

**MANNING CURTIS BRADSHAW
& BEDNAR LLC**

David C. Castleberry [11531]

dcastleberry@mc2b.com

Aaron C. Garrett [12519]

agarrett@mc2b.com

136 East South Temple, Suite 1300

Salt Lake City, UT 84101-1655

Telephone (801) 363-5678

Facsimile (801) 364-5678

*Attorneys for Plaintiff R. Wayne Klein, the
Court-Appointed Receiver of U.S. Ventures, LC,
Winsome Investment Trust, and the assets of Robert
J. Andres and Robert L. Holloway*

UNITED STATES DISTRICT COURT	
DISTRICT OF UTAH	
R. WAYNE KLEIN, the Court-Appointed Receiver of U.S. Ventures LC, Winsome Investment Trust, and the assets of Robert J. Andres and Robert L. Holloway, Plaintiffs, v. CONNIE C. PATTERSON, Defendant.	MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT Case No. 2:11-cv-00723CW-PMW District Judge Clark Waddoups Magistrate Judge Paul M. Warner

Plaintiff R. Wayne Klein, the Court-Appointed Receiver (the “Receiver”) of U.S. Ventures LC (“US Ventures”), Winsome Investment Trust (“Winsome”), and all of the assets of Robert J. Andres (“Andres”) and Robert L. Holloway (“Holloway”) (collectively, the

“Receivership Entities”), by and through his undersigned counsel, submits this Motion for Summary Judgment and Memorandum in Support.

RELIEF SOUGHT AND GROUNDS FOR MOTION

Winsome and US Ventures were Ponzi schemes operated by Andres and Holloway. On the heels of a lawsuit filed by the Commodity Futures Trading Commission (“CFTC”) against the Receivership Entities in January 2011, the Receiver was appointed to oversee the Receivership Entities and given the power to institute legal proceedings to recover property belonging to the Receivership Entities for the benefit of the Receivership Entities' innocent investors and creditors. Pursuant to this power, the Receiver brought this action to avoid fraudulent transfers Defendant received and recover from her amounts by which she was unjustly enriched.

Defendant Connie C. Patterson (“Patterson”) is a third-party marketer who assisted in the Winsome Ponzi scheme and who received transfers from Winsome and its related entities. Under the Uniform Fraudulent Transfers Act, a transfer is avoidable if it was made with actual intent to defraud and it was not made in exchange for reasonably equivalent value or received in good faith. There is no genuine dispute of material fact concerning whether the Receivership Entities operated as a Ponzi scheme, and whether Patterson received transfers from the Receivership Entities. Thus, the Receiver is entitled to summary judgment on his claim for fraudulent transfer.

Patterson was also unjustly enriched by the payments she received. Unjust enrichment occurs when a benefit is conferred upon a defendant, which is appreciated or known by the

defendant, and the circumstances surrounding the acceptance or retention by defendant of the benefit make it inequitable for her to retain the benefit. The undisputed facts prove that each of these elements exist here. First, Patterson received a benefit in the form of monetary transfers; second, Patterson knew of the transfers; and third, retention of the benefit is unjust because the funds did not come from legitimate investment activities but were stolen from innocent investors. Patterson helped to cause this fraud with her efforts to market the Ponzi scheme. Thus, the Receiver is entitled to summary judgment on his claim for unjust enrichment against Patterson.

INTRODUCTION

The Receiver respectfully requests summary judgment against Patterson based on two simple, undisputed facts: (1) the Receivership Entities operated as a Ponzi scheme and (2) Patterson did not provide reasonably equivalent value for the transfers she received from the Receivership Entities and did not receive the transfers in good faith. These undisputed facts establish that the transfers to Patterson are fraudulent and therefore avoidable.

Under the Uniform Fraudulent Transfers Act (“UFTA”), a transfer is avoidable if it was made with actual intent to defraud, and it was not made in exchange for reasonably equivalent value. *See* Utah Code § 25-6-6. Applicable case law makes clear that the first element is satisfied if the transfer came from a Ponzi scheme. *See Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) (“the mere existence of a Ponzi Scheme is sufficient to establish actual intent to defraud”). Patterson does not dispute that the Receivership Entities operated as a Ponzi scheme, and she admits that she received the transfers identified in the Complaint. It is also undisputed that Patterson assisted in the Ponzi scheme by bringing in new investors, and that she did not

provide reasonable equivalent value to the Receivership Entities in exchange for the transfers. Accordingly, the elements of the Receiver's UFTA claim are satisfied and he is entitled to Summary Judgment.¹

STATEMENT OF ELEMENTS AND UNDISPUTED FACTS

Pursuant to D.U. Civ. R. 56-1(b)(2), the Receiver provides the following Statement of Elements and Undisputed Facts.

