Case No. 14-4068

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TERRY HARPER/WINGS OVER THE WORLD MINISTRIES

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. 2:12-cv-00023-DN, Judge David Nuffer

BRIEF OF APPELLEE, R. WAYNE KLEIN

Oral Argument Not Requested

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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: *R. Wayne Klein v. Harper,* Appellate Case No. 13-4068 (June 24, 2013, 10th Cir.) (dismissed); *Klein v. King & King & Jones*, --- F. App'x ---, 2014 WL 3397671 (10th Cir. 2014) (summary judgment in favor of the Receiver affirmed); *Klein v. Cornelius*, No. 14-4024 (10th Cir.) (pending); *U.S. Commodity Futures Trading Comm'n v. U.S. Ventures*, No. 14-4077 (10th Cir.) (relating to denial of Roberto Penedo claim in receivership action and consolidated with case filed by Receiver against Penedo) (pending).

RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

As explained in Section IV below, the United States District Court for the District of Utah appropriately exercised subject-matter jurisdiction over the underlying action. This court has jurisdiction over the instant appeal based on 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

1. Did the appellant waive his right to appeal when he failed to object to the report and recommendation issued by the magistrate judge recommending that default be entered against him for his failure to follow numerous court orders?

2. Did the district court abuse its broad discretion by granting a default judgment against appellant after he repeatedly disregarded court orders?

3. Should this Court apply its prudential discretion to avoid unnecessary consideration of interlocutory claims that are wholly unrelated to the final judgment on appeal?

4. Does a court-appointed Receiver have standing to sue to recover funds fraudulently transferred by the entities he represents, and does the federal district court that appointed the Receiver have subject-matter jurisdiction to adjudicate such an action?

STATEMENT OF THE CASE

In January 2011, the Commodity Futures Trading Commission ("CFTC") initiated a lawsuit in the United States District Court for the District of Utah against a group of individuals and business entities ("the Receivership Defendants") that collectively perpetrated a large Ponzi scheme. *See Complaint*, Doc. 2 at 2.[1] As part of that suit, the district court appointed appellee R. Wayne Klein (the "Receiver") as receiver over US Ventures, LC, Winsome Investment Trust, and the assets of Robert Andres and Robert Holloway. *See Complaint*, Doc.

[1] Because this is an appeal filed by a pro se party, the district court has prepared the record for the appeal. For the Court's convenience, the Receiver is including as attachments the Report and Recommendation entered on March 5, 2014, Doc. No. 91, and the Memorandum Decision and Order Adopting Report and Recommendation entered on March 31, 2014, Doc. No. 92, which are the two documents that form the basis for this appeal.

2 at 2. Subsequently, in his role as receiver, the Receiver brought the underlying action against appellant Terry L. Harper and a non-profit corporation that Harper controlled, Wings over the World Ministries ("Wings"). *See Complaint*, Doc. 2 at 3. The Receiver sought to recover funds that had been fraudulently transferred to Harper and Wings as part of the Ponzi scheme. *See Complaint*, Doc. 2 at 3.[2]

Proceeding without counsel, Harper filed a motion to dismiss, part of which the district court construed as a challenge to its subject-matter jurisdiction and part of which it construed as a challenge to the Receiver's standing. *See Motion to Dismiss*, Doc. 8; *Memorandum Decision and Order Denying Defendant's Motion to Dismiss*, Doc. 19 at 3. The court denied that motion, concluding that it had jurisdiction to adjudicate the matter and that the Receiver had standing to sue. *See Memorandum Decision and Order Denying Defendant's Motion to Dismiss*, Doc. 19 at 3-5.

Over many months, Harper repeatedly submitted filings to the court that were frivolous, that sought to re-litigate his rejected jurisdictional and standing arguments, and that were otherwise improper. In an order entered on October 10, 2013, the court ruled that eleven of "Harper's filings violate[d] the Court's rules in format, substance and procedure." *Report and Recommendation*, Doc. 60 at 5. The court went on to note that "[t]he documents are difficult, if not impossible, to

[2] Wings failed to answer the Complaint, and a default certificate was entered against it pursuant to Federal Rule of Civil Procedure 55(a). *See* Doc. 14.

decipher and much of the information contained therein seems to have no relevance to, or bearing on, the pending matter." *Report and Recommendation*, Doc. 60 at 5. Accordingly, the court awarded the Receiver costs and fees incurred in moving to strike the frivolous filings and instructed Harper that "the continued filing of frivolous motions shall result in the imposition of sanctions." *Report and Recommendation*, Doc. 60 at 6.

