Peggy Hunt (Utah State Bar No. 6060)
Chris Martinez (Utah State Bar No. 11152)
DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Facsimile: (801) 933-7373
Email: hunt.peggy@dorsey.com
martinez.chris@dorsey.com

Attorneys for Court-Appointed Receiver R. Wayne Klein

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

R. WAYNE KLEIN, as Receiver, Plaintiff, v. M&M ANDREASEN INVESTMENTS, INC., a Utah limited liability company, MAX ANDREASEN, a Utah resident, and JOHN DOES 1-5, Defendants,	**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT** **(First, Second, Third and Fifth Causes of Action)** 2:13-cv-00462 The Honorable David Nuffer

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MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, and DUCivR 56-1, Plaintiff R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of National Note of Utah, LC, its subsidiaries and affiliates, and the assets of Wayne LaMar Palmer in the case styled as *Securities and Exchange Commission v. National Note of Utah, LC et al*., Case No. 2:12-cv-00591-BSJ (D. Utah) (Jenkins, J.) (the "Civil Enforcement Action"), by and through his counsel, respectfully seeks summary judgment on the First, Second, Third and Fifth Causes of Action of the Receiver's Complaint against Defendant M&M Andreasen Investments, Inc. ("Andreasen" or "Defendant").

This Motion is supported by the Memorandum of Law set forth herein. Additionally, the Receiver submits the following in support of the Motion: the Declaration of Receiver R. Wayne Klein (the "Klein Declaration"), a true and correct copy of which is attached hereto as Exhibit A; the Declaration of Richard Hoffman (the "Hoffman Declaration"), a true and correct copy of which is attached hereto as Exhibit B; and a transcript dated May 30, 2011 of sworn testimony of Wayne LaMar Palmer obtained as part of the Securities and Exchange Commission's investigation of the Civil Enforcement Action (the "Palmer Transcript"), true and correct copies of relevant excerpts of which is attached hereto as Exhibit C.

MEMORANDUM OF LAW

I.

INTRODUCTION

National Note of Utah, LC ("National Note") and its many affiliated entities (collectively, the "NNU Enterprise") were operated by Wayne LaMar Palmer ("Palmer") prior to the commencement of the Civil Enforcement Action as a Ponzi scheme. The Receiver is charged

with, among other things, recovering property for the benefit of National Note's investors, including by bringing actions such as the present one against those who have profited from the scheme.

The Receiver seeks to recover $49,636.99 that National Note paid to Defendant Andreasen prior to the commencement of the Civil Enforcement Action over and above the amount of the principal investment that the Defendant made in National Note (the "False Profits"). There is no factual dispute that National Note transferred the False Profits to the Defendant, that the False Profits are cash transfers made to the Defendant on account of a National Note investment over and above the principal amount the Defendant invested in National Note, or that National Note and the NNU Enterprise was operated as a Ponzi scheme. Under well-established law, therefore, the Receiver is entitled to summary judgment against the Defendant on his First, Second, and Third Causes of Action which seek the avoidance of the False Profits as fraudulent transfers and recovery of the same from the Defendant.

In addition, there is no dispute that the Defendant received a benefit from National Note from the False Profits, the Defendant knew that it was receiving this benefit: and that the Defendant's retention of the False Profits would be unjust -- the False Profits did not come from a legitimate business, but rather from other National Note investors. Accordingly, in the alternative, the Receiver is entitled to summary judgment on his Fifth Cause of Action for unjust enrichment.

II.

PROCEDURAL HISTORY

1. On June 25, 2012, the Securities and Exchange Commission (the "SEC") filed a *Complaint* against National Note and Palmer thus commencing the Civil Enforcement Action, alleging that Palmer operated the NNU Enterprise as a Ponzi scheme and asserting various causes of action for securities fraud.[1]

2. Also on June 25, 2012, the Court in the Civil Enforcement Action entered its *Order Appointing Receiver and Staying Litigation* (the "Receivership Order"),[2] appointing the Receiver as the receiver for National Note and at least 41 affiliated entities (defined above with National Note as the "NNU Enterprise"), and the assets of Palmer.

