MANNING CURTIS BRADSHAW
& BEDNAR LLC
David C. Castleberry [11531]
dcastleberry@mc2b.com
Christopher M. Glauser [12101]
cglauser@mc2b.com
136 East South Temple, Suite 1300
Salt Lake City, UT 84111
Telephone (801) 363-5678
Facsimile (801) 364-5678

Attorneys for Plaintiff 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

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. FUNDACION GUATEMALTECO AMERICANA and ROBERTO E. PENEDO, Defendants.	**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** Case No. 2:12-cv-00049-DN Judge David Nuffer

Pursuant to Fed. R. Civ. P. 56 and D.U. Loc. R. 7-1, Plaintiff R. Wayne Klein ("Plaintiff" or the "Receiver"), Court-Appointed Receiver of U.S. Ventures LC ("U.S. Ventures"), Winsome Investment Trust ("Winsome"), and the assets of Robert J. Andres ("Andres") and Robert L. Holloway ("Holloway") (collectively the "Receivership Entities"), submits this Reply Memorandum in Support of Motion for Summary Judgment.

INTRODUCTION

Defendant Roberto E. Penedo ("Penedo") does not dispute that Winsome operated as a Ponzi scheme or that he received the payments at issue in this Motion from Winsome. Therefore, it is established that Winsome made the payments at issue to Penedo with actual fraudulent intent and the elements of the Receiver's UFTA claim are satisfied. *See* Utah Code Ann. § 25-6-5(1)(a) (providing that a transfer is fraudulent if made "with actual intent to hinder, delay, or defraud any creditor of the debtor"); *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"). Therefore, the only remaining issue in this Motion is whether Penedo can establish the affirmative defense that he took the fraudulent transfers at issue in good faith and for reasonably equivalent value provided to Winsome. *See* Utah Code Ann. § 25-6-9(1). Penedo's affirmative defense fails as a matter of law, however, because no admissible evidence can establish that Penedo provided any reasonably equivalent value to Winsome.

Penedo argues that he provided reasonably equivalent value to Winsome when he performed unspecified "lobbying" services pursuant to a written agreement between Penedo and RIO Systems, Inc. ("RIO"). It is undisputed that Winsome is not a signatory to that agreement and that Winsome had no written agreement to make any payments to Penedo. Penedo does not describe the lobbying services he supposedly performed, and has never produced a bill that he sent asking for payment. To argue that these services resulted in a benefit to Winsome, Penedo traces a confusing and illogical trail through various purported and inadequately described oral representations and undocumented "arrangements" that he speculates exist. Such speculation and ill-defined arrangements cannot create material issues of fact. Specifically, Penedo seeks to create an obligation on Winsome where none exists by arguing that, although it is undisputed

that Winsome signed no agreement with Penedo or that obligated it to make the payments at issue, it nevertheless had an undocumented arrangement to be "the money" for certain of RIO's activities. The only support for this tenuous argument is Penedo's own recent Affidavit in which he claims that Robert Andres and Clayton Ballard (who is associated with RIO) made representations from which Penedo understood that Winsome would be making the payments that were RIO's obligation under its agreement with Penedo.

Penedo's argument that his written agreement with RIO was somehow changed to include Winsome as a party by unspecified and vague oral representations is barred by the parol evidence rule, the statute of frauds, and the agreement's integration clause. The law is clear that Penedo cannot attempt to alter the terms of a clear, written, integrated agreement based on speculative extra-contractual statements. *See* *Tangren Family Trust v. Tangren*, 182 P.3d 326, 330 (Utah 2008). Even if this evidence were to be considered, the statute of frauds requires that any agreement by one party to assume the obligation of another, which is what Penedo claims Winsome did, must be in writing. *See* Utah Code Ann. § 25-5-4(1). No such writing exists. Therefore, Penedo's argument is barred and must be rejected without further consideration.

Moreover, even if the Court were to consider Penedo's speculation and his unsupported "understanding" of Winsome's purported arrangement with RIO, there is no admissible evidence showing that Winsome had a legal obligation to make the payments at issue or that it received any benefit from Penedo's "lobbying" services. Penedo's vague and conclusory statements that Andres and Ballard represented that Winsome was "the money" cannot, as a matter of law, support the imposition of any legal obligation on Winsome. In fact, the only firsthand evidence of RIO's actual relationship with Winsome is the testimony of Mr. Ballard, who unequivocally testified that Winsome had no obligation to RIO to pay RIO's debts. *See* Motion at SOF ¶¶ 7-8.

Further, the services Penedo claims to have provided were directed toward a project to build a refinery in Guatemala in which Winsome had no interest, from which Winsome would receive no benefit, and which was never built. Therefore, Winsome received no benefit, and no reasonably equivalent value, in any event, and Penedo's defense must fail for this independent reason.

The admissible evidence makes clear that Penedo provided no benefit to Winsome and that Winsome had no obligation to make the payments at issue to Penedo. Therefore, Penedo cannot prove his affirmative defense and the Receiver's Motion should be granted.

REPLY TO DEFENDANT'S RESPONSES TO STATEMENT OF ELEMENTS AND UNDISPUTED FACTS

Penedo's responses to the Receiver's Statement of Elements and Undisputed Facts does not raise any material factual dispute, as the purported disputes Penedo attempts to raise are irrelevant or unsupported by admissible evidence. Below, the Receiver provides his reply to each of the elements and facts that Penedo attempts to dispute.

1. To prevail on his fraudulent transfer claim, the Receiver must demonstrate that Winsome made a transfer to Penedo "with actual intent to hinder, delay, or defraud any creditor of the debtor." 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).

Defendant's Response: Mr. Penedo does not dispute this element, but refers the Court to 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. . ." It is an absolute defense to an action for fraudulent transfer that the recipient of the transfer took in good faith and for reasonably equivalent value. It is Mr. Penedo's position that he did take in good faith and provided reasonably equivalent value in exchange. This is the main material fact in dispute which precludes summary judgment.

Receiver's Reply: Mr. Penedo does not dispute this element. He makes only a legal argument that he took in good faith and for reasonably equivalent value. This is an affirmative

defense that Penedo must prove and a legal argument, not a material factual dispute that can defeat the Receiver's Motion. As set forth below and in the Receiver's opening Memorandum, the evidence is undisputed that Penedo did not take the transfers at issue for reasonably equivalent value of in good faith.

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

Defendant's Response: Mr. Penedo does not dispute this element

Receiver's Reply: This element is not disputed.

Undisputed Facts Satisfying Applicable Elements of Fraudulent Transfer Claim

3. The undisputed record evidence establishes Winsome operated as a massive Ponzi scheme that was insolvent at the time it made the transfers at issue. *See* Declaration of R. Wayne Klein ("Klein Decl."), attached as Ex. 1, ¶¶ 8-43. Penedo presents no contradictory evidence, nor does he deny this fact. *See* Defendant Roberto E. Penedo's Answers to Plaintiff's First Set of Discovery Requests ("Penedo Responses"), attached as Ex. 2, at Response to Interrogatory 1 (stating that Penedo has no information or knowledge about whether Winsome was a Ponzi scheme or insolvent). Indeed, Robert Andres has recently pleaded guilty to wire fraud in connection with his activities at Winsome. *See* Statement By Defendant in Advance of Plea of Guilty ("Guilty Plea"), attached as Ex. 3. In the Guilty Plea, Andres admits that he "fraudulently obtained millions of dollars from investors by (1) investing the assets and asset allocation of Winsome and (2) misrepresenting the types of investments into which I would place investors' funds." *Id.* ¶ 11. Andres also admits in the Guilty Plea that he falsely represented the total assets of Winsome, disseminated false balance sheets to investors, and that he "distributed 'profits' to Pre-April 2007 Winsome investors that were actually proceeds from new Winsome investors." *Id.*

Defendant's Response: Undisputed with qualification. Mr. Penedo does not dispute that Winsome operated a Ponzi scheme; however, Mr. Penedo denies that he had any knowledge of such a scheme during his business relationships with Winsome or Mr. Andres. Mr. Penedo testified as follows:

> Q. Now, do you understand that Winsome Investment Trust it's been alleged operated as a Ponzi scheme?
>
> A. I never knew that.
>
> Q. But do you understand that it's been alleged that Winsome Investment Trust operated as a Ponzi scheme?

> A. What do you mean "alleged"? I don't understand that word. I never knew about that. And if I understand – at this point, if they – that they were engaged as a Ponzi scheme – that's what you are talking about? At this point I understand it, yes, and I feel myself as one more victim in all of this. I'm very sorry for all the victims, let me tell you, and I feel myself like another victim in all of this too.

See Deposition Transcript of Roberto Penedo at pp. 82-83, attached hereto as Exhibit B. (emphases added).

