Case No. 14-4024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM T. CORNELIUS AND
CORNELIUS & SALHAB

Appellant,

v.

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,

Appellee

Appeal from the United States District Court of the District of Utah,
Central Division

Case No. 2:11-cv-01159-DAK, Judge Dale A. Kimball

BRIEF OF APPELLEE, R. WAYNE KLEIN

Oral Argument Not Requested

David C. Castleberry
dcastleberry@mc2b.com, #11531
Christopher M. Glauser
cglauser@mc2b.com, #12101
MANNING CURTIS BRADSHAW
& BEDNAR LLC
136 East South Temple, Suite 1300
Salt Lake City, Utah 84111
(801) 363-5678
Attorneys for Appellee R. Wayne Klein

TABLE OF CONTENTS

STATEMENT OF RELATED CASES……………………………………….……… 8

RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT..….. 8

STATEMENT OF THE ISSUES……………………………………………... 8

STATEMENT OF THE CASE……………………………………………….. 9

Factual Background………………………………………………… 9

Procedural History………………………………………………... 10

STANDARD OF REVIEW………………………………………………… 13

SUMMARY OF THE ARGUMENT……………………………………… 14

ARGUMENT…………………………………………………………….. 17

I. THE RECEIVER PROPERLY ASSERTED A CLAIM FOR FRAUDULENT TRANSFER……………………….……………… 17

II. THE DISTRICT COURT ENJOYED PERSONAL JURISDICTION OVER CORNELIUS UNDER 28 U.S.C. §§ 754 AND 1692..……... 23

III. THE CFTC HAS AUTHORITY TO SEEK APPOINTMENT OF RECEIVERS WHO MAY IN TURN SEEK EQUITABLE RELIEF..………………………………………………………… 27

a. The CEA Properly Vests Judge Jenkins with the Power to Appoint a Receiver in this Ancillary Matter…………………. 28

b. The CEA's Multiple Enforcement Mechanisms are Not Mutually Exclusive. ……………………………………… 29

c. Cornelius Cannot Collaterally Attack Appointment of a Receiver ……………………………………………… 30

IV. THE RECEIVER HAS STANDING TO SUE ON BEHALF OF WINSOME.......... 31

V. THE RECEIVER'S ACTION IS TIMELY UNDER THE UFTA'S DISCOVERY RULE AND THE THEORY OF ADVERSE DOMINATION.......... 36

CONCLUSION.......... 39

TABLE OF AUTHORITIES

Cases

Pages

Am. Freedom Train Found. v. Spurney, 747 F.2d 1069 (1st Cir. 1984). 26

Barr v. United Methodist Church, 90 Cal.App.3d 259 (1979)……….. 33

Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972)…... 35, 36

CFTC v. Aurifex Commodities Research Co, 2008 WL 299002 (W.D. Mich. Feb. 1, 2008)……………………………………………………. 28

CFTC v. Brockbank, 505 F.Supp.2d 1169 (D. Utah 2007)……………. 28, 29

CFTC v. Chilcott Portfolio Mgmt., Inc., 713 F.2d 1477 (10th Cir. 1983) ……………………………………………………………….. 32, 33, 34

FTC v. LoanPointe, LLC, 525 Fed. 696 (10th Cir. 2013)…………….. 27, 29

Gilchrist v. General Electric Capital Corp., 262 F.3d 295 (4th Cir. 2001)……………………………………………………………… 25

Graham v. Davis County Solid waste Mgmt. & Energy Recovery Special Serv. Dist., 979 P.2d 363 (Utah Ct. App. 1999)……………… 32

Grant v. A.B. Leach & Co., 280 U.S. 351(1930)…………………….. 30

Haile v. Henderson Nat'l Bank, 657 F.2d 816 (6th Cir. 1981)……… 24, 25, 26

Hebertson v. Willowcreek Plaza, 923 P.2d 1389 (Utah 1996)……….. 32

In re Cohen, 199 B.R. 709 (9th Cir. BAP 1996) …………………….. 37

International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310 (1945)…………………. 23, 24, 25

Janvey v. Democratic Senatorial Campaign Committee, 793 20, 21, 38

F.Supp.2d 832 (N.D. Tex. 2011) ……………………………………......

Johnson v. Chilcott, 599 F.Supp. 224 (D. Colo. 1984)……………….. 33, 35

Klein v. Abdulbaki, No. 2:11-CV-00953, 2012 WL 2317357(D. Utah June 18, 2012)……………………………………………………. 26

Klein v. Andres, No. 2:11-CV-656, 2013 WL 489260(D. Utah Sept. 10, 2013)………………………………………………………..… 18

Klein v. Bruno, No. 2:12-CV-0058, 2013 WL 6158752 (D. Utah Nov. 25, 2013)…………………………………………………………. 18

Klein v. Fundacion Guatamalteca Americana et al., No. 14-4039 (10th Cir.) ……………...………………………………...………..... 8

Klein v. Fundacion Guatamalteco Americana, No. 2:12-CV-00049, 2014 WL 823892 (D. Utah March 3, 2014)…………………………... 18

Klein v. Harper, No. 14-4068 (10th Cir.) (pending) ....……………. 8

Klein v. King, King & Jones, 2014 WL 3397671 (10th Cir. July 14, 2014) ……………………………………………………………….. 8, 22

Klein v. King, King & Jones, No. 2:12-cv-00051, 2013 WL 4498831 (D. Utah Aug. 19, 2013)…………………………………………… 18

Klein v. Petty, 2013 WL 4780760 (D. Utah Sept. 5, 2013)………….... 26

Klein v. Widmark, 2013 WL 2902796 (D. Utah June 13, 2013)……… 26

Miller v. Hockley, 80 F.2d 980 (4th Cir. 1936) ……………………… 30

Oils, Inc. v. Blankenship, 145 F.2d 354 (10th Cir. 1944)……………... 31

Omni Capital Intern, Ltd. V. Rudolf Wolff & Co., Ltd., 484 U.S. 97 (1987)…………………………………………………………………. 29

Peay v. BellSouth Medical Assistance Plan, 205 F.3d 1206 (10th Cir. 2000)……………………………………………………………….. 23, 24, 26

Rio Grande Silvery Minnow v. Bureau of Reclamation, 599 F.3d 1165 (10th Cir. 2010)………..…………………………………….... 13

S.E.C. v. Bilzerian, 378 F.3d 1100 (D.C. Cir. 2004) ……………….... 26, 27

S.E.C. v. Madison Real Estate Group, LLC, 647 F.Supp.2d 1271(D. Utah 2009) …………………………………………………..….. 20, 21