3. The Receiver is charged with, among other things, investigating the NNU Enterprise, and he is authorized to bring suit to recover property of the Receivership Estate.[3]

4. On June 17, 2013, the Receiver commenced the above-captioned case against Andreasen, seeking to recover the False Profits transferred to it by National Note.[4]

5. On December 9, 2013, the Court entered its *Scheduling Order and Order Vacating Hearing*, setting deadlines in this case.[5]

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1 Civil Enforcement Action Docket No. 1.

2 Civil Enforcement Docket No. 9.

3 Civil Enforcement Action Docket No. 9 (Receivership Order ¶¶7(a)-7(k)) & Civil Enforcement Action Docket No. 240 (Order Granting Motion For Leave to Commence Legal Proceedings).

4 Docket No. 2.

5 Docket No. 17

6. On July 1, 2014, the Receiver served Andreasen with *Receiver's Report on Income, Equity and Fund Transfers By National Note of Utah and Affiliated Entities* (the "Receiver's Report"), a copy of which is attached as Exhibit 1 to the Klein Declaration,[6] detailing facts that the Receiver learned from his investigation of NNU, including his review of the NNU Enterprise's books and records.

7. On July 16, 2014, the Receiver served Andreasen with his *Rule 26 Expert Disclosure of Richard Hoffman*, along with Mr. Hoffman's *Expert Witness Report* (the "Expert Report"),[7] a copy of which is attached to the Hoffman Declaration.

8. On August 29, 2014, the deadline to complete discovery in this case expired.[8]

9. The deadline for Andreasen to designate an expert and serve its expert reports on the Receiver expired on October 17, 2014.[9] Andreasen has not designated an expert or served an expert report on the Receiver.[10]

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6 Klein Declaration, at ¶ 10.

7 Id. at ¶ 11.

8 Docket No. 17(Scheduling Order ¶ 5(a)).

9 Docket No. 17 (Scheduling Order ¶ 4(b)).

10 Klein Declaration, at ¶ 12.

III.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

A. First Claim For Relief – The False Profits Are Avoidable Fraudulent Transfers Recoverable From Defendant Under UFTA §§ 25-6-5(1)(a), 25-6-8(1), and 25-6-9(2)

i. Legal Elements and Authorities:

The False Profits that National Note transferred to the Defendant are avoidable as fraudulent transfers and recoverable from the Defendant under the Utah Fraudulent Transfer Act ("UFTA"), Utah Code Ann. §§ 25-6-5(1)(a), 25-6-8(1)(a) and 25-6-9(2).

Section 25-6-5(1)(a) defines a fraudulent transfer as follows:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) with actual intent to hinder, delay, or defraud any creditor of the debtor[.]

Section 25-6-8(1)(a), in turn, provides for the avoidance of the False Profit fraudulent transfers, stating as follows:

> (1) In an action for relief against a transfer or obligation under this chapter, a creditor . . . may obtain:
>
> (a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim[.]

Finally, § 25-6-9(2) allows the Receiver to recover the avoided fraudulent transfers from the Defendant as the first transferee of the False Profits, providing: "[T]o the extent a transfer is voidable in an action by a creditor under Subsection 25-6-8(1)(a), the creditor may recover judgment for the value of the asset transferred . . . ."

Typically, in determining whether "actual intent" exists under § 25-6-5(1)(a), the "badges of fraud" set forth in § 25-6-5(2) are applied. In Ponzi scheme cases, however, "actual intent"

under § 26-6-5(1)(a) is established by the mere existence of the scheme itself.[11] This Court has stated that "the very existence of a Ponzi scheme is sufficient to establish under UFTA that the debtor had the actual intent to defraud. Thus, once it is established that a debtor acted as a Ponzi scheme, all transfers by that entity are presumed fraudulent and can be avoided."[12] It is well-established, therefore, that when "innocent investors" in a Ponzi scheme "have received payments in excess of amounts of principal that they originally invested, those payments are avoidable as fraudulent transfers."[13] Allowing an investor to "recover promised returns in excess of [his or her] investment would be to further" the "fraudulent scheme at the expense of other investors."[14]

A "Ponzi" scheme is "an investment scheme in which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments."[15] "In order to show that an investment scheme is a Ponzi