Receiver's Reply: Mr. Penedo does not dispute the material fact that Winsome operated as a Ponzi scheme. Whether Mr. Penedo knew that Winsome operated as a Ponzi scheme is irrelevant. The undisputed existence of a Ponzi scheme establishes that Winsome made the transfers at issue with fraudulent intent, regardless of whether Mr. Penedo knew of the scheme. *Donell*, 533 F.3d at 770 (recognizing that the "mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud").

4. Penedo admits that he personally received total of $197,000 in payments from Winsome accounts in direct wire transfers between October of 2006 and September of 2008. *See* Ex. 2, Penedo Responses at Responses to Request for Admission 1 and Interrogatory 2.

Defendant's Response: Undisputed with qualification. Mr. Penedo does not dispute that he received a total of $197,000 from Winsome and Andres between October of 2006 and September of 2008; however, those payments consisted of partial payment for reasonably equivalent services provided by Mr. Penedo collectively to Mr. Ballard, RIO, Mr. Andres, and Winsome pursuant to the Refinery Agreement and the agreements and understanding between and among Mr. Penedo on the one hand and Mr. Ballard, RIO, Mr. Andres, and Winsome on the other. See Affidavit of Roberto E. Penedo in Opposition to Plaintiff's Motion for Partial Summary Judgment, attached hereto as Exhibit A ("Penedo Affidavit")

Receiver's Reply: Penedo does not dispute the material fact that he received the fraudulent transfers at issue. As set forth below and in the Receiver's opening Memorandum, there is no evidence that Penedo provided anything of reasonably equivalent value *to Winsome* in exchange for these payments. The purported services Penedo claims to have provided did not result in any benefit to Winsome, nor did Penedo have any agreement or obligation to Winsome to provide services to Ballard, RIO or Andres. Thus, even if Penedo did provide some services

under his agreement with RIO, Winsome received no benefit as required to establish the "good faith" defense.

5. The undisputed evidence establishes that Winsome made these transfers without any obligation to do so and without receiving reasonable equivalent value. Penedo claims that the transfers were made "as payment pursuant to certain Refinery Agreement dated October 23, 2006 between RIO Systems, Inc., Mr. Penedo, and Fundacion Guatemalteco." *See* Ex. 2, Penedo Responses at Response to Interrogatory 5. However, it is undisputed that Winsome is not a signatory to the Refinery Agreement and that the Refinery Agreement only obligates RIO to make any payments to Penedo. *Id.*; *see also* Refinery Agreement, attached as Ex. 4, at ¶ 1.1 ("RIO shall provide, or cause one or more of its affiliates and/or subsidiaries to provide Penedo and/or FundaGuam … such funds as are set forth herein").[1]

Defendant's Response: Disputed. Mr. Andres and Winsome were obligated to pay Mr. Penedo for his lobbying and other services pursuant to the Refinery Agreement and the discussions and agreements between and among Mr. Penedo on one hand and Mr. Ballard, RIO, Mr. Andres, and Winsome on the other. In addition, Mr. Andres and Winsome began to perform pursuant to the Refinery Agreement, and based on the agreements and representations made by Mr. Andres and Winsome, Mr. Andres and Winsome were both obligated to continue to perform such obligations pursuant to the Refinery Agreement.

More specifically, Mr. Penedo was requested to be part of the refinery project by both Mr. Ballard and Mr. Andres because they were interested in what Mr. Penedo had to offer. *See* Penedo Affidavit at ¶ 5, attached hereto as Exhibit A. That is, Mr. Ballard and Mr. Andres wanted Mr. Penedo's services because he was not only from Guatemala and spoke the language, but more importantly, had various connections and relationships with many high ranking Guatemalan government officials and politicians, which relationships were essential in order for Mr. Ballard and Mr. Andres to accomplish the construction of the oil refinery in Guatemala. *Id.* Mr. Ballard and Mr. Andres explained to Mr. Penedo that they were partners working together with the goal of constructing an oil refinery in Guatemala. *See id.* at ¶ 6.

Mr. Ballard and Mr. Andres explained to Mr. Penedo that the projected cost of the proposed refinery project was anticipated to be $7.2 billion. *See id.* at ¶ 9. In 2007, Mr. Penedo as FundaGuam's President, Mr. Ballard as RIO's President, and others, entered into a Memorandum of Understanding regarding the refinery project. *See id.* at ¶¶ 10-12. Mr. Ballard and Mr. Andres made clear to Mr. Penedo that Mr. Ballard and RIO on the one hand, and Mr. Andres and Winsome on the other hand, had an existing relationship and agreement among themselves whereby they were acting as business partners and were holding themselves out as one unified entity. *See id.* at ¶ 13. In fact, Mr. Penedo understood that Winsome did not need to be separately included as a party to the Refinery Agreement, and that Mr. Ballard's signature was all that was necessary as they had made clear to Mr. Penedo repeatedly that they were

[1] Penedo lobbied on RIO's behalf to build a refinery. There has never been any suggestion that the refinery was ever built or even started.

partners and working together as a single entity. As far as Mr. Penedo knew, Winsome and Andres were partners with Clayton Ballard in RIO. *See id.* at ¶ 14.

Thereafter, to accomplish the refinery project, a Refinery Agreement was devised by Mr. Ballard, Mr. Andres, and Mr. Penedo and subsequently executed. *See id*. at ¶ 21. That Refinery Agreement was formally executed by Mr. Ballard as the President of RIO, Mr. Penedo as an individual, and the legal representative of FundaGuam. *See* id. at ¶ 22. However, as with the Memorandum of Understanding, although Mr. Andres and Winsome did not formally sign the Refinery Agreement, Mr. Ballard and RIO on the one hand, and Mr. Andres and Winsome on the other presented themselves as partners, and already had an existing relationship and agreement whereby they were business partners and were holding themselves out as one unified entity. *See id*. at ¶ 24. Accordingly, Mr. Penedo understood that only Mr. Ballard's signature was required on the Refinery Agreement. *See* id. at ¶ 24. Mr. Ballard and Mr. Andres repeatedly and consistently told Mr. Penedo, both before, during, and after the execution of the Refinery Agreement, that Mr. Andres and Winsome were going to be making the payments to Mr. Penedo pursuant to the Refinery Agreement. *See id.* at ¶ 27. Mr. Ballard and Mr. Andres explained that "Winsome is the money. RIO is the logistics." *See id*. at ¶ 28. Mr. Ballard, RIO, Mr. Andres, and Winsome agreed that they would compensate FundaGuam separately from Mr. Penedo's compensation because Mr. Penedo and FundaGuam were separate and distinct. *See id*. at ¶ 30.

Pursuant to the initial Refinery Agreement and subsequent discussions with Mr. Ballard and Mr. Andres, Mr. Ballard, RIO, Mr. Andres, and Winsome agreed to pay Mr. Penedo a three percent (3%) interest in the completed refinery project in exchange for Mr. Penedo's lobbying and other services. *See id*. at ¶ 29. After further discussions between Mr. Ballard, RIO, Mr. Andres, and Winsome, rather than the initial compensation agreed to, Mr. Ballard, RIO, Mr. Andres, and Winsome agreed instead that they would pay me $4,000,000.00 up front, plus a one percent (1%) interest in the completed refinery project, plus reimbursement for all travel and other miscellaneous general expenditures Mr. Penedo was required to make while providing the agreed-upon services. *See id*. at ¶ 31. Mr. Penedo accepted those changes to the compensation from Mr. Ballard, RIO, Mr. Andres, and Winsome. *See id*. at ¶ 32.

Immediately after the Refinery Agreement was signed in October of 2006, and just as Mr. Ballard, RIO, Mr. Andres, and Winsome repeatedly and continuous explained, Mr. Andres and Winsome began making payments directly to Mr. Penedo for his personal services, in accordance with the verbal modification of the Refinery Agreement and the other discussions and agreements between and among Mr. Penedo on the one hand, and Mr. Ballard, RIO, Mr. Andres, and Winsome on the other. *See id*. at ¶ 42. In fact, Mr. Andres and Winsome continued making payments to Mr. Penedo as agreed pursuant to the Refinery Agreement from October of 2006 until approximately September of 2008, at which time the payment abruptly stopped. *See id*. at ¶ 48. However, Mr. Penedo provided and completed all of the extensive lobbying and other services as requested by Mr. Ballard, RIO, Mr. Andres, and Winsome and as agreed pursuant to the Refinery Agreement and the other discussions and agreements between and among Mr. Ballard, RIO, Mr. Andres, and Winsome on the one hand, and Mr. Penedo on the other. *See id*. at ¶ 49. Although Mr. Penedo completed all of the extensive lobbying and other services requested by Mr. Ballard, RIO, Mr. Andres, and Winsome, he has only been compensated $197,000.00 of the agreed upon $4,000,000.00 plus the 1% interest in the completed refinery project and

reimbursements for his travel and other miscellaneous expenses he was required to incur to complete his portions of the contract. *See id.* at ¶ 50. Therefore, Mr. Penedo is still owed $3,803,000.00 plus a 1% interest in the completed refinery project (if it is ever completed) and reimbursements for all of his travel and other required miscellaneous expenses. *See id*. at ¶ 51.

