STATE OF SOUTH CAROLINA
In the Supreme Court

ON CERTIFICATION OF QUESTIONS FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
J. Michelle Childs, United States District Court Judge

Appellate Case No. 2017-001652

Beattie B. Ashmore, in his Capacity as Court-Appointed Receiver for Ronnie Gene Wilson and Atlantic Bullion and Coin, Inc., Plaintiff

v.

Jim Dodds, Defendant

BRIEF OF PLAINTIFF ON CERTIFIED QUESTIONS

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STATEMENT OF CERTIFIED QUESTIONS

In this action by Plaintiff Beattie B. Ashmore ("Plaintiff" or "Receiver"), in his capacity as court-appointed receiver for Ronnie Gene Wilson and Atlantic Bullion & Coin, Inc., against Defendant Jim Dodds ("Dodds"), the United States District Court for the District of South Carolina has certified to this Court the following questions of law:

1. Under South Carolina choice of law rules, the substantive and procedural law of which jurisdiction applies to the Receiver's fraudulent conveyance claim?
2. Under South Carolina choice of law rules, the substantive and procedural law of which jurisdiction applies to the Receiver's unjust enrichment claim?

STATEMENT OF THE CASE

The U.S. Attorney's Office in South Carolina prosecuted Ronnie Gene Wilson ("Wilson") and Atlantic Bullion & Coin, Inc. ("AB&C") in the U.S. District Court for the District of South Carolina, alleging that Wilson and AB&C had recruited and encouraged clients to invest in bogus and fraudulent silver investment accounts. (Order of U.S. District Court Certifying Questions ("District Court Order"), at 2 & 5). Wilson and AB&C operated their Ponzi scheme from South Carolina, using an office in Easley and accounts at banks in Easley and also Greenville. *Id.* Wilson and AB&C managed these clients "investments" from South Carolina, sending fraudulent and altered client account statements purporting to reflect trades of silver that, in fact, had never occurred. *Id.* These fraudulent account statements showed that clients owned large quantities of silver when, in fact, no silver had been purchased and no silver trades had occurred. *Id.* at 2.

On July 30, 2012, Wilson and AB&C pled guilty in U.S. District Court in South Carolina to two counts of mail fraud stemming from their involvement in the criminal Ponzi scheme, which involved hundreds of victims and millions of dollars. *Id.* On November 13, 2012, Wilson was sentenced to a 235 month term of imprisonment. *Id.* On that same date, AB&C was sentenced to a five year term of probation and a fine was imposed. *Id.* Wilson and AB&C were ordered to pay restitution in the amount of $57,401,009.00. *Id.* at 2-3. On August 12, 2014, Wilson was again indicted on one count of obstruction of justice related to his efforts to secrete assets from the government and court appointed Receiver. *Id.* at 3. On October 6, 2014, Wilson entered another guilty plea, and on December 10, 2014 was sentenced to an additional term of imprisonment. *Id.*

Through a series of orders, the U.S. District Court appointed Beattie B. Ashmore as Receiver and authorized him to, among other things, locate and manage assets previously

acquired by and/or in the name/possession of various AB&C receivership entities and to proceed against individuals and others that the Receiver may claim to have "wrongfully, illegally, or otherwise improperly be in possession of . . . proceeds directly or indirectly traceable from investors in the Ponzi scheme." *Id.* (quoting appointment order).

The Receiver contends that a number of investors, including Defendant Dodds, were so-called "net winners" because they "profited" by large sums in the Ponzi scheme, effectively only making profit at the expense of other true victims. In a typical Ponzi scheme, initial "investors" contribute money based on promises of unreasonably high returns, but their "profits" actually come from the contributions of later "investors." When the scheme unravels, there is insufficient money left to pay back all the "investors." Those who received "profit" – the "net winners" – have only done so at the expense of the other victims of the scheme – the "net losers" – who lose their "investment," sometimes completely. As shown from the U.S. District Court's restitution order, the Ponzi scheme in this case resulted in victim losses of over $57,000,000. *See id.*

To further the U.S. District Court's directive, on February 6, 2015, the Receiver filed suit against Dodds seeking to recover $1,155,183.00 in "profits" Dodds received at the expense of victims. The Receiver did not seek the disgorgement of Dodds' "investment" of $377,800.00, only the "profit" he received over and above his investment. In his Complaint, the Receiver alleged claims for unjust enrichment and fraudulent transfer pursuant to South Carolina's Statute of Elizabeth, S.C. Code Ann. §27-23-10, or in the alternative, the Florida Uniform Fraudulent Transfer Act, Florida Statute §726.01, et seq. *See id.* at 3-4.

As noted above, at all times relevant to the case, the Ponzi scheme was operated and orchestrated out of South Carolina. *See id.* at 5 ("AB&C, at all times relevant, was owned by Wilson and operated out of an office located at 203 and 205 Siloam Road, Easley, South

Carolina."). The operating account used by AB&C in connection with the Ponzi scheme was also in South Carolina, either at Regions Bank in Greenville, South Carolina (from 1993 to 2005), Southern First in Greenville, South Carolina (from 2005 to 2012), or Cornerstone National Bank in Easley South Carolina (in 2011). *See id.*

Dodds made his first two "investments" into the scheme from his South Carolina bank accounts, and would visit Wilson at his South Carolina office where, on at least one occasion, he instructed Wilson to purchase more silver. *See id.* Although Dodds later moved to Florida, the Ponzi scheme was always operated out of South Carolina, where Wilson and AB&C maintained their office and bank accounts. *See id.* Indeed, as noted, Dodds returned to meet with Wilson in his South Carolina office. *See id.* One of the suspicious aspects of the whole operation was that Dodds was never required to fill out or initiate any paperwork to receive his "withdrawals" from the scheme, *see id.*, meaning that there is no written documentation explaining any agreement by the parties on which state's law applied to their relationship.