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11 S.E.C. v. Madison Real Estate Group, L.L.C., 647 F. Supp. 2d 1271, 1279 (D. Utah 2009) (Waddoups, J.) ("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."); Merrill v. Abbott (In re Indep. Clearing House Co.), 77 B.R. 843, 860 (D. Utah 1987) (Jenkins, J.) (same); *accord* Perkins v. Haines, 661 F.3d 623, 626 (11th Cir. 2011); Donell v. Kowell, 533 F.3d 762, 770 (9th Cir. 2008); Scholes v. Lehman, 56 F.3d 750, 753-755 (7th Cir. 1995); *see* Miller v. Kelley (In re Impact Cash, Inc.), Case No. 1:12-cv-00056, 2014 WL 5437023, at *3 (D. Utah issued Oct. 27, 2014) (Nuffer, J.) (recognizing Ponzi presumption); S.E.C. v. Management Solutions, Inc., Case No. 2:11-cv-1165, 2013 WL 4501088, at * 6 (D. Utah issued Aug. 22, 2013) (Jenkins, J.) (unpublished) (same and citing numerous cases); Wing v. Dockstader (In re VesCor Capital Corp.), 2010 WL 5020959, at * 4 (D. Utah issued Dec. 3, 2010) (Benson, J.) (unpublished) (same).

12 Kelley, 2014 WL 5437023, at *3.

13 Wing, 2010 WL 5020959, at * 5; *accord* Donell, 533 F.3d at 770.

14 In re Hedged-Investments Assoc., Inc., 84 F.3d 1286, 1290 (10th Cir. 1996).

15 Jobin v. McKay (In re M&L Bus. Mach. Co.), 84 F.3d 1330, 1332 n.1 (10th Cir. 1996); *accord* Management Solutions, Inc., 2013 WL 4501088, at * 19 (*quoting* Indep. Clearing House, 41 B.R. 985,

scheme, the Receiver must prove by a preponderance of the evidence the *sine qua non* of a Ponzi scheme: that returns to earlier investors were paid by funds from later investors."[16] Also, while not essential, the following factors are "typically present" in Ponzi schemes:[17]

> The promise of large returns;
> The promise of returns with little to no risk;
> The promise of consistent returns;
> The delivery of promised returns to earlier investors to attract new investors; and
> The general insolvency of the investment scheme from the beginning.[18]

ii. Material Facts Necessary to Meet the Elements:

The Defendant's False Profits

1. Andreasen was a National Note investor.[19]

2. In 2007, Andreasen transferred $150,000 to National Note.[20]

3. In 2007, National Note transferred $7,636.99 to Andreasen.[21]

4. In 2008, National Note transferred $18,000 to Andreasen.[22]

5. In 2009, National Note transferred $18,000 to Andreasen.[23]

6. In 2010, National Note transferred $156,000 to Andreasen.[24]

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994 n.12 (Bankr. D. Utah 1984), *quoted in* Gillman v. Geis (In re Twin Peaks Fin. Servs., Inc.), 516 B.R. 651, 655 (Bankr. D. Utah 2014).

16 Management Solutions, Inc., 2013 WL 4501088 at * 19.

17 Id.

18 Id.

19 Klein Declaration, at ¶ 14.

20 Id. at ¶ 15.

21 Id. at ¶ 16.

22 Id. at ¶ 17.

23 Id. at ¶ 18.

7. In total, National Note transferred $199,636.99 to Andreasen prior to the commencement of the Civil Enforcement Action.[25]

8. National Note transferred $49,636.99 more to Andreasen than the amount that Andreasen transferred to National Note (as defined above, the "False Profits").[26]

National Note Was A Ponzi Scheme

9. National Note raised funds from investors by issuing promissory notes.[27]

10. From the time that Andreasen invested in National Note by transferring funds to National Note in 2006 through the time that it received its last transfer in 2010 (the "Applicable Period"), the returns paid to National Note investors were not financed through the success of a business, but were paid from sums obtained from other investors.[28] This is based on at least the following:

a. Although the NNU Enterprise did generate relatively limited income from some business sources, it had negative net income every year since at least 1995.[29]

b. Commencing in at least 1998, National Note and the NNU Enterprise had negative net equity.[30]

c. Except for 2005 and 2006, NNU Enterprise's operating expenses exceeded its net

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24 Id. at ¶ 19.