With respect to Plaintiff's Footnote 2 of Paragraph No. 5, although the refinery has not yet been built, Mr. Penedo completed all of the extensive lobbying and other services requested by Mr. Ballard, RIO, Mr. Andres, and Winsome pursuant to the terms of the Refinery Agreement and Mr. Andres and Winsome began paying Mr. Penedo for those services. *See id*. at ¶ 50. Payment for Mr. Penedo's services was not contingent upon the actual construction of the refinery. *See id*. at ¶ 52. Regardless of whether the refinery was built, Mr. Penedo provided all of the services requested of him collectively by Mr. Ballard, RIO, Mr. Andres, and Winsome which was designed to be accomplished prior to any construction. *See id*. at ¶¶ 50-53.

Receiver's Reply: Penedo does not dispute the relevant facts that Winsome was not a signatory to any of the agreements pursuant to which Penedo claims he was owed payment and that there is no actual evidence of any agreement between RIO and Winsome by which Winsome would assume RIO's obligations. Penedo vaguely and repeatedly claims that Ballard and Andres "represented" and "made clear" that Winsome and RIO had some type of relationship (which Penedo cannot support or define) and that he "understood" that Winsome was "the money." Penedo also fails to provide any detail or support for his unfounded belief, such as identifying specific statements, when such statements were made, by whom, or why he believed Winsome had any involvement in the project at all. Penedo saying he believed Winsome had some relationship with RIO cannot, as a matter of law, create a factual dispute that Winsome had a legal obligation to pay him for his lobbying services for RIO. Penedo's self-serving and after-the-fact "understanding" cannot be used to contradict the plain language of the written agreements. Any claimed "understanding" based on extra-contractual statements is also barred by the statute of frauds, the parol evidence rule, and the plain language of the agreements themselves.

6. In prior briefing, Penedo has also referred to a Memorandum of Understanding ("MOU") related to the Refinery project that was entered into by China Railway HuaChuang United Investment Co., Ltd., Pursca Investment Group, Ltd., RIO, and FundaGuam in 2007. *See, e.g.*, Defendant's Motion for Partial Summary Judgment (doc. 21) at 5-6. However, like the Refinery Agreement, Winsome is not a signatory to the MOU. *See* Receiver's Opposition to Defendant Roberto E. Penedo's Motion for Partial Summary Judgment (doc. 22) at vii, xix-xx.

Defendant's Response: Undisputed in part and disputed in part. It is undisputed that Winsome did not physically sign the MOU. However, based upon the repeated and continuous agreements, understandings, and representations made by Mr. Ballard, RIO, Mr. Andres, and Winsome, and the partnership between Mr. Ballard and RIO on the one hand, and Mr. Andres and Winsome on the other, Mr. Penedo understood that Mr. Ballard's signature was on behalf of Mr. Ballard, RIO, Mr. Andres, and Winsome as partners of the same entity. Accordingly, Mr. Penedo understood that Mr. Andres and Winsome were obligated under the MOU. For more explanation and citations to the record, please refer to Mr. Penedo's Response to Paragraph No. 5 above and Mr. Penedo's affidavit, attached hereto as Ex. A.

Receiver's Reply: Penedo does not dispute the material fact that Winsome is not a signatory to the MOU. Accordingly, Winsome cannot have any obligation to pay Penedo under the MOU. Penedo's only basis to assert that Winsome had such an obligation is that he claims to have "understood" Ballard's signature to be on behalf of Winsome and others. There is not a shred of evidence to support this argument. Winsome is not mentioned in the MOU and never undertook any legally binding obligation to pay Penedo. Whether Penedo claims to have "understood" something that is not supported by any of the cited agreements or evidence is irrelevant. Such a claimed "understanding" is also barred by the statute of frauds and parol evidence rule. *See also* Receiver's Reply to Defendant's Response to Paragraph 5. *supra*.

7. Indeed, RIO's owner has provided affidavit testimony that RIO, FundaGuam, and Penedo are the only parties to the Refinery Agreement and that Winsome has never been affiliated with RIO. *See* Affidavit of Clayton Lynn Ballard, attached as Ex. 5, ¶¶ 7, 12. Mr. Ballard also testified that in October of 2012, Penedo approached him and asked that he sign an affidavit stating that RIO had assigned its rights in the Refinery Agreement to Winsome, but Mr. Ballard refused to sign Penedo's affidavit because it is not true or accurate; RIO never intended to assign its rights under the Refinery Agreement to Winsome. *Id.* ¶¶ 8-11.

Defendant's Response: Disputed. Mr. Penedo disputes that Winsome was not a party to the Refinery Agreement and that Winsome has never been affiliated with RIO. As set forth above, although neither Mr. Andres nor Winsome physically signed the Refinery Agreement,

Mr. Penedo was repeatedly and consistently told by both Mr. Ballard and Mr. Andres that Mr. Andres and Winsome did not need to sign the Refinery Agreement because Mr. Ballard and RIO on the one hand, and Mr. Andres and Winsome on the other, already had an existing relationship and agreement whereby they were business partners and were holding themselves out as one unified entity. *See* Penedo Affidavit, attached hereto as Exhibit A, at ¶ 23. For more explanation and citations to the record, please refer to Mr. Penedo's Response to Paragraph No. 5 above and Mr. Penedo's affidavit, attached hereto as Ex. A.

Mr. Penedo also disputes that RIO never intended to assign its rights under the Refinery Agreement to Winsome. In any event, however, such a statement is irrelevant to the issues set forth in Plaintiff's Memo. As explained, Mr. Penedo was asked collectively by Mr. Ballard, RIO, Mr. Andres, and Winsome to perform lobbying and other services for the refinery project. *See* Penedo Affidavit. Mr. Penedo's services were for the collective benefit of Mr. Ballard, RIO, Mr. Andres, and Winsome. *See id*. at ¶ 8. As was repeatedly and consistently explained to Mr. Penedo, Mr. Ballard and RIO on the one hand, and Mr. Andres and Winsome on the other, were partners in their attempt to build the refinery in Guatemala. *See id*. at ¶¶ 6, 13, 14, 24, & 27. However, Mr. Andres and Winsome took on the responsibility to pay Mr. Penedo for his services and expenses pursuant to the Refinery Agreement. *See id*. ¶¶ 7, 28-29, 38, & 42. Pursuant to that obligation, Mr. Andres and Winsome began to pay Mr. Penedo for my services pursuant to the Refinery Agreement. *See id*. at ¶¶ 39, 43, & 49. For more explanation and citations to the record, please refer to Mr. Penedo's Response to Paragraph No. 5 above and Mr. Penedo's affidavit, attached hereto as Ex. A

Receiver's Reply: Penedo does not dispute the material fact that he approached Ballard and asked him to sign a declaration that RIO assigned its obligations to Winsome, which Ballard refused to sign because it was false. Penedo's Response is otherwise unsupported and cannot contradict the plain language of the agreements at issue. *See* Receiver's Reply to Defendant's Response to Paragraph 5, *supra*.

8. Mr. Ballard also testified at his deposition that "RIO does not owe anything to Winsome." *See* Excerpts from Deposition of Clayton Lynn Ballard ("Ballard Depo."), attached as Ex. 6, at 20:3-24 (explaining that RIO previously entered an agreement with Bob Andres to pay him for his past services that predated the Refinery Agreement, but has no obligation to Winsome); *id*. at 99:3-10 ("Q. As far as you know, under the Refinery Agreement, the Amendments to the Refinery Agreement, and the MOU, did Winsome Investment Trust have any obligation to anyone?" "A. No written obligations. Nothing under contract, no." "Q. There are no contractual obligations?" "A. No."); *see also id*. at 62:21-22 ("Winsome had nothing to do with the agreement that RIO reached with Bob Andres"); *id*. at 69:4-6 ("Q. Did RIO Systems ever authorize Winsome Investment Trust to Act on its behalf?" "A. No").

Defendant's Response: Mr. Penedo does not dispute that the quoted language set forth in Plaintiff's Paragraph 8 is accurately quoted; however, Mr. Penedo disputes the accuracy of the

information set forth in Paragraph 8. The statement that "RIO does not owe anything to Winsome" is misleading and incorrect. Although Plaintiff is correct that Mr. Ballard had a Promissory Note with Mr. Andres, Mr. Andres and Winsome are one in the same. Mr. Ballard explained:

> Bob Andres functioned as [RIO's] attorney. Bob Andres elected to incorporate or whatever he did with Winsome, as an entity that was working with a lot of different groups and a lot of different companies and countries.
>
> I assume he did that for these reasons, so my relationship was with Bob Andres. Winsome did not create the documents, Bob Andres created the documents, as a lawyer.
>
> * * *
>
> When Winsome came into play, this was not due to Winsome. That was his election in going with his business.

