

**MANNING CURTIS BRADSHAW
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Court-Appointed Receiver of U.S. Ventures, LC,
Winsome Investment Trust, and the assets of Robert
J. Andres and Robert L. Holloway*

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

R. WAYNE KLEIN, the Court-Appointed
Receiver of U.S. Ventures LC, Winsome
Investment Trust, and the assets of Robert J.
Andres and Robert L. Holloway,

Plaintiff,

vs.

PETER O. WIDMARK, and LAURIE
WIDMARK, husband and wife,

Defendants.

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

Case No. 2:11 cv 1097 CW

District Judge Clark Waddoups

Pursuant to Fed. R. Civ. P. 56 and D.U. Loc. R. 56-1 and 7-1, Plaintiff R. Wayne Klein ("Plaintiff" or the "Receiver"), Court-Appointed Receiver of U.S. Ventures LC ("US Ventures"), Winsome Investment Trust ("Winsome"), and the assets of Robert J. Andres ("Andres") and Robert L. Holloway ("Holloway") (collectively the "Receivership Entities"), by and through his

undersigned counsel of record, respectfully submits this Motion for Summary Judgment and Memorandum in Support.

RELIEF SOUGHT AND GROUNDS FOR MOTION

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

Defendants are overpaid investors in Winsome who received back from Winsome more than they invested. Under the Uniform Fraudulent Transfers Act, a transfer is avoidable if it was made with actual intent to defraud and it was not made in exchange for reasonably equivalent value. Applicable case law makes plain that when an investor in a Ponzi scheme receives more from the Ponzi scheme than he invested, the amount of the overpayment constitutes a fraudulent transfer. This is because all transfers out of a Ponzi scheme are assumed to be fraudulent and a Ponzi scheme receives no reasonably equivalent value for any payment in excess of an investor’s investment. There is no genuine dispute of material facts concerning whether the Receivership Defendants operated as a Ponzi scheme or whether Defendants received back from the Receivership Defendants more than they invested. Thus, the Receiver is entitled to summary judgment on his fraudulent transfer claim.

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

INTRODUCTION

Summary judgment should be granted on the Receiver's first cause of action for fraudulent transfer based on two simple undisputed facts: (1) Winsome operated as a Ponzi scheme and (2) Defendants did not provide reasonably equivalent value to Winsome for the transfers they received from Winsome. These undisputed facts establish that the transfers to Defendants are fraudulent and therefore avoidable.

Under the Uniform Fraudulent Transfers Act ("UFTA"), a transfer is avoidable if it was made with actual intent to defraud, and it was not received in good faith and made in exchange for reasonably equivalent value. Applicable case law makes clear that the first element is satisfied if the transfer came from a Ponzi scheme. *See Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) (recognizing that the "mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud"). The undisputed evidence demonstrates that Winsome operated as a Ponzi scheme and that Defendants received the transfers from Winsome identified in the Complaint. *See* Statement of Elements and Undisputed Facts ("SOF"), *infra* ¶¶ 3-8. Therefore,

the only remaining issue is whether Defendants provided reasonably equivalent value to Winsome in exchange for the transfers. Defendants did not. Defendants invested \$100,000 in Winsome, and received back \$291,000 from Winsome, meaning they did not provide reasonably equivalent value for \$191,000 of the transfers they received, and that amount must be repaid. Accordingly, it is undisputed that the elements of the Receiver's UFTA claim are satisfied and he is entitled to Summary Judgment in the amount of \$191,000.

Similarly, the Receiver is entitled to summary judgment on his second cause of action for unjust enrichment. The undisputed facts demonstrate that Defendants knowingly received \$191,000 more than they invested in Winsome. Under the circumstances of a Ponzi scheme, where early investors, such as the Defendants, are paid not out of money earned through legitimate investment activity but with money invested by later investors, retention of these amounts by Defendants would be inequitable when the other innocent investors collectively lost millions of dollars. Thus, there is no genuine dispute of any material fact on the Receiver's unjust enrichment claim and he is entitled to summary judgment on his second cause of action.