Elements of Fraudulent Transfer Claim

1. To prevail on his fraudulent transfer claim, the Receiver must demonstrate that the Receivership Entities made a transfer to Patterson "with actual intent to hinder, delay, or defraud any creditor of the debtor." Utah Code § 25-6-5(1)(a). The Receiver may satisfy this element by showing that the Receivership Entities made the transfers at issue while operating as a Ponzi scheme. *See S.E.C. v. Madison Real Estate Group, L.L.C.*, 647 F.Supp.2d 1271, 1279 (D. Utah 2009) ("Under the UFTA, a debtor's actual intent to hinder, delay, or defraud is conclusively established by proving that the debtor operated as a Ponzi scheme").

¹ The Receiver filed a Motion for Judgment on the Pleadings on March 12, 2012 based on Patterson's admissions in her Answer. Doc. No. 29, Motion for Judgment on the Pleadings; Doc. No. 30, Memorandum in Support of Motion for Judgment on the Pleadings. On December 21, 2012, Magistrate Judge Warner issued a Report and Recommendation recommending that the Receiver's Motion for Judgment on the Pleadings be granted. Doc. No. 61, Report and Recommendation. No timely objection was filed in response to the Report and Recommendation, although Patterson did file a "Non-Negotiable Notice of Acceptance" on January 15, 2013 (Doc. No. 62) and a "Notice of Dishonor" on January 28, 2013 (Doc. No. 63). Because no ruling has yet been made on the Report and Recommendation and because the Receiver has uncovered other transfers to Patterson since the filing of the Complaint, the Receiver respectfully moves the Court for summary judgment against Patterson in the amount of \$1,472,425.96, the amount she received from Winsome and its related entities.

2. The Receiver may also prevail on his fraudulent transfer claim if Patterson received the transfers “without receiving a reasonably equivalent value in exchange for the transfer or obligation.” Utah Code § 25-6-5(1)(b).

Undisputed Facts Satisfying Applicable Elements of Fraudulent Transfer Claim

3. It is undisputed that the Receivership Entities operated as a fraudulent Ponzi scheme. *See* Declaration of R. Wayne Klein (“Klein Decl.”), attached as Exhibit 1, ¶¶ 8-37.

4. It is undisputed that Patterson received \$1,472,425.96 in transfers from Winsome. *Id.* ¶¶ 43-45; *see also* Complaint (Doc. No. 1) ¶¶ 49-51 (not disputed in responsive filing, *see* Doc. No. 5); Receiver’s First Set of Discovery Requests to Defendant (“Discovery Requests”) at 8, Requests for Admission 1-3, attached as Exhibit 2 (not answered).

5. The evidence demonstrates, and Patterson has not disputed, that Patterson did not provide reasonably equivalent value for the transfers she received from Winsome because she received payments for marketing the Winsome Ponzi scheme. *See* Ex. 1, Klein Decl. ¶¶ 43 - 47. Complaint ¶¶ 6, 51; Ex. 2, Discovery Requests at 8 (not answered); Deposition of Robert Andres, 140:5-141:10, attached as Exhibit 3.

Elements of Unjust Enrichment Claim

6. The Receiver’s second cause of action is for unjust enrichment. The legal elements required to prevail on his claim for unjust enrichment are as follows: a benefit conferred on the defendant, an appreciation or knowledge by the defendant of the benefit, and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. *See Rawlings*

v. Rawlings, 2010 UT 52, ¶ 29, 240 P.3d 754 (citing *Jeffer v. Stubbs*, 970 P.2d 1234, 1247-78 (Utah 1998)).

Undisputed Facts Satisfying Applicable Elements

7. It is undisputed that Patterson knowingly received transfers in the amount of \$1,472,425.96 into her bank account. Ex. 1, Klein Decl. ¶¶ 43 - 45.

