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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.

NUNZIO BRUNO,

Defendant.

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

Case No. 2:12-cv-00058-BSJ

Judge Bruce S. Jenkins

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of U.S. Ventures LC ("US Ventures"), Winsome Investment Trust ("Winsome"), and all of the assets of Robert J. Andres ("Andres") and Robert L. Holloway ("Holloway") (collectively, the "Receivership Defendants"), by and through his undersigned counsel of record, respectfully submits this Motion for Summary Judgment and Memorandum in Support.

RELIEF SOUGHT AND GROUNDS FOR MOTION

Winsome and US Ventures were Ponzi schemes operated by Andres and Holloway. On the heels of a lawsuit filed by the Commodity Futures Trading Commission ("CFTC") against the Receivership Defendants in January 2011, the Receiver was appointed to oversee the Receivership Defendants. Under the order of appointment, the Receiver was given the power to institute legal proceedings to recover property belonging to the Receivership Defendants for the benefit of the Receivership Defendants' innocent investors and creditors. Pursuant to this authority, the Receiver brought this action to avoid fraudulent transfers Defendant Nunzio Bruno ("Defendant") received and recover from him amounts by which he was unjustly enriched.

Defendant is an overpaid investor in Winsome who received back from Winsome more than he invested. Under the Uniform Fraudulent Transfers Act, 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 plain that when an investor in a Ponzi scheme receives more from the Ponzi scheme than he invested, the amount of the overpayment constitutes a fraudulent transfer. This is because all transfers out of a Ponzi scheme are assumed to be fraudulent and a

Ponzi scheme receives no reasonably equivalent value for any payment in excess of an investor's investment. There is no genuine dispute of material fact concerning whether the Receivership Defendants operated as a Ponzi scheme or whether Defendant received back from the Receivership Defendants more than he invested. Thus, the Receiver is entitled to summary judgment on his claim for fraudulent transfer.

Defendant was also unjustly enriched by the payments he received in excess of the amount he invested. Unjust enrichment occurs when a benefit is conferred upon Defendant, which is appreciated or known by Defendant, and the circumstances surrounding the acceptance or retention by Defendant of the benefit make it inequitable for Defendant to retain the benefit without payment of its value. The undisputed facts prove that each of these elements exists here. First, Defendant received a benefit in the form of monetary transfers to him; second, Defendant knew of the transfers; and third, retention of the benefit is unjust because the funds came not from legitimate investment activities but were stolen from innocent investors. Thus, the Receiver is entitled to summary judgment on his claim for unjust enrichment.

INTRODUCTION

Summary judgment should be granted on the Receiver's first cause of action for fraudulent transfer 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 he received from Winsome. These undisputed facts establish that Defendant received fraudulent transfers that can be avoided.

Under the Uniform Fraudulent Transfers Act ("UFTA"), a transfer is avoidable if it was made with actual intent to defraud, and it was not received in good faith and made in exchange for reasonably equivalent value. The Receiver has no reason to doubt the good faith of Defendant. However, applicable case law makes clear that the first element of a fraudulent transfer claim is satisfied if the transfer came from a Ponzi scheme, and there is no material dispute of fact regarding whether Winsome was a Ponzi scheme. Therefore, the only remaining issue is whether Defendant provided reasonably equivalent value to Winsome in exchange for the transfers. He did not. Defendant invested \$250,000 in Winsome and received back \$453,052.66 from Winsome, meaning he did not provide reasonably equivalent value for \$203,052.66 of the transfers he received. That amount must be repaid. Accordingly, the undisputed facts demonstrate that the elements of the Receiver's UFTA claim are satisfied and he is entitled to summary judgment on his first cause of action.

Similarly, the Receiver is entitled to summary judgment on his second cause of action for unjust enrichment. The undisputed facts demonstrate that Defendant knowingly received \$203,052.66 more than he invested in Winsome. Under the circumstances of a Ponzi scheme, where early investors such as Defendant are paid not out of money earned through legitimate investment activity but with money invested by later investors, retention of these amounts by Defendant would be inequitable when the other innocent investors collectively lost millions of dollars. Thus, there is no genuine dispute of any material fact on the Receiver's unjust enrichment claim and he is entitled to summary judgment on his second cause of action.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

Elements of Fraudulent Transfer Claim

1. To prevail on his fraudulent transfer claim, the Receiver must demonstrate that the Receivership Defendants made a transfer to Defendant "with actual intent to hinder, delay, or defraud any creditor of the debtor." [Utah Code Ann. § 25-6-5\(1\)\(a\)](#). The Receiver may satisfy this element by showing that the Receivership Defendants 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 Defendant received the transfers "without receiving a reasonably equivalent value in exchange for the transfer or obligation." [Utah Code Ann. § 25-6-5\(1\)\(b\)](#).

