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

COMMODITY FUTURES TRADING FOR COMMISSION and STATE OF UTAH DIVISION OF SECURITIES, through Attorney General Sean D. Reyes, Plaintiffs, vs. RUST RARE COIN, INC., a Utah corporation, GAYLEN DEAN RUST, an individual, and ALEESHA RUST FRANKLIN, an individual, R LEGACY RACING, INC., a Utah Corporation, R LEGACY ENTERTAINMENT DENISE GUNDERSON RUST, an individual,	: : : : : : : : :	OBJECTIONS TO RECEIVER'S MOTION FOR PONZI DETERMINATION AND TO ESTABLISH AN OBJECTION PROCEDURE; and RENEWED REQUEST FOR LEAVE TO FILE MOTION TO CERTIFY QUESTIONS OF LAW TO UTAH SUPREME COURT Case No. 2:18-cv-00892-TC
LLC, a Utah limited liability company, and	:	Judge: Tena Campbell
R LEGACY INVESTMENTS LLC, a Utah Limited liability company, Relief Defendants.	: :	Magistrate Judge: Dustin B. Pead

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Peter W. Guyon ("Guyon") and Peter W. Guyon, P.C. ("Guyon P.C.") and Guyon's clients Elisabeth Guyon, Dr. Peter W. Guyon, Jr., Russell and Kathleen Mouritsen, and Bert and Catherine van Uitert object to the Receiver's Motion for Ponzi Determination and to Establish an

Objection Procedure (the "Receiver's Motion"), and renew their request to certify questions of law to the Utah Supreme Court as follows:

I.

INTRODUCTION AND SYNOPSIS OF OBJECTIONS

Guyon's objections are in response to the court's Order Establishing Ponzi Objection Procedure dated March 30, 2022 (the "Ponzi Procedure Order") [Dkt. No. 451]. As more fully discussed below, Guyon objects to the Receiver's Motion for at least the following reasons:

(1) The court lacks jurisdiction to grant the Receiver's Motion

The Receiver's Motion seeks an unconstitutional advisory opinion based upon hypothetical facts and lacking the mandatory "case and controversy" requirement of Article III of the United States Constitution, which motion the court lacks jurisdiction to grant.

(2) The Receiver has waived the right under Utah law to assert the instant Motion

When the Receiver filed his Motion to Allow Summary Disposition Procedure (see Dkt. No. 155) (the "Summary Disposition Motion"), he clearly stated and alleged:

> This procedure will not be used by the Receiver to resolve traditional "clawback actions" from "net winners," as those actions will be resolved by ancillary proceedings. (Summary Disposition Motion, pp. 2-3)

Guyon asserts that the Receiver's actions constitute a waiver under Utah law.

(3) The Tolling Agreement relied upon by the Receiver to preserve claims against Guyon and others is invalid and unenforceable *ab initio*, which bars and renders moot the Receiver's Motion by the expiration on November 15, 2019 of the statute of limitations

The Receiver's Motion is moot against Guyon and his clients because the underlying Tolling Agreement relied upon by the Receiver to preserve claims against Guyon and others and signed by Guyon on November 8, 2019 was, on information and belief, neither authorized by the

CFTC nor signed by the Director or his/her Deputy, rendering it void *ab initio* and unenforceable.

(4) The "Ponzi" presumptions are incompatible with Utah fraudulent conveyance statutes and should be clarified by the Utah Supreme Court before any ruling on their applicability under Utah law

If the court makes the ruling requested by the Receiver, the "Ponzi presumptions" relating to changing the usual burden of proof on various evidentiary issues from the Receiver to any defendant will automatically occur, unless Guyon is allowed—prior to any such ruling—to seek the Utah Supreme Court's definitive ruling on whether such evidentiary presumptions are even possible under Utah law. Pertinent Utah fraudulent conveyance statutes on their face will not permit switching the burden of proof from the Receiver to a defendant as the "Ponzi presumptions" demand. It is in the interest of all parties that the Utah Supreme Court weigh in on this issue and that Guyon be allowed to file and pursue his [Proposed] MOTION TO CERTIFY QUESTIONS OF LAW TO UTAH SUPREME COURT or a similar version as discussed in greater detail below.

II.

DISCUSSION OF OBJECTIONS AND ARGUMENT

1. THE COURT LACKS JURISDICTION TO GRANT THE RECEIVER'S MOTION

1. This action numbered 18-892 was filed on or about November 15, 2018 in the United States District Court for the District of Utah (hereafter referred to as the "Underlying Action") by the Commodity Futures Trading Commission ("CFTC") and the State of Utah Division of Securities ("Division") against Rust Rare Coin, Inc. ("RRC"), Gaylen Dean Rust ("Rust"), Denise Gunderson Rust ("Denise") and Joshua Daniel Rust ("Joshua") named as

"Defendants" therein as well as against certain named "Relief Defendants," i.e., Alesha Rust Franklin, R Legacy Racing, Inc., R Legacy Entertainment LLC, and R Legacy Investments LLC. Guyon at times refers to Defendants and Relief Defendants collectively as the "Rust Defendants."

2. The substance of the allegations in this Underlying Action is that Defendants and Relief Defendants swindled in the neighborhood of $200 million from hundreds of people who invested in an alleged Ponzi-like scheme described in the Underlying Action as a "Silver Pool". The CFTC and the Division allege as a basis for Federal Question jurisdiction that the transactions were both commodities futures, bringing the alleged scheme under the umbrella of federal CFTC regulation, and securities, bringing it within the regulatory guidelines of the Division.[1]

3. Because the individual Receivership Defendants have all pled guilty in the parallel criminal proceedings, the Receiver concludes—and argues—it is "indisputable" that a Ponzi scheme existed in the form of the "Silver Pool"[2] and that the Receivership Defendants operated it. (Receiver's Motion, p. 4, Introduction to Memorandum of Law).[3] The Receiver's Motion further alleges that the Ponzi scheme existed entirely within the confines of the "Silver Pool" managed by the Receivership Defendants and involved only "investors" in the Silver Pool (See Receiver's Motion 2nd ¶ p. 2 and Relevant Material Facts, p. 4, ¶¶ 1, 17, 26).

4. The Receiver then argues that because this court has already determined in "a number of ancillary actions initiated by the Receiver" that the Silver Pool operated as a Ponzi

[1] Guyon believes the linch-pin between this action and this court's jurisdiction is the presence of the CFTC, without which jurisdiction will disappear, in that the transactions alleged cannot simultaneously be futures under federal law and securities under state law.
[2] See Receiver's Motion, p. 2.
[3] Guyon believes the Receiver's Motion under the facts of this case is in reality in the nature of a motion for summary judgment which seeks to avoid the requirements of Rule 56 upon the Receiver and disallow the statutory protections inherent in the rule to any defendant.

scheme, that the court should, in a blanket ruling, now conclude as a matter of law that that the Silver Pool operated as a Ponzi scheme "since at least 2008" in all present and future ancillary proceedings. Guyon believes that the ruling sought by the Receiver is an unconstitutional advisory opinion this court lacks the power to grant.

5. Despite the powers he may acquire as the court's appointee, the Receiver's authority to act is defined by the entities in the Receivership, i.e., the Rust Defendants. This means that the Receiver "stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted." *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Circuit 2008) [citing] *Lank v. N.Y. Stock Exch*., 548 F.23 61, 67 (2d Cir 1995). Guyon asserts that as a result, the Receiver has no special protections or authority arising from his court appointment beyond those that the Rust Defendants themselves had.

6. The United States Supreme Court has consistently held that federal courts do not have the power to issue advisory opinions or "opinion[s] advising what the law would be upon a hypothetical set of facts." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Neither is a federal court "empowered to decide moot questions or abstract propositions." *North Carolina* at 246 [citing] *United States v. Alaska S. S. Co*., 253 U.S. 113, 116 (1920). As the *North Carolina* court further explained at 246, "mootness is a jurisdictional question . . . [which] derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." [citing] *Liner v. Jafco, Inc*., 375 U.S. 301, 306 n. 3 (1964) and *Powell v. McCormack*, 395 U.S. 486, 496 n. 7 (1969).

7. As the Supreme Court explained in *Local No. 8-6, OH., Chemical and Atomic Workers International Union, AFL-CIO, ET AL v. Missouri*, 361 U.S. 363, 367 (1960), "the duty of this Court 'is to decide actual controversies by a judgment which can be carried into effect,

and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" [citing] *Mills v. Green,* 159 U.S. 651, 653 and *Bus Employees v. Wisconsin Board*, 340 U.S. 416 As the Local No. 8-6 case further emphasized at 370 that the court has no power over a suit not before it because it has no jurisdiction of it or its issues. "Our power only extends over and is limited by the conditions of the case now before us." [citing] 193 U.S. at 52 and *Alejandrino v. Quezon,* 271 U. S. 528. Such is the situation here. The court's power reaches only this case identified by its number 18-892

8. The Receiver's Motion runs afoul of all the Supreme Court's pronouncements identified above. There is no case or controversy in this action that involves anyone other than the named parties and definitively *does not* include Guyon or any of his clients. Those who are parties in pending ancillary proceedings may be involved in a case or controversy in their respective ancillary proceedings, but not in this action where they are not even named parties. There is no case or controversy in *any* court that involves those who have current, signed tolling agreements.

9. The Receiver's Motion seeks relief in the form of a constitutionally unauthorized blanket advisory opinion meant to bind some individuals who are not parties to any proceeding to the Receiver's interpretation of the underlying facts and who would nonetheless be foreclosed from contesting that interpretation of the underlying facts in the context of a fully individualized and particularized adversarial proceeding as contemplated by Rules 9, 56, and 57, Federal Rules of Civil Procedure as opposed to the "one size fits all" proceeding promoted by the Receiver purely out of expediency;[4]

[4] See the Receiver's statement that the court's ruling is sought "[i]n order to streamline other ancillary actions and conserve the resources of the Receivership Estate, the Receiver now seeks a conclusive determination that the Silver

10. The salient facts are apparent in the Receiver's Motion itself. The Receiver seeks an unconstitutional and illegal ruling from this court based upon hypothetical facts and lacking the "case and controversy" requirement of Article III of the United States Constitution that would purport to affect individuals and/or entities that are not parties to this proceeding (18-892) and in some cases not parties to any proceeding.

2. THE RECEIVER HAS WAIVED THE RIGHT UNDER UTAH LAW TO ASSERT THE INSTANT MOTION

11. When the Receiver filed his Motion to Allow Summary Disposition Procedure (see Dkt. No. 155) (the "Summary Disposition Motion") on April 16, 2019 he clearly stated and alleged:

> **This procedure will not be used** by the Receiver to resolve traditional "clawback actions" from "net winners," as those actions will be resolved by ancillary proceedings. (Summary Disposition Motion, pp. 2-3) (emphasis in **bold** added)

12. The [proposed] Order Granting Motion to Allow Summary Disposition Procedure (see Dkt. No. 155-1) prepared by the Receiver did not include the foregoing limitation, and the court's Order Granting Motion to Allow Summary Disposition Procedure (see Dkt. No. 165) appears to be identical to the proposed order and without the limitation.

13. Notwithstanding the pledge, and directly contradictory to it, the Receiver seeks a blanket ruling of the existence of a Ponzi scheme that will negatively affect all ancillary proceedings seeking "clawback,", both present and future.

14. The Receiver assured the court that the Summary Disposition Procedure "will not be used" to resolve "clawback actions" from "net winners" in ancillary proceedings and is now proposing to do exactly that in clear contradiction of his pledge not to. Had interested parties

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Pool operated as a Ponzi scheme since at least 2008. Such a determination will act to preclude further litigation of that issue." Motion, p. 2

known of the Receiver's plans to use the court's Summary Disposition Procedure in ancillary actions, such parties may have objected to the order but chose to rely on the Receiver's allegations in his motion.

15. The Receiver should not be allowed to rely upon the court's Summary Disposition Order (see Dkt. No. 165) in support of the Receiver's Motion because such reliance directly contradicts the Receiver's promise and amounts to a waiver under Utah law

16. Under Utah law the Receiver has waived the right to now use the Summary Disposition Procedure to "resolve traditional 'clawback actions' from 'net winners . . .." As discussed at some length in the case of *Soter's, Inc. v. Deseret Federal Savings & Loan Association*, 857 P.2d 935, 942 (Utah 1993), Utah Supreme Court concluded that

> [a] waiver is the intentional relinquishment of a known right. To constitute waiver, there must be [1] an existing right, benefit or advantage, [2] a knowledge of its existence, and [3] an intention to relinquish it.

17. In this case, the "right, benefit or advantage" is the use of the court's Summary Disposition Procedure to pursue clawback actions against net winners. The fact the Receiver specifically pledged not to utilize it confirms that it was existing and that he knew about it. That leaves the third element of whether he intended to relinquish it. As the *Soter's* court opined at 942, "the intent to relinquish a right must be distinct," which means "the totality of the circumstances 'warrants the inference of relinquishment.'" [citing] *Harris v. Faultfinders, Inc.*, 103 Ill.App.3d 785, 431 N.E.2d 1205, 1209 (1981); see also *Morgan v. Quailbrook Condominium Co.*, 704 P.23 573, 578 (Utah 1985) and *Barnard v. Wassermann*, 855 P.2d 243, 246-247 (Utah 1993).

18. The Receiver's language is unequivocal and even explains why it is unequivocal: "This [Summary Disposition] Procedure will *not* be used to resolve traditional 'clawback

actions' from 'net winners,' as those actions will be resolved by ancillary proceedings." [emphasis in *italics* added]. This does not appear to be a pledge lightly made: he might have said "I (the Receiver) will not use this procedure [because] I will pursue these other matters via ancillary proceedings." No contingencies appear in the record. No "ifs" such as "if it's convenient" or "unlesses" such as "unless it costs money" or anything of that nature. Just the outright, unqualified pledge that the Receiver will not use the Summary Disposition Procedure in clawback actions against net winners. Surely the totality of these circumstances "warrants the inference of relinquishment" as contemplated by the *Soter's* case.

3. THE TOLLING AGREEMENT RELIED UPON BY THE RECEIVER TO PRESERVE CLAIMS AGAINST GUYON AND OTHERS IS INVALID AND UNENFORCEABLE *AB INITIO*, WHICH BARS AND RENDERS MOOT THE RECEIVER'S MOTION BY THE EXPIRATION ON NOVEMBER 15, 2019 OF THE STATUTE OF LIMITATIONS

19. In mid-2019 the Receiver sent demand letters to Guyon and his clients (with the sole exception of J. Donene Polson, who received no payments of any kind from the Rust Defendants), alleging they had all received monies subject to disgorgement (i.e., "clawback") by the Receiver.

20. Guyon and his clients deny any liability whatsoever to the Receiver, but elected to sign a certain Tolling Agreement that would allegedly toll the running of the statute of limitations that was to expire on or about November 15, 2019 in the interest of fostering settlement discussions.

21. On November 8, 2019, Guyon on behalf of himself and his clients signed the Tolling Agreement as prepared by the Receiver. At no time did Guyon sign the Tolling Agreement on behalf of Guyon P. C. or otherwise agree to the tolling of any statute of limitations

on behalf of Guyon P. C. The Tolling Agreement in the RECITALS section contains the following provisions directly pertinent to this motion:

> A. **The Receiver believes and asserts that the Rust Rare Coin Receivership has causes of action against the Guyon Group[5] arising from or relating to the Guyon Group's alleged involvement with the fraudulent silver investment pool operated by Gaylen Rus**t (collectively, the "Claims").
>
> B. **The Parties are engaged in a period of evaluating the Claims, with the potential of entering into negotiations in an attempt to resolve this matter without the need for litigation, and they desire to delay commencement of any lawsuit relating to the Claims during the pendency of those considerations and negotiations.**
>
> NOW, THEREFORE, in consideration of the recitals, the mutual covenants contained herein, the sufficiency of which is mutually acknowledged, the Parties agree as follows**: . . . [**emphasis in **bold** added]

22. Paragraph 14 of the Agreement also contains the following pertinent language:

> Authority. Each signatory to this Agreement represents that he or she has full power and authority to execute this Agreement on behalf of his or her respective Party and bind that Party to the terms of this Agreement.

23. Guyon's main reason for entering into the Tolling Agreement was to allow Guyon and the Receiver to analyze the facts of their various circumstances, avoid unnecessary litigation, and attempt to negotiate a resolution as contemplated in the citation above.

24. The Receiver's intent in entering into the Tolling Agreement is expressed in his Fourth Quarterly Status Report dated October 31, 2019 in this Underlying Action (Dkt. 362, ¶ 22, pp. 10-11), attached as **EXHIBIT 1** as follows:

> **For potential claw back defendants whose claims arose more than four years before the Receiver's appointment**, **the Receiver has been securing tolling agreement[s] from them in order to undertake further analysis before reaching a final resolution**. To the extent the Receiver is unable to execute a tolling agreement or reach a favorable settlement agreement with these investors,

[5] The "Guyon Group" is defined by the Receiver in the Tolling Agreement as including Guyon and Guyon P. C.'s clients Elisabeth Guyon, Dr. Peter W. Guyon, Jr., Russell and Kathleen Mouritsen, and Bert and Catherine van Uitert, but DOES NOT include Guyon P. C. itself.

> **the Receiver intends to file ancillary lawsuits against them before the upcoming November 15, 2019 statute of limitations deadline**. The Receiver continues to remain hopeful that many of the fraudulently transferred funds will be recovered without having to resort to formal litigation. [emphasis in **bold** added]

25. The Tolling Agreement in Guyon's possession is signed only by Guyon; although there is a signature line for the Receiver, it is not signed by the Receiver. Neither is the Tolling Agreement signed by the Director of the CFTC or his/her deputy. Guyon's version of the Tolling Agreement is attached as **EXHIBIT 2**.

. 26. Guyon is unsure whether or not the Receiver also signed the Agreement, and if so, when, but believes the Receiver must affirmatively establish he signed the Agreement prior to any bar of any civil action that would otherwise occur due to the normal running of any applicable statute of limitations.

27. At the time the Tolling Agreement was signed by Guyon, the CFTC (a Plaintiff in the Underlying Action upon whom Federal Question Jurisdiction depends) had its own requirements not divulged to Guyon concerning the use of tolling agreements, as found in the CFTC Enforcement Manual dated May 20, 2019 (the "Manual") in ¶ 5.3 (second unnumbered paragraph) as follows:

> If there is a potential statute of limitations issue, Division staff may ask the potential defendant or respondent to sign a "tolling agreement." By signing a tolling agreement, the potential defendant or respondent agrees to the suspension of the running of any statute of limitations period for an agreed upon length of time. **The use of a tolling agreement in a particular matter must be approved by the Director or a Deputy who also must sign the tolling agreement**. Division staff should consult with OCC concerning any statute of limitations or tolling agreement issues that arise. [emphasis in **bold** added]

Guyon attaches collectively as **EXHIBIT 3** hereto CFTC public announcements and parts of the Manual pertinent to this matter, i.e., CFTC Release Number 7925-19 dated May 8, 2019 (pp. 1-1 and 1-2; and a public announcement of the same (pp.1-3 and 1-4. Attached hereto as **EXHIBIT**

4 are the front page and 10th page of the Manual which includes ¶ 5.3. The CFTC maintains a website with additional information at www.cftc.gov.

28. The mandatory language in ¶ 5.3 of the Manual clearly establishes two conditions to "the use of a tolling agreement": (1) the approval of the Director of the CFTC or his Deputy and (2) the signature of either on the tolling agreement itself. Guyon asserts on information and belief that neither the Director of the CFTC nor his or her Deputy approved of the Tolling Agreement prior to its signature by Guyon and neither the Director nor his Deputy signed it. The Tolling Agreement received by Guyon had only his signature. There were no discussions between Guyon and the Receiver's attorney concerning the issue. Guyon and his clients believe that without the prior approval of the CFTC Director or his Deputy and the signature of either, the Tolling Agreement is a nullity because the Receiver lacked the authority to enter into the agreement in the first place, whether the Receiver signed the Tolling Agreement or not. Guyon believes that without the agreement and authorized signature of the CFTC official, the only jurisdictional link between this [federal] court and the Receiver is broken and the Receiver has no authority to sign the Tolling Agreement on his own.

