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

COMMODITY FUTURES TRADING COMMISSION, et al., Plaintiffs, v. RUST RATE COIN, INC., et al., Defendants.	**REPLY IN SUPPORT OF RECEIVER'S MOTION FOR PONZI DETERMINATION AND TO ESTABLISH AN OBJECTION PROCEDURE** Civil No. 2:18-cv-00892-TC-DBP Judge Tena Campbell Magistrate Judge Dustin Pead

Pursuant to the Court's Order Establishing Ponzi Objection Procedure (ECF No. 451), Jonathan O. Hafen, in his capacity as Court-appointed Receiver, respectfully submits this Reply in Support of Receiver's Motion for Ponzi Determination and to Establish an Objection Procedure (this "Reply").

RELEVANT PROCEDURAL HISTORY[1]

1. On March 15, 2022, the Receiver filed a Motion for Ponzi Determination and to Establish an Objection Procedure (the "Motion"). (ECF No. 448.)

[1] In the interest of brevity, the Receiver has not restated the procedural and factual history previously set forth in his Motion. (ECF No. 448.)

2. The Motion requested a finding from the Court that Receivership Defendants operated a silver investment scheme (the "Silver Pool") as a Ponzi scheme since at least 2008 and an order from the Court establishing a process through which any interested party could be heard on the issue of whether the Silver Pool was a Ponzi scheme. (*Id.* at 2-3.)

3. On March 30, 2022, the Court entered an Order Establishing Ponzi Objection Procedure (the "Procedures Order"). (ECF No. 451.)

4. The Procedures Order adopted the Court's previously established summary disposition procedure and established an objection procedure. (*Id.* at 2.)

5. Any interested party wishing to object to the Receiver's request that the Court find that the Silver Pool operated as a Ponzi scheme was directed to submit a written objection directly to the Receiver within thirty days of entry of the Procedures Order. (*Id.*)

6. After the deadline for objections had passed, the Receiver provided copies of all objections to the Plaintiffs and lodged those objections with the Court. (ECF No. 458.)

7. On May 26, 2022, the Court set a hearing on the Motion. (ECF No. 459.)

8. Consistent with the Procedures Order, the Receiver hereby submits this Reply in response to the objections submitted. (*See* ECF No. 451 at 2.)

MEMORANDUM OF LAW

INTRODUCTION

As described in the Receiver's Motion, the Receivership Defendants operated the Silver Pool as a classic Ponzi scheme since at least 2008. The essential elements of the scheme were expressly admitted to by Gaylen Rust ("Rust") when he pled guilty in his criminal proceedings. Specifically, Rust admitted that he engaged in an intentional scheme to defraud investors in which he used newly invested funds to pay returns to earlier investors. Further, Rust expressly

admitted that the object of the scheme—and payments made to investors in relation to the scheme—was to defraud other investors and to create the false impression that the Silver Pool was a legitimate and profitable enterprise.

Through his Motion, the Receiver asks the Court for a conclusive determination—based on Rust's admissions and all of the undisputed evidence—that the Silver Pool was operated as a Ponzi scheme with the intent to defraud investors and other creditors. A number of interested parties submitted objections to the Receiver's Motion. Notably, none of the objections purports to challenge the evident facts of the fraudulent scheme. Although certain objections question the strength of the Receiver's evidence, none put forward any evidence disputing the facts of the scheme. At the most basic level, all of Rust's representations to investors were false. There was never any silver investment scheme or any significant amounts of silver bullion purchased and stored on behalf of investors. Rust's claims to the contrary and payments made to investors were simply a method of inducing additional investments from unsuspecting victims, which were used to pay returns to existing investors—the hallmark of a Ponzi scheme. For the reasons discussed below, the Receivers respectfully requests that the Motion be granted, that the Court make appropriate findings that the Silver Pool operated as a Ponzi scheme since 2008, and that the Receiver not be required to re-litigate that issue in present and future ancillary proceedings.

I. LARSEN, MUIR, AND MALDONADO OBJECTIONS[2]

The three objections (the "Joint Objections") submitted by Defendants Richard A. Larsen ("Larsen"), Vanessa Percell Maldonado ("Maldonado"), and Jeanne Muir ("Muir" and, collectively, the "Joint Objectors") make the same arguments that have been previously made by

[2] The objections submitted by Larsen, Muir, and Maldonado are substantively identical and will be addressed jointly.

the Joint Objectors' Motions to Certify Questions of Law to the Utah Supreme Court ("Motions to Certify") and Motions for Order Declaring Any Determination on Receiver's Motion for Ponzi Determination in a Separate Case is Non-Binding ("Non-Binding Motions"), which were filed in the Joint Objectors' respective ancillary proceedings. The Receiver has already responded to these arguments in those ancillary proceedings and hereby fully incorporates those responses by reference.[3] However, the Receiver also responds briefly here in the interests of the Court's convenience.

The Joint Objectors broadly assert two objections. First, the Joint Objectors argue that the Court may not use its existing summary disposition procedure to issue a conclusive finding that Receivership Defendants operated a Ponzi scheme. Second, the Joint Objectors urge the Court to refrain from making any rulings with respect to the Receivership Defendants' fraudulent scheme until the Court first rules on the Joint Objectors' respective Motions to Certify. Neither argument is well taken.

[3] *See* Memorandum in Opposition to Defendants' Motion to Certify Questions of Law to the Utah Supreme Court, *Hafen v. Larsen*, Civ. No. 2:21-cv-00743-TC, Dkt. No. 30 (D. Utah Apr. 22, 2022); Memorandum in Opposition to Defendant's Motion to Certify Questions of Law to the Utah Supreme Court, *Hafen v. Percell*, Civ. No. 2:19-cv-00899-TC-DBP, Dkt. No. 23 (D. Utah Apr. 22, 2022); Memorandum in Opposition to Defendant's Motion to Certify Questions of Law to the Utah Supreme Court, *Hafen v. Muir*, Civ. No. 2:19-cv-00913-TC, Dkt. No. 21 (D. Utah Apr. 22, 2022). *See also* Memorandum Opposing Defendant Richard A. Larsen's Motion for Order Declaring Any Determination on Receiver's Motion for Ponzi Determination in Separate Case Is Non-Binding, *Hafen v. Larsen*, Civ. No. 2:21-cv-00743-TC, Dkt. No. 37 (D. Utah May 13, 2022); Memorandum Opposing Defendant Vanessa Percell Maldonado's Motion for Order Declaring Any Determination on Receiver's Motion for Ponzi Determination in Separate Case Is Non-Binding, *Hafen v. Percell*, Civ. No. 2:19-cv-00899-TC-DBP, Dkt. No. 29 (D. Utah May 13, 2022); Memorandum Opposing Defendant Jeanne Muir's Motion for Order Declaring Any Determination on Receiver's Motion for Ponzi Determination in Separate Case Is Non-Binding, *Hafen v. Muir*, Civ. No. 2:19-cv-00913-TC-DAO, Dkt. No. 31 (D. Utah May 13, 2022).

A. The Receiver's Motion Properly Invokes the Court's Summary Jurisdiction

The Joint Objectors argue, in a summary fashion, that the Court lacks the authority to issue conclusive rulings affecting the rights of nonparties and that any such ruling would be at odds with due process and the *Federal Rules of Civil Procedure*.[4] The Joint Objectors' arguments fundamentally misconstrue the nature of the Receiver's Motion and ignore the broad discretion the Court possesses in overseeing and granting relief in the context of an equity receivership.

The sole question posed by the Receiver's Motion is whether the Receivership Defendants—the parties before the Court in this matter—operated their silver investment scheme as a Ponzi scheme. The relevant factual considerations focus entirely on the actions of the Receivership Defendants—again, the parties before the Court in this action—and on no other parties. Indeed, the Court need make no findings with respect to the actions of any other parties, including defendants in any pending or future ancillary proceeding, in order to determine that Receivership Defendants perpetrated a Ponzi scheme. Although the Joint Objectors identify various collateral legal consequences that may flow from a determination that Receivership Defendants operated a Ponzi scheme, the applicability of those consequences, including any affirmative defenses the Joint Objectors may seek to assert in their ancillary actions, have no bearing on the appropriateness of any factual determination related to the Receivership Defendants' actions in this matter. In other words, the Court is not entering any findings with regard to the Joint Objectors' actions, and the Joint Objectors' actions have no bearing on whether Receivership Defendants did, in fact, operate a Ponzi scheme. The Joint Objectors will be free to assert any factual or legal defenses in their respective ancillary proceedings. The

[4] Joint Objections at 2.

Receiver's Motion merely seeks to preclude the re-litigation of the recurring question of whether Receivership Defendants operated a Ponzi scheme with the intent to defraud investors.

Moreover, the summary proceedings ordered by the Court are a proper exercise of the broad discretion the Court possesses to manage and oversee an equity receivership, including the Court's well-established authority to streamline the resolution of overarching issues in an effort to preserve assets of the Receivership Estate. Federal district courts retain summary jurisdiction over all receivership proceedings and have broad discretion to fashion relief in an equity receivership.[5] "It is well established that summary proceedings are appropriate as part of the district court's broad powers and wide discretion to determine relief in an equity receivership."[6] Indeed, "courts are encouraged to use summary proceedings because they decrease litigation costs and prevent further dissipation of receivership assets."[7] Finally, the use of summary proceedings to resolve overarching issues furthers the ultimate goal of receivership cases, which is to further equity by treating similarly situated individuals similarly.[8]

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[5] *See S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) ("It is generally recognized that the district court has broad powers and wide discretion to determine . . . relief in an equity receivership. This discretion derives from the inherent powers of an equity court to fashion relief." (quotation marks and citation omitted)); *S.E.C. v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (recognizing that "[t]he basis for [the] broad deference to the district court's supervisory role in equity receiverships arises out of the fact that most receiverships involve multiple parties and complex transactions"); *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) ("The district court has broad powers and wide discretion to determine relief in an equity receivership.").

[6] *United States v. RaPower-3, LLC*, No. 2:15-cv-00828-DN, 2020 WL 5531563, at *14 (D. Utah Sep. 15, 2020) (slip copy); *F.D.I.C. v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y. 1992) ("In keeping with this broad discretion, the use of summary proceedings in equity receiverships, as opposed to plenary proceedings under the Federal Rules of Civil Procedure, is within the jurisdictional authority of a district court.").

