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Richard Roper, in his capacity as the court-appointed Receiver for Millennium Bank (the “Receiver”), United Trust of Switzerland S.A., UT of S, LLC, Millennium Financial Group, William J. Wise d/b/a Sterling Administration, William J. Wise d/b/a Sterling Investment Services, and William J. Wise d/b/a Millennium Aviation (“Millennium Entities”), files this Brief in Support of his Motion for Partial Summary Judgment against Defendants Asha Kamnani, M.D., John Wittnebel, Curtis Stall, Lutz Hoefer, Patricia Ann Olivier, Rick Prater, Jimmy Miranda, Vicky Miranda, Tara Small, Sharon K. Olson, Jennifer J. Lee, Edward Kilduff, Barbara Kilduff, Michael Streng, Theresa Streng, Stella Durlle, Janet Watlington, Doug Mielke, Tammy Mielke, Alexandrina Silva, Davi P. Silva, LeighAnn Love, Amber Mitchell, Alice Snyder, Douglas Herrold, Aida Herrold, Jacqueline Lacasse, Carol J. George, Oleg Klyachman, Svetlana Klyachman, Natalia Munoz, Jacqua Silva, Richard Metz, Dick E. Dale, Max Karavanchenko, and Jack Baugher (collectively, the “Net Winning Defendants”). The Receiver respectfully shows as follows:

I. INTRODUCTION AND STATEMENT OF FACTS

This case arises out of, and is ancillary to, a lawsuit brought by the Securities and Exchange Commission (“SEC”) against the Millennium Entities for claims related to a fraudulent investment scheme created, organized, and operated by William J. Wise and others. That lawsuit — *SEC v. Millennium Bank et al.*, No. 7:09-CV-050-0 — is pending in the United States District Court for the Northern District of Texas, Wichita Falls Division (“*SEC v. Millennium Bank, et al.*”). In *SEC v. Millennium Bank, et al.*, the SEC alleges, *inter alia*, that the defendants engaged in a Ponzi scheme that raised over one hundred million dollars from unwitting investors through the sale of Certificates of Deposit that purported to offer guaranteed interest rates significantly higher than those being offered by domestic, insured financial institutions (the “Ponzi scheme”). The SEC’s complaint in *SEC v. Millennium Bank, et al.*

[Docket Entry #1] describing the Ponzi scheme is in this Court's record and is incorporated herein by reference. The Receiver's investigation establishes that at least \$100 million was taken in from investors from 2004 to 2009.¹

Certain investors, the ancillary defendants identified herein as the Net Winning Defendants, invested in one or more of the Millennium Entities, and received purported interest payments over and above the amounts they initially invested (the "Transfers").² The Receiver brought this suit to rescind the transfer of "interest" to these Net Winning Defendants because the funds used for the Transfers were those of other innocent, unwitting investors in Millennium Bank's fraudulent Ponzi scheme.³

It is undisputed that the Net Winning Defendants received from the Millennium Entities sums equal to their investments in Millennium CDs *and* payments in excess of their respective investments.⁴ The money used to make those payments came directly from the sale of CDs to other investors.⁵ When Millennium Bank and William Wise made purported CD principal and interest payments to the Net Winning Defendants, they did no more than take money out of other investors' pockets and put it into the hands of the Net Winning Defendants.⁶ In other words, the "interest" paid to Net Winning Defendants is essentially money stolen from other investors, and thus belongs to the Receivership Estate. For the investors who have thus far received little or

¹ Appendix at 7-9: Report of the Receiver Dated November 22, 2010

² Appendix at 24-54: Accounting worksheets for the Net Winning Defendants; Appendix at 147-150: Declaration of Richard Roper.

³ Appendix at 55-146: Letters sent to the winning investors, describing the source of their "interest" payments and asking that they be returned; Appendix at 147-150: Declaration of Richard Roper; Appendix at 3, 6-11: Report of the Receiver Dated November 22, 2010 at 2 (discussing how Millennium Bank paid "interest" with the money of new investors).

