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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

R. WAYNE KLEIN, the Court-Appointed Receiver of U.S. VENTURES LC, WINSOME INVESMENT TRUST and the assets of ROBERT J. ANDRES and ROBERT L. HOLLOWAY Plaintiff, v. PETER O. WIDMARK and LAURIE WIDMARK, husband and wife Defendant	**MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** Case No. 2:11 cv 01097 CW Judge Waddoups

Defendants Peter and Laurie Widmark, through their attorney of record R. Steven Chambers, pursuant to Rule 56, Federal Rules of Civil Procedure, submit this Motion for Summary Judgment and Memorandum in Support.

INTRODUCTION

Defendants were investors in the Winsome Investment Trust ("Winsome") program. They invested a total of $105,000 prior to 2007. They received distributions from Winsome of $140,000 on February 13, 2007; $140,000 on March 15, 2007; and $11,000 on 2008.

Plaintiff is the court-appointed receiver of U.S. Ventures, Winsome Investment Trust, Robert L. Holloway and Robert J. Andres ("the Receivership Defendants"). Plaintiff has sued Defendants in this action under Utah's Fraudulent Transfers Act and on an equitable constructive trust claim on the basis that Defendants would be unjustly enriched if they are allowed to keep the payments they received.

A receiver stands in the shoes of the entity for which he has been appointed. A federal receiver is appointed under the court's general equity powers. Receivers are subject to any defenses that third parties held against the receivership entity.

Plaintiff Lacks Standing.

Under the equitable doctrine *in pari delicto* where two parties are culpable the law will help neither but will leave them as it found them. When an entity is under the control of a single person *in pari delicto* applies as to a receiver. In this case Winsome was solely operated and managed by Robert Andres. Consequently, Plaintiff lacks standing to pursue claims against Defendants.

The Statute of Limitations has Run on Plaintiff's Claim.

Defendants are entitled to summary judgment because the statute of limitations has run on Plaintiff's causes of action. Utah's Fraudulent Transfers Act has an absolute statute of four

years from the date of transfer for any claim except claims based on actual fraud. As to claims based on actual fraud the statute is four years from the date of transfer or one year from the date the transfer is or should have been discovered, whichever is later. There is no dispute that two of the transfers from Winsome to Defendants occurred more than four years prior to the filing of this case. Therefore, Plaintiff can succeed on his fraudulent transfer claims only if he can demonstrate that no one who had the ability to take action on those claims was aware of facts giving rise to a suspicion of fraudulent transfers before December 2, 2010, one year prior to the filing of this lawsuit. Plaintiff cannot do this; the record is devoid of any evidence to that effect and in fact the undisputed facts show that the CFTC had knowledge of fraudulent transfers as early as 2007 and, at the latest, by November 19, 2010. As a result Defendants are entitled to summary judgment to the extent of the two transfers made in 2007 that total $280,000.

Defendants are likewise entitled to summary judgment on Plaintiff's equitable claim for imposition of a constructive trust. In Utah equitable claims are governed by the general four-year statute of limitations. There is no extension for discovery. Consequently with respect to the two transfers in 2007 that total $280,000, Plaintiff's equitable claims are also time-barred.

Plaintiff Cannot Assert Equitable Claims.

In Utah equitable remedies are not available unless no adequate legal remedy exists and a plaintiff must allege and show that no adequate remedy exists at law. In this case Plaintiff has combined legal and equitable remedies and has failed to allege that no adequate remedy exists at law. Therefore his equitable claims must fail.

Defendants are entitled to summary judgment on Plaintiff's equitable claims because Plaintiff has failed to allege and cannot prove the elements of unjust enrichment. One of those elements is that the property that is the subject of the unjust enrichment claim, in this case the three transfers from Winsome to Defendants, was given with an expectation of compensation. Plaintiff cannot show that Winsome had any expectation that it would receive compensation from Defendants for the three transfers that it made to them.

STATEMENT OF ELEMENTS AND UNDISPUTED FACTS

Elements of Lack of Standing

1. *In pari delicto* is an equitable defense that holds that where two parties are culpable, the law will aid neither but will leave them as it found them. *In re: Hedged Investments, Inc.,* 84 F.3d 1281 (10th Cir. 1996).

2. Where an entity such as Winsome Trust is under the control of a sole actor the "adverse dominion" exception to the rule of *in pari delicto* does not apply and a receiver or other party who stands in the shoes of the entity is subject to that defense. *In re: NM Holdings Company LLC,* 622 F.3d 613 (6th Cir. 2010).

