IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 14-4024

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-Appellee,

v.

WILLIAM T. CORNELIUS and CORNELIUS & SALHAB,
Defendants-Appellants.

On Appeal from the U.S. District Court for the District of Utah, Central Division
No. 2:11-cv-01195, the Honorable Dale A. Kimball

BRIEF FOR AMICUS CURIAE COMMODITY FUTURES TRADING COMMISSION IN SUPPORT OF APPELLEE R. WAYNE KLEIN

Oral Argument Not Requested

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GLOSSARY

CEA	Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq.*
CFTC Action	*CFTC v. U.S. Ventures, L.C., Winsome Investment Trust, Robert J. Andres, and Robert L. Holloway* (D. Utah, No. 2:11-cv-00099-BSJ) (the civil action in which the receiver was appointed and empowered)
Winsome	Winsome Investment Trust

STATEMENT OF INTEREST

The U.S. Commodity Futures Trading Commission (CFTC) is a federal government agency authorized to participate as amicus pursuant to Fed. R. App. P. 29(a). Pursuant to Fed. R. App. P. 29(c)(4), the CFTC's interest in this case is twofold. First, the CFTC administers the Commodity Exchange Act, 7 U.S.C. §§ 1 *et seq*. ("CEA"), and wishes to inform the Court of the broad scope of remedial power afforded federal district courts under 7 U.S.C. § 13a-1. Second, the CFTC is the plaintiff in the underlying district court case in which appellee-Receiver R. Wayne Klein was appointed, *CFTC v. U.S. Ventures, L.C., Winsome Investment Trust, Robert J. Andres, and Robert L. Holloway* (D. Utah, No. 2:11-cv-00099-BSJ) ("CFTC Action").

SUMMARY OF ARGUMENT

The district court correctly held that the Receiver had the legal authority and adequate factual grounds to recover from appellants misappropriated assets of Winsome Investment Trust ("Winsome"), one of the entities in receivership. The U.S. Supreme Court has held that where a district court has jurisdiction in equity, the court may impose any equitable remedy, absent a specific statutory limitation. *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086 (1946). Every court to consider the issue has agreed that 7 U.S.C. § 13a-1, Section 6c of the CEA, is a comprehensive grant of equity jurisdiction without specific statutory limitation.

Hence, all equitable remedies and powers inherent to a federal district court were available to the district court below. 7 U.S.C. § 13a-1; Section 11 of the Judiciary Act, 1 Stat. 73, 78 (1789).

These equitable powers include the appointment of a receiver empowered to take actions to recover assets and protect the district court's ability to enforce its ultimate judgment. *SEC v. VesCor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) ("district court has broad powers and wide discretion to determine relief in an equity receivership"). Receiver R. Wayne Klein's ancillary proceeding against appellants William T. Cornelius and Cornelius & Salhab is a routine recovery action, well within the district court's jurisdiction.

Appellants received funds from Winsome, an entity in receivership, to do legal work on a state criminal matter in New Hampshire for Jerome Carter, a matter completely unrelated to any business interests of Winsome. Appellants' legal defense provided no value to Winsome, and so the district court did not err in awarding judgment to the Receiver in the amount of the diverted funds.

As this Court persuasively reasoned in a recent case involving the same receiver and receivership, *Klein v. King & King & Jones*, No. 13-4131, __ Fed. Appx. __, 2014 WL 3397671 (10th Cir. July 14, 2014) (unpublished), a law firm that cannot establish that its work provided "reasonably equivalent value" to Winsome must return the assets misappropriated from Winsome to the Receiver's

care. *See Klein v. King*, Addendum at p.5.

ARGUMENT

This Court reviews the district court's summary judgment determination *de novo*. *SEC v. Thompson*, 732 F.3d 1151, 1156 (10th Cir. 2013). In reviewing a summary judgment determination, this Court "views the evidence and draws reasonable inferences therefrom in the light most favorable to the nonmoving party." *SEC v. Thompson*, 732 F.3d at 1156-57. However, in this case, there are no disputed issues of material fact. It is undisputed that, as the district court found, appellant William Cornelius is a criminal defense attorney in Texas and that his law firm, appellant Cornelius & Salhab, represented Jerome Carter on a criminal matter brought against Mr. Carter by the State of New Hampshire. Aplt. App. at 608. One of the named defendants in the underlying CFTC Action, Robert H. Andres, diverted $89,845.73 in payments from the accounts of Winsome to appellant Cornelius & Salhab to fund Mr. Carter's criminal defense. *Id.* Further, all the parties to this appeal agree that there is no evidence that appellants in this case were aware that Winsome was being operated as a Ponzi scheme. *Id.*

I. The District Court's Grant of Summary Judgment to the Receiver Is Well-Supported in Law.

A. The District Court's Equity Jurisdiction Under 7 U.S.C. § 13a-1 Extends to the Full Scope of Federal Court Equity Jurisdiction.