SEC v. Thompson, 732 F.3d 1151 (10th Cir. 2013)………………..….. 13

Sanders v. Sharp, 793 P.2d 927 (Utah Ct. App. 1990)……………….. 38

Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995)…………….……… 38

Troelstrup v. Index Futures Group, Inc., 130 F.3d 1274 (7th Cir. 1997) ………………………………………………………………….. 36

U. S. v. Hays, 515 U.S. 737 (1995)………………...………………….. 30

Weber County v. Ogden Trece, 321 P.3d 1067 (Utah 2013)………….. 32

Wing v. Dockstader, 482 Fed. Appx. 361 (10th Cir. 2012) ………….. 32, 37, 38

Wing v. Kendrick, 2009 WL 1362383 (D. Utah May 14, 2009)………. 36

Young v. FirstMerit Bank, N.A., 2007 WL 405925 (N.D. Ohio Feb. 1, 2007)……………………………………………………………... 31

Rules

Fed. R. Civ. P. 17……..……………………………………………….. 32, 35

Fed. R. Civ. P. 24……..………………………………………………... 31

Texas Disciplinary Rules of Professional Conduct 1.08 (2014)………. 19

Utah R. Civ. P. 17….……………………………………………….. 32, 35

Statutes

17 C.F.R. § 4.20……..……………………………………………… 33

7 U.S.C. § 2…………………………………………………………. 33

7 U.S.C. § 13a-1……………………………………………………. 26, 27, 28, 29, 30

28 U.S.C. § 754……………………………………………………... 8, 11, 16, 23, 24, 25, 26, 27

28 U.S.C. § 1692……………………………………………………. 8, 11, 16, 23, 24, 25, 26, 27

Tex. Bus. & Com. Code § 24.010…..………………………………. 36

Tex. Bus. & Com. Code § 25.005…………………………………... 20

Tex. Bus. & Com. Code § 25.006………………………………….. 20

Utah Code Ann. § 25-6-5…………………………………………... 20

Utah Code Ann. § 25-6-6…………………………………………. 20

Utah Code Ann. § 25-6-8…………………………………………. 28

Utah Code Ann. § 25-6-10…..……………………………………. 36, 37

STATEMENT OF RELATED CASES

The following actions by the Receiver related to his appointment over the assets and entities at issue here have been appealed to this Court: *Klein v. King, King & Jones*, No. 13-4131 (D.C. No. 2:12-CV-00051-DBP (D. Utah)) 2014 WL 3397671 (10th Cir. July 14, 2014); *Klein v. Harper*, No. 14-4068 (10th Cir.) (pending); *Klein v. Fundacion Guatamalteca Americana et al.*, No. 14-4039 (10th Cir.) (pending).

RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

This Court enjoys jurisdiction over this appeal. Plaintiff/Appellee Mr. Klein (the "Receiver") disputes Defendants/Appellants' (referred to collectively as "Cornelius") "Jurisdictional Objections." As fully set forth below, the district court enjoyed jurisdiction over the subject matter of this case and Cornelius. Although Cornelius includes the majority of his arguments seeking reversal of the District Court's decision in his "Jurisdictional Objections" section, the Receiver will respond to those arguments in his Argument section below.

STATEMENT OF THE ISSUES

1. Whether the district court correctly found that the Receiver satisfied the elements of his Utah Uniform Fraudulent Transfers Act ("UFTA") claim.

2. Whether the district court correctly found that it had personal jurisdiction over Cornelius pursuant to 28 U.S.C. §§ 754 and 1692.

3. Whether the district court correctly found that the Receiver was properly appointed with authority to pursue equitable and statutory remedies against Cornelius.

4. Whether the district court correctly found that the Receiver has standing to bring a UFTA claim.

5. Whether the district court correctly found that the Receiver's claims are timely under the UFTA's discovery rule.

STATEMENT OF THE CASE

Factual Background

The Commodity Futures Trading Commission ("CFTC") initiated a lawsuit on January 24, 2011 against U.S. Ventures, LC ("US Ventures"), Winsome Investment Trust ("Winsome"), Robert Holloway ("Holloway"), and Robert Andres ("Andres") (the "CFTC Action"). In its lawsuit, the CFTC alleges that US Ventures, Winsome, Andres, and Holloway operated a fraudulent commodity investment program. Aplee. Supp. App. 10. In essence, the CFTC alleges that the US Ventures and Winsome fraudulently took over $50 million from investors. *Id.* In its action, the CFTC asked the Court to appoint a Receiver over the affairs of Winsome and US Ventures, and on January 25, 2011, the Receiver was appointed. *Id.* Following his appointment, the Receiver investigated the affairs of Winsome and US Ventures, and determined that both companies operated as Ponzi schemes.

Id. US Ventures defrauded investors under the guise of commodities trading. *Id.* Winsome, which also conducted additional, separate fraudulent investment schemes, sent nearly $25 million to US Ventures. *Id*.

Cornelius provided legal defense services to a Jerome Carter ("Carter") in connection with criminal charges Carter faced in New Hampshire. *Id.* Carter's bills were paid from the accounts of Winsome, and Winsome received no benefit in return for these payments. *Id.* Following his appointment and investigation into the Winsome fraud, the Receiver filed suit against Cornelius to recover those payments as fraudulent transfers, and for other equitable relief. *Id.*

Three undisputed facts demonstrate that the district court properly granted summary judgment in favor of the Receiver. *Id.* 190-192. First, Winsome operated as a Ponzi scheme. *Id.* 191. Second, Cornelius received $89,854.73 from Winsome. *Id.* Third, the only alleged value Cornelius provided in exchange for this money from Winsome was the provision of legal services to Jerome Carter, a third party in a criminal matter. *Id.* 191-192.

Procedural History

Cornelius first raised many of the arguments he makes on appeal in his Motion to Dismiss, which were ultimately rejected on three different occasions by the district court below. There, Cornelius raised the following issues as identified by the district court:

> (1) whether the Receiver's action is beyond the scope of the CFTC's main action; (2) whether the Receiver has standing to maintain the action; (3) whether there is personal jurisdiction over Defendants in this District; (4) whether the Receiver's claim is barred by the statute of limitations; (5) whether the Receiver's Complaint adequately pleads a cause of action for fraudulent transfer; and (6) whether venue in this District is proper.