On November 22, 2013, the court entered another order striking five more of Harper's filings for similar reasons and awarding the Receiver fees in the amount of $1,143.75. *Memorandum Decision & Order*, Doc. 73 at 2. Additionally, the court warned Harper that if he continued to submit improper filings, more serious sanctions could result, including "the entry of default judgment." *Memorandum Decision & Order* (November 22, 2013), Doc. 73 at 3. On December 18, 2013, the court granted the Receiver's motion to compel discovery based on Harper's refusal to provide any response. *Memorandum Decision & Ruling*, Doc. 78 at 4.

Harper nevertheless continued filing frivolous documents during the following weeks. *See Motion to Strike* (Dec. 30, 2013), Doc. 79. Moreover, he did not pay the Receiver's attorney's fees as ordered. Consequently, on December 30, 2013, the Receiver requested that the court sanction Harper by means of default judgment "for his repeated and knowing disregard for the Court's orders." *Motion to Strike Affidavit of Constructive Notice and for Default Against Defendant Terry*

L. Harper, Doc. 79 at 4. Harper did not respond to this motion. Also, he failed to comply with the trial court's orders to pay outstanding attorney's fees and to produce discovery responses by January 2, 2014. Based on these developments, the Receiver again moved for default judgment on January 29, 2014. *See* Doc. 81. As before, Harper did not respond.

On March 5, 2014, the magistrate judge entered a "Report and Recommendation," formally recommending that default be entered against Harper. *See* Doc. 91 at 12. The report specifically states that "[c]opies . . . are being sent to all parties who are hereby notified of their right to object" and that "[f]ailure to object may constitute a waiver of objections upon subsequent review." *Report and Recommendations*, Doc. 91 at 13. Harper did not object within the requisite time period. On March 31, 2014, the district court adopted the Report and Recommendation and ordered that a certificate of default be entered against Harper. *See Memorandum Decision and Order Adopting Report & Recommendation*, Doc. 92 at 2.

Harper did not notify the district court that his address had changed until May 21, 2014, well after the March 5th Report and Recommendation was served on him, when he filed a "Judicial Notice and Notice of 'Unverified' Claims," a "Notice of Trespass and 360 Tort 'Claim' Injury," a "Notice of Verification," and a "Notice of Signature." *See* Doc. 96 at 1. In a letter accompanying these filings,

Harper asked the clerk for the first time to note his change of address. *See* Doc. 96 at 1.

On May 19, 2014, the Receiver moved for default judgment against both Harper and Wings. In doing so, the Receiver produced bank records demonstrating that Wings received payments from the Receivership Defendants totaling $335,326.32. *See Motion for Entry of Default Judgment*, Doc. 94-1 at p. 3, Ex. B; *see also Amended Complaint*, Doc. 68 at 14-19. The Receiver provided evidence to the trial court that his review of the bank records "demonstrates that the Receivership Defendants received no reasonably equivalent value in exchange for their payments to Wings." *See* Doc. 94-1 at 6. Harper and Wings were both liable for the fraudulent transfers, the Receiver explained, because Harper is an alter ego of Wings. *See* Doc. 94 at 2. With these considerations in view, the district court entered final default judgment in the amount of $336,470.07—the sum of the attorney fee award and the funds that Harper and Wings received from the fraudulent Ponzi scheme. *See Judgment*, Doc 103. Although Harper received notice of the Motion for Default Judgment via email and U.S. Mail to the address Harper is currently using, *see* Doc. 94 at 6, Harper never opposed this motion, even though he did file a "Notice of Deriliction [sic] of Duty" and a "Harper 'Wish' and Order to Dismiss R. Wayne Klein's Action for Failure to 'Verify' or Support a 'Claim for Which Relief Can Be Granted Under the UFTA, and Under the 'Conflict

of Law' Doctrine'" after the Motion for Default Judgment was filed, *see* Docs. 101 and 102.

Harper appealed the default judgment.[3] *See Default Judgment*, Doc. 103; *Notice of Appeal* (June 23, 2014), Doc. 106. Acting *sua sponte*, this Court required Harper to show cause why the appeal should not be dismissed due to his failure to object to the March 5th Report and Recommendation. *See Order* (July 25, 2014). In response, Harper alleged that he had not received notice of the Report and Recommendation. *See Appellant Response to Report & Recomendation* [sic] (June 25, 2014). Thereafter, this court stated in an order that it would postpone ruling on the issue of waiver. *See Order* (July 17, 2014).