⁴ Appendix at 24-54: Accounting worksheets for the Net Winning Defendants; Appendix at 147-150: Declaration of Richard Roper.

⁵ Appendix at 55-146: Letters sent to the winning investors, describing the source of their "interest" payments and asking that they be returned; Appendix at 147-150: Declaration of Richard Roper; Appendix at 3, 6-11 Report of the Receiver Dated November 22, 2010 (discussing how Millennium Bank paid "interest" with the money of new investors).

⁶ Appendix at 55-146: Letters sent to the winning investors, describing the source of their "interest" payments and asking that they be returned; Appendix at 147-150: Declaration of Richard Roper.

nothing from their investment in Millennium CDs, money recovered from wherever it resides today is likely the largest portion of the money they will ever receive in restitution.

Because the “interest” was paid by the Millennium Entities, which were conducting a Ponzi scheme, the Transfers were both actually and constructively fraudulent under California’s enactment of the Uniform Fraudulent Transfer Act. Moreover, because the Net Winning Defendants have not repaid the “interest,” they have been unjustly enriched and a constructive trust should be imposed. There is no question that the Receiver brought these claims against the Net Winning Defendants within the time allowed, and for these reasons, the Millennium Entities are entitled to recover the “interest” amounts transferred to the Net Winning Defendants.

II. ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

To prevail on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the moving party has the initial burden of demonstrating that there is no genuine issue as to any material fact and the judgment should be entered as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); FED. R. CIV. P. 56(c). Where the party seeking summary judgment does not bear the burden of proof, it does not need to present evidence, but need only show the absence of evidence supporting an essential element of the nonmoving party’s case. *See Celotex*, 477 U.S. at 325; *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995).

Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence establishing a genuine fact issue. *See Anderson*, 477 U.S. at 257; *Matasushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-587 (1986). Although the evidence must be viewed in the light most favorable to the nonmoving party, conclusory allegations unsupported by specific, concrete facts will not prevent

summary judgment. *See Duffy*, 44 F.3d at 312. “Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *See Celotex*, 477 U.S. at 322-23.

B. California law governs the Receiver’s claims against the Net Winning Defendants.

The Texas Supreme Court has provided that Section 145 of the Restatement (Second) Conflict of Law governs choice of law disputes in tort actions. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984). Under § 145, the local law of the state which has the “most significant relationship to the occurrence and the parties” will govern the claim. *Id.*; Restatement (Second) Conflict of Laws § 145(1) (1971). The Net Winning Defendants are scattered all over the country, and William Wise directed the Ponzi scheme from no one place. However, most investors sent their money to Millennium’s offices in Napa, California. Napa was also one site of operations for the Ponzi scheme, and where most of the employees who dealt with investors were stationed. Choosing the most significant state for a fraudulent scheme that took place across most of the United States and several foreign locales (with no real business operations at all) is difficult, but California appears to be the state with the most significant common relationship to all of the parties.

C. The Receiver brought his claims against the Net Winning Defendants within the limitations period.

Section 3439.09 of the California Uniform Fraudulent Transfer Act provides that a claimant must bring his cause of action “within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could

reasonably have been discovered by the claimant.” Courts applying this standard have generally referred to this as a discovery rule. *See Fidelity Nat’l Fin., Inc. v. Friedman*, No. CV 06-4271 CAS, 2009 U.S. Dist. Lexis 40732, at *37 (C.D. Cal. Apr. 27, 2009). Therefore, the Receiver was entitled to assert his claims against the Net Winning Defendants up to one year after he discovered or reasonably could have discovered such claims. *See, e.g., Wing v. Kendrick*, No. 2:08-cv-01002-db, 2009 WL 1362383, at *3 (D. Utah May 14, 2009) (“The discovery rule generally applies in cases involving Ponzi scheme entities that have been placed in the hands of an equity receiver because the fraudulent nature of the transfers can only be discovered once the Ponzi operator has been removed from the scene.”).