25 Id. at ¶ 20.

26 Id. at ¶ 21.

27 Id. at ¶ 22 & Exh. 1 (Reciever's Report).

28 Id. at ¶ 23; Hoffman Declaration, at ¶¶ 8-10.

29 Klein Declaration, at ¶ 23(a).

30 Id. at ¶ 23(b).

operating income every year from 1995 through the commencement of the Civil Enforcement Action.[31]

d. Thus, other than in 2005 and 2006, National Note and the NNU Enterprise had no net operating income from which to make payments to investors.[32]

e. From 1995 through 2012 when the Civil Enforcement Action was commenced, National Note raised a total of approximately $140 million from investors.[33]

f. From 1995 through 2012 when the Civil Enforcement Action was commenced, National Note paid a total of approximately $88 million to investors.[34]

g. The amount that National Note owed its investors increased dramatically year after year, ballooning dramatically during the Applicable Period.[35]

i. In 2003, National Note owed $7,632,049.31 to investors.[36]

ii. By 2006, this amount had increased to $46,339,617.82.[37]

iii. In 2009, this amount was $85,437,696.28.[38]

iv. By 2012, at the time of the commencement of the Civil Enforcement

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31 Id. at ¶ 23(c).

32 Id. at ¶ 23(d).

33 Id. at ¶ 23(e).

34 Id. at ¶ 23(f).

35 Id. at ¶ 23(g).

36 Id. at ¶ 23(g)(i).

37 Id. at ¶ 23(g)(ii).

38 Id. at ¶ 23(g)(iii).

Action, $110,758,395.45 was owed to investors.[39]

h. To the extent relevant, even in 2005 and 2006, net operating income obtained from limited business operations was not sufficient to make payments to investors.[40]

i. This total net operating income in 2005 and 2006 was in the amount of $231,395.84.[41]

ii. Transfers made to National Note investors during these years were in the total amount of $12,969,257.29.[42]

11. Throughout the Applicable Period, transfers made by National Note to its investors, including the Defendant, were sourced from cash raised from other investors.[43]

National Note's Additional Ponzi Characteristics

12. Based on the following statements that it made to investors, National Note promised large, consistent returns, with little or no risk to its investors:

a. National Note investments had "Complete Safety of Principal";

b. Investors could earn "double, triple, perhaps even quadruple" their current rate of return "without sacrificing safety";

c. "In just a few short years," investors would be able to own their "own home free and clear, retire early and otherwise begin to enjoy the fruits of [their] labors years ahead of schedule";

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39 Id. at ¶ 23(g)(iv).

40 Id. at ¶ 23(h).

41 Id. at ¶ 23(h)(i).

42 Id. at ¶ 23(h)(ii).

43 Hoffman Declaration, at ¶¶ 8-10; Klein Declaration, at ¶ 24; Palmer Transcript, at pp. 147: 17-149:6 & 152:10 - 153:2 (admitting new investor money was used to pay investors).

d. "National Note has a perfect payment record. It has never been late on a single investor payment, and has never lost a nickel of investor capital";

e. Investor money "left to compound at National Note, *will double every six years*";

f. "Double digit returns, Guaranteed. – No worries about reduction in earnings";

g. "Monthly payments, Guaranteed – No guesswork about when payments arrive";

h. "Safety of Principal, Guaranteed – No fears about losing money";

i. "When National Note says 'No Worries' it literally means no worries";

j. "National Note provides its clients with the rewards of real estate investing, while insulating them from the risks and responsibilities";

k. National Note's investments are safe because "the value of the property" securing the investment is "always much higher than the amount invested (often two dollars or more of equity for every dollar funded";

l. "National Note's clients are provided a proven way to steadily compound their money, systematically doubling it every 6 years";

m. "Since [the investor] ultimately has real estate backing [his or her] funds at our company, [the investor] is assured of full payment."[44]

13. National Note generally made payments to its investors through 2011, thus creating the false impression that profits were being earned, and thereby attracting additional investors to the scheme.[45]

14. National Note and the NNU Enterprise were insolvent from at least 1998 through the commencement of the Civil Enforcement Action in June 2012,[46] including the entire Applicable Period.[47]

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44 Klein Declaration, at ¶¶ 25(a) to (m).