Appellant's Appendix ("Aplt. App.") A3. The district court rejected Cornelius's arguments on all of these issues. First, the district court found that Cornelius cannot collaterally attack the Receiver's appointment by arguing that the CEA does not permit the Receiver to seek equitable relief in this ancillary action, and also found that Cornelius has no standing to challenge the Receiver's appointment. *Id*. 4-6 ("Judge Jenkins' Order appointing Receiver is within the authority provided for in the CEA, and the Receiver's actions in bringing the present lawsuit against Defendants is within the Receiver's power granted in the Order Appointing Receiver."). Second, the district court found that the Receiver had standing to bring this case on behalf of Winsome, making the factual finding that Winsome had its own legal existence as an unincorporated association separate from Andres. *Id*. at 7-8. Third, the district court found that it had personal jurisdiction over Cornelius under 28 U.S.C. §§ 754 and 1692, which provide for nationwide service of process, rejecting Cornelius's arguments that these provisions do not provide such process and that cases so holding were wrongly decided. *Id*. at 8-13. Fourth, the district court found that the Complaint stated a claim under UFTA because it

alleged that Winsome, as a Ponzi scheme, made fraudulent transfers to Cornelius. *Id*. at 13-14. Fifth, the district court found that the Receiver's claim was timely under the UFTA's discovery rule and the adverse domination doctrine. *Id*. at 14-16.

Following discovery, the Receiver moved for summary judgment. Aplee. Supp. App. at 189. In opposing the Receiver's Motion for Summary Judgment, Cornelius resurrected many of the arguments he made in his Motion to Dismiss, asserting that Winsome did not operate as a fraudulent Ponzi scheme, that the Receiver's claims were untimely, and that Winsome had no separate legal identity from Andres giving it standing to sue. *See* Aplt. App. A20. The district court noted that it had already determined that Winsome had a separate existence, that the Receiver's claim was timely, and that Cornelius had presented "no new argument that would make the court re-examine its prior analysis on this issue." *Id*. at 3. With respect to Cornelius's argument regarding Winsome's Ponzi scheme status, the district court reviewed the evidence and found that the admissible and undisputed evidence demonstrated that Winsome operated as a Ponzi scheme, noting that Cornelius did not "cite to any record evidence to rebut the Receiver's evidence of a Ponzi scheme." *Id*. at 4. The district court then reviewed the remaining elements of the Receiver's UFTA claim and held that the undisputed evidence demonstrated that Cornelius received actually and constructively

fraudulent transfers from Winsome, and that Cornelius provided Winsome with no reasonably equivalent value in exchange for those transfers. *Id*. at 4-7. Notably, Cornelius presents nothing to dispute these findings here.

Following the district court's decision to grant summary judgment in favor of the Receiver, Cornelius moved for reconsideration of the district court's decision. The district court denied Cornelius's Motion for Reconsideration because it made "the same arguments advanced in the briefing" of the prior motions, and that the court "understood these arguments, considered the arguments carefully in connection with the prior motions, has reconsidered the arguments for purposes of this motion, and concludes that such arguments remain unavailing." Aplt. App. A28.

STANDARD OF REVIEW

The Court reviews the district court's grant of summary judgment de novo, reviewing evidence and drawing reasonable inferences in favor of the nonmoving party. *SEC v. Thompson*, 732 F.3d 1151, 1156 (10th Cir. 2013).

In determining whether jurisdiction exists, a district court is permitted to consider facts and evidence outside the pleadings. *See* Appellants' Brief ("Aplt. Br.") at 2-3. The Court reviews "de novo both the district court's determination of subject-matter jurisdiction and its ruling on the applicability of a statute of limitations." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 599 F.3d

1165, 1175 (10th Cir. 2010). The district court's "findings of jurisdictional facts" are reviewed for "clear error." *Id.* (citations and internal quotations omitted). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," and all evidence should be reviewed "in the light most favorable to the district court's ruling." *Id.*

"If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse." *Id.* (citations and internal quotations omitted). This is true not only when the district court's “factual findings are predicated upon assessments of witness credibility, but also when they arise from consideration of documentary evidence." *Id.*

SUMMARY OF THE ARGUMENT

This case involves a garden-variety fraudulent transfer claim brought by the court-appointed receiver for an entity that operated as a Ponzi scheme. The claim is straight-forward, and the facts that establish liability are not in dispute. Cornelius admits to receiving transfers from Winsome and admits that he did not provide any value to Winsome in exchange for those transfers. Cornelius also presented no evidence below to dispute the Receiver’s evidence that Winsome operated as a Ponzi scheme and that it made the transfers to Cornelius while it was insolvent. These simple, undisputed facts conclusively establish the Receiver’s

entitlement to summary judgment on his UFTA claim. *See Klein v. King, King & Jones*, 2014 WL 3397671, at *3 (10th Cir. July 14, 2014).

In an effort to avoid liability on the Receiver's straight-forward claim, Cornelius raises five principal arguments on appeal, none of which affect the undisputed facts that he received the transfers at issue from a Ponzi scheme without providing reasonably equivalent value to the transferor. Cornelius argues that the district court should be reversed because: (1) Winsome did not operate as a Ponzi scheme; (2) the district court lacked personal jurisdiction over Cornelius; (3) the jurisdiction given to the CFTC under the Commodity Exchange Act ("CEA") does not give the Receiver, in an ancillary matter to a CFTC main action, the authority to recover fraudulent transfers; (4) the Receiver lacks standing to sue on Winsome's behalf; and (5) the Receiver's claim is barred by the statute of limitations. The district court properly rejected all of these arguments.

First, Cornelius failed to present a single piece of evidence disputing the fact that Winsome operated as a Ponzi scheme. *See* Aplt. App. A22. Cornelius's failure to present any contrary evidence should be considered a waiver of this argument. In any event, Cornelius certainly cannot show that the district court's finding of a Ponzi scheme based on evidence that Cornelius failed to dispute was clearly erroneous, as required to overturn this factual finding. Cornelius openly admits that he received the transfers at issue and that the only value he provided in

exchange was legal services for an unrelated third party. App. Br. 23. Because Winsome operated as a Ponzi scheme, it is established that its transfers to Cornelius were actually and constructively fraudulent. Thus, the elements of the UFTA claim are undisputed and were plainly established below.

Second, the Receiver has standing to assert claims on behalf of Winsome, an unincorporated association. The district court plainly made this factual finding and Cornelius presents nothing here to demonstrate that the district court's finding is clearly erroneous.

Third, the district court had personal jurisdiction over Cornelius based on 28 U.S. C. §§ 754 and 1692, which provide for nationwide service of process.

Fourth, Cornelius's argument that the CEA does not give the Receiver authority to bring this case is based on a misunderstanding of the operation of the CEA and the Receiver's ability to seek legal and equitable remedies under state law. When a judge appoints a receiver in an ancillary matter to a CFTC action, the receiver may seek remedies in conformity with the judge's order in other lawsuits, which is precisely what occurred here. Cornelius's argument that, because other provisions of the CEA permit state officers and individuals to seek remedies as well, the Receiver cannot pursue similar claims on Winsome's behalf under the provisions that expressly allow him to do so, ignores the plain language of the CEA and case law interpreting its enforcement mechanisms as co-existent, not

mutually exclusive. Moreover, Cornelius's interpretation would eviscerate one of the key purposes of a receivership, which is to fairly distribute assets to defrauded investors. Cornelius advocates a position that would require each creditor to bring an individual claim and would result in an unfair recovery to whichever creditor pursues his or her claim more quickly.