Undisputed Facts Establishing *In Pari Delicto*

3. Defendants invested in Winsome Trust. Complaint, ¶¶ 6-7.

4. Winsome Trust was solely controlled by Robert Andres. Complaint, ¶ 24; Declaration of Michelle Bougas, ¶¶ 2c, 23 , filed in *CFTC v. U.S. Ventures, Winsome Trust, Robert Holloway and Robert Andres* ("the U.S. Ventures case"), which is the case that resulted in the appointment of R. Wayne Klein as receiver for Winsome. ("Bougas Declaration").

5. Plaintiff has not alleged and cannot show the existence of an innocent member of Winsome's management or any other entity who could have prevented the fraud had he known about it. Complaint.

Elements of Statute of Limitations

6. To prevail on their Motion for Summary Judgment based on their affirmative defense of the applicable statute of limitations, Defendants must show that the complaint was filed outside of the applicable limitations period. If the Plaintiff seeks to extend the applicable statute of limitations using the discovery rule, the burden is on the Plaintiff to negate the possibility that the claims could have been discovered earlier. *Utah Park City Mines v. Greater Park City Company,* 870 P.2d 880 (Utah 1993).

7. Because Plaintiff, as the non-moving party, ultimately bears the burden of proof as to his claims, Defendants need only to point to an absence of facts in the pleadings, discovery and other documents that support an essential element of Plaintiff's case. *Celotex Corporation v. Catrett,* 477 U.S. 317 (1986). In this case, the absence of proof of an essential element of Plaintiff's case is the want of any evidence that negates the possibility that Plaintiff's claims could have been discovered sooner. Defendants have gone beyond this requirement and demonstrate in this Motion that the CFTC knew or should have known of the fraudulent transfers as early as 2007 and in any event by November 19, 2010.

8. Plaintiff's equitable claims are governed by Utah's four-year statute of limitations found in Utah Code 78B-2-307(3). *American Tierra Corporation v. City of West Jordan,* 840 P.2d 757 (Utah 1992).

Undisputed Facts Establishing Statute of Limitations Defense

9. Defendants received three distributions from Winsome, as follows:

$140,000 on February 13, 2007

$140,000 on March 15, 2007

$11,000 on May 12, 2008

Defendants' Answers to Plaintiff's Interrogatories, Interrogatory #2.

10. This case was filed on December 2, 2011. Complaint.

11. There is no evidence in the pleadings, discovery or documents filed in this case that indicates that Plaintiff could not have discovered the alleged fraudulent transfers prior to December 2, 2010, one year before this case was filed.

Elements of Unavailability of Equitable Claims

12. Equitable remedies such as asking for imposition of a constructive trust on a theory of unjust enrichment are not available unless the claimant pleads and proves the lack of adequate remedies at law. *Thorpe v. Washington City,* 2010 UT App. 297, 240 P.3d 500 (Utah App. 2010).

Undisputed Facts Establishing the Unavailability of Equitable Claims

13. Plaintiff has pleaded a cause of action under Utah's Fraudulent Transfer Act. Complaint, paragraphs 53-56.

14. Plaintiff has not pleaded or demonstrated that adequate remedies at law do not exist. Complaint.

15. Plaintiff has pleaded a claim in equity for imposition of a constructive trust on a theory of unjust enrichment. Complaint, paragraph 59.

Elements of Failure to Plead and Prove Unjust Enrichment

16. In order to prevail on his claim of constructive trust based on a theory of unjust enrichment Plaintiff must plead and prove: (1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. *Rawlings v. Rawlings,* 2010 UT 52, 240 P.3d 754; *Parks v. Zions First National Bank,* 673 P.2d 590 (Utah 1983).

17. Where a payment or transfer of property is made and the transferor or claimant seeks recovery on a theory of unjust enrichment, the claimant must show that the transfer was made with the expectation of compensation by the transferee. If there was no such expectation the transfer was gratuitous and the retention of the transfer by the transferee is not inequitable or unjust. *Howard v. Manes,* 2013 UT App. 208, 309 P.3d 279

18. Defendants need only to point to an absence of facts in the pleadings, discovery and other documents that support an essential element of Plaintiff's case. *Celotex Corporation v. Catrett,* 477 U.S. 317 (1986). In this case, that absence of proof of an essential element of Plaintiff's claim for unjust enrichment is the lack of any evidence that the payments to Defendants were not gratuitous. *Howard v. Manes,* 2013 UT App. 208, 309 P.3d 279.

Undisputed Facts Establishing the Unavailability of Unjust Enrichment

19. Plaintiff has neither pleaded nor can he demonstrate any evidence that Winsome had an expectation of compensation from the Widmarks at the time the three transfers were made to them. Complaint.

STATEMENT OF ADDITIONAL FACTS

The following facts are not in dispute.

