

**MANNING CURTIS BRADSHAW
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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.

RAVKIND & ASSOCIATES,

Defendant.

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

Case No. 2:12-cv-00022-EJF

Magistrate Judge Evelyn J. Furse

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) (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* ¶¶ 3-5. Therefore, the only remaining issue is whether Defendant provided reasonably equivalent value to Winsome in exchange for the transfers. The evidence demonstrates that Winsome did not receive reasonably equivalent value for the transfers. 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); Tex. Bus. Comm. Code § 24.005(a)(1). 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); *see also Janvey v. Democratic Senatorial Campaign Committee*, 712 F.3d 185, 196 (5th Cir. 2013) (“This court has held that transfers from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, ‘as a matter of law, insolvent from its inception’”) (quoting *Am. Cancer Soc. v. Cook*, 675 F.3d 524, 527 (5th Cir. 2012)).

2. The Receiver may also prevail on his fraudulent transfer claim if the Receivership Defendant made the transfers to Defendant while insolvent and “without receiving a reasonably equivalent value in exchange for the transfer or obligation.” Utah Code § 25-6-5(1)(b); Tex. Bus. Comm. Code § 24.005(a)(2).

Undisputed Facts Satisfying Applicable Elements of Fraudulent Transfer Claim

3. It is undisputed that Winsome operated as a massive fraudulent Ponzi scheme that was insolvent at the time it made the transfers at issue. Declaration of R. Wayne Klein (“Klein Decl.”), attached as Exhibit 1, ¶¶ 8-42. Defendant presents no contradictory evidence, nor does it deny this fact. *See* Original Answer of Defendant Ravkind & Associates to the Receiver’s Complaint (Doc. No. 24), attached as Exhibit 2, ¶¶ 10-47 (Defendant is without sufficient knowledge to either admit or deny the allegations regarding the Ponzi scheme or Winsome’s insolvency). Indeed, Robert Andres has recently pled guilty to wire fraud in connection with his activities at Winsome. *See* Statement by Defendant in Advance of Plea of Guilty (“Guilty

Plea”), attached as Exhibit 3. In the Guilty Plea, Andres admits that he "fraudulently obtained millions of dollars from investors by (1) investing the assets and asset allocation of Winsome; and (2) misrepresenting the types of investments into which [he] would place investors' funds."

Id. ¶ 11. Andres also admits in the Guilty Plea that he falsely represented the total assets of Winsome, disseminated false balance sheets to investors, and that he "distributed 'profits' to Pre-April 2007 Winsome investors that were actually proceeds from new Winsome investors." *Id.*

4. It is undisputed that Defendant knowingly received a total of \$225,000 in payments from Winsome accounts in direct wire transfers between April 2008 through May 2008. *See Ravkind & Associates Responses to Plaintiff's First Set of Discovery Requests ("First Discovery Responses")*, attached as Exhibit 4, Responses to Request for Admission 1 and Request for Admission 2.

5. It is undisputed that Defendant returned \$175,000 to Receivership Defendants between June and July 2008, and Defendant retained the remaining \$50,000. *Id.*

6. Defendant asserts that these transfers were received as payment for providing legal services to Albert and Cherylyn Sellers (the "Sellers"). *See id.* at Response to Interrogatory 5.

7. The undisputed evidence establishes that Winsome made these transfers without any obligation to do so and without receiving reasonably equivalent value. Defendant claims that "Winsome Investment Trust, through attorney Bob Andres, represented legal fees would be paid and, indeed, were paid." *See Ravkind & Associates Responses to Plaintiff's Second Set of Discovery Requests*, attached as Exhibit 5, at Response to Interrogatory No. 18. However, Defendant has provided no evidence of a written agreement obligating the Receivership Defendants to pay Mr. & Mrs. Sellers' legal fees. Indeed, Bob Andres himself stated: "Though

this is only my comments (sic) as to their character, I believe that [the Sellers have] done nothing wrong. As such, that is the reason that I am helping them.” See Ex. 1, Klein Decl. at ¶¶ 47-48.

8. Defendant has also failed to demonstrate any benefit that the Receivership Defendants received as a result of paying the legal fees for the Sellers. Mr. & Mrs. Sellers were the only ones who received the benefit of the legal services that Defendant provided.