Undisputed Facts Satisfying Applicable Elements

3. It is undisputed that the Receivership Defendants operated as a fraudulent Ponzi scheme. Declaration of R. Wayne Klein ("Klein Decl."), *see* Appendix, Exhibit 1, ¶¶ 7-42.

4. It is undisputed that Defendant received \$203,052.66 more in payments from Winsome than he invested. *Id.* at ¶¶ 43-45.

Elements of Unjust Enrichment Claim

5. 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 [Jefferies v. Stubbins, 970 P.2d 1234, 1247-78 \(Utah 1998\)](#)).

Undisputed Facts Satisfying Applicable Elements

6. It is undisputed that Defendant knowingly received transfers in the amount of \$453,052.66 into his bank account. Ex. 1, Klein Decl. ¶ 43.

7. 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 an overpayment for unearned fictitious profits. *Id.* ¶¶ 7-45.

STATEMENT OF ADDITIONAL UNDISPUTED FACTS

The Ponzi Scheme

8. US Ventures was a Utah limited liability company headquartered in Salt Lake City, Utah that was run by Holloway. US Ventures claimed to be engaged in the trading of commodity futures in a manner that generated high investment returns for investors, with returns averaging .5% to 1% per day. US Ventures claimed to have very few trading days with losses; many investors were told there had been only one day of losses since the inception of trading. Winsome was the largest investor in US Ventures. *See id.* ¶ 9.

9. Winsome described itself as a private trust, headquartered in Houston, Texas. Winsome was run by Andres, who had complete and sole authority over the trust. Winsome was

formed on June 1, 2002 but did not begin active operations until February 2005, when it opened its first bank account. *Id.* ¶ 23.

10. Andres and Winsome solicited individuals and entities to send funds for participation in a commodity futures pool that Winsome said it managed or controlled. Some of the participants (investors) were told that US Ventures was doing the trading; others were led to understand that Winsome would be conducting the commodities trading. *Id.* ¶ 24.

11. Winsome solicited funds from investors based on representations that investors would earn profits "exceeding normal investment returns," based on Winsome's specialized expertise in identifying and taking advantage of investment opportunities. The investment agreements with investors were called Joint Venture Agreements. Winsome offered two principal investment programs. In the first, investors were promised a large share of the profits that Winsome was to earn from its various investments. In the second, investors were promised a "guaranteed" return of a set amount. This guaranteed return generally ranged from 10-15% per quarter. *Id.* ¶ 25.

12. Most investors chose the first program. However, sometime after the collapse of US Ventures, Winsome moved most of the investors into the "guaranteed" program. *Id.* ¶ 26.

13. The vast majority of the funds that Winsome solicited from investors since its formation was received beginning in October 2005. Winsome used those investor funds to invest in varied investment schemes. None of the investment schemes pursued by Winsome resulted in profits to Winsome. *Id.* ¶ 27.

14. Much of the money gathered by Winsome was received from third-party marketers—individuals who solicited other investors and were paid commissions for bringing in investors or were paid a percentage of the profits the investors were reported to have earned. *Id.* ¶ 28.

15. Between October 2005 and April 2007, Andres and Winsome collected over \$43 million from investors – either directly or through third-party marketers. *Id.* ¶ 29.

16. In mid-2006, Andres and Holloway reached an agreement that as Andres raised additional funds from investors, Andres would no longer send those funds to US Ventures. Under this arrangement, US Ventures agreed to change its accounting records to reflect the receipt of investments in the amounts reported by Andres to Holloway—even though Andres was no longer sending money to US Ventures or Holloway. *Id.* ¶ 30.

17. Out of the more than \$43 million Winsome received from investors before April 2007, Winsome sent \$24.7 million to US Ventures. The remainder was retained by Andres and Winsome. This money was used to make distribution payments to other investors, for other investment programs being pursued by Andres and Winsome, and for the personal uses of Andres, including payments to his wife. *Id.* ¶ 31.

18. There were a number of other investment projects that Winsome did pursue. Winsome spent and lost millions of dollars of investor funds on these projects. Despite all of these investment projects losing money, Winsome continued telling investors that their investments were profitable and still made frequent and sizable distribution payments to investors. *Id.* ¶¶ 32-33.

19. The CFTC filed suit against the Receivership Defendants on January 24, 2011. At that time, the bank and brokerage accounts for the Winsome-related defendants had aggregate account balances of \$896.19. *Id.* ¶ 34.