To date, Harper has not provided any discovery, nor has he paid the Receiver's attorney's fees. In total, the trial court has struck or rendered moot no fewer than twenty of Harper's filings. *See Report and Recommendation*, Doc. 91 at 4-8.

STANDARD OF REVIEW

When a district court enters default judgment as a discovery sanction, this Court reviews the judgment for abuse of discretion. *Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1159 (10th Cir. 2013). This Court has recognized "that district courts enjoy 'very broad discretion to use sanctions where necessary to

[3] Wings is not a party to this appeal because it has no counsel of record and cannot be represented by Harper, who is not an attorney.

insure . . . the expeditious and sound management of the preparation of cases for trial.'" *Lee v. Max Int'l*, 638 F.3d 1318, 1320 (10th Cir. 2011) (quoting *In re Baker*, 744 F.2d 1438, 1440 (10th Cir. 1984) (en banc)). The United States Supreme Court "has echoed this message, admonishing courts of appeals to beware the 'natural tendency' of reviewing courts, far from the fray, to draw from fresh springs of patience and forgiveness, and instead to remember that it is the district court judge who must administer (and endure) the discovery process." *Id*. (quoting *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 642 (1976)).

SUMMARY OF THE ARGUMENT

Harper waived his right to appeal the default judgment by failing to respond to the March 5th Report and Recommendation upon which the default was based. Even if this Court decides to review the default judgment, the district court acted well within its broad discretion. This Court's decision in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (1992), sets forth five factors to consider with respect to whether a default judgment is appropriate, and here, all five factors support the district court's decision. Separately, this Court should not address the various interlocutory issues that Harper raises in his brief, all of which lack factual and legal support. Indeed, only two of those interlocutory issues have actually been addressed by the district court: Harper's claims that the district court lacked subject matter jurisdiction and that the Receiver lacked standing. Even if the Court

reaches those issues, well-established law makes plain that the Receiver indeed had standing to bring the underlying suit and that the district court had jurisdiction to adjudicate it.

ARGUMENT

I. HARPER WAIVED HIS RIGHT TO APPEAL.

This Court has "adopted a firm waiver rule when a party fails to object to the findings and recommendations of the magistrate." *Moore v. United States*, 950 F.2d 656, 659 (1991). This "waiver rule provides that the failure to make timely objection to the magistrate's findings or recommendations waives appellate review of both factual and legal questions." *Id.*

Here, Harper did not object to the March 5th Report and Recommendation. Although he claims that he never received notice of that report, the report itself makes clear that copies "are being sent to all parties who are hereby notified of their right to object." *Report and Recommendation*, Doc. 91 at 13. The report also explicitly notes that "[f]ailure to object may constitute a waiver of objections upon subsequent review." Doc. 91 at 13. The copy of the report that was sent to Harper's address was never returned as undeliverable.

Moreover, Harper did not file a change of address notice with the district court at any time prior to the March 5th Report and Recommendation. The district court's rules of practice provide that "[i]n all cases, counsel and parties appearing

pro se must notify the clerk's office immediately of any change in address, email address, or phone number." *See* D.U. Civ. R. 83-1.3(e). In short, it was Harper's duty to maintain his current mailing address with the court; Harper is exclusively responsible for his own alleged lack of notice regarding the March 5th Report and Recommendation. Harper did not notify the district court that his address had changed until May 21, 2014, when he filed a "Judicial Notice and Notice of 'Unverified' Claims," a "Notice of Trespass and 360 Tort 'Claim' Injury," a "Notice of Verification," and a "Notice of Signature." *See* Doc. 96 at 1. In a letter accompanying these filings, Harper asked the clerk for the first time to note his change of address. *See* Doc. 96 at 1.

Further, after default was entered, and to establish the Receiver's damages, the Receiver served on Harper his Motion for Entry of Default Judgment via email and U.S. Mail to the address Harper is currently using. *See* Doc. 94 at 6. Harper never opposed this motion, although he did file a "Notice of Deriliction [sic] of Duty" and a "Harper 'Wish' and Order to Dismiss." *See* Docs. 101 and 102. Ultimately, regardless of whether Harper actually had notice of the March 5th Report and Recommendation or whether he was responsible for his own lack of notice, his failure to object constitutes a waiver of his right to maintain the instant appeal. This Court should accordingly decline to consider any of Harper's arguments.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING DEFAULT AGAINST HARPER AS A SANCTION.