8. It is undisputed that that Winsome operated as a Ponzi scheme, that there are innocent investors who collectively lost millions of dollars through Winsome, and that Patterson received payments for her efforts in bringing other investors into the Winsome fraud. *Id.* ¶¶ 7-48.

STATEMENT OF ADDITIONAL FACTS

Patterson Received Fraudulent Transfers from Winsome, an Organization Operating a Ponzi Scheme.

9. Winsome described itself as a private trust and solicited individuals and entities to send funds for participation in a commodity futures pool. *See* Ex. 1, Klein Decl. ¶¶ 23-24. Some of the investors were told that their funds would be sent to US Ventures, a Utah LLC, for trading; others were led to understand that Winsome itself would be conducting the commodities trading. *Id.* ¶ 24. Between October 2005 and April 2007, Winsome lured over \$43 million from investors. *Id.* ¶ 29.

10. Winsome spent over \$35 million of investor monies for commodities trading at US Ventures or for other investment projects. *Id.* ¶¶ 31-32. \$24.7 million was sent directly to US Ventures for trading. *Id.* ¶ 31. None of the \$35 million spent resulted in gains for Winsome.

Id. ¶¶ 31-33. Notwithstanding these tremendous losses, Winsome continued to issue account statements to investors showing increasing account values. *Id.* ¶ 33.

11. Winsome became insolvent at least as early as November 2005. *Id.* ¶ 37. Nevertheless, at least as early as December 5, 2005, Winsome made distribution payments to investors. *Id.* ¶ 44. Many of these distribution payments were paid with funds received from other new investors. *Id.* ¶¶ 35-36. In fact, the Receiver has identified at least 61 such instances to date. *Id.*

12. From December 19, 2005 through November 3, 2008, Patterson received at least thirty-seven payments from Winsome totaling at least \$1,472,425.96. *Id.* ¶¶ 43-44.²

The Receiver was Appointed in the CFTC Action.

13. The Commodity Futures Trading Commission (“CFTC”) filed a Complaint against Winsome and the other Receivership Entities, alleging they engaged in a Ponzi scheme whereby over \$50 million was fraudulently taken from investors in the action styled as *U.S. Commodities Trading Commission v. U.S. Ventures LC, Winsome Investment Trust, Robert J. Andres and Robert L. Holloway*, Case No. 2:11CV00099 BSJ ¶ 1 (“CFTC Action”).

14. The CFTC moved the Court to appoint a Receiver to gather and take control of the assets of Receivership Entities and distribute any funds obtained under the Court's supervision. On January 25, 2011, the Court granted the CFTC's motion and placed Winsome and US Ventures, along with any business entity owned by the Receivership Entities, under the

² Since the filing of the Complaint, the Receiver has uncovered \$471,663.42 in additional transfers to Patterson. Ex. 1, Klein Decl. ¶ 48.

control of the Receiver. Ex. 1, Klein Decl. ¶¶ 1-3. This action is brought by the Receiver as part of his duties under that order.

Patterson's Admissions

15. On August 9, 2011, the Receiver filed the Complaint in this action seeking a judgment against Patterson for the fraudulent transfers she received. *See* Complaint (Doc. No. 1). In the Complaint, the Receiver alleges that Patterson “assisted Andres in operating the Ponzi scheme. She solicited investors to participate in Winsome and received compensation from Winsome for the investors she solicited. Patterson was a principal of For Your Growth, a Houston-based company that also solicited investors.” *Id.* ¶ 6. In response, Patterson filed a “Non-Negotiable Notice of Acceptance” (the “Answer”). *See* Doc. No. 5. In her Answer, Patterson asserts a defense to the Receiver's claim based on her “acceptance” of the Complaint and that “[d]ishonor may result if you fail to respond.” *Id.*³ Significantly, Patterson does not deny any of the Receiver’s allegations, but instead admits the facts contained in the Receiver's Complaint are true, stating “I do not argue the facts.” *Id.* Since her Answer was filed, Patterson has sent numerous Notices of Dishonor and similar documents to the Court and to Plaintiff's