STATEMENT OF ELEMENTS AND UNDISPUTED FACTS

Elements of Fraudulent Transfer Claim

1. To prevail on his fraudulent transfer claim, the Receiver must demonstrate that Winsome made a transfer to Defendants "with actual intent to hinder, delay, or defraud any creditor of the debtor." *See* Utah Code § 25-6-5(1)(a). The Receiver may satisfy this element by showing that Winsome made the transfers at issue while operating as a Ponzi scheme. *See S.E.C. v. Madison Real Estate Group, L.L.C.*, 647 F. Supp. 2d 1271, 1279 (D. Utah 2009) ("Under the UFTA, a debtor's actual intent to hinder, delay, or defraud is conclusively established by proving that the debtor operated as a Ponzi scheme.") (quotation omitted).

2. The Receiver may also prevail on his fraudulent transfer claim if Winsome made the transfers to Defendants "without receiving a reasonably equivalent value in exchange for the transfer or obligation." Utah Code § 25-6-5(1)(b).

Undisputed Facts Satisfying Applicable Elements of Fraudulent Transfer Claim

3. It is undisputed that Winsome operated as a fraudulent Ponzi scheme. *See* Declaration of R. Wayne Klein ("Klein Decl."), attached as Exhibit 1, ¶¶ 8-42; *Id.* at ¶ 42 (Specifically, Andres, one of the Receivership Defendants, pled guilty to wire fraud and Holloway, another Receivership Defendant, was convicted by a jury of four counts of wire fraud and a tax violation.)

4. It is undisputed that Defendants received \$191,000 more in payments from Winsome than they invested. *Id.* at ¶¶ 43-45; *see also* Defendants' Answers to Discovery Requests, attached as Exhibit 2, Request for Admission No. 1 (admitting that "from February 2007 through and including May 2008, [Winsome] made Transfers to [Defendants] totaling approximately \$291,000.00") and Interrogatories No. 2 and No. 4 (admitting that Defendants received \$291,000 from Winsome but invested no more than \$105,000¹.)

Elements of Unjust Enrichment Claim

5. The Receiver's second cause of action is for unjust enrichment. The legal elements required to prevail on his claim for unjust enrichment are as follows: a benefit conferred on the Defendants, an appreciation or knowledge by the Defendants of the benefit, and the acceptance or retention by the Defendants of the benefit under such circumstances as to make it inequitable for the Defendants to retain the benefit without payment of its value. *See Rawlings*

¹ Although Defendants state in their Response to Interrogatory No. 4 that they invested a total of \$105,000 with the Receivership Defendants, the Bank Records (attached as Exhibit C to Ex. 1, Klein Decl.) demonstrate that Defendants only invested \$100,000.

v. Rawlings, 2010 UT 52, ¶ 29, 240 P.3d 754 (citing *Jeffer v. Stubbs*, 970 P.2d 1234, 1247-78 (Utah 1998)).

Undisputed Facts Satisfying Applicable Elements of Unjust Enrichment Claim

6. It is undisputed that Defendants knowingly received transfers in the amount of \$291,000.00 from Winsome. Ex. 1, Klein Decl. ¶ 43; *see also* Ex. 2, Request for Admission No. 1 (admitting that “from February 2007 through and including May 2008, [Winsome] made Transfers to [Defendants] totaling approximately \$291,000.00”).

7. It is undisputed that Defendants invested \$100,000 with Winsome, and therefore received \$191,000 more from Winsome than they invested. Ex. 1, Klein Decl. ¶ 43-45.

8. It is undisputed that Winsome operated as a Ponzi scheme, that Winsome operated while insolvent, that there are innocent investors who collectively lost millions of dollars through Winsome, and that Defendants received a benefit from these fraudulently received funds. Ex. 1, Klein Decl. ¶¶ 8-44.

ARGUMENT

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is no genuine dispute of material fact as to the elements of the Receiver's causes of action for fraudulent transfer or unjust enrichment, and the Court should therefore enter summary judgment in his favor on both claims.

I. THE RECEIVER IS ENTITLED TO SUMMARY JUDGMENT ON HIS FRAUDULENT TRANSFER CLAIM.

Pursuant to UFTA, a transfer is fraudulent if the debtor made the transfer with actual intent to defraud a creditor, *see* Utah Code Ann. § 25-6-5(1)(a), and if the transfer was not

received by the transferee in good faith and "for a reasonably equivalent value," *see id.* § 25-6-9. A transfer that is fraudulent under UFTA may be avoided. *Id.* § 25-6-8(1)(a).

Here, the transfers at issue are fraudulent because: (1) Winsome, as a Ponzi scheme, made the transfers with actual intent to defraud creditors; and (2) Defendants did not provide reasonably equivalent value for the transfers they received. Therefore, the Receiver asks the Court to avoid the transfers Defendants received in excess of the amounts they invested and enter judgment against Defendants in that amount.

a. Winsome Made the Transfers to Defendants with Actual Intent to Defraud Because it Operated as a Ponzi Scheme.