29. The Manual was first published on May 8, 2019 "with the intent to increase transparency, certainty, and consistency, and, more generally, to advance the rule-of-law principles that underpin all DOE (Division of Enforcement) and CFTC enforcement actions."[6] Consistent with these stated policies and others, the CFTC is bound by its own internal rules, including §5.3. If the Tolling Agreement was not agreed to—and signed—by the Director or his Deputy, the Tolling Agreement is a nullity and unenforceable against Guyon and his clients. See *United States ex rel. Accardi*, 347 U.S. 260, 268 (1954) (Agency failure to exercise its own

[6] CFTC's Division of Enforcement Issues First Public Enforcement Manual, Release Number 7925-19, May 8, 2019.

discretion as required by valid regulations). The *Accardi* case has been cited as authoritative more recently by the district court in *A.S.M., et al. v. Warden, Stewart County Detention Center*, et al, 467 F.Supp.3d 1341, 1352 (USDC, M.D.Ga. 2020) (an agency must follow its own properly delegated procedures as a matter of procedural due process) and in *Thomas v. District of Columbia Government, et al.*, 580 F.Supp 2nd 142, fn 4 (USDC DC 2008) ("The *Accardi* doctrine holds that government agencies are bound to follow their own rules, even self-imposed procedural rules that limit otherwise discretionary decisions."); see also *Panhandle Eastern Pipe Lline Co. v. Federal Energy Regulatory Commission*, 613 F.2d 1120 (C.A.D.C., 1979) (agency bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C., 1986) (agency must adhere to its own regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be enforced). An agency action that fails to follow its own regulations will be struck down by the courts. *U.S. v. Heffner*, 420 F.2d 809, (C.A. Md. 1969); *Morton v. Ruiz*, 415 U.S. 199 (1974) (where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures).

30. On information and belief Guyon asserts that the CFTC and the Receiver did not follow the mandatory requirements outlined above and that the Tolling Agreement is, therefore, unenforceable and void**.** To be binding and enforceable, the Tolling Agreement must be agreed to and signed by the Receiver as contemplated by the Tolling Agreement itself and approved and signed by the CFTC Director or his/her Deputy as mandated by ¶5.3 of the CFTC Enforcement Manual. Movants assert that neither of those requirements has been met.

4. THE "PONZI" PRESUMPTIONS ARE INCOMBATIBLE WITH UTAH FRAUDULENT CONVEYANCE STATUTES AND THEIR APPLICATION SHOULD BE CLARIFIED BY THE UTAH SUPREME COURT BEFORE ANY RULING ON THEIR APPLICABILITY UNDER UTAH LAW

31. The Receiver's Motion alleges and presumes that the "Silver Pool" was a "classic" Ponzi scheme (Receiver's Motion, pp. 3, 16) and that "none of the various iterations of Rust's investment programs was legitimate and that all the various programs touted by Rust were simply part of the larger Ponzi scheme" (Receiver's Motion, p. 3 fn 2)[7].

32. The Receiver does not discuss the benefits—to the Receiver—if the court recognizes the existence of a Ponzi scheme, or the inevitable disadvantages to those who might be caught in the web of such a ruling by the court. All those who were victimized directly and indirectly are in danger of being victimized a second time—this time by the Receiver. Simply put, if the Receiver can wrangle a Ponzi scheme finding, the burdens of proof will be in danger of being shifted to the victims in every ancillary proceeding, present and future, and the defendants in those current and future cases may not be allowed to argue they were not involved in the Ponzi scheme. That outcome, Guyon believes, is directly contrary to Utah State law and for that reason is seeking the court's indulgence in allowing him to seek the ruling of the Utah Supreme Court on the applicability of Utah law on the alleged Ponzi presumptions.

33. In Guyon's case in particular, Guyon had a decades-long agreement and course of dealing with Gaylen Rust, RRC, and the entire Rust family to provide legal services. This long-standing agreement provided that some of Guyon's payment for fees was in the form of silver bullion kept on the premises of RRC. Since his appointment the Receiver has persistently and

[7] Guyon strongly disputes the Receiver's statement that this matter is a Ponzi scheme at all, at least as far as Guyon's direct purchase of silver bullion is concerned, much less a "classic" one, and observes that the Receiver has failed to mention the "granddaddy" of all Ponzi cases, i.e., *Cunningham v. Brown*, 265 U.S. 1, 44 S.Ct. 424, 68 L.Ed. 873 (1924) The *Cunningham* case has not to Guyon's knowledge been overruled, overturned, amended, or even altered by the United States Supreme Court and therefore continues to be the "last word" in Ponzi litigation.

consistently represented to the court that no "meaningful" amount of silver bullion existed as part of the purported Ponzi scheme. (see Receiver's Motion, ¶ 21) Therefore, in 2015 when Gaylen Rust showed Guyon a significant amount of silver bullion at RRC that Gaylen Rust said was Guyon's, it likely was. If that is so, it is supportive of Guyon's claims that he bought and sold silver bullion directly and not as a member of any "pool" and is inconsistent with the Receiver's purported assertions that Guyon was involved in the alleged Ponzi scheme. If the Receiver decides to pursue Guyon as a Ponzi investor and victim, Guyon ought to have the right to question the existence of a Ponzi scheme as it applies to him, as well as the court's federal question jurisdiction,[8] rather than have the issue decided summarily in an unrelated action as the Receiver is attempting to do here..

34. Accordingly, Guyon must be allowed, prior to any ruling on the Receiver's Motion, to file and pursue an updated but similar version of his [Proposed] MOTION TO CERTIFY QUESTIONS OF LAW TO UTAH SUPREME COURT (the "Motion to Certify") (**collectively attached with memorandum in support as EXHIBIT 5**) in the interest of seeking Utah's highest court to make its determination of whether the Ponzi presumption and its three (3) applications are even allowed under Utah Law as expressed in Utah's Uniform Voidable Transaction Act (the "UUVTA") found in Utah Code Annotated ("UCA") §25-6-101, *et seq*. This fourth objection is supported by at least two (2) rulings from the supreme courts of both Minnesota and Texas based on either identical or similar statutes in those respective states, both of which are attached hereto as follows: **EXHIBIT 6**: *Finn, et al. v. Alliance Bank, et al.*, 886 N.W.2d 618 (Minn. 2015) and **EXHIBIT 7**: Janvey v. *The Gold Channel, Incorporated*, 487 S.W.3d 560 (Texas 2010).

[8] Guyon believes that any purported claims the Receiver may purport to assert are purely state jurisdictional claims.

35. If the Receiver receives the blanket benefit of the three Ponzi presumptions, all defendants in existing and future ancillary proceedings will automatically be relegated to bearing the burden of proof to overcome the presumptions in the Receiver's favor. In Guyon's case at least, he will be deprived of the right to seek the ruling of the Utah Supreme Court that the Ponzi presumptions do not apply under Utah law in the first place.

36. In support of this 4th objection Guyon hereby incorporates by this reference all allegations and arguments in the Motion to Certify and its supporting Memorandum, which are either summarized or reproduced, and discussed immediately below each of the 3 questions to which they relate. If the court rules in the Receiver's favor, Guyon will likely be collaterally estopped to raise the issue in any subsequent ancillary action, despite not having had the opportunity to contest it, all in violation of Guyon's rights to due process of law[9]

37. The three questions of law concerning which Guyon seeks the Utah Supreme Court's determination prior to any ruling by this court are as follows: [10]

Question 1: Whether under the provisions of UCA §25-6-103 the Receiver must offer evidence and sustain the burden of proving that the debtor-transferor was insolvent on the date of the transfer, or whether insolvency is presumed.[11]

UCA § 25-6-103 provides in pertinent part:

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[9] Guyon previously sought leave to file this Motion to Certify on May 25, 2020 (Docket # 325-12) in the context of the Receiver's Motion to Approve Proposed Distribution Plan, Objection Procedure, and Claim Analysis. The court did not allow the filing, asserting that Guyon would not be harmed thereby because he would have the right to file it if and when the Receiver decided to file suit against Guyon. However, now that the Receiver is seeking a ruling that could harm Guyon if the court makes the requested finding, the court should now allow these issues raised by Guyon to be litigated before any ruling on the Receiver's Motion or, at the least, preserve the issues in the event the Receiver decides to file suit.

[10] Guyon has attempted to adopt to the extent possible the recommendations of Judge David Nuffer as outlined in his Thesis of March 2018 entitled *Certification of Legal Questions to the Utah Supreme Court.*

[11] According to §25-6-103, there is only one presumption of insolvency under Utah law, and that is a "built in" presumption of insolvency in the case of a debtor who is "generally not paying . . . debts as they become due." There is nothing in the statute that suggests any other presumption. Logically, then, there is no reason to presume insolvency under any conditions other than those specifically expressed in the statute. To presume insolvency merely because of an alleged Ponzi scheme—or even a proven one—would amount to judicially amending the language of the statute to include a Ponzi scheme presumption where none exists, contrary to the expressed will of the Legislature.

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

(2)(a) A debtor that is generally not paying the debtor's debts as they become due other than as a bona fide dispute is presumed to be insolvent.

(b) The presumption imposed on the party against which the presumption is directed has the burden of proving that the nonexistence of insolvency is more probable than its existence.

38. It is important to note that the insolvency of RRC or Rust or other individuals or entities is not a necessary element to actual fraud cases, which this case is as alleged by the Receiver, but in the event the Receiver later determined to pursue a constructive fraud case against any defendant, insolvency and financial distress *are* necessary elements, which in a Ponzi scheme scenario would be presumed, thereby relieving the Receiver of the burden of proving those elements and shifting them to a defendant.

39. The Ponzi scheme presumption on voidability is that the operator of a Ponzi scheme is conclusively insolvent when it transfers assets. Insolvency of course relates to the issue of constructive fraud in Utah's version of the Uniform Voidable Transactions Act (the "UUVTA"), which is divided into two possible formulations in Utah Code Annotated (hereafter "UCA") §25-6-202(b)(i) and (ii) where the debtor makes a transfer or incurs an obligation:

> without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due."

40. The UUVTA itself already provides two "tests" to determine insolvency. First, it declares that "[a] debtor is insolvent if, at fair valuation, the sum of the debtor's debts is greater

than all of the debtor's assets" (UCA §25-6-103(1)). Second, the UUVTA also includes a "built in" presumption of insolvency that "[a] debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute." (UCA §25-6-103(2)(a))

41. The "built in" presumption based on the general non-payment of debts is unrelated to any circumstance necessarily arising from the operation of a Ponzi scheme, and to add a conclusive presumption largely on policy grounds arising from a Ponzi scheme but unrelated to the "built-in" presumption is not justified by the UUVTA's language.

42. Additionally, the Ponzi presumption of insolvency should not be applied because the constructive fraud provisions of UCA §25-6-202(1)(b)(i) and (ii) are largely unrelated to the issue of insolvency and contemplate proof separate from insolvency on the part of the creditor "by a preponderance of the evidence." (UCA §25-6-202(3))

43. In its examination of Minnesota Statutes ("MinnStat") §513.44(a)(2), virtually identical to Utah's statutory scheme, the Minnesota supreme court concluded that despite the fact that the second statutory formulation of constructive fraud was "only indirectly related to the debtor's insolvency, . . . [w]ith limited exceptions federal courts usually have applied the presumption to both formulations of constructive fraud." *Finn, et al. v. Alliance Bank, et al.*, 860 N.W.2d 638, 648 (Minn.2015) [citing] *Donell v. Kowell*, 533 F.3d 762 (9th Cir.2008)

44. At the same time, the *Finn* court rejected the application of the conclusive Ponzi Presumption to the issue of insolvency, opining at 649 that "it is not at all clear that every fraudulent investment arrangement that is later determined to be a Ponzi scheme necessarily will have been insolvent from its inception."

45. Neither will the underlying facts of this case support the addition of a conclusive presumption of insolvency. When the FBI and others effectively shut down Rust Rare Coin, Inc.,

and a number of other businesses being operated by Gaylen Rust, at the very least RRC (and possibly other interlocking businesses) was likely solvent, judging by the fact it had been a successful business for over 30 years, and was operating on November 15, 2018 when it was shut down. In fact, the Receiver has admitted that RCC was solvent (see Receiver's Motion, p. 15).

Question 2: Whether "value" in UUVTA (UCA §25-6-104) is presumed to be limited to the amount of the principal portion of a debt or of the original investment and excludes satisfaction of the interest portion of a debt or a contractual obligation to pay a profit, i.e., as a matter of law the debtor cannot under any circumstances receive reasonably equivalent value for the "interest" or "profits" it pays to investors, notwithstanding UUVTA (UCA §25-6-104(1) which includes in the definition of "value" property transferred and satisfaction of an antecedent debt, and makes no distinction between the principal portion and the interest portion of the debt or between the amount of the original investment and a contractual profit.

46. UCA §25-6-202 recognizes two affirmative defenses to claims of voidability of transfers, i.e., the first involving constructive fraud, and the second actual fraud:

> Under UCA §25-6-202(1)(b) a transferee in a case involving constructive fraud claims against him or her brought under UCA §25-6-202(b)(i) or (ii) has the statutory affirmative defense of "a reasonably equivalent value in exchange for the transfer or obligation" against a creditor's claim of a voidable transfer.
>
> Under UCA §25-6-304(1), a transferee against whom actual-fraud claims have been brought under UCA §25-6-202(1)(a) has the statutory affirmative defense that he or she "took in good faith and for a reasonably equivalent value" against a creditor's claim of an intentional fraudulent transfer.

47. Whether the creditor's claims sound in constructive fraud (UCA §25-6-202(b)(i) or (ii)) or actual fraud (UCA §25-6-202(1)(a), the creditor has the burden of proving the claims by a preponderance of the evidence as stated in UCA §25-6-202(3), and there is nothing in the statute that allows the court to adjust the statutory scheme contemplated by the Utah Legislature to relieve a trustee or receiver of that burden.

48. This presumption disallows a transferee (who has the burden of showing value was given under the Uniform Fraudulent Transfer Act) from asserting value beyond the principal

or original investment. The ramifications of that presumption forbid the transferee from seeking interest or profits that may have been paid by Rust or RRC. In this case, any interest or profits received by a transferee could be presumptively considered to be fraudulent conveyances and subject to "clawback" by the Receiver.

49. There are at least three reasons to reject the Ponzi presumption that a debtor cannot as a matter of fact or law receive "reasonably equivalent value" for the "interest" or "profits" it pays to investors. As the following discussion will demonstrate, the application of such a presumption completely ignores the language of the applicable statutes.

A. The issue of "value" is governed in the UUVTA by UCA §25-6-104(1), which states in pertinent part as follows:

> Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. . . .

B. "Antecedent debt" is "any legally enforceable right to payment against the debtor . . .." *Finn*, 860 N.W.2d at 651. Such a broad statement of what qualifies as value given is entirely inconsistent with the Ponzi presumption that no facts will justify the recognition of value in an exchange between a Debtor operating a Ponzi scheme and an investor.

50. Courts applying the Ponzi scheme value presumption "deem a contract between the operator of a Ponzi scheme and an investor to be unenforceable by the investor as a matter of public policy to the extent that the investor seeks a return in excess of its original principal." *Finn* 860 N.W.2d at 652. This line of thinking is based on two concepts, discussed immediately below:

A. The nature of Ponzi schemes is that payments to some inevitably come from money stolen from others. While this conclusion is true of the original Ponzi scheme, it is not true of all such schemes. In some circumstances, which Movants believe includes the Rust

Defendants, much of the payments for interest and profits came from legitimate sources of earnings.

B. The second concept, which *Finn* roundly criticized as "a dubious assumption about the purpose of fraudulent transfer laws," is that fraudulent transfer laws are able "to achieve greater equity in favor of unsatisfied creditors and investors." At 860 N.W.2d at page 652 *Finn* bluntly states: "[E]quality among a debtor's creditors, even if they are victims of a Ponzi scheme, is not the purpose of fraudulent transfer law."

51. There is nothing in UUVTA that provides for or mandates an equal distribution of assets among creditors. Under UCA §25-6-303, Utah Code, creditors have the following options: (a) to avoid the transfer; (b) attachment or other such proceeding authorized by the rules of civil procedure; (c) to enjoin further transfer; (d) to appoint a receiver; or (e) "any other relief the circumstances may require."

52. Movants are well aware of the arguments made by some that trumpet the purported unfairness of allowing some creditors to profit by preferential transfer at the expense of others. However, even if such a result is unfair, which Movants do not concede, the UUVTA is not the appropriate vehicle to change the result. Neither is the superimposition of a Ponzi presumption not contemplated in the legislation in the first place. In sum, there is nothing in the UUVTA that prevents a debtor from making a preferential transfer—as long as the transfer is not fraudulent. See *Aretz v. Kloos*, 89 Minn. 432, 439, 95 N.W.216, 219 (1903); *Vost v. Stickney*, 19 Minn. 367, 369 and Boston Trading Grp., *Inc. v. Burnazos*, 835 F.2d 1504, 1509 (1st Cir.1987) (Breyer, J.), *Town of Southampton v. Chiodi*, 971 N.Y.S.2d 75 (2009 N.Y. Slip Op. 52856).

53. This rejection of the idea that a state statute can or should be altered by the mere presence of a Ponzi scheme is echoed in the case of *Janvey v. Golf Channel, Inc.*, 487 S.W.3d

560 (Texas 2019), wherein the Texas Supreme Court responded to a Certified Question from the United States Court of Appeals for the 5th Circuit relating to the "reasonably equivalent value" requirement of the affirmative defense in the Texas statute, which is identical to Utah's in UCA §25-6-202(b). The Texas Court of Appeals had initially embraced the Ponzi Presumption and concluded that a $5.9 million transfer of services was avoidable because all transfers are considered fraudulent and the debtor insolvent. *Janvey* at 567. The transferee's affirmative defense that it received the transfer "in good faith and for a reasonably equivalent value" was deemed forfeit because of the conclusive presumption the transfer was fraudulent due to illegality and insolvency inherent in Ponzi scheme transfers. *Janvey* at 567.

54. On rehearing, however, the Circuit Court vacated its initial opinion (*Janvey* at 563) and certified the following question to the Texas Supreme Court:

> Considering the definition of "value" in section 24.004(a) of [TUFTA], the definition of "reasonably equivalent value" in section 24.004(d) of [TUFTA], and the comment in [UFTA] stating that "value" is measured "from a creditor's viewpoint," what showing of "value" under TUFTA is sufficient for a transferee to prove the elements of the [good-faith] affirmative defense under section 24.009(a) of [TUFTA]?

The Texas Supreme Court's answer follows:

> Construing the relevant statutory provisions, we conclude TUFTA's "reasonably equivalent value" requirement can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business.

55. Utah's good faith affirmative defense in the UUTVA is identical to that of Texas, and Section UCA §25-6-202(b) provides an "escape hatch" to the creditor who gave "reasonably equivalent value" for the transfer or obligation while the debtor was, or was about to become, financially distressed as contemplated by UCA §25-6-202(b)(i) or (ii). It remains to be seen whether Utah law imposes the same or similar evidentiary conditions, i.e., (1) full performance

under a lawful, arm's-length contract for fair market value, (2) consideration having an objective value at the time of the transaction, and (3) the exchange occurred in the ordinary course of the transferee's business.

56. Despite the Receiver's attempts to utilize it as a tool to "equalize" the treatment of "winners and losers" in an alleged Ponzi scheme, the UUVTA "was designed to prevent fraudulent transfers of assets by debtors who seek to defraud creditors or avoid debts by placing assets beyond creditors' reach. See *Timothy v. Pia, et al.*, 424 P.3d 937 (Utah App.2018), ¶ 11, [citing] *Bradford v. Bradford*, 1999 UT App 373, ¶ 14, 993 P.2d 887. Accord, *Porenta v. Porenta*, 416 P.3d 487, 492 (Utah 2017). See also *Bird v. Wardley (In re White)*,[12] Memorandum Decision on Lynn E. Wardley's Motion for Summary Judgment (Docket No. 58) (Bankr.Utah 2018), ". . . the purpose of [UUTVA is] to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors."

57. The legislative purpose is clear under the foregoing authorities. There is nothing in the statute that allows, suggests, or contemplates the use of the UUVTA to "clawback" monies from some investors to pay to others in an attempt to equalize the losses to all, whether because of a Ponzi scheme or not.

Question 3: Whether under the provisions of UUVTA (UCA§25-6-202), the Receiver must offer evidence and sustain the burden of proving that transfers made in furtherance of an alleged Ponzi scheme were made with fraudulent intent, or whether fraudulent intent is presumed.

58. The idea of a presumption of fraudulent intent required by UCA §25-6-202(1)(a) is rooted in the nature of a Ponzi scheme itself, *i.e.*, the mere existence of a Ponzi scheme has been held to be a sufficient reason to establish as a matter of law that the transferor made the

[12]Bankruptcy No. 14-25727; Adversary Proceeding No. 16-02089.

transfer "with actual intent to hinder, delay, or defraud." See, for example, the discussion in *Merrill v. Abbott* (*In re Independent Clearing House Co.*), 77 B.R. 843, 860 (D. Utah 1987):

> One can infer an intent to defraud future undertakers from the mere fact that a debtor was running a Ponzi scheme. Indeed, no other reasonable inference is possible. A Ponzi scheme cannot work forever. The investor pool is a limited resource and will eventually run dry. The perpetrator must know that the scheme will eventually collapse as a result of the inability to attract new investors. The perpetrator nevertheless makes payments to present investors, which, by definition, are meant to attract new investors. He must know all along, from the very nature of his activities, that investors at the end of the line will lose their money. Knowledge to a substantial certainty constitutes intent in the eyes of the law, . . . and a debtor's knowledge that future investors will not be paid is sufficient to establish his actual intent to defraud them (citations omitted).