³ Patterson's defense, based on her alleged tender “[has] been universally rejected by courts throughout the country for at least the last 25 years.” *McLaughlin v. CitiFinancial Auto Credit, Inc.*, 2010 WL 2377089 (D.Conn. 2010) *3 (collecting cases). As in *Bryant v. Washington Mut. Bank*, Patterson's “tender[ed] payment” was no such thing, “but rather [the tender of] a worthless piece of paper.” 524 F.Supp.2d 753, 760 (W.D. Va. 2007) (finding that Plaintiff's Bill of Exchange was not a “legitimate negotiable instrument” and dismissing Plaintiff's argument that Defendant’s refusal to reject Plaintiff's tendered payment within 72 hours meant “the payment was considered honored”).

counsel, most of which re-affirm that Patterson does “not argue the facts.” *See, e.g.*, Doc. No. 19, 20, 35, 52, 53.

16. On August 15, 2012, the Receiver served his first set of discovery requests on Patterson, including the following Requests for Admission:

REQUEST NO. 1: Admit that from December 2005 through and including November 2008, the Receivership Defendants made transfers to you totaling approximately \$1,000,762.54.

REQUEST NO. 2: Admit that the Receivership Defendants owed you no obligation to make payments to you.

REQUEST NO. 3: Admit that you did not provide anything of value to the Receivership Defendants in exchange for the Transfers you received from the Receivership Defendants.

See Ex. 2, Discovery Requests at 8.

17. In Response, Patterson filed a “Non-Negotiable Notice of Acceptance” similar to her Answer which admitted “I do not argue the facts.” *See* Doc. No. 53. Patterson did not otherwise respond to the Receiver’s discovery requests.

Patterson's Active Involvement in the Winsome Fraud

18. Patterson assisted Winsome in the Ponzi scheme by bringing new investors into the fraud as a third-party marketer. Ex. 1, Klein Decl. ¶¶ 43-47; *see also* Ex. 3, Andres Depo. 140:19-141:10 (Q And did Ms. Patterson bring in any other investors? A She did, and I do not know the number and I do not know the amount. Q Did Ms. Patterson, Mr. McGinnis, or Mr. Carter receive any compensation from Winsome Investment Trust for bringing in other investors? A I would say Ms. Patterson did under the joint venture agreement that she probably

had. *** Q *And the compensation that Ms. Patterson received, was that limited to what she obtained through the joint venture agreement that she entered into with the investors she brought in? A Yes.*") (emphasis added).

19. For her services, Patterson was paid commissions and/or a percentage of the recovery that was to be earned by the other investors. Some of Patterson's third party marketing efforts were done in her name and other efforts were accomplished through her company called "For Your Growth." Ex. 1, Klein Decl. ¶ 46.

20. Evidence of Patterson's efforts to raise money for Winsome includes:

a. A check paid to Patterson in the amount of \$5,574.80 dated December 16, 2005 with a notation that the check is for 70% of the profits of another investor—identified as "Person." See Ex. 1, Klein Decl. at Exhibit C (Bates Number CFTC00910).

b. A December 31, 2005 Substitute Form 1099-B from Winsome to Patterson showing \$31,606.00 paid to her or credited to her investment account for her role in acting as intermediary for investments by "Person," "Person 3," and "SJohn." See Substitute Form 1099-B, attached to Klein Decl. as Exhibit D.

c. An agreement between Patterson, C.L. Ballard, and Winsome dated January 20, 2006 pursuant to which Patterson agreed to raise \$300,000.00 in investment funds for Winsome. See Agreement, attached to Klein Decl. as Exhibit E.

d. In connection with the January 20, 2006 agreement, Patterson stated that she "intend[ed] to introduce" the Winsome program to others and pledged not to disclose to those investors information she learned about the trading strategy of Winsome. See

Non-Disclosure/Non-Circumvention Agreement, attached to Klein Decl. as Exhibit F, ¶¶ 1-2.

e. On February 8, 2006, Patterson and her company, For Your Growth, signed an agreement by which an investor (Sacred Site Properties) invested \$200,000.00 with Patterson. This agreement does not reference Winsome, but uses the same format and language as the Winsome agreement found in Non-Disclosure/Non-Circumvention Agreement cited above. Under this agreement, Patterson would receive 30% of the profits earned for Sacred Site Properties. Patterson asserts that she has “knowledge of investment possibilities capable of exceeding normal investment returns” and promises to: i) provide “[a] trading platform through which to conduct the business of this Agreement,” ii) provide “control to deposit funds,” and iii) monitor “[a]ctivity related to the underlying business of this Agreement.” *See* Agreement dated Feb. 8, 2006, attached to Klein Decl. as Exhibit G.

