding that an unlicensed contractor could maintain a suit for unjust enrichment despite statutory language barring "any action" for "any act or contract").

For these reasons, Beck's reliance on the general statements about equitable remedies and on cases discussing that principle is misplaced. Beck relies primarily

on *Micklesen v. Broadway Ford, Inc.*, 153 Idaho 149, 280 P.3d 176 (2012), *see* OB at 14-16, but that case does not support his argument. In *Micklesen*, the Idaho Supreme Court held that the district court erred by analyzing the plaintiff's claim for fraud in the inducement -- which he brought under the Idaho UCC -- under the common law fraud standard. *Id*. at 152. That holding was premised on the court's conclusion that the common law of contracts had been abrogated by the UCC because, despite the absence of any explicit abrogation of the common law in the statute, the UCC "contains the 'rights and remedies for material misrepresentation or fraud'" and "is a codification of the equitable remedy of rescission." *Id*. at 153 (citing I.C. § 28-12-505(4)). As a result, the court determined that it was "clear" that the UCC was "meant to displace the common law actions for fraud or material misrepresentation in leases that fall under the purview of this chapter." *Id*.

The *Micklesen* court's conclusion that actions on contracts that fall under the purview of the UCC are subject to the UCC rather than the common law of contracts does not support Beck's argument here. While Beck argues that this Court "should apply the same analysis as *Micklesen*," OB at 15, his conclusion about where that analysis leads is mistaken because it is premised on his unsupported assertion that the IUFTA "is the codification of the equitable remedy of unjust enrichment in fraudulent transfer cases." OB at 15. Beck argues, citing the UFTA's roots in the Statute 13 Elizabeth, that the UFTA "embodies nearly 500

years of fraudulent transfer law" and provides greater remedies than the a claim for unjust enrichment. OB at 15-16. But that history cannot overcome the presumption against statutory changes to the common law or the express anti-displacement language of section 55-919, and it does not demonstrate that the IUFTA is the codification of unjust enrichment. *See Silica Tech, L.L.C. v. J-Fiber, GmbH*, 2009 U.S. Dist. LEXIS 73700, *121-123 (D. Mass. May 19, 2009) (rejecting the argument that common law equitable fraudulent conveyance claims had been displaced because the predecessor statute to the UFTA codified "both common and statutory law stretching back at least to 1571 and the Statute of Elizabeth").

Moreover, Beck's argument about the adequacy of a legal remedy is contrary to Idaho Supreme Court authority permitting unjust enrichment claims in addition to claims for breach of contract and allowing recovery on the former even when the latter fails. *See, e.g.*, *Bates*, 146 Idaho at 776. Indeed, the mere existence of the "express enforceable contract" rule demonstrates that Beck's argument is wrong. If, as Beck argues, an unjust enrichment claim is barred when a legal remedy is available, there would be no need for a specific rule regarding unjust enrichment claims and express enforceable contracts; the mere fact that a party sued for breach of contract would, under Beck's theory, be sufficient to preclude any claim for unjust enrichment regardless of the success of the breach of

contract claim. That the "express enforceable contract" rule is itself riddled with exceptions in which unjust enrichment claims are permitted only furthers the conclusion that Beck's argument is contrary to the law.

b) The Foreign Authority Beck Relies Upon is Unconvincing.

The authority from outside Idaho that Beck relies upon, see OB at 19-23, is likewise unconvincing, in part because Beck overstates that authority. Beck asserts that "several other jurisdictions have held that an equitable claim for unjust enrichment will not lie when the plaintiff has an adequate legal remedy under the UFTA." OB at 19. The authority cited by Beck does not, however, support his assertion.