45 Id. at ¶ 26; *see supra* ¶¶ 10-11.

46 Id. at ¶ 27; *see* Hoffman Declaration, Exh. 1 (Expert Report) & discussion *infra* at Part III.C.ii. As discussed above, insolvency of the enterprise is an indicator of a Ponzi scheme, but it is not determinative.

B. Second Claim For Relief - The False Profits Are Avoidable Fraudulent Transfers Recoverable From Defendant Under UFTA §§ 25-6-5(1)(b), 25-6-8(1)(a) and 25-6-9(2)

i. Legal Elements and Authorities:

Alternatively, the False Profits National Note transferred to the Defendant are avoidable as fraudulent transfers and recoverable from the Defendant under UFTA §§ 25-6-5(1)(b), 25-6-8(1)(a) and 25-6-9(2).

Section 25-6-5(1)(b) defines a transfer as fraudulent as follows:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> . . . .
>
> (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:
>
> . . .
>
> (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Thus, under this section, a transfer is fraudulent if it is not made for reasonably equivalent value *and* the elements of subsection (b)(ii) are shown. Transfers that are fraudulent under § 25-6-5(1)(b) are avoidable and recoverable from the initial transferee under §§ 25-6-8(1)(a) and 25-6-9, both of which are quoted in section III.A.i. above.

It is well-established that false profits paid in a Ponzi scheme can never be "value" as defined in UFTA § 25-6-4, much less "reasonably equivalent value." As a matter of law, National Note "did not receive anything of value in exchange for the transfers to the Defendant

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To the extent that insolvency is a material fact for purposes of this discussion, the Receiver incorporates by reference Material Facts ¶¶ 1-2(a) to (f) in Part III.C.ii below.

[47] Hoffman Declaration & Exh. 1 (Expert Report).

in excess of" its principal investment.[48] This is because payments "in excess of amounts invested are considered fictitious profits," they are not a "return on legitimate investment activity."[49] The payment of these "fictitious profits" does not benefit the enterprise but instead depletes "the scheme's resources further. Accordingly, the payments [are] not for reasonably equivalent value."[50]

ii. Material Facts Necessary to Meet the Elements:

1. The Receiver refers to and incorporates by reference herein each of the Material Facts at ¶¶ 1- 14 of section III.A.i above. Based on these Material Facts, the Receiver has established that the Defendant received its False Profits, and that they were transferred to it as part of a Ponzi scheme.

2. For the reasons set forth in the Material Facts outlined in ¶¶ 1-2(a) to (f) of Part III.C.ii., which are incorporated by this reference, during the entire Applicable Period, National Note intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due.[51]

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48 Klein v. Bruno, Case No. 2:12-cv-0058, 2013 WL 6158752 at *2 (D. Utah issued Nov.25, 2013) (Jenkins, J.) (unpublished).

49 Wing, 2010 WL 5020959, at * 5 (*quoting* Donell, 533 F.3d at 770).

50 Wing, 2010 WL 5020959, at * 5.

51 Part III.C.ii. *infra*, Material Fact ¶¶ 1-2(a) to (f); *see* Hoffman Declaration & Exh. 1 (Expert Report); Klein Declaration & Exh. 1 (Receiver's Report).

C. Third Claim For Relief - The False Profits Are Avoidable Fraudulent Transfers Recoverable From Defendant Under UFTA §§ 25-6-6(1), 25-6-8(1)(a) and 25-6-9(2)

i. Legal Elements and Authorities:

Alternatively, the False Profits that National Note transferred to the Defendant are avoidable as fraudulent transfers and recoverable from the Defendant under UFTA §§ 25-6-6(1), 25-6-8(1)(a) and 25-6-9(2).

Section 25-6-6(1) defines a fraudulent transfer as follows:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:
>
> (a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and
>
> (b) the debtor was insolvent at the time of or became insolvent as a result of the transfer or obligation.

