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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*

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UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH

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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.

LOU GEORGES,

Defendant.

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

Case No. 2:12-cv-00076 DN

Judge David Nuffer

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.

## **RELIEF REQUESTED AND GROUNDS THEREFORE**

In this Motion, the Receiver asks that the Court enter summary judgment in favor of the Receiver. 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 Lou Georges (“Georges”) admits that he did not provide reasonably equivalent value for transfers he received from Winsome. These undisputed facts establish that the transfers to Georges 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”). Georges does not dispute that Winsome operated as a Ponzi scheme, nor does he deny receiving the transfers identified in the Complaint. Georges also admits that he did not provide anything of value to Winsome in exchange for the transfers he 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**

### **Elements of Fraudulent Transfer Claim**

1. To prevail on his fraudulent transfer claim, the Receiver must demonstrate that the receivership debtor, in this case Winsome, made a transfer to Georges “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 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 Winsome made the transfers to Georges “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 Ann. § 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 Georges received at least \$48,500.00 in transfers from Winsome and from Bear & Bull, an entity controlled by Robert Andres that was also involved in the Winsome fraud and Ponzi scheme. See [Klein Decl.](#) ¶¶ 43-45.<sup>1</sup>

5. Georges admits that he provided no value in exchange for these transfers, which he identifies as “gifts.” See [Georges’s Amended \[sic\] Reply to Plaintiff’s First Set of Discovery Requests, attached as Exhibit 2](#),<sup>2</sup> at Response to Interrogatory No. 2 (identifying \$48,500 in transfers from Winsome as “gift/loan Mr. Robert Andres (Admit)”), Response to Request for Admission No. 2 (admitting that “Any monies wired to me after the ordered [sic] issued by The S.E.C. commission to stop trading by Winsome Trust was purely a gift to assist myself in paying

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<sup>1</sup> Georges also received money from U.S. Ventures. However, if this motion is granted, the Receiver will not be seeking the return of those transfers from U.S. Ventures based on disputed questions whether the trade monitoring performed by Georges for U.S. Ventures constituted reasonably equivalent value to U.S. Ventures.

<sup>2</sup> Because Georges did not restate the discovery requests to which he was responding, the initial requests and Mr. Georges’ response are both included in [this Exhibit](#).

my bills for a possibility to trade at a future date”), Response to Interrogatory No. 6, (“I never provided any items as a lien for any of the monies which were given to Me (sic) by US Ventures or Winsome Trust. Monies that were given to me by Winsome Trust were what I believed were gifts . . . and I was not able to work for the timeframe from 2008 and 2009.”); *see also* [Excerpts from Deposition of Lou Georges, attached as Exhibit 3](#), at 14:17-20. (Q: “[I]t’s your testimony here today that any transfers made by Winsome Investment Trust to you were gifts? A: Yes.”), 17:2-5 (“q. So as far as you were concerned, as far as you know, the money from Winsome Investment Trust to you was a gift? A. Correct.”).

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

### **Undisputed Facts Satisfying Applicable Elements of Unjust Enrichment Claim**

7. It is undisputed that Georges knowingly received transfers in the amount of \$48,500 from Winsome and its related companies. *See* [Ex. 1, Klein Decl. ¶¶ 43-45](#); [Ex. 2, Georges’s Amended \[sic\] Reply to Plaintiff’s First Set of Discovery Requests](#) at Response to Interrogatory No. 2 (identifying \$48,500 in transfers from Winsome as “gift/loan Mr. Robert Andres (Admit)”).

8. It is undisputed that that Winsome and its related companies operated as a Ponzi scheme, that there are innocent investors who collectively lost millions of dollars through Winsome, and that Georges 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) Georges 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 Georges and enter judgment against him for the amount he received from Winsome and its related companies.

#### **a. Winsome Made the Transfers to Georges 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 addition, Winsome made payments to Georges 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 Georges 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. § 25-6-5\(2\)](#). 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](#). Georges admits that he provided no reasonably equivalent value to Winsome in exchange for the \$48,500.00 in “gifts” he received from Winsome. See Statement of Elements and Undisputed Facts (“SOF”) ¶ 5. Therefore, it is undisputed that the transfers at issue were constructively fraudulent and they should be avoided on that additional basis.

**c. Georges 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 to a claim for actual fraudulent transfer, and the burden is on Georges 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 Georges. 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, 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 Georges “gave reasonably equivalent value; it is whether [Winsome] *received* reasonably equivalent value.” [In re Lucas Dallas, Inc., 185 B.R. 801, 807 \(9th Cir. 1995\)](#) (emphasis in original).

Here, there is no genuine issue of material fact as to whether Winsome received reasonably equivalent value for its transfers to Georges. As noted, Georges admits that he received at least \$48,500.00 from Winsome without providing anything of value in exchange because he considered the transfers gifts. SOF ¶ 5. Therefore, the undisputed facts demonstrate that Georges did not provide reasonably equivalent value and therefore Receiver is entitled to recover on his fraudulent transfer claim. The Court should enter judgment against Georges in the amount of \$48,500.00.

## **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 \(Utah 1998\)](#)).

Georges's receipt of the funds from the Ponzi scheme satisfies these three elements. Georges plainly received a known benefit when he received tens of thousands of dollars from Winsome. SOF ¶ 5. Georges'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 Georges 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 Georges 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, the Receiver respectfully requests that the Court enter summary judgment in his favor and against Georges in the amount of \$48,500.00 plus all fees, costs, and interest available under applicable law.

DATED this 26<sup>th</sup> day of August, 2014.

**MANNING CURTIS BRADSHAW & BEDNAR LLC**

/s/ David C. Castleberry

David C. Castleberry  
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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 below named Defendant this 26<sup>th</sup> day of August, 2014.

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

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/s/ Melissa Aguilar

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