20. Sixty-two months passed between the first distribution payments that Winsome made (November 2005) and the last distribution payment (December 2010). Winsome made distributions during 53 of these months. Of those 53 months, there were only ten in which Winsome received sufficient revenue from sources other than new investors to fund those distribution payments. In the remaining 43 months, Winsome could have funded the distributions to investors only by using monies sent to Winsome by new investors. During these 43 months, \$37,515,524.37 of the payments made to investors could have only been paid using investor funds. *Id.* ¶ 35.

21. The Receiver has identified 61 instances in which funds sent by investors to Winsome can be directly traced as going to other investors rather than to US Ventures or other investment projects. These specific-Ponzi payments were made during the US Ventures era and afterwards. *Id.* ¶ 36.

22. The facts stated above make clear that Winsome operated while it was insolvent, a typical sign of a Ponzi scheme. *Id.* ¶ 37.

SEC Lawsuit, Asset Freeze

23. On April 11, 2007, the SEC filed a lawsuit in the United States District Court for the District of Utah against Novus Technologies and other defendants. The SEC lawsuit named US Ventures and Holloway as relief defendants. At the request of the SEC, the court entered

orders freezing the assets of Holloway and US Ventures. [SEC v. Novus Techs., LLC, No. 2:07-CV-00235 \(D. Utah, filed Apr. 11, 2007\)](#). *Id.* ¶ 38.

24. After the assets of US Ventures were frozen by the Court in April 2007, US Ventures ceased conducting any commodities trading. Winsome, however, continued to solicit and accept funds from investors (directly and through third-party marketers). Investors were told a variety of stories, including that commodities trading was still taking place and that Winsome had other investment projects it was pursuing. *Id.* ¶¶ 39-40.

25. Even after the cessation of commodities trading by US Ventures, Winsome continued telling some investors that Winsome was engaged in commodities trading. In October 2007, Winsome created a chart purporting to show the results of commodities trading for July, August, and September 2007. This was after US Ventures had ceased trading. This document indicates that Winsome had a \$1 million trading account and that it earned \$953,647 in trading profits during 53 days of trading during the quarter. The chart indicates that profits were earned every day, with no losses being recorded. In reality, there is no evidence any such trading account existed. *Id.* ¶ 41.

26. On December 8, 2011, criminal indictments of Andres and Holloway were unsealed. Andres was charged with five counts of wire fraud relating to the operations of Winsome. Holloway was charged with four counts of wire fraud and one count of filing a false tax return. The criminal proceedings are pending. *Id.* ¶ 42.

27. When the CFTC filed suit in the CFTC Action against the Receivership Defendants on January 24, 2011, the bank and brokerage accounts for the Receivership Defendants had aggregate account values of less than \$1,000.00. *Id.* ¶ 34.

Transfers from Winsome to Defendant

28. Defendant made payments to Winsome totaling \$250,000, on the following days and in the following amounts: March 20, 2006, \$100,000; May 1, 2006, \$100,000; September 5, 2006, \$50,000. *Id.* ¶ 44.

29. Between April 4, 2006 and May 27, 2008, Defendant received 27 different payments from Winsome, or Winsome-related entities, totaling \$453,052.66. *Id.* ¶ 43.¹

30. These payments came from a Winsome account, or the account of a Winsome-related entity. *Id.* ¶ 43.

¹ For one of the transfers Defendant received, a \$12,006.91 transfer dated May 17, 2006, the bank records in the Receiver's possession does not list Defendant's name or bank account. However, Defendant provided evidence that he received this transfer in his discovery responses. *See* Total Earnings for 2006 as Per Good Faith Contract, attached at Appendix, Exhibit 2.

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 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) the Receivership Defendants made the transfers with actual intent to defraud creditors; and (2) Defendant did not provide reasonably equivalent value for the transfers he received. Therefore, the Receiver asks the Court to avoid the amount of the transfers Defendant received in excess of the amount he invested and enter judgment against Defendant for that amount.

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 v. Kowell, 533 F.3d 762, 767 \(9th Cir. 2008\)](#). This is because the "Ponzi scheme operator is the 'debtor,' and each investor is a 'creditor.'" [Id. 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 Klein v. Scogin, Case No. 2:12-cv-121-DP, 2012 WL 5503540, at *1 \(D. Utah Oct. 10, 2012\)](#) ("[U]nder Utah's Fraudulent Transfer Act (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)) (unpublished); [Klein v. Abdulkaki, Case No. 2:11-cv-00953-DK, 2012 WL 2317357, at *6 \(D. Utah June 18, 2012\)](#) ("Under the Ponzi scheme presumption, any transfers made in the course of a Ponzi scheme are considered intentional or actual fraudulent transfers 'because transfers made in the course of a Ponzi scheme could have been made for no purpose other than to hinder, delay or defraud creditors.'" (quoting [In re Manhattan Inv. Fund Ltd., 397 B.R. 1, 8 \(S.D.N.Y. 2007\)](#)) (unpublished).

