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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,

Plaintiff,

vs.

KING & KING & JONES, P.C.,

Defendant.

**MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT**

Case No. 2:12-cv-00051-DBP

Magistrate Judge Dustin B. Pead

Pursuant to Fed. R. Civ. P. 56 and D.U. Loc. R. 7-1, Plaintiff R. Wayne Klein (“Plaintiff” or the “Receiver”), Court-Appointed Receiver of U.S. Ventures LC (“U.S. Ventures”), Winsome Investment Trust (“Winsome”), and the assets of Robert J. Andres (“Andres”) and Robert L. Holloway (“Holloway”) (collectively the “Receivership Entities”), submits this Motion for Summary Judgment and Memorandum in Support.

INTRODUCTION

Plaintiff is entitled to summary judgment in this case based on two simple, undisputed facts: (1) Winsome operated as a Ponzi scheme and (2) Defendant did not provide reasonably equivalent value to Winsome for the transfers it received from Winsome. These undisputed facts establish that the transfers to Defendant 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. 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) (recognizing that the courts recognize that the “mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud”). Defendant does not dispute that Winsome operated as a Ponzi scheme, and it admits that it received the transfers from Winsome identified in the Complaint. *See* Statement of Elements and Undisputed Facts (“SOF”), *infra* ¶¶ 3-4. Therefore, the only remaining issue is whether Defendant provided reasonable equivalent value to Winsome in exchange for the transfers. Defendant admits that it did not. The only value Defendant claims to have provided in exchange for the transfers at issue was the provision of legal services for a third party unrelated to Winsome. Accordingly, it is undisputed that the elements of the Receiver’s UFTA claim are satisfied and he is entitled to Summary Judgment.

STATEMENT OF ELEMENTS AND UNDISPUTED FACTS

1. To prevail on his fraudulent transfer claim, the Receiver must demonstrate that Winsome made a transfer to Defendant “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 Winsome 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." (quotation omitted)).

2. The Receiver may also prevail on his fraudulent transfer claim if the Receivership Defendant made the transfers to Defendant "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 Winsome operated as a fraudulent Ponzi scheme. Declaration of R. Wayne Klein ("Klein Decl."), attached as Exhibit 1, ¶¶ 8-42.

4. It is undisputed that Defendant received total of \$25,000 in payments from Winsome accounts in direct wire transfers on September 26, 2006 and November 21, 2006. *Id.* at ¶¶ 43-44; *see also* Complaint ¶ 48; Answer ¶ 48.

5. Defendant asserts that these transfers were received as payment for providing legal services to a Mr. Enrique Baca. *See* Excerpt from Plaintiff's First Set of Discovery Requests to Defendant ("Requests"), attached as Ex. 2, at Interrogatories 4, 16; Excerpt from Defendant's response to First Set of Discovery Requests ("Response"), attached as Ex. 3, at Responses to Interrogatories 4, 16.

6. Defendant admits that Mr. Baca received the benefit of the legal services provided. *See* Requests at Interrogatories 5, 10; Response at Responses to Interrogatories 5 ("The benefit to Mr. Baca was the representation in regard to very serious charges"), 10 ("The person who received the benefit was Enrique Baca").

7. Defendant also admits that it knows of no relationship between Mr. Baca and Winsome. *See* Requests at Interrogatory 5; Response at Response to Interrogatory 5 (“Defendant does not know his client Enrique Baca’s relationship to the receivership defendants”).

Elements of Unjust Enrichment Claim

8. 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 *Jeffs v. Stubbs*, 970 P.2d 1234, 1247-78 (Utah 1998)).

Undisputed Facts Satisfying Applicable Elements of Unjust Enrichment Claim

9. It is undisputed that Defendant knowingly received transfers in the amount of \$25,000 from Winsome. Ex. 1, Klein Decl. ¶¶ 43-44; Complaint ¶ 48; Answer ¶ 48.

10. 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 Defendant received a benefit from these fraudulently received funds. Ex. 1, Klein Decl. ¶¶ 8-42.