Section 11 of the Judiciary Act gives federal courts jurisdiction over "all

suits . . . in equity." 1 Stat. 73, 78 (1789); *see* U.S. Const. art. III, § 1 (vesting judicial power in such inferior courts as Congress may ordain and establish). In *Porter v. Warner*, 328 U.S. 395 (1946), the Supreme Court held that unless a statute expressly restricts a district court's jurisdiction in equity, the full scope of that jurisdiction under Section 11 of the Judiciary Act applies: Unless a statute "in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id*. at 398. *See* Section 11 of the Judiciary Act (federal court jurisdiction over "all suits . . . in equity). This categorical language in that case is at the heart of the many judicial decisions holding that equitable remedies are available under 7 U.S.C. § 13a-1. *E.g., CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 193 (4th Cir. 2002), *quoting Porter v. Warner*, 328 U.S. at 398 ("the comprehensiveness of … equitable jurisdiction is not to be denied or limited in the absence of clear legislative command").

It is firmly established that receivership is among the district court's powers in equity, *Plata v. Schwarzenegger*, 603 F.3d 1088, 1095 & n.3 (9th Cir. 2010), and the "court has broad powers and wide discretion to determine relief" in that receivership. *SEC v. VesCor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010).

The Commodity Exchange Act's Section 6c establishes the district court's authority to issue an injunction, and it states no special limitations on that

authority. 7 U.S.C. § 13a-1. Accordingly, appellants do not identify any express or necessary limitation on the district court's injunctive authority under that statute. *See* 7 U.S.C. § 13a-1(a), (b). Thus, by direct application of *Porter v. Warner*, the district court in the underlying CFTC Action was imbued by under 7 U.S.C. § 13a-1 with the full equitable powers of a federal district court. In scores of CFTC enforcement actions, federal courts in this and other circuits have exercised this authority to appoint receivers to marshal the assets of the estate in receivership,[1] and it was entirely proper for the district court to do so here with respect to Winsome.

Appellants argue that 7 U.S.C. § 13a-1 does not provide for "[r]elief for investors or customers." Brief for Appellants at 7. But under *Porter v. Warner*, it is the absence of any special limitation that is dispositive. Appellants make no attempt to distinguish that precedent, nor could they.

As this Court has observed regarding an analogous provision in the securities law, this broad equitable authority extends to the appointment of a

[1] *See, e.g.*, *CFTC v. Brockbank*, 505 F.Supp.2d 1169 (D. Utah 2007), *aff'd*, *CFTC v. Brockbank*, 316 Fed. Appx. 707, 2008 WL 904724 (10th Cir. 1008) (unpublished decision); *see also CFTC v. Walsh*, 712 F.3d 735 (2d Cir. 2003); *Armstrong v. Guccione*, 470 F.3d 89 (2d Cir. 2006); *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187 (4th Cir. 2002); *CFTC v. Topworth Int'l*, 205 F.3d 1107 (9th Cir. 1999); *CFTC v. Sidoti*, 178 F.3d 1132, 1138 & n.5 (11th Cir. 1999); *CFTC v. American Metals Exch. Corp.*, 991 F.2d 71, 76 (3d Cir. 1993).

receiver, with all appropriate equitable powers. *VesCor Capital Corp.*, 599 F.3d at 1194 ("district court has broad powers and wide discretion to determine relief in an equity receivership"). The district court properly did so here.

B. The District Court Can Order Restitution and Disgorgement Under 7 U.S.C. § 13a-1 Injunctive Actions.

For similar reasons, the CFTC is also empowered by 7 U.S.C. § 13a-1 to claim forms of equitable relief including restitution and disgorgement. Such remedies are clearly among the powers of a court in equity to craft an injunction, and under *Porter* they are within the unrestrained statutory grant of injunctive authority under 7 U.S.C. § 13a-1. Likewise, an equitable receivership may also encompass the recovery of ill-gotten gains that have left the wrongdoer's possession. *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998) ("[T]he broad equitable powers of federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong.").

In fact, the district court's equity jurisdiction is particularly broad and flexible when a public agency brings an enforcement case in furtherance of the public interest. The Supreme Court in *Porter* stated that when an action is brought in the public interest, the district court's equitable powers "assume an even broader and more flexible character." 328 U.S. at 398. Restitution "lies within that equitable jurisdiction" and "is within the recognized power and within the highest

tradition of a court of equity." *Id.* at 403.

Appellants argue that restitution and disgorgement may not be sought under Section 6c of the CEA, 7 U.S.C. § 13a-1.[2] Instead, they argue, victims of CEA violations can be provided by relief only through state attorneys general, 7 U.S.C. § 13a-2, and through private actions to obtain damages, 7 U.S.C. § 25. Brief for Appellants at 8 (declaring this point "dispositive"). However, nothing in the CEA supports the notion that Congress's establishment of additional, alternative paths to money damages in any way erodes the broad grant of equitable monetary relief available under 7 U.S.C. § 13a-1. Appellants cite no language to the contrary.