1. Widmarks invested a total of $105,000 in Winsome prior to 2007. Defendants' Answers to Plaintiff's Interrogatories, #4 and #5.

2. The Commodities Futures Trading Commission ("CFTC") began investigating Winsome in April, 2007. Bougas Declaration, ¶7.

3. The CFTC investigation continued through 2010 and culminated in the filing of the U.S. Ventures case. Bougas Declaration, dated January 20, 2011.

4. In 2007 the Securities and Exchange Commission ("SEC") filed suit against U.S. Ventures in which it alleged that U.S. Ventures was operated in a manner similar to a Ponzi scheme. Complaint in Case No. 2:07 CV 00235 (D. Utah, April 11, 2007, ¶¶69-77. The Complaint also alleged that U.S. Ventures and Robert Holloway had been unjustly enriched. Complaint, ¶¶118-119. ("the Novus lawsuit").

5. As part of the relief granted to the SEC in the Novus lawsuit Judge Paul Cassell entered an order freezing the assets of U.S. Ventures on April 11, 2007. Order Freezing Assets and Prohibiting Destruction of Documents filed in Novus Lawsuit, April 11, 2007, Document #10.

6. In January, 2010, Gil Miller, the retained expert witness in the Novus lawsuit, gave his expert report in which he concluded that U.S. Ventures was operated as a Ponzi scheme and that Winsome was U.S. Venture's largest investor. *Report of Gil A. Miller*, 2010 WL 1942427 (D.Utah), pages 16-17 (excerpted pages attached hereto).

7. As part of her investigation into Winsome, Michelle Bougas reviewed documents obtained by the SEC in the Novus lawsuit and the deposition of Robert Holloway taken May 27, 2009, November 30, 2009 and December 28, 2009. Bougas Declaration, ¶¶17-18.

8. Ms. Bougas also reviewed information the CFTC received from participants in the Winsome program. Bougas Declaration, ¶20.

9. On January 7, 2010, Bryan Bailey gave an affidavit in which he stated that in 2007 a large Winsome-U.S. Ventures investor wanted his money back and this request caused a lot of concern at Winsome-U.S. Ventures because there was insufficient money to honor that request. Affidavit of Bryan R. Bailey given in U.S. Ventures lawsuit, ¶44 ("Bailey Affidavit").

10. This incident would be a "very big red flag" as to the existence of a Ponzi scheme. Deposition of Wayne Klein, page 64, line 20 ("Klein Deposition").

11. Ponzi schemes and fraudulent transfers "go hand in hand." Klein Deposition, page 76, lines 9-11.

12. On November 19, 2010, Jerry Comeaux gave an affidavit in which he listed several Frequently Asked Questions ("FAQs") regarding Winsome. Declaration of Jerry Comeaux filed in U.S. Ventures case, ¶5.

13. These FAQs are "badges of fraud" that are frequently seen in Ponzi schemes. Klein deposition, page 67, lines 12-19.

ARGUMENT

POINT I: PLAINTIFF LACKS STANDING TO BRING THIS ACTION UNDER THE DOCTRINE OF *IN PARI DELICTO.*

In pari delicto is an equitable defense that holds that when two parties are equally culpable the law aids neither but leaves them where it found them. *Haddock v. City of Salt Lake,* 23 Utah 521, 65 P. 491 (1901).

In *In re: Hedged Investments, Inc.,* 84 F.3d 1281 (10th Cir. 1996) the Tenth Circuit reiterated the doctrine of *in pari delicto*, in this way: " 'one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.' " 84 F.3d at 1284 (citation omitted). *In re: Hedged* involved a bankruptcy trustee who sued to recover "excess profits" from investors in a Ponzi scheme. Those investors, like the Defendants in this case, were fortunate enough to get out of the scheme and received more money back than they had invested.

The investors raised the *in pari delicto* defense, arguing that because the trustee stood in the shoes of the entity and held only claims of the entity, he is subject to any defenses, legal or equitable, that could have been raised against the entity. The Tenth Circuit in *Hedged* analyzed the Seventh Circuit's decision in *Scholes v. Lehman,* 56 F.3d 750 (7th Cir. 1995) *cert denied,* 516 U.S. 795 (1995). In that case the Seventh Circuit stated that *in pari delicto* is not available against a receiver because once the "evil zombie" that controlled the entity is removed, the *in pari delicto* defense "loses its sting." The Tenth Circuit rejected this argument in the context of a

bankruptcy trustee, holding that since the trustee obtained only what the entity held the trustee was subject to equitable defenses such as *in pari delicto.*