During the course of this case and relevant to the matter before this Court, the parties filed cross-motions for summary judgment in the U.S. District Court. In an Order partially resolving Dodds' Motion for Summary Judgment, the District Court, *sua sponte*, indicated its intention to certify questions to this Court relating to choice of law. *See id.* at 1. Thereafter, the U.S. District Court ordered the parties to consult and submit "a joint statement regarding the facts, the nature of the controversy, and the questions to be answered that should be incorporated into the courts certification order." *Id.* The parties submitted the ordered joint statement of facts and nature of controversy, as well as competing proposed questions for certification. *See id.* On August 2, 2017, the U.S. District Court issued an Order certifying questions to this Court, asking which state's substantive and procedural law applies to the Receiver's claims. *See id.*

As set forth below, the Receiver asserts that South Carolina substantive law and procedural law apply to both claims asserted in his Complaint. As to the question of procedural law, the Receiver strongly asserts that there is no dispute that, under South Carolina choice of law jurisprudence, courts should apply the procedural law of the forum state – here, South Carolina – such that certification to this Court on that procedural issue is unnecessary.[1]

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[1] The facts cited in this brief are drawn from the District Court Order. When the U.S. District Court notified the parties of its intention to certify questions, it ordered the parties to submit a proposed joint statement of facts relevant to the issues and a proposed set of questions for the Court to consider for certification to this Court. (District Ct. Order, at 1). When the parties submitted their proposed joint statement of facts, therefore, the U.S. District Court had not yet determined the specific legal questions it intended to certify. The Receiver understood, however, that the certified questions would merely ask this Court for guidance on *how the U.S. District Court* should apply South Carolina choice-of-law rules to classify and determine what state's substantive law applied to the fraudulent conveyance and unjust enrichment claims, *not* ask this Court to actually apply the facts of the case and reach a conclusion as to which substantive law applied. The District Court's Order explained as much, stating that it was intending to "seek certification to the South Carolina Supreme Court on *choice of law rules* needed to determine if the substantive law of Florida or South Carolina applies." *Id.* at 4 (emphasis added). For this reason, the parties did not submit, nor did the U.S. District Court enter findings concerning, the full range of facts that might be relevant to answering the ultimate question of which state's *substantive* law applies to these claims.

Despite these circumstances, the Receiver still maintains that there are sufficient facts in the District Court Order for this Court to conclude that South Carolina substantive law applies. However, to the extent this Court disagrees, or believes there are insufficient facts to draw this conclusion, the Receiver respectfully submits that this Court should either (1) accept certification to answer solely the question of what choice of law rules the *U.S. District Court* should apply to the claims, leaving the U.S. District Court to make the ultimate decision of which state's substantive law applies based on the more complete factual record before it, or (2) if this Court intends to answer the questions of which state's substantive law applies, return this matter to the U.S. District Court for further factual findings relevant to those questions, as there are numerous additional facts confirming why South Carolina substantive law applies here. *Cf. Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 148, 414 S.E.2d 127, 130 (1992) (explaining that there were insufficient facts in the record before the Court to determine on a certified question whether to adopt the more modern view of choice of law for insurance coverage disputes contained in § 193 of the *Restatement (Second) of Conflicts of Law*).

ARGUMENT

I. Standard of Review

This Court may answer "questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court" in accordance with Rule 244 of the South Carolina Appellate Court Rules. Rule 244(a), SCACR. Pursuant to this rule, this Court accepted certification of the following questions certified by the United States District Court for the District of South Carolina:

1. Under South Carolina choice of law rules, the substantive and procedural law of which jurisdiction applies to the Receiver's fraudulent conveyance claim?

2. Under South Carolina choice of law rules, the substantive and procedural law of which jurisdiction applies to the Receiver's unjust enrichment claim?

The Receiver's argument concerning these two questions is set forth below and demonstrates that South Carolina substantive and procedural law applies to both the fraudulent conveyance and the unjust enrichment claims. The Receiver further submits that this Court may wish to consider, based upon good grounds, adopting the choice of law framework in the *Restatement (Second) of Conflict of Laws* ("Second Restatement"), which focuses on the state with the "most significant relationship" to the issues. Under South Carolina's current choice of law rules or the Second Restatement, however, South Carolina substantive and procedural law applies to the claims in this case.

II. South Carolina Substantive and Procedural Law Applies to the Receiver's Fraudulent Conveyance Claim

A. General Rules Concerning Choice of Law

Under South Carolina's traditional choice of law rules, courts classify a claim as either sounding in tort or sounding in contract. For tort claims, courts apply the substantive law of the

place where the injury occurred, also known as *lex loci delicti*. *See Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 143, 494 S.E.2d 449, 454 (Ct. App. 1997) ("Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred.") (citations omitted); *Bannister v. Hertz Corp.*, 316 S.C. 513, 515, 450 S.E.2d 629, 630 (Ct. App. 1994). For tort claims, "the well-established rule is that the law of the place where the injury was occasioned or inflicted, governs in respect of the right of action, and the law of the forum in respect to matters pertaining to the remedy only." *Rauton v. Pullman Co.*, 183 S.C. 495, 501, 191 S.E. 416, 419 (1937).