ARGUMENT

I. THE RECEIVER IS ENTITLED TO SUMMARY JUDGMENT ON HIS FRAUDULENT TRANSFER CLAIM.

Pursuant to UFTA, a transfer is fraudulent if the debtor made the transfer with actual intent to defraud a creditor, *see* § Utah Code Ann. § 25-6-5(1)(a), and if the transfer was not received by the transferee in good faith and “for a reasonably equivalent value,” *see* § *id.* 25-6-9. A transfer that is fraudulent under UFTA may be avoided. *Id.* § 25-6-8(1)(a).

Here, the transfers at issue are fraudulent because: (1) Winsome made the transfers with actual intent to defraud creditors; and (2) Defendant did not take these transfers for a reasonably equivalent value. Therefore, the Receiver asks the Court to avoid the transfers to Defendant and enter judgment against it for the amount it received from Winsome.

a. Winsome Made the Transfers to Defendant with Actual Intent to Defraud because they Operated as a Ponzi Scheme.

“Courts have routinely applied UFTA to allow receivers to recover monies lost by Ponzi scheme investors.” *Donell v. Kowell*, 533 F.3d 762, 767 (9th Cir. 2008); *see also* Utah Code Ann. § 25-6-1. This is because the “Ponzi scheme operator is the ‘debtor,’ and each investor is a ‘creditor.’” *Donell*, 533 F.3d at 767. One of the ways a receiver may recover under UFTA is if the entity placed in receivership, or the “debtor,” transferred funds with the “actual intent to hinder, delay, or defraud” any of its creditors. Utah Code Ann. § 25-6-5(1)(a); *see also* *Donell*, 533 F.3d at 770. Significantly, courts recognize that the “mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud” under UFTA. *Id.*; *see also* *In re Cohen*, 199 B.R. 709, 717 (9th Cir. BAP 1996) (“Proof of a Ponzi scheme is sufficient to establish the Ponzi operator's actual intent to hinder, delay, or defraud creditors for purposes of actually fraudulent transfers . . .”); *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.”).

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).

Here, Winsome operated as a Ponzi scheme. In particular, Winsome was insolvent throughout its operations, including when it made the transfers at issue to Defendant. *See* Ex. 1, Klein Decl. ¶¶ 8-42. Winsome also used funds received from investors to pay fraudulent distributions to other investors, a typical practice of a Ponzi scheme. *See id.* As a result, every transfer Winsome made was with actual intent to defraud. *See Donell*, 533 F.3d at 770 (“mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud”).

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

Demonstrating that a transfer was received in good faith and for reasonably equivalent value is an affirmative defense, and the burden is on Defendant to prove both of these elements. *Terry v. June*, 432 F. Supp. 2d 635, 641-642 (W.D. Va. 2006); *see also Wing v. Holder*, 2010 WL 5021087 * 2-3 (D. Utah, December 3, 2010); *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”); *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”). The pertinent question is whether Winsome received reasonably equivalent value for its payments to Defendant. This question is answered from the perspective of the tort creditors of Winsome, its 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*, 553 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 Defendant “gave reasonably equivalent value; it is whether [Winsome] *received* reasonably equivalent value.” *In re Lucas Dallas, Inc.*, 185 B.R. 801, 807 (9th Cir. 1995). Defendant cannot meet the burden of proving this affirmative defense.

Here, the transfers from Winsome to Defendant were not received for a reasonably equivalent value. Defendant received at least \$25,000 from Winsome without providing Winsome anything of value in exchange. SOF¶¶ 4-7. Defendant admits that the funds it received were for providing legal services to a Mr. Enrique Baca and that it was Mr. Baca that benefitted from the services. *Id.* However, no benefit purportedly provided to Mr. Baca can satisfy Defendant’s obligation of demonstrating that it provided reasonably equivalent value. Utah courts have held that “[s]atisfaction of an obligation owed the transferee by a third party does not qualify as fair consideration” under UFTA. *Dahnken, Inc. v. Wilmarth*, 726 P.2d 420, 422 (Utah 1986). *See also In re Whaley*, 229 B.R. 767, 775 (Bankr. D. Minn. 1999) (“A payment made solely for the benefit of a third party, such as a payment to satisfy a third party's

debt, does not furnish reasonably-equivalent value to the debtor.” (citing *In re Bargfrede*, 117 F.3d 1078, 1080 (8th Cir. 1997)). Under these cases, Defendant’s purported provision of legal services to Mr. Baca provided no benefit to Winsome.