The *Scholes, supra,* case has been cited for the proposition that once the wrongdoers are removed from control of an entity the entity is no longer subject to equitable defenses such as *in pari delicto*. This argument is based on the adverse domination theory discussed below. In cases where the entity is under the exclusive control of a single person, however, courts have found an exception to the adverse domination theory. For example, in *Shearson Lehman Hutton v. Wagoner,* 944 F.2d 114 (2d Cir. 1991) the Second Circuit held that a trustee has no standing to sue a third party who participated in a fraud against the corporation with the participation of the corporation's management. This has led to what is called the *Wagoner* or *sole actor* rule, which states the where an entity is under the control of a single person so that there can be no other person who could bring a claim on behalf of the entity, the entity is subject to the defense of *in pari delicto.* Other courts have adopted this theory. See, e.g. *Smith ex rel. estates of Boston Chicken, Inc. v. Arthur,* 175 F.Supp 2d. 1180 at 1199 (D. Ariz. 2001) (in "cases involving more than one corporate actor, the plaintiff may avoid dismissal for lack of standing by alleging the existence of 'an innocent member...of management who would have been able to prevent the fraud had he known about it.'" (citation omitted)); *Official Committee of Unsecured Creditors v. R.F. Lafferty, Inc.,* 267 F.3d 340, at 360 (3rd Cir. 2001) ("[i]n sum, we will impute the fraudulent conduct of the Shapiros to the Debtors because the Shapiros perpetrated the alleged fraud in the course of their employment, and because, although the Shapiros may have acted adversely to the interests of the Debtors, they were the sole actors engaged in the alleged fraudulent conduct:" *In*

re Mediators, Inc., 105 F.3d 822, at 827 (2d Cir. 1997) ("However, where the principal and agent are one and the same, the adverse interest exception is itself subject to an exception styled the 'sole actor' rule.")

The sole actor rule was explained in *In re: NM Holdings Company LLC,* 622 F.3d 613 (6th Cir. 2010). There the Sixth Circuit said:

The adverse-interest exception, however, itself has an exception:

> The sole actor rule is an exception to the adverse interest exception.... The sole actor rule comes into play where the wrongdoer is, in essence, the corporation (the "sole actor"). Indeed, it has its roots in cases where the agent and the principal are literally the same person (literally a "sole actor") and thus information obtained by a person in his role as an agent is treated as also being obtained in his role as principal, even if his activities as agent are contrary to his interests as a principal. Therefore, where the wrongdoer acts contrary to the interests of the corporation, under the adverse interest exception the wrongdoer's conduct would not ordinarily be imputed to the corporation. *But where the wrongdoer is a sole actor, the adverse interest exception is not applied and his wrongdoing is nevertheless imputed to the corporation.* 622 F.2d at 620-621 (citation omitted; emphasis added).

Winsome was the entity through which Andres perpetrated his fraud. Through Winsome Andres solicited investors into its pool, took their money, failed to invest it as promised, lied to investors about the returns they were earning, furnished false earnings reports to substantiate those lies and made payments to some investors. Winsome was solely managed and operated by Robert Andres. He was the attorney, the sole manager and the trustee of Winsome. There is no entity besides Andres. There is no innocent member of management who, had he but known of Andres' activities, could have stepped forward and stopped the fraud. Consequently, the adverse dominion exception to the defense of *in pari delicto* is not applicable in this case.

In this case Plaintiff lacks standing to bring the claims on behalf of Winsome because the adverse dominion exception to the defense *in pari delicto* is itself subject to an exception, that being that Winsome was under the sole control of Andres.

POINT II: PLAINTIFF'S CLAIMS UNDER UTAH CODE 25-6-6 ARE BARRED BY THE FOUR-YEAR STATUTE OF LIMITATIONS.

Utah Code section 25-6-10 sets time limits for bringing claims alleging fraudulent transfers. After those limits have passed the claim is extinguished.

Claims made under Section 25-6-5(1)(b) or 25-6-6(1) must be brought within four years after the transfer was made. Section 25-6-5(1)(b) refers to transfers where the transferor did not receive reasonably equivalent value in exchange for the transfer and the transferor was either engaged or about to engage in a business or transaction for which its remaining assets were unreasonably small; or the transferor intended to incur or believed or reasonably should have believed that it would incur debts beyond its ability to pay. This is often referred to a "constructive fraud."

Section 25-6-6(1) is virtually identical to section 25-6-5(1)(b) except that it refers to claims that arise before a transfer is made.

