

**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

<p>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,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>RAVKIND & ASSOCIATES,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT</p> <p style="text-align: center;">Case No. 2:12-cv-00022-EJF</p> <p style="text-align: center;">Magistrate Judge Evelyn J. Furse</p>
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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 Reply Memorandum in Support of Motion for Summary Judgment.

INTRODUCTION

Defendant Ravkind & Associates (“Defendant”) admits that it “does not have any evidence to dispute the material facts listed by the Plaintiff, with the exception that Defendant denies that it knowingly received the fraudulent funds.” Defendant’s Response to Plaintiff’s Motion for Summary Judgment and Memorandum in Support (Dkt. 36) (“Response”) at 2. Thus, Defendant admits, or at least cannot dispute, that it received the payments at issue from Winsome, that Winsome operated as a Ponzi scheme and made the transfers with actual intent to defraud its creditors, and that the only thing Defendant provided in exchange for those payments were legal services for a third party unrelated to Winsome. *See* Motion for Summary Judgment and Memorandum in Support (Dkt. 35) (“Motion”) at iii-v.

Defendant argues that because it provided value to a third party in exchange for the transfers from Winsome, it would avoid liability. Response at 2.¹ Two other courts in this District recently rejected this exact argument in cases where attorneys argued that their provision of legal services to a third party resulted in reasonably equivalent value to Winsome. *See* Memorandum Decision & Order from *Klein v. King, King, & Jones, P.C.*, Case No. 2:12-cv-00051, United States District Court for the District of Utah Central Division (Pead, M.J.), attached as Exhibit A, at 5 (rejecting argument that “reasonably equivalent value was established when Defendant provided legal representation to [a third party]” and holding that “in order to establish reasonably equivalent value under the UFTA it is Winsome, as the debtor, who must have received the equivalent value”); Memorandum Decision & Order from *Klein v. Cornelius*, Case No. 2:11-cv-1159, United States District Court for the District of Utah Central Division

¹ Defendant seems to misunderstand the Receiver's position. The Receiver is not seeking recovery from Defendant because Defendant did not succeed in exonerating Mr. and Mrs. Sellers; the Receiver is seeking recovery because Winsome paid for services that redounded to the benefit of Mr. and Mr. Sellers.

(Kimball, J.), attached as Exhibit B (rejecting argument that legal services provided to third party demonstrated reasonably equivalent value and finding “no benefit purportedly provided to [the third party] can satisfy Defendants’ obligation of demonstrating that they provided reasonably equivalent value to Winsome”).

With the facts not in dispute, the Court is only left to decide the legal question of whether Defendant’s claimed lack of knowledge that it was “receiving fraudulent funds” is a valid defense to a claim for fraudulent transfer under the Uniform Fraudulent Transfers Act (“UFTA”) even when it did not provide value to the transferor. The law is clear that it is not. Accordingly, the undisputed facts demonstrate that the Receiver is entitled to judgment as a matter of law.

**PLAINTIFF'S RESPONSE TO DEFENDANT'S RESPONSE
TO STATEMENT OF ELEMENTS AND UNDISPUTED FACTS**

As noted, Defendant does not dispute the facts as stated by the Receiver except to assert that it did not know that it was “receiving fraudulent funds.” Response at 2. Defendant also does not dispute the elements of the Receiver’s claims as stated. *Id.* Rather, Defendant simply asserts that, with respect to the Receiver’s unjust enrichment claim, it would not be inequitable for Defendant to retain the fraudulent transfers it received because Defendant claims to have acted “in good faith.”

These responses are irrelevant to the Receiver’s Motion. As set forth below, whether Defendant knew that it was receiving fraudulent funds has no bearing on whether the transfers at issue were fraudulent because fraudulent intent is determined from the perspective of the debtor, i.e., Winsome. *See Donell v. Kowell*, 533 F.3d 762, 767 (9th Cir. 2008) (noting that “Courts have routinely applied UFTA to allow receivers to recover monies lost by Ponzi scheme investors” and explaining that this is because the “Ponzi scheme operator is the ‘debtor,’ and each investor is a ‘creditor’”). Because Winsome was acting as a Ponzi scheme, its actual

fraudulent intent is established. *Id.* at 770. Moreover, because Defendant does not dispute that Winsome was insolvent at the time of the transfers (*see* Response at 2 (admitting facts stated by Receiver); Motion at 3 (stating that Winsome was insolvent at the time of the transfers at issue)), and because Defendant admits that the only value it claims to have provided was legal services to a third party (*see* Response at 2 (admitting facts stated by Receiver); Motion 6 (noting Defendant asserts that the value it provided was legal services to Albert and Cherylyn Sellers), Winsome’s constructive fraudulent is also established. *See* Utah Code Ann. § 25-6-5(1)(b) (providing that a transfer is 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).

Although Defendant claims to have acted ‘in good faith,’ it fails to establish the required elements of any defense to which that assertion could be relevant. 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.” Even if Defendant’s assertion that it acted in good faith is correct, it cannot establish this defense because it is undisputed that Defendant provided no reasonably equivalent value to Winsome, the transferor. For these reasons, and as further set forth below, the Receiver is entitled to summary judgment.

