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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*

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UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH

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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.

JUDITH BASSETT,

Defendant.

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

Case No. 2:12-cv-00095-CW

Pursuant to Fed. R. Civ. P. 56, Plaintiff R. Wayne Klein (“Plaintiff” or the “Receiver”), Receiver of US Ventures LC, (“US Ventures”), Winsome Investment Trust (“Winsome”), and the assets of Robert J. Andres (“Andres”) and Robert L. Holloway (“Holloway”), by and through counsel of record, hereby submits this Memorandum in Support of his Motion for Summary Judgment.

## **INTRODUCTION**

Plaintiff is entitled to summary judgment in this case based on two simple, undisputed facts: (1) US Ventures operated as a Ponzi scheme and (2) Defendant admits that she did not provide reasonably equivalent value for the transfers she received from US Ventures. 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 US Ventures operated as a Ponzi scheme, and she admits that she received at least the transfers identified in the Complaint. Therefore, the only remaining issue is whether Defendant provided reasonable equivalent value to US Ventures in exchange for the transfers. In her Answer Defendant admits that she did not. 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 US Ventures 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 US Ventures 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 US Ventures operated as a fraudulent Ponzi scheme. Declaration of R. Wayne Klein ("Klein Decl."), attached as Exhibit 1, ¶¶ 8-41.

4. It is undisputed, and Defendant admits, that Defendant received at least \$33,007.94 in payments from US Ventures. *Id.* at ¶ 42; Complaint ¶ 30-31; Answer ¶ 30-31.

5. Defendant also admits that she received other amounts in addition to the \$33,007.94 set forth in the Complaint. Complaint ¶ 32; Answer ¶ 32.

6. Defendant further admits that she did not provide reasonably equivalent value to US Ventures for the transfers she received. Complaint ¶ 33; Answer ¶ 33.

### **Elements of Unjust Enrichment Claim**

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

**Undisputed Facts Satisfying Applicable Elements of Unjust Enrichment Claim**

8. It is undisputed that Defendant knowingly received over \$33,007.94 in transfers from US Ventures. Complaint ¶¶ 30-32; Answer ¶¶ 30-32.

9. It is also undisputed that Defendant did not provide US Ventures with reasonable equivalent value for those payments. Complaint ¶ 33; Answer ¶ 33.

10. It is undisputed that that US Ventures operated as a Ponzi scheme, that there are innocent investors who collectively lost millions of dollars through US Ventures, 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) US Ventures made the transfers with actual intent to defraud creditors, and (2) Defendant did not take these transfers for a reasonably equivalent value or in good faith. Therefore, the Receiver asks the Court to avoid the transfers to Defendant and enter judgment against her for the amount she received from US Ventures.

#### **a. US Ventures Made the Transfers to Defendant with Actual Intent to Defraud because it Operated as a Ponzi Scheme.**

“Courts have routinely applied UFTA to allow receivers to recover monies lost by Ponzi scheme investors.” *Donell* 533 F.3d at 767; *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, US Ventures operated as a Ponzi scheme. In particular, US Ventures was insolvent from about a week after it began operations, including when it made the transfers at issue to Bassett. *See Klein Decl.* ¶¶ 17, 21. US Ventures also used funds received from investors to pay fraudulent distributions to other investors, a typical practice of a Ponzi scheme. *Id.* ¶ 20. Therefore, the undisputed evidence shows that US Ventures was operated as a Ponzi scheme. As a result, every transfer they 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 US Ventures received reasonably equivalent value for its payments to Defendant. This question is answered from the perspective of the tort creditors of US Ventures, 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 [US Ventures] *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, there is no genuine issue of material fact as to whether the transfers from US Ventures to Defendant were received for a reasonably equivalent value. Defendant admits she received over \$33,007.94 from US Ventures without providing anything of value in exchange. Statement of Elements and Undisputed Facts ("SOF"), *supra*, ¶¶ 3-6. Defendant expressly admits that she did not provide US Ventures with reasonably equivalent value for the transfers. *Id.* ¶ 6. Therefore, the undisputed facts demonstrate that the Receiver is entitled to recover on his fraudulent transfer claim and the Court should enter judgment against Defendant in the amount of \$33,007.94.

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

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 she received thousands of dollars from US Ventures. 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 reasonably equivalent value in exchange for the payments. 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 Foregoing reasons, Plaintiff respectfully requests that the Court enter Summary Judgment in his favor and against Defendant in the amount of \$33,007.94.

DATED this 26th day of April, 2013.

**MANNING CURTIS BRADSHAW & BEDNAR LLC**

/s/ David C. Castleberry

David C. Castleberry

Aaron C. Garrett

Attorneys for Receiver for US Ventures, LC, Winsome Investment Trust, and the assets of Robert J. Andres and Robert L. Holloway

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of April, 2013, I caused to be served in the manner indicated below a true and correct copy of the attached and foregoing **MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** upon the following:

VIA FACSIMILE  
 VIA HAND DELIVERY  
 VIA U.S. MAIL  
 VIA FEDERAL EXPRESS  
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