[7] *RaPower-3*, 2020 WL 5531563, at *14; *Elliott*, 953 F.2d at 1566 ("A summary proceeding reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets.").

[8] *See, e.g.*, *S.E.C. v. Management Solutions, Inc.*, No. 2:11-cv-01165-BSJ, 2013 WL 594738, at *3 (D. Utah Feb. 15, 2013) (acknowledging that the "very purpose of the receivership" is to treat similarly situated parties similarly).

Consistent with this broad authority, federal courts routinely employ summary proceedings to resolve disputes related to equity receiverships, even with respect to non-parties.[9] "[S]ummary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard."[10] Indeed, the Court previously has employed summary proceedings to resolve disputes related to property claimed by non-parties in this action.[11] Thus, the Receiver's Motion properly invokes the Court's summary jurisdiction, and the Joint Objectors' arguments with respect to the joinder or consolidation requirements found in the *Federal Rules of Civil Procedure* are inapposite.

B. The Summary Disposition Procedure Comports with Due Process

The Joint Objectors assert, also in a conclusory fashion, that the Court's summary disposition procedure interferes with their due process rights.[12] This assertion fails to articulate how the Court's summary disposition procedure fails to satisfy due process or to identify any prejudice that the Joint Objectors would suffer through their participation in a summary, as opposed to a plenary, proceeding with respect to the question of whether Receivership Defendants operated a Ponzi scheme.

As noted above, summary proceedings are routinely employed in federal equity receiverships and are designed to comport with due process rights while efficiently resolving disputes and preserving the Receivership Estate for all of the victims. Due process requires notice

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[9] *See RaPower-3*, 2020 WL 5531563, at *14 ("The use of summary proceedings in federal receivership cases also extends to their use against nonparties."); *AAAG-California, LLC v. Kisana*, No. 2:20-cv-00026-HCN-JCB, 2021 WL 633560, at *4 (D. Utah Feb. 18, 2021) (employing summary proceeding to order turnover of receivership property from non-party).

[10] *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999); *see also F.T.C. v. Assail, Inc.*, 410 F.3d 256, 268 (5th Cir. 2005); *Elliott*, 953 F.2d at 1567 (summarizing cases).

[11] *See* Order Granting Motion to Allow Summary Disposition Procedure, ECF No. 162; Order and Memorandum Decision Granting Turnover Motion, ECF No. 320 at 2 (employing summary proceeding to determine ownership of $1.6 million in disputed funds).

[12] Joint Objections at 2.

and an opportunity to be heard.[13] Here, there is no dispute that the Joint Objectors received notice of the Receiver's Motion, as each submitted a timely objection. Nor is there any real dispute that the Joint Objectors have a meaningful opportunity to be heard.

"Due process is flexible and calls for such procedural protections as the particular situation demands."[14] The Court looks to the strength of the private interest,[15] the risk of erroneous deprivation, the probable value of additional or substitute safeguards, and the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail."[16] Finally, a party claiming deprivation of due process "must show how they were prejudiced by the summary proceeding and how they would have been better able to defend their interests in a plenary proceeding."[17]

Here, any interested party—including the Joint Objectors—wishing to challenge the contention that the silver investment scheme operated by the Receivership Defendants was a Ponzi scheme had the opportunity to submit a written objection to the Court, request discovery—including written discovery and depositions—and present evidence and witnesses in the upcoming evidentiary hearing.[18] Aside from a conclusory assertion that the Joint Objectors

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[13] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Reagan Outdoor Advertising v. Salt Lake City Corp.*, No. 2:19-cv-00435, 2021 WL 409788, at *2 (D. Utah Feb. 6, 2021) (slip copy).

[14] *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quotation and alteration marks omitted).

[15] It is not clear that the Joint Objectors or any other objectors have a protectible interest in the outcome of the Court's factual determination that Receivership Defendants perpetrated a Ponzi scheme. *See Reagan Outdoor*, 2021 WL 409788, at *2 (recognizing the threshold inquiry of "whether the individual possessed a protected interest such that the due process protections apply." (quotation and alteration marks omitted)). For purposes of the Receiver's Motion, the Receiver will assume that the Joint Objectors and the other interested parties who submitted objections did have sufficiently protectible interests to require due process protections. In any event, the summary disposition procedure comports with due process.

[16] *Id.* at 335.

[17] *Elliott*, 953 F.2d at 1567.

[18] *See* ECF No. 451 at 2.

would be unable to fully conduct discovery on the issue of whether a Ponzi scheme existed in the time outlined by the Court's summary disposition procedure, the Joint Objectors have articulated no source of prejudice.[19] But the Joint Objectors had the opportunity to seek discovery under the Court's summary disposition procedure and chose not to. If the Joint Objectors believed that additional time was required to complete the discovery they believe is necessary, they had the ability to request additional time. The Joint Objectors cannot claim a due process violation while refusing to participate in the procedures the Court has established.[20]

Moreover, the issues for which the Joint Objectors claim they need discovery focus on the Joint Objectors' relationships with Receivership Defendants, not directly on whether Receivership Defendants operated a Ponzi scheme.[21] Indeed, the Joint Objectors do not seem to dispute that Receivership Defendants operated a Ponzi scheme. Rather, the Joint Objectors' position appears to be that their individual interactions with Receivership Defendants were somehow separate and apart from the Ponzi scheme. To the extent that the Joint Objectors wish to conduct discovery related to their own interactions with Receivership Defendants, they will have the opportunity to do so in their respective ancillary proceedings. Nothing in the Receiver's Motion prevents the Joint Objectors from arguing that their individual interactions with

[19] Joint Objections at 2-3.

[20] *See Rivera v. Bernalillo Cty.*, 51 Fed. App'x 828, 831-32 (10th Cir. 2002) (holding that an employee's refusal to take advantage of the established procedures resulted in waiver of due process claim).

[21] *See, e.g.*, Larsen Objection at 3 (claiming to need discovery "concerning Larsen's legitimate business with Rust Rare Coin … since approximately 1999 and a Precious Metals Custody Agreement Mr. Rust entered into"); Muir Objection at 3 (claiming to need discovery concerning "when [Rust Rare Coin] allegedly stopped operating as a legitimate business"); Maldonado Objection at 3 (same).

Receivership Defendants were somehow separate from the Ponzi scheme.[22] The Motion merely seeks to preclude re-litigation of the issue of whether Receivership Defendants operated the silver investment scheme as a Ponzi scheme.

Importantly, none of the Joint Objectors has articulated a basis for concluding that any unidentified discovery would uncover anything to contradict Rust's express admissions of fraudulent intent. For example, there is no reason to believe that Rust's testimony would be contrary to his express admissions that "[b]eginning at least in and around 2008 and continuing to and around November 15, 2018, . . . [Rust] did knowingly and willfully combine, conspire, confederate, and agree with others . . . to commit the crimes of Wire Fraud."[23] Rust further admitted that "[t]o convince investors and potential investors that their investments were profitable and to convince potential investors that the silver trading program was earning money, [Rust] used investment money from later investors to pay the promised returns to earlier investors."[24] And, critically, Rust admitted that the "object of the wire fraud conspiracy was to defraud investors by inducing them to invest in RRC's 'silver trading program' through material misrepresentations and omissions of material fact."[25] Put simply, none of the vaguely described discovery the Joint Objectors claim to have desired—but which they did not seek—would serve to undermine these key admissions.

On the other side of the analysis, significant administrative and fiscal burdens would be imposed on the Receivership Estate, victims of Receivership Defendants' fraudulent scheme, and

[22] To be clear, the Receiver does not believe that the Joint Objectors' relationships with Receivership Defendants were separate from the Ponzi scheme. However, those issues can be dealt with in individual ancillary proceedings as appropriate.

[23] ECF No. 448-1, Gaylen Rust Plea at 5.

[24] *Id.* at 6-7.

[25] *Id.* at 5.

the Court if the Receiver were forced to continue re-litigating the issue of whether the Receivership Defendants—all of whom have now pled guilty in their criminal proceedings—operated a Ponzi scheme. It is because of this burden that the Tenth Circuit has recognized that "in fashioning relief in an equity receivership, a district court has discretion to summarily reject formalistic arguments that would otherwise be available in a traditional lawsuit." *Broadbent v. Advantage Software, Inc.*, 415 F. App'x 73, 78 (10th Cir. 2011) (unpublished). The Joint Objectors have identified no specific discovery that would serve to undermine the inescapable conclusion that Receivership Defendants operated a Ponzi scheme. And forcing the Receivership Estate, Receivership Defendants' victims, and the Court to bear the burden of engaging in successive rounds of discovery and litigation on an issue that is conclusively established by the perpetrator's guilty plea would be the height of formalism. *See In re Slatkin*, 525 F.3d 805, 814 (9th Cir. 2008) ("We now hold that a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors **conclusively establishes the debtor's fraudulent intent** . . . **and precludes relitigation of that issue.**" (emphasis added)). Balancing these interests and recognizing the flexibility granted the Court, the summary proceeding fully complies with the requirements of due process.

C. The Motion Is Ripe

The Joint Objectors' final argument is that the Court should refrain from making a determination about the existence of a Ponzi scheme until after deciding whether to certify certain questions of law to the Utah Supreme Court.[26] In so arguing, the Joint Objectors incorporate their respective Motions to Certify. As explained in greater detail in the Receiver's

[26] Joint Objections at 3-4.

oppositions to the Motions to Certify,[27] none of the questions the Joint Objectors proposed to certify to the Utah Supreme Court meet the high standard required for certification. Specifically, none of the proposed questions is case determinative or sufficiently novel to justify certification. Moreover, the Motions to Certify fundamentally misapprehend the case law related to Ponzi schemes in the context of Utah's fraudulent transfer statute and ignore the factual reality of a Ponzi scheme and why courts routinely recognize that all transfers related to such schemes are presumptively fraudulent. Although the Receiver has previously addressed these arguments, he will briefly reiterate the foundational problems with the Motions to Certify for the convenience of the Court.

As an initial matter, the Joint Objectors' argument ignores the reality that the question of whether Receivership Defendants operated a fraudulent investment scheme as a Ponzi scheme is squarely before the Court and must be resolved, regardless of the determination's impact on any particular ancillary proceeding. The plaintiffs in this matter have alleged that Receivership Defendants operated their silver investment program as a Ponzi scheme.[28] The Court will necessarily be required to address Receivership Defendants' fraudulent scheme in resolving the case before it. The resolution of the issue of whether Receivership Defendants operated a Ponzi scheme must be made regardless of the collateral consequences for any ancillary proceeding.