ARGUMENT

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

a. The Transfers at Issue Were Actually Fraudulent.

Defendant does not dispute any of the facts demonstrating that the transfers at issue were actually fraudulent. 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). Defendant's purported lack of knowledge and good faith have no bearing on this issue. Rather, the law is clear that a transfer is actually fraudulent if the "debtor," or transferor, is a Ponzi scheme operator. *See Donell*, 533 F.3d at 767. The "mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud" under UFTA. *Id.* at 770; *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").

Under this law, the transfers at issue are actually fraudulent because Winsome, as a Ponzi scheme, acted with fraudulent intent. Therefore, Defendant's arguments regarding its knowledge of the scheme are irrelevant, and the transfers at issue are avoidable.

b. Defendant Cannot Establish the Affirmative Defense of Utah Code Ann. § 25-6-9(1).

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." This is an affirmative defense that Defendant bears the burden of proving. *See 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 to this defense is whether *Winsome received* reasonably equivalent value for its payments to Defendant, not whether Defendant *provided* reasonably equivalent value to a third party. *See* Ex. A, Memorandum Decision & Order from *Klein v. King, King, & Jones, P.C.*; Ex. B, Memorandum Decision & Order from *Klein v. Cornelius*, Case No. 2:11-cv-1159; *see also S.E.C. v. Resource Development International, LLC*, 487 F.3d 295, 301 (5th Cir. 2007) (rejecting argument that attorney who provided legal services to Ponzi scheme operator provided reasonably equivalent value to the Ponzi entity in exchange for fraudulent transfers and noting that “[c]onsideration having no utility from a creditor's viewpoint does not satisfy the statutory definition”). Providing some benefit to a third party cannot satisfy this requirement. *See Dahnken, Inc. v. Wilmarth*, 726 P.2d 420, 422 (Utah 1986) (“Satisfaction 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.” (citing *In re Bargfrede*, 117 F.3d 1078, 1080 (8th Cir. 1997))).

The decisions by Magistrate Judge Pead and Judge Kimball also turn on this analysis when they both ruled in favor of the Receiver in nearly identical cases. *See* Memorandum Decision & Order from *Klein v. King, King, & Jones, P.C.*, Case No. 2:12-cv-00051, United States District Court for the District of Utah Central Division (Pead, M.J.), attached as Exhibit A, at 5 (rejecting argument that “reasonably equivalent value was established when Defendant provided legal representation to [a third party]” and holding that “in order to establish reasonably

equivalent value under the UFTA it is Winsome, as the debtor, who must have received the equivalent value”); Memorandum Decision & Order from *Klein v. Cornelius*, Case No. 2:11-cv-1159, United States District Court for the District of Utah Central Division (Kimball, J.), attached as Exhibit B (rejecting argument that legal services provided to third party demonstrated reasonably equivalent value and finding “no benefit purportedly provided to [the third party] can satisfy Defendants’ obligation of demonstrating that they provided reasonably equivalent value to Winsome”).

Because the only value Defendant claims to have provided is legal services for the Sellers, it cannot satisfy its burden to establish this defense, regardless of its purported good faith. Accordingly, the Receiver is entitled to summary judgment on his fraudulent transfer claim.

c. The Transfers at Issue are Constructively Fraudulent.

Defendant’s assertions of good faith and lack of knowledge are also irrelevant to the issue of constructive fraud. A transfer may 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).

Defendant does not dispute that Winsome was insolvent. With respect to reasonably equivalent value, as set forth above, such value must be provided to the debtor, Winsome, and not to some third party. *See also* Utah Code Ann. § 25-6-5(1)(b) (providing that a transfer is fraudulent “if *the debtor made the transfer . . . without receiving* reasonably equivalent value in exchange”) (emphasis added). Therefore, as with the good faith defense, Defendant’s provision of legal services to the Sellers cannot demonstrate reasonably equivalent value. Therefore, the elements of a claim for constructive fraud are also established.

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

Defendant's only argument against summary judgment on the Receiver's alternative unjust enrichment claim is to assert that it would be inequitable for Defendant to have to return the fraudulent transfers it received because Defendant claims to have acted in good faith. Response at 2. However, Defendant's conclusory argument ignores that this would allow Defendant to retain transfers of money that was derived from defrauded, innocent investors' payments to a fraudulent Ponzi scheme. The investors' have no recourse other than for the Receiver to recover Winsome's fraudulent transfers and proceed with a pro rata distribution of recovered funds. Defendant, in contrast, may seek recovery from its clients, the Sellers', for any funds it believes it is owed by them for the legal services they received. Defendant also ignores that it provided no benefit to Winsome for these payments. Under these circumstances, particularly where there are other innocent investors who have suffered significant losses, it would be inequitable and unjust for Defendants to retain these fraudulent transfers.

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 20th day of June, 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 **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served in the method indicated below this 20th day of June, 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 _____