Appellants cite only one court decision to support their argument that the CFTC lacks authority under the Commodity Exchange Act to seek and obtain restitution and disgorgement judgments: *CFTC v. American Metals Exch. Corp.*, 991 F.2d 71, 76 (3d Cir. 1993). They claim *American Metals* shows that 7 U.S.C. § 13a-1 is "just not the proper action for appointment in equity of a receiver empowered to bring actions to benefit defrauded investors." Brief for Appellants at 9. But *American Metals* was just such a case, and nothing in the Third Circuit's

[2] Disgorgement as a remedy does not necessarily require that the disgorged funds be returned to the victims of a CEA violation. *See SEC v. Contorinis*, 743 F.3d 293, 301 (2d Cir. 2014) (because disgorgement's goal is to make "illicit action not compensatory for the wrongdoer, disgorgement need not serve to compensate the victims for the wrong doing") and cases cited therein.

opinion undermines a receiver's authority to do so. In that case, a case where receiver was appointed, *see* 991 F.2d at 75, and the equitable remedy of disgorgement was available, *id.* at 76, the appellant did "not challenge the propriety of disgorgement as an equitable remedy," but just the amount of disgorgement ordered. *Id.* at 76 (holding that the "district court did not err in imposing the ancillary relief of disgorgement").

Appellants ignore that context, quoting in isolation certain language from the decision concerning the "scope of relief fall[ing] outside that remedy's recognized parameters." Brief for Appellant at 9. However, the "parameters" in question concerned the proper calculation of the *amount* of disgorgement. *See American Metals*, 991 F.2d at 76-78 (criticizing the district court for failure to hold a hearing to attempt to calculate unlawful profits).

American Metals does not cite *Porter v. Warner*, but it follows the same logic as many other cases recognizing that the CEA empowers the CFTC to seek equitable remedies under 7 U.S.C. § 13a-1, and the statute in no way limits or restrains the federal district court's general equity jurisdiction. *American Metals*, 991 F.2d at 76 n.9 (the authority to order disgorgement in CFTC injunction actions has been found in "the general equity power of the federal courts"). It also cites with approval a case that does rely on *Porter v. Warner*. *See* 991 F.2d at 76 n.9, *citing SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir. 1971). *See id.*,

446 F.2d at 1307 (*citing Porter v. Warner* and other precedents on a federal district court's general equity powers to grant restitution as an ancillary remedy).

The cases are legion holding that equitable remedies such as restitution and disgorgement may be ordered in a CFTC injunctive action under 7 U.S.C. § 13a-1. *E.g., CFTC v. Wilshire Inv. Management Corp.*, 531 F.3d 1339, 1344 (11th Cir. 2008) (recognizing Commission's ability to seek all forms of equitable relief, given that the "unqualified grant of statutory authority to issue an injunction under § 13a-1 carries with it the full range of equitable remedies"); *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d at 193 (4th Cir. 2002) ("It is well settled that equitable remedies such as disgorgement are available to remedy violations of the CEA"); *CFTC v. Vartuli*, 228 F.3d 94, 113 (2d Cir. 2000) (affirming district court's order of disgorgement in CFTC injunctive action); *CFTC v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir. 1986) (disgorgement is a "necessary and appropriate" remedy under the CEA); *CFTC v. Co Petro Mktg. Grp.*, 680 F.2d 573, 583 (9th Cir. 1982) (recognizing district court's ability to award ancillary relief, including disgorgement); *CFTC v. Hunt*, 591 F.2d 1211, 1223 (7th Cir. 1979) (a district court presiding over a CFTC injunctive action may compel a violator of the CEA to disgorge his illegally obtained profits); *see CFTC v. Brockbank*, 505 F.Supp.2d 1169, 1175 (D. Utah 2007) (imposing restitution judgment and disgorgement in CFTC injunctive action brought under 7 U.S.C. § 13a-1), *aff'd*,

CFTC v. Brockbank, 316 Fed. Appx. 707, 2008 WL 904724 (10th Cir. 1008) (unpublished decision).

C. The Receiver May Initiate Ancillary Proceedings to Secure and Recover Assets in Aid of the District Court's Award of Equitable Remedies.

Receiver Klein had authority to repatriate estate assets pursuant to the district court's "ancillary jurisdiction," meaning jurisdiction which ensures "a federal court's inherent power to enforce its judgments." *Peacock v. Thomas*, 516 U.S. 349, 356, 116 S.Ct. 862, 868 (1996). "Without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate.' " *Id.* at 356, *quoting Riggs v. Johnson County*, 73 U.S. 166, 6 Wall. 166, 187, 18 L.Ed. 768, 1867 WL 11194 (1868). This ancillary power extends beyond simply freezing assets[3] to repatriating estate assets through receiver-initiated recovery actions. *Oils, Inc. v. Blankenship*, 145 F.2d 354, 356 (10th Cir. 1944) (a "federal court, which has appointed a receiver in a proceeding of which it has jurisdiction, has jurisdiction to entertain a suit or proceeding to