For contract claims, if the issue relates to the contract's formation, interpretation, or validity, courts apply the substantive law of the place where the contract was formed, also known as *lex loci contractus*. *See Lister*, 329 S.C. at 144, 494 S.E.2d at 455 ("[A] contract as to its validity and interpretation is governed by the law of the place where it is made, the *lex loci contractus*."). If the issue concerns performance of the contract, courts apply the substantive law of the place of performance. *See id.* (citing *Witt v. American Trucking Associations, Inc.*, 860 F. Supp. 295 (D.S.C. 1994)).

Overriding these two governing approaches is the general rule that a South Carolina court will not apply another state's substantive law that clearly is against South Carolina's public policy. *See Boone v. Boone*, 345 S.C. 8, 14, 546 S.E.2d 191, 193 (2001) ("[U]nder the 'public policy exception,' the Court will not apply foreign law if it violates the public policy of South Carolina."). On the other hand, if there is no material difference in the law of the states at issue, a court need not make an explicit determination of which state's law applies. *See, e.g., Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 307, 728 S.E.2d 61, 65 (Ct. App. 2012) (explaining that the circuit court determined Appellants lacked standing under both South Carolina and North

Carolina, without resolving which state's law applied, as both states followed the same standing rule at issue).

The District Court's first certified question addresses the Receiver's claim for fraudulent conveyance. The Receiver is unaware of any cases from South Carolina directly on point that classify this claim as a tort claim or contract claim for choice of law purposes, and, as will be discussed more completely below, the claim seeks only equitable remedies through a return of the "profit" Dodds retained at the expense of the true victims of the Ponzi scheme. As set forth below, however, for choice of law purposes the claim is best classified as a tort-like claim, a result reached by numerous courts across the country faced with the specific question. As such, the rule of *lex loci delicti* applies. Under that rule as applied in this case, the substantive law of South Carolina applies to the claim because the injury occurred in South Carolina. However, even if this Court were to classify a fraudulent conveyance claim as a contract-like claim, the Court would still reach the same conclusion that South Carolina's substantive law applies.

Finally, the analysis below provides reasons why this Court may consider adopting the choice of law approach used in the Second Restatement, which focuses on the state with the "most significant relationship" to the issues. This approach reflects the modern reality that the issues in many cases cross state lines, especially in multi-victim Ponzi scheme cases like the one before the Court.

B. Fraudulent Conveyance is Best Classified as a Tort Claim for South Carolina Choice of Law Purposes

Under South Carolina's "tort or contract" approach to choice of law, the Receiver's fraudulent transfer claim should be classified as a tort. The Receiver's fraudulent transfer claim relies on South Carolina's Statute of Elizabeth, which provides:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

S.C. Code Ann. § 27-23-10(A).

The statute "renders void any transfer of property made with 'intent or purpose to delay, hinder, or defraud creditors and others.'" *Carr v. Guerard*, 365 S.C. 151, 153-54, 616 S.E.2d 429, 430 (2005) (quoting S.C. Code Ann. § 27-23-10 (Supp. 2004)). This Court has held under this statute that conveyances shall be set aside under two conditions: "First, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without consideration." *Windsor Props., Inc. v. Dolphin Head Constr. Co.*, 331 S.C. 466, 470-71, 498 S.E. 2d 858, 860 (1998). "Actual knowledge of, or participation in, the debtor's fraudulent intention on the part of the transferee need not be established in order to justify a conclusion that the transaction was illegal." *Coleman v. Daniel*, 261 S.C. 198, 210, 199 S.E.2d 74, 80 (1973). "The transaction is subject to attack if at the same time of the transfer the transferee had notice of circumstances which would arouse the suspicion of an ordinarily prudent man and cause him to

make inquiry as to the purpose for which the transfer was being made, which would disclose the fraudulent intent of the maker." *Id.*

Receivers in Ponzi scheme cases commonly resort to fraudulent conveyance claims to recover excess "profits" from "net winners" of the scheme. A "net winner" is a participant in the scheme who received more money that he or she contributed. Ponzi schemes operate by paying some participants money alleged to be "profit" or a "return" on their "investment," even though the money is actually just taken from subsequent "investors." Those who receive in excess of what they contributed are "net winners" and have benefitted at the direct expense of those who contributed later, who are the "net losers." Because the Ponzi scheme is insolvent from its inception, the money the net winner receives is not "profit," but is actually the money of the other participants, who, by losing that money, become the true victims of the scheme. "[W]hen claims are brought against Ponzi scheme investors, 'the general rule is that to the extent innocent investors have received payments in excess of the amounts or principal that they originally invested, those payments are avoidable as fraudulent transfers.'" *SEC v. Forte*, Nos. 09-63 & 09-64, 2009 U.S. Dist. LEXIS 116802, *10 (E.D. Pa. 2009) (*quoting Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008)).

Defendant Dodds contends that the substantive law of Florida should apply to the fraudulent conveyance claim against him. Florida, like many other states (but not South Carolina), has adopted the Uniform Fraudulent Transfers Act ("UFTA"), which is often used in Ponzi scheme cases as well. *See* Fla. Stat. Ann. § 726.105. Although similar in many respects, there are sufficient differences between the claim under South Carolina's Statute of Elizabeth and Florida's UFTA as applied to this case, requiring a decision on which state's substantive law applies. As explained above, to make this choice of law the Court must classify a fraudulent

transfer claim as either sounding in tort (so that *lex loci delicti* applies) or in contract (so that *lex loci contractus* applies). As explained here, a fraudulent conveyance claim is best considered a tort for this purpose.