Beck relies primarily on *U.S. v. Bame*, 721 F.3d 1025 (8th Cir. 2013), *see* OB at 19-21, 24, 32 & 38, but that case does not offer him nearly the support he seeks. In particular, Beck cites *Bame* for the proposition that "[c]ourts have often found" that fraudulent transfer statutes displace unjust enrichment claims, *see* OB at 20 & 32, but the "courts" to which the *Bame* court was referring is, in reality, only one court: the United States District Court for the District of Minnesota. 721 F.3d at 1030-31 (citing *Kelley v. Coll. of St. Benedict*, 901 F. Supp. 2d 1123, 1132 (D. Minn. 2012) and *Arena Dev. Grp., LLC v. Naegle Commc'ns., Inc.*, 2008 US Dist. LEXIS 35628, 2008 WL 1924179, *5 (D. Minn. April 29, 2008)). And, in any event, the *Bame* court expressly refrained from resolving whether unjust

enrichment is precluded by the Minnesota version of the UFTA. *Id.* at 1029. At most, *Bame* supports the premise that the federal courts in Minnesota take the view that the Minnesota UFTA displaces claims for unjust enrichment in Minnesota.

Beck's other authority is similarly unhelpful to his cause. Two of the cases he cites were decided under Massachusetts law and addressed only whether a constructive trust was preempted by the UFTA, not whether a claim for unjust enrichment was displaced. *See* OB at 21-22, citing *Cavadi d. DeYeso*, 941 N.E.2d 23, 39 (Mass. 2011) and *United States v. All Assets Held at Bank Julius Baer & Co., Ltd*., 772 F. Supp. 2d 191, 202 (D.D.C. 2011). And in *Advanced Telcomm. Network, Inc. v. Allen (In re Advanced Telecomm. Network, Inc.)*, 321 B.R. 308, 342-343 (Bankr. M.D. Fla. 2005), the court, applying New Jersey law, held that the unjust enrichment claim was not viable because the defendants had, in fact, not been unjustly enriched and because the unjust enrichment claim was encompassed within the release granted to the defendants.

In fact, *Cavadi* supports the Receiver's position, not least because that court rejected the argument there, similar to Beck's argument here, that an intent to abrogate common-law causes of action is "implicit in the broad scope of the UFTA." 458 Mass. at 630. The court instead concluded that "far from implicitly suppressing common-law causes of action UFTA is designed to establish a uniform statutory baseline for fraudulent transfer actions which is supplemented by the

common law unless there is an inherent conflict." *Id.* That conclusion relied, in part, on the UFTA reporter's comment that the UFTA is not "a complete or exclusive law covering fraudulent transfers and obligations." *Id*. (citing Kennedy, the Uniform Fraudulent Transfer Act, 18 UCC L.J. 195, 200 (1986)). As a result, the court held that the plaintiff's nonstatutory "reach and apply" action was not precluded by the UFTA because it "required no proof of a fraudulent conveyance," and because it "sweeps more broadly than UFTA," but that the constructive trust remedy was preempted because the underlying theory of constructive trust was based on fraud and was, as a result, necessarily within the scope of the UFTA. *Id*. at 630, 633, 635-636. As a result, the *Cavadi* court's holding and analysis illuminate the problem with Beck's argument: Like that creditor's nonstatutory claim, this Receiver's unjust enrichment claim "required no proof of a fraudulent conveyance" and is likewise not preempted by the IUFTA.

Beck also argues, briefly, that the Receiver's unjust enrichment claim fails because it is based upon the "very same facts" as the claim under the UFTA. OB at 16. Beck fails to explain how the claims are based upon the same facts. And they are not: while there are, of course, facts relevant to both claims, Beck's success on the UFTA claims rested on his statutory affirmative defenses, and the facts relevant to those defenses related primarily to the argument about whether Yost was an "initial transferee" within the meaning of the IUFTA. ER 137-140.

In contrast, the facts relevant to the unjust enrichment claim were the amount of Trigon monies received by Beck, the amount by which he profited, and the amounts lost by innocent Trigon investors.