Finally, Cornelius's statute of limitations argument was properly rejected by the district court. The UTFA's one-year discovery rule and the adverse domination theory, adopted by this Circuit and numerous others, establish that any applicable limitations period was tolled until after the Receiver was appointed and discovered the fraudulent transfers to Cornelius. Therefore, the Receiver's claims against Cornelius were timely. For these reasons, the district court's rulings should be affirmed.

ARGUMENT

I. THE RECEIVER PROPERLY ASSERTED A CLAIM FOR FRAUDULENT TRANSFER.

Cornelius argues that the Receiver's claim "is not a Ponzi scheme claim" and that therefore the elements of the Receiver's UFTA cause of action are not satisfied. Aplt. Br. 32-33. Cornelius bases this argument principally on his assertion that no Ponzi scheme was found to exist, although he does not bother to explain how the district court's finding that Winsome was a Ponzi scheme is

clearly erroneous or point to any evidence to contradict that finding. In any event, Cornelius's assertion is expressly refuted by the record below. The Receiver submitted substantial evidence that Winsome operated as a Ponzi scheme, which Cornelius did not dispute.[1] The district court's finding of a Ponzi scheme cannot be found to be clearly erroneous given Cornelius's complete failure to point to any contrary evidence. Aplt. App. A22-23. Many other Courts in the District of Utah have found that Winsome was a Ponzi scheme. *See Klein v. Fundacion Guatamalteco Americana*, No. 2:12-CV-00049, 2014 WL 823892, *1 (D. Utah March 3, 2014); *Klein v. Bruno*, No. 2:12-CV-00058, 2013 WL 6158752, *1 (D. Utah Nov. 25, 2013); *Klein v. Andres*, No. 2:11-CV-656, 2013 WL 489260, *2 (D. Utah Sept. 10, 2013); *Klein v. King, King & Jones*, No. 2:12-CV-00051, 2013 WL 4498831, *1 (D. Utah Aug. 19, 2013). No contrary decisions exist. Thus, to the extent Cornelius bases this argument on the purported absence of a Ponzi scheme, he has waived that position by failing to challenge the Ponzi scheme's existence below.

[1] *See* Aplt. App. A22 ("In this case, although the parties dispute whether Winsome operated as a Ponzi scheme, the evidence demonstrates that it did. The Receiver has submitted evidence establishing that Winsome was insolvent throughout its operations, including when it made the transfers at issue to Defendants. Winsome used funds received from investors to pay fraudulent distributions to other investors, a typical practice of a Ponzi scheme. As a result, every transfer Winsome made was with actual intent to defraud. *Defendants do not cite to any record evidence to rebut the Receiver's evidence of a Ponzi scheme*.") (emphasis added); *see also* Aplee. Supp. App. 203-310 (Declaration of Receiver providing testimony and evidence of Ponzi scheme).

Cornelius next argues that the Receiver failed to make his UFTA case based on his incorrect assumption that the Receiver was somehow required to show that Cornelius was involved in defrauding Winsome's investors. Aplt. Br. 32-33. Cornelius fails to cite any legal authority for this assertion. Instead, Cornelius believes that simply because there is no deal between Carter and Andres, or Cornelius and Andres, to further Andres's and Winsome's Ponzi scheme, Cornelius is immune to the relief sought by the Receiver. This is wrong. Whether Cornelius was acting to defraud investors is irrelevant because the UFTA focuses on the conduct of the debtor/transferor, Winsome. *See* Utah Code § 25-6-5(1) (providing that a transfer is fraudulent if "*the debtor* made the transfer or incurred the obligation (a) with actual intent to hinder, delay, or defraud any creditor of the debtor.") (emphasis added). Simply put, if Winsome made a fraudulent transfer, the Receiver may recover the transfer. Further, Cornelius bases this argument, in part, on his assertion that he is under no obligation to investigate who was paying Carter's legal bills. The Texas Disciplinary Rules of Professional Conduct state otherwise. Texas Disciplinary Rules of Professional Conduct 1.08(e) (2014) expressly forbids attorneys from allowing third parties to pay for legal representation absent adherence to further inquiry about the situation and specific disclosures that allow the client to knowingly consent.

The UFTA, adopted by Utah and Texas, identifies two forms of fraudulent transfers: actually and constructively fraudulent transfers.[2] A transfer is actually fraudulent if it was made with actual intent to hinder, delay, or defraud any creditor. *See* Utah Code Ann. § 25-6-5(1)(a); Tex. Bus. & Com. Code § 25.005. A constructively fraudulent transfer exists when the transfer is made (1) without receiving reasonably equivalent value in exchange for the transfer; and (2) the transferor was insolvent at the time of the transfer or became insolvent as a result of the transfer. Utah Code Ann. § 25-6-6; *see also* Tex. Bus. & Com. Code § 25.006. A debtor's intent to hinder, delay, or defraud is established by proving that the debtor operated as a Ponzi scheme. *Madison*, 647 F.Supp.2d at 1279. Because every transfer derives from the assets available to the investors in the Ponzi scheme, each underpaid investor is a tort-creditor of Winsome.

Janvey v. Democratic Senatorial Campaign Committee, 793 F.Supp.2d 825, 832-33 (N.D. Tex. 2011) is instructive. There, the court held that transfers to the Democratic Senatorial Campaign Committee and the Republican National Committee from a Ponzi scheme operator were fraudulent, regardless of the fact that the Committees were not alleged to have participated in the Ponzi scheme or

[2] The elements of a fraudulent transfer claim are the same under Utah or Texas law, as both jurisdictions have adopted UFTA. *S.E.C. v. Madison Real Estate Group, LLC*, 647 F.Supp.2d 1271, 1279 n.33 (D. Utah 2009) ("Both Texas and Utah have adopted the UFTA. Because both states have adopted the UFTA, the court does not resolve here the conflict regarding whether Texas or Utah law applies.").

to have received the funds as returns on fraudulent investments. *Janvey*, 793 F.Supp.2d at 828. Rather, because the Ponzi scheme had fraudulent intent in making the transfers, the transfers were fraudulent, regardless of the intent of the recipients. The same conclusion applies here; Winsome's payments to Cornelius were fraudulent regardless of Cornelius's subjective intent.

Cornelius does not contest that Winsome transferred $89,845.73 to him from September 27, 2006 to July 31, 2007. *See* Aplt Br. 31. Winsome's fraudulent intent in making those transfers is also established because intent to defraud, hinder, or delay a creditor exists when a debtor operated as a Ponzi scheme. *Madison*, 647 F.Supp.2d at 1279. Therefore, the transfers at issue are actually fraudulent.