Thus, under this section, a transfer is fraudulent if it is not made for reasonably equivalent value *and* the transferor was insolvent or became insolvent as a result of the transfer. Transfers that are fraudulent under § 25-6-6(1) are avoidable and recoverable from the initial transferee under §§ 25-6-8(1)(a) and 25-6-9(2), both of which are quoted in section III.A.i. above.

As discussed in Part III.B.i. above, which discussion is incorporated herein, it is well-established that false profits paid in a Ponzi scheme can never be value, much less reasonably equivalent value. Accordingly, as a matter of law, the False Profits National Note transferred to the Defendant are not for reasonably equivalent value and § 25-6-6(1)(a) is met as a matter of law.

"Insolvency" is defined in UFTA § 25-6-3 as follows:

> (1) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(2) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.

ii. Material Facts Necessary to Meet the Elements:

1. The Receiver refers to and incorporates by reference herein each of the Material Facts at ¶¶ 1-14 of section III.A.i above. Based on these Material Facts, the Receiver has established that the Defendant received its False Profits, and that they were transferred to it as part of a Ponzi scheme.

2. Throughout the Applicable Period, National Note was insolvent under UTFA § 25-6-3 because its debts were greater than all of its assets at a fair valuation. Furthermore, throughout the Applicable Period, National Note was unable to pay its debts at they came due.[52]

a. As of December 31, 2004, the sum of National Note's liabilities exceeded the fair value of its assets by approximately $3.2 million. National Note's insolvency continued to increase during the Applicable Period. By June 30, 2012, the sum of National Note's liabilities exceeded the fair value of its assets by approximately $68 million.[53]

b. National Note's primary source of recorded income was "interest income" payable from note receivables reportably owed by National Note's affiliates (the "Affiliate Notes Receivable").[54]

c. National Note's primary expense was interest owed to its investors on the investors' respective promissory notes.[55]

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52 Hoffman Declaration, at ¶ 7 & Exh. 1 (Expert Report).

53 Id. at ¶ 7(a).

54 Id. at ¶ 7(b).

d. The majority of the "interest income" reported by National Note on account of the Affiliate Notes Receivable was never actually collected in cash from the affiliates or otherwise.[56]

e. In fact, National Note's affiliates did not generate sufficient operating income to actually make payments on the Affiliate Notes Receivable. The amount of interest income that was actually paid by affiliates to National Note in cash during the Applicable Period was $9,076,510, as compared to the total amount of interest reported to be owed on the Affiliate Notes Receivable which was recorded as being in the amount of $53,660,632.[57]

f. National Note did not have the ability to pay obligations to its investors from the cash it was collecting from its affiliates. During the Applicable Period, there was at least a $28 million shortfall between National Note's recorded revenue from the Affiliate Notes Receivable and the amount that was owed to National Note's investors.[58]

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55 Id. at ¶ 7(c).

56 Id. at ¶ 7(d).

57 Id. at ¶ 7(e).

58 Id. at ¶ 7(f). This does not take into account payments of principal made to investors. Not only was National Note unable to pay the interest it owed to its investors as it came due, National Note was unable to pay its principal repayment obligations as they came due. Id.

D. Fifth Claim For Relief – The False Profits Must Be Returned Because The Defendant Has Been Unjustly Enriched

i. Legal Elements and Authorities:

Unjust enrichment requires the Receiver to prove (1) a benefit conferred on the Defendant; (2) an appreciation or knowledge by the Defendant of the benefit; and (3) 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.[59]

ii. Material Facts Necessary to Meet the Elements:

1. The Receiver refers to and incorporates by reference herein each of the Material Facts at ¶¶ 1-14 of section III.A.i and Material Facts at ¶¶ 1-2(a) to (f) of section III.C.ii above.

2. As of the date of the commencement of the Civil Enforcement Action, at least 554 investors had received less from National Note than the amount that they invested, and a large percentage of those investors received absolutely no return.[60]

3. From his investigation to date, the Receiver anticipates that allowable claims against the Receivership Estate for net principal losses will exceed $59.4 million.[61]

4. As of this time, the Receiver anticipates that returns to those investors who have allowable claims will be far less than 100% return of their principal investment.[62]

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59 Rawlings v. Rawlings, 240 P.3d 754, 763 (Utah 2010).