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[27] Memorandum in Opposition to Defendants' Motion to Certify Questions of Law to the Utah Supreme Court, *Hafen v. Larsen*, Civ. No. 2:21-cv-00743-TC, Dkt. No. 30 (D. Utah Apr. 22, 2022); Memorandum in Opposition to Defendant's Motion to Certify Questions of Law to the Utah Supreme Court, *Hafen v. Percell*, Civ. No. 2:19-cv-00899-TC-DBP, Dkt. No. 23 (D. Utah Apr. 22, 2022); Memorandum in Opposition to Defendant's Motion to Certify Questions of Law to the Utah Supreme Court, *Hafen v. Muir*, Civ. No. 2:19-cv-00913-TC, Dkt. No. 21 (D. Utah Apr. 22, 2022). The Receiver hereby incorporates his prior responses in his oppositions by reference.

[28] *See* ECF No. 56 (alleging Receivership Defendants operated a silver investment scheme as a Ponzi scheme and asserting claims of fraud, violations of the Commodity Exchange Act and securities fraud)

Moreover, none of the Joint Objectors' proposed questions impact the definition of a Ponzi scheme or otherwise call into question the factual circumstances under which a Ponzi scheme operates. Thus, the question of whether Receivership Defendants operated a Ponzi scheme is ripe and should be decided, even if the Court were to certify questions of law to the Utah Supreme Court.

With respect to the Motions to Certify, the Joint Objectors have not met their heavy burden. Perhaps most critically, the Motions to Certify focus entirely on the operation of Utah's Uniform Voidable Transactions Act (the "UVTA") in the context of a Ponzi scheme and do not even attempt to address the Receiver's other potential avenues of recovery, including claims of unjust enrichment.[29] Even if the Utah Supreme Court were to answer all of the proposed questions favorably to the Joint Objectors (an extremely unlikely outcome), the Receiver can obtain all of the same relief under alternative theories of recovery. Because a proposed question must be case determinative, the Joint Objectors' failure to address the Receiver's alternative theories of recovery is fatal to the Motions to Certify.[30] The only object of the Motions to Certify, in light of the Receiver's alternative path to recovery, is to delay the inevitable and to impose additional costs on the Receivership Estate.

However, the Motions to Certify also suffer from a fatal defect in that they fundamentally misapprehend the case law related to Ponzi schemes in the context of fraudulent transfer claims. While the Joint Objectors attempt to paint the precedents of this Court and the Tenth Circuit as

[29] *See generally* Motions to Certify.

[30] *Lane v. Progressive Nat'l Ins. Co.*, 800 F. Appx. 662, 664 (10th Cir. 2020) (noting that a proposed question must "control[] the outcome of [a] case"); *see also Booth v. Home Depot, U.S.A., Inc.*, No. 20-6074, 2021 WL 4805496, at *2 (10th Cir. 2021) ("We do not certify every novel or difficult question of state law. But we will certify a question if it could determine the case before us and if it is sufficiently novel that we are uncomfortable deciding it without guidance from the state's highest court." (citation omitted)).

"judge-made law," they ignore the factual reality of a Ponzi scheme and precisely why courts routinely recognize that all transfers related to such schemes are presumptively fraudulent.

The defining feature of a Ponzi scheme is that newly invested funds are used to pay returns to existing investors, instead of being used for some profit-generating enterprise.[31] Such a scheme is, by definition, fraudulent because newly invested funds are not used for a legitimate profit-generating opportunity, as represented to the investor. Instead, newly invested funds are diverted to pay promised returns to existing investors. By definition, fraud occurs on both sides of such a transaction. The new investor is defrauded when their funds are not used for their intended purpose. The existing investor is defrauded when their returns are not generated by a legitimate venture, but were instead stolen from other innocent investors. The natural consequence of this distinguishing characteristic of a Ponzi scheme is that transfers related to the scheme are, by definition, fraudulent. Both the party making the investment into the scheme and the party receiving the supposed "returns" are defrauded. Far from some abstract presumption operating in a vacuum, the Ponzi presumption flows naturally from the factual reality of how a Ponzi scheme operates.[32]

[31] *See Jobin v. McKay*, 84 F.3d 1330, 1332 n.1 (10th Cir. 1996). Utah's appellate courts have defined a Ponzi scheme similarly. *See, e.g.*, *State v. Hamilton*, 437 P.3d 530, 532 n.1 (Utah Ct. App. 2018) ("A Ponzi scheme is a fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments. Under these types of schemes, money from the new investors is used directly to repay or pay interest to earlier investors, usually without any operation or revenue-producing activity other than the continual raising of new funds." (internal citations and quotation marks omitted)).

[32] *See Hafen v. Evans*, No. 2:19-cv-00895-TC, 2021 WL 3501658, at *2 (D. Utah Aug. 9, 2021) ("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." (emphasis added)).

The Receiver will not reiterate in detail all of the reasons why each individual proposed question is neither novel nor case determinative. That analysis is contained in detail in the Receiver's prior oppositions to the Motions to Certify and is incorporated herein by reference. However, it is worth emphasizing a few critical points. First, Utah's federal courts have consistently interpreted the UVTA and its predecessor in the context of Ponzi schemes for decades and have concluded that the existence of a Ponzi scheme establishes (1) the Ponzi perpetrator's actual intent to hinder, delay, or defraud creditors and (2) the schemes inherent insolvency.[33] All of the Joint Objectors' proposed questions have been addressed by Utah's federal courts on a consistent basis for many years.[34] In all those years, the Utah Legislature has made both cosmetic and substantive changes to the UVTA on numerous occasions, but has declined to disavow or otherwise overrule the federal courts' application of Utah law.[35] As the Utah Supreme Court has consistently emphasized, the Utah Legislature is presumed to operate with the full knowledge of the courts' interpretation of its statutory commands.[36] Further, the Utah Supreme Court has instructed that the Legislature's declination to overrule the courts' statutory interpretation indicates acceptance of that interpretation.[37] Thus, the Utah Legislature's

[33] *See, e.g.*, *In re Indep. Clearing House Co.*, 77 B.R. 843, 856 (D. Utah 1987).

[34] *See, e.g.*, *Klein v. Cornelius*, 786 F.3d 1310, 1316 (10th Cir. 2015) (receiver's standing under the UFTA); *Miller v. Wulf*, 84 F. Supp. 3d 1266, 1274 (D. Utah 2015) (definition of "value" in context of a Ponzi scheme).

[35] *See, e.g.*, Uniform Voidable Transactions Act, 2017 Utah Laws Ch. 204 (S.B. 58) (reciting amendment history of the UVTA).

[36] *See, e.g.*, *Olseth v. Larson*, 158 F.3d 532, 539 (Utah 2007) (on certification from the Tenth Circuit, refusing to deviate from long-standing interpretation of statutory language).

[37] *Id.* ("If the Legislature wants to change the tolling statute's general application, it is always free to do so. But at this point, the Legislature has accepted our plain-language interpretation of the tolling statute for almost ninety years."); *State Bd. Of Land Comm'rs v. Ririe*, 190 P. 59, 62 (Utah 1920) (Legislature "has given its affirmative approval by the re-enactment of the section with full knowledge of the interpretation placed upon it"); *see also Salt Lake Cty. v. Kennecott Copper Corp.*, 163 F.2d 484, 489 (10th Cir. 1947) (recognizing that state legislature's choice not to overturn long-standing interpretation is entitled to deference).

declination to correct or disavow the federal courts' longstanding interpretation of the UVTA and its predecessors, despite revisiting the statute on numerous occasions, indicates "affirmative approval" of the federal courts' treatment.

Second, the proposed questions all suffer from the same fatal flaw. The questions each seek to challenge the application of the so-called "Ponzi presumption," and incorrectly suggest that the Ponzi presumption allows the Receiver to bypass the need to provide evidence critical elements of his claims under the UVTA. However, the proposed questions misapprehend the reasons for the Ponzi presumption. As discussed above, the existence of a Ponzi scheme is evidence of, for example, the actual intent of a Ponzi perpetrator to hinder, delay, or defraud creditors.[38] Because direct evidence of intent is so often impossible to provide, courts infer such intent from the fact of a Ponzi scheme's existence. "Indeed, no other reasonable inference is possible."[39] Thus, the fact that a Ponzi perpetrator did pay returns to existing investors from newly invested funds—the definition of a Ponzi scheme—is evidence of the perpetrator's actual intent to hinder, delay, or defraud.

However, in this case, the Receiver has presented direct evidence in the form of Gaylen Rust's admissions of his actual intent to hinder, delay, or defraud investors. Rust pled guilty to wire fraud conspiracy related to the operation of the silver investment opportunity and expressly admitted that the "object of the wire fraud conspiracy was to defraud investors."[40] Such direct

[38] *See State v. Florez*, 465 P.3d 307, 313 (Utah Ct. App. 2020) (recognizing that intent is "a state of mind, which is rarely susceptible of direct proof"); *State v. Gonzalez*, 822 P.2d 1214, 1217 (Utah Ct. App. 1991) ("[I]ntent may be inferred from the actions of the defendant or from surrounding circumstances.").

[39] *Evans*, 2021 WL 3501658, at *2.

[40] ECF No. 448-1, Gaylen Rust Plea at 5.

evidence of intent conclusively establishes Rust's actual intent to defraud investors and meets the Receiver's burden of proof.

Finally, the Motions to Certify proceed under the misapprehension that a question should be certified if the Utah Supreme Court has not addressed the exact question posed. This misstates the relevant standard. As the Tenth Circuit has repeatedly emphasized, ""[federal courts] will not trouble [their] sister state courts every time an arguably unsettled question of state law comes across [their] desks."[41] "If a reasonably clear and principled course is available, courts should exercise judgment and restraint before certifying questions. Federal district courts enjoy wide latitude in deciding certification motions."[42] This wide latitude should be used to "conserve the time, energy, and resources of the parties as well as of the court itself."[43] As explained in detail in the Receiver's oppositions to the Motions to Certify, Utah's appellate courts have provided ample guidance on which this Court can rely to resolve each of the questions posed by the Joint Objectors. In short, the Motions to Certify do not constitute a reason for this Court to refrain from deciding whether Receivership Defendants operated a Ponzi scheme.