Moreover, even if the same facts underlie multiple claims, those claims are not duplicative if they "rest on different legal standards," and Fed. R. Civ. P. 8(d)(2) allows a plaintiff to plead alternative claims. *Cohen v. Morgan Schiff & Co. (In re Friedman's Inc.)*, 394 B.R. 623, 628-629 (S.D. Ga. 2008). It is beyond dispute that the Receiver's fraudulent transfer claim rested on a "different legal standard" than the unjust enrichment claim. *See id*. (comparing elements of fraudulent transfer claim with elements of a legal malpractice claim). If the same facts underlie each claim and the damages thus overlap, the result is simply that, at trial, the plaintiff would be precluded from a double recovery. *Id.*

The District Court recognized that there is "arguably a split of authority" regarding the preemption of claims by the UFTA. ER 7. But the majority view, particularly among courts in the Ninth Circuit, is consistent with the statutory language: the UFTA does not displace the common law and does not displace actions for unjust enrichment. And, in the interest of promoting uniformity in the application of the UFTA, Idaho is likely to follow the majority view. *See* Idaho Code § 55-920; *Chatterbox*, 2007 U.S. Dist. LEXIS 34022 at *11 ("Because the Idaho Legislature's purpose in enacting the [Idaho Trade Secrets Act] was to

promote the goal of uniformity, it is appropriate for courts applying Idaho law to follow the majority in interpreting the displacement provision."). *See also Industrial Indem. Co.*, 93 Idaho at 725 (concurring with Kentucky court's rejection of the "minority view" that a workmen's compensation statute "'sweeps away' all civil action arising out of injuries compensable under workmen's compensation acts" and holding that the common law action of indemnity or reimbursement remained available) (quoting *Whittenberg Eng. & Const. Co. v. Liberty Mutual Ins. Co.*, 390 S.W.2d 877 (Ky. 1965)).

In sum, Beck's argument that the IUFTA displaces the common law, including claims for unjust enrichment, does not withstand scrutiny and is not availing. It is contrary to the language of the statute, contrary to fundamental canons of statutory construction, and contrary to Idaho law and to the majority view of the courts. The District Court correctly rejected that argument, holding that the IUFTA "does not clearly abrogate the common law claim of unjust enrichment," *see* ER at 7, and Beck has failed to demonstrate any error.

B. The District Court did Not Abuse Its Discretion in Rejecting Beck's Additional Arguments Raised in his Post-Trial Motions.

Beck also raises a litany of arguments about why he was not or could not have been unjustly enriched. OB at 34-45. These arguments were either raised for the first time in Beck's Post-Trial Motions or are raised for the first time in Beck's

Appellant's Brief. The argument raised for the first time before this Court is waived. And those arguments raised for the first time in the Post-Trial Motions were properly denied on that basis alone. Moreover, although couched as Rule 59(e) arguments, those arguments contend that the jury verdict was contrary to the law, and as such, they were improperly raised arguments for judgment as a matter of law that, even if reviewed, are upheld if any evidence supported the jury's verdict.

1. **Beck's Argument that the Receiver Failed to Establish the First Element of Unjust Enrichment is Not Properly Before this Court Because it Was not Raised Below.**

Beck argues that the Receiver failed to establish the first element of his claim for unjust enrichment because the payments to Beck went through Yost instead of directly from Trigon to Beck. OB at 39-41. Beck did not make that argument in the District Court, either in his Rule 50(a) Motion or his Post-Trial Motions. *See* ER 31-33, 46-48, 124-136. As the argument is raised for the first time on appeal, it is not properly before this Court. *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 666 (9th Cir. 1999) ("Robinson did not argue lack of authenticity of the loan document or security interest documents before the district court, and the argument is not appropriate for the first time on appeal."). Moreover, Beck's argument ignores the evidence that the payments from Yost to Beck were made the same day that Yost cashed the checks from Trigon, and that

Palmer wrote those checks to Yost for the purpose and with the understanding that the monies were being used to pay Beck. ER 35, 78-80, 94-97, 156, 189-197, 199-200, 201-203. It also ignores the jury's finding that $555,000 of the monies used to pay Beck belonged to or came from Trigon. ER 35.

2. Beck's Arguments About Being a Bona Fide Purchaser for Value and About Statutory Interest Are Procedurally and Substantively Infirm.

Beck further argues that he was not unjustly enriched because (1) he was a bona fide purchaser for value, *see* OB at 36-39; and (2) because Idaho law entitled him to twelve percent interest, *see* OB at 42-45. But Beck raised those arguments for the first time in his Post-Trial Motion and, as a result, they were properly denied for that reason alone. Moreover, because those arguments seek judgment as a matter of law but were not raised in Beck's Rule 50(a) Motion, they are not properly appealed.

a) The District Court's Decision is Afforded Extraordinary Deference, if Reviewed at All, Because Beck's Arguments are Not Proper Under Rule 59(e).

