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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.

WILLIAM V. ISON, PATTY J. ISON and
GRACE FOUNDATION,

Defendants.

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

Case No. 2:12-cv-00055 BSJ

Honorable Bruce S. Jenkins

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 against Defendant Patty J. Ison ("Defendant").¹

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 for the transfers she 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 admits that Winsome operated as a Ponzi scheme, that she received the transfers identified in the Complaint, and that she provided no reasonably equivalent value in exchange for those transfers. 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

¹ The Receiver's claims against Defendant Grace Foundation were dismissed with prejudice on November 9, 2012. *See* November 9, 2012 Order of Dismissal. Default has been entered against Defendants William Ison and Patty Ison. *See* October 16, 2012 Entry of Default Certificate, Doc No. 22. While Default has been entered against Ms. Ison, she has never sought to have that default vacated, but has instead proceeded with a substantive defense to the Receiver's lawsuit. William Ison is currently incarcerated for running another fraudulent scheme, and it is believed that he is in jail in California.

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" when it was unable to pay its debts as they became due. Utah Code § 25-6-5(1)(b).

Undisputed Facts Satisfying Applicable Elements of Fraudulent Transfer Claim

3. The Receiver served Defendant with Requests for Admission on February 6, 2013. *See* Plaintiff's First Set of Discovery Requests to Defendant Patty Ison ("Requests"), attached as Exhibit 1. Defendant failed to respond to those requests within 30 days, and, while the Receiver welcomed the Defendant's partial answers served untimely so he could understand more about this case, he did not provide an extension for the requests for admissions. *See* Defendant's Response to First Set of Discovery Requests ("Responses"), attached as Exhibit 2, at Certificate of Service (dated April 11, 2013). Accordingly, all of the Requests are deemed admitted. *See* Fed. R. Civ. P. 36(a)(3) ("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").

4. It is undisputed that Winsome operated as a fraudulent Ponzi scheme. Declaration of R. Wayne Klein ("Klein Decl."), attached as Exhibit 3, ¶¶ 8-42; Ex. 1, Requests at Request for Admission No. 6 ("Admit that the Receivership Defendants operated as a Ponzi

scheme") (admitted by failure to timely respond).² It is also undisputed that Winsome was insolvent when it made the transfers to Defendant. *See* Ex. 3, Klein Decl. ¶ 37; Ex. 1, Requests at Request for Admission No. 5 ("Admit that the Receivership Defendants were insolvent at least as early as November 2005") (admitted for failure to timely respond).

5. It is also undisputed that Defendant received transfers from Winsome totaling at least \$185,501.03 in a joint bank account she shared with her husband. *See* Ex. 3, Klein Decl. at ¶ 43 (identifying payments from Winsome into Defendant's account); Ex. 1, Requests at Request for Admission No. 1 ("Admit that from November 2006 through and including May 2008, the Receivership Defendants made Transfers to You totaling approximately \$185,501.03) (admitted for failure to timely respond).³

6. It is also undisputed that Defendant provided no reasonably equivalent value in exchange for the transfers she received. *See* Ex. 3, Klein Decl. at ¶¶ 43-44; Ex. 1, Request for Admission No. 3 ("Admit that the Receivership Defendants owed no obligation to make payments to you") (admitted for failure to timely respond), Request for Admission No. 4

² Defendant's response to the Receiver's Requests for Admission was served well over 30 days after the Requests were made, and the Requests are therefore admitted in full. However, even considering Defendant's belated response, she admits that Winsome operated as a Ponzi scheme. *See* Ex. 2, Response at Response to Request for Admission No. 6 (admitting that the Receivership Defendants operated as a Ponzi scheme).

³ Even in her untimely response, Defendant does not deny that she received the transfers from Winsome, but only claims to be unaware of each specific transfer made into her account. *See* Ex. 2, Responses at Response to Request to Admit No. 1 (admitting that "it appears that there were transfers made without my knowledge or authorization to a joint bank account I held with my husband, William Ison"), Response to Interrogatory No. 2 (stating only that Defendant "do[es] not have any specific knowledge or information about th[e] Transfers" but not denying that the transfers were received), Response to Interrogatories 7 (admitting that Defendant shared a joint bank account with William Ison at Merrill Lynch). Defendant does not, and cannot, deny that the transfers were, in fact, made to her account. Therefore this fact is undisputed in any event.

("Admit that you did not provide anything of value in exchange for the Transfers you received from the Receivership Defendants") (admitted for failure to respond).⁴

7. Defendant admits that, other than this speculative hearsay, she "did not provide anything of value that [she is] aware of to the Receivership Defendants." Ex. 2, Responses at Response to Request for Admission No. 4.