II. HOWELL OBJECTION TO SUMMARY DISPOSITION PROCEDURE

Gretchen and Leslie Howell (the "Howells") raise certain procedural objections to the use of the Court's summary disposition procedure to address the Receiver's Motion.[44] Specifically,

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[41] *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007).

[42] *Lawrence v. First Fin. Inv. Fund V, LLC*, 444 F. Supp. 3d 1313, 1318–19 (D. Utah 2020) (citations omitted); *see also Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998) ("[J]ust because a new state law question is raised, certification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." (internal quotation marks omitted)).

[43] *Boyd Rosene and Assocs., Inc. v. Kansas Mun. Gas Agency*, 178 F.3d 1363, 1365 (10th Cir. 1999).

[44] *See* Howells' Objection to the Receiver's 'Summary Disposition Procedure' for a Ponzi Determination ("Howell Procedural Objection"), lodged by the Receiver as ECF No. 458-

the Howells argue that the Court's summary disposition procedure (1) interferes with their constitutional right to a jury trial under the Seventh Amendment and (2) undermines the Howells' procedural protections. Neither argument holds water.

A. The Summary Disposition Procedure Does Not Interfere with the Howells' Jury Trial Rights.

The Howells first argue that the Seventh Amendment entitles them to a jury trial on all elements of the Receiver's claims against them, including the Receiver's allegation that Receivership Defendants operated a Ponzi scheme.[45] Although the Howells spend considerable time discussing whether the claims asserted by the Receiver constitute claims at law for which a jury trial is available, the Howells' argument nevertheless fails to recognize the simple fact that—even for claims at law tried to a jury—not every element or claim actually reaches the jury. Indeed, the *Federal Rules of Civil Procedure* expressly contemplate the pretrial summary disposition of claims and issues when those claims and/or issues may be resolved as a matter of law.[46] Claims are also subject to dismissal or determinative adverse jury instructions as sanctions for discovery misconduct.[47] In short, simply because a cause of action is one at law and triable to a jury does not mandate that every issue of every claim actually reaches a jury.

The Howells point to no case law—and the Receiver is aware of no such case law—standing for the proposition that a case at law precludes the pretrial disposition of claims or issues. Indeed, such preclusion would fly in the face of numerous rules of civil procedure and

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3. The Howells' second objection centers of the Receiver's substantive evidence and will be addressed below.

[45] Howell Procedural Objection at 9.

[46] *See, e.g.*, FED. R. CIV. P. 12(b)(6); FED R. CIV. P. 56.

[47] *See* FED. R. CIV. P. 37.

would lead to the absurd result that no court could enter summary judgment or dismiss a claim at law. This is clearly not the case.

Moreover, as explained herein, ample evidence supports a determination that Receivership Defendants operated a Ponzi scheme. Just as the Court would be able to determine the existence of a Ponzi scheme at summary judgment, it can do so through its summary disposition procedure.[48] The effect of the Howells' argument would be to require the Receiver to serially re-litigate the issue of whether Receivership Defendants operated a Ponzi scheme in dozens of ancillary actions and force the Court to submit that issue to the jury in each and every case. Not only would such a situation constitute an enormous waste of resources for the Court and the victims of Receivership Defendants' scheme, but also it would risk multiple disparate outcomes on the same set of facts. This is precisely why courts routinely employ summary proceedings in equity receiverships, especially in light of the overlapping factual and legal issues between various ancillary actions in such receiverships.[49] In short, the summary disposition procedure does not implicate the Howells' right to a jury trial.

B. The Summary Disposition Procedure Comports with Due Process.

The Howells next argue that the summary disposition procedure is unfair because it supposedly undermines the procedural protections afforded the Howells in their separate ancillary proceeding.[50] As discussed above, the summary disposition procedure established by the Court more than meets the requirements for due process.[51] The Howells' objection fails to

[48] *See, e.g.*, *Hafen v. Famulary*, 2:19-cv-00627-TC, Dkt. No. 28 at 10 (granting the Receiver's Motion for Partial Summary Judgment and finding that Receivership Defendants operated a Ponzi scheme); *Hafen v. Brimley*, 2:19-cv-00875-TC, Dkt. No. 21 at 13 (same); *Hafen v. Evans*, 2:19-cv-00895-TC, Dkt. No. 38 at 10 (same).

[49] *See* Section I.A *supra*.

[50] Howell Procedural Objection at 12-13.

[51] *See* Section I.B *supra*.

articulate how the Receiver's Motion, which is premised on precisely the same facts and evidence disclosed during the Howells' separate ancillary proceeding,[52] causes them any prejudice. Indeed, the Howells' primary procedural objection appears to be that the Court should make a Ponzi determination in the Howells' separate ancillary proceeding, rather than in this summary proceeding. But the Howells fail to articulate "how they were prejudiced by the summary proceeding and how they would have been better able to defend their interests in a plenary proceeding."[53] The Howells admit that they have conducted extensive discovery in their separate ancillary proceeding.[54] If the Howells had evidence to dispute the existence of a Ponzi scheme, they had the opportunity—through the summary disposition procedure—to provide it. In short, the Howells have had every opportunity to explore the factual predicate underlying the Ponzi scheme and, if possible, to provide evidence showing that the Ponzi scheme did not exist. This more than satisfies the requirements of due process.

III. HOWELL OBJECTION TO RECEIVER'S SUBSTANTIVE EVIDENCE

In addition to the Howells' objection to the use of the summary disposition procedure, they also submitted an objection attempting to challenge the Receiver's substantive evidence establishing the existence of a Ponzi scheme.[55] The Howells advance two main arguments in an attempt to assert that the Receiver has failed to adduce admissible evidence of a Ponzi scheme's existence: (1) the Receiver is not entitled to rely on the statements made by Gaylen Rust in his

[52] The Howells' separate objection to the evidence underlying the Receiver's Motion is addressed below.

[53] *Elliott*, 953 F.2d at 1567.

[54] Howell Procedural Objection at 12-13.

[55] *See* Howells' Objection and Memorandum Opposing the Receiver's Motion for a Ponzi Determination ("Howell Substantive Objection"), lodged by the Receiver as ECF No. 458-4.

criminal plea and (2) the Receiver's expert testimony should be excluded. Neither argument has merit.

A. Gaylen Rust's Statements in His Criminal Plea Are Admissible

The Howells first contend that the Court may not consider the admissions in Rust's guilty plea because (1) the plea is inadmissible hearsay and (2) Rust invoked his Fifth Amendment rights when deposed by the Howells in their separate ancillary proceeding. For the reasons discussed below, these arguments are unavailing.

1. Courts Routinely Admit Statements in Plea Allocutions

The Howells' contention that Rust's guilty plea is inadmissible is incorrect.[56] Rust is a defendant in this matter. As such, statements in his guilty plea are admissible under Rule 801(d)(2) of the Federal Rules of Evidence. Rule 801(d)(2) provides that a statement is not hearsay when it is offered against an opposing party and "was made by the party in an individual or representative capacity." As a party to this action, Rust's own statements, offered to prove his misconduct, are simply not hearsay.

Moreover, courts routinely admit guilty pleas pursuant to Rule 807 and 803(22) of the Federal Rules of Evidence.[57] Under Rule 807, a statement that is not otherwise admissible under

[56] Perhaps recognizing that this argument is unavailing, the Howells devote a total of three sentences and no substantive analysis to their claim that Rust's guilty plea is inadmissible hearsay. *Id.* at 11. They fail to even attempt to address the wealth of caselaw discussing the admissibility of statements contained in plea agreements. *See infra*. The argument's lack of development is an independent reason for the Court to reject it. *See Hawkins v. Colvin*, No. 2:13-cv-00980-EJF, 2015 WL 1481150, at *13 (D. Utah Mar. 31, 2015) ("The Court need not address undeveloped arguments.").

[57] *See, e.g.*, *Thomas v. Durastani*, 607 F.3d 655, 665 n.8 (10th Cir. 2010) (citing *In re Slatkin*, 525 F.3d 805 (9th Cir. 2008), with approval and admitting plea agreement to prove intent under Rule 807); *Slatkin*, 525 F.3d at 814 ("We now hold that a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent . . . and precludes relitigation of that issue."); *Scholes v.*

a hearsay exception is admissible if "(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of the circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts."[58] Mr. Rust's Guilty Plea meets the requirements for admission under Rule 807.

First, while the Guilty Plea is not in the form of an affidavit or declaration, it is the functional equivalent of such things and is, in many ways, considerably more reliable. For example, whereas an affidavit must be notarized, Rust's guilty plea is countersigned by two officers of the Court: his personal attorney and an Assistant United States Attorney. These individuals are obviously much more likely to know Rust than a randomly selected notary public would. Likewise, while a declaration must indicate that it is signed under penalty of perjury, Rust's statement affirms that he executed it voluntarily, following sufficient discussion with his counsel, after careful thought with an unclouded mind and "with a full understanding of [his] rights, the facts and circumstances of the case and the consequences of the plea."[59]

Second, the trustworthiness of Rust's guilty plea is guaranteed by the fact that it was created specifically for submission to the Court in the context of a formal legal proceeding and was crafted with the assistance and advice of counsel. Moreover, Rust was singularly well suited to recite the facts contained in his guilty plea since he admits to owning, operating and managing "all aspects" of RRC for nearly two decades.[60] Finally, it cannot go unnoticed that Rust's guilty

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Lehmann, 56 F.3d 750, 762 (7th Cir. 1995) (accepting Ponzi scheme operator's guilty plea as evidence establishing existence of a Ponzi scheme); *Wing v. Alvey*, No. 2:08-cv-796, 2009 WL 223612, at *1 (D. Utah Jan. 29, 2009) ("[N]umerous courts have also held that a 'criminal conviction for operating a Ponzi scheme establishes the operator's fraudulent intent.'").

[58] FED. R. EVID. 807.

[59] ECF No. 448-1, Gaylen Rust Plea at 12.