Under the extinguishment statute, Section 25-6-10(2), claims under either of these two constructive fraud statutes must be made within four years of the transfer. There is no extension based upon a discovery rule such as exists in Section 25-6-10(1), which states:

> A claim for relief or cause of action regarding a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:
> (1) under Subsection 25-6-5(1)(a) within four years after the transfer was made or the obligation was incurred or, if later, within one year after the obligation was or could reasonably have been discovered by the claimant;

Therefore, for all of his claims under Utah's Fraudulent Transfers statute, the Plaintiff has an absolute four-year statute of limitations from the date of the transfer for all causes of action except those based on Section 25-6-5(1)(a), the actual fraud provision.

The transfers that the Plaintiff seeks to recover are three separate payments by Winsome to Widmarks. These are set out in Undisputed Fact No. 2:

$140,000 made on February 13, 2007

$140,000 made on March 15, 2007

$11,000 made on May 12, 2008

It is evident that the first two transfers were made more than four prior to this action being filed on December 11, 2011. Consequently any claim for return of $280,000 under Section 25-6-5(1)(b) or 25-6-6(1), the so-called constructive fraud sections, have been extinguished.

POINT III: PLAINTIFF'S EQUITABLE CLAIMS HAVE BEEN EXTINGUISED UNDER UTAH'S FOUR-YEAR "CATCH ALL" STATUTE OF LIMITATIONS.

All causes of action, whether legal or equitable, are subject to statutes of limitations in Utah. *In re: Hoopiiaina Trust,* 2006 UT 53, 149 P.3d 1129. There the Supreme Court cited *American Tierra Corporation v. City of West Jordan,* 840 P.2d 757 (Utah 1992), which held that "the four-year catch-all statute of limitations applies to all causes of action, legal or equitable, 'in which affirmative relief is sought' and another 'more specific' statute of limitations does not apply." 144 P.2d at 1136-1137.

Utah Code section 78B-2-307(3) provides a four year statute of limitations "for relief not otherwise provided for by law." Like Section 25-6-10(2) this is an absolute statute of limitations; there is no discovery provision that would extend the period.

In this case Plaintiff's claims for equitable relief are barred because the transfers by which Plaintiff claims Defendants were unjustly enriched occurred more than four years before this action was filed. These are the transfers of $140,000 each that occurred on February 13, 2007 and March 15, 2007.

POINT IV: PLAINTIFF'S CLAIMS UNDER SECTION 25-6-5(1)(a) HAVE BEEN EXTINGUISHED BECAUSE THE CFTC KNEW OR REASONABLY COULD HAVE DISCOVERED THE EXISTENCE OF THE TRANSFERS MORE THAN ONE YEAR PRIOR TO THE FILING OF THIS LAWSUIT.

In a case where a receiver or trustee is appointed, any causes of action do not belong to the receiver or the trustee. Instead, they belong to the entity for which the receiver is acting. *Wing v. Buchanan,* 533 Fed.Appx. 807 (10th Cir. 2013) (unpublished opinion). In that case, one similar to this, the Tenth Circuit stated

> We reject two arguments put forth by Wing [the court-appointed receiver]. Wing argues that the earlier appointment of the bankruptcy trustee has no bearing on the statute of limitations because Wing, as the receiver, is the "claimant" referred to in the statute [Utah Code section 25-6-10]. . . . We disagree. The receiver has no claims to bring on his own behalf, instead he brings them on behalf of the companies. Therefore it is the companies and the creditors that are the "claimants" that benefit from the discovery rule. *The receiver's mere appointment cannot resurrect otherwise stale claims.* 533 Fed.Appx at 811 (emphasis added).

Thus, the statute of limitations in this case did not begin to run upon Plaintiff's appointment. Instead it began to run at an earlier time.

In *Wing*, the Tenth Circuit stated that it believed "that Utah would adopt the 'adverse domination' theory so that the discovery period would not begin to run until the bad actors controlling an entity were removed." 533 Fed.Appx. at 811. However, Utah case law does not support this black-and-white construction of the adverse domination theory.

In *Utah Park City Mines v. Greater Park City Company,* 870 P.2d 880 (Utah 1993) the Utah Supreme Court reviewed the adverse domination theory as a corollary to the discovery rule. It quoted with approval from *International Railways of Central America v. United Fruit Company,* 373 F.2d 408 (2d Cir. 1967). In that case the Second Circuit stated

> One principle emerging with some clarity is that a plaintiff who seeks to toll the statute on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." Such control was found for example in *Adams v. Clarke,* 22 F.2d 957 (9 Cir.1927), where all the directors were accused of wrongdoing and held a majority of the capital stock.... *This principle must mean at least that once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue.* And here we think [plaintiff] fails. 373 F.2d at 414; quoted in *UPCM v. Greater Park City Company*, 870 P.2d at 886 (emphasis added).

