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

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

Defendants Peter and Laurie Widmark, through their attorney of record R. Steven Chambers, submit this Memorandum in Opposition to Plaintiff's Motion for Entry of Judgment.

ARGUMENT

POINT I: JUDGMENT IN THE AMOUNT OF $191,000.00 IS APPROPRIATE GIVEN THE COURT'S RULING.

On August 26, 2015, the Court entered its Memorandum Decision and Order ("Order"). That Order stated that Plaintiff is entitled to judgment in the amount of the transfers received from the Winsome Trust less the amount the Defendants invested. The uncontested facts established that Defendants received a total of $291,000 and invested a total of $100,000. Therefore, Defendants concur, for purposes of this Motion, that based upon the Court's Order judgment of $191,000 is appropriate.

POINT II: PRE-JUDGMENT INTEREST IS NOT APPROPRIATE.

Plaintiff relies on *Morrison Knudsen Corp. v. Ground Improvement Techniques*, 532 F.3d 1063 (10th Cir. 2008) for his claim that "prejudgment interest is an element of compensatory damages and is part of the actual damages sought." This reliance is misplaced because *Morrison* and the Supreme Court case on which it relied, *West Virginia v. United States*, 479 U.S. 305 (1987), are both cases that involve issues of contractual liability under federal law. The Tenth Circuit in *Morrison* explained that "under federal law, prejudgment interest is generally available." It then went on to hold that

> By the terms of their contract, MK and GIT were bound by federal law. The contract required the court to determine all substantive legal issues in accordance with the FAR [Federal Acquisition Regulation System]. The FAR, by reference to the CDA [Contracts Dispute Act], applies the federal interest rate. . . . The district court properly concluded that federal law applied to both the calculation of damages and prejudgment interest. 532 F.3d at 1077.

Similarly, *West Virginia v. United States*, 479 U.S. 305 (1987) was a case brought by the United States against the state of West Virginia for reimbursement of costs incurred by the Army Corps of Engineers in preparing temporary housing for victims of the collapse of a coal waste dam and a series of storms that caused flooding and mudslides in the same area of the state. The President declared both events "major disasters," which qualified the areas for federal relief under the Disaster Relief Act of 1970. Both the district court and the Court of Appeals held that West Virginia was contractually obligated to repay the United States as a matter of federal contractual law. The Supreme Court affirmed these holdings. 479 U.S. at 308.

This case, by contrast, involves neither a contract claim nor federal law. Plaintiff's sole claim on which he was granted judgment is Utah's Fraudulent Transfer Act, Utah Code §25-6-1, *et seq.* Where a claim in federal court arises under state law, prejudgment interest can be awarded if state law would allow it. *Casto v. Arkansas-Louisiana Gas Corp.*, 562 F.2d 622 (10th Cir. 1977) (in diversity cases the award of prejudgment interest is determined by state law); *In re: Slatkin*, 525 F.3d 805 (9th Cir. 2008) (award of prejudgment interest was allowed under state law which allows prejudgment interest in fraud cases); *In re: Keefe*, 401 B.R. 520 (B.A.P. 1st Cir. 2009) (prejudgment interest on fraudulent transfer claim depends on whether the claim is federal or state).

Utah's Fraudulent Transfer Act makes no provision for prejudgment interest in determining what constitutes a claim. A "claim" is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,

disputed, undisputed, legal, equitable, secured or unsecured." Utah Code §25-6-2(3). A claim therefore does not include interest on the right to payment.

Under section 25-6-8 a creditor may avoid "the transfer or obligation to the extent necessary to satisfy the creditor's claim." Utah Code §25-6-8(1)(a). That section does not allow avoidance to the extent to satisfy the claim plus interest.

Utah's Fraudulent Transfer Act does not provide for prejudgment interest in the remedies available to creditors. Therefore the addition of prejudgment interest to the judgment would be in error.

POINT III: IF PREJUDGMENT INTEREST IS PROPER THE PERIOD FOR WHICH IT IS CALCULATED IS FROM THE TIME OF PLAINTIFF'S COMPLAINT.

In cases where prejudgment interest is allowed on fraudulent transfer claims the starting point for calculating interest is the date of demand by the receiver or the date of filing the complaint, whichever is earlier. It is not the date of the transfers themselves. In *In re: Investment Bankers, Inc.*, 4 F.3d 1556 (10th Cir. 1993). The Tenth Circuit addressed the award of prejudgment interest in the context of a bankruptcy trustee's attempt to recover a fraudulent conveyance from a transferee. The Court held that awarding prejudgment interest from the date of the trustee's demand or filing of an adversary proceeding is appropriate if the equities of the case demand an award of prejudgment interest.

Other courts that have considered this situation have reached the same result. "Prejudgment interest has been awarded [in fraudulent conveyance actions] pursuant to the rate set forth in 28 U.S.C. § 1961 from the date the adversary proceeding was filed." *In re: Phillips*

379 B.R. 765 (Bkr. N.D. Ill 2007). In that case the court noted that awarding interest from the date of the transfer would be incorrect "because the transfer is not improper in any respect at the time it occurs." 379 B.R. at 788, quoting from *Nelson Co. v. Amquip Corp.,* 117 B.R. 813, 818 (Bkr. E.D. Pa, 1990). *See, also, In re: Keefe*, 401 B.R. 520 (B.A.P. 1st Cir. 2009) ("'courts have traditionally awarded prejudgment interest to a trustee who successfully avoids a preferential or fraudulent transfer from the time demand is made or an adversary proceeding is instituted.'") 401 B.R. at 526, quoting from *In re: Neponset River Paper Co.,* 231 B.R. 829 at 935 (B.A.P. 1st Cir. 1999).