Whether the Receiver reasonably could have discovered claims is a question of whether the Receiver exercised reasonable diligence. *See, e.g., Cadle Co. v. Wilson*, 136 S.W.3d 345, 351 (Tex. App.—Austin 2004, no pet.) (internal citation omitted); *Crook v. Johnston*, 93 S.W.3d 263, 271 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (stating that the question is whether there is an “issue of material fact about when Receiver discovered, or in the exercise of reasonable diligence should have discovered, the allegedly fraudulent transfer”); *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 793 F. Supp. 2d 825, 832 (N.D. Tex. June 22, 2011) (noting that the issue focuses on whether the receiver exercised reasonable diligence).⁷ There is no genuine issue of material fact in this case that the Receiver exercised reasonable diligence to identify the fraudulent transfers or that he brought his suit against the Net Winning Defendants within the limitations period.

In particular, the Receiver was appointed on March 26, 2009, and immediately began the complex and intricate task of determining the structure of the Millennium Entities, the manner in

⁷ Like California, Texas has also adopted the Uniform Fraudulent Transfer Act. *See* TEX. BUS. & COMM. CODE § 24.001 *et seq.*

which the fraud on the investors occurred, identifying and liquidating all assets, piecing together bank records to determine credits and debits made to investors and insiders, and performing other tasks designed to maximize recovery for the investors.⁸ Moreover, the Receiver worked closely with his forensic accountants to determine the potential net winners in the Ponzi scheme.⁹ The Receiver's forensic accountants provided an initial Investor Analysis and Summary on May 11, 2010.¹⁰ Shortly thereafter, on June 1, 2010, the forensic accountants provided the Receiver with information regarding the net winners, giving the Receiver information regarding the fraudulent transfers on which this suit is based.¹¹ The Receiver filed this suit less than a year later, on March 1, 2011.¹²

Given the complexity of the Millennium Entities' "business" and the fact that they kept virtually no records and conducted operations all over the United States and in foreign locations, there is no genuine issue of material fact that the Receiver exercised reasonable diligence in attempting to identify fraudulent transfers. *See Janvey*, 793 F. Supp. 2d at 837 (noting that it would have been "unreasonable to expect the Receiver to have discovered the \$1.6 million in contributions—out of a complex, long-lasting, intentionally-concealed, international scheme involving billions of dollars and myriad transactions—in less than four days" after the receiver had been appointed; further noting that it would not have been unreasonable for the Receiver to have taken a longer period of time). He conducted a complex investigation and, a little over a year later, was able to identify information regarding the Net Winning Defendants. Less than a

⁸ Appendix at 147-150; Declaration of Richard Roper; Appendix at 4-5; Report of the Receiver Dated November 22, 2010 (discussing the actions taken by the Receiver).

⁹ Appendix at 147-150; Declaration of Richard Roper.

¹⁰ Appendix at 151-152; E-mail correspondence from K. McCullough to J. Ecklund and T. Evans attaching initial Investor Analysis and Summary.

¹¹ Appendix at 153-154; E-mail correspondence from K. McCullough to J. Ecklund and T. Evans attaching Millennium Bank Investor Queries.

¹² *See* Docket Entry #1.

year after obtaining this information, he filed this lawsuit. Accordingly, the Receiver brought this suit within the limitations period and is entitled to summary judgment as specified below.

D. The Millennium Entities' payment of "interest" to the Net Winning Defendants constitutes an actual fraudulent transfer, and the "interest" should be returned to the Receivership Estate.

The Millennium Entities were not a "bank" in the traditional sense. They conducted no ordinary banking operations. They did not regularly make loans nor did they make investments. Moreover, this Court has previously found that the Millennium Entities were conducted as a Ponzi scheme.¹³ A Ponzi scheme is, by its nature, a fraudulent enterprise, and any transfers made in furtherance of such an enterprise are presumptively fraudulent. *See Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008); *In re Slatkin*, 525 F.3d 805, 814 (9th Cir. 2008); *In re AFI Holding, Inc.*, 525 F.3d 700, 704 (9th Cir. 2008). Accordingly, the Transfers were made with actual fraudulent intent.