60 Klein Declaration, at ¶ 28.

61 Id. at ¶ 29.

62 *See* id. at ¶ 30.

IV.

ARGUMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court "shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Here, the material facts are undisputed, presenting pure issues of law for determination by the Court. For the reasons discussed below, the Court should grant summary judgment on the First, Second, Third, and Fifth Causes of Action of the Receiver's Complaint.

A. THE FALSE PROFITS ARE AVOIDABLE FRAUDULENT TRANSFERS THAT ARE RECOVERABLE FROM THE DEFENDANT

i. The Receiver Is Entitled To Summary Judgment On His First Claim For Relief

The material facts set forth above establish that the Defendant was an investor in National Note,[63] that the Defendant received the False Profits from National Note over and above the amount invested in National Note,[64] and that National Note was operated as a Ponzi scheme during at least the Applicable Period.[65] Accordingly, based on the law set forth in Part III.A.i. above, the False Profits may be avoided as fraudulent transfers under UTFA § 25-6-5(1)(a) and avoided and recovered from the Defendant under UFTA §§ 25-6-8(1)(a) and 25-6-9(2) as a matter of law.

On the issue of the existence of a Ponzi scheme, there is no question that the Receiver has established "the *sine qua non* of a Ponzi scheme: that returns to earlier [National Note] investors

63 Part III.A.ii., ¶ 1.

64 *See* id. at ¶¶ 2-8.

65 *See* id. at ¶¶ 8-14.

were paid by funds from later [National Note] investors."[66] This alone establishes a Ponzi scheme. Additionally, the Receiver has shown that National Note has most if not all of the characteristics that "typically present" in Ponzi schemes,[67] specifically:

> The promise of returns with little to no risk;[68]
> The promise of consistent returns;[69]
> The delivery of promised returns to earlier investors to attract new investors;[70] and
> The general insolvency of the investment scheme from the beginning.[71]

Accordingly, it cannot be disputed that National Note was a Ponzi scheme,[72] and thus, as a matter of law, the False Profits that National Note transferred to the Defendant are avoidable and recoverable from the Defendant because they are fraudulent transfer made with actual intent to hinder, delay, or under UFTA § 25-6-5(1)(a). The Receiver is entitled to summary judgment on his First Claim for Relief.

ii. The Receiver Is Entitled To Summary Judgment On His Second Claim For Relief

The material facts set forth above also establish that the Defendant was an investor in National Note,[73] that the Defendant received the False Profits from National Note over and above

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66 Management Solutions, Inc., 2013 WL 4501088 at * 19.

67 Id.

68 *See* Part III.A.ii., ¶¶ 12(a) to (m).

69 *See* id.

70 *See* Part III.A.ii., ¶13.

71 *See* Part III.A.ii., ¶ 14; Part III.C.ii.,¶¶ 1-2(a) to (f).

72 The Defendant has no foundation to challenge the Receiver's facts because it did not conduct the discovery necessary to allow it to do so.

73 *See* Part III.A.ii., ¶ 1.

the amount invested in National Note,[74] and that National Note was operated as a Ponzi scheme during at least the Applicable Period.[75] Accordingly, based on the law set forth in Part III.B.i. above, the False Profits may be avoided as fraudulent transfers under UTFA § 25-6-5(1)(b) and avoided and recovered from the Defendant as a matter of law. Accordingly, the Receiver is entitled to summary judgment on his Second Claim for Relief.

Specifically, the Receiver has established the two relevant subsections of UFTA § 25-6-5(1)(b). Based on the law set forth in Part III.B.i. above, National Note could not have received reasonably equivalent value in exchange for the False Profits within the meaning of § 25-6-5(1)(b). Indeed, when viewed from the perspective of National Note's creditors, *i.e.* the innocent investors whose money was used to pay other investors, every payment to the Defendant above its principal investment resulted in a diminution of National Note's assets.[76] National Note received no benefit from its payments of the False Profits to the Defendant. Instead, each payment advanced the unsustainable Ponzi scheme.[77]

Furthermore, throughout the Applicable Period, National Note lacked capital reserves, income, or assets to pay the debts it owed. National Note survived only by attracting new investors and using their investments to pay debts, including amounts owed to prior investors.[78]

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74 *See* id. at ¶¶ 2-8.