59. However, the conclusion on this issue in the *Clearing House* case is clearly inconsistent with current Utah statutory law. The pertinent language of Utah's Uniform Voidable Transactions Act ("UUVTA") at UCA §25-6-202(1) allows a creditor to avoid a transfer or obligation "if the debtor made the transfer or incurred the obligation**: (a) with actual intent to hinder, delay, or defraud any creditor of the debtor."** Insofar as the burden of proof is concerned, the UUVTA clearly assigns it to the creditor by the following language at UCA §25-6-202(3):

> **A creditor making a claim for relief under Subsection (1) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.** [emphasis in bold added]

60. The UUVTA then provides a list of 11 factors, generally known as "badges of fraud," that a court *may* consider in making its determination of whether a creditor has proved "actual intent" to hinder, delay, or defraud any creditor (UCA §25-6-202(3)). It is important to note that the 11 "badges of fraud" factors in UCA §25-6-202(3) are neither exclusive nor conclusive of the issue of "actual intent." Rather, the statute clearly states that "consideration *may* be given, among other factors, [to the badges of fraud]."

61. Because the badges of fraud enumerated in UCA §25-6-202(2) are non-exclusive (i.e., they allow consideration of a non-enumerated badge of fraud to be considered, which might even include operating a Ponzi scheme), UCA §25-6-202(2) cannot logically be interpreted to mean that the Legislature intended a *non-enumerated* badge of fraud, whatever it is, to be conclusive. If even an enumerated badge if fraud is *non conclusive*, then certainly a non-enumerated one cannot be *conclusive*. The literal, unambiguous meaning of UCA §25-6-202(2) simply cannot be stretched to include the "infer[ence of] an intent to defraud" from the mere existence of a Ponzi scheme as the court concluded in the *Clearing House* case.

62. That same conclusion was reached by the Supreme Court of Minnesota in the well-reasoned case of *Finn*, attached hereto as **Exhibit 6** wherein the court first observed that there was nothing in the Minnesota Uniform Fraudulent Transfer Act[13] "allowing a court to presume anything based on the mere existence of a Ponzi scheme" and then held:

> ". . . the Legislature's enumeration of a specific list of badges of fraud, none of which are conclusive, precludes an interpretation that it intended a *non-enumerated* badge of fraud to be *conclusive*." [emphasis in italics in original]

63. Neither is there anything in UUVTA which would allow a court to make a presumption based upon the mere existence of a Ponzi scheme. Aside from being patently illogical, for the court to apply a presumption in the Receiver's favor that any transfers in furtherance of the alleged Ponzi scheme were made with fraudulent intent and thereby avoided as a matter of law is clearly contrary to the expressed intent of the Legislature in the language itself.[14]

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[13] The provision of the Minnesota Uniform Fraudulent Transfer Act, Minn.Stat.§513.44(a)(1), under consideration in the *Finn v. Alliance Bank* case cited above, is identical to UUVTA §25-6-202(1).

[14] As the Utah Supreme Court in *State v. Robinson*, 147 P.3d 448, ¶39 (Utah 2006) has stated concerning statutory interpretation, "[w]hen interpreting statutes, we determine the statute's meaning by first looking to the statute's plain language, and give effect to the plain language unless the language is ambiguous.' [citing] *Blackner v. State*, 2002 UT 44, ¶ 12, 48 P.3d 949."

64. The *raison d'être* of the UUVTA is to provide a framework "to prevent fraudulent transfers of assets by debtors who seek to defraud creditors or avoid debts by placing assets beyond creditors' reach, ..." *Timothy v. Pia, Anderson, Dorius, Reynard & Moss, LLC.*, 424 P.3d 937, 940 (Utah App. 2018) [citing] *Bradford v. Bradford*, 1999 UT App 373, ¶ 14, 993 P.2d 887 (Ut App 1999). It was not created to create evidentiary presumptions in favor of trustees and receivers to make it easier for them to recover transfers to innocent victims of fraudulent schemes.

65. Superimposing a Ponzi presumption on the Utah statute would constitute a judicial amendment or "rewrite" of the statute, which this court lacks the authority to do. There is nothing to justify allowing a creditor (the Receiver in this case) "to bypass the proof requirements of a fraudulent transfer claim merely by showing that the debtor operated a Ponzi scheme and transferred assets 'in furtherance of the scheme.'" See *Finn, et al. v. Alliance Bank*, et al., 860 N.W.2d 638, 646 (Minn.2015).

66. Neither is there any statement in the language of UCA §25-6-202(3) that would justify the court's granting the functional equivalent of summary judgment on the issue of fraudulent intent merely upon a finding of a Ponzi scheme without allowing the debtor, at a minimum, the opportunity of filing countering declarations or affidavits.

67. A similar conclusion was reached by the Supreme Court of Texas *in Janvey v. The Golf Channel, Incorporated*, 487 S.W.3d 560 (Texas 2016) (attached as **Exhibit 7**) on a Texas statute identical to Utah's "actual intent to hinder, delay, or defraud" statute found at UCA §25-6-202. Construing the Texas equivalent of UCA §25-6-304 (which is a "safe harbor" from voidability if a transfer was "in good faith and for a reasonably equivalent value," the Texas court rejected the Ponzi scheme presumption that no "reasonably equivalent value" could be

established as a matter of law and embraced the conclusion that proof that the transferee (1) fully performed under a lawful, arm's length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business would satisfy the requirements of the statute. *Janvey* at 564.

68. It is also important to note that the broad presumption reflected in the *Clearing House* case has not been applied to *all* transfers made during the life of a Ponzi scheme. The court in *Kapila v. Phillips Buick-Pontiac-GMC Truck, Inc.* (In re ATM Financial Services, LLC), 2011 Bankr. LEXIS 2394, at 17-18 (Bankr. M.D. Fla. June 24, 2011) musing that "[t]he Ponzi scheme presumption must have some limitations, lest it swallow every transfer made by a debtor, whether or not such transfer has anything to do with the debtor's Ponzi scheme" concluded as follows:

> Finding the debtor took acts in furtherance of a Ponzi scheme . . . does not automatically entitled the trustee to rely upon the Ponzi scheme presumption. To establish the debtor's fraudulent intent with regard to the specific transfers at issue in this case, the trustee must show that each transfer was made in furtherance of the Ponzi scheme. The reason for this is clear: the Court can only infer intent to defraud future purchasers when the trustee has shown the transfers at issue somehow perpetuated the debtor's Ponzi scheme. Transfers made by the debtor unrelated to the Ponzi scheme do not warrant this inference.

69. Finally, there is nothing in the statute that allows the court to "presume" anything. There is no mention of "Ponzi" or "scheme." Rather, the focus of UCA §25-6-202(1) is on individual transactions (i.e., "[a] transfer made or obligation incurred is voidable as to a creditor . . ..") as opposed to an overlying alleged conspiracy involving hundreds of victims.

70. Furthermore, from the standpoint of procedural due process, applying such a presumption would be the equivalent of granting summary judgment in favor of the Receiver on the issue of fraudulent intent without allowing victims the procedural and substantive safeguards allowed and contemplated by the Federal Rules of Civil Procedure in their individual cases.

71. In summary, the issue is whether this court should certify the three Ponzi presumptions to the Utah Supreme Court, which Movants urge the court to do, for the following reasons:

(1) the questions posed by Guyon must, under the *Erie* doctrine, be decided by Utah law, and Movants believe that the Utah Supreme Court is in the best position to make the requested determinations;

(2) the answers to the questions posed by Guyon may be determinative of issues in this and other litigation; and

(3) Guyon believes that the answers to the questions for which they seek certification to the Utah Supreme Court have not been answered by any controlling appellate decision, constitutional provision, or statute.

III.

CONCLUSION

1. Objection No. 1: The court lacks jurisdiction to grant the Receiver's Motion because it seeks an advisory opinion based on hypothetical facts and lacking a case and controversy as mandated by Article III of the United States Constitution.

2. Objection No. 2: The court should not grant the Receiver's Motion because the Receiver has waived his right, benefit, or advantage under Utah law to use the court's Summary Disposition Order in ancillary proceedings.

3. Objections No. 3: The "Ponzi presumptions" the Receiver seeks to impose on present and future defendants in ancillary proceedings via the Receiver's Motion are

incompatible with Utah law and should not be ruled upon by this court until the Utah Supreme Court has reviewed the application of those presumptions under current Utah law.

4. Objection No. 4: The Receiver's Motion is barred by the statute of limitations that expired on November 15, 2019 and cannot proceed against Guyon or his clients because the Tolling Agreement signed by Guyon on November 8, 2019 and upon which the Receiver intends to preserve his planned ancillary cases was neither agreed to nor signed by the Director (or his/her Deputy) of the Commodities Futures Trading Commission as mandated by ¶ 5.3 of the CFTC Enforcement Manual.

DATED this 28th day of April, 2022.

PETER W. GUYON, P.C.

/s/ Peter W. Guyon
Peter W. Guyon

CERTIFICATE OF SERVICE

Guyon certifies that a true and correct copy of the foregoing OBJECTIONS TO RECEIVER'S MOTION FOR PONZI DETERMINATION AND TO ESTABLISH AN OBJECTION PROCEDURE; and RENEWED REQUEST FOR LEAVE TO FILE MOTION TO CERTIFY QUESTIONS OF LAW TO UTAH SUPREME COURT was served on the Receiver by email transmission to the following address on the 29th day of April, 2022:

rustclaims@parrbrown.com

DATED this 28th day of April, 2022.

/s/Peter W. Guyon
Peter W. Guyon, Attorney

EXHIBIT 1

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Attorneys for Jonathan O. Hafen as Receiver for the Rust Rare Coin Receivership

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

COMMODITY FUTURES TRADING COMMISSION, and STATE OF UTAH DIVISION OF SECURITIES, through Attorney General Sean D. Reyes Plaintiffs, v. RUST RARE COIN INC., a Utah corporation, and GAYLEN DEAN RUST, an individual, DENISE GUNDERSON RUST, an individual, JOSHUA DANIEL RUST, an individual, Defendants; and ALEESHA RUST FRANKLIN, an individual, R LEGACY RACING INC, a Utah corporation, R LEGACY ENTERTAINMENT LLC, a Utah limited liability company, and R LEGACY INVESTMENTS LLC, a Utah limited liability company. Relief Defendants.	**RECEIVER'S FOURTH QUARTERLY STATUS REPORT** ***For the period July 1, 2019 to September 30, 2019*** Civil No. 2:18-cv-00892-TC Honorable Tena Campbell Magistrate Judge Dustin Pead

19. Outlined above is a description of the physical Receivership assets known to the Receiver, along with their values. The Receiver is still in the process of determining the value of various assets in the Receivership Estate, and the value of certain assets will not be finally determined until they are sold to an arms-length buyer.

V. DESCRIPTION OF LIQUIDATED AND UNLIQUIDATED CLAIMS.

20. The Receiver worked closely with his accountants this quarter to finalize their analysis of the Receivership's potential liquidated and unliquidated claims. This involved reviewing questionnaires, business records, and subpoenaed documents from various investors and related entities. As a result of this process, over 80 investor groups and several hundred individual investors have been identified and numerous transactions by these investors are being analyzed by the Receiver and his team.

21. Based on the net winner analyses provided by BRG, the Receiver has identified over $50 million of potential net winner claims. The number and value of these potential claims are based primarily on the books, records and correspondence of the Receivership Defendants, and are therefore fluid and subject to ongoing investigation and change. The Receiver hopes to claw back significant funds for the Receivership Estate. To facilitate these recoveries, the Receiver and his legal counsel have drafted and sent out demand letters to potential claw back defendants in an effort to negotiate settlement agreements with them. The Receiver has also reviewed the analyses provided by BRG to help streamline the claw back process and distinguish between claimants and potential claw back defendants.

22. For potential claw back defendants whose claims arose more than four years before the Receiver's appointment, the Receiver has been securing tolling agreement from them in order to undertake further analysis before reaching a final resolution. To the extent the Receiver is unable

to execute a tolling agreement or reach a favorable settlement agreement with these investors, the Receiver intends to file ancillary lawsuits against them before the upcoming November 15, 2019 statute of limitations deadline. The Receiver continues to remain hopeful that many of the fraudulently transferred funds will be recovered without having to resort to formal litigation.

23. BRG is also in the final stages of its "sources and uses" analysis, which the Receiver expects will be completed this next quarter.

VI. LIST OF KNOWN CREDITORS OF THE RECEIVERSHIP.

24. As mentioned above, he Receiver initiated the claims process during this last quarter which included a claim deadline of October 4, 2019. As a result of this process, the Receiver received over 585 claim forms from potential claimants and creditors of the Receivership Estate. A list of the first and last names of each of these claimants is attached hereto as Exhibit B.

VII. STATUS OF CREDITOR CLAIMS PROCEEDINGS.

25. The Receiver and his team have begun reviewing the claim forms filed by potential Receivership claimants to determine whether such claims should be allowed or denied by the Court. The Receiver expects this to be an intensive process that will require significant analysis by both his accountants and legal counsel. As part of these efforts, the Receiver's team is entering the relevant claim form data into an electronic master matrix to help track the status of each creditor's claim.

26. Once the Receiver has made an initial determination of whether certain claims should be allowed or disallowed, he intends to file an omnibus motion with the Court asking it to rule on various categories of claims identified by the Receiver.

EXHIBIT 2

TOLLING AGREEMENT

This Tolling Agreement ("Agreement") is entered into this ___ day of November 2019 (the "Effective Date"), by and between Jonathan O. Hafen, in his capacity as Court-Appointed Receiver ("Receiver") for the estates of Rust Rare Coin Inc., Gaylen Dean Rust, Denise Gunderson Rust, Joshua Daniel Rust, R Legacy Entertainment LLC, R Legacy Investments LLC, and R Legacy Racing Inc. (the "Rust Rare Coin Receivership"), on the one hand, and Peter W. Guyon, Elizabeth Guyon, Dr. Peter W. Guyon, Jr., Russell and Kathleen Mouritsen, and Bert and Catherin van Uitert (collectively the "Guyon Group"), on the other hand. The Receiver and the Guyon Group hereinafter may be referred to individually as "Party" and collectively as "Parties."

RECITALS

A. The Receiver believes and asserts that the Rust Rare Coin Receivership has causes of action against the Guyon Group arising from or relating to the Guyon Group's alleged involvement with the fraudulent silver investment pool operated by Gaylen Rust (collectively, the "Claims").

B. The Parties are engaged in a period of evaluating the Claims, with the potential of entering into negotiations in an attempt to resolve this matter without the need for litigation, and they desire to delay commencement of any lawsuit relating to the Claims during the pendency of those considerations and negotiations.

NOW, THEREFORE, in consideration of the recitals, the mutual covenants contained herein, the sufficiency of which is mutually hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. Tolling Period. The tolling period ("Tolling Period") commenced at 12:01 a.m. Utah time on November 4, 2019 (the "Tolling Commencement Date"), and shall end ten (10) calendar days after the date on which the non-terminating Party receives the written notice required by Section 7 below to terminate this Agreement.

2. Tolling of Statute of Limitations. The Parties acknowledge that each Party is relying on the tolling effect of this Agreement. None of the time elapsed during the Tolling Period shall be included in the computation of any statutes of limitation or other time limitations, whether statutory, equitable, contractual, or otherwise, applicable to the Claims and any defenses thereto. Nothing in this Agreement shall have the effect of (a) reviving any claim, defense, action, or other proceeding of any Party that was barred or had expired as of the Tolling Commencement Date, or that expires or otherwise becomes barred after the Tolling Period ends, or (b) invalidating or minimizing the impact of any other time-based defense such as laches, estoppel, etc., that would apply as of the Tolling Commencement Date. Nor shall anything in this Agreement waive any existing claims or defenses of any Party or its affiliates, successors, or assigns.

3. Non-assertion of Claims. For the duration of the Tolling Period, the Parties agree to forbear and postpone the filing, commencement, and prosecution of any legal or equitable action related to the Claims, if any. This Agreement may be asserted by way of defense to any action commenced in violation of this Section 3.

4. Asserting Claims Following Expiration of Tolling Period. Nothing in this Tolling Agreement shall preclude any Party from initiating Claims or other legal action against another Party after the expiration of the Tolling Period.

5. No Admissions. Nothing in this Agreement shall be deemed or constitute an admission by any Party of any wrongdoing, liability, fault, waiver of any right or defense (except as specifically provided herein), or an admission as to any matter of law or fact. The Parties further agree that this Agreement will not be admissible for any purpose other than to rebut or clarify a statute of limitations or other time-related defense.

6. Modification. This Agreement may be modified only in a writing signed by all Parties. This Agreement shall constitute the entire understanding between the Parties concerning the subject matter of this Agreement and supersedes and replaces all prior negotiations, proposed agreements, and agreements, written or oral, relating to this subject matter.

7. Termination. Any Party may terminate this Agreement in accordance with this Section 7 for any reason without cause. To terminate this Agreement, the Party wishing to terminate must provide written notice to the other Party, either actually received by messenger or hand delivery or sent by certified or registered mail, return receipt requested, addressed as indicated below. The termination shall be effective, and the Tolling Period shall end, ten (10) calendar days after the date on which the non-terminating Party receives the written notice required by this Section 7.

The addresses and persons to whom notice is to be given under this Section 7 are as follows:

If to the Receiver
Jonathan O. Hafen, Esq.
PARR BROWN GEE & LOVELESS
101 South 200 East, Suite 700
Salt Lake City, Utah 84111

If to the Guyon Group
Peter W. Guyon
~~614 Newhouse Bldg~~ 525 E. 100 S., Ste 300
~~10 Exchange Place~~
Salt Lake City, UT ~~84111~~ 84102

8. Successors and Assigns. This Agreement shall bind and benefit each of the Parties and their respective successors and assigns.

9. Governing Law; Forum Selection; and Attorney's Fees. This Agreement, for all purposes, shall be construed in accordance with the laws of the State of Utah without regard to conflicts-of-laws principles. Any action or proceeding by any Party to enforce this Agreement shall be brought only in any state or federal court located in Salt Lake County, State of Utah. The Parties hereby irrevocably submit to the exclusive jurisdiction and venue of such courts and waive the defense of inconvenient forum as to the maintenance of any such action or proceeding in such venue. The prevailing Party in any action to enforce this Agreement shall be entitled to recover reasonable attorney's fees, costs, and expenses incurred in connection therewith.

10. No Waiver as to Third Parties. Except as specifically provided herein, this Agreement shall not be deemed to constitute a waiver of any rights, claims, or defenses of any Party or its affiliates, successors, and assigns against any other individual, corporation, partnership, government agency, or other entity not a Party to this Agreement.

11. Representation by Counsel. Each Party acknowledges that it has been represented by counsel, or has had the opportunity to seek representation by counsel, in the negotiation and execution of this Agreement and has voluntarily, with full knowledge and without coercion or duress of any kind, entered into this Agreement.

12. Entire Agreement. Unless specifically provided herein, this Agreement contains all the understandings and representations between the Parties with respect to the Tolling Period for the Claims and any defenses thereto and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, with respect thereto.

13. Execution of Counterparts and Facsimiles. Separate counterparts of this Agreement may be executed by the Parties with the same force and effect as if all such parties had executed a single copy of this Agreement. Facsimile signatures and electronic signatures affixed to the Agreement and transmitted by email by the signing Party or signing Party's representative are as good as hand-signed originals and may be used herein.

14. Authority. Each signatory to this Agreement represents that he or she has full power and authority to execute this Agreement on behalf of his or her respective Party and bind that Party to the terms of this Agreement.

[Remainder of Page Intentionally Left Blank]

[Signature Page – Tolling Agreement]

IN WITNESS WHEREOF, the Parties hereto have signed and executed this Agreement, effective as of the Effective Date, on the dates indicated below.

Peter W. Guyon, individually and as counsel for Peter W. Guyon, Elizabeth Guyon, Dr. Peter W. Guyon, Jr., Russell and Kathleen Mouritsen, and Bert and Catherin van Uitert

_____ Date: 11/8/2019

Jonathan O. Hafen, in his capacity as Court-Appointed Receiver for the estates of Rust Rare Coin Inc., Gaylen Dean Rust, Denise Gunderson Rust, Joshua Daniel Rust, R Legacy Entertainment LLC, R Legacy Investments LLC, and R Legacy Racing Inc.

