

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 84111
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,

Plaintiff,

vs.

E. URSULA ANDRES,

Defendant.

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

Case No. 2:11-cv-00656-TS

Judge Ted Stewart

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 Motion for Summary Judgment and Memorandum in Support.

INTRODUCTION

The Receiver is entitled to summary judgment in this case based on two simple, undisputed facts: (1) Winsome operated as a Ponzi scheme and (2) Defendant admits that she 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 does not dispute that Winsome operated as a Ponzi scheme, nor does she deny receiving the transfers identified in the Complaint. Defendant also admits that she did not provide anything of value to Winsome in exchange for the transfers she received. This undisputed evidence plainly satisfies the elements of the Receiver's claims and demonstrates that 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 the receivership debtor, in this case Winsome and two companies controlled by Robert Andres, 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 and Andres 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 Winsome 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. It is undisputed that Winsome operated as a fraudulent Ponzi scheme controlled by Andres. Declaration of R. Wayne Klein ("Klein Decl."), attached as Exhibit 1, ¶¶ 8-42.

4. It is also undisputed that Defendant received at least \$311,075.00 in payments from Winsome and its related companies.¹ *Id.* at ¶ 43; *see also* Complaint (doc. 1) ¶ 48 (identifying transfers from Winsome and Robert Andres' companies to Ursula Andres); Answer (doc. 17) ¶ 3 (claiming that Defendant "is not able to either admit or deny" the allegations in Paragraph 48-51 of the Complaint).

5. Defendant admits that she "did not provide any service or consideration to any Receivership Defendant" and that she "does not believe anything of value was exchanged." *See* Defendant's Responses to Discovery Requests ("Responses"), attached as Exhibit 2, at Response to Request for Admission No. 3, Response to Interrogatory No. 4; *see also* Complaint ¶ 51 (alleging that Defendant did not provide reasonably equivalent value in exchange for the transfers); Answer ¶ 3 (claiming that Defendant "is not able to either admit or deny" the

¹ \$246,500.00 of this total was paid by Winsome. \$63,575.00 was paid from the bank accounts of Bear & Bull Strategies ("Bear & Bull") and \$1,000.00 was paid from a bank account of C2G Strategies ("C2G"). Andres controlled all three companies and their bank accounts. Pursuant to the order appointing the Receiver, these bank accounts fall under the stewardship of the Receiver as the assets of Andres. *See* Ex. 1, Klein Decl. ¶ 43, n.4.

allegations in Paragraph 48-51 of the Complaint). Defendant also admits that Winsome owed her no obligation. *See* Ex. 2, Responses at Response to Request for Admission No. 2.

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

Undisputed Facts Satisfying Applicable Elements of Unjust Enrichment Claim

7. It is undisputed that Defendant knowingly received at least \$311,075.00 in transfers from Winsome and Robert Andres. *See* Complaint ¶ 48; Answer ¶ 3.

8. It is also undisputed that Defendant did not provide reasonable equivalent value for those payments. *See* Ex. 2, Responses at Response to Requests for Admission No. 2-3, Response to Interrogatory No. 4; Complaint ¶ 51; Answer ¶ 3.

9. 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 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 and its related companies.

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 defines 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 operated while it was insolvent. *See* 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. Because it is undisputed that Winsome was operated as a Ponzi scheme, every transfer it made was with actual intent to defraud under the UFTA. *See Donell*, 533 F.3d at 770 ("mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud").

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 the debtor was 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. 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. Defendant admits that she provided no reasonably equivalent value to Winsome in exchange for the transfers she received. *See* SOF ¶ 5. Therefore, it is undisputed that the transfers at issue were constructively fraudulent and they should be avoided on that additional basis.

c. 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 the receivership debtor, 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 because she has submitted no evidence and she admits that she provided no value in exchange for the transfers she received from Winsome.

Here, there is no genuine issue of material fact as to whether the transfers from Winsome to Defendant were received for a reasonably equivalent value. Defendant does not deny that she received at least \$311,075.00 from Winsome and companies controlled by Robert Andres without providing anything of value in exchange. Statement of Elements and Undisputed Facts, *supra*, ¶¶ 3-5. Defendant admits that she "did not provide any service or consideration to any Receivership Defendant," that she "does not believe anything of value was exchanged," and that Winsome owed her no obligation to provide the transfers. *Id.* ¶ 5. Therefore, the undisputed facts demonstrate that Defendant did not provide reasonably equivalent value and the Receiver is entitled to recover on his fraudulent transfer claim. The Court should enter judgment against Defendant in the amount of \$311,075.00.

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 hundreds of 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 \$311,075.00 plus all fees, costs, and interest available under applicable law.

DATED this 31st 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 on this 31st day of May, 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
 VIA EMAIL
 VIA ECF

E. Ursula Andres
10802 Archmont Drive
Houston, Texas 88080-3926

/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 Records)
- Exhibit 2 Defendant's Response to Plaintiffs' First Set of Discovery Requests