[3] It is common in a federal equity receivership for the district court to establish a freeze on assets—extending to assets in the hands of third parties —to protect its authority to issue a final judgment and request that the Receiver administer this freeze. *SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990). *See SEC v. American Bd. of Trade, Inc.*, 830 F.2d 431, 438 (2d Cir. 1987) (district court enjoys broad equitable discretion in imposing an asset freeze); *see Aplt. App. at 216* ¶ 14 (district court order in CFTC Action provides that third parties subject to asset freeze upon personal service or notice of the freeze order).

collect or recover assets"); *Pope v. Louisville, N.A. & C. Ry.*, 173 U.S. 573, 577, 19 S.Ct. 500, 501 (1899) (federal receiver may sue in the court of his appointment "to accomplish the ends sought and directed by the suit in which the appointment was made"). This "assures that any funds that may become due can be collected." *Unifund SAL*, 910 F.2d at 1041.

When assets properly belonging to entities under a receivership are in the possession of third parties, a federal district court may empower a court-appointed receiver to pursue them. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 986 (11th Cir. 1995) (district court's equitable powers include power "to issue provisional remedies ancillary to its authority to provide final equitable relief"); *FTC v. Southwest Sunsites, Inc*., 665 F.2d 711, 718 (5th Cir. 1982) (district court may act to protect its jurisdiction to grant final equitable relief through ancillary jurisdiction); *see* 7 U.S.C. § 13a-1(a) (authorizing district court to appoint a receiver to perform "such duties as the court may consider appropriate").

It is unavailing for a relief defendant to argue, as appellants do, that they were unaware of the underlying CEA violations. The named relief defendant need not have committed a violation of the underlying regulatory regime, but rather may be an innocent entity or person that was unjustly enriched by a diversion of assets. A federal receiver's authority includes the retrieval of assets given to others who did not provide reasonably equivalent value to the estate. *See SEC v. Resource*

Development Int'l, 487 F.3d 295, 301-02 (5th Cir. 2007) ("A payment made *solely* for the benefit of a third party, such as a payment to satisfy a third party's debt, does not furnish reasonably-equivalent value to the debtor"); *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998) ("[T]he broad equitable powers of federal courts can be employed to recover ill-gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong."); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998) (a court can grant relief against a "relief defendant" who, though not engaged in any wrongdoing, possesses ill-gotten gains derived from the unlawful acts and practices of liable defendants).

Here, the district court in the CFTC Action properly authorized Receiver Klein to initiate proceedings to recover assets as an exercise of this ancillary jurisdiction. Its Order directed Klein to take "exclusive custody, control, and possession of all the funds, property, mail or any other communication and other assets of, in the possession of, or under the control of Defendants, wherever situated." Aplt. App. at 220 (quoting order appointing receiver in CFTC Action, R.15 at 8, Par. 27(c) (Jan. 25, 2011)). It authorized Klein to "[i]nitiate, defend, compromise, adjust, intervene in, dispose of or become a party to any action or proceedings in state, federal or foreign court necessary to preserve or increase the assets of the Defendants, to carry out his or her duties pursuant to this Order to

recover payments made improperly by the Defendants or entities in receivership." Aplt. App. at 221 (CFTC Action, R.15 at 9, Par. 27(i)). Accordingly, this action is lawfully authorized within the scope of the receivership.

The district court properly applied state law to determine whether there was a "fraudulent transfer" to assess the appellants' liability. Aplt. App. at 320-321, *citing* Utah Code Ann. § 25-6-5(1). *See Janvey v. Democratic Senatorial Campaign Comm.*, 712 F.3d 185, 190 (5th Cir. 2013) (federally-appointed receiver may sue to recover assets fraudulently transferred to third parties pursuant to a Ponzi scheme, bringing action under state uniform-fraudulent-transfer acts (UFTA)), *quoted with approval in Klein v. King & King & Jones*, No. 13-4131, __ Fed. Appx. __, 2014 WL 3397671 (10th Cir. July 14, 2014) (unpublished) (Addendum); *Donell v. Kowell*, 533 F.3d 762, 767 (9th Cir. 2008) ("Courts have routinely applied the UFTA to allow receivers to recover monies lost by Ponzi scheme investors"). In Utah, the Utah Uniform Fraudulent Transfer Act permits recovery of estate funds, even from persons innocent of any wrongdoing, unless they can establish that they gave reasonably equivalent value to the receivership entity in exchange for the funds. *See Klein v. King & King & Jones*, 2014 WL 3397671, at *3 (Addendum).[4]

[4] Fraudulent transfers are one basis, but not the only legal basis, upon which a
---footnote continued on next page---

Thus, appellants' emphasis on the undisputed fact that the monies transferred to them were used to provide legal representation a criminal state court in New Hampshire is misplaced. The fact that appellants provided value to *someone* is not legally relevant. As this Court explained in *Klein v. King & King & Jones*, No. 13-4131, __ Fed. Appx. __, 2014 WL 3397671 (10th Cir. July 14, 2014) (unpublished) (Addendum hereto), a good-faith defense to a fraudulent transfer based upon provision of "reasonably equivalent value" must be reasonably equivalent value to the entity in receivership, not a third-party. *Klein v. King*, Addendum at 4. In that case, a different action to recover funds in this same receivership, this Court held that appellant King & King & Jones "must have