_____ Date: _____

EXHIBIT 3

News & Events

- Press Releases
- Public Statements & Remarks
- Events

Release Number 7925-19

May 8, 2019

CFTC's Division of Enforcement Issues First Public Enforcement Manual

Washington, DC — The Commodity Futures Trading Commission's (CFTC) Division of Enforcement (DOE) published its Enforcement Manual (Manual) today. This is the first issuance of a public Manual by DOE. The Manual provides an overview of the CFTC and DOE, and it establishes certain general policies and procedures that guide the work of DOE staff in detecting, investigating, and prosecuting violations of the Commodity Exchange Act (CEA) and the CFTC Regulations.

The Manual serves as a general reference for DOE staff in the investigation and prosecution of potential violations of the CEA and CFTC regulations. It also provides the general public with information about DOE's operations with the intent to increase transparency, certainty, and consistency, and, more generally, to advance the rule-of-law principles that underpin all DOE and CFTC enforcement actions.

"The publication of the Enforcement Manual is part of a broader agency effort to advance policy-neutral reforms designed to make us better regulators," said Enforcement Director James McDonald. "Our Manual aims to increase the level of clarity and transparency in our work. Clarity and transparency in our policies should promote fairness, increase predictability, and enhance respect for the rule of law. We expect the publication of our Manual to advance these goals going forward."

Enforcement Chief Counsel Gretchen Lowe commented, "The Enforcement manual is intended to be a useful guide for the Enforcement staff in their work dedicated to the mission of the Division and the Commission in investigating and prosecuting violations of the CEA and Regulations. By sharing this manual today, it may facilitate a better understanding and give perspective about the Division efforts to meet that mission"

***

DOE's Office of Chief Counsel prepared the Manual and it reflects the views and policies of DOE and does not necessarily reflect the position or views of the CFTC or any of the individual Commissioners. DOE is also not intending to waive any applicable

privileges or protections in the publication of the Manual. The Manual also is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by any party in any matter, civil or criminal. The Manual will be periodically revised and updated.

The Manual is available on the CFTC's website (www.cftc.gov) and is linked on the DOE's webpage at DOE Enforcement Manual.

RELATED LINKS

- Division of Enforcement Manual
- Remarks of CFTC Director of Enforcement James M. McDonald at the 41st Annual Conference of the Future Industry Association's Law & Compliance Division

...Displaying results 1 - 10 of 163

CFTC's Division of Enforcement Issues First Public Enforcement Manual (/PressRoom/PressReleases/7925-19)
... May 8, 2019 CFTC's Division of **Enforcement** Issues First Public **Enforcement Manual** Washington, DC — The Commodity Futures Trading ...

Division of Enforcement (/About/CFTCOrganization/DOE)
... Division of **Enforcement** The mission of the Division of **Enforcement** (DOE) is to protect the public and preserve ... guidance through, among other things, its **Enforcement Manual** as well as advisories on self-reporting, cooperation, ...

Enforcement Director James McDonald to Depart CFTC (/PressRoom/PressReleases/8275-20)
... Futures Trading Commission today announced that Division of **Enforcement** Director James McDonald will depart the agency ... on October 8, 2020. Mr. McDonald has served as Director of **Enforcement** since April of 2017. "Jamie led the Division of ... including publication of the Division's **Enforcement Manual**, into which all published guidance and advisories are ...

CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance (/PressRoom/PressReleases/8165-20)
... Futures Trading Commission today announced the Division of **Enforcement** has issued new guidance outlining factors the ... penalties (CMPs) to the Commission to be imposed in CFTC **enforcement** actions. The guidance memorializes the existing ... and has been incorporated into the Division's **Enforcement Manual** . This is the first Division CMP guidance issued ...

CFTC's Enforcement Division Issues Staff Guidance on Recognition of Self-Reporting, Cooperation, and Remediation (/PressRoom/PressReleases/8296-20)
... Futures Trading Commission today announced the Division of **Enforcement** (DOE) issued new guidance for **enforcement** staff when recommending the recognition of a ... which will be published in the agency's **Enforcement Manual** , follows recent updates of the **manual**'s civil ...

Remarks of CFTC Director of Enforcement James McDonald at Futures Industry Association Fireside Chat (/PressRoom/SpeechesTestimony/opamcdonald6)
... the penalty guidance we recently issued in the Division of **Enforcement**. But before we dig into the details, I want to ... implications for the Commission, and for the Division of **Enforcement**. Among other things, Dodd-Frank significantly ... and increase clarity. We published an **Enforcement Manual**, laying out publicly for the first time the ...

CFTC Issues Guidance on Factors Used in Evaluating Corporate Compliance Programs in Connection with Enforcement Matters (/PressRoom/PressReleases/8235-20)
... of new, public, staff-level guidance by the Division of **Enforcement**, which outlines factors that will be considered ... when evaluating compliance programs in connection with **enforcement** matters. The guidance, which will be published in the agency's **Enforcement Manual** , is the first of its kind issued by the Division. It ...

Remarks of CFTC Director of Enforcement James M. McDonald at the 41st Annual Conference of the Future Industry Association's Law & Compliance Division Conference (/PressRoom/SpeechesTestimony/opamcdonald3)
... Remarks of CFTC Director of **Enforcement** James M. McDonald at the 41st Annual Conference ... greater economic growth. [1] In this vein, the Division of **Enforcement** today announces and makes public its **Enforcement Manual**. The **Enforcement Manual** serves as a general ...

p. 2-3

CFTC Files Eight Anti-Spoofing Enforcement Actions against Three Banks (Deutsche Bank, HSBC & UBS) & Six Individuals (/PressRoom/PressReleases/7681-18)
… January 29, 2018 CFTC Files Eight Anti-Spoofing **Enforcement** Actions against Three Banks (Deutsche Bank, HSBC … Criminal Investigative Division, criminal and civil **enforcement** actions against three banks and six individuals … precious metals futures contracts by utilizing a variety of **manual** spoofing techniques with respect to precious metals …

2013-30975 (/LawRegulation/FederalRegister/OrdersandOtherAnnouncements/2013-30975.html)
… Commission's retention of its examination authority and its **enforcement** authority.\10\ … for the compliance function. The HKMA Supervisory Policy **Manual**, Module IC-1 provides that the primary role of the … establishes an effective system of internal oversight and **enforcement** of such policies and procedures to ensure that …

1 (?keys=ENFORCEMENT%20MANUAL&page=0) 2 (?keys=ENFORCEMENT%20MANUAL&page=1)
3 (?keys=ENFORCEMENT%20MANUAL&page=2) 4 (?keys=ENFORCEMENT%20MANUAL&page=3)
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7 (?keys=ENFORCEMENT%20MANUAL&page=6) 8 (?keys=ENFORCEMENT%20MANUAL&page=7)
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Last » (?keys=ENFORCEMENT%20MANUAL&page=16)

P. 2-4

EXHIBIT 4

Commodity Futures Trading Commission
Division of Enforcement

Enforcement Manual

May 20, 2020

5.3 Statute of Limitations and Tolling Agreements

Title 28 U.S.C. § 2462 states that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." Some courts have held that the five-year statute of limitations in § 2462 applies to certain claims brought by the CFTC under the CEA and the Regulations. The statute of limitations is an affirmative defense that is waived if it is not raised in timely fashion, or may be waived by agreement.

If there is a potential statute of limitations issue, Division staff may ask the potential defendant or respondent to sign a "tolling agreement." By signing a tolling agreement, the potential defendant or respondent agrees to the suspension of the running of any statute of limitations period for an agreed upon length of time. The use of a tolling agreement in a particular matter must be approved by the Director or a Deputy who also must sign the tolling agreement. Division staff should consult with OCC concerning any statute of limitations or tolling agreement issues that arise.

5.4 Obtaining Information – In General

5.4.1 Voluntary Statements and Productions

Division staff may obtain documents or statements from any person or entity willing to provide them voluntarily. In preparing to take a statement from a witness, Division staff consider whether to take the statement as part of an interview or in the form of voluntary testimony recorded by an official reporter. The taking of non-subpoenaed voluntary testimony recorded by an official reporter is governed by Part 11 of the Regulations, 17 C.F.R. pt. 11. *See* Section 5.10 of the Manual (Investigative Testimony). Staff provide the Statement to Persons Providing Information about Themselves to the CFTC to any witness providing information about themselves. *See* Section 9.5 of the Manual (Statement to Persons).

5.4.2 Use of Compulsory Process / Formal Order of Investigation

The CFTC's power to subpoena testimony and documents in connection with its investigatory proceeding derives from Section 6(c)(5) of the CEA, 7 U.S.C. § 9(5). That provision, in pertinent part, states:

> [F]or the purpose of any investigation . . . under this Act, and for the purpose of any action taken under section 12(f), any member of the Commission . . . or other officer designated by the Commission . . . may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry.

Id. Pursuant to Section 6(c)(6) of the CEA, the Commission can require the attendance of subpoenaed witnesses or the production of subpoenaed records "from any place in the United

EXHIBIT 5

Peter W. Guyon, P.C. (1285)
49 West 9000 South
Sandy, UT 84070
Tel: (801) 322-5555
Email: peter@guyonlaw.com

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

COMMODITY FUTURES TRADING COMMISSION and STATE OF UTAH DIVISION OF SECURITIES, through Attorney General Sean D. Reyes, Plaintiffs, vs. RUST RARE COIN, INC., a Utah corporation, GAYLEN DEAN RUST, an individual, DENISE GUNDERSON RUST, an individual, And JOSHUA DANIEL RUST, an individual, Defendants; and ALEESHA RUST FRANKLIN, an individual, R LEGACY RACING, INC., a Utah Corporation, R LEGACY ENTERTAINMENT LLC, a Utah limited liability company, and R LEGACY INVESTMENTS LLC, a Utah Limited liability company, Relief Defendants.	[Proposed] MOTION TO CERTIFY QUESTIONS OF LAW TO THE UTAH SUPREME COURT Case No. 2:18-cv-00892-TC Judge: Tena Campbell Magistrate Judge: Dustin B. Pead

Peter W. Guyon ("Guyon") and Peter W. Guyon, P. C. ("Guyon P. C.") (collectively "Movants") move this Federal Court to certify to the Utah Supreme Court the following

questions of law concerning the interpretation of the following provisions of Utah's Uniform Voidable Transactions Act (the "UUVTA") found in Utah Code Annotated (hereafter "UCA") §25-6-101, et seq. as applied to an alleged Ponzi scheme for the purpose of aiding this court in its deliberations in this case as well as in other cases ancillary hereto wherein the Receiver alleges the existence of a Ponzi scheme:[1]

Question 1: Whether under the provisions of UCA §25-6-103 the Receiver must offer evidence and sustain the burden of proving that the debtor-transferor was insolvent on the date of the transfer, or whether insolvency is presumed.[2]

Question 2: Whether "value" in UUVTA (UCA §25-6-104) is presumed to be limited to the amount of the principal portion of a debt or of the original investment and excludes satisfaction of the interest portion of a debt or a contractual obligation to pay a profit, i.e., as a matter of law the debtor cannot under any circumstances receive reasonably equivalent value for the "interest" or "profits" it pays to investors, notwithstanding UUVTA (UCA §25-6-104(1)) which includes in the definition of "value" property transferred and satisfaction of an antecedent debt, and makes no distinction between the principal portion and the interest portion of the debt or between the amount of the original investment and a contractual profit.

Question 3: Whether under the provisions of UUVTA (UCA§25-6-202), the Receiver must offer evidence and sustain the burden of proving that transfers made in furtherance of an alleged Ponzi scheme were made with fraudulent intent, or whether fraudulent intent is presumed.

---

[1] This action is authorized and contemplated by Utah Code Annotated §78A-3-102 and Rule 41, Utah Rules of Appellate Procedure.

[2] According to §25-6-103, there is only one presumption, and that is a "built in" presumption of insolvency in the case of a debtor who is "generally not paying . . . debts as they become due." There is nothing in the statute that suggests any other presumption. Logically, then, there is no reason to presume insolvency under any conditions other than those specifically expressed in the statute. To presume insolvency merely because of an alleged Ponzi scheme—or even a proven one—would amount to judicially amending the language of the statute to include a Ponzi scheme presumption where none exists, contrary to the expressed will of the Legislature.

In support hereof Movants assert the following:[3]

1. These questions of law, both individually and collectively, may well be determinative of the issue of alleged Ponzi victims' vulnerability to "clawback" actions brought by the Receiver, depending on the availability of evidence to the respective parties and may be material to the parties' decisions of the extent to engage in discovery and/or to file dispositive motions. Ultimately, definitive answers to certified questions of law may well be instrumental in determining the level of probability of serious settlement negotiations.

2. There do not appear to be decisions from the Utah courts on the issues raised, although there are at least two well-reasoned decisions from the highest courts of two other jurisdictions that may provide guidance, i.e., *Finn v. Alliance Bank*, 860 N.W.2d 638 (Minn.2015) and *Janvey v. The Golf Channel, Inc.*, 487 S.W.3d 560 (Tex.2016), particularly because the statutes analyzed by those courts are virtually identical to the Utah statutes under scrutiny.

3. There are pending thirty (30) ancillary lawsuits wherein the interpretation and analysis of Utah's UUVTA will likely be an issue, but it appears that each of the 30 ancillary lawsuits are in early stages of litigation, and a definitive analysis from the Utah Supreme Court can only encourage the completion of litigation for both sides. Furthermore, no litigation is now pending that affects Movants.

4. Overall, given the frequency that alleged Ponzi scheme cases appear in the federal courts, it seems highly likely that a definitive pronouncement from the highest court in the State of Utah concerning the issues typically raised in such cases would be helpful to all those involved in such cases prior to the expenditure of vast sums of money rather than later on.

[3] Movants have attempted to adopt to the extent possible the recommendations of Judge David Nuffer as outlined in his Thesis of March 2018 entitled *Certification of Legal Questions to the Utah Supreme Court.*

In further support of this motion Movants submit the memorandum filed concurrently herewith, all documents and papers on file in this action, all documents and papers submitted in all ancillary actions, and whatever oral argument the court may entertain..

DATED this 25th day of May, 2020.

PETER W. GUYON, P.C.

/s/Peter W. Guyon
Peter W. Guyon, Attorney for Movants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **[Proposed] MOTION TO CERTIFY QUESTIONS OF LAW TO THE UTAH SUPREME COURT** was served upon the Receiver via electronic transmission to the following email address on the 25th day of May, 2020:

rustclaims@parrbrown.com

PETER W. GUYON, P.C.

/s/Peter W. Guyon
Peter W. Guyon, Attorney for Movants

Peter W. Guyon, P.C. (1285)
49 West 9000 South
Sandy, UT 84070
Tel: (801) 322-5555
Email: peter@guyonlaw.com

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

COMMODITY FUTURES TRADING COMMISSION and STATE OF UTAH DIVISION OF SECURITIES, through Attorney General Sean D. Reyes, Plaintiffs, vs. RUST RARE COIN, INC., a Utah corporation, GAYLEN DEAN RUST, an individual, DENISE GUNDERSON RUST, an individual, And JOSHUA DANIEL RUST, an individual, Defendants; and ALEESHA RUST FRANKLIN, an individual, R LEGACY RACING, INC., a Utah Corporation, R LEGACY ENTERTAINMENT LLC, a Utah limited liability company, and R LEGACY INVESTMENTS LLC, a Utah Limited liability company, Relief Defendants.	MEMORANDUM IN SUPPORT OF [Proposed] MOTION TO CERTIFY QUESTIONS OF LAW TO UTAH SUPREME COURT Case No. 2:18-cv-00892-TC Judge: Tena Campbell Magistrate Judge: Dustin B. Pead

Peter W. Guyon ("Guyon") and Peter W. Guyon, P. C. ("Guyon P. C.") (collectively "Movants") submit the following memorandum of law in support of their [Proposed] MOTION

TO CERTIFY QUESTIONS OF LAW TO UTAH SUPREME COURT filed concurrently herewith.

I
INTRODUCTION AND BACKGROUND

1. On November 15, 2018 the Commodity Futures Trading Commission ("CFTC") and State of Utah Division of Securities ("Division of Securities"), alleging Federal Question jurisdiction, jointly filed an action in the United States District Court for the District of Utah, Central Division, against Rust Rare Coin, Inc., a Utah corporation ("RRC"), Gaylen Dean Rust ("Rust"), Denise G. Rust ("Denise"), and Joshua Daniel Rust ("Josh") under case number 19-892 (the "Underlying Action") for various alleged violations of law. An amended complaint (the "Amended Complaint") was filed on December 12, 2018 (Doc. no. 56).

2. The essence of the Amended Complaint is that RRC, Rust, Denise, and Josh operated a scam whereby investors' money was aggregated into a "Silver Pool"[1] and was fraudulently diverted from its intended use to other businesses operated by Rust, personal expenses, and the payment of fictitious profits of earlier "investors." Plaintiffs allege: "[t]he Silver Pool was a sham. Defendants Rust and RRC did not use contributions from investors to purchase silver for the Silver Pool." (Amended Complaint, ¶ 2) Plaintiffs have suggested that the alleged "Silver Pool" arrangement with and payments from and to investors were "in the manner of a Ponzi Scheme" or that payments to later investors were "Ponzi payments." (Amended Complaint ¶¶ 2, 35, 48, 53)[2]

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[1] Amended Complaint ¶ 1.

[2] In addition, the Receiver has alleged in ancillary proceedings that "[b]ecause Receivership Defendants operated the Silver Pool as a Ponzi scheme, as a matter of law, the transfers to Defendants were made with the intent to hinder, delay, or defraud creditors." See, for example, *Hafen v. Famulary*, et al., Case No. 2:19-cv-00627-TC, First Cause of Action (Fraudulent Transfer), ¶49.

3. Jonathan O. Hafen was first appointed as a Temporary Receiver by the court's Order Granting Plaintiffs' ex parte Motion for statutory restraining order, appointment of Receiver, and other Equitable Relief (Document No. 22) (the "Restraining Order") and later as the Receiver, to serve without bond, pursuant to the court's Order Appointing Receiver and Staying Litigation (Document No. 54). The Restraining Order also froze Defendants' assets and essentially terminated all Defendants' business operations.

4. Recently, the Receiver has filed, ancillary to this case, 30 separate civil actions in this court against various investors, wherein the Receiver clearly alleges that the Receivership Defendants "have been operating a classic Ponzi scheme since at least 2008 by soliciting funds from investors in violation of federal commodities and securities laws and using the funds obtained to pay bogus returns to earlier investors."[3] See, for example, *Hafen v. Oberhansly,* et al., Case No: 2:29-cv-00627-TC, ¶ 1.

5. There is no ancillary action currently pending against Movants by virtue of Movants' waiver of the statute of limitations defense, although the Receiver has verbally notified Guyon that the Receiver intends to pursue the collection of approximately $500,000 from Movants as bogus "profits" subject to clawback.

6. In direct response to these allegations, Movants deny the same and assert that ALL payments in cash and merchandise received by Movants from Rust over the period of the

[3] Hafen v. Oberhansly et al, 2:19-cv-00627; Hafen v. Howell et al, 2:19-cv-00813; Hafen v. Nichols et al, 2:29-cv-00829; Hafen v. Olsen et al, 2:19-cv-00869; Hafen v. Brimley et al, 2:29-cv-00875; Hafen v. Enloe et al, 2:19-cv-00876; Hafen v. Kirkham et al, 2:19-cv-00889; Hafen v. Rico et al, 2:19-cv-00890; Hafen v. Holmes et al, 2:19-cv-00891; Hafen v. Callister et al, 2:19-cv-00892; Hafen v. Evans et al, 2:19-cv-00895; Hafen v. Taylor et al, 2:19-cdv-00896; Hafen v. Wheeler, Ronald The Estate of, 2:19-cv-00898; Hafen v. Percell et al, 2:19-cv-00899; Hafen v. Rust Johnson, 2:19-cv-00900; Hafen v. Ellingford et al, 2:19-cv-00901; Hafen v. Thurgood et al, 2:19-cv-00903; Hafen v. Call et al, 2:19-cv-00905; Hafen v. Carlisle et al, 2:19-cv—00908; Hafen v. Dearden et al, 2:19-cv-00909; Hafen v. Aase et al, 2:19-cv-00910; Hafen v. Barnes et al, 2:19-cv-00912; Hafen v. Muir, 2:19-cv-00913; Hafen v. Nielson, 2:19-cv-00914; Hafen v. Birge et al, 2:19cv-00915; Hafen v. Wade et al, 2:19-cv-00916; Hafen v. Tea et al, 2:19cv-00917; Hafen v. Haddock, 2:19-cv-00918; Hafen v. Wells et al, 2:19-cv-00921; Hafen v. Roche, 2:19-cv-00942.