See Ex. C Ballard depo at pp. 21, 22-23.

Mr. Andres and Winsome are indistinguishable, and have been treated as such by Plaintiff in this case and others. The receiver seized all assets of both Winsome and Andres, and has sued Mr. Penedo as receiver of the assets of both Winsome and Andres. As explained by the Receiver, "Winsome described itself as a private trust, headquartered in Houston, Texas. Winsome was run by Andres, who had complete and sole authority over the trust." *See* Declaration of Wayne Klein at ¶ 23, attached as Exhibit 1 to Plaintiff's Memo.

Receiver's Reply: Penedo does not dispute the fact that Ballard, the only party on record with direct knowledge of the relationship between RIO and Winsome, testified that Winsome owed RIO no obligation and had no agreement with RIO. Moreover, the language quoted by Penedo does not establish, or even imply that "Mr. Andres and Winsome are one and the same." In fact, it establishes the opposite. Ballard states that "Winsome did not create the documents, Bob Andres created the documents as a lawyer" making clear that Andres was *not* acting for Winsome when he created documents. The remaining testimony also makes clear that whatever actions Andres took, they were taken as a lawyer for RIO or individually, but not for Winsome. Moreover, that the Receiver was appointed for both Winsome and Andres' assets does not establish that Andres and Winsome were "one and the same" or provide any evidence to support

any obligation by Winsome to make the payments at issue to Penedo. Indeed, even if Andres and Winsome could be treated as "one and the same," which they cannot, there is no evidence that Andres owed Penedo any obligation to make the payments at issue or that he received any benefit. Further, the Receiver is only appointed over the assets of Andres, and not his liabilities. Thus, this Response does not create any disputed issue of material fact as to whether Penedo provided reasonably equivalent value to Winsome in any event. *See also* Receiver's Reply to Defendant's Response to Paragraph 5, *supra*.

Elements of Unjust Enrichment Claim

9. 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 defendant, an appreciation or knowledge by the defendant of the benefit, and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant 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).

Defendant's Response: Undisputed for purposes of this motion

Receiver's Reply: This paragraph is not disputed.

Undisputed Facts Satisfying Applicable Elements of Unjust Enrichment Claim

10. It is undisputed that Penedo knowingly received transfers in the amount of $197,000. ¶ 4, *supra*.

Defendant's Response: Undisputed for purposes of this motion.

Receiver's Reply: This element is undisputed.

11. It is undisputed that that Winsome operated as a Ponzi scheme, that there are innocent investors who collectively lost millions of dollars through Winsome, and that Penedo received a benefit from these fraudulently received funds. ¶ 3, *supra*; Ex. 1, Klein Decl. ¶¶ 8-43.

Defendant's Response: Disputed. There is no evidence that Mr. Penedo directly received any benefit from monies fraudulently received from investors who lost millions of dollars through Winsome. Mr. Penedo does not dispute that it was eventually discovered that Mr. Andres and Winsome operated a Ponzi scheme and fraudulently obtained millions of dollars

thereby from investors; however, Mr. Penedo denies that he received an unjust benefit from those fraudulently received funds. Instead, Mr. Penedo provided reasonably equivalent services for all monies that he received from Mr. Andres and Winsome. In fact, Mr. Penedo provided all required services which entitled him to $4 million in payment plus a 1% interest in the completed refinery project in addition to reimbursements for miscellaneous expenses in relation to the performance of his services. The $197,000.00 that Mr. Penedo received from Mr. Andres and Winsome is only a fraction of the monies Winsome owes to Mr. Penedo for the completion of the agreed upon services that Mr. Penedo performed collectively for Mr. Ballard, RIO, Mr. Andres, and Winsome. Mr. Penedo provided all services requested by Mr. Ballard, RIO, Mr. Andres, and Winsome, and is therefore entitled to not only retain the $197,000 that he received, but is entitled to payment for the remainder of the monies owed by Mr. Andres and Winsome for such completed services, which amounts to more than $3,803,000.00. *See* Penedo Affidavit at ¶¶ 50-52. *See Also*, Response to Paragraph 5, *supra*.

Receiver's Reply: Penedo does not dispute the material facts that Winsome operated as a Ponzi scheme, that Winsome received millions of dollars from innocent defrauded investors, or that Penedo was paid with those funds. Penedo only argues that he provided services in exchange for the payments he received from an admitted Ponzi scheme. However, as set forth in this Reply and in the Receiver's opening Memorandum, Winsome had no obligation to make any payment to Penedo and received no reasonably equivalent value for the payments he received from fraudulently obtained funds.

RECEIVER'S RESPONSE TO DEFENDANTS STATEMENT OF ADDITIONAL FACTS

Below the Receiver provides his response to each numbered paragraph in Defendants' "Statement of Additional Facts."

1. Beginning in 2007, Mr. Ballard, who was RIO's President at the time, and Mr. Andres, who was the creator and Trustee of Winsome, began discussions with Mr. Penedo about joining a potential joint venture with the goal of building an oil refinery in Guatemala, my home country. *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue. The only remaining issue is whether Penedo provided reasonably equivalent value to Winsome for the payments he received. That Andres was trustee for Winsome and had discussions with Penedo, even if true, has no bearing on whether Penedo provided value to Winsome.

2. Mr. Ballard and Mr. Andres both requested that Mr. Penedo be part of the proposed joint venture because they were both interested in what he had to offer. That is, Mr. Ballard and Mr. Andres wanted Mr. Penedo's services because he was not only from Guatemala and spoke the language, but more importantly, had various connections and relationships with many high ranking Guatemalan government officials and politicians, which relationships were essential in order to accomplish the construction of an oil refinery in Guatemala. *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue. The only remaining issue is whether Penedo provided reasonably equivalent value to Winsome for the payments he received. That Ballard and Andres asked Penedo to "be part of the proposed joint venture," even if true, has no bearing on whether Penedo provided value to Winsome. Moreover, the undisputed evidence demonstrates that Winsome was never part of a joint venture with Penedo. *See* Defendant's Additional Fact No. 9 (identifying signatories to MOU that do not include Winsome); Defendant's Additional Fact No. 16 (identifying signatories of Refinery Agreement as Penedo, FundaGuam, and Ballard).

3. Mr. Ballard and Mr. Andres explained that they were partners working together with the goal of constructing the proposed oil refinery project. *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue and unsupported. Even if Ballard and Andres "explained that they were partners," a fact for which Penedo provides no specific detail or support, that assertion cannot demonstrate that Winsome received any reasonably equivalent value for the fraudulent transfers it made to Penedo. There is no evidence that Winsome ever entered into any agreement obligating it to make the payments to Penedo or demonstrating any benefit Winsome received in exchange.

4. In fact, at all times, Mr. Ballard and Mr. Andres repeatedly and continuously explained that "Winsome is the money. RIO is the logistics." *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue and unsupported. Even if Ballard and Andres "explained that Winsome is the money. RIO is the logistics" a fact for which Penedo provides no specific detail or support, that assertion cannot

demonstrate that Winsome received any reasonably equivalent value for the fraudulent transfers it made to Penedo. There is no evidence that Winsome ever entered into any agreement with RIO or any other party obligating it to make the payments or demonstrating any benefit Winsome received in exchange for the payments it made to Penedo. Also, it is undisputed that subsequent to any alleged discussions that Penedo asserts were held with Winsome, Penedo entered an additional written agreement. This later agreement regarding the refinery project was with *RIO only*; despite all the claims that Penedo makes regarding Winsome's role; Winsome was not made a party to this agreement.

5. Mr. Penedo's services were for the collective benefit of Mr. Ballard, RIO, Mr. Andres, and Winsome. *See* Exhibit A.

Receiver's Response: Penedo provides no support for any benefit to Winsome. There is no evidence of any benefit to Winsome from Penedo's unspecified services under an agreement with RIO for a refinery that was never built.

6. Mr. Penedo was told by both Mr. Ballard and Mr. Andres that the projected cost of the proposed refinery project was anticipated to be Seven Billion, Two Hundred Million Dollars ($7,200,000,000.00). *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue.

7. Beginning in 2006, China Railway HuaChuang United Investment Co., Ltd. ("China Railway"), Pursca Investment Group, Ltd. ("Pursca"), RIO, Mr. Ballard, Winsome, Mr. Andres, and FundaGuam arrived at an agreement to proceed with the oil refinery project in Guatemala. *See* Exhibit A.