The transfers at issue were also constructively fraudulent because Winsome received no reasonably equivalent value for the payments it made to Cornelius. As noted, Cornelius admits that the only benefit he allegedly provided in exchange for the transfers was to provide legal services for Carter, not for Winsome. Aplt. Br. 1, 9, 23, 31. Winsome, therefore, received no benefit for payments it made to Cornelius. The evidence also establishes that Winsome was insolvent when it made the transfers to Cornelius. *See* Aplee. Supp. App. 21 (citing declaration providing that Winsome owed its investors millions of dollars when it made the

transfers to Cornelius).[3] Thus, Winsome's transfers to Cornelius were also constructively fraudulent.

In sum, Cornelius's argument misses the thrust of the Receiver's claim. This is an ancillary receivership action to recover fraudulent transfers on behalf of Winsome. The Receiver is within his rights to seek equitable relief to recover fraudulent transfers made while Winsome operated as a Ponzi scheme. It does not matter that transfers were made to individuals who claim not to be part of the Ponzi scheme. What matters is whether Winsome made the transfers to Cornelius with fraudulent intent. If it did, the Receiver can recover the transfers. In Cornelius's terms, "the [Receiver's] proof against Corneliuss [sic] amounted to no more than that Andres's payments to Cornelius for payment of Carter's legal bills occurred *while* Andres was conducting an elaborate fraudulent scheme." Aplt. Br. 33. It is precisely because Winsome transferred funds to Cornelius while Andres was conducting a Ponzi scheme that the transfers are fraudulent. Thus, the district court's decision to grant summary judgment in favor of the Receiver was proper and should be affirmed.

---

[3] Notably, this Court recently affirmed a holding that transfers from Winsome to another law firm for its representation of a third party were actually and constructively fraudulent. *See Klein v. King King & Jones*, 2014 WL 3397671 (10th Cir. July 14, 2014). The Court also noted in that case that the record below "does reflect that beginning as early as 2005, Winsome was operated as an illegal Ponzi scheme." *Id.* at #1.

II. THE DISTRICT COURT ENJOYED PERSONAL JURISDICTION OVER CORNELIUS UNDER 28 U.S.C. §§ 754 AND 1692.

When federal law is implicated the basis for jurisdiction derives from constitutional limits of due process from the Fifth, rather than the Fourteenth, Amendment. *Peay v. BellSouth Medical Assistance Plan*, 205 F.3d 1206, 1210 (10th Cir. 2000). In this case, 28 U.S.C. §§ 754 and 1692 provide the basis for jurisdiction. Accordingly, the Fifth Amendment determines whether a constitutionally-sufficient relationship exists between the Defendants and this forum. Under the Fifth Amendment, a court may exercise personal jurisdiction unless the defendant can prove that litigating in the forum infringes on liberty interests. *Peay*, 205 F.3d at 1213. The defendant must show that he has been inconvenienced sufficient to warrant constitutional protection by analyzing: (1) his contacts with the forum state, (2) inconvenience to the defendant, (3) judicial economy, (4) probable situs of discovery proceedings, [and] (5) nature of the regulated activity. *Id*. at 1212. This Court need not engage in this analysis anew, however, because Cornelius does not contest the district court's proper finding that he has not made this showing. Rather than explain why he has suffered constitutional inconvenience under *Peay*, Cornelius simply attempts to muddy the waters by citing irrelevant and inapplicable case law.

Cornelius ignores the *Peay* analysis and instead argues that the district court lacked personal jurisdiction because *International Shoe Co. v. State of Wash.*,

Office of Unemployment Compensation and Placement, 326 U.S. 310, 316 (1945) and the Utah jurisdictional tests are not satisfied. Aplt. Br. 16-18. However, *International Shoe* is a tool for determining minimum contacts in diversity claims under the Fourteenth Amendment. *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Employment*, 326 U.S. 310, 316 (1945). It does not supply the test for a case, such as this one, where jurisdiction is based on 28 U.S.C. §§ 754 and 1692. *See* 7 (Pt. 2) JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 66.08[1] (2d ed. 1996) ("[I]n cases under [§§ 754 and 1692] the minimum contact analysis of *International Shoe* as a limitation on extraterritorial power, does not apply, since service of process under § 1692 [is] nationwide."); *Peay*, 205 F.3d at 1210.

Cornelius's argument rests on the incorrect belief that service of process under § 1692 is extra-territorial for a district court. However, "[t]he process authorized by § 1692 is not 'extra-territorial' but rather nationwide." *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 826 (6th Cir. 1981). The effect of §§ 754 and 1692 is to provide an appointing district court with personal jurisdiction over anyone in the nation. Cornelius fails to recognize that the jurisdictional boundaries that normally apply are expanded for the purposes of § 1692. Thus, those who would traditionally be outside the jurisdiction of a district court under an *International Shoe* analysis are properly within a district court's jurisdiction where

"[t]he appointment court's process extends to any judicial district where receivership property is found." *Id.*

The Federal Rules of Civil Procedure anticipate that service of process may be executed on individuals outside of the state where a district court resides. *See Haile*, 657 F.2d at 824 (finding that Rule 4 contemplates service of process on those outside a court's state boundary). Federal law supplies the appropriate rubric for determining service of process in such circumstances. Here, the "statute of the United States which provides for service of process beyond the territorial limits of the state in which the district court sits in the case … is 28 U.S.C. § 1692." *Id.*[4] Because this is a matter arising under federal law, Fifth Amendment due process principles apply. Cornelius fails to argue this applicable analysis on appeal.

Although he pays lip service to *International Shoe* and fails to assert that he has satisfied the applicable Fifth Amendment analysis, Cornelius does not seriously contest that the applicable test in a receivership action is provided by 28 U.S.C. §§ 754 and 1692. *Id.* at 18-19. Acknowledging these statutes'

[4] Cornelius also relies on *Gilchrist v. General Electric Capital Corp.*, 262 F.3d 295 (4th Cir. 2001) to no avail. The *Gilchrist* court failed to analyze, nor was the issue briefed, whether § 1692 provides nationwide service of process. The above-cited case law, on the other hand, appropriately analyzes § 754 in conjunction with § 1692. Courts have consistently found that the two sections read together provide nationwide service of process and personal jurisdiction. *See, e.g.*, *Haile*, 657 F.2d at 826.

applicability, Cornelius attempts to argue that the many courts that have applied this analysis are "simply wrong." *Id*. at 19. Cornelius is incorrect.