Elements of Unjust Enrichment Claim

9. 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); see also *Villarreal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. Ct. App. 2004) (“Unjust enrichment occurs when the ‘person sought to be charged [has] wrongfully secured a benefit or [has] passively received one which it would [be] unconscionable to retain.’”) (alterations in original, quoting *City of Corpus v. S.S. Smith & Sons Masonry, Inc.*, 736 S.W.2d 247, 250 (Tex. Ct. App. 1987))).

Undisputed Facts Satisfying Applicable Elements of Unjust Enrichment Claim

10. It is undisputed that Defendant knowingly received transfers in the amount of \$225,000 from Winsome and returned only \$175,000 to Winsome. Ex. 1, Klein Decl. ¶¶ 44-45; First Discovery Responses, attached as Ex. 4, Responses to Request for Admission 1 and Request for Admission 2.

11. 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

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is no genuine dispute of material fact as to the elements of the Receiver's causes of action for fraudulent transfer or unjust enrichment, and the Court should therefore enter summary judgment in his favor on both claims.

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

Pursuant to UFTA, a transfer is actually fraudulent and may be avoided if the debtor made the transfer with actual intent to defraud a creditor, *see* § Utah Code Ann. § 25-6-5(1)(a); Tex. Bus Comm. Code § 24.005(a)(1). A transfer may also be avoided as constructively fraudulent "if the debtor made the transfer . . . without receiving reasonably equivalent value in exchange" and the debtor could not pay its debts as they became due. Utah Code Ann. § 25-6-5(1)(b).

Here, the transfers at issue are both actually and constructively fraudulent because: (1) Winsome, as a Ponzi scheme, made the transfers with actual intent to defraud creditors; (2) Winsome made the transfers while it was insolvent; and (3) 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 Defendant for \$50,000.

a. The Transfers to Defendant are Actually Fraudulent Because Winsome Made them While Operating 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.* Further demonstrating Winsome’s fraud, Andres pleaded guilty to wire fraud in connection with his activities in Winsome. SOF ¶ 3. Specifically, Andres admits in the Guilty Plea that he

distributed “profits” to early Winsome investors using proceeds from later investors. *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”). Therefore, the transfers to Defendant are avoidable and the Receiver is entitled to summary judgment.

b. Defendant did not take the Transfers at Issue for Reasonably Equivalent Value.

Utah Code Ann. § 25-6-9(1) provides that a transfer is not avoidable “against a person who took in good faith and for a 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”); *Citizens Nat. Bank of Texas v. NXS Const., Inc.*, 387 S.W.3d 74, 85 (Tex. Ct. App. 2012) (explaining that taking transfers in good faith for reasonably equivalent value “may be an affirmative defense to a fraudulent-transfer claim”). The pertinent question is whether *Winsome received* reasonably equivalent value for its payments to Defendant, and not whether Defendant *provided* reasonably equivalent value to a third party.

As the Fifth Circuit explained in *S.E.C. v. Resource Development International, LLC*, 487 F.3d 295, 301 (5th Cir. 2007), “[t]he primary consideration in analyzing the exchange of value

for any transfer is the degree to which the transferor's net worth is preserved. According to the commentary to [UFTA], value is to be determined in light of the act's purpose, in order to protect creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition." *Id.* (citations and internal quotations omitted). Thus, the question of whether Winsome received reasonably equivalent value 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"). "Here, [Winsome's] net worth was diminished by the [\$50,000] payment to [the Defendant] and its defrauded creditors received no benefit from funding the legal defense of [Mr. & Mrs. Sellers]." *S.E.C. v. Resource Development International, LLC*, 487 F.3d at 301-302.

In *Resource Development*, the Fifth Circuit 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. *Id.* at 301. 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 court-appointed receiver then sued the defendant to recover that transfer from the Ponzi entity under 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.*

The evidence establishes that Winsome did not receive reasonably equivalent value in exchange for the transfers it made to Defendant. *See* SOF ¶¶ 5-8. The only value Defendant claims to have provided in exchange for the transfers from Winsome is legal representation of third party individuals, namely Mr. & Mrs. Sellers. However, the Receivership Defendants had no obligation to make any payment to Defendant in connection with Defendant's legal representation of the Sellers. Further, there is no evidence that Winsome received any benefit for its gratuitous payments to Defendant. No benefit purportedly provided to the Sellers 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 the Sellers provided no benefit to Winsome.