Receiver's Response: There is no evidence that Winsome arrived at any agreement with FundaGuam or Penedo. In fact, the undisputed evidence demonstrates that the only agreements Penedo relies upon did not include Winsome. *See* Defendant's Statement of Additional facts ¶¶ 9, 16.

8. To formalize the parties' agreement, a Memorandum of Understanding was executed in 2007. *See* Memorandum of Understanding, attached hereto as Exhibit D.

Receiver's Response: This statement is irrelevant. There is no evidence that Winsome was part of the MOU. The undisputed evidence demonstrates, and Penedo admits, that Winsome was not a signatory to the MOU. *See* Defendant's Statement of Additional Facts ¶ 9; Opp. at Ex. D.

9. The Memorandum of Understanding was executed by China Railway, Pursca, Mr. Ballard as RIO's President, and myself as FundaGuam's President. *See* Exhibit D.

Receiver's Response: As Penedo admits, Winsome was not a signatory to the MOU.

10. Prior to Mr. Penedo's signing of the Memorandum of Understanding, Mr. Ballard and Mr. Andres made clear to Mr. Penedo that Mr. Ballard and RIO on the one hand, and Mr. Andres and Winsome on the other hand, had an existing relationship and agreement among themselves whereby they were acting as business partners and were essentially one unified entity. *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue. Whether Ballard and Andres had a separate "relationship" or "agreement" has no bearing on any obligation to Penedo. Penedo points to no evidence of any written or specific legal agreement obligating Winsome to make any payment to him and the undisputed evidence demonstrates that only RIO, and not Winsome, entered into an agreement with Penedo. Moreover, even if Ballard, Andres, RIO, and Winsome had some relationship prior to Penedo entering an agreement with RIO, no such relationship could provide Penedo with any basis to require Winsome to make the payments at issue to him under his agreements with other parties. It is also undisputed that after any alleged statements, Penedo signed the MOU with parties other than Winsome.

11. As a result of the representations of Mr. Ballard and Mr. Andres, Mr. Penedo understood that Winsome did not need to be separately included as a party to the Refinery Agreement, and that Mr. Ballard's signature was all that was necessary as they had made clear repeatedly that they were partners and working together as a single entity. As far as Mr. Penedo knew, Winsome and Andres were partners with Mr. Ballard in RIO. *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue. Penedo's speculative "understanding" is not relevant to whether Winsome received reasonably equivalent value for the transfers it made to Penedo. The Refinery Agreement clearly identifies only RIO, Penedo, and FundaGuam as its signatories. Thus, any speculative belief by Penedo that Winsome would benefit from his "lobbying" services or be under any obligation to pay him was unreasonable as a matter of law and is irrelevant to the parties' actual obligations.

12. Once the Memorandum of Understanding was executed, the parties thereto formed a Nevada corporation known as GPR Holdings, LLC ("GPR Holdings"). *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue. The Receiver notes that Winsome is not a party to the MOU.

13. Initially, RIO brought FundaGuam and Mr. Penedo into the Guatemalan refinery project to assist Mr. Ballard, RIO, Mr. Andres, Winsome, and what later became GPR Holdings in obtaining the government approvals through lobbying and other unique services that Mr. Penedo was able to provide as a result of the various connections and relationships he had with many high ranking government officials and politicians in Guatemala. *See* Exhibit A.

Receiver's Response: Penedo provides no support for his assertion that RIO solicited FundaGuam and Mr. Penedo to assist *Winsome*. The undisputed evidence demonstrates that Winsome was not a party to the MOU or the Refinery Agreement. Further, there is no evidence that Winsome ever received any benefit from Penedo's services.

14. FundaGuam is a nonprofit Guatemalan humanitarian aid foundation that provides various forms of humanitarian aid to the people of Guatemala, and has close contacts with various members of the Guatemalan government. *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue.

15. As President of FundaGuam, and also from previous humanitarian and immigration reform work he had done, Mr. Penedo had close personal contacts with various members of the Guatemalan government, which contacts were considered critical to the success of the refinery project. *See* Exhibit A.

Receiver's Response: This paragraph is irrelevant to the Motion at issue. There is also no evidence that the refinery project was ever undertaken or that Winsome ever received any benefit from Penedo's "lobbying" services.

16. Because of his close personal contacts with Guatemalan government officials and because of his position with FundaGuam, Mr. Ballard, Mr. Andres, and Mr. Penedo came to an understanding regarding the refinery project and the Refinery Agreement was subsequently executed. *See* Exhibit A; *see also,* Refinery Agreement, attached hereto as Exhibit E.

Receiver's Response: Penedo provides no support for any argument that Andres was a party to the Refinery Agreement. In fact, Penedo admits that the only signatories to that Agreement were RIO, Penedo, and FundaGuam. *See* Defendant's Statement of Additional Facts ¶ 17.

17. The Refinery Agreement was formally signed by Mr. Ballard as the President of RIO, Mr. Penedo as an individual, and the legal representative of FundaGuam. *See* Exhibit A.

Receiver's Response: The Receiver notes that Penedo admits that Winsome was not a signatory of the Refinery Agreement.

18. Mr. Ballard, RIO, Mr. Andres, and Winsome entered into a Refinery Agreement with Mr. Penedo both individually and with FundaGuam. *See* Exhibit A.

Receiver's Response: This paragraph is false and unsupported. The Refinery Agreement was entered only by RIO, Penedo, and FundaGuam. *See* Opp. at Ex. E, pp. 1, 13. Neither Winsome nor Andres is a signatory to this Agreement and Penedo's claim to the contrary is unsupported.

19. As with the Memorandum of Understanding, although Mr. Andres and Winsome did not formally sign the Refinery Agreement, Mr. Penedo was repeatedly and consistently told by both Mr. Ballard and Mr. Andres that Mr. Andres and Winsome did not need to sign the Refinery Agreement because Mr. Ballard and RIO on the one hand, and Mr. Andres and Winsome on the other, already had an existing relationship and agreement whereby they were business partners and were holding themselves out as one unified entity. *See* Exhibit A.

Receiver's Response: Penedo fails to provide any support for his claim that he was told that Ballard and Andres had a separate relationship or agreement. Penedo fails to point to any evidence of what precisely was said, when it was said, or how any claimed statement could impose an obligation on Winsome under an Agreement to which it was not a signatory. Further, even if Andres and Ballard had some independent agreement among themselves, of which there is no evidence, such an agreement would have no effect on the plain language of the Refinery Agreement, which was undisputedly signed only by RIO, Penedo, and FundaGuam. There is no evidence that Winsome was a signatory to or obligated under that Agreement.

20. Mr. Andres was so involved in the proposed project that he devised and drafted the Refinery Agreement. *See* Exhibit A.

Receiver's Response: This Paragraph is irrelevant to the Motion at issue. Whether Andres assisted in drafting the Refinery Agreement has no bearing on whether Winsome received reasonably equivalent value in exchange for its payments to Penedo. It is undisputed that Winsome is not a signatory to the Refinery Agreement and Penedo provides no evidence as to how Andres' participation in the drafting of that Agreement, even if true, could demonstrate any reasonably equivalent value to Winsome. Moreover, Ballard's testimony, cited by Pendeo above, makes clear that any involvement Andres had was as a lawyer for RIO or individually, not on behalf of Winsome. *See* Defendant's Response to SOF ¶ 8.

21. Mr. Ballard and Mr. Andres explained to Mr. Penedo, both before, during, and after the execution of the Refinery Agreement, that Mr. Andres and/or Winsome were going to be making the payments to me pursuant to the Refinery Agreement. *See* Exhibit A.

Receiver's Response: This Paragraph further demonstrates the Receiver's entitlement to summary judgment. That Winsome purportedly paid RIO's obligation under the Refinery Agreement only demonstrates that Winsome made the payments at issue without any obligation to do so, as only RIO was a signatory to the Refinery Agreement. That is precisely why the

payments were fraudulent and made without reasonably equivalent value to Winsome. Winsome's purported payment of a debt of a third party cannot satisfy the requirement of reasonably equivalent value. *See* *Dahnken, Inc. v. Wilmarth*, 726 P.2d 420, 422 (Utah 1986) ("Satisfaction of an obligation owed the transferee by a third party does not qualify as fair consideration" under UFTA); *see also* *In re Whaley*, 229 B.R. 767, 775 (Bankr. D. Minn. 1999) ("A payment made solely for the benefit of a third party, such as a payment to satisfy a third party's debt, does not furnish reasonably-equivalent value to the debtor") (citing *In re Bargfrede*, 117 F.3d 1078, 1080 (8th Cir. 1997)).

22. Mr. Ballard and Mr. Andres again explained that "Winsome is the money. RIO is the logistics." *See* Exhibit A.

Receiver's Response: *See* Response to Defendant's additional fact 21, *supra*.