[60] *Id.* at 5.

plea is plainly so against his penal interests that if he were "unavailable" within the meaning of Rule 804(a) of the Federal Rules of Evidence, his guilty plea would undoubtedly be admissible under subpart (b)(3) of that rule. Put simply, Rust's guilty plea consists of precisely the kinds of admissions a person would make only if they were true.[61]

With respect to Rule 807(a)'s "more probative" requirement, Rust's guilty plea provides the most probative evidence possible of his actual intent to hinder, delay, or defraud investors.[62] Specifically, Rust admits that he "did knowingly and willfully combine, conspire, confederate, and agree with others . . . to commit the crimes of Wire Fraud" in connection with RRC and that the "object of the wire fraud conspiracy was to defraud investors by inducing them to invest in RRC's 'silver trading program' through material misrepresentations and omissions of material fact about the program."[63]

Moreover, Rust's guilty plea would clearly be "more probative" of the existence of a Ponzi scheme than any other evidence. Although the Receiver has provided additional evidence to establish the existence of a Ponzi scheme with his Motion,[64] direct evidence of Rust's intent in the form of his personal admissions is without a doubt the most probative evidence available. The statements in Rust's guilty plea are therefore admissible under Rule 807.

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[61] *See Slatkin*, 525 F.3d at 812 (holding that the Ponzi scheme operator's guilty plea had all the required guarantees of trustworthiness when it "(1) was made under oath with the advice of counsel, (2) subjected Slatkin to severe criminal penalties, (3) was made after Slatkin was advised of his constitutional rights, and (4) was accepted by the court in the criminal matter only after the court determined that Slatkin's plea was knowing and voluntary").

[62] *See id.* ("Slatkin's admissions in the plea agreement that he operated a Ponzi scheme, and that he did so with the actual intent to defraud, are more probative on these issues than any other evidence the Trustee could procure.").

[63] ECF No. 448-1, Gaylen Rust Plea at 5.

[64] *See* Report of Jonathan O. Hafen and accompanying exhibits, ECF No. 448-2; Report of D. Ray Strong and accompanying exhibits, ECF No. 448-3, 448-4.

In addition, evidence of a final judgment of conviction is admissible "if the judgment was entered after a trial or guilty plea . . . ; the conviction was for a crime punishable by . . . imprisonment for more than an year; [and] the evidence is admitted to prove any fact essential to the judgment."[65] Rust's guilty plea easily meets all of these requirements. Rust has now pled guilty to operating RRC with the goal of defrauding investors and to using newly invested funds to pay returns to existing investors.[66] These admissions expose Rust to a stipulated sentence of 19 years' imprisonment.[67] Finally, the evidence is admissible to prove the critical elements of a Ponzi scheme, which forms the basis of the judgment against Rust. Courts routinely admit plea allocutions pursuant to Rule 803(22) to establish the existence of a Ponzi scheme.[68]

Thus, Rust's guilty plea is admissible pursuant to Rules 803 and 807. The statements in his guilty plea are inarguably trustworthy and more probative of his actions and intentions than any other possible evidence. Moreover, the guilty plea is expressly exempted from the rule against hearsay as evidence of a final judgment of conviction.

2. Rust's Invocation of His Fifth Amendment Rights Does Not Bar Admission of His Guilty Plea

The Howells further argue that the Court may not consider the statements contained in Rust's guilty plea because Rust invoked his Fifth Amendment rights when deposed by the Howells in their ancillary proceeding. In so arguing, the Howells ask the Court to ignore the factual reality that Rust has now pled guilty and is serving 19 years' imprisonment for his role in the fraudulent investment scheme in which the Howells were investors due to the sheer

[65] FED. R. EVID. 803(22).
[66] ECF No. 448-1, Gaylen Rust Plea at 5-7.
[67] *Id.* at 8.
[68] *See Scholes*, 56 F.3d at 762; *Securities Investor Protection Corp. v. Bernard L. Madoff Invest. Securities LLC*, 528 F. Supp. 3d 219, 233- 34 (S.D.N.Y. 2021) (collecting cases)

happenstance of the timing of their deposition of Rust in their separate ancillary proceeding. Discovery is not a game of "gotcha." The purpose of the *Federal Rules of Civil Procedure* is "to secure the just, speedy, and inexpensive determination of every action and proceeding" on the merits.[69] Indeed, the "policy behind the Federal Rules is to discourage mechanistic technicality in favor of dispute resolution on the merits."[70] The Howells' argument would flip these fundamental principles on their head.

The cases cited by the Howells are not to the contrary. Although courts certainly have discretion to bar subsequent testimony of a witness who invokes his Fifth Amendment rights at a deposition, such a bar is far from mandatory, especially when such a bar would act to perpetuate an injustice.[71] The Howells received millions of dollars in fictitious "profits" that were actually stolen from other investors. There is no blanket ban on evidence from a witness who invokes his Fifth Amendment rights during a deposition taken while criminal charges were pending.

In *Poore v. Glanz*,[72] a sexual assault victim sued the sheriff responsible for the detention facility in which she was harmed. The officer who perpetrated the assaults asserted his Fifth Amendment rights when deposed.[73] Finding that it would be "unfairly prejudicial" to the plaintiff victim if the officer were to testify for the sheriff at trial, the trial court refused to allow the officer to take the stand.[74] If there were a categorical prohibition on the admission of testimony following an invocation of Fifth Amendment rights, the court would have had no need

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[69] Fed. R. Civ. P. 1.

[70] *Lucas v. Aetna Cas. & Sur. Co.*, 540 F. Supp. 1387, 1388 (D. Colo. 1982).

[71] *See, e.g.*, *Gutierrez-Rodriguez v. Cartegena*, 882 F.2d 553 (1st Cir. 1989) (when defendant police officer refused to answer deposition questions concerning the incident in question, the district court did not abuse its discretion in refusing to allow the officer to testify at trial).

[72] 724 Fed.App'x. 635 (10th Cir. 2018).

[73] *See id.* at 644.

[74] *Id.*

to make a determination of unfair prejudice. Clearly, the admission of testimony after an invocation of the right to remain silent is a case-by-case proposition.

The *SEC v. Art Intellect, Inc.*[75] case also does not preclude the admission of Rust's guilty plea. In that case it was the defendants themselves who first invoked their Fifth Amendment rights, a critical distinction from the case at hand. The Receiver had no control over Rust's invocation of his Fifth Amendment rights and no ability to obtain Rust's admissions until after Rust pled guilty. As in *Poore v. Glanz*, the *Art Intellect* Court considered the degree to which the SEC would be prejudiced by the admission of the defendants' affidavits following their refusal to testify at their depositions. Again, consideration of prejudice is inconsistent with the existence of a blanket rule.[76]

Nor would consideration of Rust's guilty plea be barred by Rule 37, as urged by the Howells.[77] Although a party is generally prohibited from using evidence the party failed to disclose as required by Rule 26(a) or (e), such evidence is admissible if the failure to disclose "was substantially justified or is harmless." FED. R. CIV. P. 37(c)(1). As an initial matter, it is unclear precisely what evidence the Howells contend the Receiver failed to disclose or identify as required by Rule 26. To the extent the Howells are asserting that the Receiver was obligated to

[75] No. 2:11-cv-357, 2013 WL 840048 (D. Utah, March 6, 2013).

[76] *See also S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir. 1994) ("A trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment. Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side."); *F.T.C. v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1291 (D. Minn. 1985) ("A complete bar of testimony seems unjustified in this instance, however, since the plaintiff did receive pretrial information from Farkas relating to certain areas of inquiry. Nor does a more limited ban on testimony seem appropriate. To be sure, the Federal Rules of Civil Procedure aim to prevent surprise, prejudice and perjury by ensuring full and fair mutual discovery before trial. The court has inherent power to monitor whether the assertion of a privilege causes unfair prejudice to the opposing litigant.").

[77] Howell Substantive Objection at 17.

disclose the existence of Rust's plea admissions and the Receiver's intent to rely on those admissions earlier in the Howells' ancillary proceeding, such an assertion is nonsensical. Rust did not plead guilty until December 20, 2021.[78] There was no possibility prior to that date that the existence of Rust's admissions could be disclosed.

In any event, any delay in disclosure of Rust's plea was harmless. Under Rule 37, the Court should consider "(1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness."[79] The Howells can point to no source of surprise or prejudice resulting from Rust's admissions. Indeed, the factual admissions made by Rust in his guilty plea are entirely consistent with the Receiver's allegations, the documentary evidence, and the expert testimony provided in the Howells' ancillary proceeding. In fact, Rust's admissions merely confirm the Receiver's allegations and do nothing to change the factual landscape the Howells face. Thus, the Howells have suffered no prejudice.

To the extent the Howells contend that they should be entitled to re-depose Rust—and cure any alleged prejudice they have suffered— they had the opportunity to request such discovery under the Court's summary disposition procedure and declined to do so.[80] The Howells cannot be heard to complain that they were not allowed the opportunity to conduct

[78] ECF No. 448-1, Gaylen Rust Plea at 12.

[79] *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999).

[80] If the Howells believe they should be entitled to re-depose Rust in their separate ancillary proceeding, they may move to reopen discovery in that venue. The Receiver does not believe reopening discovery is warranted, but that issue can be dealt with in the separate ancillary proceeding.

additional discovery in response to Rust's guilty plea if they felt such discovery was necessary. Nor does consideration of Rust's guilty plea admissions affect any trial dates.

Finally, there is no evidence of bad faith or willfulness with respect to the Receiver's disclosure of Rust's admissions. Those admissions did not exist until late 2021, and Rust's conviction was not final until March 8, 2022, when the court accepted Rust's guilty plea and sentenced Rust to 19 years' imprisonment.[81] The Receiver filed his Motion one week later on March 15, 2022.[82] Thus, any supposed delay in disclosure was harmless and Rust's admissions should be considered.

B. The Receiver's Expert Testimony Is Admissible

The Howells next argue that the Court should disregard the expert reports of D. Ray Strong and the Receiver, along with their accompanying exhibits, in determining whether Receivership Defendants operated a Ponzi scheme. As an initial matter, now that Rust has pled guilty and admitted the essential facts of his fraudulent scheme, the Court may determine that the silver investment program was a Ponzi scheme without relying on the reports. However, as explained below, the Howells' arguments in favor of exclusion of the reports are neither persuasive nor accurate. Specifically, the Howells fundamentally misrepresent the nature of the expert reports and their supporting evidence, which—when viewed in their entirety—are clearly admissible in this summary proceeding.[83]

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[81] *United States v. Rust*, 2:19-cr-00164-TS-CMR, Dkt. No. 156 (D. Utah Mar. 8, 2022). Joshua Rust also pled guilty on March 8, 2022. *Id.* at Dkt. Nos. 159, 162.