In *S.E.C. v. Resource Development International, LLC*, 487 F.3d 295, 301 (5th Cir. 2007), the Fifth Circuit Court of Appeals addressed a nearly identical situation and held that payments made to the attorneys of the individual who operated a Ponzi scheme were not made for reasonably equivalent value. In that case, the defendant agreed to pay a Mr. Cook, an individual who was operating a Ponzi scheme, \$60,000 for attorney fees related to an S.E.C. lawsuit against Cook. *Id.* at 298. In exchange, Cook caused one of the Ponzi entities to wire that same amount to the defendant. *Id.* The S.E.C. then sued the defendant to recover that transfer from the Ponzi entity under the UFTA. *Id.* The Fifth Circuit affirmed the trial court’s holding that the transfer was fraudulent under UFTA. *Id.* at 301. In particular, the Fifth Circuit held that because the transfer was made by a Ponzi scheme, fraudulent intent was established. *Id.* The Fifth Circuit also upheld the trial court’s finding that the Ponzi entity in receivership received no reasonable equivalent value based on the payment made for the legal fees of one of the Ponzi scheme’s organizers. *Id.* Here, similar to *Resource Development*, Defendant cannot show that the legal services it provided to Mr. Baca resulted in any value received by Winsome. Therefore, Defendant cannot prove the “good faith” affirmative defense.

Defendant does not assert that Mr. Baca had any relationship with Winsome. Nor does it argue that Winsome received any benefit from Defendant’s provision of legal services to Mr. Baca. SOF ¶¶ 4-7. Accordingly, the Court should enter judgment against Defendant in the amount of \$25,000 plus all applicable costs, fees, and interest.

II. THE RECEIVER IS ENTITLED TO SUMMARY JUDGMENT ON HIS UNJUST ENRICHMENT CLAIM.

The Receiver seeks a judgment for unjust enrichment in the alternative based on the same facts that support his fraudulent transfer claim. 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)).

Defendant's receipt of the funds from the Ponzi scheme satisfies these three elements. Defendant plainly received a known benefit when it received thousands of dollars from Winsome. SOF ¶ 4. Defendant's retention of that benefit is unjust because the money was derived from other innocent investors' payments to a fraudulent Ponzi scheme, not actual investment gains and because Defendant provided no benefit to Winsome in exchange for the payments. SOF ¶¶ 4-7. Under these circumstances, particularly where there are other innocent investors who have suffered significant losses, retention by Defendant of these payments would be unjust. *See In re Pearlman*, 472 B.R. 115, 125 (Bankr. M.D. Fla. 2012) (noting that "trustee has stated a valid cause of action that, if proven, defendants were unjustly enriched when they received payments to the extent they exceed defendants' original investment").

CONCLUSION

For the forgoing reasons, the Receiver respectfully requests that the Court grant summary judgment in his favor and against Defendant.

DATED this 19th day of April, 2013.

MANNING CURTIS BRADSHAW
& BEDNAR LLC

/s/ David C. Castleberry
David C. Castleberry
Aaron C. Garrett
Attorneys for Plaintiff

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 this 19th day of April, 2013, addressed as follows.

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

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HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
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 USDC ECF NOTICE

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/s/ David C. Castleberry

INDEX OF EXHIBITS

- Exhibit 1 Declaration of R. Wayne Klein (includes Exhibit A – Order Granting Plaintiff's *Ex Parte* Motion for Statutory Restraining Order, Expedited Discovery, Accounting, Order to Show Cause re Preliminary Injunction and Other Equitable Relief; Exhibit B – Receiver's Expert Witness Report on Ponzi Scheme and Insolvency; Exhibit C – Bank of America Checking Account)
- Exhibit 2 Excerpts from Plaintiff's First Set of Discovery Requests to Defendant
- Exhibit 3 Excerpts from Defendant's Response to Plaintiffs' First Set of Discovery Requests