The Utah Supreme Court also reviewed *White v. Federal Deposit Insurance Corporation,* 122 F.2d 770 (4th Cir. 1941), a case in which the FDIC as receiver sued former bank directors. The directors raised the statute of limitations as a defense. The FDIC countered with the adverse domination argument as a bar to the running of the statute of limitations. The Fourth Circuit disagreed with the FDIC, stating that "what we have here is more than mere notice to the corporation. We have actual knowledge on the part of all the stockholders of the corporation who would be entitled to complain of the wrong, coupled with actual knowledge on the part of bank examiners whose duty it is to protect depositors and the public." 122 F.2d at 775.

The Utah Supreme Court in *UPCM v. Greater Park City Company, supra,* concluded that, as a matter of law, a proxy statement sent to shareholders contained sufficient information "to put them on notice of further inquiry" and the statute of limitations began to run at the time of the special shareholders' meeting, thereby barring UPCM's claims despite its assertion of the adverse domination theory.

In the present case, the Plaintiff's causes of action against the Widmarks are not his alone. If those claims were stale at his appointment or became stale before he filed this action he cannot assert them simply because this action was brought within one year of his appointment. The question therefore becomes, at what point was Winsome or the CFTC sufficiently aware of the potential for bringing fraudulent transfer claims that the statute began to run?

Winsome was solely owned and operated by Robert Andres. There were no other trustees or shareholders; therefore, whatever knowledge Andres had is imputed to Winsome. Consequently, Winsome is charged with knowledge of the fraudulent transfers from the time they were made.

The next issue, when did the CFTC have knowledge sufficient to put it on notice of the need to inquire further, is crucial because the CFTC, like the bank examiners in *White v. Federal Deposit Insurance Corporation,* 122 F.2d 770 (4th Cir. 1941), has a duty to protect the public and, more importantly, has the power and authority to seize control of Winsome in order to fulfill that duty. Were that not so, Plaintiff would never have been appointed and this lawsuit would not have been filed. Because of the existence of the CFTC with its power to take action, Plaintiff cannot negate the possibility that someone or some entity could have sued earlier than he did.

Because Plaintiff as the non-moving party has the ultimate burden of proof, all Defendants need do is point to that absence of evidence of this essential element of Plaintiff's case. Having done that, Defendants are entitled to summary judgment.

Defendants have gone beyond pointing to an absence of evidence. In addition they have shown that as a matter of law the CFTC knew or should have known of the fraudulent transfers at the latest by November 19, 2010. The CFTC began investigating Winsome in 2007. That investigation continued through 2008, 2009 and 2010. In January, 2010, the CFTC obtained an affidavit from Bryan Bailey, a former employee of U.S. Ventures, in which Mr. Bailey stated that in 2007 a Winsome-U.S. Ventures investor requested his $5 million investment be returned. This caused concern because there wasn't sufficient money to meet that demand. According to Mr. Klein, who is acting as his own expert witness, this event would have been a "big red flag" as to the existence of a Ponzi scheme. Furthermore, according to Mr. Klein, Ponzi schemes and fraudulent transfers go hand in hand. Suspicion that a Ponzi scheme exists necessarily implies suspicion of fraudulent transfers.

Somewhere between April, 2007, when the CFTC began investigating Winsome and January, 2011, when the CFTC sought the appointment of a receiver for Winsome, the CFTC gained sufficient knowledge to be put on notice of potential fraudulent transfers. If that knowledge came any time before December 2, 2010, the Plaintiff's claims under Utah Code section 25-6-5(1) are barred because that date is one year prior to the filing of the complaint in this action.

By December, 2010, the CFTC was in the final stages of preparing the U.S. Ventures lawsuit that was filed on January 24, 2011. The complaint in that case is 31 pages long and was accompanied by a motion for appointment of a receiver and a memorandum in support of that motion that is 32 pages long. The complaint and the motion and memorandum were the culmination of nearly four years of investigation by the CFTC. By the time the CFTC or SEC files suit "they are ready to prove their case at trial." Klein Deposition, page 56, lines 22-25.

It is inconceivable that the CFTC had absolutely no knowledge of the possibility of the existence of a Ponzi scheme and attendant fraudulent transfers before December 2, 2010, and somehow gathered sufficient information to "prove their case at trial" within six weeks. By Plaintiff's own testimony "cases of this size, magnitude and complexity I would expect to take at least six months to investigate fully and perhaps as much as three years." Klein Deposition, page 57, lines 6-9.