An obvious reason to classify a fraudulent conveyance claim as a tort for choice of law purposes is that the statutory language and elements of the claim speak in terms of fraud and misconduct, which are hallmarks of a tort-like claim. *See Lister v. NationsBank of Del., N.A.*, 329 S.C. 133, 143, 494 S.E.2d 449, 455 (Ct. App. 1997) (treating fraudulent misrepresentation claim as tort and applying *lex loci delicti* "where the plaintiff, as a result of the misrepresentation, suffered a loss"). For example, the statute refers to transfers with "intent or purpose to delay, hinder, or defraud creditors and others," and uses terms such as by "guileful, covinous, or fraudulent devices and practices." S.C. Code Ann. § 27-23-10(A).

The elements of the claim further demonstrate why it is more properly considered a tort instead of a contract for choice of law purposes. The Receiver will be able to prove the "net winner" received a fraudulent transfer if he can establish: (1) the transfer was made with the actual intent of defrauding creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the net winner. *See Grayson Consulting, Inc. v. Wachovia Sec., Inc. (In re Derivium Capital, LLC),* 396 B.R. 184, 192 (Bankr. S.C. 2008). As to the first element, "the existence of a Ponzi scheme gives rise to a presumption of fraudulent intent on the part of the proponent of the scheme." *Grayson Consulting, Inc.*, 396 B.R. at 192-93. "Courts presume actual intent in relation to a Ponzi scheme because the debtor knows at the time of the transfer that the scheme ultimately must collapse." *Brincko v. Rio Props. (In re: National Consumer Mortgage, Co.)*, 2013 U.S. Dist. LEXIS 5986 (D. Nev. Jan. 14, 2013) (quoting *Merrill v. Abbott* (*In re Indep. Clearing House Co.*), 77 B.R. 843, 860 (D. Utah 1987)).

As to the second element, the very essence of a Ponzi scheme is insolvency. *See Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) ("This Circuit has found that a Ponzi scheme is, as a matter of law, insolvent from its inception." (internal quotations omitted)). Further, as defined, 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." Black's Law Dictionary 1198 (8th ed. 2004); *see also Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1088 n.3 (2d Cir. 1995) ("A [P]onzi scheme is a scheme whereby a corporation operates and continues to operate at a loss. The corporation gives the appearance of being profitable by obtaining new investors and using those investments to pay for the high premiums promised to earlier investors. The effect of such a scheme is to put the corporation farther and farther into debt by incurring more and more liability and to give the corporation the false appearance of profitability in order to obtain new investors.").

As to the third element, intent can be imputable to the net winner, even without actual knowledge of or participation in the debtor's fraudulent purpose. *See Coleman*, 261 S.C. at 210, 199 S.E.2d at 80. "The transaction is subject to attack if at the same time of the transfer the transferee had notice of circumstances which would arouse the suspicion of an ordinarily prudent man and cause him to make inquiry as to the purpose for which the transfer was being made, which would disclose the fraudulent intent of the maker." *Id.*

The U.S. District Court for the District of South Carolina has previously found these elements satisfied in prior "net winner" actions by the Receiver in connection with this Ponzi scheme and in the past. *See Ashmore v. Fowler*, 2016 U.S. Dist. LEXIS 100913, at *8-*11 (D.S.C. Aug. 2, 2016) (applying South Carolina's Statute of Elizabeth and unjust enrichment law

to a claim against a "net winner"); *Ashmore v. Taylor*, 2014 U.S. Dist. LEXIS 162147, at *9-*12 (D.S.C. Nov. 18, 2014) (applying South Carolina law in "The Three Hebrew Boys" Ponzi scheme). These elements, which speak in terms of "defrauding," "intent," "imputing" that intent, and "circumstances" that "would arouse the suspicion of an ordinarily prudent man," all point to a fraudulent conveyance claim as a tort claim, not a contract claim, for choice of law purposes.

South Carolina case law discussing fraudulent conveyance claims further refers to the "badges of fraud" in such conveyances, explaining that "fraud is not to be expected to seek the glare of day, or the presence of witnesses for its consummation. It is usually effected in secret, and it is only from circumstances, such as these, that we presume it." *Coleman*, 261 S.C. at 209, 199 S.E.2d at 79 (citations omitted). Such secrecy was the hallmark of the Wilson/AB&C Ponzi scheme. *See, e.g.*, District Ct. Order, at 5 (noting that "Dodds was not required to fill out or initiate any paperwork when a withdrawal from the AB&C account was requested or when it was made"). By focusing on the fraud underlying the conveyance, the claim focuses on wrongdoing that is much more appropriately classified as a tort for choice of law purposes.