23. Pursuant to the initial Refinery Agreement and subsequent discussions with Mr. Ballard and Mr. Andres, Mr. Ballard, RIO, Mr. Andres, and Winsome agreed to pay Mr. Penedo a three percent (3%) interest in the completed refinery project in exchange for his lobbying and other services. *See* Exhibit A.

Receiver's Response: Penedo provides no evidence that Winsome agreed to make these payments. Only RIO is a party to the Refinery Agreement. There is also no evidence that Winsome received any benefit from these payments.

24. After further discussions, it was agreed between Mr. Ballard, RIO, Mr. Andres, Winsome, and Mr. Penedo, rather than the initial compensation agreed to, Mr. Ballard, RIO, Mr. Andres, and Winsome agreed instead that they would pay Mr. Penedo a total of $4,000,000.00 up front, plus a one percent (1%) interest in the completed refinery project, plus reimbursement for all travel and other miscellaneous general expenditures Mr. Penedo was required to make while providing the agreed-upon services. *See* Exhibit A.

Receiver's Response: Penedo provides no evidence that Winsome agreed to make these payments. Only RIO is a party to the Refinery Agreement. There is also no evidence that Winsome received any benefit from these payments.

25. Mr. Andres and his entity, Winsome, were involved in the Guatemala refinery project from the very beginning – dating back to when Mr. Penedo was first approached about the project in 2006. *See* Exhibit A.

Receiver's Response: This Paragraph is irrelevant. Whether Andres or Winsome was "involved" in the refinery project, even if true, has no bearing on whether Winsome received reasonably equivalent value for its payments to Penedo. It is undisputed that the refinery project was never completed and that Winsome received no benefit therefrom. Accordingly, even if Winsome had been "involved" in the project, that involvement provided no reasonably equivalent value. Moreover, Penedo's own cited evidence demonstrates that any participation Andres had in the refinery project was as a lawyer for RIO or individually, not on behalf of Winsome. *See* Defendant's Response to SOF ¶ 8.

26. Specifically, Mr. Penedo repeatedly observed that Mr. Andres and Winsome were present at, or at least participated in, most if not all of the refinery project meetings; they were copied on virtually all correspondence involving the refinery project; and they participated in virtually every matter related thereto. *See* Exhibit A.

Receiver's Response: Penedo provides no support for his assertion that Winsome "participated" in the refinery project. Specifically, he does not explain why he believed any participation was on behalf of Winsome or who represented Winsome in the claimed participation. Significantly, even if Winsome "participated" in the project, the undisputed evidence demonstrates that Winsome was not a party to the Refinery Agreement and there is no evidence that Winsome had any obligation to make the payments at issue to Penedo or that it received any reasonably equivalent value in exchange for those payments. Moreover, Penedo's own cited evidence demonstrates that any participation Andres had in the refinery project was as a lawyer for RIO or individually, not on behalf of Winsome. *See* Defendant's Response to SOF ¶ 8.

27. In addition, Mr. Penedo observed that Mr. Andres and Winsome paid all of the expenses that Mr. Penedo was aware of that were incurred by Mr. Ballard, RIO, Mr. Andres, and Winsome with respect to the Guatemala refinery project, except for the money that is still owed to Mr. Penedo. *See* Exhibit A.

Receiver's Response: This Paragraph is irrelevant to the present Motion. Whether Winsome paid the expenses of Ballard, RIO, or Andres has no bearing on whether it received reasonably equivalent value in exchange for the fraudulent transfers it made to Penedo. Indeed, the fact that Winsome made these payments that it had no obligation to make only supports the Receiver's claims.

28. Mr. Ballard, RIO, Mr. Andres, and Winsome repeatedly explained to and assured Mr. Penedo, beginning from the outset of the refinery project back in 2006, that Mr. Andres and Winsome were responsible to pay all expenses incurred during the course of the refinery project. *See* Exhibit A.

Receiver's Response: This Paragraph further demonstrates the Receiver's entitlement to summary judgment. That Winsome purportedly paid RIO's obligations under the Refinery Agreement only demonstrates that Winsome made the payments at issue without any obligation to do so, as only RIO was a signatory to the Refinery Agreement. That is precisely why the payments were fraudulent and made without reasonably equivalent value to Winsome. Winsome's purported payment of a debt of a third party cannot satisfy the requirement of reasonably equivalent value. Moreover, Penedo provides no detail about what was said, when, by whom, or why he believes any statements were made on behalf of Winsome.

29. Mr. Penedo later learned that RIO had provided Mr. Andres with a promissory note for $20,256,000 that was given in exchange for Mr. Andres' role in various projects, including the refinery project. The note was payable upon the successful completion of any of several projects on which the two of them were involved, including the refinery project. *See* Promissory Note, attached hereto as Exhibit F.

Receiver's Response: This Paragraph is irrelevant to the present Motion and incorrect. The Promissory Note attached to Defendant's Opposition as Exhibit F is not a note between RIO

and Andres, but appears to be a note between Native American Energy Group, Inc. and Howard Patron that is unrelated to this case. *See* Opp. at Ex. F. Penedo appears to be referring to a different Promissory Note payable from RIO to Andres in his personal capacity, a copy of which is attached hereto as Exhibit A. However, Winsome is not a party to that note, which shows, at most, that RIO owed a contingent debt to Andres. It does not show any obligation by Winsome to make payments to Penedo, nor does it identify any benefit Winsome received for those payments. The fact that RIO owed Andres money does not explain why Winsome received value for Penedo's lobbying services. Moreover, it is undisputed that the refinery was never built, and therefore no benefit was received by anyone as a result of the Promissory Note.

30. Those repeated explanations and assurances were confirmed once Mr. Andres and Winsome began to make multiple payments directly to Mr. Penedo for the services that he was providing pursuant to the Refinery Agreement. *See* Exhibit A.

Receiver's Response: This Paragraph further demonstrates the Receiver's entitlement to summary judgment. That Winsome purportedly paid RIO's obligation under the Refinery Agreement only demonstrates that Winsome made the payments at issue without any obligation to do so, as only RIO was a signatory to the Refinery Agreement. That is precisely why the payments were fraudulent and made without reasonably equivalent value to Winsome. Winsome's purported payment of a debt of a third party cannot satisfy the requirement of reasonably equivalent value. *See* *Dahnken, Inc. v. Wilmarth*, 726 P.2d 420, 422 (Utah 1986) ("Satisfaction of an obligation owed the transferee by a third party does not qualify as fair consideration" under UFTA); *see also* *In re Whaley*, 229 B.R. 767, 775 (Bankr. D. Minn. 1999) ("A payment made solely for the benefit of a third party, such as a payment to satisfy a third party's debt, does not furnish reasonably-equivalent value to the debtor") (citing *In re Bargfrede*, 117 F.3d 1078, 1080 (8th Cir. 1997)).

31. During Mr. Ballard's deposition on or about April 12, 2013 wherein Mr. Ballard explained that Mr. Andres and/or Winsome was responsible to ensure that Mr. Penedo and others were paid for expenses incurred pursuant to the Refinery Agreement. *Ballard Dep*. 71:24-72:11; 74:8-19; 32:24-33:4, attached hereto as Exhibit C.

Receiver's Response: Penedo mischaracterizes the cited testimony. Ballard actually testified that *Andres* paid some expenses and that he had no understanding of whether those payments involved Winsome. In fact, Ballard never testified in the cited excerpts that Winsome made any payments, but referred only to payments by Andres. *See* Ballard Dep. 32:24-33:4; 71:24-72:11; 74:8-19, attached to Opp. as Ex. C.

32. During his deposition, Mr. Ballard also testified that Winsome's incentive for making payments to Mr. Penedo and Fundaguam was to be paid on the Promissory Note. Ballard Dep. 72:18-22. attached hereto as Exhibit C.

Receiver's Response: This statement mischaracterizes Ballard's testimony. Ballard was asked if he had any idea why "Bob Andres or Winsome Investment Trust would have been making payments to Fundaguam or Roberto," thus, it was not clear which party his response referred to. *See* Ballard Dep. 72, attached to Opp. as Ex. C. Moreover, it is undisputed that the Promissory Note was executed by Andres only. It is also undisputed that the refinery project was never completed. That Andres had a contingent Promissory Note executed in his personal capacity that was never paid cannot demonstrate any benefit to Winsome.

33. Immediately after the Refinery Agreement was signed in October of 2006, and just as Mr. Ballard, RIO, Mr. Andres, and Winsome had repeatedly and continuously explained, Mr. Andres and Winsome began making payments directly to Mr. Penedo for his personal services, in accordance with the verbal modification of the Refinery Agreement and the other discussions and agreements between and among Mr. Penedo on the one hand, and Mr. Ballard, RIO, Mr. Andres, and Winsome on the other. *See* Exhibit A.