[82] ECF No. 448.

[83] The Court previously relied on the reports submitted by the Receiver and Mr. Strong in granting summary judgment in three ancillary proceedings. *See Hafen v. Famulary*, 2:19-cv-00627-TC, Dkt. No. 28; *Hafen v. Brimley*, 2:19-cv-00875-TC, Dkt. No. 21; *Hafen v. Evans*, 2:19-cv-00895-TC, Dkt. No. 38.

1. Mr. Strong's Report and Testimony Are Admissible

The Howells first argue that the Court should disregard the plethora of evidence demonstrating conclusively the existence of a Ponzi scheme because of supposed deficiencies in Mr. Strong's report.[84] As explained in detail herein, the Howells' arguments fundamentally misrepresent Mr. Strong's analysis, ask the Court to disregard thousands of pages of analysis and supporting evidence, and ultimately fail to justify excluding Mr. Srong's testimony.

The Howells argue that Mr. Strong's analysis should be excluded for two reasons: (1) that Mr. Strong relied on supposedly incomplete and unreliable data and (2) that Mr. Strong supposedly invades the province of the jury by providing an opinion as to the ultimate facts in the case.[85] Neither argument holds water.

First, the Howells focus on a smattering of statements from Mr. Strong's deposition taken out of context, and in some cases mischaracterized, to argue that Mr. Strong's analysis is not supported by reliable data.[86] In so doing, the Howells fail to explain precisely how these statements establish that the data relied upon was insufficient to reach the conclusions drawn by Mr. Strong and conveniently choose to ignore the extensive analysis contained in Mr. Strong's report and the hundreds of pages of supporting exhibits.[87] Indeed, the data evaluated by Mr.

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[84] Howell Substantive Objection at 13-15. The Howells incorporate by reference their Motion to Exclude Proposed Expert D. Ray Strong ("Strong Motion"), filed in their separate ancillary proceeding. *See Hafen v. Howell*, 2:19-cv-00813-TC, Dkt. No. 54 (D. Utah Feb. 14, 2022). The Howells also suggest in passing that Mr. Strong's analysis should be excluded because Mr. Strong was not personally involved with the accounting of RRC prior to November 2018. This argument is nonsensical in light of Mr. Strong's role as an expert witness allowed to rely on precisely the kind of documentary evidence he relied upon. *See* FED. R. EVID. 702, 703.

[85] Strong Motion at 13.

[86] Strong Motion at 3.

[87] *See* Expert Report of D. Ray Strong and accompanying exhibits ("Strong Report"), ECF No. 448-3, 448-4. The Receiver previously lodged all of the supporting appendices to Mr. Strong's report in the *Hafen v. Famulary* matter. *See* 2:19-cv-00627-TC, Dkt. No. 22 (D. Utah Sept. 28, 2020) (voluminous appendices to Strong and Hafen reports filed through conventional

Strong includes bank documentation; analyses conducted by the Utah Division of Securities in its initial investigation; declarations obtained by Plaintiffs; transcripts of interviews of Rust conducted by Plaintiffs and the FBI on November 15, 2018; bank account statements; cancelled checks; deposit slips; debit and credit memos; wire transfer advices; wire data; account setup and signature documentation for RRC accounts; QuickBooks and Acumatica accounting systems for RRC and related entities; the Microsoft Dynamics RMS point-of-sale system for RRC; various physical records and files maintained by RRC; RRC email archives; investor statements maintained by Gaylen Rust; documents obtained from third-party financial institutions, precious metal vendors, investors, and customers; declarations from David Costanzo, Howard Hess, Brink's, and HSBC; and independent searches of corporate records and filings.[88] The Howells fail entirely to explain how this wealth of data is insufficient to support Mr. Strong's conclusions.

Although Mr. Strong was transparent in his report about the limitations of the various categories of data he analyzed, he also explained in detail the lengths taken to account for and overcome those limitations.[89] For example, Mr. Strong acknowledged that bank documentation for periods prior to 2012 was incomplete.[90] Mr. Strong went on to describe the analysis he conducted using data from the RRC accounting systems, email archives, information from investors, and RRC's income tax returns for the 2008-2010 time period.[91] Specifically, Mr. Strong conducted a transaction-by-transaction reconstruction of RRC's accounting activity to

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means). Due to the volume of these appendices, the Receiver did not lodge them again. However, they were provided to the Howells during discovery in their ancillary proceeding.

[88] Strong Report at 10-12 (listing categories of documents and data examined).

[89] *See generally* Strong Report.

[90] Strong Report at 11 n.26.

[91] *Id.* at 16-19; 20-24 (describing detailed analysis and reconstruction of 2008-2010 period).

better reflect RRC's operating activity.[92] Although the Howells assert—in a conclusory fashion—that Mr. Strong's analysis is unreliable because the accounting data is incomplete, they do not even attempt to explain how Mr. Strong's detailed reconstruction is insufficient to support his conclusion that RRC was not sufficiently profitable to support the payments made to investors in the 2008 through 2010 time period and that the only source for these payments to investors was from newly attracted investments.[93]

Ultimately, the Howells' objections to certain gaps in the data available to Mr. Strong goes to the weight to be ascribed to his conclusions, not their admissibility.[94] At no point do the Howells challenge Mr. Strong's methodology or even attempt to explain how the supposed incompleteness of the records undermine Mr. Strong's analysis and conclusions. And critically, the Howells proffer no evidence disputing the existence of a Ponzi scheme.

Second, the Howells argue that Mr. Strong improperly invades the province of the jury by opining on the ultimate issue of whether Receivership Defendants operated a Ponzi scheme.[95] This argument flies in the face of Federal Rule of Evidence 704 and relies on a misreading of the Tenth Circuit's decision in *Sprecht v. Jensen*. Rule 704 specifically provides that "[a]n opinion is not objectional just because it embraces an ultimate issue."[96] Although the Tenth Circuit has indicated that an expert may not testify as to "ultimate issues of law," the court has emphasized

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[92] *Id.* at 22.

[93] *Id.* at 24.

[94] *See McGraw v. Cobra Trucking, Inc.*, 569 F. Supp. 3d 1089, 1101 (D. Colo. 2021) ("To the extent [the expert's] facts and data . . . may be inaccurate, incomplete, or otherwise imperfect, those flaws go to the weight to be ascribed to his opinions, and not to their admissibility." (alteration marks omitted)); *Jones v. State Farm Mut. Auto. Ins. Co.*, No. 19-cv-01873-NYW, 2021 WL 3625435, at *9 (D. Colo. 2021) ("But these criticisms challenge particular flaws in [the expert's] data and/or assumptions, but do not address his methodology, and thus go to the weight, rather than the admissibility, of [the expert's] opinions.").

[95] Strong Motion at 4.

[96] FED. R. EVID. 704(a).

that an expert may assist the jury in understanding the facts in evidence "even though reference to those facts is couched in legal terms."[97] Indeed, the *Specht* court expressly held that an expert's testimony "is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function."[98]

The Howells' reliance on *Rowe v. DPI Specialty Foods, Inc.* is similarly misplaced. In *Rowe*, the court considered excluded portions of the testimony of an economic expert who claimed "that his role as an assessor of economic causation gives him license to weigh and compare facts and reliability of witnesses 'because all of that has bearing on causation.'"[99] The *Rowe* court correctly noted that the role of an expert is not to weigh the evidence or to opine on the reliability of witnesses.[100] However, Mr. Strong's analysis does no such thing. Mr. Strong sets forth the facts underlying his analysis and provides his conclusion that RRC was not sufficiently profitable to generate the payments made to investors and that the only source of funds available to pay returns to investors—in addition to the operations of RRC and its related businesses—was from new investments.[101] Such opinions fall squarely in line with permissible expert testimony.[102] Indeed, the Tenth Circuit has expressly stated that "Witnesses are permitted

[97] *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988); *Untied States v. Buchanan*, 787 F.2d 477, 483 (10th Cir. 1988) (holding that an expert can testify that a particular weapon was required to be registered with the Bureau of Alcohol, Tobacco, and Firearms).

[98] *Specht*, 853 F.2d at 809-10.

[99] *Rowe*, No. 2:13-cv-00708-DN-DJF, 2015 WL 4949097, at *5 (D. Utah Aug. 19, 2015).

[100] *Id.* at *6. The *Rowe* court did not categorically exclude the expert from testifying. Rather, the Court limited the testimony to acceptable topics. *Id.*

[101] *See* Strong Report at 76.

[102] *See Schmidt v. Int'l Playthings LLC*, 536 F. Supp. 3d 856, 939 (D.N.M. 2021) ("[E]xperts may not testify to their interpretations of the law, but the Court concludes that experts may opine on ultimate issues whether a party violated the law, as long as it is not a bare legal conclusion unsupported by facts.").

to testify about how the law applies to a certain set of facts, so long as they provide adequate explanations for their conclusion."[103]

As described above, Mr. Strong's testimony is admissible. Mr. Strong conducted a comprehensive analysis of Receivership Defendants' business operations over more than a decade. His analysis is supported by copious documentary evidence, none of which is disputed by the Howells. To the extent that the Howells claim that some aspects of the data relied upon by Mr. Strong are incomplete, that objection goes to the weight of his testimony, not its admissibility. Finally, Mr. Strong properly sets forth the facts and draws appropriate conclusions from those facts. He does not offer a naked legal opinion or usurp the role of the judge or jury. Mr. Strong's conclusions—based on substantial evidence and undisputed by the Howells—is admissible.

2. Mr. Hafen's Testimony Is Admissible

The Howells also argue that the Receiver's proposed testimony is inadmissible because (1) Mr. Hafen is not qualified as an expert with respect to the matters covered in the Receiver's Report and (2) the proposed testimony improperly invades the province of the jury.[104] As with the Howells' arguments with respect to Mr. Strong, neither argument is tenable. In particular, the Howells fundamentally misrepresent the purpose and content of the Receiver's Report and fail to provide any evidence suggesting that Mr. Hafen's conclusions are incorrect.

[103] *United States v. Richter*, 796 F.3d 1173, 1196 & n.13 (10th Cir. 2015) ("The rule gleaned from these decisions is summarized in the following illustration to Rule 704: an expert would not be permitted to tell a jury that a testator lacked capacity to make a will, but would be allowed to explain that a testator lacked the mental capacity to know the nature and extent of his property and the natural object of his bounty.").