"Courts have routinely applied UFTA to allow receivers to recover monies lost by Ponzi scheme investors." *Donell v. Kowell*, 533 F.3d 762, 767 (9th Cir. 2008); *see also* Utah Code Ann. § 25-6-1. This is because the "Ponzi scheme operator is the 'debtor,' and each investor is a 'creditor.'" *Donell*, 533 F.3d at 767. One of the ways a receiver may recover under UFTA is if the entity placed in receivership, or the "debtor," transferred funds with the "actual intent to hinder, delay, or defraud" any of its creditors. Utah Code Ann. § 25-6-5(1)(a); *see also Donell*, 533 F.3d at 770. Significantly, courts recognize that the "mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud" under UFTA. *Id.*; *see also S.E.C. v. Madison Real Estate Group, L.L.C.*, 647 F. Supp. 2d 1271, 1279 (D. Utah 2009) ("Under the UFTA, a debtor's actual intent to hinder, delay, or defraud is conclusively established by proving that the debtor operated as a Ponzi scheme"); *see also Klein v. Scogin*, Case No. 2:12-cv-121-DP, 2012 WL 5503540, at *1 (D. Utah Oct. 10, 2012) ("[U]nder Utah's Fraudulent Transfer Act (UFTA), a debtor's actual intent to hinder, delay, or defraud is conclusively established by proving that the debtor operated as a Ponzi scheme." (quotation omitted)) (unpublished); *Klein v. Abdulbaki*, Case No. 2:11-cv-00953-DK, 2012 WL 2317357, at *6 (D. Utah June 18, 2012) ("Under the

Ponzi scheme presumption, any transfers made in the course of a Ponzi scheme are considered intentional or actual fraudulent transfers "because transfers made in the course of a Ponzi scheme could have been made for no purpose other than to hinder, delay or defraud creditors." (quoting *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 8 (S.D.N.Y. 2007)) (unpublished).

Case law has defined a Ponzi scheme as "a fraudulent investment scheme in which money contributed by later investors generates artificially high dividends for the original investors, whose example attracts even larger investments." *State v. Bolson*, 2007 UT App 268, ¶ 4, 167 P.3d 539 (citing Black's Law Dictionary 1180 (7th ed.1999)). In general, Ponzi schemes collapse on themselves because the returns paid to investors are not based on returns from the underlying business venture, but from the principal of other investors. *In re Hedged-Investments Associates, Inc.*, 48 F.3d 470, 471 n. 2 (10th Cir. 1995).

Here, Winsome operated as a Ponzi scheme. In particular, Winsome was insolvent throughout its operations, including when it made the transfers at issue to Defendants. SOF ¶ 7-22. Winsome also used funds received from investors to pay fraudulent distributions to other investors, a typical practice of a Ponzi scheme. SOF ¶ 20-21; *See also* Ex. 1, Klein Decl. ¶ 42 (Andres pled guilty to wire fraud in the criminal indictment.) Therefore, the undisputed evidence shows that Winsome operated as a Ponzi scheme. As a result, every transfer Winsome made was with actual intent to defraud. *See Donell*, 533 F.3d at 770 ("mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud").

b. Defendants did not take the Transfers at Issue in Good Faith and for Reasonably Equivalent Value.

UFTA provides that a transfer is not voidable "against a person who took in good faith and for a reasonably equivalent value" Utah Code Ann. § 25-6-9(1). Under the law, the pertinent question is whether Winsome received reasonably equivalent value for its payments to