The statute of limitations applicable to fraudulent conveyance claims, S.C. Code Ann. § 15-3-530(7), further supports this classification. That statute applies a three-year discovery rule for "any action for relief *on the ground of fraud* in cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the court of chancery." S.C. Code Ann. § 15-3-530(7) (emphasis added); *see also PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 127 F. Supp.3d 568, 590 (D.S.C. 2015); *In re J.R. Deans Co., Inc.*, 249 B.R. 121, 132 (Bankr. D.S.C. 2000)

(applying the three year statute of limitations of § 15-3-530(7) to an action under the Statute of Elizabeth).[2]

Finally, the great weight of authority across the country classifies fraudulent conveyance claims as torts for choice of law purposes. "A number of courts have classified fraudulent conveyance claims as torts for purposes of choice-of-law issues." *SEC v. Infinity Grp. Co.*, 27 F. Supp. 2d 559, 564 (E.D. Pa. 1998) (citing cases); *see also Montoya v. Akbari-Shahmirzadi (In re Akbari-Shahmirzadi)*, Nos. 11-15351-t11, 13-01035-t, 2016 Bankr. LEXIS 3957, at *7-8 n.3 (U.S. Bankr. D.N.M. Nov. 14, 2016) ("Courts are ... in general agreement that, at least for choice of law purposes, fraudulent transfers are akin to torts, not contracts.") (citing cases); *Taylor v. Cmty. Bankers Sec., LLC*, No. H-12-02088, 2013 U.S. Dist. LEXIS 86485, at *12-13 (S.D. Tex. June 20, 2013) (ruling that, for purposes of a choice of law analysis, "[f]raudulent transfer claims sound in tort").

Courts addressing fraudulent transfer claims in the specific context of Ponzi scheme cases have reached similar conclusions. *See Perkins v. Champagne (In re Int'l Mgmt. Assocs., LLC)*, 495 B.R. 96, 105 (Bankr. N.D. Ga. 2013) ("In the context of a fraudulent transfer action involving an investor in a Ponzi scheme, the Court concludes that the action is more equivalent to a tort claim than to a contract claim."); *see also Terry v. June*, 420 F. Supp. 2d 493, 503 (W.D.

[2] The Receiver seeks only equitable relief, namely, disgorgement and return of the excess "profit" retained by the net winner so that it can be distributed by the debtor, upon approval of the U.S. District Court, to the true victims of the scheme. The statute of limitations, by referring to "cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the court of chancery," confirms the equitable nature of the claim. S.C. Code Ann. § 15-3-530(7). It is only necessary to classify his claim as "tort" for analytical purposes under South Carolina's existing choice of law framework.

Va. 2006) (explaining that a fraudulent conveyance claim under Virginia law sounds in tort for choice of law purposes).[3]

Therefore, following South Carolina's choice of law rules, the Receiver's fraudulent conveyance claim is best classified as a tort claim, meaning that *lex loci delicti* applies, the substantive law of the place of the injury. Following that rule, and as shown below, South Carolina's substantive law should apply to the Receiver's claim for fraudulent conveyance because the injury occurred in South Carolina.

C. South Carolina's Substantive Law Applies to the Fraudulent Conveyance Claim

Having demonstrated that fraudulent conveyance is best classified as a tort for choice of law purposes, courts should apply the substantive law of the place where the injury occurred, or *lex loci delicti*. *See Lister*, 329 S.C. at 143, 494 S.E.2d at 454 ("Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred.") (citations omitted); *Bannister*, 316 S.C. at 515, 450 S.E.2d at 630. The facts demonstrate that the injuries alleged in this case occurred in South Carolina.

In this case, the Plaintiff (the Receiver on behalf of Atlantic Bullion & Coin, Inc.), suffered the loss in South Carolina where the company was located and operated the Ponzi scheme on a daily basis. Further, all of AB&C's operating accounts were located in South Carolina. All of the bogus trades and account statements were generated in South Carolina. Lastly, the money transferred to Dodds was sent from a bank located in South Carolina. *See* District Court Order, at 2 & 5.

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[3] Even Florida law, which Dodds wants to apply here, considers a fraudulent transfer claim to be a tort for choice of law purposes. *See Meininger v. Euram, LLC (In re Land Res., LLC)*, 23 Fla. L. Weekly Fed. B 351 (U.S. Bankr. M.D. Fla. 2011) (Florida bankruptcy court applying Florida choice of law rules found in *Restatement (Second) of Conflicts of Laws* § 145, which is for torts, to fraudulent conveyance claim).

There do not appear to be any specific cases in South Carolina clearly applying *lex loci delicti* to a fraudulent conveyance claim, but other case law in the similar context of fraudulent misrepresentations confirms that the location where the plaintiff suffers injury to its money and accounts is the place of the injury. For example, the Court of Appeals in *Lister*, 329 S.C. at 143, 494 S.E.2d at 455, explained that courts apply the substantive law of the jurisdiction "where the plaintiff, as a result of the misrepresentation, suffered a loss." In *Lister*, the plaintiff claimed a fraudulent misrepresentation in connection with a car rental that occurred in Aruba, but that involved improper charges on the plaintiff's credit card that occurred in South Carolina, requiring application of South Carolina law. "[T]he injury that occurred was the misappropriation of the plaintiffs' money and this injury was directly to their money, which occurred in South Carolina....South Carolina was the place where the money was wrongfully appropriated." *Rogers v. Lee*, 414 S.C. 225, 231-32, 777 S.E.2d 402, 405 (Ct. App. 2015) (discussing *Lister*).