Elements of Unjust Enrichment Claim

8. The Receiver's second cause of action is for unjust enrichment. The legal elements required to prevail on this claim are: a benefit conferred on Defendant, an appreciation or knowledge by Defendant of the benefit, and the acceptance or retention by Defendant of the benefit under such circumstances as to make it inequitable for Defendant to retain the benefit without payment of its value. *See Rawlings v. Rawlings*, 2010 UT 52, ¶ 29, 240 P.3d 754.

Undisputed Facts Satisfying Applicable Elements of Unjust Enrichment Claim

9. Defendant does not dispute that she received the transfers at issue, totaling \$185,501.03, from Winsome into her joint bank account. *See* Ex. 3, Klein Decl. at ¶ 43; Ex. 1, Requests at Request for Admission No. 1.

10. Defendant presents no admissible evidence that she provided Winsome anything of value in exchange for these transfers. *See* Ex. 1, Requests at Request for Admission No. 3.

⁴ Again, Defendant's untimely Response, which should be disregarded, is of no help to Defendant. In that Response, Defendant presents no admissible evidence to dispute the fact that she provided no reasonably equivalent value to Winsome. The only value that Defendant identifies that she might have provided in exchange for the transfers at issue is \$85,000 in proceeds Defendant claims her husband told her he received from the refinance of their home and that he claimed he provided to Robert Andres "as a loan or possibly an investment." Ex. 2, Response at Response to Request for Admission No. 4. However, Defendant has no evidence or personal knowledge of that alleged transaction and admits that "[t]he only information that [she has] regarding any possibly [sic] amounts owed to me is based on information told to me by my husband, William Ison." *See id.* at Response to Request for Admission No. 3. Thus, it remains undisputed by admissible evidence that Defendant provided no reasonably equivalent value to Winsome.

11. It is undisputed 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. 3, Klein Decl. ¶¶ 8-42; Ex. 1, Requests at Request for Admission No. 6.

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). A transfer can also be constructively fraudulent if the debtor made the transfer without receiving a reasonably equivalent value and (i) was engaged in or about to engage in a transaction for which the debtor's assets were unreasonably small, or (ii) intended to incur or reasonably should have believed the debtor would incur debts beyond its ability to pay as they became due. *See* Utah Code Ann. § 25-6-5(1)(b). A transfer that is actually or constructively fraudulent under UFTA may be avoided. *Id.* at § 25-6-8(1)(a).

Here, the transfers at issue are actually fraudulent because Winsome, as a Ponzi scheme, made the transfers with actual intent to defraud creditors. The transfers were also constructively fraudulent because (1) Winsome was insolvent at the time it made the transfers, 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 Winsome.

a. Winsome 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, Defendant admits that Winsome operated as a Ponzi scheme. Statement of Elements and Undisputed Facts, *supra*, ("SOF") ¶ 4. In particular, Winsome operated while it was insolvent. See Ex. 3, Klein Decl. ¶ 37. Winsome also used funds received from investors to pay fraudulent distributions to other investors, another typical practice of a Ponzi scheme. See *id.* ¶¶ 35-36. Therefore, the undisputed evidence shows that Winsome 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"). As such, all transfers are avoidable under UFTA and the Receiver is entitled to summary judgment on his fraudulent transfer claim.

b. The Transfers from Winsome are Constructively Fraudulent because they were Made While Winsome was Insolvent and Defendant did not Provide Winsome with Reasonably Equivalent value.

A transfer is constructively fraudulent if the debtor did not receive reasonably equivalent value in exchange for the transfer and made the transfer while insolvent. *See* Utah Code Ann. § 25-5-6(a)(2). Notably, proof of a Ponzi scheme also establishes constructive fraud because it demonstrates that the debtor "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. 3, Klein Decl. ¶ 37; SOF ¶ 4.⁵ 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. Defendant admitted that she provided no reasonably equivalent value in exchange for the transfers when she failed to timely respond to the Receiver's Requests for Admission. *See* SOF ¶¶ 5-6. As discussed below, even if the Court were to consider Defendant's untimely Responses, Defendant fails to present any admissible evidence that she provided reasonably equivalent value. Therefore, it is undisputed that the transfers at issue were constructively fraudulent and should be avoided.

c. Defendant Cannot Establish the Affirmative Defense that She Took the Transfers at Issue in Good Faith or for Reasonably Equivalent Value.