f. The Receiver has found on the hard drive of Winsome’s computer a “form” agreement to be used by Patterson in agreements with investors she brought to Winsome. This form agreement is similar to the Feb. 8, 2006 agreement, but with blank spaces to fill in the names and amounts of investments by others. *See* Form Agreement, attached to Klein Decl. as Exhibit H.

g. The Receiver has found a document labeled “WIT Program Fund Distributions” dated March 1, 2006 on the Winsome computer hard drive. This document shows payments of \$3,794.70 to Patterson with an explanation that it

represented one third of 70% of the profits earned on the investment account in the name “PattLynn.” This document also shows \$5,594.52 paid to Patterson’s company, For Your Growth, as compensation for investments by at least five other investors, including the three investors listed in Exhibit D, cited above. *See* WIT Program Fund Distributions, attached to Klein decl. as Exhibit I.

h. On May 5, 2006, the agreement attached to the Klein Decl. as Exhibit E appears to have been amended to provide that monies that Patterson gathered from other investors would remain in an account under Patterson’s and Ballard’s names if the investments were less than \$100,000.00 each. The Receiver found this unsigned “Letter of Understanding” on the Winsome hard drive. *See* Letter of Understanding, attached to Klein Dec. as Exhibit J.

i. In a letter to Patterson dated May 27, 2006, Winsome identified six investors who appear to have sent money to Winsome through Patterson. The Receiver found this unsigned letter on the Winsome hard drive. *See* Letter: Private Program Participation, attached to Klein Decl. as Exhibit K.

j. A Winsome document dated June 19, 2006 and found on the Winsome hard drive identifies eleven investors that appear to have come into Winsome through Patterson. *See* Winsome Investment Trust Investment Summary, attached to Klein Decl. as Exhibit L, at lines 4-6, 10-11, 13, 17-18, 21, 29, and 36.

k. On January 27, 2007, Patterson sent an email to Robert Andres at Winsome in which Patterson stated that her “investors” had invested \$4 million in the

Winsome program and she wanted to be able to reassure her investors “that their investment is safe with For Your Growth and Winsome Investment Trust.” *See* Patterson email to Andres, attached to Klein Decl. as Exhibit M.

1. In a July 21, 2007 email from Patterson to Andres, Patterson states that she had brought 22 investment accounts into Winsome. *See* Patterson email to Andres, attached to Klein Decl. as Exhibit N.

ARGUMENT

The Receiver is entitled to summary judgment if he can show that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). “The mere existence of a scintilla of evidence in support of the [nonmovant]’s position will be insufficient to defeat a properly supported motion for summary judgment.” *Rasmussen v. General Growth Properties, Inc.*, No. 2:04-CV-00099, 2005 WL 3334752 (D. Utah December 7, 2005) (citing *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir.1994)). Rather, “to preclude summary judgment, the nonmovant must present facts upon which a reasonable jury could find in favor of the nonmovant.” *Id.* (citing *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1068 (10th Cir.2005)). Because there is no genuine dispute of material fact as to the elements of the Receiver’s claims, the Receiver asks the Court to enter summary judgment in his favor.

I. THERE ARE NO DISPUTED ISSUES OF MATERIAL FACT.

Fed. R. Civ. P. 34(1) provides that “[a] party may serve on any other party a written request to admit . . . the truth of any matters within the scope of Rule 26(b)(1) relating to: facts, the application of law to fact, or opinions about either.” “A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.” Fed. R. Civ. P. 34(3). Fed. R. Civ. P. 8(b)(6) similarly provides that “[a]n allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.” *See also Burlington No. R.R. Co. v. Huddleston*, 94 F.3d 1413, 1415

(10th Cir.1996) (“By failing to submit an answer or other pleading denying the factual allegations of Plaintiff’s complaint, Defendant admitted those allegations, thus placing no further burden upon Plaintiff to prove its case factually”). A responsive pleading is required to a Complaint. *See* Fed. R. Civ. P. 12(a)(1)(A) (providing that “[a] defendant *must* serve an answer” within established time limits) (emphasis added).