(cont'd)

federally-appointed receiver, acting within the broad discretion of a federal district court, may seek to recover estate assets. For example, other courts have looked to state law or federal common law to impose a constructive trust when assets were transferred from a wrongdoer to a third party. *E.g.*, *Rollins v. Metropolitan Life Ins. Co.*, 912 F.2d 911, 914 (7th Cir. 1990) (under Indiana law, courts have imposed a constructive trust where a duty has been breached and "a third party unjustly enriched as a result of that breach, even absent wrongdoing by the party unjustly enriched," and "equity may collect proceeds from an innocent party in order to protect the equitable rights of those who have suffered the wrong"); *American Nat'l Bank & Trust Co. v. United States*, 832 F.2d 1032, 1035 (7th Cir. 1987) (constructive trust is used in equity jurisdiction as a "device for preventing unjust enrichment"). Regardless of the methodology, these courts do not permit retention of assets transferred from a wrongdoer to a third party simply because the third party was unaware of the wrongdoing.

provided 'reasonably equivalent value' to *Winsome*."[5] Addendum at 4 (emphasis in the original). Appellants offer no reason to reach a different result in this very similar case.

II. The District Court Properly Declined to Review the Exercise of Discretion by a Different District Court Judge in Appointing and Empowering Receiver Klein.

For the reasons discussed above, the district court correctly ruled as a matter of law that it was within the jurisdiction of the district court overseeing the CFTC Action to appoint a receiver to recover assets pursuant to 7 U.S.C. § 13a-1. *See* Aplt. App. at 312. Having thus established its ancillary jurisdiction, the district court properly declined to review the earlier order of a *different* district court appointing Receiver Klein.[6] That is in the very nature of an ancillary proceeding: the jurisdictional facts establishing the rationale for appointment of the receiver need not and may "not exist" in the subordinate suit or proceeding. *Oils v. Blankenship*, 145 F.2d at 356; *Aetna Ins. Co. v. Chicago, R.I.& P.R. Co.*, 229 F.2d

[5] The district court, in its decision granting summary judgment, observed the parallel district court proceedings granting judgment for Receiver Klein in *Klein v. King & King & Jones*, No. 2:12-cv-051-DPB (Docket No. 30 and August 19, 2013 Order, 2013 WL 4498831 (D. Utah 2013)), *aff'd*, __ Fed. Appx. __, 2014 WL 3397671 (10th Cir. July 14, 2014), involved the "exact same circumstances the court faced in this case." *See* Aplt. App. at 612-613.

[6] *See* Aplt. App. at 308-325, R.21, 2012 WL 2261114 (June 15, 2012 Memorandum Decision and Order); *see also* Aplt. App. at 610 (adopted in final memorandum order)

584, 586 (10th Cir. 1956) (same); *see SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (once subject matter jurisdiction is established for the defendant, there is no need to establish subject matter jurisdiction over the relief defendant).

Once a receiver is appointed in a federal equity proceeding, the subject matter jurisdiction of the appointing court is "borrowed" through the doctrine of ancillary jurisdiction. That is what *Oils* and these other cases explain. A different district court presiding over a receiver-initiated recovery action need not verify all the jurisdictional facts establishing independent subject matter jurisdiction. Of course, federal district courts are "under an independent obligation to examine their own jurisdiction," *United States v. Hays*, 515 U.S. 737, 742, 115 S.Ct. 2431, 2435 (1995), and so the district court below had to and did verify that it could proceed pursuant to the doctrine of ancillary jurisdiction. *See* Aplt. App. at 308-325. Past this examination, the underlying jurisdictional facts supporting that exercise of discretion by another federal district court judge reside in a different district court docket, the CFTC Action. The district court here, the Honorable Dale A. Kimball presiding, correctly held that any further challenge to the appointment of Receiver Klein should have been brought in the docket in which Receiver Klein was appointed, before the Honorable Bruce S. Jenkins. Apt. App. at 311, *quoting Grant v. A.B. Leach & Co.*, 280 U.S. 351, 359, 50 S.Ct. 107, 110 (1930) ("And even if the order appointing the receiver was erroneous and might have been

vacated in part on a direct attack, … plainly the validity of the appointment could not have been questioned by a collateral attack in another court"). *See generally CFTC v. U.S. Ventures, L.C., Winsome Investment Trust, Robert J. Andres, and Robert L. Holloway* (D. Utah, No. 2:11-cv-00099-BSJ) & docket entries therein (the record supporting appointment of Receiver Klein in the CFTC Action, a record not before this Court for review).[7]

Appellants' other arguments are without merit. Utah law, not Texas law, determines whether Winsome has the capacity to sue or be sued.[8] Personal jurisdiction exists.[9] The Receiver's action is not time-barred. *See* Aplt. App. 321-

[7] In particular, appellants' new argument on appeal that the CFTC was obliged to and allegedly failed to provide the Securities and Exchange Commission with some notification, and that this somehow affects the validity of Receiver Klein's appointment, is unsupported by any record evidence or law. In any event, such a challenge to the appointment of the Receiver could only be made upon intervention in the underlying CFTC Action.