The District Court's decision on Beck's newly raised additional arguments is reviewed, if at all, with extraordinary deference because Beck's arguments should have been raised under Rule 50(a). In his brief to this Court, Beck couches his "bona fide purchaser" and "statutory interest" arguments as made pursuant to Rule 59(e), but they are, in fact, not Rule 59(e) arguments but rather improper Rule

50(b) arguments. In the District Court, Beck attempted to raise both the "bona fide purchaser" argument and the "statutory interest" argument under both Rule 50(b) and Rule 59(e). ER 32. Because neither was raised in Beck's Rule 50(a) Motion, however, neither was properly raised under his Rule 50(b) Motion.

Through these arguments, Beck seeks judgment as a matter of law under Rule 50. Regardless of how Beck attempts to frame his "bona fide purchaser" and "statutory interest" arguments, his briefing to the District Court and to this Court makes clear that he was and is challenging the jury's verdict on unjust enrichment, not any earlier ruling from the District Court, and that he is arguing that, notwithstanding the verdict, he is entitled to judgment as a matter of law on the unjust enrichment claim. OB at 39-44; ER 131-135. Indeed, Beck refers, more than once, to the jury's verdict as presenting a "manifest error of law." OB at 39 & 44.

Under the Federal Rules of Civil Procedure, Beck should have raised these arguments in a Rule 50(a) motion prior to the case going to the jury. But he did not. As a result, those arguments were not properly raised in Beck's Rule 50(b) motion. Moreover, they are not proper in a Rule 59(e) motion. *See Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (motions to alter or amend a judgment "cannot be used to raise arguments which could, and should, have been made before the judgment issued"); *Elm Ridge Exploration Co., LLC v.*

Engle, 721 F.3d 1199, 1216 (10th Cir. 2013) (noting that a sufficiency of the evidence challenge is not properly raised under Rule 59(e) and summarily affirming the district court's denial of the Rule 59(e) motion); *Olympia Express, Inc. v. Linee Aeree Italiane S.P.A.*, 2007 U.S. Dist. LEXIS 14307, *46-48, 2007 WL 641557 (N.D. Ill. Feb. 27, 2007) (noting that Rule 59(e) motions have a different purpose than motions for judgment as a matter of law and agreeing with plaintiff's argument that "while cloaked in the garb of a Rule 59(e) motion, in substance Alitalia's motion seeks a Rule 50(b) judgment as a matter of law that Alitalia cannot ask for directly"). In substance, Beck seeks a Rule 50(b) judgment as a matter of law, but he attempts an "end-run around the requirements of Rule 50." *Id.* at *48.

Where, as here, a Rule 50(b) motion for judgment as a matter of law is based on grounds not previously asserted in a Rule 50(a) motion, this Court is "limited to reviewing the jury's verdict for plain error, and should reverse only if such plain error would result in a manifest miscarriage of justice." *Go Daddy Software*, 581 at 961, (9th Cir. 2009) (quoting *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 (9th Cir. 2002)) (internal quotation marks and citation omitted). Review under such a standard is "extraordinarily deferential" and "is limited to whether there was *any* evidence to support the jury's verdict." *Id*. at 961-962 (quoting *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001)). As

discussed *infra*, there was substantial evidence to support the jury's verdict. As a result, the District Court correctly denied Beck's Post-Trial Motions.

b) Beck's Arguments Were Raised for the First Time in his Post-Trial Motion and Were Properly Rejected for That Reason Alone.

Even if considered as otherwise proper under Rule 59(e), the fact that Beck failed to make the "bona fide purchaser" and "statutory interest" arguments prior to his Post-Trial Motions is, by itself, sufficient reason to affirm the District Court's rejection of those arguments.