Here, the Receiver served Patterson with requests to admit that she received the payments at issue, that Winsome had no obligation to make those payments to her, and that she did not provide reasonable equivalent value for the payments. Statement of Additional Facts, *supra*, (“SOF”) ¶ 16. Patterson’s only response to those Requests was to file a non-responsive document in which she admitted “I do not argue the facts.” *Id.* ¶ 17. This response was plainly not a “written answer or objection addressed to the matter” raised in the Receiver’s Requests. Fed. R. Civ. P. 34(3). Nothing in Patterson’s response denies, or even addresses the matters in the Receiver’s Requests for Admission. Therefore, these facts are admitted and undisputed.

Patterson also stated in her Answer that she “do[es] not argue the facts” and failed to deny any of the Receiver’s allegations from the Complaint. SOF ¶ 15. These undisputed allegations include that the Receivership Entities operated as a Ponzi scheme, that Patterson received transfers from Winsome, that Patterson provided no reasonably equivalent value in exchange for that money, and that she acted as a third-party marketer for the scheme. *See* Complaint (Doc. No. 1) at ¶¶ 1, 6, 48-51. These facts are undisputed due to Patterson’s failure to respond to the Receiver’s allegations. *See* Fed. R. Civ. P. 8(b)(6).

In addition to her admissions, Patterson has submitted nothing to dispute the Receiver's evidence that the Receivership Entities operated as a Ponzi scheme, that she received the payments at issue, that she assisted the scheme as a third-party marketer, and that she did not provide reasonable equivalent value for the payments. *See* SOF ¶¶ 1-10; Ex. 1, Klein Decl. Accordingly, there is no disputed issue of material fact on these matters.

II. THE RECEIVER IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON HIS FRAUDULENT TRANSFER CLAIM.

The Receiver is entitled to judgment as a matter of law on his fraudulent transfer claim based on the undisputed facts that the Receivership Entities operated as a Ponzi scheme, Patterson received payments from the Receivership Entities, and Patterson did not provide reasonably equivalent value for those payments.

A. The Receivership Entities Made Transfers to Patterson with Actual Intent to Defraud Because they Operated as a Ponzi Scheme.

Under the Uniform Fraudulent Transfers Act ("UFTA"), codified at Utah Code Annotated §§ 25-6-1 *et. seq.*, a transfer is fraudulent if the debtor makes the transaction "with actual intent to hinder, delay, or defraud any creditor." Utah Code § 25-6-6. "Courts have routinely applied UFTA to allow receivers to recover monies lost by Ponzi scheme investors." *Donell*, 533 F.3d at 767. This is because the "Ponzi scheme operator is the 'debtor,' and each investor is a 'creditor.'" *Donell*, 533 F.3d at 767. Significantly, courts recognize that the "mere existence of a Ponzi Scheme is sufficient to establish actual intent to defraud" under UFTA. *Id.*; *see also Klein v. Scogin*, Case No. 2:12-cv-121-DP, 2012 WL 5503540, at *1 (D. Utah Oct. 10, 2012) ("[U]nder Utah's Fraudulent Transfer Act (UFTA), a debtor's actual intent to hinder, delay,

or defraud is conclusively established by proving that the debtor operated as a Ponzi scheme." (quotation omitted) (unpublished); *Klein v. Abdulbaki*, Case No. 2:11-cv-00953-DK, 2012 WL 2317357, at *6 (D. Utah June 18, 2012) ("Under the Ponzi scheme presumption, any transfers made in the course of a Ponzi scheme are considered intentional or actual fraudulent transfers 'because transfers made in the course of a Ponzi scheme could have been made for no purpose other than to hinder, delay or defraud creditors.'" (quoting *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 8 (S.D.N.Y.2007)) (unpublished).

Utah case law has defined a Ponzi scheme as "a fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even larger investments." *State v. Bolson*, 2007 UT App 268, ¶ 4, 167 P.3d 539 (citing Black's Law Dictionary 1180 (7th ed. 1999)). In general, Ponzi schemes collapse on themselves because the returns paid to investors are not based on returns from the underlying business venture, but from the principal of other investors. *In re Hedged-Investments Associates, Inc.*, 48 F.3d 470, 471 n. 2 (10th Cir. 1995).