Congress enacted a statutory framework designed to give the CFTC power to appoint receivers to execute litigation ancillary to a CFTC action. 28 U.S.C. §§ 754, 1692; 7 U.S.C. § 13a-1. Numerous courts have interpreted §§ 754 and 1692 to jointly confer nationwide service of process and *in personam* jurisdiction in ancillary CEA receivership matters.[5] *See Peay*, 204 F.3d at 1213; *SEC v. Bilzerian*, 378 F.3d 1100, 1103-05 (D.C. Cir. 2004); *Am. Freedom Train Found. v. Spurney*, 747 F.2d 1069, 1073 (1st Cir. 1984); *Haile*, 657 F.2d at 823-24; *Klein v. Abdulbaki*, No. 2:11-CV-00953, 2012 WL 2317357, at *2 (D. Utah June 18, 2012) (adopting *Haile* analysis and finding personal jurisdiction under §§ 754 and 1692).

The *Bilzerian* court's analysis directly refutes Cornelius's argument. There, a defendant argued, as Cornelius does here, that personal jurisdiction could not extend to him under § 1692 because that provision only provides for jurisdiction over property. *Bilzerian*, 378 F.3d at 1104. After a lengthy analysis, the Court found that §1692 grants a district court authority to issue process and execute that process. *Id.* at 1105. The Court concluded that the ability to execute process found in § 1692 "mean[s] the method by which a judgment, including a judgment

---

[5] Federal district courts in Utah have also consistently found personal jurisdiction under these statutes. *See Klein v. Petty*, 2013 WL 4780760, at *4 (D. Utah Sept. 5, 2013); *Klein v. Widmark*, 2013 WL 2902796, at *4 (D. Utah June 13, 2013).

in personam, is enforced. This is [] distinct from 'attachment' which is used to denote the method by which *in-rem* (or *quassin-rem*) [sic] jurisdiction is obtained." *Id.* at 1105-06.

There is no meaningful difference between the facts in *Bilzerian* and this case. The Receiver was duly appointed and executed process under §§ 754 and 1692. This Court should adopt the wisdom of other circuits and Utah's own district court finding that these provisions confer nationwide service of process and personal jurisdiction.

III. THE CFTC HAS AUTHORITY TO SEEK APPOINTMENT OF RECEIVERS WHO MAY IN TURN SEEK EQUITABLE RELIEF.

The CFTC has statutory authority to seek the appointment of a receiver. 7 U.S.C. § 13a-1(a). A district court is further empowered to grant injunctive relief under § 13a-1(b). This Court has recognized that such authority carries with it a full range of equitable remedies pursuant to § 13a-1(b). *See FTC v. LoanPointe, LLC*, 525 Fed. Appx. 696, 699 (10th Cir. 2013) (finding that authority to grant injunctive relief provides courts with the ability to issue a full range of equitable remedies). The statutory and case law provides that Judge Jenkins appropriately appointed the Receiver to seek the relief at issue in this case, including the ability to recover fraudulent transfers under UFTA.

The receiver has found no case that has held that a receiver appointed in a CFTC action cannot pursue fraudulent transfers made by the entity placed under

receivership. To the contrary, if Cornelius's position carries the day, the work of hundreds, if not thousands, of receiverships actions would be undone.

a. The CEA Properly Vests Judge Jenkins with the Power to Appoint a Receiver in this Ancillary Matter.

Judge Jenkins properly appointed the Receiver under these statutes to seek equitable remedies, such as avoidance of fraudulent transfers. *See* Aplee. Supp. App. 110-112; Utah Code Ann. § 25-6-8; 7 U.S.C. § 13a-1(b) (establishing that no restraining order shall be issued *ex parte* other than "appointing a temporary receiver to administer such restraining order and to perform other duties as the court may consider appropriate."); *CFTC v. Brockbank*, 505 F.Supp.2d 1169, 1173 (D. Utah 2007) (finding that the CEA allows ancillary equitable relief through disgorgement and restitution), *aff'd, CFTC v. Brockbank*, 316 Fed. Appx. 707, 2008 WL 904724 (10th Cir. 1008) (unpublished decision); *CFTC v. Aurifex Commodities Research Co.*, 2008 WL 299002, at * 10 (W.D. Mich. Feb. 1, 2008). The CEA is clear – a court may order the receiver to "perform such other duties as the court may consider appropriate." 7 U.S.C. § 13a-1(a). Judge Jenkins, in appointing the Receiver, ordered him to "[t]ake exclusive custody, control, and possession of all funds, property, mail, or any other communication and other assets of, in the possession of, or under the control of Defendants, wherever situated." Aplee. Supp. App. 110-112. Thus, the Receiver is permitted to bring this UFTA action.

Cornelius argues that ancillary actions to recover assets after a CFTC action are unfair and go beyond the CEA's regime. To the contrary, the CEA plainly allows district courts to appoint receivers, and allows those receivers to pursue claims in ancillary matters against individuals, such as Cornelius, who have received fraudulent transfers from a Ponzi scheme. 7 U.S.C. § 13a-1(a); *LoanPointe*, 525 Fed. Appx. at 699; *Brockbank*, 505 F.Supp.2d at 1173. This procedure is not unfair, but ensures that the individuals harmed by a Ponzi scheme or similar fraudulent conduct are repaid on an equitable, *pro rata* basis.

b. The CEA's Multiple Enforcement Mechanisms are Not Mutually Exclusive.

Nowhere does the CEA state that any one of the actions it permits is an exclusive or singular remedy. Indeed, the United States Supreme Court has found that "[t]he availability of[] … private rights of action[] supplements, but does not substitute, for the regulatory and enforcement program of the CFTC." *Omni Capital Intern. Ltd. V. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 107(1987), 484 U.S.; *see also id.* ("The Committee fully expects [it will] not become necessary to rely on private litigants as policemen of the Commodity Exchange Act."). Therefore, Cornelius's assertion that an attorney general's or an individual's authority to sue is "dispositive" of this matter is incorrect. Aplt. Br. 8. That an attorney general can seek an injunction and other equitable remedies against a violator of the CEA does nothing to prevent the CFTC from exercising its separate ability to seek

appointment of a receiver, nor does it gainsay the Receiver's ability to seek UFTA recovery pursuant to his appointment by Judge Jenkins. Other than the unremarkable and irrelevant fact that the CEA permits state officer and individual actions, Cornelius can cite nothing to the contrary.

Here, the Receiver seeks only to recover fraudulent transfers made by Andres and Winsome pursuant to Judge Jenkins's Order by way of equitable remedies available under the UFTA. This is precisely the type of relief receivers in ancillary CFTC actions may seek under the express provisions of the CEA. *See* 7 U.S.C. §13a-1.

c. Cornelius Cannot Collaterally Attack Appointment of a Receiver.