Other courts have followed a similar approach to fraud-based claims, focusing on where the financial injury occurred. *See Hovis v. Gen. Dynamics Corp. (In re Marine Energy Sys. Corp.)*, 362 B.R. 247, 255 (Bankr. D.S.C. 2006) (applying South Carolina law to Plaintiff's claims for fraud and negligent misrepresentation, because "the alleged wrong occurred in South Carolina, the place of MESC's incorporation, its principal place of business, and the place were MESC allegedly suffered a loss due to Defendants' alleged misrepresentations that induced Plaintiff to enter into the APA to acquire property in Charleston, South Carolina"); *Connelly Mgmt. v. McNicoll*, No. 2:02-CV-2440-PMD-GCK, 2006 U.S. Dist. LEXIS 97580, at *77-78 (D.S.C. Mar. 15, 2006) (citing *Lister* and applying South Carolina substantive law to insurance scam claims because the torts occurred in South Carolina, noting that "Plaintiffs suffered a loss

in South Carolina when the fake health insurance McNicoll, Anderson and Reeve conspired to create which was sold to Plaintiffs failed to pay Plaintiffs' claims"); *see also Hermelink v. Dynamex Operations E., Inc.*, 109 F. Supp. 2d 1299, 1304 (D. Kan. 2000) ("[W]hen a person sustains a financial loss due to misrepresentation, 'the place of wrong is where the loss is sustained,' not where the misrepresentation is made.") (citations omitted). Whether focusing on where the plaintiff suffers injury to its money and accounts, where the "financial injury" occurred, in this case South Carolina would be the place for both.

In the present case involving Dodds, the "injury" from the Ponzi scheme and fraudulent transfers was "directly to [the Receivership's] money, which occurred in South Carolina," and "South Carolina was the place where the money was wrongfully appropriated." *Rogers*, 414 S.C. at 231-32, 777 S.E.2d at 405. As stated above, AB&C, at the time subverted by Wilson, operated the Ponzi scheme in South Carolina, including maintaining operating accounts from which payments to Dodds were made. (District Ct. Order, at 5.)[4]

[4] Some states can apply the doctrine of *lex loci delicti* in different ways, like Virginia, which defines "the place of the tort as being where 'the last event necessary to make an [actor] liable for an alleged tort takes place,'" as opposed to Maryland, which defines the place of the tort as "the place of injury," namely "the place where the injury was suffered, not where the wrongful act took place." *MainStreet Bank v. Nat'l Excavating Corp.*, 791 F. Supp. 2d 520, 530 (E.D. Va. 2011) (citations omitted). South Carolina's version of *lex loci delicti* applies the substantive law of "state in which the injury occurred." *Lister*, 329 S.C. at 143, 494 S.E.2d at 454 ("Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the state in which the injury occurred.") (citations omitted); *Bannister*, 316 S.C. at 515, 450 S.E.2d at 630; *Rauton v. Pullman Co.*, 183 S.C. 495, 501, 191 S.E. 416, 419 (1937) (For tort claims, "the well-established rule is that the law of the place where the injury was occasioned or inflicted, governs in respect of the right of action, and the law of the forum in respect to matters pertaining to the remedy only."). Under any of these approaches applied to the facts in this case, the place of the tort was South Carolina, such that South Carolina's substantive law applies. The nuanced variations in how *lex loci delicti* is applied, however, may further demonstrate the need for a clearer standard, such as the "most significant relationship" standard in the Second Restatement.

D. Even if Treated as a Contract Claim, South Carolina Substantive Law Should Apply

Although a fraudulent conveyance claim is properly classified as a tort for choice of law purposes, even if classified as a "contract" claim, the Court should reach the same result and apply South Carolina substantive law. As discussed above, South Carolina courts follow the rule of *lex loci contractus* for contract claims. If the issue relates to the contract's formation, interpretation, or validity, courts apply the substantive law of the place where the contract was formed. *Lister*, 329 S.C. at 144, 494 S.E.2d at 455 ("[A] contract as to its validity and interpretation is governed by the law of the place where it is made, the *lex loci contractus*."). If the issue concerns performance of the contract, courts apply the substantive law of the place of performance. *See id.* (citing *Witt v. American Trucking Associations, Inc.*, 860 F. Supp. 295 (D.S.C. 1994)). Under either approach, the law of South Carolina would apply.

It is conceptually challenging to consider a Ponzi scheme fraudulent transfer as a "contract" under most scenarios, particularly in this case since there is no written agreement, contract, or written documents describing the investment relationship. However, for the sake of the argument, the "contract" could have only been "formed" in South Carolina, where Dodds and Wilson first met, made his first investment and where Wilson orchestrated and operated the Ponzi scheme. (District Ct. Order, at 4-5.) Additionally, Dodds' first two "investments" were drawn off of Dodds' South Carolina bank account. *Id.* at 5. Thus, any claim relating to the formation, interpretation, or validity of such a "contract" would be governed by South Carolina law.

Likewise, if the claim concerned "performance," the "contract" was performed by Wilson/AB&C's fabrication of silver trades manifested via the Account Statements and the sending of funds from its accounts in South Carolina. There was no "performance" required of

Dodds in Florida at all to perpetuate the scheme. In fact, all aspects of the Ponzi scheme were conducted in South Carolina, including the physical location of AB&C and all of the operating accounts. *Id.*

Again, *Lister* is instructive. In that case, which involved contract claims in addition to the tort claims, the Court of Appeals explained:

> Although the breach of contract was initiated in Aruba, it was completed through the financial relationship between the Listers and NationsBank in South Carolina. The Listers applied for the credit card in South Carolina and received bills for their credit card in South Carolina. The Listers were notified in South Carolina of the unauthorized charge by ASHA, N.V., on the Visa Gold Card. The breach of contract, the taking of the money from the Visa account, occurred in South Carolina. South Carolina was the place where the money was wrongfully appropriated. South Carolina was the place of the breach of contract and the place of performance. We hold that South Carolina law applies pursuant to the contract theory for choice of law.

