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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 T. CORNELIUS and CORNELIUS
& SALHAB,

Defendants.

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

Case No. 2:11-cv-01159-DAK

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

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) Defendants did not provide reasonably equivalent value to Winsome for the transfers they received from Winsome. These undisputed facts establish that the transfers to Defendants 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 "mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud"). The undisputed evidence demonstrates that Winsome operated as a Ponzi scheme and that Defendants received the transfers from Winsome identified in the Complaint. *See* Statement of Elements and Undisputed Facts ("SOF"), *infra* ¶¶ 3-6. Therefore, the only remaining issue is whether Defendants provided reasonable equivalent value to Winsome in exchange for the transfers. Defendants did not. The only value Defendants claim 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 Defendants "with actual intent to hinder, delay, or defraud any creditor of the debtor." *See* 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 Winsome made the transfers to Defendants "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); 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 fraudulent Ponzi scheme. *See* Declaration of R. Wayne Klein ("Klein Decl."), attached as Exhibit 1, ¶¶ 8-42.

4. It is also undisputed that Defendants received a total of \$89,845.73 in payments from Winsome accounts in direct wire transfers between September 2006 and July 2007. *Id.* at ¶ 43; *see also* Summary of Payments received by Defendants (produced by Defendants), attached as Exhibit 2 (identifying \$89,845.73); Defendants' Memo. in Support of Motion to Dismiss (doc. 12) at 2 (admitting that Defendants received payments "between September 2006 and July 2007 by wire transfers from an account styled in the name 'Winsome Trust'").

5. Defendants do not claim that they provided reasonably equivalent value to Winsome in exchange for these funds. Rather, Defendants claim only to have provided legal

services to a Mr. Jerome Carter. *See* Response to Plaintiff's First Set of Discovery Requests ("Responses"), attached as Exhibit 3, at Response to Request for Admission No. 3 ("value to Carter fully given resulting in dismissal of indictment"), Response to Interrogatory 4 (identifying the basis for transfers received as "Jerome Carter – legal services; fees and expenses"), 10 ("Value provided was successful legal representation of Jerome Carter in criminal proceedings in New Hampshire"); *see also* August 27, 2011 letter from William Cornelius, attached as Ex. 4 (describing services provided to Mr. Carter in exchange for transfers at issue).

6. Defendants admit that Mr. Carter received the benefit of the legal services provided. *See* Ex. 3, Responses at Response to Request for Admission No. 3, Response to Interrogatories 4, 10.

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 *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

8. It is undisputed that Defendants knowingly received transfers in the amount of \$89,845.73 from Winsome. Ex. 1, Klein Decl. ¶ 43; *see also* Ex. 2, Defendants' Summary of Payments.

9. It is undisputed that Winsome operated as a Ponzi scheme, that Winsome operated while insolvent, that there are innocent investors who collectively lost millions of dollars through Winsome, and that Defendants received a benefit from these fraudulently received funds. Ex. 1, Klein Decl. ¶¶ 8-44.

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); Tex. Bus. Comm. Code § 24.005(a)(1), and if the transfer was not received by the transferee in good faith and "for a reasonably equivalent value," *see* Utah Code Ann. § 25-6-9; Tex. Bus. Comm. Code § 24.009. A transfer that is fraudulent under UFTA may be avoided. *Id.* § 25-6-8(1)(a); Tex. Bus. Comm. Code § 24.008(a)(1).

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

a. Winsome Made the Transfers to Defendants 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 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"); *Janvey*, 712 F. 3d at 196 ("transfers from a Ponzi scheme are presumptively made with intent to defraud"); *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").

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 Defendants. *See* Ex. 1, Klein Decl. ¶¶ 23-42. 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. The Transfers from Winsome are Constructively Fraudulent Because they were Made While Winsome was Insolvent and Defendants 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. 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. Defendants do not claim to have provided reasonably equivalent value to Winsome in exchange for the transfers, but claim only to have provided legal services to a third party. *See* SOF ¶¶ 5-6. Therefore, it is undisputed that the transfers at issue were constructively fraudulent and should be avoided.

c. Defendants 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 Defendants 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 Defendants. This question is answered from the perspective of the tort creditors of Winsome, its defrauded investors. *See 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 Defendants "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). Defendants cannot meet the burden of proving this affirmative defense.

Here, the transfers from Winsome to Defendants were not received for a reasonably equivalent value. Defendants received at least \$89,845.73 from Winsome without providing Winsome anything of value in exchange. SOF¶¶ 3-6. Defendants admit that the funds they received were for providing legal services to a Mr. Jerome Carter and that it was Mr. Carter that benefitted from the services. *Id.* However, no benefit purportedly provided to Mr. Carter can satisfy Defendants' obligation of demonstrating that they provided reasonably equivalent value to Winsome. 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, Defendants' purported provision of legal services to Mr. Carter cannot demonstrate reasonably equivalent value provided 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 reasonably 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*, Defendants cannot show that the legal services they provided to Mr. Carter resulted in any value received by Winsome. Therefore, Defendants cannot prove the "good faith" affirmative defense.

Defendants do not assert that Mr. Carter had any relationship with Winsome that would obligate Winsome to pay his criminal defense fees. Nor do they argue that Winsome received any benefit from Defendants' provision of legal services to Mr. Carter. Accordingly, the Court should enter judgment against Defendants in the amount of \$89,845.73 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 *Jeffs v. Stubbs*, 970 P.2d 1234, 1247-78 (Utah 1998)); *see also Villarreal*, 136 S.W.3d at 270.

Defendants' receipt of the funds from the Ponzi scheme satisfies these elements. Defendants plainly received a known benefit when they received thousands of dollars from Winsome. SOF ¶¶ 3-9. Defendants' 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 Defendants provided no benefit to Winsome in exchange for the payments. *Id.* Under these circumstances, particularly where there are other innocent investors who have suffered significant losses, retention by Defendants 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 Defendants.

DATED this 31st day of May, 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 31st day of May, 2013, addressed as follows.

<input type="checkbox"/> HAND DELIVERY	Barry Dunbar Bowen, pro hac vice
<input type="checkbox"/> U.S. MAIL	3031 Brazos Street
<input type="checkbox"/> OVERNIGHT MAIL	Houston, Texas 77006-3418
<input type="checkbox"/> FAX TRANSMISSION	Phone (713) 521-3525
<input type="checkbox"/> E-MAIL TRANSMISSION	Fax (713) 521-3575
<input checked="" type="checkbox"/> USDC ECF NOTICE	berrybowen@comcast.net

<input type="checkbox"/> HAND DELIVERY	Todd E. Zenger (5238)
<input type="checkbox"/> U.S. MAIL	Kirton & McConkie
<input type="checkbox"/> OVERNIGHT MAIL	1800 Eagle Gate Tower
<input type="checkbox"/> FAX TRANSMISSION	60 East South Temple
<input type="checkbox"/> E-MAIL TRANSMISSION	Salt Lake City, Utah 84111
<input checked="" type="checkbox"/> USDC ECF NOTICE	Phone (801) 328-3600
	Fax (801) 321-4893
	tzenger@kmclaw.com

/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 Defendants' Summary of Payments
- Exhibit 3 Defendant's Response to Plaintiffs' First Set of Discovery Requests
- Exhibit 4 August 27, 2011 from William Cornelius to Wayne Klein