[104] Howell Substantive Objection at 13-14. The Howells also incorporate by reference their Motion to Exclude Proposed Expert Jonathan O. Hafen ("Hafen Motion"), which was submitted in their separate ancillary action. *See* 2:19-cv-00813, Dkt. No. 52.

As an initial matter, the Howells misrepresent the nature of the Receiver's Report. The Receiver's Report details the results of the Receiver's investigation into the business operations of RRC and its affiliated entities, summarizing thousands of pages of documentation and information obtained through interviews with investors, customers, and former employees of Receivership Defendants.[105] A significant part of the Receiver's Report gathers and summarizes reports from victims of Receivership Defendants' scheme about the types of representations that were made to participants by Receivership Defendants.[106] Many of these reported representations are contained in investors' responses to questionnaires sent by the Receiver as part of his investigation. When responding to the Receiver's questionnaires, recipients certified that their responses were true and accurate under penalty of perjury.[107] Nearly 400 investors responded to the questionnaire and submitted documents.[108] Although there is no reason to doubt the accuracy of these reports from victims of Receivership Defendants' scheme, if necessary, the Receiver could call each of these witnesses at trial to describe the representations made by Receivership Defendants.[109] Thus, these victim statements are capable of being presented in admissible form, if necessary, and the Court may consider these statements in these summary proceedings.[110]

Having gathered the evidence and information about Receivership Defendants' business operations, including the types of representations typically made to investors, the Receiver

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[105] Receiver's Report, ECF No. 448-2, at 8-10.

[106] *Id.* at Ex. B (summarizing representations to investors by Receivership Defendants).

[107] A true and correct copy of the Receiver's questionnaire form is attached hereto as Exhibit A. The certification is found on page 7 of the questionnaire.

[108] Receiver's Report at 8.

[109] Receivership Defendants' representations to investors would be admissible because they would not be offered for the truth of the matter asserted. FED R. EVID. 801(c). Indeed, Receivership Defendants' representations to investors were demonstrably false.

[110] *See Trevizo v. Adams*, 455 F.3d 1155, 1160 (10th Cir. 2006) (holding that evidence need not be submitted in a form that would be admissible at trial at the summary judgment stage). *See also* FED. R. EVID. 1006 (allowing summaries of voluminous writings).

conducted an evaluation of the silver investment program operated by Receivership Defendants.[111] That investigation revealed that Receivership Defendants' representations to investors were categorically false.[112] In his report, the Receiver walks through the facts he discovered in his investigation—including reports from investors, examination of internal communications of Receivership Defendants, and analyses conducted by Mr. Strong and his team—and concludes that the silver investment program exhibited the defining characteristics of a Ponzi scheme.[113] This is the quintessential work of an expert witness.

With respect to the Howells' specific arguments, neither is tenable. First, Mr. Hafen is qualified by virtue of his knowledge, skill, experience, and training.[114] Mr. Hafen was selected as Receiver on the basis of his nearly 30 years' experience in the legal field and is qualified to opine as to whether Receivership Defendants' silver investment program operated as a legitimate opportunity or as a fraudulent scheme.[115]

Second, as with Mr. Strong, the Howells' insistence that Mr. Hafen's proposed testimony invades the province of the jury relies on a fundamental misreading of the relevant law. Rule 704 expressly provides that "[a]n opinion is not objectional just because it embraces an ultimate issue."[116] As with Mr. Strong, Mr. Hafen sets forth the facts discovered through his investigation and explains why those facts led him to conclude that Receivership Defendants' representations to investors were false and that, ultimately, the silver investment program exhibited the characteristics of a Ponzi scheme. This type of testimony has been specifically approved by the

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[111] Receiver's Report at 11-14.
[112] *Id.* at 13.
[113] *Id.* at 15.
[114] FED. R. EVID. 702.
[115] *See* Receiver's Report, Appx. A (Hafen curriculum vitae).
[116] FED. R. EVID. 704(a).

Tenth Circuit.[117] As with Mr. Strong, Mr. Hafen's analysis is supported by thousands of pages of documentary evidence, none of which has been disputed by the Howells. In short, Mr. Hafen's testimony is admissible and imminently helpful to the factfinder.

IV. TAYLOR OBJECTION

Colette Taylor and her related entities raise a number of challenges to the Receiver's Motion. None of Ms. Taylor's objections present any evidence suggesting that the Silver Pool was not operated as a Ponzi scheme.[118] Instead, as with other objectors, Ms. Taylor's arguments center on the possible collateral legal consequences that may stem from a factual finding that Receivership Defendants operated a Ponzi scheme. None of Ms. Taylor's arguments undermine the inescapable conclusion that the Silver Pool was a Ponzi scheme or support the idea that such a finding should not occur.

A. Certification to the Utah Supreme Court Is Unnecessary and Inappropriate

Ms. Taylor first argues that the Court should refrain from making any finding with respect to the existence of a Ponzi scheme until after the Court rules on the pending motions to certify question of law to the Utah Supreme Court that were filed in the *Larsen*, *Muir*, and *Maldonado* ancillary actions.[119] As discussed above in response to the Joint Objections, none of the questions proposed for certification clear the high bar required for certification.[120] As a result, certification is inappropriate.

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[117] *United States v. Richter*, 796 F.3d 1173, 1196 & n.13 (10th Cir. 2015) ("Witnesses are permitted to testify about how the law applies to a certain set of facts, so long as they provide adequate explanations for their conclusion.").

[118] *See* Objection to Motion for Ponzi Determination in *Hafen v. Tayor, et al.* ("Taylor Objection"), lodged by the Receiver as ECF No. 458-2.

[119] Taylor Objection at 2-3.

[120] *See* Section I.C.

Moreover, none of the issues raised in the motions for certification affect the standards for determining whether Receivership Defendants operated a Ponzi scheme. Instead, the proposed questions for certification focus on the potential collateral consequences of such a finding. The Receiver's Motion seeks a factual determination from the Court that Receivership Defendants operated their silver investment program as a Ponzi scheme since at least 2008. This issue is squarely before the Court and must necessarily be decided in order to ultimately resolve the Plaintiffs' claims in this matter.[121] There is no reason to wait to make a factual determination as to the existence of a Ponzi scheme.

B. Ms. Taylor's Own Knowledge of the Scheme

Ms. Taylor's second objection concerns the collateral applicability of any factual finding that Receivership Defendants operated a Ponzi scheme in the presently pending ancillary proceeding against Ms. Taylor.[122] Specifically, Ms. Taylor argues that a Ponzi determination should not carry with it a presumption that investors in the silver trading pool knew about Receivership Defendants' wrongdoing or that investors acted with any fraudulent intent.[123]

Again, this objection concerns potential collateral consequences of the Court's determination about the existence of a Ponzi scheme—not whether any such scheme existed. Nevertheless, the Receiver does not dispute that the factual finding he seeks from the Court implicates Receivership Defendants' fraudulent intent when making transfers to investors. As

[121] *See* ECF No. 56 (alleging Receivership Defendants operated a silver investment scheme as a Ponzi scheme and asserting claims of fraud, violations of the Commodity Exchange Act and securities fraud).

[122] Taylor Objection at 3-5.

[123] *Id.*

explained above, transfers to participants in a Ponzi scheme were necessarily made with the actual intent to hinder, delay, or defraud creditors of Receivership Defendants.[124]

Nor does the Receiver dispute that Ms. Taylor has the right to present evidence of her affirmative defense of having received transfers from Receivership Defendants in good faith and for reasonably equivalent value.[125] However, that issue is not before the Court in the Receiver's Motion and can be addressed in the separate ancillary proceeding.

C. Precise Starting Date of the Ponzi Scheme

Ms. Taylor's final objection is that the Receiver should be required to prove the exact start date of the Ponzi scheme.[126] As an initial matter, this objection is based on the inaccurate statement that "the value given to the debtor in each transaction should be 'adjusted' to include verifiable market appreciation of the metals in question up until" the precise start date of the Ponzi scheme.[127] This position stems from the mistaken premise that physical metals given to Receivership Defendants by were, in fact, held and maintained by Receivership Defendants. The Receiver disputes this premise and will—in the appropriate venue—provide evidence that Receivership Defendants did not hold physical metals of third parties in any kind of segregated manner.

Moreover, Ms. Taylor's argument assumes that Receivership Defendants' fraud began with the technical start of a Ponzi scheme. To the extent that the evidence shows that Receivership Defendants diverted investor funds and property prior to the technical start date of

[124] *See* Section I.C *supra*.
[125] *See* UTAH CODE § 25-6-304(1).
[126] Taylor Objection at 5-6.
[127] *See id.* at 6.

a Ponzi scheme, such fraudulent conduct would preclude any "adjustment" of values as advocated for by Ms. Taylor.

Finally, Rust admitted in his plea allocution that his fraudulent scheme began "at least in and around 2008."[128] To the extent that a more precise date would be relevant or applicable in the separate ancillary proceeding against Ms. Taylor, it can be addressed in that forum. For purposes of the Receiver's Motion, the Court can make a finding that Receivership Defendants' silver investment scheme operated as a Ponzi scheme within all timeframes captured in Rust's admissions.

V. GUYON OBJECTION

Peter Guyon submitted an objection individually and on behalf of his law firm and clients.[129] Although Mr. Guyon asserts a number of challenges to this Court's jurisdiction and the propriety of the Receiver's Motion, none are well taken. Moreover, none of Mr. Guyon's objections serves to challenge the indisputable fact that Receivership Defendants operated their silver investment scheme as a Ponzi scheme.

A. This Court Has Jurisdiction to Rule on the Receiver's Motion.

Mr. Guyon's first objection is that the Receiver's Motion seeks an unconstitutional advisory opinion from the Court.[130] Specifically, Mr. Guyon argues that there is no "case or controversy" before the Court with respect to the Receiver's Motion and argues—in a conclusory fashion—that the Court may not employ a summary disposition procedure to resolve the Receiver's Motion. Neither position is tenable.

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[128] *See* Gaylen Rust Plea Agreement, ECF No. 448-1.

[129] 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 ("Guyon Objection"), lodged by the Receiver as ECF No. 458-1.

[130] Guyon Objection at 3-7.