Federal district courts are "under an independent obligation to examine their own jurisdiction." *U.S. v. Hays*, 515 U.S. 737, 742 (1995). For the reasons discussed above, the district court correctly ruled as a matter of law that it was within the jurisdiction of a federal district court judge to appoint a receiver to collect assets pursuant to 7 U.S.C. § 13a-1. *See* Aplt. App. 312. It is well-settled that appointment of a receiver in one action cannot be collaterally attacked on substantive grounds in an ancillary matter. *Grant v. A.B. Leach & Co.*, 280 U.S. 351, 359 (1930); *Miller v. Hockley*, 80 F.2d 980, 983 (4th Cir. 1936) ("That the action of the court [appointing a temporary receiver] cannot be attacked collaterally is virtually the unanimous holding in the decisions on this point.");

Young v. FirstMerit Bank, N.A., 2007 WL 405925, at *3 (N.D. Ohio Feb. 1, 2007) ("[T]he appointment of a receiver, if erroneous, is not subject to collateral attack in another court."); *Oils, Inc. v. Blankenship*, 145 F.2d 354, 356 (10th Cir. 1944). If Cornelius wanted to properly challenge the appointment of the Receiver, he had a right to intervene in the CFTC action to challenge the authority of the Receiver to pursue an action against him. Fed. R. Civ. P. 24(a)(2). Cornelius failed to avail himself of this option, and Judge Kimball below correctly ruled that he could not alter or rule on the order appointing the receiver made by Judge Jenkins in the CFTC Action. To the extent that Cornelius seeks to attack Receiver's appointment, his argument falters at the gate.[6]

IV. THE RECEIVER HAS STANDING TO SUE ON BEHALF OF WINSOME.

Winsome is an unincorporated association with standing to sue and be sued under Utah law. Under applicable case law and statutes, a duly appointed receiver has standing to assert the rights of an unincorporated association to recover transfers.

[6] Cornelius also argues that the CFTC's alleged failure to notify the SEC somehow proves that the SEC is vested with authority to recover fraudulently transferred funds. Cornelius cites no record evidence in support of his factual assertion that the CFTC failed to notify the SEC. This argument was not raised below and is inappropriate to consider at this stage of the litigation. It is also irrelevant, as Cornelius has no standing to assert the alleged rights of the SEC.

The Federal Rules unambiguously dictate that Utah law applies to determine what constitutes an unincorporated association. Fed. R. Civ. P. 17(b)(3) establishes that for entities other than individuals and corporations, the capacity to sue and be sued is determined "by the law of the state where the court is located," in this case Utah. Cornelius presents no reason why this Rule should not apply.

In Utah, an unincorporated association exists when "two or more persons associated in any business … not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may sue or be sued by such common name." Utah R. Civ. P. 17(d); *see also Weber County v. Ogden Trece*, 321 P.3d 1067, 1074-75 (Utah 2013); *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389, 1392 (Utah 1996); *Graham v. Davis Cnty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist.*, 979 P.2d 363, 368 (Utah Ct. App. 1999). In *Ogden Trece*, the Utah Supreme Court found that to conduct business as an unincorporated association, an entity need only be habitually engaged in an occupation or employment for livelihood or gain. *Ogden Trece*, 321 P.3d at 1075-76. As this Court has held, a receiver can maintain a suit to recover funds on behalf of an unincorporated association. *See Wing v. Dockstader*, 482 Fed. Appx. 361, 362-63 (10th Cir. 2012); *CFTC v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1482 (10th Cir. 1983). Additionally the CEA and its corresponding regulations demonstrate that a commodity pool like

Winsome is a separate entity from its operator (Andres), as those statutes distinguish commodity pool operators from the commodity pools they operate. *See Chilcott*, 713 F.2d at 1482 (*citing* 7 U.S.C. § 2; 17 C.F.R. § 4.20(a)(1)).

The ruling in *Johnson v. Chilcott*, 599 F.Supp. 224 (D. Colo. 1984) is directly on point. There a receiver was appointed to oversee assets of a Ponzi scheme operator with an investment pool named Chilcott Futures Fund ("CFF"). *Id.* The defendants there argued, similar to Cornelius, that the court's subject matter jurisdiction was lacking because the receiver could not pursue claims on behalf of CFF. The District Court found an independent corporate existence based on the contract governing the investor's investment, acknowledgment of CFF's existence, and the existence of procedures to "cash out" of the investment pool. *Id.* at 228-229. "In complex fraud cases, courts cannot allow themselves to be diverted or confused by the camouflage of details which merely sidetrack the main inquiry." *Id.* at 230. "[T]he trend in other jurisdictions 'has been the rejection of legal niceties to assure full recognition of the unincorporated association as a separate legal entity.'" *Id.* (citing *Barr v. United Methodist Church*, 90 Cal.App.3d 259 (1979)).

Here, the Receiver presented evidence in the district court of joint venture agreements acknowledging that Winsome is a contracting party. Aplee. Supp. App. 19-21. Those agreements state that the investors "participate in investments

in [Winsome's] discretion" according to Winsome's "knowledge of investment possibilities capable of exceeding normal investment returns." *Id.* 20. The joint venture agreements include procedures for withdrawing investments and demonstrate that Winsome transacted business with other individuals under a common name; Winsome Investment Trust. *Id.* Winsome also had a Tax ID number separate from other entities, had several bank accounts in its own name, and operated its own website. *Id.* at 20-21. Notably, Cornelius expressly acknowledges that Winsome entered into several agreements with other entities such as HI-Tec Fibernet, LLC and DeLolier. Aplt. Br. 15-16.

Like the criminal organization in *Ogden Trece*, or the investment pool in *Chilcott*, Winsome consistently engaged in business ventures to defraud investors through an elaborate Ponzi scheme and entered into multiple agreements with others under a common name to fuel its criminal ends. Aplee. Supp. App. at 19-21. These undisputed facts were not challenged below and are not clearly erroneous. The investors in Winsome had a common intent to provide their money to Winsome for investment with the hope of reaping greater profit through investments that were pooled with other investors in Winsome. *Id.* The investors who entered into joint venture agreements with Winsome knew that Winsome had "policies and procedures to which" the investors "must abide" and that these "policies and procedures apply to all" individuals who invested in Winsome.

Therefore, Winsome is an unincorporated association capable of suing and being sued. *See Ogden Trece* 321 P.3d at 1074-75; *Chilcott*, 599 F. Supp. at 229; Fed. R. Civ. P. 17(b); Utah R. Civ. P. 17(d).

Because Winsome is an unincorporated association, the Receiver has standing to sue to enforce Winsome's rights under the UFTA. The Receiver need only show that he seeks to enforce substantive rights on behalf of Winsome pursuant to existing law. *See Chilcott*, 713 F.2d at 1482. The Receiver satisfies this burden, as his claim is based on the enforcement of legal remedies available to Winsome under the UFTA pursuant to Judge Jenkins' lawfully entered Order.