Further, when the interest payments were made, the assets of the Millennium Entities were insufficient to fully reimburse all of their defrauded investors for the money each invested in the Ponzi scheme. Because they simply paid old investors with new investors' money and spent the rest, the Millennium Entities therefore knew or should have known at the time the Transfers were made that they would be unable to fully reimburse the defrauded investors who had invested in the Ponzi scheme.

The Millennium Entities made the interest payments with the actual intent to hinder, delay, or defraud creditors, including the defrauded investors.¹⁴ The claims of the Millennium Entities' creditors, including the defrauded investors in the Ponzi scheme, arose before or within a reasonable time after the Transfers. Accordingly, the interest payments were fraudulent as to

¹³ Appendix at 155-163: Hearing transcript excerpts, *SEC v. Millennium Bank, et al.*, dated July 9, 2009.

¹⁴ Millennium Bank engaged in all relevant actions herein through its managers, members, and control persons; specifically the other SEC Defendants.

the Millennium Entities' creditors, including the defrauded investors, pursuant to the Uniform Fraudulent Transfer Act, CAL. CIV. CODE § 3439 *et seq.*

There is no genuine issue of material fact that each of the Net Winning Defendants invested in the Millennium Entities through the purchase of CDs.¹⁵ In addition, there is no genuine issue of material fact that each of the Net Winning Defendants received "interest" payments from the Millennium Entities over and above the amount they invested.¹⁶ The interest payments made to the Net Winning Defendants against whom summary judgment is sought total \$888,066.98.¹⁷ Specifically, the following interest payments were made to the Net Winning Defendants:

Table 1

Investor ID	Name	Principal Invested	Total Amount Received	Net Amount Received from Interest
000513	Asha Kamnani, MD	\$50,000.00	\$54,250.00	\$4,250.00
001112	John L. Wittnebel	\$130,000.00	\$154,121.05	\$24,121.05
000971	Curtis Stall	\$70,000.00	\$100,759.48	\$30,759.48
000442	Lutz Hoefler	\$18,500.00	\$32,358.00	\$13,858.00
000759	Patricia Ann Olivier	\$20,000.00	\$26,250.00	\$6,250.00
000816	Rick Prater	\$75,000.00	\$76,796.40	\$1,796.40
000704	Jimmy & Vicky Miranda	\$30,000.00	\$34,830.19	\$4,830.19
000949	Tara Small	\$25,000.00	\$31,712.01	\$6,712.01
000761	Sharon K. Olson	\$12,000.00	\$34,078.70	\$22,078.70
000589	Jennifer J. Lee	\$75,000.00	\$86,088.00	\$11,088.00
000528	Ed & Barbara Kilduff	\$410,000.00	\$445,651.37	\$35,651.37
000987	Michael & Theresa Streng	\$5,000.00	\$7,153.37	\$2,153.37
000271	Stella R. Durle	\$127,708.31	\$148,639.95	\$20,931.64
001075	Janet L. Watlington	\$100,000.00	\$130,396.02	\$30,396.02
000698	Douglas & Tammy Mielke	\$245,000.00	\$429,447.80	\$184,447.80
000940	Davi P. & Alexandrina B. Silva	\$10,000.00	\$17,143.68	\$7,143.68

¹⁵ See Appendix at 24-54: Accounting worksheets for each of the Net Winning Defendants.

¹⁶ *Id.*

¹⁷ *Id.* There are other "net winners" who are defendants in this lawsuit. However, this motion for summary judgment addresses only those defendants who have answered the Receiver's lawsuit and have not settled the claims against them.