[8] Fed. R. Civ. P. 17(b)(3) (for entities other than individuals and corporations, the capacity to be sued is determined "by the law of the state where the [district] court is located"). Utah law permits an unincorporated association to be sued. Utah R. Civ. P. 17(d). *See also* Fed. R. Civ. P. 17(b)(3)(A) (providing capacity to sue to enforce a substantive right under federal law).

[9] 28 U.S.C. § 754 (a receiver has capacity to sue in any district without ancillary appointment), 28 U.S.C. § 1692 (permitting process beyond the territorial limits of the state where the district court sits). *See* 7 U.S.C. § 13a-1(e) (CEA provides for broad nationwide service extending to "wherever the defendant may be found"); Fed. R. Civ. P. 4(k)(1)(C) (establishing of personal jurisdiction via summons "when authorized by a federal statute").

232 (observing that under both Texas and Utah law, there is an additional one-year discovery rule). *See also Resolution Trust Corp. v. Gardner*, 798 F.Supp. 790, 795 (D.D.C. 1992) (discussing rationale for another year's extension under the adverse domination theory). [10]

[10] This reasoning assumes, arguendo, that the Utah tolling doctrine applies here in federal court. However, some courts have held that while a federal court may borrow an appropriate state statute of limitations, the question of tolling is a matter consigned to federal common law. *Resolution Trust*, 798 F.Supp. at 794 & n.4. *Cf. Heimeshoff v. Hartford Life & Acc. Ins. Co.*, __ U.S. __, 134 S.Ct. 604, 616 (2013) (state's tolling rules are "ordinarily borrowed" when a federal statue is deemed to borrow a state's limitations period). Because this Court in *Farmers & Merchants Nat'l Bank v. Bryan*, 902 F.2d 1520, 1523 (10th Cir. 1990), adopted the adverse domination theory, it matters not whether federal or state law is applied in this case. 902 F.2d at 1532 (adopting "adverse domination theory as part of the federal common law of this circuit").

Were it necessary to reach the question, it is questionable whether appellants' statute of limitations argument, a defense at law, should be applied in this equity proceeding. Statues of limitations can be used as an affirmative defense in cases at law, but equity "eschews mechanical rules; it depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). "[S]tatutes of limitations are not controlling measures of equitable relief." *Id*.

CONCLUSION

This Court should affirm the district court's judgment in favor of Receiver Klein.

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Pursuant to the Court's Order on ECF filing of March 18, 2009, I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I, Nancy R. Doyle, hereby certify that I on September 9, 2014 served the CFTC's Amicus Curiae Brief via the CM/ECF Case Filing System on the list of names below. I further certify that I have sent additional true and correct copies of the brief by both email and by overnight mail to the addresses below.

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ADDENDUM

--- Fed.Appx. ----, 2014 WL 3397671 (C.A.10 (Utah))
(Cite as: 2014 WL 3397671 (C.A.10 (Utah)))

H

Only the Westlaw citation is currently available.This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.
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–Appellee,
v.
KING & KING & JONES, Defendant–Appellant.

No. 13–4131.
July 14, 2014.

Background: Receiver for investment trust that operated as Ponzi scheme brought action against law firm to recover funds that trust paid for individual's defense against state-court criminal charges. The United States District Court for the District of Utah, Dustin Pead, United States Magistrate Judge, 2013 WL 4498831, granted summary judgment to receiver. Firm appealed.

Holdings: The Court of Appeals, Gregory A. Phillips, Circuit Judge, held that:
(1) trust did not receive "reasonably equivalent value" for funds transferred to firm, and
(2) firm was initial not subsequent transferee of funds.

Affirmed.

West Headnotes

[1] Fraudulent Conveyances 186 77

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(G) Consideration
186k77 k. Sufficiency in General. Most Cited Cases

Investment trust that operated as Ponzi scheme did not receive "reasonably equivalent value" for funds transferred to law firm for individual's defense against state-court criminal charges, and thus good-faith defense was unavailable to firm under Utah Uniform Fraudulent Transfer Act in federally appointed receiver's action to recover funds; firm's legal services did not benefit anyone but individual. West's U.C.A. § 25–6–5(1)(a).