The undisputed evidence demonstrates that the Receivership Entities operated as a Ponzi scheme. Of the \$43 million that Winsome attracted from its investors, it spent over \$35 million of investor monies for commodities trading at US Ventures or for other investment projects. SOF ¶¶ 9-12. None of the \$35 million spent resulted in gains for Winsome or its investors. *Id.* Notwithstanding these tremendous losses, Winsome continued to issue account statements to investor showing increasing account values. *Id.* Even as Winsome became insolvent it began making distribution payments to investors. *Id.* These distributions were paid with funds given to

Winsome by other investors. *Id.* Indeed, between March 2006 and July 2008, there were more than 60 instances in which Winsome paid funds to investors with monies that could only have come from other investors. *Id.* Therefore, the undisputed evidence shows that Winsome operated as a Ponzi scheme. As a result, every transfer it made was with actual intent to defraud. *See Donell*, 533 F.3d at 770 (“The mere existence of a Ponzi Scheme is sufficient to establish actual intent to defraud”) (quotation omitted).

B. Patterson did not take the Transfers at Issue for Reasonably Equivalent Value or in Good Faith.

UFTA provides that a transfer is not voidable “against a person who took in good faith and for a reasonably equivalent value.” Utah Code Ann. § 25-6-9(1). Under the law, the pertinent question is whether the debtors, in this case the Receivership Entities, received reasonably equivalent value for their payments to Defendant. This question is answered from the perspective of the tort creditors of the Receivership Entities, their defrauded investors. *In re Jordan*, 392 B.R. 428, 441 (Bankr. D. Idaho 2008) (“Whether a debtor received a reasonably equivalent value is analyzed from the point of view of the debtor's creditors, because the function of this element is to allow avoidance of only those transfers that result in diminution of a debtor’s . . . assets.”); *see also Donell*, 533 F.3d at 767 (explaining that, in a Ponzi scheme, the Ponzi scheme operator is the “debtor,” and each good faith investor in the scheme who has not regained his initial investment is a “creditor”). In other words, the question is not whether the transferee “gave reasonably equivalent value; it is whether the [Ponzi scheme operator] *received* reasonably equivalent value.” *In re Lucas Dallas, Inc.*, 185 B.R. 801, 807 (9th Cir. 1995).

Additionally, because demonstrating that a transfer was received in good faith and for reasonably equivalent value is an affirmative defense, the burden is on the defendant to prove both of these elements. *Terry v. June*, 432 F.Supp.2d 635, 641-642 (W.D. Va. 2006); *see also Holder*, 2010 WL 5021087 * 2-3; *Wing v. Apex Holding Co.*, No. 2:09-CV-00022, 2009 WL 2843343, *5 (D. Utah Aug. 27, 2009) (“whether a defendant took payments from [Ponzi scheme receivership entity] in good faith and for reasonably equivalent value is an affirmative defense”). *See, e.g., Barnard & Burk Group, Inc. v. Labor Com’n*, 122 P.3d 700, 704 (Utah Ct. App. 2005) (noting that defendant bore the burden of proving statute of limitation defense “[a]s with any affirmative defense”). Patterson cannot satisfy that burden.

There is no genuine issue of material fact as to whether the transfers from the Receivership Entities to Patterson were received for a reasonably equivalent value. Patterson received over \$1.4 million from Winsome, and there is no evidence that she provided anything of value in exchange. SOF ¶ 12. She also admits she did not provide the Receivership Entities with reasonably equivalent value for the transfers. *Id.* ¶ 15-18.

Patterson acted as a third-party marketer for Winsome. *Id.* ¶¶ 18-21. However, “[t]hose who receive money for bringing new investors to a [Ponzi] scheme have not provided reasonably equivalent value within the meaning of the Uniform Fraudulent Transfer Act.” *Holder*, 2010 WL 5021087 at *2. Patterson cannot argue that she gave reasonably equivalent value to Winsome in exchange for the significant amount of money she received. As the court in *Holder* chided, “[i]t takes cheek to contend that in exchange for the payments [the third-party marketer] received the [Ponzi] scheme benefitted from his efforts to extend the fraud by securing new

investments.” *Id.* (quoting *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir.2006)). Andres, the individual who controlled Winsome while it operated the fraud, testified in his deposition that the compensation that Patterson received from Winsome was limited to what she obtained as a third-party marketer for Winsome. SOF ¶ 19.