All that is required to start the statute of limitations running is that the plaintiff or someone with the ability to enforce a fraudulent transfer claim be put on inquiry notice. This notice was apparent sometime after 2007 but in any case at the very latest by November 19, 2010, when the CFTC obtained the Comeaux declaration (Undisputed Fact No. 12). By that time the CFTC had the benefit of over three years of investigation, Bryan Bailey's declaration, which raised a "very big red flag" and Jerry Comeaux's declaration, which evidenced "badges of fraud" such as are common in Ponzi schemes. Therefore, the one-year discovery statute of limitations began to run at latest on November 19, 2010, and expired on November 19, 2011, three weeks

before this action was filed. Plaintiff's claim under Utah Code 25-6-5(1)(a) is barred by the statute of limitations.

POINT V: PLAINTIFF'S CLAIM FOR AN EQUITABLE CONSTRUCTIVE TRUST FAILS AS A MATTER OF LAW.

Plaintiff's second cause of action is for imposition of an equitable constructive trust on funds that were paid to Defendants by Winsome (Complaint, paragraphs 57-60). This claim must fail as a matter of law for two reasons. First, an equitable remedy is not available unless all legal remedies have been exhausted and the plaintiff has alleged the absence of adequate remedies at law. Secondly, even if the remedy was available Plaintiff has not alleged sufficient facts to make out a cause of action.

A. An Equitable Remedy Cannot Be Asserted Where Legal Remedies Exist.

There are two types of constructive trusts in Utah: legal constructive trusts and equitable constructive trusts. *Rawlings v. Rawlings,* 2010 UT 52, 240 P.3d 754 (Utah 2010). In that case the Supreme Court of Utah discussed the difference between constructive trusts at law and constructive trusts in equity. The former arises as an operation of law to give effect to an oral express trust that would otherwise be barred by the statute of frauds.[1]

An equitable constructive trust

> "may arise 'where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it....' " A claim for unjust enrichment in Utah requires proof of three elements:
>
> > "(1) a benefit conferred on one person by another; (2) an

[1] Plaintiff has pleaded an equitable constructive trust (Paragraph 60). It is clear that a legal constructive trust claim would fail because of the lack of a fiduciary relationship between Plaintiff and Defendants.

> appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." *Rawlings v. Rawlings, supra,* 240 P.3d at 763 (citations and footnotes omitted).

Plaintiff has alleged unjust enrichment as the grounds for his claim to impose an equitable constructive trust (Complaint, paragraph 59).

In Utah, equitable claims such as unjust enrichment or imposition of an equitable constructive trust can only be raised in the absence of an adequate remedy at law and that absence must be affirmatively alleged. In *Thorpe v. Washington City,* 2010 UT App. 297, 240 P.3d 500 (Utah App. 2010) the plaintiff alleged breach of his employment contract and unjust enrichment. The Court of Appeals upheld summary judgment in favor of the city and with regard to the unjust enrichment claim said "It is settled in Utah that 'the law will not imply an equitable remedy when there is an adequate remedy at law.'" 240 P.3d at 507. The Court went on to explain that it is a requirement that the plaintiff plead that no adequate remedy at law exists.

This Court recognized this doctrine of Utah law in *Miller v. Basic Research, Inc,* 2008 WL 4755787 (D.Utah 2008). There Judge Stewart stated

> In *Commercial Fixtures & Furnishings, Inc. v. Adams,* [footnote omitted] the Utah Supreme Court refused to allow a plaintiff to proceed with an equitable case because the plaintiff had not yet exhausted the legal remedies available to them. Other Utah Courts have similarly held that a plaintiff cannot pursue an equitable claim unless it has either pursued legal claims to their conclusion or shown that doing so would be fruitless. [footnote omitted].

Furthermore, "[u]nder Utah law, if there is a contract governing certain subject matter, an unjust enrichment claim seeking recovery related to the same subject matter is precluded."

Wilcox v. Career Step LLC, 2010 WL 624863 (D.Utah 2010), quoting from *TruGreen Cos., L.L. C. v. Mower Brothers,* 199 P.3d 929 at 933 (Utah 2008) ("As we have stated previously, restitution and unjust enrichment are remedies found in quantum meruit. As tools of equity, they are used only when no express contract is present.").

In the present case the Plaintiff not only has failed to plead that no adequate remedies exist at law, he has coupled a legal remedy with his claim for equitable relief. Plaintiff's First Cause of Action is a legal claim under Utah's Fraudulent Transfers Act, Utah Code section 25-6-5 and -6. As long as Plaintiff's legal claims remain he may not make a claim for equitable relief. Therefore, the Complaint fails to state a claim on which relief can be granted because the equitable claim is not available as a matter of law.