The analysis by this Court in *Chilcott* is on point. There, defendants, like Cornelius, relied on *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), for the proposition that a receiver lacked standing to assert the rights of debenture holders for misconduct of a trustee. Similar to the defendants in *Chilcott*, Cornelius argues that the Receiver cannot recover for individual investors in the Ponzi scheme. In *Chilcott*, however, this Court distinguished *Caplin* because in *Chilcott* the receiver sought to recover funds on behalf of an unincorporated association. *Chilcott*, 713 F.2d at 1483. The same distinction applies here, as the Receiver seeks to enforce the rights of Winsome and not

individual investors. Therefore, *Caplin* is inapplicable and Cornelius's argument must be rejected.[7]

V. THE RECEIVER'S ACTION IS TIMELY UNDER THE UFTA'S DISCOVERY RULE AND THE THEORY OF ADVERSE DOMINATION.

Under the UFTA, actually fraudulent transfer claims are extinguished only if they are not brought "within four years of the allegedly fraudulent transfer or, *if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.*" Utah Code Ann. § 25-6-10(1) (emphasis added); Tex. Bus. & Com. Code § 24.010(1). As explained above, the transfers to Cornelius were part of a Ponzi scheme with actual intent to defraud. *See* Section IV, *supra*; *see also Wing v. Kendrick*, 2009 WL 1362383, at *3 (D. Utah May 14, 2009) ("The discovery rule generally applies in cases involving Ponzi scheme entities that have been placed in the hands of an equity receiver because the

[7] The Seventh Circuit analyzed a similar argument in *Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274, 1277-78 (7th Cir. 1997). There, the court found that a receiver could not recover transfers from a sole proprietorship because that entity "has no legal identity apart from the proprietor." *Id.* at 1277. The court distinguished *Chilcott*, finding that the sole proprietorship at issue in the *Troelstrup* case merely had a brokerage account with a fictitious name and noting that "the pool [in *Chilcott*] had a good deal more structure than [the] brokerage account." *Id.* at 1278. That is not the case here. As explained above, Winsome conducted business under a common name, used a separate tax identification number, and entered into contracts with others who had sophisticated procedures for buying into Winsome's commodity pool. Winsome operated far beyond a mere account at a brokerage house. Therefore, the sole proprietorship issue raised in *Troelstrup* is inapplicable.

fraudulent nature of the transfers can only be discovered once the Ponzi operator has been removed from the scene."); *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…"). Because the transfers were actually fraudulent, the discovery rule applies and the Receiver's complaint is within the limitation period, as it was filed within one year of his appointment. *See* Aplee. Supp. App. 15-19.

Cornelius's argument that Andres's criminal conduct was widely known is irrelevant. *See* Aplt. Br. 29. The existence of Internet websites and actions against Andres by state securities regulators are not sufficient to pinpoint when *the Receiver* could have reasonably discovered the fraudulent transfers to Cornelius. *See* Utah Code Ann. § 25-6-10 (1); Tex. Bus. & Com. Code § 24.010 (1). There also is no reason to believe that Winsome's transfers to Cornelius could reasonably notify the Receiver that the transfers were the product of a Ponzi scheme before the Receiver was appointed and completed his investigation of Winsome's fraudulent activities. This Court has held similarly when applying Utah's one year discovery rule and the adverse domination theory. *See Dockstader*, 482 Fed. Appx. at 364-65.[8]

---

[8] Even if Texas law applied, Texas courts have used the adverse domination theory as a conceptual tool to explain why a receiver might delay bringing suit under the

Cornelius's sole response to the tolling agreement argument is that Winsome is not a legal entity and therefore it cannot exist for the purposes of the doctrine. This argument has been addressed previously. *See* Section III, *supra*. Cornelius cites no case law to support the proposition that an unincorporated association such as Winsome cannot rely on the tolling of the statute of limitations.

The Receiver's claims are also timely because, as pointed out by *Scholes*, the receivership entities were "zombies" under the control of wrongdoers, and once the wrongdoers were removed, and Winsome was placed under the control of the Receiver, Winsome was freed from its spell and could act in its best interest for the first time and "became entitled to the return of the moneys" for the benefit of the innocent investors in Winsome. *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995). "[T]he statute of limitations period begins to run only once the wrongdoing directors lose control of the entity." *Dockstader*, 482 Fed. Appx. at 365 (*citing Sanders v. Sharp*, 793 P.2d 927, 932 (Utah Ct. App. 1990)).

There is no dispute that Andres operated Winsome as a Ponzi scheme. The appointment of the Receiver removed Andres as the operator, and only then was Winsome able to operate independent of Andres' criminal designs. *See Scholes*, 54 F.3d at 756. Any applicable statute of limitations was therefore tolled until the Receiver was appointed because Winsome could not assert its claims while it was

---

one year discovery rule of Texas' Uniform Fraudulent Transfer Act. *Janvey*, 793 F.Supp.2d at 832-33.

under the control by Andres. *Dockstader*, 482 Fed.Appx. at 364-65. Accordingly, the Receiver's claim is timely, and the Receiver respectfully requests the Court to affirm the district court's decision below.

CONCLUSION

For the reasons stated above, the Receiver asks this court to affirm the district court's decisions below granting summary judgment against Cornelius.

DATED this 2nd day of September, 2014.

MANNING CURTIS BRADSHAW
& BEDNAR LLC

/s/ David C. Castleberry

____

David C. Castleberry
Christopher M. Glauser
Attorneys for Receiver for US Ventures, LC,
Winsome Investment Trust, and the assets of
Robert J. Andres and Robert L. Holloway

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) and contains fewer than 14,000 words.

DATED this 2nd day of September, 2014.

MANNING CURTIS BRADSHAW
& BEDNAR LLC

/s/ David C. Castleberry
____
David C. Castleberry
Christopher M. Glauser
Attorneys for Receiver for US Ventures, LC,
Winsome Investment Trust, and the assets of
Robert J. Andres and Robert L. Holloway

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with Microsoft Security Essentials version 1.165.2578.0, last updated January 24, 2014, and this submission is free of viruses.

DATED this 2nd day of September, 2014.

MANNING CURTIS BRADSHAW
& BEDNAR LLC

/s/ David C. Castleberry
____
David C. Castleberry
Christopher M. Glauser
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 brief to be served in the method indicated below to the following this 2nd day of September, 2014.

___HAND DELIVERY _x_U.S. MAIL ___OVERNIGHT MAIL ___FAX TRANSMISSION ___E-MAIL TRANSMISSION _x_ECF NOTICE	Berry D. Bowen 3014 Brazos Street Houston, TX 77006
_x_HAND DELIVERY ___U.S. MAIL ___OVERNIGHT MAIL ___FAX TRANSMISSION ___E-MAIL TRANSMISSION _x_ECF NOTICE	Todd Zenger Kirton & McConkie 1800 World Trade Center 60 East South Temple Salt Lake City, UT 84111

/s/ Melissa Aguilar

____