000626	Leigh Ann Love	\$125,000.00	\$218,750.00	\$93,750.00
000501	Amber Mitchell	\$44,600.00	\$56,732.08	\$12,132.08
000962	Alice G. Snyder	\$10,400.00	\$14,436.85	\$4,036.85
000435	Douglas & Aida Herrold	\$10,000.00	\$21,075.94	\$11,075.94
000570	Jacqueline L. Lacasse	\$39,000.00	\$51,063.37	\$12,063.37
000347	Carol J. George	\$71,997.50	\$86,094.75	\$14,097.25
000545	Svetlana Klyachman	\$50,000.00	\$62,985.60	\$12,985.60
000545	Oleg Klyachman	\$50,000.00	\$62,985.60	\$12,985.60
000723	Natalia Munoz	\$195,000.00	\$278,981.32	\$83,981.32
000941	Jacqua J. Silva	\$15,000.00	\$19,315.50	\$4,315.50
000695	Richard Metz	\$500,000.00	\$622,300.00	\$122,300.00
000222	Dick E. Dale	\$110,000.00	\$138,858.18	\$28,858.18
000470	Max V. Karavanchenko	\$75,425.00	\$85,218.66	\$9,793.66
000062	Jack A. Baugher	\$15,000.00	\$74,223.92	\$59,223.92

But as discussed, these Transfers were not interest. Instead, they were merely stolen funds from other investors that were used to make fictitious payments to keep the Ponzi scheme alive. Therefore, the Transfers should be voided pursuant to CAL. CIV. CODE 3439.04(a)(1). *See also Donell*, 533 F.3d at 772 (“If investors receive more than they invested, payments in excess of amounts invested are considered fictitious profits because they do not represent a return on legitimate investment activity,” and such payments “are avoidable as fraudulent transfers”). Further, judgment should be entered in favor of the Receiver and against the Net Winning Defendants in the amounts specified in Table 1 above pursuant to CAL. CIV. CODE § 3439.08(b) (“[C]reditor may recover judgment for the value of the asset transferred . . . or the amount necessary to satisfy the creditor’s claim, whichever is less.”). There is no issue of material fact as to these points and summary judgment is therefore appropriate pursuant to Rule 56.

E. The Millennium Entities’ payment of “interest” to the Net Winning Defendants constitutes a constructive fraudulent transfer, and the “interest” should be returned to the Receivership Estate.

Without receiving reasonably equivalent value in exchange for the interest payments above the amounts initially invested as principal, Millennium Bank engaged in transactions for which the remaining assets of the Millennium Entities were unreasonably small in relation to its

business. *Donell*, 533 F.3d at 770 (“Proof that transfers were made pursuant to a Ponzi scheme generally establishes that the scheme operator ‘[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction”). Moreover, the Millennium Entities intended to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due, including the claims of the defrauded investors. *See id.* The Net Winning Defendants have not repaid the interest amounts they received above and beyond their investments. Therefore, the interest payments should be voided pursuant to CAL. CIV. CODE § 3439.07(a)(1).

In addition, any attempt to argue that Millennium Bank owed any of the Net Winning Defendants an “antecedent debt” for purposes of establishing “reasonably equivalent value” fails as a matter of law. Courts routinely hold “that a defrauded investor gives ‘value’ to the Debtor in exchange for a return of the principal amount of the investment, but *not as to any payments in excess of principal.*” *See Perkins v. Haines*, 661 F.3d 623, 627 (11th Cir. 2011) (citing cases) (emphasis added). Indeed, in *Donell v. Kowell*, the Ninth Circuit noted that “profits gained through theft from later investors are not a reasonably equivalent exchange for the winning investor’s initial investment.” 533 F.3d at 770. Thus, the alleged satisfaction or reduction of an antecedent debt does not constitute “reasonably equivalent value” for purposes of avoiding the return of “interest” payments to the Receivership Estate. *See In re AFI Holding, Inc.*, 525 F.3d 700, 709 (9th Cir. 2008) (finding that an investor “exchanged reasonably equivalent value for return of his principal ‘investment’” but not for any amounts received over and above that initial investment). Accordingly, judgment should be entered in favor of the Receiver and against the

Net Winning Defendants pursuant to CAL. CIV. CODE § 3439.07(a)(1) and in the amounts specified in Table 1 above.