Lister v. NationsBank of Del., N.A., 329 S.C. 133, 145, 494 S.E.2d 449, 456 (Ct. App. 1997)

Therefore, even if a fraudulent conveyance claim is considered a "contract" claim for purposes of choice of law, South Carolina substantive law would apply to the Receiver's claim.

E. This Court Should Consider Adopting the Second Restatement Approach to Choice of Law

As demonstrated above, regardless of whether the Receiver's claim for fraudulent conveyance is considered a tort or contract claim for choice of law purposes, South Carolina's substantive law should apply to the claim. However, a *lex loci delicti* and *lex loci contractus* analysis is not always easily applied, especially for a fraudulent conveyance claim and where there are multiple transactions involving multiple states. Many states have instead adopted the approach from the *Restatement (Second) on Conflicts of Laws* (the "Second Restatement"), which, for both tort and contract claims, looks to the state with the "most significant

relationship" to the issues. This Court may wish to consider adopting the Second Restatement approach, which would also be particularly appropriate for cases, like this Ponzi scheme, that originate in South Carolina and that have a "significant relationship" to the State. Further, typically a trustee in bankruptcy or a receiver sitting in equity is appointed in the state where the debtor corporation and Ponzi operation conducted business.

The Court of Appeals in *Lister*, which was performing a choice of law analysis for both tort and contract claims, noted that South Carolina "has not adopted the modern choice of law test found in the [Second] Restatement," but conducted the analysis anyway for both types of claims. *Lister*, 329 S.C. 133, 145-48, 494 S.E.2d 449, 456-57. The Court concluded that, if South Carolina followed the Second Restatement's "most significant relationship" test, South Carolina law would apply to both types of claims in that case because South Carolina had the "most significant relationship" to the Listers' claims. *See id.* The Court looked to § 145(1) of the Second Restatement, which concerns choice of law for tort claims, and § 188(1) of the Second Restatement, which concerns choice of law for contract claims. Under both of these sections, the Second Restatement directs the court to "the most significant relationship" to the issue under the principles of § 6 of the Second Restatement, which the Court explained:

> According to the Restatement, a court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. *Restatement (Second) of Conflict of Laws* § 6 (1971). However, when there is no such directive, the Restatement has established certain factors relevant to the choice of the applicable rule of law. To determine the place with the "most significant relationship," the court must evaluate the following general principles:
>
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Lister, 329 S.C. 133, 146, 494 S.E.2d 449, 456 (quoting *Restatement (Second) of Conflict of Laws* § 6 (1971)).

The *Lister* court further explained that, in tort cases, a court applying the Second Restatement's principles must take into account the following contacts:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

Id. at 146-47, 456. For contract cases, a court would consider, in the absence of an effective choice of law by the parties, various "contacts" including:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

Id. at 147, 456-57. "The tort and contract contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.* (citing Second Restatement §§ 145(2), 188(2)).

This framework may provide a more practical way to determine which law applies to the fraudulent conveyance claim in a Ponzi scheme case such as this one. For example, when viewed as a tort claim, there would be little dispute that South Carolina has "the most significant relationship to the occurrence and the parties." *Restat 2d of Conflict of Laws*, § 145. The

Receivership suffered its financial injuries to its accounts and money (the insolvency and indebtedness of the company) in South Carolina, the checks and payments were issued to the net winners from South Carolina and eventually drawn on banks in South Carolina, Ron Wilson and AB&C were domiciled in South Carolina, and the parties' relationship was centered in South Carolina. (District Ct. Order, at 5.) When viewed as a contract claim, the same holds true, as Wilson and Dodds began their relationship in South Carolina, Dodds' first two "investments" were drawn off of a South Carolina bank, and the Ponzi scheme was fully orchestrated and operated in South Carolina. *Id.* at 4-5.

The fact that Dodds may have moved to Florida at some point after establishing an investment relationship is irrelevant. The Second Restatement looks to the state with the *most* significant relationship, which is South Carolina. This approach is particularly appropriate in a case such as this where the effects of the Ponzi scheme can become widespread and are rarely are confined to one state. For example, in a receivership case stemming from a Ponzi scheme involving more than $ 73 million, 1,300 investors, and at least 34 different states, a Texas federal court the applied Second Restatement choice of law rules to conclude that Washington State had the most substantial relationship to the parties:

> Under this analysis, the Court concludes that Washington is the state with the most substantial relationship to the parties and the alleged fraudulent transfers of receivership assets. [The fraudulent investment program] RDI and several of its affiliates...had their principle [sic.] places of business in Washington. In fact, all of RDI's business was conducted from its Tacoma office. By implication, RDI bore its "injuries" from the fraudulent transfers in Washington more so than in any other state. Moreover, to the extent that receivership assets were ordered transferred out of RDI and its affiliates, those decisions -- and, hence, the "conduct" causing injury -- occurred in Washington at the direction of [the "masterminds" of the fraud] James and David Edwards, both of whom were residents of Washington at the time....

> [E]ven if the Court were to consider the myriad domiciles of the RDI investors as relevant to its analysis under § 145 [of the Second Restatement], Washington State, in the aggregate, nevertheless has more relevance to the Receiver's fraudulent transfer claims since every investor's relationship was "centered" in Washington. Washington State is where RDI prospectuses and solicitations originated; where investors sent their completed applications to participate in the RDI program; where they sent their money; and where their investment contracts were executed. Washington addresses also appeared on all preprinted letterhead that the Receiver has discovered. For these reasons, the Court concludes that Washington law should govern the Receiver's fraudulent transfer claim.