Calculating interest from the date of demand or the date of the complaint, whichever is earlier, is consistent with the Plaintiff's argument and the Court's ruling that the Plaintiff is the claimant. In the Order, the Court stated "[t]he CFTC does not have the ability to institute an action on behalf of Winsome to set aside fraudulent transfers, and as such, cannot constitute the claimant. Moreover the Receiver could not have known about the transfers until his appointment." Because the Plaintiff has been deemed to be the claimant in this case and because the Plaintiff as Receiver came into existence only in January, 2011, the claims that the Plaintiff is attempting to recover did not exist prior to that time in any form that he could enforce. There is no evidence that the Plaintiff made demand prior to instituting this lawsuit in December, 2011. Therefore, prejudgment interest should accrue, if at all, from the date of the complaint, December 2, 2011.

POINT IV: IF PREJUDGMENT INTEREST IS PROPER THE CORRECT RATE SHOULD BE TIED TO MARKET RATES.

Plaintiff has selected an arbitrary proposed interest rate of five percent. The only justification offered for this rate is that the calculation of interest is within the discretion of the court and that an award of 5% has been upheld in the past.

Rather than arbitrarily choose a rate the appropriate rate must be tied to the market rate. *In the Matter of Oil Spill by the Amoco Cadiz,* 954 F.2d 1279 (7th Cir. 1992) ("Interest at what rate? Surely the market rate." 954 F.2d at 1332). *Cement Division, National Gypsum Co. v. City of Milwaukee,* 144 F.3d 1111 (7th Cir. 1998) (appropriate rate is the average prime rate over the proper period). In *Continental Transfert Technique Ltd. v. Federal Government of Nigeria,* 603 Fed. Appx. 1 (D.C. Cir. 2015) the court stated "[t]his court has repeatedly concluded that the use of the prime rate in the award of prejudgment interest reflects an appropriate exercise of the district court's discretion." 603 Fed. Appx. at 5.

In *Forman v. Korean Air Lines Co. Ltd,* 84 F. 3d 446 (D.C. Cir. 1996), the court stated "we quite agree with many of our sister circuits that the use of the prime rate for determining prejudgment interest is well within the district court's discretion." 84 F.3d at 450. And in *Alberti v. Klevenhagen,* 896 F.2d 927 (5th Cir. 1997) the Fifth Circuit not only said the prime rate was appropriate but found that the district court's failure to use the prime rate was error.

The Tenth Circuit has stated in dicta that either the prime rate or the 52-week Treasury bill rate is appropriate. *Kleier Advertising, Inc., v. Premier Pontiac*, 921 F.2d 1036 (10th Cir.

1990), fn. 4. In *Amoco Production Co. v. United States,* 663 F.Supp 998 (D. Utah 1987) Judge Anderson of this Court held:

> The rate should reflect the return defendants could have obtained on the money in financial markets during that period.
> The court finds the appropriate rate to be the fifty-two week Treasury Bill rate prescribed by Congress in 28 U.S.C. §1961. 663 F.Supp. at 1001.

The correct interest rate to be applied is either the average of the prime rate over the appropriate period of time or the 52-week Treasury Bill rate in effect at the time of judgment. Attached to this Memorandum is a table showing the prime rate as of the first day of every month from February, 2007 (when the Widmarks received their first distribution) through September, 2015. The average of all those months is 3.99%. However, since December, 2011, when this case was filed, the prime rate has been 3.25% every month. Using 3.25% simple interest on the excess distributions of $191,000 for 46 months (December, 2011, through September, 2015) yields a total of $23,795.42 in interest.

Alternatively, the 52-week Treasury Bill rate as of September 23, 2015, was 0.33% (www.bankrate.com/rates/interest-rates/treasury.aspx, accessed September 28, 2015). Applying that rate to the overpayment of $191,000 from December 2, 2011, to the present yields $2,390.60 in interest.

Defendants submit that if interest is allowed the appropriate rate is the Treasury Bill rate. The issue here is the same as was framed by the court in *Amoco Production v. United States*, 663 F. Supp. 998 (D. Utah 1987), that of full compensation for those who have been deprived of funds. Congress has determined that post-judgment interest -- compensation for delaying

payment to those entitled once it is determined that they are entitled to payment -- is set by the Treasury Bill rate. There should be no penalty imposed on Defendants nor windfall granted to Plaintiff by imposition of a higher rate before judgment, especially where there is a good faith dispute before judgment over the entitlement to the money.

CONCLUSION

An award of prejudgment interest in a case based on state law is a matter of state law. Utah's Fraudulent Transfer Act does not provide for interest as a component of a "claim" as that term is defined by the Act. Therefore, it is not appropriate to award prejudgment interest.

Assuming, without agreeing or conceding, that prejudgment interest is appropriate, the proper time for which interest should be awarded is from the date of the complaint, not the date of each transfer. Further, the correct interest rate to be used is the average of the prime rate over the appropriate period of time or the 52-week Treasury Bill rate in effect the week prior to judgment. The latter is the appropriate rate because it is the same as the post-judgment rate prescribed by 28 U.S.C. §1961. That rate compensates Plaintiff for loss of use of the money after judgment; Plaintiff should be entitled to no more for loss of the use of the money prior to judgment.

Dated September 30, 2015.

/s/ R. Steven Chambers
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO MOTION FOR ENTRY OF JUDGMENT to the following in the manner indicated on September 30, 2015:

David Castleberry
Attorney for Plaintiff
ECF

/s/ R. Steven Chambers