Along the same lines, Patterson did not act in good faith when she received the transfers at issue. Patterson acted as a third party marketer, and received significant payments for her efforts to promote the fraud. *Id.* ¶ 16. If a transfer was not received in good faith, the Receiver "may recover the entire amount paid to [Patterson] *including* amounts that could be considered return of principal." *Donell*, 533 F.3d at 771 (citing *Scholes v. Lehmann*, 56 F.3d 750, 759 (7th Cir. 1995)). The transferee bears burden of demonstrating that the transfers were received in good faith. *In re M&L Business Machine Co., Inc.*, 84 F.3d 1330, 1334 (10th Cir. 1996). Good faith is measured objectively. *Id.* 1338. "If the circumstances would place a reasonable person on inquiry of a debtor's fraudulent purpose, and a *diligent* inquiry would have discovered the fraudulent purpose, then the transfer is fraudulent." *Id.* at 1338 (emphasis in original).

Patterson bears the burden on this element of her defense, but has provided no information to dispute her role in the Ponzi scheme. Instead, the Receiver has been able to uncover significant evidence showing that Patterson was deeply embedded in the Ponzi scheme. *See* SOF¶ 18-22. Patterson knew of issues relating to solvency because of erratic payments from Winsome. *Id.* ¶ 20(k). Patterson received significant compensation from the Ponzi scheme for convincing at least 22 others to invest with her or Winsome. *Id.* ¶¶ 12, 20(l). Patterson claimed to investors that she had knowledge of the supposed trading platform that allowed significant

rates of return, would control the deposited funds, and would actively monitor the investments. *See* ¶ 20(e). Patterson entered into agreements with investors without mentioning Winsome or Andres, and would then forward these investments to Winsome for supposed investment. *Id.* 20 ¶ 20(e),(f). Therefore, because the transfers at issue were made with fraudulent intent, and because the transfers were not received for value or in good faith, the Receiver respectfully requests that the Court enter judgment against Patterson in the amount of \$1,472,425.96.

II. THE RECEIVER IS ENTITLED TO SUMMARY JUDGMENT ON HIS SECOND CAUSE OF ACTION FOR UNJUST ENRICHMENT.

A claim for unjust enrichment requires the plaintiff to satisfy three elements: (1) a benefit conferred on the defendant; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. *See Rawlings v. Rawlings*, 2010 UT 52, ¶ 29, 240 P.3d 754 (citing *Jeffer v. Stubbs*, 970 P.2d 1234, 1247-78 (Utah 1998)).

Patterson's receipt of the funds of the Ponzi scheme satisfies these elements. Patterson plainly received a known benefit when she accepted over \$1.4 million from Winsome. Her retention of that benefit is unjust because it was received through investors' payments to a fraudulent Ponzi scheme. Moreover, as set forth above, Patterson gave no reasonably equivalent value to Winsome in exchange for the funds she received. Also, Patterson did not receive the funds from Winsome in good faith. Patterson's payments were given in exchange for her efforts

to bring others into the fraud. Therefore, the Receiver respectfully requests summary judgment on this claim.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court enter Judgment against Patterson for an amount equal to all payments received by her from Winsome or its related companies, which total is in excess of \$1,472,425.96, plus interest on each payment at the statutory rate from the date of such payment until judgment is entered.

DATED this 11th day of February, 2013.

**MANNING CURTIS BRADSHAW
& BEDNAR LLC**

/s/ David C. Castleberry
David C. Castleberry
Aaron C. Garrett
*Attorneys for Plaintiff R. Wayne Klein, the
Court-Appointed Receiver of U.S. Ventures, LC,
Winsome Investment Trust, and the assets
of Robert J. Andres and Robert L. Holloway*

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** to be served in the method indicated below to the Defendant in this action this 11th day of February, 2013.

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
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 E-MAIL TRANSMISSION
 USDC ECF NOTICE

Connie Claire Patterson
710 Electra Drive
Houston, TX 77079

/s/ David C. Castleberry