In addition, as this Court noted in *Wilcox, supra,* where a contract governs certain subject matter, equitable remedies of this type are not available. Here the relationship between Plaintiff and Defendants is based on the investment contract which Winsome and Defendants entered into and pursuant to which Defendants were paid the sums that Plaintiff now seeks to collect. Because the Plaintiff stands in the shoes of Winsome as its receiver, Plaintiff is a party to this agreement just as Winsome was. For this reason as well Plaintiff's equitable claims are barred as a matter of law and his complaint fails to state a claim on which relief can be granted.

B. Plaintiff's Equitable Claims Fail for Lack of Pleading or Showing Unjust Enrichment.

In order to make a claim for unjust enrichment, assuming such a claim is available to the plaintiff, the Plaintiff must show three things: (1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or

retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. *Rawlings v. Rawlings,* 2010 UT 52, 240 P.3d 754; *Parks v. Zions First National Bank,* 673 P.2d 590 (Utah 1983).

In *Jeffs v. Stubbs,* 970 P.2d 1234 (Utah 1998) the Utah Supreme Court analyzed the third requirement, that the acceptance of the benefit is under circumstances that make it inequitable for the transferee to retain the benefit.[2] The Court cited the Restatement, 2d, **Restitution**, §70 (1937) for its conclusion that "one who renders services with the reasonable expectation of a returned benefit does not render the services gratuitously." 970 P.2d at 1247.

The issue in *Jeffs* was whether improvements made to land by the plaintiff were gratuitous. If they were, the Court said, then the acceptance of those benefits by the defendant was not under circumstances that make it inequitable for the defendant to retain those benefits without compensating the plaintiff. However, the Court noted that the trial court found that the plaintiff expected to use the land in the future and, upon that expectation, made the improvements. Therefore, the improvements were not gratuitous because the plaintiff expected compensation in the form of being able to use the improvements after they were made.

The reverse of the *Jeffs* case was demonstrated in *Howard v. Manes,* 2013 UT App. 208, 309 P.3d 279. In that case the Court of Appeals affirmed a grant of summary judgment to the defendant in an unjust enrichment case, holding that the plaintiff did not make improvements to real property with the expectation that she would receive any benefit from those improvements.

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[2] The analysis was made under Arizona law but the Court recognized that "we find the analysis [under Utah law] to be much the same." 970 P.2d at 1248.

As a result, it was not inequitable for the defendant to retain those benefits. The Court of Appeals said:

> Nor can the estate show that Thelma [plaintiff] built the improvements with any "expectation of a return benefit, compensation, or consideration.". . . . Utah courts have rejected unjust enrichment claims where benefits are "officiously or gratuitously furnished" with no expectation of compensation. 309 P.3d at 290 (citations omitted).

In the present case the Plaintiff has failed to plead the elements of unjust enrichment. Although he has pleaded the existence of unjust enrichment he has failed to plead the three constituent elements that make a claim for unjust enrichment. More importantly, however, the Plaintiff has not demonstrated, and cannot demonstrate, that it would be inequitable for the Widmarks to retain the money paid to them by Winsome Trust. The reason for this is that those funds were paid gratuitously and without expectation of compensation.

Winsome had no expectation that the Defendants would provide compensation to it for the payments in excess of the Defendants' investment. There was no contract, written or oral, no representations made by Defendants, no demands from Winsome to Defendants or anything else that would give rise to an inference that Winsome made those payments expecting something in return from the Defendants. Consequently the payments were gratuitous and it is not inequitable for the Defendants to retain them.

CONCLUSION

This case is about equity. Even the legal claims under Utah's Fraudulent Transfers Act are, at bottom, equitable. The Fraudulent Transfers Act is a codification of equitable principles and is based on a notion of what is fair. Plaintiff claims the moral high road, arguing that he is

merely trying to recover ill-gotten gains from the few for the benefit of the many. Yet it must be remembered that Plaintiff has no rights in and of his status as a court appointed receiver. Whatever claims he has, first belonged to Winsome Trust and are subject to defenses that Defendants could have asserted against Winsome.

While the Plaintiff's motives are laudable this Court cannot let the end justify the means. It may be tempting to carve out an exception to the legal and equitable principles that prohibit Plaintiff's causes of action "however, to paraphrase the Supreme Court, the issue is not whether such an exception would make good policy but whether the exception can be found in the [law]". *In re: Hedged,* 84 F.3d 1281 at 1285-1286 (10th Cir. 1996).

For the reasons set forth above, Plaintiff's claims are barred and Defendants are entitled to summary judgment dismissing this action.

Dated September 30, 2014.

/s/ R. Steven Chambers
R. Steven Chambers
Attorney for Defendants Peter and Laurie Widmark

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Motion for Summary Judgment and Memorandum in Support with accompanying exhibits on the following this 30th day of September, 2014:

David Castleberry
Attorney for Plaintiff
Via ECF

/s/ R. Steven Chambers