"A motion for reconsideration 'may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). For that reason, a "new argument" in a Rule 59(e) motion is not a "proper reason" for the district court to reconsider its decision. *389 Orange St. Partners*, 179 F.3d at 666. And a district court does not abuse its discretion by declining to address an issue raised for the first time in a Rule 59(e) motion. *See Smith v. Rush (In re Smith)*, 350 Fed. Appx. 162, 163 (9th Cir. 2009) (citing *389 Orange St. Partners*, 179 F.3d at 666).

In his Post-Trial Motions, Beck argued, for the first time, that he could not have been unjustly enriched because he was a bona fide purchaser for value and

that he was not unjustly enriched because Idaho's statutory prejudgment interest rate is twelve percent. ER 131-135.[4] Beck purported to make those arguments under both Rule 50(b) and Rule 59(e). The District Court noted that the arguments were "not raised as a basis for the Rule 50(a) motion," *see* ER at 6, and Beck has not challenged that conclusion. The District Court also held that, to the extent the arguments were made pursuant to Rule 59(e), its "earlier pretrial motion rulings were not based on a 'manifest error of law[.]'" ER 6-7.

The record is devoid of any indication that Beck made those arguments prior to his Post-Trial Motions, and the District Court referenced no specific pretrial motion ruling. As a result, Beck's argument that the District Court abused its discretion by denying his Rule 59(e) Motion "without explanation" lacks merit. Because that motion consisted of new arguments, the District Court need not have even addressed the arguments at all. *See Smith*, 350 Fed. Appx. at 163; *389 Orange St. Partners*, 179 F.3d at 666.

Moreover, Beck's contention about the lack of explanation is inaccurate. Beck claims that the District Court's only analysis specific to denying Beck's Rule

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[4] Beck claimed that he previously raised the statutory interest argument on summary judgment, *see* ER 127, but he cited nothing in his post-trial memorandum supporting that claim, and the record does not show that Beck had previously made any such argument with respect to the Receiver's unjust enrichment claim.

59(e) Motion was "a single sentence." OB at 35, citing ER 6-7. Beck completely ignores the additional discussion of his Rule 59(e) Motion later in the District Court's decision as well as its explanation that Beck's arguments "disregard the elements of unjust enrichment the jury found as well as the fact that it is undisputed that Beck received an additional $50,000 as interest on the loan to Yost that the Receiver did not recover." ER 10. By failing to acknowledge that discussion, Beck has necessarily failed to establish that the District Court abused its discretion.

c) In any Event, the District Court did not Abuse its Considerable Discretion in Denying Beck's Rule 59(e) Motion Because Substantial Evidence Supported the Jury's Verdict on Unjust Enrichment.

In any event, even setting aside, *arguendo*, the procedural infirmities in Beck's "bona fide purchaser" and "statutory interest" arguments, the District Court did not abuse its considerable discretion in rejecting those arguments.

Even if Beck's arguments are construed to have been proper under Rule 59(e), they were still correctly rejected by the District Court. This Court reviews a district court's denial of a motion under Rule 59(e) for abuse of the court's "considerable" discretion. *Turner v. Burlington Northern Santa Fe R.R.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1254 n.1 (9th Cir. 1999)). "A district court may properly reconsider its decision if it '(1)

is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.'" *Smith v. Clark County Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (quoting *School Dist. No. 1J v. ACandS, Inc*., 5 F.3d 1255, 1263 (9th Cir. 1993)). "Clear error occurs when 'the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *United States v. U.S. Gypsum Co*., 333 U.S. 364, 395 (1948)).

Beck does not argue that there was newly discovered evidence or an intervening change in controlling law. He argues only manifest injustice and clear error. But, as discussed above, there was no initial decision on this issue because Beck raised the arguments for the first time in his Post-Trial Motions. Although the District Court referenced "earlier pretrial rulings," *see* ER 6, there is nothing in the record indicating a ruling regarding the arguments that Beck raised in his Rule 59(e) Motion. And, in any event, Beck does not discuss any such ruling in his Appellant's Brief. As a result, even assuming, *arguendo*, that a ruling did exist, Beck failed to demonstrate how the ruling was "manifestly unjust" or the product of "clear error."