[2] Fraudulent Conveyances 186 180.1

186 Fraudulent Conveyances
186II Rights and Liabilities of Parties and Purchasers
186II(A) Original Parties
186k180 Rights and Liabilities of Grantees as to Creditors
186k180.1 k. In General. Most Cited Cases

Fraudulent Conveyances 186 242(1)

186 Fraudulent Conveyances
186III Remedies of Creditors and Purchasers
186III(C) Right of Action to Set Aside Transfer, and Defenses
186k242 Defenses
186k242(1) k. In General. Most Cited Cases

Law firm was initial not subsequent transferee of funds from investment trust that operated as Ponzi scheme, and thus subsequent-transferee defenses were unavailable to firm under Utah Uniform Fraudulent Transfer Act in federally appointed receiver's action to recover funds, which trust paid for individual's defense against state-court criminal charges; firm received funds directly from trust and thereby obtained dominion and control

over them. West's U.C.A. §§ 25–6–9(1), 25–6–9(2)(b).

[3] Fraudulent Conveyances 186 ⚿58

186 Fraudulent Conveyances
186I Transfers and Transactions Invalid
186I(E) Insolvency of Grantor
186k56 Solvency of Grantor
186k58 k. Retention of Property Sufficient to Pay Debts. Most Cited Cases

Investment trust, in transferring funds to law firm while operating as Ponzi scheme, intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due, as required for transfer to constitute constructively fraudulent conveyance recoverable by federally appointed receiver in action to recover funds under Utah Uniform Fraudulent Transfer Act. West's U.C.A. § 25–6–5(1)(b).

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Before MATHESON, PORFILIO, and PHILLIPS, Circuit Judges.

ORDER AND JUDGMENT[FN*]

GREGORY A. PHILLIPS, Circuit Judge.

***1** R. Wayne Klein ("Mr. Klein" or "Receiver"), the court-appointed receiver for Winsome Investment Trust ("Winsome"), filed this action to recover funds paid from Winsome to King & King & Jones, P.C. ("KKJ"). The district court granted summary judgment in favor of the Receiver. KKJ appeals, and we affirm.

BACKGROUND

KKJ is an Atlanta, Georgia, law firm. In 2006, an individual named Enrique Baca retained KKJ to defend him against pending criminal charges in Georgia state court, for a fee of $25,000. The payment to KKJ came in the form of two wire transfers of $12,500 each to KKJ from Winsome's bank account. KKJ's state-court efforts on Mr. Baca's behalf were successful: in 2007, the charges were dropped.

The nature of Mr. Baca's relationship to Winsome, and Winsome's reasons for paying KKJ to represent him, do not appear in the record. The record does reflect that beginning as early as 2005, Winsome was operated as an illegal Ponzi scheme.[FN1] Between 2005 and 2011, it collected millions of dollars from investors, much of which it lost in a series of ill-fated ventures. It is undisputed that the funds paid to KKJ to represent Mr. Baca were derived from this Ponzi scheme.

In January 2011, as the result of an action filed by the Commodity Futures Trading Commission, Mr. Klein was appointed receiver for Winsome and for a number of other related individuals and entities. Among his duties as receiver, he was charged with recapturing and returning investor funds that were diverted as part of the Ponzi scheme. Mr. Klein then filed this action seeking to recover the $25,000 KKJ received from Winsome. He theorized that the wire transfers from Winsome amounted to fraudulent transfers under Utah law, or, alternatively, that KKJ had been unjustly enriched by them.

The parties filed cross-motions for summary judgment. The district court granted the Receiver's motion for summary judgment and denied KKJ's motion. The district court reasoned that although KKJ received the wire transfers in good faith as payment for legal services provided to Mr. Baca, KKJ provided no value to Winsome for the funds it received. The beneficiary of the payments from Winsome to KKJ was Mr. Baca, not Winsome. The district court concluded that the payments, which amounted to both actual and constructive fraudulent transfers, should therefore be recouped in favor of Winsome's investors.

ANALYSIS

We review the district court's summary judgment determination de novo. *S.E.C. v. Thompson*, 732 F.3d 1151, 1156 (10th Cir.2013). Summary judgment should be granted 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). "In making that determination, a court views the evidence and draws reasonable inferences therefrom in the light most favorable to the nonmoving party." *Thompson*, 732 F.3d at 1156–57 (internal quotation marks and brackets omitted).

***2** A federally appointed receiver may sue under state uniform-fraudulent-transfer law to recover assets fraudulently transferred to third parties pursuant to a Ponzi scheme. *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir.2013). Here, the Receiver relies on Utah's Uniform Fraudulent Transfer Act, Utah Code Ann. §§ 25–6–1 to 25–6–14 ("UFTA"). "Because the [UFTA] is remedial in nature, it should be liberally construed." *Nat'l Loan Investors, L.P. v. Givens*, 952 P.2d 1067, 1069 (Utah 1998).

Under the UFTA, a transfer is actually fraudulent if it was made "with actual intent to hinder, delay, or defraud any creditor of the debtor." § 25–6–5(1)(a). In the district court, KKJ conceded that Winsome made the transfers with actual intent to defraud its creditors. *See* KKJ's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Aplee. Supp.App. at 172, 174. The UFTA, however, provides a good-faith defense in actions seeking to avoid such fraudulent transfers. "A transfer or obligation is not voidable under Subsection 25–6–5(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." § 25–6–9(1). KKJ contends that it is entitled to the defense because it is both a "person who took in good faith and for reasonably equivalent value" and a "subsequent transferee."