Silver Agreement from April 1, 2012 through November 15, 2018 were exclusively for legal services rendered by Peter W. Guyon, P.C. ("Guyon P.C.") to the Receivership Defendants, business enterprises owned and/or controlled by Rust, and Rust's extended family members.

7. The suggestions in this action (the "Underlying Action") that payments were made "in the manner of a Ponzi Scheme" and the actual allegations of an actual Ponzi scheme are all denied by Movants in their entirety, but they raise important issues of presumptions and burden of proof to all parties against whom the Receiver has initiated litigation or against whom the Receiver intends to pursue litigation, including Movants.

8. Because the outcome of a contested issue can depend on which party has the burden of proof or whether the outcome of a particular legal issue is presumed, every actual or potential party can be either positively or negatively affected. As will be discussed in greater detail below, there are at least three presumptions (the "Typical Ponzi Scheme Presumptions") that federal courts have often applied in cases when the court concludes a Ponzi scheme exists:

- a party who operates a Ponzi scheme is presumed to be insolvent or in financial distress;
- value is presumed to be limited to the principal or original investment portion of the obligation, i.e., as a matter of law the debtor cannot under any circumstances receive reasonably equivalent value for the "interest" or "profits" it pays to investors; and
- transfers in furtherance of the scheme are presumed to be made with fraudulent intent;

9. Guyon has been unable to find any definitive rulings by the Utah Supreme Court relating to the application of Utah law to any of the Typical Ponzi Scheme Presumptions, and believes there are no such rulings. If this court concludes that there may be an underlying Ponzi scheme in this case, this court may be forced to rule on the status and effect of Utah law without

the benefit of specific and definitive rulings by the Utah Supreme Court on those issues in the context of an alleged Ponzi scheme.

10. Furthermore, as discussed in greater detail below, there are recent well-reasoned and compelling rulings by the supreme courts of the States of Minnesota and Texas that have rendered decisions on statutes identical to Utah's on Typical Ponzi Scheme Presumptions that are contrary to previous federal court decisions in their respective states and to federal court decisions in other states including Utah. Copies of those decisions are attached hereto as **Exhibit A** *(Finn v. Alliance Bank*, 860 N.W.2d 638 (Minn.2015)) and **Exhibit B** (Janvey v. *The Golf Channel, Incorporated*, 487 S.W.3d 560 (Texas 2016)) and incorporated herein by this reference.

11. It is well-settled that federal courts are obliged to apply state law,[4] and it appears from the attached cases or *Finn* and *Janvey* that the pendulum in favor of allowing the Typical Ponzi Scheme Presumptions to benefit trustees and receivers may be moving in the opposite direction. As an example, in the *Janvey* case the 5th Circuit Court of Appeals, applying Texas law, initially ruled in favor of the receiver and ordered the defendant Golf Channel to return all remuneration paid for services provided, but upon rehearing vacated its opinion and certified the question of "value" to the Texas Supreme Court.[5] The answer to the certified question allowed the defendant Golf Channel its remuneration. In the *Finn* case, the Ponzi issues appear to have been issues of first impression by the Minnesota Supreme Court[6] brought in the context of a state receivership proceeding with a number of *amici curiae* and concluded with a definitive ruling that

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[4] As the U.S. Supreme Court held in *Erie Railroad Co. v. Tompkins*, 304 US 64, 78 (1938): "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."
[5] *Janvey* at 564.
[6] *Finn* at 642.

rejected the "Ponzi scheme presumption" as applied to Minnesota's version of the Uniform Fraudulent Transfer Act.[7]

12. Movants believe there are compelling reasons for the Utah Supreme Court to do the same in this case, particularly because Utah's version of the Uniform Fraudulent Transfer Act is largely identical to the specific statutes at issue in the *Finn* and *Janvey* cases, and that this court should have the benefit of such definitive rulings before applying Utah law to the facts of this case.

13. Furthermore, Movants believe that all persons and entities against whom the Receiver has filed or contemplates filing ancillary lawsuits seeking to recover what the Receiver describes as "profits" beyond their original "investments" should be given notice hereof in that all such defendants may be affected by this request and, if the court determines the motion should be filed, to have the opportunity to join in the motion or otherwise participate if they see fit to do so.

14. The term "Ponzi scheme" has no precise definition[8], but had its genesis in the early 1920s arising from a scam perpetrated by Charles Ponzi, who sold his promissory notes to unsuspecting investors accompanied by the false assertion that he was buying international postal coupons in foreign countries and selling them in others at a profit of 100%.

15. Ponzi's promissory notes matured in 90 days, at which time they were to repay $150 for each $100 loaned. To sweeten the deal, Ponzi circulated the notice that he would pay his 90-day notes in full after only 45 days and 100% of the loan if presented in less than 45 days.

16. Despite his statements to the contrary, Ponzi never made investments of any kind

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[7] *Finn* at 643.

[8] The 9th Circuit defines a Ponzi scheme as ". . . a financial fraud that induces investment by promising extremely high, risk-free returns, usually in a short time period, from an allegedly legitimate business venture. The fraud consists of funneling proceeds from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating the illusion that a legitimate profit-making business opportunity exists and inducing further investment." *Donell v. Kowell*, 533 F.3d 762, 76i7 n.2 (9th Cir.2008); and the 5th Circuit as ". . . a pyramid scheme where earlier investors are paid from the investments of more recent investors, rather than from any underlying business concern, until the scheme ceases to attract new investors and the pyramid collapses." *Janvey v. Democratic Senatorial Campaign Comm..*, 712 F.2d 185, 188 n.1 (5th Cir.2013).

and was always insolvent. Eventually, holders of notes demanded payment, which exceeded funds available to pay them, and Ponzi found himself in bankruptcy. There the trustee sought to set aside alleged preferential transfers from Ponzi's limited funds to earlier claimants to the detriment of later ones. The lower court ruled against the trustee, but the Supreme Court reversed, finding all noteholders to be in the same class and stating at 13:

> [i]t is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankrupt law. Those who were successful in the race of diligence violated not only its spirit but its letter and secured an unlawful preference.

17. Accordingly, the preferential transfers were collected into the bankruptcy estate for distribution to the entire class of creditors *pro rata*, giving birth, intentionally or not, to the idea that all other considerations aside, the most important result is to summarily make all investors in a Ponzi scheme who received more than they invested *pro rata* losers on the principle announced in *Cunningham* that "equality is equity."

18. The "equality is equity" concept was not immediately recognized on the legal landscape at the time and its ramifications not fully appreciated, and for years it lay dormant in the literature. Surprisingly, although the *Cunningham* case was decided in 1924, sixty-five years would pass until the appearance of the first reported case of a successful avoidance action on the grounds of fraudulent conveyance against an innocent investor. See *Wootton v. Barge*, 875 F.2d 508, 510-11 (5th Cir.1989). And not until the mid-1980s did bankruptcy trustees in alleged Ponzi scheme cases begin to pursue clawback actions based upon the grounds of fraudulent conveyance against innocent investors who received more than they invested.[9]

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[9] See discussion in:Amy Sepinwall, *Righting Others' Wrongs: A Critical Look at Clawbacks in Madoff-type Ponzi schemes and Other Frauds*, Brooklyn Law Review, (2012), Vol. 78:1, p. 22, fn 88

19. It is from this humble beginning that the proliferation of lawsuits by trustees and receivers has sprung, particularly relating to "affinity fraud," i.e.., arising from fraud perpetrated against identifiable groups sometimes brought together by religion, ethnicity, language, age, or profession. The proliferation and prevalence of instances of affinity Ponzi schemes,[10] particularly within recent years, has led to an increase of cases brought by bankruptcy trustees and, as in this case, by court appointed receivers.[11] Case law continues to develop and courts continue the unenviable task of attempting to balance the interests of all parties while sorting through views of the law that are often conflicting from jurisdiction to jurisdiction, all of which adds up to a lack of uniformity and predictability.

20. In general, the existence of a Ponzi scheme is established by the following: "(1) deposits were made by investors; (2) the Debtor conducted little or no legitimate business operations as represented to investors; (3) the purported business operations of the Debtor produced little or no profits or earnings; and (4) the source of payments to investors was from cash infused by new investors." *Rieser v. Hayslip* (*In re* Canyon Sys. Corp.), 343 B.R. 615, 630 (Bankr. S.D. Ohio 2006). The 10th Circuit has held: A Ponzi scheme is a fraudulent investment scheme in which "profits" to investors are not created by the success of the underlying business venture but instead are derived from the capital contributions of subsequently attracted investors. *Sender v. Simon*, 84 F.3d 1299 (10th Cir.1996), n.1 [citing] *Sender v. Nancy Elizabeth R. Heggland Family Trust* (In re *Hedged-Investments Assoc., Inc.*) 48 F.3d 470-471 n. 2 (10th Cir.1995)

21. Movants have no independent knowledge of alleged agreements and arrangements between the Rust Defendants and alleged "investors," and can only speak to *their* agreement,

[10] The $50 billion scheme against thousands of victims of Bernard Madoff is perhaps the best known.
[11] See discussion in Kathy Bazoian Phelps & Steven Rhodes, *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes*, §1.04 (2012).

which Movants maintain does not amount to involvement in a Ponzi scheme for the following reasons:

A. Insofar as element (1) is concerned, Movants made no "deposits" into any "Silver Pool" as alleged by the Receiver. All payments from Movants to Rust and RRC were to directly purchase silver bullion and for no other reason.

B. With respect to element (2) RRC was a widely known and legitimate business enterprise that operated for decades; thus the Ponzi scheme requirement that Gaylen and RRC "conducted little or no legitimate business operations" is entirely missing.

C. Although Movants lack independent information concerning whether or not RRC "produced little or no profits or earnings," as required by element (3), it seems unlikely that RRC was in such financial distress when it had operated and expanded over a period of more than 3 decades.

D. With respect to element (4), the Receiver has alleged that payments to early investors came from later investors, the commingling of funds acknowledged by the Receiver must at least leave substantial doubt about the source of at least part of the funds from which earlier investors were paid.

22. As a point of clarification, the prime objective of this motion is of course not to prove that no Ponzi scheme exists here; rather it is to move this court to seek a definitive ruling from Utah's highest court on the applicability and meaning of the three Ponzi presumptions under Utah law in the event the court entertains the possibility that a Ponzi scheme exists and that Movants were victims of it. Movants' argument follows:

23. Since the mid-1980s Federal courts have often accorded trustees and receivers the following three presumptions in alleged Ponzi scheme cases:

- The Debtor who runs a Ponzi scheme is presumed to be insolvent or in financial distress;
- "Value" is limited to the principal or original investment portion of the obligation; and
- Transfers in furtherance of the scheme are presumed to be made with fraudulent intent.

24. The overall effect of this practice has been to: (1) ignore in some cases the literal language of the state statutes at issue; (2) allow trustees and receivers to summarily avoid the proof requirements contemplated by the state statutes; (3) summarily disallow innocent defendants who have received more than their investments the protections of procedural and substantive due process; (4) justify the redistribution of wealth by trustees and receivers on grounds not contemplated by the state statutes themselves; (5) in essence "rewrite" contracts entered into by Ponzi scheme victims; (6) ignore the Constitutional freedom of contract; and (7) ignore the actual facts of cases in return for expedience. The discussion that follows further demonstrates the negative consequences of the Ponzi scheme presumptions and urges the court not to allow them.

II
ARGUMENT

A. THE PRESUMPTION THAT A DEBTOR IS INSOLVENT DUE TO THE INHERENT FINANCIAL DISTRESS CREATED BY A PONZI SCHEME IS INCONSISTENT WITH THE LANGUAGE OF THE UUVTA

25. The Ponzi scheme presumption on voidability is that the operator of a Ponzi scheme is conclusively insolvent when it transfers assets. Insolvency of course relates to the issue of constructive fraud in Utah's version of the Uniform Voidable Transactions Act (the

"UUVTA"), which is divided into two possible formulations in Utah Code Annotated (hereafter "UCA") §25-6-202(b)(i) and (ii) where the debtor makes a transfer or incurs an obligation:

> without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due."

26. The UUVTA itself already provides two "tests" to determine insolvency. First, it declares that "[a] debtor is insolvent if, at fair valuation, the sum of the debtor's debts is greater than all of the debtor's assets" (UCA §25-6-103(1)). Second, the UUVTA also includes a "built in" presumption of insolvency that "[a] debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute." (UCA §25-6-103(2)(a))

27. The "built in" presumption based on the general non-payment of debts is unrelated to any circumstance necessarily arising from the operation of a Ponzi scheme, and to add a conclusive presumption largely on policy grounds arising from a Ponzi scheme but unrelated to the "built-in" presumption is not justified by the UUVTA's language.

28. Additionally, the Ponzi presumption of insolvency should not be applied because the constructive fraud provisions of UCA §25-6-202(1)(b)(i) and (ii) are largely unrelated to the issue of insolvency and contemplate proof separate from insolvency on the part of the creditor "by a preponderance of the evidence." (UCA §25-6-202(3))

29. In its examination of virtually identical provisions of Minnesota Statutes ("Minn.Stat.") §513.44(a)(2), the Minnesota supreme court concluded that despite the fact that the second statutory formulation of constructive fraud was "only indirectly related to the debtor's

insolvency, . . . [w]ith limited exceptions federal courts usually have applied the presumption to both formulations of constructive fraud." *Finn* at 648 [citing] *Donell v. Kowell*, 533 F.3d 762 (9th Cir.2008)

30. At the same time, the *Finn* court rejected the application of the conclusive Ponzi Presumption to the issue of insolvency, opining at 649 that "it is not at all clear that every fraudulent investment arrangement that is later determined to be a Ponzi scheme necessarily will have been insolvent from its inception."

31. The underlying facts of the case will not support the addition of a conclusive presumption of insolvency. When the FBI and others effectively shut down Rust Rare Coin, Inc., and a number of other businesses being operated by Gaylen Rust, at the very least RRC (and possibly other interlocking businesses) was likely solvent, judging by the fact it had been a successful business for over 30 years, and was operating on November 15, 2018 when it was shut down.

B. THE PRESUMPTION THAT A PONZI SCHEME DEBTOR CANNOT AS A MATTER OF LAW RECEIVE REASONABLY EQUIVALENT VALUE FOR THE INTEREST AND/OR PROFITS IT PAYS TO INVESTORS IS UNSUPPORTED IN UTAH LAW AND INCONSISTENT WITH THE IDEAL OF FAIRNESS AMONG INVESTORS

32. UCA §25-6-202 recognizes two affirmative defenses to claims of voidability of transfers, i.e., the first involving constructive fraud, and the second actual fraud:

> Under UCA §25-6-202(1)(b) a transferee in a case involving constructive fraud claims against him or her brought under UCA §25-6-202(b)(i) or (ii) has the statutory affirmative defense of "a reasonably equivalent value in exchange for the transfer or obligation" against a creditor's claim of a voidable transfer.
>
> Under UCA §25-6-304(1), a transferee against whom actual-fraud claims have been brought under UCA §25-6-202(1)(a) has the statutory affirmative defense that he or she "took in good faith and for a reasonably equivalent value" against a creditor's claim of an intentional fraudulent transfer.

33. Whether the creditor's claims sound in constructive fraud (UCA §25-6-202(b)(i) or (ii)) or actual fraud (UCA §25-6-202(1)(a), the creditor has the burden of proving the claims by a preponderance of the evidence as stated in UCA §25-6-202(3), and there is nothing in the statute that allows the court to adjust the statutory scheme contemplated by the Utah Legislature to relieve a trustee or receiver of that burden.

34. There are at least three reasons to reject the Ponzi presumption that a debtor cannot as a matter of fact or law receive "reasonably equivalent value" for the "interest" or "profits" it pays to investors. As the following discussion will demonstrate, the application of such a presumption completely ignores the language of the applicable statutes.

A.. The issue of "value" is governed in the UUVTA by UCA §25-6-104, which states in pertinent part as follows:

> (1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. . . .

B. "Antecedent debt" is "any legally enforceable right to payment against the debtor . . .." *Finn*, 860 N.W.2d at 651. Such a broad interpretation of what qualifies as a basis of value is entirely inconsistent with the Ponzi presumption that no facts will justify the recognition of value in an exchange between a Debtor operating a Ponzi scheme and an investor.

35. Courts applying the Ponzi scheme value presumption "deem a contract between the operator of a Ponzi scheme and an investor to be unenforceable by the investor as a matter of public policy to the extent that the investor seeks a return in excess of its original principal." *Finn* 860 N.W.2d at 652. This line of thinking is based on two concepts, discussed immediately below:

A. The nature of Ponzi schemes is that payments to some inevitably come from money stolen from others. While this conclusion is true of the original Ponzi scheme, it is not true of all such schemes. In some circumstances, which Movants believe includes the Rust Defendants, much of the payments for interest and profits came from legitimate sources of earnings.

B. The second concept, which *Finn* roundly criticized as "a dubious assumption about the purpose of fraudulent transfer laws," is that fraudulent transfer laws are able "to achieve greater equity in favor of unsatisfied creditors and investors." At 860 N.W.2d at page 652 *Finn* bluntly states: "[E]quality among a debtor's creditors, even if they are victims of a Ponzi scheme, is not the purpose of fraudulent transfer law."

36. Indeed, there is nothing in UUVTA that provides for or mandates an equal distribution of assets among creditors. Under UCA §25-6-303, Utah Code, creditors have the following options: (a) to avoid the transfer; (b) attachment or other such proceeding authorized by the rules of civil procedure; (c) to enjoin further transfer; (d) to appoint a receiver; or (e) "any other relief the circumstances may require."

37. Movants are well aware of the arguments made by some that trumpet the purported unfairness of allowing some creditors to profit by preferential transfer at the expense of others. However, even if such a result is unfair, which Movants do not concede, the UUVTA is not the appropriate vehicle to change the result. Neither is the superimposition of a presumption not contemplated in the legislation in the first place. In sum, there is nothing in the UUVTA that prevents a debtor from making a preferential transfer—as long as the transfer is not fraudulent. See *Aretz v. Kloos*, 89 Minn. 432, 439, 95 N.W.216, 219 (1903); *Vost v. Stickney*, 19

Minn. 367, 369 and Boston Trading Grp., *Inc. v. Burnazos*, 835 F.2d 1504, 1509 (1st Cir.1987) (Breyer, J.), *Town of Southampton v. Chiodi*, 971 N.Y.S.2d 75 (2009 N.Y. Slip Op. 52856).

38. This rejection of the idea that a state statute can or should be altered by the mere presence of a Ponzi scheme is echoed in the case of *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560 (Texas 2019), wherein the Texas Supreme Court responded to a Certified Question from the United States Court of Appeals for the 5th Circuit relating to the "reasonably equivalent value" requirement of the affirmative defense in the Texas statute, which is identical to Utah's in UCA §25-6-202(b). The Texas Court of Appeals had initially embraced the Ponzi Presumption and concluded that a $5.9 million transfer of services was avoidable because all transfers are considered fraudulent and the debtor insolvent. *Janvey* at 567. The transferee's affirmative defense that it received the transfer "in good faith and for a reasonably equivalent value" was deemed forfeit because of the conclusive presumption the transfer was fraudulent due to illegality and insolvency inherent in Ponzi scheme transfers. *Janvey* at 567.

39. On rehearing, however, the Circuit Court vacated its initial opinion (*Janvey* at 563) and certified the following question to the Texas Supreme Court:

> Considering the definition of "value" in section 24.004(a) of [TUFTA], the definition of "reasonably equivalent value" in section 24.004(d) of [TUFTA], and the comment in [UFTA] stating that "value" is measured "from a creditor's viewpoint," what showing of "value" under TUFTA is sufficient for a transferee to prove the elements of the [good-faith] affirmative defense under section 24.009(a) of [TUFTA]?

The Texas Supreme Court's answer follows:

> Construing the relevant statutory provisions, we conclude TUFTA's "reasonably equivalent value" requirement can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business.

40. Utah's good faith affirmative defense in the UUTVA is identical to that of Texas, and Section UCA §25-6-202(b) provides an "escape hatch" to the creditor who gave "reasonably equivalent value" for the transfer or obligation while the debtor was, or was about to become, financially distressed as contemplated by UCA §25-6-202(b)(i) or (ii). It remains to be seen whether Utah law imposes the same or similar evidentiary conditions, i.e., (1) full performance under a lawful, arm's-length contract for fair market value, (2) consideration having an objective value at the time of the transaction, and (3) the exchange occurred in the ordinary course of the transferee's business.