In any event, ample evidence at trial supported the jury's finding that Beck was unjustly enriched in the amount of $55,000. "The proper recovery in an unjust enrichment action is the measure of the benefit received which if allowed to be

retained would be unjust." *Cozzetto v. Wisman*, 120 Idaho 721, 726, 819 P.2d 575 (Ct. App. 1991). The undisputed evidence at trial was that numerous innocent Trigon investors lost tens of millions of dollars and that, in contrast, Beck received all of his principal amount plus $105,000 in interest on his loan to Yost, at least $55,000 of which was paid with Trigon monies. ER 40, 78-80, 85-86, 94-97, 153-155, 165-168, 189-197, 199-200, 201-203. This was more than sufficient evidence for the jury to find that Trigon had conferred a benefit on Beck, that Beck had accepted the benefit, and that it would be inequitable for him to retain the benefit without compensating Trigon's Receiver -- in short, that Beck had been unjustly enriched at the expense of Trigon's innocent investors. *See Cozzetto*, 120 Idaho at 726 (the determination of the amount by which a defendant is unjustly enriched "is a factual issue within the discretion of the court"); *Bates*, 146 Idaho at 776 (concluding that there was substantial evidence presented at trial to support the jury's verdict on unjust enrichment); *Missal*, 1998 U.S. Dist. LEXIS 6016 at *14 n. 6 ("It is undisputed that defendants received vast profits from the BLC scheme, while other investors suffered staggering losses. There is no dispute that defendants did nothing to 'earn' their profits…defendants may indeed be unjustly enriched at the expense of other investors, and equity might demand that defendants at least relinquish their gains, so that other investors can recoup some of their losses.").

Beck argues, nonetheless, that he could not have been unjustly enriched as a matter of law because of the jury's findings that he acted in good faith and gave "value" to Yost. OB at 36-39. But in addition to being procedurally foreclosed, Beck's argument hangs on his assertion that "a transferee who acts in good faith and pays value is by definition a bona fide purchaser," OB at 36, an assertion that Beck fails to support with any authority. Beck similarly fails to support his assertion that the jury's finding that he acted in good faith and gave value to Yost made him a bona fide purchaser for value. OB at 37. Instead, he conflates the subsequent transferee defense with the concept of a bona fide purchaser for value.

In fact, Beck's argument illustrates the fundamental difference between the UFTA and unjust enrichment claims. Under the UFTA, Beck's arguments about taking in good faith and providing value are a defense. But they are merely one of the factors that the jury considers in determining whether it is unjust for Beck to retain all of the Trigon monies he received. Presumably, it is because the jury found that Beck provided "value" to Yost that it determined that Beck should repay only the interest that was paid with Trigon monies, rather than the principal. The fact that the jury found that the "value" provided was sufficient for a defense to the recovery of $550,000 under the UFTA claim does not signify that such value is

sufficient to establish, as a matter of law, that Beck was not unjustly enriched in the amount of $55,000.[5]

Beck also argues that the District Court abused its discretion by rejecting his argument that he could not have been unjustly enriched "because Idaho law entitled him to more interest on his loan than the interest he received from Yost." Beck argues that "he was entitled to a reasonable rate of return" on his loan to Yost, that the Idaho statutory pre-judgment interest rate of 12% is "a reasonable interest rate," and at that the 12% rate, he would have been entitled to $66,904.10 interest on his loan. OB at 42-45.

Beck is mistaken on the facts. It was undisputed that Beck received $105,000 in interest on his loan to Yost at a rate of 20% that far exceeds the 12% prejudgment interest rate Beck claims is "a reasonable interest rate" and the $66,904.10 that Beck claims was a reasonable amount of interest. ER at 10, 74, 78-80. As a result, his contention that Idaho law entitles him to more interest than he received is misguided: even if the Idaho prejudgment interest rate was considered a "reasonable" rate, Beck still received nearly $40,000 more in interest than he would have received at the statutory prejudgment rate.

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[5] Notably, at Beck's urging, the jury instructions stated that "'value' may be something less than reasonably equivalent value." ER 139.

Moreover, Beck fails to cite any authority establishing that the Idaho statutory prejudgment interest rate is a "reasonable" rate of interest or explaining why that rate would apply rather than the much lower statutory post-judgment interest rate. *See* Idaho Code § 28-22-104(2).