Defendants. This question is answered from the perspective of the tort creditors of the Receivership Defendants, their defrauded investors. *In re Jordan*, 392 B.R. 428, 441 (Bankr. D. Idaho 2008) ("Whether a debtor received a reasonably equivalent value is analyzed from the point of view of the debtor's creditors, because the function of this element is to allow avoidance of only those transfers that result in diminution of a debtor's . . . assets."); *see also Donell*, 553 F.3d at 767 (explaining that, in a Ponzi scheme, the Ponzi scheme operator is the "debtor," and each good faith investor in the scheme who has not regained his initial investment is a "creditor"). In other words, the question is not whether the transferee "gave reasonably equivalent value; it is whether the [Ponzi scheme operator] *received* reasonably equivalent value." *In re Lucas Dallas, Inc.*, 185 B.R. 801, 807 (9th Cir. 1995). Where "causes of action are brought under UFTA against Ponzi scheme investors, the general rule is to the extent innocent investors have received payments in excess of the amounts of principal that they originally invested, those payments are avoidable as fraudulent transfers" *Wing v. Dockstader*, Case No. 2:08-cv-776, 2010 WL 5020959, at *5 (D. Utah Dec. 3, 2010) (quoting *Donell*, 553 F.3d at 770) (unpublished). Whether a transfer was made in good faith and for reasonably equivalent value is an affirmative defense that Defendants must prove. *See Miller v. Rodak*, No. 1:12cv76 DN, 2012 WL 3156538, *3 (D. Utah Aug. 3, 2012) (unpublished); *see also Wing v. Gillis*, Case No. 2:09-cv-314, 2012 WL 994394, at *2 (D. Utah March 22, 2012) (noting that "in the context of a Ponzi scheme it is difficult for even an innocent investor to make such a showing") (unpublished).

Here, the transfers from Winsome to Defendants in excess of \$100,000 were not received for reasonably equivalent value. It is undisputed that Defendants received \$291,000.00 from Winsome in exchange for the \$100,000 they invested. SOF ¶¶ 29-31. The \$191,000 difference

is "considered fictitious profits because [it does] not represent a return on legitimate investment activity." *Dockstader*, 2010 WL 5020959, at *5 (quotation omitted). Payment of this amount to Defendants "did not benefit [Winsome] and instead simply depleted the scheme's resources faster." *Id.* Thus, "the payments were not for reasonably equivalent value and, therefore, were fraudulent transfers." *Id.* As a result, the Receiver is entitled to summary judgment on his first cause of action for fraudulent transfer.

II. THE RECEIVER IS ENTITLED TO SUMMARY JUDGMENT ON HIS UNJUST ENRICHMENT CLAIM.

The Receiver seeks a judgment for unjust enrichment in the alternative based on the same facts that support his fraudulent transfer claim. A claim for unjust enrichment requires the plaintiff to satisfy three elements: (1) a benefit conferred on the Defendants; (2) an appreciation or knowledge by the Defendants of the benefit; and (3) the acceptance or retention by the Defendants of the benefit under such circumstances as to make it inequitable for the Defendants to retain the benefit without payment of its value. *See Rawlings v. Rawlings*, 2010 UT 52, ¶ 29, 240 P.3d 754 (citing *Jeffs v. Stubbs*, 970 P.2d 1234, 1247-78 (Utah 1998)). The undisputed facts demonstrate the Receiver is entitled to summary judgment on this cause of action.

Defendants' receipt of the funds from the Ponzi scheme satisfies these three elements. Defendants plainly received a known benefit when they received hundreds of thousands of dollars above and beyond their investment in Winsome. SOF ¶¶ 3-8. Defendants' retention of that benefit is unjust because the money was derived from other innocent investors' payments to a fraudulent Ponzi scheme, not actual investment gains. SOF ¶¶ 3-8. Under these circumstances, particularly where there are other innocent investors who have suffered significant losses, retention by Defendants of these payments would be unjust. *See In re Pearlman*, 472 B.R. 115, 125 (Bankr. M.D. Fla. 2012) (noting that "trustee has stated a valid

cause of action that, if proven, defendants were unjustly enriched when they received payments to the extent they exceed defendants' original investment.")

CONCLUSION

For the forgoing reasons, the Receiver respectfully requests that the Court grant summary judgment in his favor and against Defendants.

DATED this 30th day of September, 2014.

MANNING CURTIS BRADSHAW
& BEDNAR LLC

/s/ David C. Castleberry

David C. Castleberry
Christopher M. Glauser
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** to be served in the method indicated below this 30th day of September, 2014, addressed as follows.

<input type="checkbox"/> HAND DELIVERY	R. Steven Chambers
<input type="checkbox"/> U.S. MAIL	P.O. Box 711522
<input type="checkbox"/> OVERNIGHT MAIL	Salt Lake City, Utah 84171
<input type="checkbox"/> FAX TRANSMISSION	Tel: (801) 327-8200
<input type="checkbox"/> E-MAIL TRANSMISSION	Fax: (801) 327-8222
<input checked="" type="checkbox"/> USDC ECF NOTICE	

/s/ Melissa Aguilar