41. Despite the Receiver's attempts to utilize it as a tool to "equalize" the treatment of "winners and losers" in an alleged Ponzi scheme, the UUVTA "was designed to prevent fraudulent transfers of assets by debtors who seek to defraud creditors or avoid debts by placing assets beyond creditors' reach. See *Timothy v. Pia, et al.*, 424 P.3d 937 (Utah App.2018), ¶ 11, [citing] *Bradford v. Bradford*, 1999 UT App 373, ¶ 14, 993 P.2d 887. Accord, *Porenta v. Porenta*, 416 P.3d 487, 492 (Utah 2017). See also *Bird v. Wardley (In re White)*,[12] Memorandum Decision on Lynn E. Wardley's Motion for Summary Judgment (Docket No. 58) (Bankr.Utah 2018), ". . . the purpose of [UUTVA is] to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors."

42. The legislative purpose is clear under the foregoing authorities. There is nothing in the statute that allows, suggests, or contemplates the use of the UUVTA to "clawback" monies from some investors to pay to others in an attempt to equalize the losses to all.

[12]Bankruptcy No. 14-25727; Adversary Proceeding No. 16-02089.

C. THE PRESUMPTION THAT TRANSFERS IN FURTHERANCE OF A PONZI SCHEME ARE MADE WITH FRAUDULENT INTENT AS A MATTER OF LAW IS INCONSISTENT WITH UTAH SUBSTANTIVE LAW

43. The idea of a presumption of fraudulent intent required by UCA §25-6-202(1)(a) is rooted in the nature of a Ponzi scheme itself, *i.e.*, the mere existence of a Ponzi scheme has been held to be a sufficient reason to establish as a matter of law that the transferor made the transfer "with actual intent to hinder, delay, or defraud." See, for example, the discussion in *Merrill v. Abbott* (*In re Independent Clearing House Co.*), 77 B.R. 843, 860 (D. Utah 1987):

> One can infer an intent to defraud future undertakers from the mere fact that a debtor was running a Ponzi scheme. Indeed, no other reasonable inference is possible. A Ponzi scheme cannot work forever. The investor pool is a limited resource and will eventually run dry. The perpetrator must know that the scheme will eventually collapse as a result of the inability to attract new investors. The perpetrator nevertheless makes payments to present investors, which, by definition, are meant to attract new investors. He must know all along, from the very nature of his activities, that investors at the end of the line will lose their money. Knowledge to a substantial certainty constitutes intent in the eyes of the law, . . . and a debtor's knowledge that future investors will not be paid is sufficient to establish his actual intent to defraud them (citations omitted).

44. However, the conclusion on this issue in the *Clearing House* case is clearly inconsistent with current Utah law. The pertinent language of Utah's Uniform Voidable Transactions Act ("UUVTA") at UCA §25-6-202(1) allows a creditor to avoid a transfer or obligation "if the debtor made the transfer or incurred the obligation: **(a) with actual intent to hinder, delay, or defraud any creditor of the debtor."** Insofar as the burden of proof is concerned, the UUVTA clearly assigns it to the creditor by the following language at UCA §25-6-202(3):

> **(3) A creditor making a claim for relief under Subsection (1) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.** [emphasis in bold added]

45. The UUVTA then provides a list of 11 factors, generally known as "badges of fraud," that a court *may* consider in making its determination of whether a creditor has proved "actual intent" to hinder, delay, or defraud any creditor (UCA §25-6-202(3)). It is important to note that the 11 "badges of fraud" factors in UCA §25-6-202(3) are neither exclusive nor conclusive of the issue of "actual intent." Rather, the statute clearly states that "consideration *may* be given, among other factors, [to the badges of fraud]."

46. Because the badges of fraud enumerated in UCA §25-6-202(2) are non-exclusive (i.e., they allow consideration of a non-enumerated badge of fraud to be considered, which might even include operating a Ponzi scheme), UCA §25-6-202(2) cannot logically be interpreted to mean that the Legislature intended a *non-enumerated* badge of fraud, whatever it is, to be conclusive. If even an enumerated badge if fraud is *non conclusive*, then certainly a non-enumerated one cannot be *conclusive*. The literal, unambiguous meaning of UCA §25-6-202(2) simply cannot be stretched to include the "infer[ence of] an intent to defraud" from the mere existence of a Ponzi scheme as the court concluded in the *Clearing House* case.

47. That same conclusion was reached by the Supreme Court of Minnesota in the well-reasoned case of *Finn, et al., v. Alliance Bank, et al.,* 860 N.W.2d 638, 646-647 (Minn.2015) attached hereto as **Exhibit A** wherein the court first observed that there was nothing in the Minnesota Uniform Fraudulent Transfer Act[13] "allowing a court to presume anything based on the mere existence of a Ponzi scheme" and then held:

> ". . . the Legislature's enumeration of a specific list of badges of fraud, none of which are conclusive, precludes an interpretation that it intended a *non-enumerated* badge of fraud to be *conclusive*." [emphasis in italics in original]

[13] The provision of the Minnesota Uniform Fraudulent Transfer Act, Minn.Stat.§513.44(a)(1), under consideration in the *Finn v. Alliance Bank* case cited above, is identical to UUVTA §25-6-202(1).

48. Neither is there anything in UUVTA which would allow a court to make a presumption based upon the mere existence of a Ponzi scheme. Aside from being patently illogical, for the court to apply a presumption in the Receiver's favor that any transfers in furtherance of the alleged Ponzi scheme were made with fraudulent intent and thereby avoided as a matter of law is clearly contrary to the expressed intent of the Legislature in the language itself.[14]

49. The *raison d'etre* of the UUVTA is to provide a framework "to prevent fraudulent transfers of assets by debtors who seek to defraud creditors or avoid debts by placing assets beyond creditors' reach, ..." *Timothy v. Pia, Anderson, Dorius, Reynard & Moss, LLC.*, 424 P.3d 937, 940 (Utah App. 2018) [citing] *Bradford v. Bradford*, 1999 UT App 373, ¶ 14, 993 P.2d 887 (Ut App 1999). It was not created to create evidentiary presumptions in favor of trustees and receivers to make it easier for them to recover transfers to innocent victims of fraudulent schemes.

50. Superimposing a Ponzi presumption on the Utah statute would constitute a judicial amendment or "rewrite" of the statute, which this court lacks the authority to do. There is nothing to justify allowing a creditor (the Receiver in this case) "to bypass the proof requirements of a fraudulent transfer claim merely by showing that the debtor operated a Ponzi scheme and transferred assets 'in furtherance of the scheme.'" See *Finn, et al. v. Alliance Bank*, et al., 860 N.W.2d 638, 646 (Minn.2015).

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[14] As the Utah Supreme Court in *State v. Robinson*, 147 P.3d 448, ¶39 (Utah 2006) has stated concerning statutory interpretation, "[w]hen interpreting statutes, we determine the statute's meaning by first looking to the statute's plain language, and give effect to the plain language unless the language is ambiguous.' [citing] *Blackner v. State*, 2002 UT 44, ¶ 12, 48 P.3d 949."

51. Neither is there any statement in the language of UCA §25-6-202(3) that would justify the court's granting the functional equivalent of summary judgment on the issue of fraudulent intent merely upon a finding of a Ponzi scheme without allowing the debtor, at a minimum, the opportunity of filing countering declarations or affidavits.

52. A similar conclusion was reached by the Supreme Court of Texas *in Janvey v. The Golf Channel, Incorporated,* 487 S.W.3d 560 (Texas 2016) on a Texas statute identical to Utah's "actual intent to hinder, delay, or defraud" statute found at UCA §25-6-202. Construing the Texas equivalent of UCA §25-6-304 (which is a "safe harbor" from voidability if a transfer was "in good faith and for a reasonably equivalent value," the Texas court rejected the Ponzi scheme presumption that no "reasonably equivalent value" could be established as a matter of law and embraced the conclusion that proof that the transferee (1) fully performed under a lawful, arm's length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business would satisfy the requirements of the statute. *Janvey* at 564.

53. It is also important to note that the broad presumption reflected in the *Clearing House* case has not been applied to *all* transfers made during the life of a Ponzi scheme. The court in *Kapila v. Phillips Buick-Pontiac-GMC Truck, Inc.* (In re ATM Financial Services, LLC), 2011 Bankr. LEXIS 2394, at 17-18 (Bankr. M.D. Fla. June 24, 2011) musing that "[t]he Ponzi scheme presumption must have some limitations, lest it swallow every transfer made by a debtor, whether or not such transfer has anything to do with the debtor's Ponzi scheme" concluded as follows:

> Finding the debtor took acts in furtherance of a Ponzi scheme . . . does not automatically entitled the trustee to rely upon the Ponzi scheme presumption. To establish the debtor's fraudulent intent with regard to the specific transfers at issue in this case, the trustee must show that each transfer was made in furtherance of

> the Ponzi scheme. The reason for this is clear: the Court can only infer intent to defraud future purchasers when the trustee has shown the transfers at issue somehow perpetuated the debtor's Ponzi scheme. Transfers made by the debtor unrelated to the Ponzi scheme do not warrant this inference.

54. Finally, there is nothing in the statute that allows the court to "presume" anything. There is no mention of "Ponzi" or "scheme." Rather, the focus of UCA §25-6-202(1) is on individual transactions (i.e., "[a] transfer made or obligation incurred is voidable as to a creditor . . ..") as opposed to an overlying alleged conspiracy involving hundreds of victims.

III
CONCLUSION

55. The issue is whether this court should certify the three Ponzi presumptions to the Utah Supreme Court, which Movants urge the court to do, for the following reasons:

(1) the questions posed by Movants must, under the *Erie* doctrine, be decided by Utah law, and Movants believe that the Utah Supreme Court is in the best position to make the requested determinations;

(2) the answers to the questions of law posed by Movants may be determinative of issues raised in pending and potential litigation, particularly to the issue of alleged Ponzi victims' vulnerability to "clawback" actions brought by the Receiver;

(3) answers to the questions posed by Movants may facilitate a more efficient framing on discovery issues, dispositive motions, and settlement negotiations;

(4) Movants believe that the answers to the questions for which they seek certification to the Utah Supreme Court have not been answered by any controlling appellate decision, constitutional provision, or statute; and

(5) overall, given the frequency that alleged Ponzi scheme cases appear in the federal courts, including Utah, it seems highly likely that a definitive pronouncement from the highest

court in the State of Utah concerning the issues typically raised in such cases would be helpful to all those involved in such cases prior to the expenditure of vast sums of money rather than later on.

DATED this 25th day of May, 2020.

PETER W. GUYON, P.C.

/s/Peter W. Guyon
Peter W. Guyon, Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **MEMORANDUM IN SUPPORT OF [Proposed] MOTION TO CERTIFY QUESTIONS OF LAW TO THE UTAH SUPREME COURT** was served upon the Receiver via email to the following email address on the 25th day of May, 2020:

rustclaims@parrbrown.com

PETER W. GUYON, P.C.

/s/Peter W. Guyon
Peter W. Guyon, Attorney

EXHIBIT 6

860 N.W.2d 638

Patrick FINN and Lighthouse Management Group, Inc., Appellants/Cross–Respondents
v.
ALLIANCE BANK, Respondent/Cross–Appellant
Home Federal Bank, Respondent/Cross–Appellant
KleinBank, Respondent/Cross–Appellant
Merchant's Bank, Respondent/Cross–Appellant
M & I Marshall & Ilsley Bank, Respondent/Cross–Appellant
American Bank of St. Paul et al., Defendants.

Nos. A12–1930
A12–2092.

Supreme Court of Minnesota.

Feb. 18, 2015.

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OPINION

STRAS, Justice.

This case requires us to decide two questions of first impression under Minnesota's Uniform Fraudulent Transfer Act ("MUFTA"), Minn.Stat. §§ 513.41 –.51

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(2014). The first question is whether the so-called "Ponzi-scheme presumption," adopted by a number of federal courts, applies to claims brought under MUFTA. On that question, the court of appeals divided the Ponzi-scheme presumption into three separate components, each of which relates to an element of a MUFTA claim. The court held that a Ponzi-scheme operator acts with fraudulent intent and is insolvent as a matter of law when it makes "interest" or "profit" payments to investors, but it rejected the presumption that a Ponzi-scheme operator can never receive "reasonably equivalent value" for those payments. We agree with the court of appeals' conclusion on the inapplicability of the reasonably-equivalent-value component of the Ponzi-scheme presumption, but conclude that the fraudulent-intent and insolvency components also lack support in MUFTA.

The second question is whether the statute of limitations governing claims "for relief on the ground of fraud," Minn.Stat. § 541.05, subd. 1(6) (2014), or the one governing claims "upon a liability created by statute," Minn.Stat. § 541.05, subd. 1(2), applies to MUFTA claims. On that question, the court of appeals adopted a bifurcated approach. For MUFTA claims based on "constructive fraud," the court applied the statute of limitations for claims "upon a liability created by statute," whereas for MUFTA claims based on "actual fraud," it applied the statute of limitations for claims "for relief on the ground of fraud." Because we conclude that the Receiver's complaint fails to adequately allege a claim of constructive fraud, we consider only the limitations period applicable to actual-fraud claims. For those claims, we agree with the court of appeals that the statute governing claims "for relief on the ground of fraud" applies. Accordingly, we affirm the decision of the court of appeals as modified and remand to the district court for further proceedings consistent with this opinion.

I.

This case involves the largely fraudulent lending operations of First United Funding, LLC ("First United"), an entity controlled by Corey N. Johnston. First United acted as a conduit between borrowers and lenders by making loans to borrowers and then selling "participation" interests in those loans to financial institutions. Beginning in 2002, First United began selling participation interests that exceeded the amount of the underlying loans ("oversold participations"), or that did not rest on any underlying loans at all ("fictitious participations"). Even after 2002, however, not all of the participation interests sold by First United were fraudulent.

The respondents in this case, which include Home Federal Bank, Klein Bank, Merchant's Bank, M & I Marshall & Ilsley Bank (collectively "the Respondent Banks"), and Alliance Bank, each purchased participation interests from First United that were real, not fraudulent. Nevertheless, First United commingled funds from its legitimate participation interests with those that were fraudulent. Consequently, First United financed many of its payouts to earlier "investors" at least in part through the payments made by later "investors," according to a structure commonly known as a "Ponzi scheme."

The scheme unraveled in September 2009, when two banks sued First United and asked the court to appoint a receiver. The district court appointed appellants/cross-respondents Patrick Finn and Lighthouse Management Group (collectively "the Receiver") to recover and liquidate First United's remaining assets and to distribute them to the victims of First United's scheme. The district court later expanded

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the scope of the Receiver's duties, authorizing it to pursue claims against third parties. For his part in the scheme, Johnston pleaded guilty in September 2010 to federal charges of bank fraud and filing a false tax return.

The Receiver commenced this action in May 2011, seeking to claw back payments made by First United, before its collapse, to various financial institutions, including Alliance Bank and the Respondent Banks. The Receiver alleged in its complaint that the payments made by First United were voidable under MUFTA, both as actually fraudulent transfers, Minn.Stat. § 513.44(a)(1), and as constructively fraudulent transfers, Minn.Stat. §§ 513.44(a)(2), 513.45(a).

The allegations against Alliance Bank were based on its purchase of a participation interest in a $3.18 million loan made to Jerry Moyes, an Arizona businessman. The loan was real, not fictitious, and it was not oversold. First United renewed the loan to Moyes several times until he paid it in full by June 2007. Over the life of the loan, First United paid roughly $4.3 million to Alliance Bank, or approximately $1.2 million more than the principal amount of the loan.

According to the complaint, each of the Respondent Banks purchased participation interests between 2002 and 2004 in one or more loans, each of which the borrower paid in full approximately one year later. The last month in which any of the Respondent Banks received a principal or interest payment from First United was March 2005. First United paid the Respondent Banks sums beyond the principal amounts of the underlying loans, resulting in profits ranging from $78,000 to roughly $338,000. The participation interests of the Respondent Banks were neither fictitious nor oversold.

Alliance Bank and the Respondent Banks moved to dismiss the Receiver's complaint under Minn. R. Civ. P. 12.02(e), arguing both that the Receiver failed to bring the action in a timely fashion and to state claims upon which relief could be granted. The district court concluded that the 6–year statute of limitations for actions "upon a liability created by statute" applied to the Receiver's claims. Minn.Stat. § 541.05, subd. 1(2). Accordingly, it dismissed the claims brought against the Respondent Banks, none of which had received a payment from First United after March 2005. It also dismissed the claims against Alliance Bank to the extent they arose from transfers made prior to May 12, 2005—exactly 6 years before the filing of the Receiver's complaint.

The court also concluded, however, that the Receiver had pleaded legally sufficient claims against each of the financial institutions that had participated in First United's loan-participation scheme. The court based its conclusion in part on a "Ponzi-scheme presumption," which the court described as a rule providing that "the profits that good-faith investors enjoy in connection with a Ponzi scheme are recoverable as fraudulent transfers." Accordingly, it allowed the remaining claims against Alliance Bank to proceed.

Following discovery, both the Receiver and Alliance Bank moved for summary judgment. The district court granted the Receiver's motion and denied Alliance Bank's motion, again relying on the Ponzi-scheme presumption. The court entered judgment in favor of the Receiver for $1,235,388.

The Receiver appealed the district court's dismissal of its claims against the Respondent Banks. It argued that the applicable limitations period is provided by Minn.Stat. § 541.05, subd. 1(6), which applies to claims "for relief on the ground of

[860 N.W.2d 644]

fraud" and provides a 6–year period that only begins to run upon "the discovery by the aggrieved party of the facts constituting the fraud." For its part, Alliance Bank appealed the district court's decision granting summary judgment to the Receiver, asserting that MUFTA does not contain a Ponzi-scheme presumption and that it gave reasonably equivalent value in exchange for the transfers from First United. The court of appeals consolidated the two appeals.

Finn v. Alliance Bank, 838 N.W.2d 585 (Minn.App.2013).

With respect to the Receiver's appeal, the court of appeals relied on our decision in *McDaniel v. United Hardware Distributing Co.*, 469 N.W.2d 84 (Minn.1991), to hold that the applicable statute of limitations under MUFTA depends on whether a claim is based on actual or constructive fraud. *Finn*, 838 N.W.2d at 594–95. Because the common law recognized claims for actual fraud, the court reasoned, they were not "liabilit[ies] created by statute," even though the Receiver brought its claims under a statute. *Id.* at 595. Instead, the court treated such claims as seeking "relief on the ground of fraud" and accruing only upon the discovery by the Receiver of the facts constituting the fraud. *Id.* In contrast, because constructive-fraud claims did not exist at common law, according to the court, it treated those claims as involving "liabilit[ies] created by statute," which accrued on the date when First United made the allegedly fraudulent payments to each financial institution. *See id.* at 591–96.

With regard to Alliance Bank's appeal, the court of appeals divided the Ponzi-scheme presumption into three components. *Id.* at 598. It concluded the first two components—that a person or entity running a Ponzi scheme has actual intent to defraud and that a Ponzi scheme is presumptively insolvent—are consistent with MUFTA. *Id.* at 598–601. But it concluded that the third component—that payments to investors in a Ponzi scheme are never for reasonably equivalent value—was unfounded, at least in the case of Alliance Bank. *Id.* at 601–03. Accordingly, the court directed the district court to enter summary judgment in favor of Alliance Bank on remand. *Id.* at 604. Even though it had rejected the third component of the Ponzi-scheme presumption, the court further concluded that the Receiver had sufficiently pleaded its actual-fraud claims against the Respondent Banks. *Id.* at 603–604. We subsequently granted the separate petitions for review filed by the Receiver and the Respondent Banks.

II.

The first question presented in this case is whether the so-called "Ponzi-scheme presumption" applies to claims brought under MUFTA, Minn.Stat. §§ 513.41 –.51 (2014). Whether MUFTA contains such a presumption is a question of statutory interpretation that we review de novo. *See Citizens State Bank Norwood Young Am. v. Brown*, 849 N.W.2d 55, 60 (Minn.2014).

A.

Designed to "prevent debtors from placing property that is otherwise available for the payment of their debts out of the reach of their creditors," *id.*, MUFTA allows creditors to recover assets that debtors have fraudulently transferred to third parties. To cover the variety of situations in which debtors may attempt to place assets beyond the reach of creditors, MUFTA allows creditors to recover assets that a debtor transfers with fraudulent intent, Minn.Stat. § 513.44(a)(1), as well as those transfers that the law treats as constructively fraudulent, *see* Minn.Stat. §§ 513.44(a)(2), 513.45.