In his quest for authority in support of his argument, Beck misses the mark by analogizing himself to innocent investors in a Ponzi scheme. OB at 42-44. That analogy is misguided because Beck has steadfastly maintained that he was not an investor in Trigon. *E.g.*, ER 145-147. More importantly, the authority relied upon by Beck, *see* OB at 42-43, is contrary to the law in this Circuit. In the Ninth Circuit, it is well-established that an innocent investor in a Ponzi scheme is not entitled to any payments "in excess of the amounts of principal." *Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008). Indeed, this jury's finding of unjust enrichment in this case is consistent with Ninth Circuit law and with the principle that an innocent investor who receives profit or interest from a Ponzi scheme "should not be permitted to benefit from a fraud at [the expense of innocent investors] merely because he was not himself to blame for the fraud. All he is being asked to do is to return the net profits of his investment-the difference between what he put in at the beginning and what he had at the end." *Id*. (quoting *Scholes v. Lehmann,* 56 F.3d 750, 757-58 (7th Cir.1995)). *See id.* ("The 'winners' in the Ponzi scheme, even if innocent of any fraud themselves, should not be permitted to 'enjoy an advantage

over later investors sucked into the Ponzi scheme who were not so lucky.'") (quoting *In re United Energy Corp.*, 944 F.2d 589, 596 (9th Cir.1991)).

Beck also misfires in claiming that the jury's verdict "presents a manifest error of law because it means the jury gave Beck no interest on his money, interest to which he was entitled at law." OB at 44. Beck ignores the undisputed fact that the jury verdict enabled him to keep the other $50,000 in interest he received. ER 10, 41. Beck argues that there was no evidence that the other $50,000 came from Trigon. That claim is not accurate and not relevant. The jury heard evidence that the $50,000 came from monies delivered to Yost for investment in Trigon, *see* ER 143-144; as a result, the jury could reasonably have concluded that although the $50,000 did not come from Trigon's account, it belonged to Trigon. Moreover, whether the $50,000 came from Trigon is irrelevant because the Receiver did not seek to recover that amount and the jury did not award it to the Receiver.

In short, Beck's various arguments challenging the jury verdict were improperly raised or not raised at all in the District Court. Even if not procedurally foreclosed, each argument is substantively unavailing. The District Court did not err, let alone abuse its considerable discretion, in denying the arguments made in Beck's Post-Trial Motions.

VII.

CONCLUSION

For the foregoing reasons, the District Court correctly denied Beck's Post-Trial Motions, and its decision should be affirmed in all respects. The argument not raised before the District Court should not be entertained by this Court.

RESPECTFULLY SUBMITTED THIS 27th day of November, 2013.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By s/ Matthew Gordon
Matthew Gordon, ISB No. 8554

CERTIFICATE OF COMPLIANCE (FRAP 32(A)(7)(C)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, And Type Style Requirements

a. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B because this brief contains 11,343 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B (iii).

b. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

DATED THIS 27th day of November, 2013.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By : s/ Matthew Gordon
Attorneys for Appellee/Plaintiff

STATEMENT OF RELATED CASES (CIRCUIT RULE 28-2.6)

Appellee represents the below listed is a related case:

9th Circuit Case No.:	13-35694
Appellant/Defendant:	Capital One Bank (USA), N.A.
Appellee/Plaintiff	R. Wayne Klein, the Court-Appointed Receiver of Trigon Group, Inc. and for the Assets of Daren L. Palmer

Klein v. Capital One Bank (USA), N.A. is related to this case because it is another of the Receiver's lawsuits to collect funds diverted from Trigon to third parties. The issues in that case are not, however, the same or closely related to the issues in this case.

DATED THIS 27th day of November, 2013.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By : s/ Matthew Gordon
Attorneys for Appellee/Plaintiff

CERTIFICATE OF SERVICE

WHEN ALL CASE PARTICIPANTS ARE REGISTERED FOR THE APPELLATE CM/ECF SYSTEM

I hereby certify that I electronically filed the foregoing Supplemental Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 27, 2013.

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I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: s/ Matthew Gordon