Receiver's Response: This Paragraph further demonstrates the Receiver's entitlement to summary judgment. That Winsome purportedly paid RIO's obligation under the Refinery Agreement only demonstrates that Winsome made the payments at issue without any obligation

to do so, as only RIO was a signatory to the Refinery Agreement. That is precisely why the payments were fraudulent and made without reasonably equivalent value to Winsome. Winsome's purported payment of a debt of a third party cannot satisfy the requirement of reasonably equivalent value. *See* *Dahnken, Inc. v. Wilmarth*, 726 P.2d 420, 422 (Utah 1986) ("Satisfaction of an obligation owed the transferee by a third party does not qualify as fair consideration" under UFTA); *see also* *In re Whaley*, 229 B.R. 767, 775 (Bankr. D. Minn. 1999) ("A payment made solely for the benefit of a third party, such as a payment to satisfy a third party's debt, does not furnish reasonably-equivalent value to the debtor") (citing *In re Bargfrede*, 117 F.3d 1078, 1080 (8th Cir. 1997)).

Additionally, Penedo provides no evidence that there was any effective "verbal modification" of the Refinery Agreement. Any such modification would violate the parol evidence rule and the very terms of the Refinery Agreement. *See* Opp. at Ex. E § 6.9 ("This Agreement, including this Section 6.9, may not be modified except in a writing executed by duly authorized representatives of the Parties"). Moreover, the Refinery Agreement was amended many times in writing, demonstrating that the parties knew how to and were capable of properly amending the Agreement in writing. *See* Opp. at Ex. E, Addendum. In fact, Penedo and Ballard executed no fewer than *nine* written amendments to the Refinery Agreement and not once, in any of the Amendments, did Winsome become a signatory. *See* Amendments, attached as Exhibit B.

34. Mr. Penedo was also aware that payments were being made to FundaGuam by Mr. Andres and Winsome, but he did not have direct control over those payments. *See* Exhibit A.

Receiver's Response: This Paragraph is irrelevant.

35. Mr. Andres and Winsome continued making payments to Mr. Penedo as agreed pursuant to the terms of the Refinery Agreement from October of 2006 until approximately September of 2008, at which time the payments abruptly stopped. *See* Exhibit A.

Receiver's Response: This Paragraph further demonstrates the Receiver's entitlement to summary judgment. That Winsome was purportedly paid RIO's obligations under the Refinery Agreement only demonstrates that Winsome made the payments at issue without any obligation to do so, as only RIO was a signatory to the Refinery Agreement. That is precisely why the payments were fraudulent and made without reasonably equivalent value to Winsome. Winsome's purported payment of a debt of a third party cannot satisfy the requirement of reasonably equivalent value. Additionally, Penedo provides no evidence of any binding agreement that obligated Winsome to make any payment under the Refinery Agreement.

36. However, Mr. Penedo provided and completed all of the extensive lobbying and other services as requested by Mr. Ballard, RIO, Mr. Andres, and Winsome and as agreed pursuant to the Refinery Agreement and the other discussions and agreements between and among Mr. Ballard, RIO, Mr. Andres, and Winsome on the one hand, and Mr. Penedo on the other. *See* Exhibit A.

Receiver's Response: Penedo provides no evidence that Winsome ever requested that he perform or benefitted from his purported "lobbying" services. Only RIO was a signatory to the Refinery Agreement under which Penedo purportedly performed the services and Winsome has no obligation to make payments on RIO's behalf. There is also no evidence that Winsome received any benefit in exchange for the payments it made to Penedo.

37. Although Mr. Penedo completed all of the extensive lobbying and other services requested by Mr. Ballard, RIO, Mr. Andres, and Winsome, he has only been compensated $197,000.00 of the agreed upon $4,000,000.00 plus the 1% interest in the completed refinery project and reimbursements for my travel and other miscellaneous expenses he was required to incur to complete my portions of the contract. *See* Exhibit A.

Receiver's Response: Penedo provides no evidence that Winsome ever requested that he perform, or that Winsome benefitted from, his purported "lobbying" services. Only RIO was a signatory to the Refinery Agreement under which Penedo purportedly performed the services

and Winsome has no obligation to make payments on RIO's behalf. There is also no evidence that Winsome received any benefit in exchange for the payments it made to Penedo.

38. Mr. Penedo's lobbying and other services were required prior to any construction of the actual refinery. Payment for his services was not in any way contingent or conditioned on the actual construction or completion of the refinery. *See* Exhibit A.

Receiver's Response: This Paragraph is irrelevant to the present Motion. The terms of Penedo's Agreement with RIO, an Agreement to which Winsome was not a signatory and under which it had no obligation, have no bearing on whether Winsome received reasonably equivalent value in exchange for its payments to Penedo. Moreover, Penedo can point to no evidence of any benefit that Winsome received from his purported services.

ARGUMENT

Penedo does not dispute that Winsome operated as a Ponzi scheme, and therefore made the transfers at issue with actual fraudulent intent. *See* *Donell*, 533 F.3d at 770. Penedo also admits that he received the $197,000 at issue in this Motion. Accordingly, the only remaining issue is whether Penedo can prove the affirmative defense set forth in Utah Code Ann. § 25-6-9, which requires him to prove that he received the transfers at issue in good faith and for reasonably equivalent value. Penedo cannot make this showing.

Penedo's only argument is that he provided reasonably equivalent value to Winsome when he performed unspecified "lobbying" services under the Refinery Agreement between himself, RIO, and FundaGuam. Pendeo admits that Winsome is not a signatory to that Agreement. He nevertheless argues that, based on vague verbal statements he claims were made by Ballard and Andres, Winsome was obligated to make the payments at issue despite the fact that Winsome had no written agreement with Penedo or any other person or individual to make the payments to Penedo. This argument must be rejected for two reasons. First, Penedo's argument relies entirely on extra-contractual, verbal statements that are inadmissible under the parol evidence rule, statute of frauds, and the plain language of the Refinery Agreement.

Second, even if the Court were to consider Penedo's Affidavit testimony regarding the alleged statements, the verbal statements create no issue of disputed fact as to whether Winsome received reasonably equivalent value in exchange for its payments to Penedo. Penedo provides no evidentiary support for his ambiguous self-serving statements. He does not explain what specific representations were made, when they were made, or by whom. He also fails to explain why any representations that Winsome and RIO had some unknown prior relationship led him to

believe that Winsome was somehow obligated under an agreement that expressly identifies only RIO as the signing party. Moreover, Penedo's speculative assertions are contradicted by the testimony of Clayton Ballard, the person in control of RIO and the person most knowledgeable about Winsome's role with RIO. It is also undisputed that the refinery project was never completed, and therefore no benefit was provided to any party, let alone to a non-signatory such as Winsome. Accordingly, there is no disputed issue of material fact and the Receiver is entitled to summary judgment as a matter of law as to the $197,000 it transferred directly to Penedo.

I. PENEDO PRESENTS NO ADMISSIBLE EVIDENCE THAT HE PROVIDED REASONABLY EQUIVALENT VALUE.

Penedo's argument that he provided reasonably equivalent value to Winsome in exchange for the fraudulent transfers he received is based entirely on his assertion that Winsome, Andres, Ballard, and RIO made vague and unspecified extra-contractual statements to the effect that they had some prior relationship that Penedo does not define and which he cannot support with admissible evidence. Therefore, Penedo argues, Winsome was obligated to make the payments at issue under agreements that do not even mention Winsome. Penedo's arguments should be rejected out of hand because his attempt to rely on extra-contractual verbal statements to impose an obligation on Winsome is prohibited by the statute of frauds, the parol evidence rule, and the plain language of the agreements at issue.

Utah's statute of frauds provides that "every promise to answer for the debt, default, or miscarriage of another" is void unless the agreement is in writing. Utah Code Ann. § 25-5-4(1). Under this section, even if the Court were to consider the ambiguous and unspecified statements Penedo claims were made and Penedo's argument that those statements represented an agreement by Winsome to pay RIO's obligation under the Refinery Agreement, such an agreement must be

set forth in writing. Penedo points to no written agreement by Winsome to pay RIO's obligation. Therefore, any such agreement is barred.