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 ultimately 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. [See In re Hedged-Investments Assocs., Inc., 48 F.3d 470, 471 n. 2 \(10th Cir. 1995\)](#).

Here, the Receivership Defendants operated as a Ponzi scheme. In particular, Winsome was insolvent throughout its operations, including when it made the transfers at issue to Defendant. SOF ¶ 22. Winsome also used funds received from investors to pay fraudulent distributions to other investors, a typical practice of a Ponzi scheme. SOF ¶ 20. Therefore, the undisputed evidence shows that Winsome operated as a Ponzi scheme. As a result, every transfer it made was with actual intent to defraud. [See Donell, 533 F.3d at 770](#) ("The mere existence of a Ponzi Scheme is sufficient to establish actual intent to defraud." (quotation omitted)).

B. Defendant Did not Take the Transfers at Issue in Exchange for Reasonably Equivalent Value.

UFTA provides that a transfer is not voidable "against a person who took in good faith and for a reasonably equivalent value" [Utah Code Ann. § 25-6-9\(1\)](#). Under the law, 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 the Receivership Defendants, their 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, 533 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 the transferee "gave reasonably

equivalent value; it is whether the [Ponzi scheme operator] *received* reasonably equivalent value." [*In re Lucas Dallas, Inc.*, 185 B.R. 801, 807 \(9th Cir. 1995\)](#). Where "causes of action are brought under UFTA against Ponzi scheme investors, the general rule is to the extent innocent investors have received payments in excess of the amounts of principal that they originally invested, those payments are avoidable as fraudulent transfers" [*Wing v. Dockstader*, Case No. 2:08-cv-776, 2010 WL 5020959, at *5 \(D. Utah Dec. 3, 2010\)](#) (quoting [*Donell*, 553 F.3d at 770](#)) (unpublished). Whether a transfer was made in good faith and for reasonably equivalent value is an affirmative defense that Defendant must prove. [*See Miller v. Rodak*, No. 1:12cv76 DN, 2012 WL 3156538, *3 \(D. Utah Aug. 3, 2012\)](#) (unpublished); *see also* [*Wing v. Gillis*, Case No. 2:09-cv-314, 2012 WL 994394, at *2 \(D. Utah March 22, 2012\)](#) (noting that "in the context of a ponzi scheme it is difficult for even an innocent investor to make such a showing") (unpublished).

Here, the transfers from Winsome to Defendant were not received for reasonably equivalent value. It is undisputed that Defendant received \$453,052.66 from the Winsome in exchange for the \$250,000 he invested. SOF ¶¶ 28-29. The \$203,052.66 difference is "considered fictitious profits because [it does] not represent a return on legitimate investment activity." [*Dockstader*, 2010 WL 5020959, at *5](#) (quotation omitted). Payment of this amount to Defendant "did not benefit [Winsome] and instead simply depleted the scheme's resources faster." [*Id.*](#) Thus, "the payments were not for reasonably equivalent value and, therefore, were fraudulent transfers." [*Id.*](#) As a result, the Receiver is entitled to summary judgment on his first cause of action for fraudulent transfer.

II. THE RECEIVER IS ENTITLED TO SUMMARY JUDGMENT ON HIS SECOND CAUSE OF ACTION FOR UNJUST ENRICHMENT.

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)). The undisputed facts demonstrate the Receiver is entitled to summary judgment on this cause of action.

Defendant's receipt of the funds from the Ponzi scheme satisfies these three elements. Defendant plainly received a known benefit when he received hundreds of thousands of dollars above and beyond his investment in Winsome. SOF ¶¶ 28-29. 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. SOF ¶¶ 20, 22. Under these circumstances, particularly where there are other innocent investors who have suffered significant losses, retention by Defendant of the amount of overpayment 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 Court should grant the Motion for Summary Judgment. A Proposed Order is attached hereto as Appendix, Exhibit 3.

DATED this 8th day of August, 2013.

MANNING CURTIS BRADSHAW
& BEDNAR LLC

/s/ Aaron C. Garrett
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 to the Defendant in this action this 8th day of August 2013.

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