Also, Winsome was also not obligated to make any payments to the Defendant. Mr. Andres, the individual who operated Winsome, explained that he wanted to assist the Sellers by paying their legal fees because he believed that they had done nothing wrong. *See* SOF ¶ 7. Mr. Andres' payment of legal fees was merely a gift to for the benefit of the Sellers. Because this

gift came from stolen money, however, it must be returned for the benefit of the investors who lost money in the fraud.

Based on the foregoing, it is undisputed that the transfers at issue were actually fraudulent and should be avoided. Accordingly, the Court should enter judgment against Defendant in the amount of \$50,000 plus all applicable costs, fees, and interest.

c. The Transfers are Constructively Fraudulent Because They Were Made While Winsome Was Insolvent and Defendant Did Not Provide Winsome With Reasonably Equivalent Value.

In addition to the transfers at issue being actually fraudulent, the Receiver is entitled to summary judgment on the independent basis that the transfers are also constructively fraudulent. Pursuant to UFTA, a transfer can be avoided as a constructive fraudulent transfer if 1) the debtor made the transfer without receiving reasonably equivalent value in exchange, and 2) the transferor could not pay its debts as they became due. Utah Code Ann. § 25-6-5(1)(b). This provision further demonstrates that reasonably equivalent value must be provided to the debtor, and not to some other party. *See id.* (providing that a transfer is fraudulent "if the debtor made the transfer . . . without receiving reasonably equivalent value in exchange").

Just as in an actual fraudulent transfer claim, proof of a Ponzi scheme satisfies the elements of a constructive fraudulent transfer claim because it shows that the transferor "intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." *Donell*, 533 F.3d at 770. It is undisputed that the elements of constructive fraud are met in this case. Winsome was insolvent throughout its operation. *See* Ex. 1, Klein Decl. ¶ 37. Therefore, it had no ability to pay its debts as they became due except by fraudulently soliciting new funds to pay earlier investors. Moreover, the fact that Winsome operated as a Ponzi scheme demonstrates that it intended to incur debts beyond its ability to pay. *See Donell*, 533 F.3d at 770. Thus, the insolvency element

is undisputedly established. As discussed above, Winsome did not receive reasonably equivalent value in exchange for the transfers at issue. Accordingly, the transfers were constructively fraudulent under Utah Code Ann. § 25-6-5(1)(b), and therefore should be voided.

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 *Jeffs 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 ¶¶ 4-5. 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 in the amount of \$50,000.

DATED this 9th day of May, 2014.

MANNING CURTIS BRADSHAW
& BEDNAR LLC

/s/ David C. Castleberry

David C. Castleberry
Christopher M. Glauser
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 9th day of May, 2014, addressed as follows.

<input type="checkbox"/> HAND DELIVERY	Andrew G. Counts
<input type="checkbox"/> U.S. MAIL	The Tracy Firm
<input type="checkbox"/> OVERNIGHT MAIL	5473 Blair Road, Suite 200
<input type="checkbox"/> FAX TRANSMISSION	Dallas, TX 75231
<input type="checkbox"/> E-MAIL TRANSMISSION	(214) 324-9000 (Telephone)
<input checked="" type="checkbox"/> USDC ECF NOTICE	(972) 387-2205 (Facsimile)
	ACounts@vehiclesafetyfirm.com

<input type="checkbox"/> HAND DELIVERY	Paul G. Cassell
<input type="checkbox"/> U.S. MAIL	Hatch James & Dodge, PC
<input type="checkbox"/> OVERNIGHT MAIL	10 West Broadway, Suite 400
<input type="checkbox"/> FAX TRANSMISSION	Salt Lake City, UT 84101
<input type="checkbox"/> E-MAIL TRANSMISSION	(801) 363-6363 (Telephone)
<input checked="" type="checkbox"/> USDC ECF NOTICE	(801) 363-6666 (Facsimile)

/s/ David C. Castleberry _____

INDEX OF EXHIBITS

1. Declaration of R. Wayne Klein
 - 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
 - B. Expert Report of R. Wayne Klein
 - C. Bank Statements
 - D. Email exchange between Robert Andres and Billy Ravkind
2. Original Answer of Defendant Ravkind & Associates to the Receiver's Complaint
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