Penedo argues that the Court should apply two of the exceptions to the statute of frauds set forth in Utah Code Ann. § 25-5-6(2) and (3) to find that Winsome undertook an "original obligation" to pay Penedo for his claimed lobbying services. Opp. 38-40. However, in addition to being wholly unsupported by evidence of an actual obligation or debt owed by Winsome, Penedo's "original obligation" argument under either provision requires that, among other elements, Winsome receive some direct benefit from Penedo. *See, e.g.*, Utah Code Ann. 25-5-6(3) (providing that section applies where a promise is made "upon consideration beneficial to the promisor"); *Healthcare Services Group, Inc. v. Utah Dept. of Health*, 40 P. 3d 591, 596 (Utah 2002) (finding that statute of frauds might not apply under Utah Code Ann. § 25-5-6(2) "[w]here a promise is an original undertaking of the promisor for its own benefit"). The only benefit Penedo identifies is the promissory note from RIO to Andres. But, as set forth above, Winsome received no benefit from that note. The note was executed between RIO and Andres only, making absolutely clear that Winsome is not included in the note. Further, even if Winsome had some interest in the note, which it does not, neither Winsome nor Andres received any benefit by providing money to pay RIO's debts when RIO already supposedly owed Andres under a note for prior services. Therefore, neither of the exceptions cited by Penedo applies and the statute of frauds bars any claim that Winsome made an oral agreement to pay RIO's debt.

The parol evidence rule also bars Penedo's claimed verbal modification of the Refinery Agreement. That rule prohibits a party from submitting extra-contractual evidence to alter the terms of a contract unless the terms at issue are facially ambiguous. *See Tangren*, 182 P.3d at

330. In *Tangren*, the parties disputed whether a lease entered into between a father, as trustee for a family trust, and his son was a valid and enforceable agreement. Although the lease, as written, was a straight-forward 99 year lease, the son argued that it was actually intended only to be effective to protect his interest in the land at issue after the father died, and not as an enforceable lease pursuant to its terms. *Id*. 327-330. The trial court considered extrinsic evidence of the parties' intent to find that the lease was invalid. *Id*. The Court of Appeals reversed, and the Utah Supreme Court affirmed that opinion, holding that it was improper for the trial court to consider extrinsic evidence of any kind because the lease was a clear, integrated agreement. *Id*. at 332. The Court noted that "when parties have reduced to writing what appears to be a complete and certain agreement, it will be conclusively presumed, in the absence of fraud, that the writing contains the whole of the agreement between the parties." *Id*. at 330 (quotation omitted). Significantly, the Court expressly rejected the son's argument that the father had orally altered the terms of the lease from their plan language, the same argument Penedo raises here. *Id*. at 330-331.

Here, the Refinery Agreement and MOU are express and unambiguous as to the parties to each agreement. Each agreement lists the parties thereto on the first page, as well as clearly identifying the signatories on the execution page. *See* Opp. at Ex. D and Ex. E. There is nothing in either agreement to cast doubt on the identity of signatories or to suggest that some other unnamed party may be obligated to make payments to Penedo. Accordingly, the agreements are facially clear and unambiguous and Penedo's attempt to submit parol evidence must be denied.

Penedo's attempt to change the written terms of the Refinery Agreement also violates the express terms of the Agreement itself. Section 6.9 of the Refiner Agreement states:

> Entire Agreement. This Agreement is the complete, entire, final and exclusive statement of the terms and conditions of the agreement among the Parties. This Agreement supersedes, and the terms of this Agreement govern, any prior agreements, term sheets or letters of intent among the Parties with respect to the subject matter hereof. This Agreement, including this Section 6.9 may not be modified except in a writing executed by duly authorized representatives of the Parties.

Opp. at Ex. E, § 6.9. Contrary to this provision, Penedo seeks to significantly alter the terms of the Refinery Agreement by adding an entirely new party and imposing on that party the obligations of RIO. This is clearly impermissible. Indeed, the Court in *Tangren* relied on a similar integration clause in refusing to consider extrinsic evidence, finding that "[a] completely integrated agreement must be interpreted on its face, and thus the purpose and effect of including a merger clause is to preclude the subsequent introduction of evidence of preliminary negotiations or of side agreements in a proceeding in which a court interprets the document." *Tangren*, 182 P.3d at 330 (citation omitted). This clear law prohibits Penedo's improper attempts to alter the plain terms of the Refinery Agreement.

Moreover, the Refinery Agreement itself makes clear that Penedo understood the requirement to alter the Agreement only in writing and that he was capable of doing so. Penedo executed at least nine amendments to the Agreement, all of which are signed by only Penedo, Ballard, and FundaGuam and none of which even mention Winsome. This makes absolutely clear that Penedo knew that the written terms of the Refinery Agreement controlled the parties' obligations and that no amendment was effective unless it was made in writing.

The only evidence Penedo submits to show that he purportedly provided reasonably equivalent value in exchange for the fraudulent transfers from Winsome consist of inadmissible

verbal statements from which Penedo seeks to alter the terms of a written agreement. This evidence cannot be considered and therefore, the Receiver's Motion must be granted.

II. THE UNDISPUTED EVIDENCE DEMONSTRATES THAT WINSOME RECEIVED NO REASONABLY EQUIVALENT VALUE FOR ITS PAYMENTS TO PENEDO.

Even if the Court were to consider the inadmissible verbal statements that Penedo claims were made, those statements do not provide any basis to dispute the fact that Winsome did not receive reasonably equivalent value. Penedo claims that Ballard, RIO, Andres, and/or Winsome made statements that led Penedo to "understand" that Ballard, RIO, Andres, and Winsome had a prior agreement or relationship. Penedo cannot use these unsupported, conclusory allegations to escape summary judgment.

> Because the party opposing a motion for summary judgment must set forth "specific facts" to defeat the motion, Fed.R.Civ.P. 56(e), "[u]nsupported conclusory allegations ... do not create a genuine issue of fact." *L & M Enters., Inc. v. BEI Sensors & Sys. Co.*, 231 F.3d 1284, 1287 (10th Cir.2000). A conclusory affidavit from an expert witness is therefore insufficient to defeat summary judgment. *Matthiesen v. Banc One Mortgage Corp.*, 173 F.3d 1242, 1247 (10th Cir.1999). Similarly, mere speculation unsupported by evidence is insufficient to resist summary judgment. *Peterson v. Shanks*, 149 F.3d 1140, 1144-45 (10th Cir.1998).

Martinez v. CO2 Services, Inc., 12 Fed.Appx. 689, 694-695 (10th Cir. 2001). Here, Penedo offers only such conclusory speculation.

Although Penedo repeatedly claims that Andres, Ballard, RIO, and Winsome made representations that led him to believe that they had some unknown, prior relationship, he provides no further support for those claims and no detail about why he formed that belief. Nowhere does Penedo state what was actually said by whom, when it was said, or why he believes that such statements could bind Winsome to undertake the obligation to pay hundreds of

thousands of dollars under a contract to which it was not a signatory. He simply says that he understood that Winsome was "the money." Of course, this argument ignores that this is exactly the problem with Penedo's receipt of the payments at issue. Winsome evidently was the money, but this money needs to come back to the receivership estate because Winsome received no value for these payments to Penedo. Other than Penedo's unsupported speculation, which is insufficient to defeat summary judgment, there is no evidence that Winsome had any obligation to make the payments at issue.

There is also no evidence that Winsome received any benefit in exchange for the payments. The only possible benefit Penedo attempts to identify is the Promissory Note between Andres and RIO. As is clear from the face of the Note, Winsome is not a party to it and therefore had no possibility of receiving any benefit even if it had been paid. And, if RIO already owed Andres a significant amount of money under a note, it strains credulity to argue that Winsome, a fraudulent Ponzi scheme operated by Andres, received value when it supplied money to Penedo. Because there is simply no evidence that Winsome received any value for the fraudulent transfers it made to Penedo, Penedo cannot prove his affirmative defense and the Receiver is entitled to summary judgment.

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

Penedo does not address the Receiver's entitlement to summary judgment on his unjust enrichment claim. Therefore, the Receiver's Motion should be granted as unopposed as to this claim. The Receiver is entitled to summary judgment on this claim in any event because it is undisputed that Winsome operated as a Ponzi scheme and defrauded its investors out of millions of dollars. It is also undisputed that Penedo received funds from Winsome that were obtained

from these fraudulent activities. As set forth above, Penedo provided no reasonably equivalent value for the transfers. Therefore, it is clear that Penedo received a known benefit from Winsome and that, because that benefit was received in connection with the fraudulent Ponzi scheme, it would be unjust to allow Penedo to retain the benefit at the expense of Winsome's defrauded investors.

CONCLUSION

For the forgoing reasons, and as set forth in the Receiver's opening Memorandum, the Receiver respectfully requests that the Court grant summary judgment in his favor and against Penedo in the amount of $197,000 plus all applicable costs, fees, and interest.

DATED this 28th day of October, 2013.

MANNING CURTIS BRADSHAW & BEDNAR LLC

/s/ Christopher M. Glauser
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 to be served in the method indicated below to the Defendants in this action this 28th day of October, 2013.

___HAND DELIVERY
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___OVERNIGHT MAIL
___FAX TRANSMISSION
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_x_USDC ECF NOTICE

Jeffery J. Owens
Strong & Hanni
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Attorneys for Defendant Roberto E. Penedo

/s/ Christopher M. Glauser