In evaluating these defenses, we consider first whether KKJ "took in good faith and for reasonably equivalent value." The Receiver concedes that KKJ acted in good faith. The question is whether KKJ provided "reasonably equivalent value" for the $25,000 it received.

[1] The district court concluded that to satisfy this requirement, KKJ must have provided "reasonably equivalent value" *to Winsome*. Because the record fails to show that the legal services KKJ provided benefitted anyone but Mr. Baca, the district court further concluded that the "reasonably equivalent value" requirement was not met. We agree. *See, e.g.*, *S.E.C. v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301–02 (5th Cir.2007) ("A payment made *solely* for the benefit of a third party, such as a payment to satisfy a third party's debt, does not furnish reasonably-equivalent value to the debtor" (internal quotation marks omitted) (applying Texas UFTA)); *Dietz v. St. Edward's Catholic Church* (*In re Bargfrede*), 117 F.3d 1078, 1080 (8th Cir.1997) (per curiam) (applying similar provision in Federal Bankruptcy code); [FN2] *see also Dahnken, Inc. v. Wilmarth*, 726 P.2d 420, 422 (Utah 1986) (holding, under Utah's predecessor Uniform Fraudulent Conveyance Act, that "[s]atisfaction of an obligation owed the transferee by a third party does not qualify as fair consideration" for payment by the debtor). [FN3]

[2] Nor is KKJ entitled to the UFTA's exceptions for subsequent transferees, Utah Code Ann. § 25–6–9(1), or subsequent good-faith transferees, *id.* § 25–6–9(2)(b). As a direct transferee and recipient of the funds wired from Winsome's account, who obtained dominion and control over the funds once they were transferred, KKJ was not a "subsequent" transferee. Rather, KKJ was the "initial" transferee. *See, e.g.*, *Bailey v. Big Sky Motors, Ltd.* (*In re Ogden*), 314 F.3d 1190, 1202–05 (10th Cir.2002) (applying similar "initial transferee" concept in Bankruptcy Code, 11 U.S.C. § 550(a)).

***3** Also, Mr. Baca was not the initial transferee, as KKJ argues. There has been no showing that the wire transfer gave him actual dominion or control over the funds, which were wired directly from

Winsome's account to KKJ. *See Rupp v. Markgraf,* 95 F.3d 936, 938–40 (10th Cir.1996) (concluding, based on similar Bankruptcy Code provision in 11 U.S.C. § 550, that individual who caused a corporate debtor to make a fraudulent transfer to his creditors through his role as corporate principal, but who never personally had dominion and control of funds, was the "entity for whose benefit the transaction was made," and that the *recipients* of funds were the initial transferees).

[3] Finally, we agree with the district court that in addition to being actually fraudulent, the transfers were constructively fraudulent under § 25–6–5(1)(b). Under the UFTA, a transfer is constructively fraudulent if it was made without the debtor receiving "a reasonably equivalent value in exchange" and if either the debtor's remaining assets were unreasonably small in relation to the transaction, or the debtor "intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." § 25–6–5(1)(b). For reasons we have already stated, the transfers were not made for reasonably equivalent value. Furthermore, as the district court recognized, "Winsome's operation as Ponzi scheme also shows that Winsome intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due." Aplee. Supp.App. at 209 (internal quotation marks and brackets omitted).

In sum, the district court correctly determined that the transfers to KKJ were actually and constructively fraudulent under the Utah UFTA. KKJ is not entitled to either the good-faith "reasonably equivalent value" or the "subsequent transferee" defenses under the UFTA. We therefore affirm the grant of summary judgment to the Receiver, the denial of summary judgment to KKJ, and the judgment of the district court.

FN* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

FN1. A "Ponzi" scheme is "an investment scheme in which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments," and usually attracting investors by promising them "large returns for their investments." *In re Hedged–Investments Assocs., Inc.,* 48 F.3d 470, 471 n. 2 (10th Cir.1995).

FN2. *Bargfrede* interpreted the phrase "reasonably equivalent value" used in the fraudulent transfer provision of the Federal Bankruptcy Code, 11 U.S.C. § 548. The phrase "reasonably equivalent value" in the UFTA was derived from § 548, and we therefore find this interpretation persuasive. *See Frank Sawyer Trust of May 1992 v. Comm'r,* 712 F.3d 597, 608 n. 2 (1st Cir.2013) (stating cases construing § 548 offer guidance in interpreting meaning of "reasonably equivalent value" used in UFTA).

FN3. "Fair consideration" is a predecessor term to "reasonably equivalent value," and serves a similar function to the latter term in the fraudulent transfer context. *See Texas Truck Ins. Agency, Inc. v. Cure* (*In re Dunham*), 110 F.3d 286, 289 (5th Cir.1997) (equating "fair consideration" with "reasonably equivalent value" for purposes of § 548).

C.A.10 (Utah),2014.
Klein v. King & King & Jones
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