UFTA provides a potential affirmative defense if a defendant can prove that she took the

⁵ Defendant does not dispute this fact, even in her belated response. Instead, she simply states that she has no knowledge of Winsome's financial condition. *See* Ex. 2, Response at Response to Request for Admission No. 5. Therefore, it is undisputed that Winsome was insolvent when it made the transfers to Defendant.

transfer "in good faith and for reasonably equivalent value." See Utah Code Ann. § 25-6-9(1). 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, there is no genuine issue of material fact as to whether the transfers from Winsome to Defendant were received for reasonably equivalent value. First, Defendant admitted that she provided no reasonably equivalent value by failing to timely respond to the Receiver's Requests for Admission. See SOF ¶¶ 5-6. Thus, this element is conclusively established against

Defendant, and the Court need not consider this defense further. However, even if the Court were to consider Defendant's belated response, it remains undisputed by admissible evidence that Defendant provided no reasonably equivalent value.

Defendant does not dispute that she received the transfers totaling over \$185,500 from Winsome into her bank account. SOF ¶ 5. Although Defendant claims in her belated response that she does not to have specific knowledge of all transfers to her account, the Receiver's evidence identifies each transfer, and these transfers are sent to a bank account for William and Patty Ison. *See* Ex. 3, Klein Decl. ¶ 43, Ex. C. Defendant puts forth no evidence to dispute the Receiver's records. Therefore, it is undisputed that Defendant received the transfers at issue.

Defendant also fails to present any admissible evidence that she provided Winsome with reasonably equivalent value for the transfers, as she is required to do to prove this affirmative defense. Instead, Defendant simply speculates about a hearsay statement from her husband in which she believes he said he may have provided funds from a home refinance to Robert Andres for "a loan or possibly an investment." SOF ¶ 6. Defendant produces no admissible evidence to support this hearsay statement or to show that any funds were provided to Winsome, the transferor. Defendant's own admissions demonstrate that any argument that she provided reasonable value to Winsome is entirely speculative. Defendant states only that "[i]f I had an ownership interest in my home that gave rise to a claim of ownership on the \$85,000 proceeds William told me we received from refinancing our home and *if* William did loan or invest that money with Robert Andres, I *may have* provided something of value to Robert Andres." *See* Ex. 2, Responses at Response to Request for Admission No. 4 (emphasis added). Defendant further admits that she does not know if the transfers at issue in this case were for the repayment of the claimed loan or investment with Andres "or whether they are fraudulent." *See id.* at Response to

Interrogatory No. 4. Defendant's hypothetical speculation cannot support her affirmative defense of reasonable value.

Even if Defendant's hearsay statement were supported, payments to Robert Andres could not satisfy Defendant's obligation to show that she provided reasonably equivalent value to Winsome. Courts routinely and consistently hold that for a defendant to prevail on a defense to a fraudulent transfer based on value, the defendant must provide value to the entity that transferred the money; payments for another party's debts or obligations are not enough. *See Dahnken, Inc. v. Wilmarth*, 726 P.2d 420, 422 (Utah 1986) (holding that "[s]atisfaction of an obligation owed the transferee by a third party does not qualify as fair consideration" under UFTA); *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") (citation omitted). Without admissible evidence of reasonably equivalent value provided to Winsome, Defendant's speculative argument that she "may have provided something of value to Robert Andres" is irrelevant. Therefore, this affirmative defense fails as a matter of law and the Receiver is entitled to summary judgment.⁶

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

⁶ Notably, Defendant's hearsay statement is also insufficient to support any claim of reasonably equivalent value because she claims that her husband told her that he provided only \$85,000 to Andres, while Defendant received over \$185,500 from Winsome. Therefore, even if Defendant could prove that the funds were provided to Andres *and* that that payment somehow represented value to Winsome (which she cannot), she would remain liable for the over \$100,000 in additional funds that she received, for which she does not even speculate that she provided any value.

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*, 2010 UT 52, ¶ 29, 240.

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 Winsome. 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 \$185,501.03.

DATED this 29th day of May, 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 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 29th day of May, 2013, addressed as follows

- Hand Delivery
- U.S. Mail
- Overnight Mail
- Fax Transmission
- E-mail Transmission
- USDC ECF Notice

William V. Ison, #38879-013
San Diego Correctional Facilities
P.O. Box 439049
San Diego, CA 92143

- Hand Delivery
- U.S. Mail
- Overnight Mail
- Fax Transmission
- E-mail Transmission
- USDC ECF Notice

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Attorney for Patty J. Ison

/s/ David C. Castleberry

INDEX OF EXHIBITS

- Exhibit 1 Plaintiff's First Set of Discovery Requests to Defendant Patty Ison
- Exhibit 2 Defendant Patty Ison's Response to Plaintiffs' First Set of Discovery Requests to Defendant Patty Ison
- Exhibit 3 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)