[860 N.W.2d 645]

The former type, typically referred to as a claim of actual fraud, requires a creditor to prove that the debtor made the transfer with the "actual intent to hinder, delay, or defraud any creditor of the debtor." Minn.Stat. § 513.44(a)(1) ; *see also Neubauer v. Cloutier*, 265 Minn. 539, 544 n. 4, 122 N.W.2d 623, 628 n. 4 (1963) ("A creditor who assails a conveyance of his debtor for fraud must show it."). Because actual intent to defraud a creditor is "rarely susceptible of direct proof," we recently explained that a creditor may rely on various "badges of fraud," such as whether a transfer was made to an "insider" and whether the transfer was "disclosed or concealed," Minn.Stat. § 513.44(b), to prove a debtor's fraudulent intent. *Citizens State Bank*, 849 N.W.2d at 60. Once a creditor has proven that the debtor made a transfer with fraudulent intent, the transferee may still defeat liability by establishing the affirmative defense in Minn.Stat. § 513.48, which protects transferees "who took [the transfer] in

good faith and for a reasonably equivalent value." Minn.Stat. § 513.48(a). Otherwise, the creditor is entitled to "recover judgment for the value of the asset transferred, ... or the amount necessary to satisfy the creditor's claim, whichever is less," against the transferee. Minn.Stat. § 513.48(b).

The other type, typically referred to as a claim of constructive fraud, does not require proof of fraudulent intent. Rather, it requires a creditor to prove that

> the debtor made the transfer or incurred the obligation: ...
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Minn.Stat. § 513.44(a)(2) ; *see also id.* § 513.45(a) (stating that a transfer is fraudulent "as to a creditor whose claim arose before the transfer was made" if there was no "reasonably equivalent value" for the transfer and "the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer"). Thus, a claim for constructive fraud turns on a creditor's ability to show that the debtor made the transfer "without receiving reasonably equivalent value," and that the debtor was insolvent, or the transfer made the debtor insolvent or unable to pay its debts. *See* Minn.Stat. §§ 513.42, 513.44(a)(2), 513.45(a).

The Receiver asks us to recognize a "Ponzi-scheme presumption," by which a creditor could prove certain elements of a fraudulent-transfer claim simply by establishing that the debtor operated a Ponzi scheme and that the transfers were made "in furtherance of the scheme." *Perkins v. Haines*, 661 F.3d 623, 626 (11th Cir.2011). As the court of appeals recognized, the Ponzi-scheme presumption actually consists of three separate presumptions. *Finn*, 838 N.W.2d at 598. The first is that it conclusively establishes that the debtor had fraudulent intent, which means that it treats all transfers from a Ponzi scheme as actually fraudulent. *See Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir.2008) (" '[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent' to defraud." (quoting *In re AFI Holding, Inc.*, 525 F.3d 700, 704 (9th Cir.2008))); *S.E.C. v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir.2007) (stating that proof that the debtor operated a Ponzi scheme "establishes

[860 N.W.2d 646]

the fraudulent intent behind the transfers it made").

The other two presumptions would conclusively establish constructive fraud. First, the mere existence of a Ponzi scheme would prove as a matter of law that the debtor was "insolvent" at the time of a disputed transfer, regardless of the transfer's timing and the actual operations of the debtor. *See, e.g., Wiand v. Lee*, 753 F.3d 1194, 1201 (11th Cir.2014) (stating that Ponzi schemes "are insolvent and become more insolvent with each investor payment"); *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir.2006) (declaring that a Ponzi scheme is, "as a matter of law, insolvent from its inception"). Second, a court would be required to presume that any transfer from a Ponzi scheme was not for reasonably equivalent value, which would both establish the second requirement of a constructive-fraud claim and negate the statutory defense to an actual-fraud claim. *See, e.g., Donell*, 533 F.3d at 777–78 (holding that any payments above "the innocent investor's initial outlay" are not based on a "

'reasonably equivalent' exchange"); *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."). Stated differently, the Ponzi-scheme presumption, by operation of its three components, allows a creditor to bypass the proof requirements of a fraudulent-transfer claim by showing that the debtor operated a Ponzi scheme and transferred assets "in furtherance of the scheme." *Perkins*, 661 F.3d at 626.

Notably, however, MUFTA neither mentions nor defines a "Ponzi scheme," a label coined from a fraud perpetrated by Charles Ponzi, who had promised Boston investors in the 1920s a 50-percent return for lending him money over a 90-day period, ostensibly to purchase international-postage coupons. *See Cunningham v. Brown*, 265 U.S. 1, 7, 44 S.Ct. 424, 68 L.Ed. 873 (1924). As it turned out, Ponzi was using funds paid by later investors to provide the returns promised to early investors, which eventually earned him 5 years in prison for mail fraud. *See Ponzi v. Fessenden*, 280 F. 1022, 1022 (1st Cir.1922). Although the moniker "Ponzi scheme" generally refers to a financial arrangement similar to the one operated by Charles Ponzi, even those courts that have recognized a Ponzi-scheme presumption have struggled to define its scope, in no small part due to the multitude of different forms that a fraudulent-investment scheme can take.

> [T]here is no precise definition of a Ponzi scheme and courts look for a general pattern, rather than specific requirements. "[T]he label 'Ponzi scheme' has been applied to any sort of inherently fraudulent arrangement under which the debtor-transferor must utilize after-acquired investment funds to pay off previous investors in order to forestall disclosure of the fraud."

In re Manhattan Inv. Fund Ltd., 397 B.R. 1, 12 (Bankr.S.D.N.Y.2007) (quoting *In re Bayou Grp., LLC*, 362 B.R. 624, 633 (Bankr.S.D.N.Y.2007)).

In this case, the district court found that First United operated a Ponzi scheme because several "hallmark[s]" of such a scheme were present, including the "need[ ]" for First United to oversell loan participations in order "to repay earlier borrowers," and the fact that "First United was insolvent from 2002 through 2009." No party challenges the district court's finding that First United operated a Ponzi scheme. Instead, the disagreement is about the legal significance of that finding.

MUFTA does not contain a provision allowing a court to presume anything

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based on the mere existence of a Ponzi scheme. The word "Ponzi" does not appear in the Minnesota Statutes, and MUFTA does not address "schemes." Rather, MUFTA addresses a "transfer made or obligation incurred by a debtor," Minn.Stat. §§ 513.44(a), 513.45(a), which indicates that the focus of the statute is on individual transfers, rather than a pattern of transactions that are part of a greater "scheme." MUFTA's emphasis on individual transactions finds support in the definition of the word "transfer," which refers to "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with *an asset or an interest in an asset*, and includes payment of money, release, lease, and creation of a lien or other encumbrance." Minn.Stat. § 513.41(12) (emphasis added). The asset-by-asset and transfer-by-transfer nature of the inquiry under MUFTA requires a creditor to prove the elements of a fraudulent transfer with respect to each transfer, rather than relying on a presumption related to the form or structure of the entity making the transfer.*See* Minn.Stat. § 513.41(6), (9) (defining a "debtor" as "a person who is liable on a claim," and a "person," in turn, as any "individual, partnership, corporation, association, organization, government or governmental subdivision or entity, business trust, estate, trust, or any other legal or commercial entity").

1.

Like the court of appeals, we will examine each of the three components of the Ponzi-scheme presumption to determine whether any of the three finds support in MUFTA. The first component, as stated above, requires a court to presume—conclusively, as the Receiver would have it—that fraudulent intent accompanies all transfers in furtherance of a Ponzi scheme. The Receiver argues that such a presumption is justified by the nature of a Ponzi scheme, in which, it claims, the scheme's operator invariably intends to cheat all investors.

Even if there is evidence to support the inference that Ponzi-scheme operators generally intend to defraud investors, MUFTA does not contain a provision allowing a court to presume fraudulent intent. Instead, MUFTA contains a list of factors, commonly referred to as "badges of fraud," that a court may consider to determine whether a debtor made a transfer with an actual intent to defraud creditors. *See* Minn.Stat. § 513.44(b). That "the debtor was involved in a Ponzi scheme" is not among them. To be sure, the list of badges of fraud is not exclusive, *see id.* (stating that "consideration may be given, among other factors, to" the badges of fraud), so a court could consider a debtor's operation of a Ponzi scheme if such a fact is properly alleged and supported. But the Legislature's enumeration of a specific list of badges of fraud, none of which are conclusive, precludes an interpretation that it intended a *non-enumerated* badge of fraud to be *conclusive. Cf. In re Welfare of J.B.,* 782 N.W.2d 535, 543 (Minn.2010) (discussing the canon "*expressio unius est exclusio alterius,* " that "the expression of one thing is the exclusion of another").

Thus, although a court could make a "rational inference" from the existence of a Ponzi scheme that a particular transfer was made with fraudulent intent, *Finn,* 838 N.W.2d at 599, there is no statutory justification for relieving the Receiver of its burden of proving—or for preventing the transferee from attempting to disprove—fraudulent intent. Instead, fraudulent intent must be determined in light of the facts and circumstances of each case. *See, e.g., Prod. Credit Ass'n of Midlands v. Shirley,* 485 N.W.2d 469, 472–73 (Iowa 1992) ;

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Myers Dry Goods Co. v. Webb, 297 Ky. 696, 181 S.W.2d 56, 58 (1944) ; *Stein v. Brown,* 18 Ohio St.3d 305, 480 N.E.2d 1121, 1124 (1985) ; *see also Citizens State Bank,* 849 N.W.2d at 65 (noting that whether a transfer is made with fraudulent intent is ordinarily a question of fact).

2.

Turning to constructive-fraud claims under MUFTA, the second component of the Ponzi-scheme presumption would require a court to presume—again, conclusively as the Receiver would have it—that a debtor who operates a Ponzi scheme is insolvent when it transfers assets. MUFTA contains two formulations of constructive fraud, one that applies to "a creditor whose claim arose before the transfer was made," Minn.Stat. § 513.45(a), and the other to the claim of a creditor that "arose before or after the transfer was made." Minn.Stat. § 513.44(a)(2).

The first formulation, under Minn.Stat. § 513.45(a), turns on whether, when the transfer occurred, the debtor was or had become "insolvent," which is a term of art with a defined meaning under MUFTA. According to MUFTA, "[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." Minn.Stat. § 513.42(a). MUFTA *does* contain a presumption that allows a court to conclude that a debtor is insolvent, but the presumption does not depend on the existence of a Ponzi scheme. Rather, "[a] debtor who is generally not paying debts as they become due is presumed to be insolvent." Minn.Stat. § 513.42(b). The Receiver would have us add a second presumption to MUFTA—one based largely on policy grounds—for debtors that operate Ponzi schemes. However, to do so, we would have to add language to MUFTA, something we cannot do. *See Frederick Farms, Inc. v. Cnty. of Olmsted,* 801 N.W.2d 167, 172

(Minn.2011) (stating that we cannot "add words to a statute 'that are purposely omitted or inadvertently overlooked' by the Legislature" (quoting *Premier Bank v. Becker Dev., LLC,* 785 N.W.2d 753, 760 (Minn.2010))).

The second statutory formulation, which applies to claims that "arose before or after the transfer was made," Minn.Stat. § 513.44(a), features different measures of financial distress. Specifically, rather than focusing on insolvency, a constructive-fraud claim under section 513.44(a)(2) turns, in part, on proof that the debtor

> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Minn.Stat. § 513.44(a)(2). The Receiver urges us to apply the second component of the Ponzi-scheme presumption to claims arising under section 513.44(a)(2), even though the inquiry under that provision is only indirectly related to the debtor's insolvency. With limited exceptions, federal courts usually have applied the presumption to both formulations of constructive fraud. *See, e.g., Donell,* 533 F.3d at 770–71.

As with the first statutory formulation, however, the Receiver's argument on the second formulation lacks textual support. MUFTA requires courts to determine whether the debtor fit within either of the two financial-distress measures in Minn.Stat. § 513.44(a)(2), *at the time the transfer was made. See* Minn.Stat. § 513.44(a)(2). As a practical matter, even if we were to assume that every entity operating a Ponzi scheme becomes insolvent

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by the time it is subject to one or more fraudulent-transfer claims, such an assumption still would not prove that such an entity was insolvent at the time it transferred its assets. The temporal element is important because, as a factual matter, it is not at all clear that every fraudulent investment arrangement that is later determined to be a Ponzi scheme necessarily will have been insolvent from its inception. For example, it is not hard to imagine a debtor that begins as a legitimate business and eventually turns to fraud, which the Respondent Banks insist occurred here. Similarly, a debtor could have assets or legitimate business operations aside from the Ponzi scheme, as Alliance Bank argues here, that it uses to stave off insolvency, at least for a while. Such an entity could be financially stable for a time, whether its stability is measured by the technical definition of insolvency in Minn.Stat. §§ 513.42 and 513.45(a), or the alternate methods of measuring financial distress in Minn.Stat. § 513.44(a)(2). Such a Ponzi scheme may be rare, but when the statute requires a creditor to prove a fraudulent-transfer claim, a conclusive presumption that a Ponzi scheme is insolvent from its inception may be incorrect, both as a matter of law and as a matter of fact.

The Receiver relies on *Cunningham v. Brown,* 265 U.S. 1, 44 S.Ct. 424, 68 L.Ed. 873 (1924), to support its argument that a Ponzi scheme is always insolvent from its inception. In *Cunningham,* the Supreme Court of the United States described Charles Ponzi's scheme as "always insolvent and became daily more so, the more his business succeeded." *Id.* at 8, 44 S.Ct. 424. Some federal courts have seized upon that statement in *Cunningham* as support for adopting the second component of the Ponzi-scheme presumption. *See, e.g., Wiand,* 753 F.3d at 1201 (relying on *Cunningham* for the proposition that Ponzi schemes are "insolvent and become more insolvent with each investor payment"); *Warfield,* 436 F.3d at 558 (referring to "a Ponzi scheme, which is, as a matter of law, insolvent from its inception" (citing *Cunningham,* 265 U.S. at 7–8, 44 S.Ct. 424)). However, to the

extent that the Supreme Court's statement has any relevance to our interpretation of MUFTA, it reflects only the Court's observation that the particular swindle operated by Charles Ponzi, whose postage-stamp scheme never operated legitimately, was insolvent when it began. It does not stand for the broader proposition that every Ponzi scheme, even those businesses that once operated legitimately or had legitimate operations apart from the Ponzi scheme, is necessarily insolvent from its inception, without regard to whether the debtor was paying its debts as they became due or whether its debts exceeded its assets. Accordingly, we reject the second component of the Ponzi-scheme presumption.

3.

The third component of the Ponzi-scheme presumption requires a court to conclude—once again as a matter of law—that a debtor operating a Ponzi scheme cannot receive reasonably equivalent value for the "interest" or "profits" it pays to investors. As discussed above, for constructive-fraud claims under Minn.Stat. §§ 513.44(a)(2) and 513.45(a), a creditor must prove that the debtor transferred its assets "without receiving a reasonably equivalent value in exchange for the transfer." And for actual-fraud claims under Minn.Stat. § 513.44(a)(1), a transferee may establish as an affirmative defense that he or she "took in good faith and for a reasonably equivalent value." Minn.Stat. § 513.48(a). Adopting the third component of the Ponzi-scheme presumption would effectively negate a transferee's good-faith defense to an actual-fraud claim

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and conclusively establish a crucial element of a constructive-fraud claim.

MUFTA does not define "reasonably equivalent value," but designates certain types of transactions as made for reasonably equivalent value in the context of a fraudulent-transfer claim. Such transactions include an asset acquired from the debtor "pursuant to a regularly conducted, noncollusive foreclosure sale" and the "execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." Minn.Stat. § 513.43(b). For other types of transactions, the determination of whether a debtor received reasonably equivalent value in exchange for a transfer of its assets depends on the facts and circumstances of each case. *See, e.g., New Horizon Enters., Inc. v. Contemporary Closet Design, Inc.*, 570 N.W.2d 12, 16 (Minn.App.1997) (stating that the determination of whether a debtor received reasonably equivalent value was an issue for the trial court to resolve based on all the facts and circumstances in the case); *see also Neubauer v. Cloutier*, 265 Minn. 539, 545, 122 N.W.2d 623, 629 (1963) (stating that the determination of "fair consideration" in exchange for a transfer under the predecessor to MUFTA depended on, among other things, "the market value of the interest conveyed at the time of the transfer" and "the amount of antecedent debt thereby satisfied").

Determining whether a debtor has received reasonably equivalent value depends on how to "value" an exchange under MUFTA. MUFTA defines "value," in relevant part, as follows: "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied." Minn.Stat. § 513.43(a). As MUFTA's text and our cases confirm, deciding whether a debtor has received reasonably equivalent value is a function of the relative value received by the debtor in the underlying exchange. *See* Minn.Stat. §§ 513.44(a)(2), 513.45(a) (focusing on whether the debtor "made the transfer ... without receiving reasonably equivalent value in exchange"); *In re Butler*, 552 N.W.2d 226, 232–34 (Minn.1996) (explaining the concept of reasonably equivalent value).

MUFTA's text and our cases also confirm that the satisfaction of an antecedent debt can constitute reasonably equivalent value. *See* Minn.Stat. § 513.43(a) (stating that "value" is given if "an antecedent debt is secured or satisfied"); *see also Nat'l Sur. Co. v. Wittich*, 184 Minn. 21, 24, 237

N.W. 585, 586 (1931) (holding that satisfaction of an antecedent debt was "good consideration," and that the payment was not fraudulent with respect to creditors). In this case, as in most cases involving a Ponzi scheme, the value given to First United in exchange for the payment of Ponzi-scheme proceeds was the satisfaction of an antecedent debt. What qualifies as antecedent debt is not clear under MUFTA's text, but the statute defines the term "debt" broadly as "liability on a claim," Minn.Stat. § 513.41(5), which in turn refers to "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." *Id.* § 513.41(3).

Our cases interpreting MUFTA's predecessor have recognized that antecedent debt can take a variety of forms. In *Kummet v. Thielen*, for example, the antecedent debt consisted of a personal loan between two spouses and one spouse's entitlement to insurance proceeds covering the damage to her household furnishings and personal effects.

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210 Minn. 302, 303, 298 N.W. 245, 246 (1941). Similarly, in *Skinner v. Overend*, the antecedent debt involved unpaid wages to which a son was contractually entitled from his father. 190 Minn. 456, 457–58, 252 N.W. 418, 418–19 (1934). In both cases, we concluded that the satisfaction of the antecedent debt constituted "fair consideration" for the transfer of property, and that the debtor's creditors were not entitled to void the transfer as a fraudulent conveyance. *See Kummet*, 210 Minn. at 305–06, 298 N.W. at 247; *Skinner*, 190 Minn. at 458, 252 N.W. at 419. In light of these cases and the broad definitions of the terms "debt" and "claim" in MUFTA, we conclude that any legally enforceable right to payment against the debtor is sufficient to qualify as an antecedent debt under MUFTA.*See Kummet*, 210 Minn. at 305–06, 298 N.W. at 247 (noting that the obligation in question "was enforceable").

Generally speaking, investors in a Ponzi scheme provide funds to a scheme's operator based on the operator's promises to repay the investor's principal investment, plus more, at some point in the future. *See In re Vaughan Co. Realtors*, 481 B.R. 752, 760 (Bankr.D.N.M.2012) (describing the "typical Ponzi scheme"). To maintain the fraud, the scheme's operator typically cloaks the promised returns in the veneer of a legitimate investment opportunity. *See id.* In the current case, for example, First United promised investors that, if they purchased participation interests, they would receive disbursements once borrowers made payments on the loans underlying the investment. Absent the existence of a Ponzi scheme, such a promise would fit comfortably within the realm of antecedent debt, and satisfaction of that promise would constitute "value," as that term is defined in MUFTA.

However, courts that adopt the Ponzi-scheme presumption effectively deem a contract between the operator of a Ponzi scheme and an investor to be unenforceable as a matter of public policy. *See In re Hedged–Invs. Assocs., Inc.*, 84 F.3d 1286, 1290 (10th Cir.1996) (holding that the contract, to the extent it provided excess returns to an investor, was unenforceable as a matter of public policy); *cf. In re Carrozzella & Richardson*, 286 B.R. 480, 487 (Bankr.D.Conn.2002) (identifying "a line of cases ... which focuses on the fact that the debtor was involved in a Ponzi scheme and, thus, to permit the investors to enforce their agreements with the debtor would be against public policy"). By doing so, the Ponzi-scheme presumption eliminates the possibility that an investor has a legally enforceable claim against the debtor based on the investment contract. Without a legally enforceable contractual claim, any payment made to an investor beyond its principal investment is not for antecedent debt, and therefore cannot be in exchange for reasonably equivalent value. *See, e.g., Perkins v. Haines*, 661 F.3d 623, 627 (11th Cir.2011) ("[T]he general rule is that a defrauded investor gives 'value' to the Debtor in exchange for a return of the principal amount of the investment, but not as to any payments in excess of principal."); *Donell*, 533 F.3d at 777–78 ("Up to the amount that

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'profit' payments return the innocent investor's initial outlay.... there is an exchange of 'reasonably equivalent value' for the defrauded investor's outlay. Amounts above this ... are not a 'reasonably equivalent' exchange for the defrauded investor's initial outlay.").