Even if this Court chooses to consider this appeal, the district court did not abuse its discretion by entering default judgment as a sanction for Harper's discovery abuses and for his failure to obey the district court's orders. To determine if a sanction such as default judgment is appropriate, courts consider "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; . . . (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Ehrenhaus*, 965 F.2d at 921 (citations omitted). "These factors do not constitute a rigid test; rather, they represent criteria for the district court to consider prior to imposing dismissal as a sanction." *Id*.

Here, as the magistrate judge set forth in the March 5th Report and Recommendation, application of the *Ehrenhaus* factors supports the default judgment. *See Report and Recommendation*, Doc. 91 at 10-11. Harper never responded to the motion for default filed by the Receiver. Harper's complete unwillingness to participate in any discovery—even after an order to compel—prejudiced the Receiver's ability to develop and prosecute the case. Likewise, Harper's many improper filings significantly interfered with the judicial process

and unnecessarily increased the Receiver's costs and expenses. Further, the court's repeated warnings to Harper rendered his disregard for court orders particularly culpable. As explained above, the trial court specifically warned Harper that a default against him may result if he continued submitting frivolous filings.

Harper's conduct demonstrates that a lesser sanction would not have been effective, as he repeatedly ignored the district court's orders in making numerous frivolous filings after being ordered not to do so and in refusing to pay the monetary sanctions the court imposed. Notably, this Court has recognized that "three strikes are more than enough to allow the district court to call a litigant out." *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011); *see also id*. at 1319 ("[N]o one … should count on more than three chances to make good a discovery obligation."). Harper was ordered to follow the district court's instructions at least three times before default was recommended by the magistrate, but he never complied. *See* Statement of the Case, *supra* (citing Doc. 60, 73, 78). Thus, the district court did not abuse its discretion in concluding that default judgment was proper.

The Court has previously reached the same conclusion in several analogous cases. For example, in *Klein-Becker*, the Court affirmed a default judgment entered against a pro se litigant who had "continued to fall short of meeting his discovery obligations," even after being warned and sanctioned by the court. 711

F.3d at 1160. Applying the *Ehrenhaus* factors, the district court concluded that the litigant's disregard for the court's orders had "prejudiced [his opponent] and interfered with the judicial process." *Id.* On appeal, this Court reviewed the lower court's analysis approvingly. *Id.* Here, Harper has not only "fall[en] short of meeting his discovery obligations," he has disregarded those obligations altogether.

Additionally, this Court has held that in certain circumstances, increasing the expense of litigation can constitute a harm supporting default judgment. In *Gross v. General Motors LLC*, a plaintiff repeatedly refused to produce relevant documents despite the court's orders to do so. 441 F. App'x 562, 565 (10th Cir. 2011). Additionally, the defendant was forced "to contend with mounting attorney fees in responding to [the plaintiff's] numerous motions," which lacked merit. *Id.* These facts, under the *Ehrenhaus* framework, supported the trial court's entry of default. *Id.* at 565-66. Other similar cases have been decided the same way. *See, e.g.*, *Lee*, 638 F.3d at 1320 (holding "that the district court's considerable discretion in this arena easily embraces the right to dismiss or enter default judgment in a case . . . when a litigant has disobeyed two orders compelling production of the same discovery materials").

In this case, there is no question that Harper's numerous frivolous filings and complete unwillingness to participate in discovery unnecessarily prolonged litigation and increased its expense. Indeed, the district court specifically

recognized that Harper caused the Receiver to incur unnecessary fees by ordering Harper to pay the fees the Receiver incurred in responding to Harper's frivolous filings. In view of that fact—and in view of the pertinent case law—the trial court did not abuse its discretion by entering default.