75 *See* id. at ¶¶ 8-14.

76 Wing, 2010 WL 5020959, at * 5; In re Jordan, 392 B.R. 428, 441 (Bankr. D. Idaho 2008) ("Whether a debtor received a reasonably equivalent value is analyzed from the point of view of the debtor's creditors, because the function of this element is to allow avoidance of only those transfers that result in diminution of a debtor's . . . assets").

77 *See* Part III.A.ii., ¶¶ 9-11, 14; Part III.C.ii., ¶¶ 1-2(a) to (f).

78 *See* id.

It cannot be disputed therefore that National Note intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due within the meaning of UFTA § 25-6-5(1)(b)(ii).[79] Accordingly, the False Profits are avoidable fraudulent transfers under UFTA §25-6-5(1)(b) as a matter of law.

iii. The Receiver Is Entitled To Summary Judgment on His Third Claim For Relief

The material facts set forth above also establish that the Defendant was an investor in National Note,[80] that the Defendant received the False Profits from National Note over and above the amount invested in National Note,[81] and that National Note was operated as a Ponzi scheme during at least the Applicable Period.[82] Accordingly, based on the law set forth in Part III.C.i. above, the False Profits may be avoided as fraudulent transfers under UTFA § 25-6-6(1) and avoided and recovered from the Defendant as a matter of law. Accordingly, the Receiver is entitled to summary judgment on his Third Claim for Relief.

Both elements of UFTA § 25-6-6(1) have been established by the Receiver. Specifically, based on the law set forth in Part III.B.i. above, National Note could not have received reasonably equivalent value in exchange for the False Profits within the meaning of UFTA § 25-6-6(1)(a). Furthermore, it cannot be disputed that National Note was insolvent through the Applicable Period as required under UFTA § 25-6-6(1)(b) and within the meaning of UFTA §

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79 The Defendant also has no foundation to challenge the relevant facts here because it did not conduct the discovery necessary to allow it to do so.

80 *See* Part III.A.ii., ¶ 1.

81 *See* id. at ¶¶ 2-8.

82 *See* id. at ¶¶ 8-14.

25-6-3.[83] The sum of National Note's debts during the Applicable Period was greater than all of its assets at a fair valuation.[84] Also, National Note had no ability to pay its debts as they become due.[85] Accordingly, the False Profits are avoidable fraudulent transfers as a matter of law.

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

The Receiver has established that the Defendant has been unjustly enriched as a matter of law. He has established all three elements of unjust enrichment discussed in Part III.D.i. above. Specifically, the Receiver has established that the False Profits conferred a benefit on the Defendant and that the Defendant has an appreciation for that benefit. Indeed, many investors have received no return of their principal investment and will receive far less than their principal investment from the assets of the Receivership Estate.[86] Furthermore, the acceptance or retention by the Defendant of the benefit under the present circumstances makes it inequitable for the Defendant to retain the benefit without payment of its value.[87] Because there are other innocent investors who have lost much or most of their principal investment,[88] it would be unjust for the Defendant to retain the False Profits that were paid from other investors.[89]

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83 *See* Part III.A.ii., ¶ 14; Part III.C.ii., ¶¶ 1-2(a) to (f).

84 *See* Part III.C.ii, ¶¶ 2(a) to (f).

85 *See* id.

86 *See* Part IV.A.ii., ¶¶ 2-4.

87 *See* id.

88 *See* Part IV.A.ii., ¶¶ 2-4.

89 *See* In re Pearlman, 472 B.R. 115, 125 (Bankr. M.D. Fla. 2012) (noting that "trustee has stated a valid cause of action that, if proven, defendants were unjustly enriched when they received payments to the extent they exceed defendants' original investment").

V.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in favor of the Receiver on his First, Second, Third, and Fourth Claims for Relief and enter judgment in favor of the Receiver in the amount of $50,051.22.

DATED this 31st day of December, 2014.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt
Peggy Hunt
Chris Martinez
Attorneys for R. Wayne Klein, Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the foregoing **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT** was filed with the Court on this 31st day of December, 2014 and was served via ECF on all parties who have requested notice in this case.

/s/ Chris Martinez