Two principles guide the reasoning of the courts that have concluded that investment contracts with Ponzi-scheme operators are contrary to public policy. The circumstances of this case provide reason to doubt both principles.

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The first principle is a factual observation about the nature of most Ponzi schemes: the payment of "profits" from a Ponzi scheme comes solely from funds stolen from other participants and serves only the purpose of concealing the scheme and allowing it to continue. In *Donell,* for example, the court observed that "[p]ayouts of 'profits' made by Ponzi scheme operators are not payments of return on investment from an actual business venture." 533 F.3d at 777; *see also In re Indep. Clearing House Co.,* 77 B.R. 843, 858 (Bankr.D.Utah 1987) ("[T]he debtors here had no legitimate source of earnings but were operating a Ponzi scheme."). In many Ponzi schemes, it is true that there is no legitimate source of earnings and the payment of profits "confer[s] no benefit on the [Ponzi scheme] but merely deplete[s] [the scheme's] resources faster." *Scholes v. Lehmann,* 56 F.3d 750, 757 (7th Cir.1995). However, not every Ponzi scheme lacks a legitimate source of earnings. Here, for example, no one disputes that First United operated a Ponzi scheme (at least at some point), but there is also no dispute that the banks in this case purchased non-oversold participation interests in *actual* loans to *real* borrowers, which provided First United with a legitimate source of earnings with which to pay the banks.

The second principle is a dubious assumption about the purpose of fraudulent-transfer laws. In *Donell,* the court stated:

> [t]he purpose of UFTA is to permit the receiver to collect those assets that can actually be located and recovered in the wake of a Ponzi scheme, and to ratably distribute those assets among all participants, including the many investors who lost everything. UFTA accomplishes this by requiring good faith participants to disgorge their gains and permitting them [to] keep the full amount of their initial investment.

533 F.3d at 779; *see also, e.g., In re Petters Co.,* 499 B.R. 342, 356 (Bankr.D.Minn.2013) ("[G]reater equity is deemed to lie in favor of unsatisfied creditors and investors."). Likewise, the Receiver argues here that we should adopt the Ponzi-scheme presumption because it avoids the "absurd[ity] and inequit[y]" of allowing "a criminal mastermind like Johnston," the Ponzi-scheme operator, to determine "who profits from the Ponzi scheme and who bears the loss." One of the *amici* echoes the Receiver's argument by asserting that fraudulent-transfer actions are an "essential tool" for achieving equality among all of the victims of a Ponzi scheme.

Yet equality among a debtor's creditors, even if they are victims of a Ponzi scheme, is *not* the purpose of MUFTA. Rather, its purpose is to "prevent debtors from putting property which is available for the payment of their debts beyond the reach of their creditors." *In re Butler,* 552 N.W.2d 226, 232 (Minn.1996) (quoting *Kummet v. Thielen,* 210 Minn. 302, 306, 298 N.W. 245, 247 (1941)). Under Minnesota's fraudulent-transfer laws, a transfer qualifies as constructively fraudulent only if it depletes the assets of the debtor without a reasonably equivalent reduction in the debtor's liabilities. As we have recognized,

> [p]ayment of an honest debt is not fraudulent under the general statutes against fraudulent conveyances, although it operates as a preference; the rule being that a preference by an insolvent debtor of

> one of his creditors can be avoided only by appropriate proceedings under the bankruptcy law ... and is not open to attack in an action brought by another creditor.

Thompson v. Schiek, 171 Minn. 284, 287, 213 N.W. 911, 912 (1927) ; *see also, e.g., Wittich,* 184 Minn. at 24, 237 N.W. at 586 (rejecting a fraudulent-transfer claim because

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"[t]he antecedent debt was a good consideration, and the fact that it was a preference in no way invalidated the transaction").

Many of the Receiver's arguments focus on the purported unfairness of allowing some creditors to profit at the expense of others. However, with one exception that is not relevant here,[1] MUFTA does not prohibit a debtor from making a preferential transfer in favor of one bona fide creditor over another, so long as the transfer is not fraudulent. *See Aretz v. Kloos,* 89 Minn. 432, 439, 95 N.W. 216, 219 (1903) (stating that preferences in favor of a "bona fide creditor" are valid "in the absence of actual fraud"); *Vose v. Stickney,* 19 Minn. 367, 369 (Gil. 312, 314) (1872) (declaring that it is "clearly not unlawful" to prefer one creditor over another, even if the preference has "the incidental effect of preventing [another creditor] from collecting his debt"). Mere preferences are different from fraudulent transfers because "[t]he basic object of fraudulent conveyance law is to see that the debtor uses his limited assets to satisfy *some* of his creditors; it normally does not try to choose among them." *Boston Trading Grp., Inc. v. Burnazos,* 835 F.2d 1504, 1509 (1st Cir.1987) (Breyer, J.).

In short, neither of the principles underlying the third component of the Ponzi-scheme presumption is persuasive, especially as applied to the facts alleged in this case. Accordingly, like the first two components, we decline to adopt the third component of the Ponzi-scheme presumption.

B.

Even though we have rejected each component of the Ponzi-scheme presumption, we still must address the specific actions taken by the district court with respect to the various dispositive motions filed by the parties in this case. Specifically, we must first decide whether the district court properly granted the Respondent Banks' motion to dismiss, and then determine whether it properly granted summary judgment to the Receiver against Alliance Bank.

1.

The district court granted the motion to dismiss filed by the Respondent Banks because, according to the court, the Receiver's lawsuit was untimely under the applicable statute of limitations, an issue that we address in Part III of this opinion. The Respondent Banks also sought dismissal, however, on the ground that the Receiver's complaint failed to state a legally sufficient claim.

In reviewing whether a complaint has stated a claim under Minn. R. Civ. P. 12.02(e), we consider "only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Gretsch v. Vantium Capital, Inc.,* 846 N.W.2d 424, 429 (Minn.2014) (quoting *Park Nicollet Clinic v. Hamann,* 808 N.W.2d 828, 831 (Minn.2011)). A district court may only dismiss a complaint under Rule 12.02(e) if "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Walsh v. U.S. Bank, N.A.,* 851 N.W.2d 598, 602 (Minn.2014) (quoting *N. States Power Co. v. Franklin,* 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963)). However, as we recently reiterated, "we are 'not bound by legal conclusions stated in a

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complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim.' " *Walsh,* 851 N.W.2d at 603

(quoting *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn.2008)).

The Respondent Banks argue that the Receiver failed to allege adequate facts in support of three elements of its fraudulent-transfer claims: actual fraudulent intent by First United, First United's insolvency, and a lack of reasonably equivalent value in the exchanges. Although the Receiver's complaint sufficiently alleged facts in support of the first two elements, we agree with the Respondent Banks that the Receiver insufficiently pleaded the lack-of-reasonably-equivalent-value element of a constructive-fraud claim.

As to the first element, the Receiver's complaint sufficiently alleged fraudulent intent. The complaint documented a number of fictitious and oversold participation interests sold by First United, and alleged that First United made the payments to the Respondent Banks with "actual intent to hinder, delay, or defraud creditors of [First United] or Johnston." It also stated that Johnson admitted, as "part of his guilty plea and plea agreement[,] that he operated a Ponzi scheme *to defraud banks* in connection with commercial loans that Johnston had arranged" (emphasis added). Construing all reasonable inferences in the Receiver's favor, we agree with the court of appeals that the Receiver's complaint stated a claim for actual fraud against the Respondent Banks. *Finn*, 838 N.W.2d at 603–04.

The Receiver's complaint also sufficiently alleged that First United was insolvent when it made payments to the Respondent Banks. The complaint stated that, "[a]t the time of the transfers[,] ... [First United] and Johnston were engaged in or were about to engage in business for which their remaining assets were unreasonably small in relation to their business." Indeed, the complaint recounted not only the details of the Ponzi scheme, but also asserted that Johnston diverted nearly $23 million "to support his lavish lifestyle" and that First United "maintained no system to track the over $1.6 billion in cash transfers." Given these factual allegations, and the inferences that can be drawn from them, we conclude that the Receiver's complaint sufficiently alleged facts in support of the insolvency-related requirements of Minn.Stat. § 513.44(a)(2) and Minn.Stat. § 513.45(a).

However, in light of our holding that there is no Ponzi-scheme presumption, the Receiver's complaint does not sufficiently allege the third element: that the transfers to the Respondent Banks lacked reasonably equivalent value. The most relevant allegation in the Receiver's complaint is that, "because [First United] and Johnston were engaged in a Ponzi scheme, [First United] did not receive reasonably equivalent value in exchange for the profits it paid." This allegation, on its face, is nothing more than a legal presumption that, as we conclude above, does not accurately reflect Minnesota law. There are no other allegations from which a factfinder could draw a reasonable inference that the payments made by First United to the Respondent Banks were for anything other than the satisfaction of First United's antecedent debts. Accordingly, because the Receiver's complaint relies exclusively on an incorrect statement of the law to support the lack-of-reasonably-equivalent-value element, we affirm the district court's decision to dismiss the Receiver's constructive-fraud claims against the Respondent

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Banks.[2]

2.

Unlike the claims against the Respondent Banks, the proceedings against Alliance Bank advanced to the summary-judgment stage, at which point both the Receiver and Alliance Bank filed motions for summary judgment. The district court granted the Receiver's motion for summary judgment and denied the motion filed by Alliance Bank. The court reasoned that, under the Ponzi-scheme presumption, any payments received by Alliance Bank in excess of its principal investment were voidable as fraudulent transfers under MUFTA.

On appeal, we must determine if the district court correctly concluded that "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show[ed] that there [was] no genuine issue as to any material fact and that [the Receiver was] entitled to judgment as a matter of law."Minn. R. Civ. P. 56.03. Reviewing the district court's grant of summary judgment de novo, we "view the evidence in the light most favorable to the party against whom summary judgment was granted." *Sampair v. Vill. of Birchwood,* 784 N.W.2d 65, 68 (Minn.2010).

Once the Ponzi-scheme presumption is set aside, the undisputed factual record requires summary judgment in favor of Alliance Bank rather than against it. To establish constructive fraud, the Receiver must prove both that First United did not receive reasonably equivalent value for its payments and that First United met the insolvency-related requirements in Minn.Stat. § 513.44(a)(2) or Minn. Stat § 513.45(a). Similarly, Alliance Bank can establish an affirmative defense to the Receiver's actual-fraud claim by proving that it gave reasonably equivalent value to First United and that it took the payments in good faith.[3] With respect to both types of claims, the absence of a genuine issue of material fact regarding whether First United received reasonably equivalent value based on the satisfaction of its antecedent debt would require us to grant judgment as a matter of law to Alliance Bank.

The value claimed by Alliance Bank is the satisfaction of the debt owed by First United under the participation agreement between the parties. Under that agreement, Alliance Bank purchased a 100% undivided interest in the loan to Jerry Moyes and all of its proceeds. The Receiver does not dispute that the Moyes loan was real and not oversold. The participation agreement obligated First United to act as Alliance Bank's agent in receiving payments on the loan, and then contractually required First United to remit those payments to Alliance Bank. Because we have already rejected a rule requiring us to invalidate all contracts made with a Ponzi-scheme operator, and the Receiver essentially provides no reason to invalidate the participation agreement other than the fact it was a part of a greater Ponzi scheme,[4] we conclude that the satisfaction

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of First United's antecedent debt constituted "value" under MUFTA. Minn.Stat. §§ 513.41(3), 513.41(5).

The record also does not present a genuine issue of material fact regarding whether the value received by First United was reasonably equivalent to the payments it made to Alliance Bank. As stated above, First United was contractually obligated to pass on the interest and principal payments it received from Moyes to Alliance Bank. Alliance Bank introduced evidence at the summary-judgment stage, again undisputed, that the rate of return on the loan it purchased was commercially reasonable. Under these circumstances, we agree with the court of appeals that, "because the underlying uncontested facts show that First United received reasonably equivalent value for its transfers to Alliance, the district court erred by denying Alliance's motion for summary judgment." *Finn,* 838 N.W.2d at 603. Accordingly, we instruct the district court on remand to grant summary judgment to Alliance Bank and to deny the Receiver's motion for summary judgment.

III.

The next question presented in this case requires us to identify the statute of limitations applicable to MUFTA claims. Two possibilities exist. The first requires a party to file an action "upon a liability created by statute" within 6 years. Minn.Stat. § 541.05, subd. 1(2). The other requires a party to file an action "for relief on the ground of fraud" within 6 years, but provides that "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."Minn.Stat. § 541.05, subd. 1(6). Because MUFTA claims are, on the one hand, statutory claims, and on the other, claims based on fraud, either provision potentially applies.[5]

In addressing the statute-of-limitations question, the court of appeals divided MUFTA claims into two categories. For actual-fraud claims under Minn.Stat. § 513.44(a)(1), it relied on our decision in *McDaniel,* to hold that, because actual-fraud claims existed at common law, they are for "relief on the ground of fraud" and accrue only upon the discovery of the facts

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constituting the fraud. *Finn,* 838 N.W.2d at 594–95; *see generally McDaniel v. United Hardware Distrib. Co.,* 469 N.W.2d 84 (Minn.1991). In contrast, the court deemed constructive-fraud claims under Minn.Stat. § 513.44(a)(2) or Minn. Stat § 513.45(a) as "liabilit[ies] created by statute" because no comparable cause of action existed at common law and such claims are actionable only under MUFTA. *Finn,* 838 N.W.2d at 593–94. We express no opinion on the statute of limitations applicable to constructive-fraud claims because of our conclusion in Part II that the Receiver did not adequately plead such claims in its complaint. However, we agree with the court of appeals that actual-fraud claims are subject to the limitations period applicable to actions "for relief on the ground of fraud."

The selection of an appropriate statute of limitations presents a question of law that we review de novo. *Park Nicollet Clinic v. Hamann,* 808 N.W.2d 828, 831 (Minn.2011). In selecting the statute of limitations that applies to actual-fraud claims, we are not writing on a clean slate. In particular, we have historically described claims to set aside fraudulent conveyances as "claims for relief on the ground of fraud" and applied a discovery rule to such claims. *See, e.g., Brasie v. Minneapolis Brewing Co.,* 87 Minn. 456, 463, 92 N.W. 340, 342 (1902) ("G.S. 1894, § 5136, provides that an action for relief on the ground of fraud shall be brought within six years from the discovery of the fraud; and it has been held by this court that an action to set aside a conveyance alleged to have been executed for the purpose of defrauding creditors comes within the meaning of that statute."); *Duxbury v. Boice,* 70 Minn. 113, 117–19, 72 N.W. 838, 838–39 (1897) (stating that an action "to set aside as fraudulent and void as to creditors of the grantor a conveyance" "was one 'for relief on the ground of fraud,' and therefore the limitation applicable is ... six years after 'the discovery by the aggrieved party of the facts constituting the fraud.' "). We have never suggested that "relief on the ground of fraud" is so narrow that it includes only those claims that qualify as common-law fraud. To the contrary, "actions for relief on the ground of fraud" may include "not only such actual frauds as may form the basis for actions at law, but also all such transactions as a court of equity will adjudge to be frauds, actual or constructive." *St. Paul, Stillwater & Taylor's Falls Ry. Co. v. Sage,* 49 F. 315, 321 (8th Cir.1892) (applying Minnesota law).

The Respondent Banks argue, however, that the law on fraudulent transfers has evolved in the more than 100 years since we decided *Brasie* and *Duxbury,* and that the evolution has largely come by statute. *See* Uniform Fraudulent Conveyance Act, Act of Apr. 20, 1921, Ch. 415, 1921 Minn. Laws 642; MUFTA, Act of Apr. 7, 1987, ch. 19, 1987 Minn. Laws 28 (codified at Minn.Stat. §§ 513.41 –.51). In their view, the enactment of these statutes converted fraudulent-transfer claims from claims "for relief on the ground of fraud" to claims "upon a liability created by statute."

As the court of appeals recognized, the argument made by the Respondent Banks is inconsistent with our decision in *McDaniel,* in which we considered whether retaliatory-discharge claims are "liabilit[ies] created by statute" or are for the nonpayment of wages. 469 N.W.2d at 85. We ultimately concluded that the retaliatory-discharge claim in *McDaniel* was a liability created by statute, but only after observing that the statutory remedy at issue preceded common-law recognition of the tort by "more than a decade." *Id.* at 85, 88. Here, by contrast, the parties do not dispute that fraudulent-transfer claims

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based on an actual intent to hinder, delay, or defraud creditors existed at common law as early

as 1868, and likely earlier. *See Blackman v. Wheaton*, 13 Minn. 326, 330 (Gil. 299, 303) (1868). Setting aside whether constructive-fraud claims existed at common law—a question we need not answer—the fact that the Legislature has codified fraudulent-transfer liability does not change the underlying "gist and essence" of fraudulent-transfer law. *McMillan v. Cheeny*, 30 Minn. 519, 521, 16 N.W. 404, 405 (1883). Nor does it transform it into a liability created by statute, which, as we made clear in *McDaniel*, does not apply "to liabilities existing at common law which have been recognized by statute." 469 N.W.2d at 85.

In short, for the limited purpose of determining the applicable statute of limitations, we conclude that a claim against a transferee that receives an actually fraudulent transfer under MUFTA is for "relief on the ground of fraud," just as it was for a transferee that received a fraudulent transfer at the time of *McMillan* and *Duxbury*. Thus, we agree with the court of appeals that the district court erred when it dismissed the Receiver's actual-fraud claims under Minn. Stat § 541.05, subd. 1(2), and therefore remand to the district court for consideration of whether the Receiver filed its action within 6 years of the discovery of the "facts constituting the fraud."

IV.

With respect to the Receiver's claims against Alliance Bank, we affirm as modified and instruct the district court to grant summary judgment to Alliance Bank on remand. As to the Receiver's claims against the Respondent Banks, we conclude that the Receiver failed to adequately plead constructive fraud. However, we remand to the district court for consideration of whether the dismissal of the Receiver's constructive-fraud claims should be with or without prejudice, and for a determination of whether the Receiver commenced its action based on actual fraud within 6 years after the discovery of the facts constituting the fraud. Accordingly, for the foregoing reasons, we affirm as modified and remand to the district court for further proceedings consistent with this opinion.

Affirmed.

Notes:

[1] The lone exception is that MUFTA treats certain preferential transfers made to *insiders* as fraudulent. Minn.Stat. § 513.45(b).

[2] We leave it to the district court's discretion to determine whether to grant the Receiver leave to amend its complaint against the Respondent Banks on remand. *See* Minn. R. Civ. P. 15.01.

[3] The Receiver does not dispute that Alliance Bank received the payment in good faith and without knowledge of the underlying fraud. Moreover, it is undisputed that Alliance Bank performed due diligence on the Moyes loan and ensured that the loan was properly secured.

[4] Although the Receiver claims that its proposed rule would only invalidate "investment" contracts, there is no obvious limiting principle to the scope of the rule it proposes. For example, suppose that a Ponzi-scheme operator uses $1,000 in Ponzi-scheme proceeds to buy a futures contract from a securities dealer. It is a speculative move by the Ponzi-scheme operator, who believes that the price of the commodity underlying the futures contract will increase. Under the Receiver's proposed rule, because the transaction involves an investment, the payment to the securities dealer potentially would be recoverable under MUFTA as a fraudulent transfer if the price of the commodity falls, even if the Ponzi-scheme operator purchased the futures contract at the prevailing market price.

[5] The dispute about the applicable statute of limitations relates solely to the Receiver's claims against the Respondent Banks. As to those claims, the district court granted the Receiver's motion to dismiss based both on its conclusion that fraudulent-transfer claims are "liabilit[ies] created by statute" and its finding that the Receiver had failed to timely commence its action against the Respondent Banks within 6 years after its claims had accrued. Although we concluded in

Part II that the Receiver failed to adequately plead the lack-of-reasonably-equivalent-value element of its constructive-fraud claims, our conclusion has no bearing on the Receiver's actual-fraud claims. For those claims, the Receiver had to plead only those facts establishing that First United had an "actual intent to hinder, delay or defraud" First United's creditors. *See* Minn.Stat. § 513.44(a)(1). It did not also have to plead a lack of reasonably equivalent value because only transferees—in this case, the Respondent Banks—carry the burden to plead and prove the affirmative defense in Minn.Stat. § 513.48. *See* Minn.Stat. § 513.48(a) ("A transfer or obligation is not voidable under section 513.44(a)(1) against a person who took in good faith and *for a reasonably equivalent value* or against any subsequent transferee or obligee." (emphasis added)).