It is also important to note that Harper's appellate brief contains only glancing arguments regarding the default judgment. *See Appellant Brief* at 10-11, 15-16. His brief instead primarily focuses on other substantive issues in the underlying case that are not relevant to whether default was proper. *See Appellant Brief* at 18, 24, 26. To the extent that Harper does address the default, he appears to characterize it as some sort of improper procedural scheme, relying in part on his alleged lack of notice. *See Appellant Brief* at 10-11, 15-16. However, even assuming for the sake of argument that Harper initially lacked notice of the default, it simply does not follow that the default was improper. Harper had notice of the multiple court orders that he disobeyed, which were entered on October 25, 2013, November 22, 2013, and December 18, 2013.[4] *See Order Adopting Report and Recommendation*, Doc. 67; *Memorandum Decision and Order*, Doc. 73; *Order for Attorney Fees*, Doc. 77; *Memorandum Decision Granting Motion to Compel*, Doc. 78. Harper's sustained disregard for those orders justifies the default judgment.

[4] These orders were all sent to Harper at the same address he used for purposes of his own filings until the following January. *See Respondent's Motion for Summary Judgment*, Doc. 82 at 1.

III. THE COURT SHOULD NOT CONSIDER HARPER'S ATTEMPT TO APPEAL OTHER INTERLOCUTORY ISSUES.

Harper's brief raises several substantive issues related to the underlying dispute. Specifically, he has styled his claims in terms of double jeopardy, Fifth Amendment takings, Fourth Amendment rights, and judicial bias. *See Appellant Brief* at 18, 24, 26. Not only are these claims legally unfounded, they all appear to revolve around Harper's factual contention that he invested more in the Ponzi scheme than he ever received in return. Harper did not provide any bank records to substantiate the conclusory claim by Harper that he sent money to Winsome from his bank account or from the bank account of Wings. Moreover, Harper's claim of having invested would only benefit Harper if he was also able to demonstrate that he had invested more than he received and that he had invested *in good faith*. *See* Utah Code Ann. § 25-6-9 ("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") (emphasis added). And, crucially, the Receiver has not been able to develop evidence or otherwise test Harper's factual contentions because Harper has been unwilling to engage in discovery.

In fact, the Receiver requested that Harper identify the very type of transfer he claims alleviates him from liability and he refused to provide that information. For instance, one of the Receiver's interrogatories asks Harper to "identify each

and every benefit [he] claims that any Receivership Defendant received from [him] by virtue of the service or consideration" allegedly given for the fund transfers at issue. *Motion to Compel*, Doc. 70-1 at 9. Another interrogatory asks Harper to [i]dentify all bank, deposit, and/or investment accounts of any kind" that he may have used during the relevant time period. *Motion to Compel*, Doc. 70-1 at 9. Forthright and timely responses to these interrogatories clearly could have shed additional light on Harper's alleged transfers to the Receivership Defendants had Harper actually had any such evidence in his possession.[5] But Harper refused to respond to any of the Receiver's discovery requests, leaving the Receiver with no opportunity to explore the defense that Harper now attempts to raise in conclusory fashion in an appellate brief.

More fundamentally, the substantive issues raised in Harper's brief (with two possible exceptions) have not even been litigated in the district court. There is simply no order for this Court to review with respect to these issues, even on an interlocutory basis. The only substantive issues that were actually litigated below and that have possibly been raised here are Harper's claims that the Receiver lacked standing to sue and that the district court lacked subject-matter jurisdiction

[5] If Harper had engaged in discovery, the Receiver's analysis indicates that the evidence would show that Harper is seeking to claim credit for monies invested by others at Harper's suggestion—and that some of the fraudulent transfers the Receiver is seeking to recover were sales commissions paid to Harper.

over the dispute. *See Appellant Brief* at 20-21. The district court addressed and rejected those claims in its order denying Harper's motion to dismiss.

"Ordinarily, an interlocutory order merges into the final judgment and becomes appealable along with the final judgment." *Norouzian v. Univ. of Kan. Hosp. Auth.*, 438 F. App'x 677, 681 (10th Cir. 2011). This Court, however, has qualified that general rule with a prudential one in contexts similar to this case. In *AdvantEdge Bus. Grp., L.L.C. v. Thomas E. Mestmaker & Assocs., Inc.*, the district court dismissed a case for lack of prosecution. 552 F.3d 1233, 1235-36 (10th Cir. 2009). In resolving an appeal taken from that dismissal, this Court refused to also consider an interlocutory order for partial summary judgment that had previously been entered against appellant. *Id.* at 1236-38. The Court articulated "a prudential rule allowing the appellate court to review an interlocutory order preceding a dismissal" only "in that rare case when it makes sense to do so." *Id.* at 1237.