First, Mr. Guyon's argument misapplies the "case or controversy" requirement of Article III and disregards the procedural posture of the Receiver's Motion. Mr. Guyon correctly notes that federal courts may not issue advisory opinions.[131] However, Mr. Guyon's suggestion that the Receiver's Motion seeks a ruling from the court as to some "hypothetical set of facts" is inaccurate. The issues presented in the Motion are neither abstract nor hypothetical. The Receiver's Motion asks the Court for a factual determination that the Receivership Defendants—the defendants before the Court in this matter—operated their silver investment program as a Ponzi scheme.[132] In order to streamline the process and conserve resources of the Receivership Estate and the Court, the Motion further requested that the Court use its previously established summary disposition procedure to allow any interested parties to participate and—if appropriate—object to the requested relief.[133]

Second, as discussed above, the propriety of Receivership Defendants' actions is squarely before the Court.[134] The Plaintiffs' allegations in this matter are that Receivership Defendants operated a Ponzi scheme to defraud investors. Resolving the issue of whether a Ponzi scheme existed will, therefore, be necessary to resolve the parties' respective rights and responsibilities. Thus, any determination that Receivership Defendants operated a Ponzi scheme cannot be advisory.

Finally, to the extent that Mr. Guyon's argument challenges the appropriateness of the Court's summary disposition procedure, it also fails. As discussed above, this Court's authority to employ summary proceedings to streamline the resolution of overarching issues and preserve

[131] *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1170 (10th Cir. 2006).
[132] Motion at 3-4.
[133] *Id.*
[134] *See* Section I.C *supra*.

assets of the Receivership Estate is well established.[135] Aside from a passing reference to various Rules under the *Federal Rules of Civil Procedure*, Mr. Guyon identifies no prejudice he would suffer through the use of the summary disposition procedure.[136] Nor did Mr. Guyon choose to avail himself of the opportunity to engage in any discovery as permitted by the Court's Procedures Order.[137] He cannot now complain that he has been prejudiced by an inability to conduct discovery.[138] In short, Mr. Guyon has had the opportunity to come forward with any evidence disputing the existence of a Ponzi scheme or to request discovery and has not done so.

B. The Receiver Did Not Waive Any Rights

Mr. Guyon next claims that the Receiver waived his ability to use the Court's summary disposition procedure to resolve his Motion because, in his first motion asking the Court to establish a summary disposition procedure, the Receiver asserted that the "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."[139] Mr. Guyon argues that this passing reference in the Receiver's prior motion somehow precludes the Receiver from asking the Court for a dispositive ruling with respect to the existence of a Ponzi scheme. The argument is not well taken.

As an initial matter, Mr. Guyon's argument misapprehends the nature of waiver under Utah law. As the Utah Supreme Court has explained, "waiver is the intentional relinquishment of

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[135] *See* Section I.A *supra*.

[136] Guyon Objection at 6.

[137] *See generally* Guyon Objection.

[138] *See Rivera v. Bernalillo Cty.*, 51 Fed. App'x 828, 831-32 (10th Cir. 2002) (holding that an employee's refusal to take advantage of the established procedures resulted in waiver of due process claim).

[139] Guyon Objection at 7; *see also* Motion to Allow Summary Disposition Procedure, ECF No. 155, at 2-3.

a known right."[140] Contrary to Mr. Guyon's suggestion, the Receiver had no established right to the use of a summary disposition procedure for any aspect of this case. The use of such procedures derives from the Court's inherent authority to fashion relief in an equity receivership.[141] Although the Court has the discretion to allow such procedures, it has no obligation to do so.[142] Thus, the Receiver had no right to the use of a summary disposition procedure, which is why the Receiver asked the Court to exercise its discretion to establish such procedures.

More importantly, the Receiver's Motion does not seek to determine the rights of any individual claw back defendant. The Motion asks the Court to make a factual finding that Receivership Defendants—the defendants before the Court in this matter—operated their silver investment scheme as a Ponzi scheme. The relevant factual considerations focus entirely on the actions of Receivership Defendants—again, the parties before the Court in this matter—and on no other parties. Indeed, the Court need make no findings with respect to the actions of any other parties, including defendants in any pending or future ancillary proceeding, in order to determine that Receivership Defendants perpetrated a Ponzi scheme. Thus, the Receiver's Motion does not seek to "resolve traditional 'clawback actions' from 'net winners,'" contrary to Mr. Guyon's suggestion. Defendants in such actions will be able to assert all applicable defenses to any claims asserted by the Receiver. The only impact of the Motion is that the Receiver will not be required to re-litigate the recurring issue of whether the silver investment scheme operated as a Ponzi scheme.

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[140] *Soter's Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935, 937 (Utah 1993) (emphasis added).

[141] *See S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010).

[142] *See United States v. RaPower-3, LLC*, No. 2:15-cv-00828-DN, 2020 WL 5531563, at *14 (D. Utah Sep. 15, 2020) (slip copy).

C. The Receiver's Tolling Agreement Is Valid.

Mr. Guyon next argues that the tolling agreement executed by Mr. Guyon, his affiliated entities and clients, and the Receiver is invalid and unenforceable because it is not signed by the CFTC or by the Receiver.[143] This argument lacks merit.

As an initial matter, the relevant tolling agreement is fully executed by the parties to the agreement—the Receiver and the Guyon defendants.[144] Mr. Guyon's insistence that the CFTC was a necessary party to the settlement agreement is wholly unsupported and is contrary to all relevant case law. In particular, it is well established that the Receiver is the party with standing to pursue claims belonging to Rust Rare Coin, Inc.[145] The potential claims against Mr. Guyon and his affiliated parties belong to the Receiver, not the CFTC. Nor does the Receiver act on behalf of the CFTC. The Receiver "is an officer of the court, not the parties' agent."[146] Neither the CFTC nor the Utah Division of Securities is a proper party to any tolling agreement. Consequently, Mr. Guyon's argument fails.

D. Certification to the Utah Supreme Court Is Unnecessary and Inappropriate.

As with other parties who have objected, Mr. Guyon argues that the Court should refrain from making a determination that Receivership Defendants operated a Ponzi scheme until certain

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[143] Guyon Objection at 9-13.

[144] *See* Tolling Agreement, dated November 8, 2019, attached hereto as Exhibit B.

[145] *See Klein v. Cornelius*, 786 F.3d 1310, 1316-17 (10th Cir. 2015) (discussing the Receiver's status as the proper party to pursue claims belonging to the entity in receivership); *Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995) ("Now that the corporations created and initially controlled by [the Ponzi perpetrator] are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by [the Ponzi perpetrator].").

[146] *United States v. Solco I, LLC*, 962 F.3d 1244, 1246 (10th Cir. 2020) (alteration marks omitted).

questions of law are first certified to the Utah Supreme Court.[147] Mr. Guyon also seeks leave to file a motion to certify such questions of law.[148] As discussed above, such certification is unnecessary and inappropriate.[149] The questions proposed to be certified by Mr. Guyon are substantively identical to questions proposed for certification by the Joint Objections.[150] For all of the reasons the Receiver has already articulated, none of the proposed questions is case determinative or novel. Moreover, the proposed questions implicate various collateral legal consequences that flow from a Ponzi determination, but should not preclude a factual determination that a Ponzi scheme existed.

VI. STILLMAN OBJECTION

Gary Stillman submitted a limited objection to the Receiver's Motion in which Mr. Stillman "does not object to the Court entering a judicial determination that the 'Silver Pool' operated as a Ponzi scheme."[151] Instead, Mr. Stillman objects to a finding that all of Rust Rare Coin, Inc.'s operations—including its consignment business—were part of the Ponzi scheme.[152] The Receiver does not contend that every aspect of Receivership Defendants' business dealings was fraudulent. Nor does the Receiver dispute that many customers engaged in wholly legitimate transactions through which they bought and sold items through Rust Rare Coin, Inc., including through consignment arrangements. Moreover, the Receiver agrees that defendants in any action

[147] Guyon Objection at 14-28.
[148] *Id.* at Ex. 5.
[149] *See* Section I.C.
[150] *Compare* Joint Objections *with* Guyon Objection, Ex. 5 at p.7; *see also* Receiver's oppositions cited in note 27 *supra*.
[151] *See* Gary Stillman's Partial Objection to Motion for Ponzi Determination Pursuant to Dkt. 451, Order Establishing Ponzi Objection Procedure ("Stillman Objection"), lodged by the Receiver as ECF No. 458-8, at 2.
[152] *Id.*

asserted by the Receiver will be free to assert that their particular interactions with Rust Rare Coin, Inc. were separate and apart from the Ponzi scheme.

However, the Receiver also recognizes that the business operations of Receivership Defendants were heavily commingled with the fraudulent investment scheme. The degree to which an individual's relationship with Rust Rare Coin, Inc. can be categorized as separate and apart from the Ponzi scheme will be necessarily fact dependent. Consequently, it is the Receiver's position that such questions should be addressed in individual ancillary actions, rather than at this stage.

CONCLUSION

For the reasons discussed herein, the Receiver respectfully requests that the Motion be granted, that the Court find Receivership Defendants operated their silver investment program as a Ponzi scheme since 2008, and that the Receiver not be required to re-litigate the existence of a Ponzi scheme in current or future ancillary proceedings. The undisputed evidence, including the express admissions of Gaylen Rust, conclusively demonstrate that the silver investment program was a fraudulent Ponzi scheme operated with the intent to defraud investors. None of the objecting parties have put forth evidence calling these facts into question. Nor do the objecting parties' procedural and substantive objections raise an issue of fact or law sufficient to prevent the Court from entering a finding that Receivership Defendants operated a Ponzi scheme. A finding that a Ponzi scheme existed will streamline all future proceedings and avoid the imposition of significant burdens on the Receivership Estate, victims of Receivership Defendants' scheme, and the Court.

Respectfully submitted this 8th day of July 2022.

PARR BROWN GEE & LOVELESS, P.C.

/s/ *Cynthia D. Love*

Joseph M.R. Covey
Cynthia D. Love

Attorneys for the Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **REPLY IN SUPPORT OF RECEIVER'S MOTION FOR PONZI DETERMINATION AND TO ESTABLISH AN OBJECTION PROCEDURE** was (1) electronically filed with the Clerk of the Court through the CM/ECF system on July 8, 2022, which sent notice of the electronic filing to all counsel of record, (2) posted on the Receiver's website (rustrarecoinreceiver.com), and (3) emailed to all those on the Receiver's master mailing matrix.

/s/ *Cynthia D. Love*