F. The Net Winning Defendants have been unjustly enriched by receiving “interest” payments at the expense of other, innocent investors.

Based on principles of justice, equity, and good conscience, the Net Winning Defendants, who received more money than they invested, were unjustly enriched at the expense of other investors. The transfer of fictitious “interest” payments caused certain investors to receive money that belonged to other investors for no reasonably equivalent exchange. Because of the nature of the Ponzi scheme and the fact that the Millennium Entities’ assets are insufficient to fully repay all of its creditors, investors who had not yet received their principal back from Millennium Entities will only receive a fraction of the amount of their investments back. It would be fundamentally unfair to allow certain investors to receive profits truly belonging to other investors while the latter stand to recover little to none of their original investments. *Donell*, 533 F.3d at 770 (“The ‘winners’ in the Ponzi scheme, even if innocent of any fraud themselves, should not be permitted to enjoy an advantage over later investors sucked into the Ponzi scheme who were not so lucky.”).

Moreover, the Ponzi scheme involved actual fraud and was the source of the transfer of the “interest” payments. The Transfers also involved actual fraud on the part of the defendants in *SEC v. Millennium Bank, et al.* As a third-party beneficiary who obtained the “interest” through this fraud, the Net Winning Defendants, who actually profited, were unjustly enriched and are not entitled to retain the profits.

The funds used for the interest payments are directly traceable to funds of the other investors in the Ponzi scheme. As such, they constitute Receivership assets and should be

disgorged and paid to the Receiver for ultimate distribution equitably among all defrauded investors.

G. A constructive trust should be imposed on the “interest” payments.

The interest payments constitute fraudulent transfers under California law. *See Donell*, 533 F.3d at 770; *In re Slatkin*, 525 F.3d at 814. Moreover, the Net Winning Defendants who received payments in excess of their principal have been unjustly enriched by the interest payments, and therefore, the funds used for the interest payments are impressed with a constructive trust and should be disgorged. *See* CAL. CIV. CODE § 2224 (“One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”).

The Receiver has a superior equitable interest to recover the investor funds used to pay interest above and beyond the principal invested by certain investors. Once the funds are recovered, it is anticipated that they will be distributed on a pro rata basis to the defrauded investors who lost money and to appropriate creditors of the Millennium Entities. The Receiver alone is in a position to redistribute the limited funds available to the Receivership Estate, including those the Receiver should be awarded based on the purported transfer of “interest.”

There is no question that the Net Winning Defendants received their “interest” payments from the funds invested by other, innocent investors. As a result, the Receiver seeks the imposition of a constructive trust against each of the Net Winning Defendants in the amounts specified in Table 1 above.

III. CONCLUSION

THEREFORE, the Receiver requests that a judgment against each of the Net Winning Defendants be entered in the amount of the “interest” payments made over and above the

principal amount he or she invested. In addition, the Receiver requests that he be awarded pre-judgment interest on the amount of “interest” payments received directly or indirectly by the Net Winning Defendants.¹⁸ Further, the Receiver requests that he be granted any other relief, both special and general, to which he may be justly entitled.

Dated this 24th day of January, 2012.

Respectfully submitted,

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¹⁸ *Donell v. Kowell*, 533 F.3d 762, 772 (9th Cir. 2008) (“Once the district court has identified the avoidable transfers, it has the discretion to permit the receiver to recover pre-judgment interest on the fraudulent transfers from the date each transfer was made.”)

CERTIFICATE OF SERVICE

On January 24, 2012, I electronically submitted the foregoing document to the Clerk of the Court for the United States District Court for the Northern District of Texas using the electronic case filing system of the Court.

/s/ Jennifer Ecklund
Jennifer Ecklund

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