Although *AdvantEdge* addressed a case dismissed for failure to prosecute, this Court has since applied the case's prudential rule to default judgments. In *Gross*, discussed above, the plaintiff against whom default was entered appealed from that judgment and also sought review of the court's previous interlocutory order of summary judgment on some of her claims. 441 F. App'x at 563. On appeal, this Court explained that "the concerns raised by Ms. Gross's attempt to appeal the district court's interlocutory order in this case are similar to those at

issue in *AdvantEdge Business Group*, and we conclude that the prudential rule applies." *Id.* at 566. Application of that rule, the Court explained, "requires that the party seeking review of an interlocutory order must demonstrate good reasons why the court should allow appellate review." *Id.* The Court reached a similar conclusion in *Norouzian*, "reasoning that a litigant should not be permitted to manipulate 'district court processes to effect the premature review of an otherwise unappealable interlocutory order.'" 438 F. App'x at 681 (quoting *AdvantEdge*, 552 F.3d at 1237-38).

Harper has not demonstrated "good reasons why the court should allow appellate review" of his interlocutory claims. This is not the type of "rare case" that requires the Court to set aside its prudential rule. Therefore, the Court should not consider Harper's arguments related to the Receiver's standing and the district court's subject-matter jurisdiction. The only issue properly before the Court is whether the trial court's decision to enter default judgment against Harper was an abuse of discretion. As explained in Section I, the trial court properly applied the *Ehrenhaus* factors to this case, and Harper's frivolous claims and knowing disregard for the court's orders supports default judgment against him as a sanction.

IV. EVEN IF THE COURT CONSIDERS THE INTERLOCUTORY ISSUES RAISED BY HARPER, IT SHOULD AFFIRM THE DISTRICT COURT'S ENTRY OF DEFAULT.

Even if the Court decides not to apply the prudential rule from *AdvantEdge*, it should still affirm the district court. The issues regarding standing and subject-matter jurisdiction were properly resolved by the district court in its March 27, 2013 order denying Harper's motion to dismiss.

First, with respect to subject-matter jurisdiction, it is well established "that a 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,' and that 'such action or suit is regarded as ancillary' to the court's original subject-matter jurisdiction." *Merrill Scott & Assocs., Ltd. v. Concilium Ins. Servs.*, 253 F. App'x 756, 761 (10th Cir. 2007) (quoting *Pope v. Louisville, N.A. & C. Ry.*, 173 U.S. 573, 577 (1899)); *see also Crawford v. Silette*, 608 F.3d 275, 278 (5th Cir. 2010) ("[F]ederal law creates subject matter jurisdiction for federal receivers."). As the *Crawford* court explained:

> [It is an] undisputed proposition that the initial suit which results in the appointment of the receiver is the primary action and that any suit which the receiver thereafter brings in the appointment court in order to execute his duties is ancillary to the main suit. As such, the district court has ancillary subject matter jurisdiction over every such suit irrespective of diversity, amount in controversy or any other factor which would normally determine jurisdiction.

Id. (quoting *Haile v. Henderson Nat. Bank*, 657 F.2d 816, 822 (6th Cir. 1981)) (citation omitted). Here, the district court had subject-matter jurisdiction over the underlying lawsuit because it is ancillary to the CFTC action in which Klein was appointed Receiver. *See U.S. Commodity Futures Trading Comm'n v. U.S. Ventures LC*, No. 2:11CV00099 BSJ (D. Utah filed Jan. 24, 2011).

Finally, with respect to standing, it is also well established that the Receiver of an entity "used to perpetrate a Ponzi scheme has standing to recover fraudulent transfers as though the [R]eceiver were a creditor of the scheme." *Wing v. Dockstader*, 482 F. App'x 361, 363 (10th Cir. 2012); *see also Klein v. King & King & Jones*, --- F. App'x ---, 2014 WL 3397671, at *1 (10th Cir. July 14, 2014). Here, the Receiver has sought to recover fraudulent transfers made to Harper. Consequently, the Receiver's standing to sue is not in doubt.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court affirm the district court's decision to enter default judgment against the Defendants.

DATED this 30th day of September, 2014.

MANNING CURTIS BRADSHAW
& BEDNAR LLC

/s/ David C. Castleberry

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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 30th day of September, 2014.

MANNING CURTIS BRADSHAW
& BEDNAR LLC

/s/ David C. Castleberry

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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 30th 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 30th day of September, 2014.

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Terry Harper
2907 Shelter Island Drive #105
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/s/ Melissa Aguilar

_____