Warfield v. Carnie, No. 3:04-cv-633-R, 2007 U.S. Dist. LEXIS 27610, at *3, *20-*25 (N.D. Tex. Apr. 13, 2007).

The Second Restatement's choice of law principles include "certainty, predictability and uniformity of result" and the "ease in the determination and application of the law to be applied." *Restat 2d of Conflict of Laws*, § 6. These principles are clearly served by using a "most significant relationship" approach to Ponzi schemes like the one involved here.[5]

Finally, the Second Restatement approach here is particularly useful because it does not just classify claims as "tort-like" or "contract-like," but includes rules for the choice of law for claims for restitution and other similar claims relating to *fraudulent transfers* of property, which also follow the "most significant relationship" approach. *See, e.g., Restat 2d of Conflict of Laws*, § 221 (restitution) & § 222 (property in general). As to movable property specifically, the

[5] Interestingly, Florida follows the Second Restatement and has "abandoned the strict doctrine of lex loci delicti." *Judge v. Am. Motors Corp.*, 908 F.2d 1565, 1567 (11th Cir. 1990) follows the Second Restatement. Therefore, if the Receiver had brought the claim in Florida against Dodds, the Florida court would apply that Second Restatement test, would almost certainly view South Carolina as the state with the "most significant relationship," and would apply South Carolina substantive law. It would be an odd result for a South Carolina court to apply Florida law where, had the same claim been brought in Florida, a Florida court would apply South Carolina law. The most logical result is to view South Carolina as the state with "most significant relationship" to this Ponzi scheme and to have its law apply regardless of where the claim is actually brought.

Second Restatement looks to "the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance under the principles stated in § 6." *Id.* at § 244. Comment j to this section specifically notes:

> The law selected by application of the rule of this Section will be applied to determine other questions of validity as between the parties to the conveyance. For example, this law will be applied to determine *whether the conveyance is tainted with illegality and, if so, whether it is void or voidable as a result. This law will also be applied to determine the existence and effect of fraud* and of a violation of the rule against perpetuities.

Id. at Comment j (emphasis added). In other words, the Second Restatement applies the "most significant relationship" test to a broader range of claims for fraudulent conveyance. *See, e.g., Lincoln Fed. Sav. & Loan Assn.v Thomson McKinnon Secur., Inc.*, Civil No. 87-2107 (CSF), 1990 U.S. Dist. LEXIS 3183, at *5-6 (D.N.J. Mar. 20, 1990) (explaining that "[c]onflict-of-law questions regarding fraudulent conveyances are governed by Restatement § 244," which refers to the "state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance"); *In re Kaiser Steel Corp.*, 87 B.R. 154, 159 (Bankr. D. Colo. 1988) (citing to Section 244, Comment j in fraudulent conveyance case).

Numerous courts have followed the Second Restatement approach on choice of law, and, specifically, to fraudulent conveyance claims. *See, e.g., SEC v. Infinity Grp. Co.*, 27 F. Supp.2d 559, 564 (E.D. Pa. 1998) (applying Second Restatement "most significant relationship" choice of law test to claims of fraudulent conveyance in federal question jurisdiction case); *Taylor v. Cmty. Bankers Sec.*, LLC, No. H-12-02088, 2013 U.S. Dist. LEXIS 86485, at *12-13 (S.D. Tex. June 20, 2013) (applying "most significant relationship" test to fraudulent transfer claims, which "sound in tort," and to unjust enrichment, "an equitable principle"); *In re Kaiser Steel Corp.*, 87 B.R. 154, 159 (Bankr. D. Colo. 1988) (applying Second Restatement approach to fraudulent

conveyance claim). South Carolina is, in fact, in a distinct minority of states that do not follow the Second Restatement approach. According to a recent survey, as many as 24 states follow the Second Restatement approach for tort claims and 23 follow it for contract claims, while South Carolina is one of only 10 states following the so-called "traditional" test for tort claims and one of only 12 following it for contract claims. *See* Symeon C. Symeonides, "Choice of Law in the American Courts in 2016: Thirtieth Annual Survey," 65 Am. J. Comp. L. 1, 33 (2017).

There would be nothing new about this Court adopting a Second Restatement approach. This Court has already applied the Second Restatement's approach to the choice of law concerning the validity and effect of conveyances of interests in land. *See S.C. Dep't of Parks, Recreation, & Tourism v. Brookgreen Gardens*, 309 S.C. 388, 394, 424 S.E.2d 465, 468 (S.C. 1992). The Court of Appeals has done likewise. *See Leasing Enters., Inc. v. Livingston*, 294 S.C. 204, 207, 363 S.E.2d 410, 411 (Ct. App. 1987) (citing Restatement (Second) of Conflicts Section 223(1) (1971)). The South Carolina federal district court has also applied the Second Restatement view as it relates to the choice of law on privileges, citing this Court's decision in *Brookgreen Gardens* to explain that "South Carolina courts have also shown a willingness to apply the Second Restatement in the past." *Wellin v. Wellin*, 211 F. Supp.3d 793, 804 (D.S.C. 2016).

This Court has previously adopted other Second Restatement approaches to the law. *See, e.g., Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 50-51, 533 S.E.2d 312, 322 (2000) (adopting approach expressed in Restatement (Second) of Torts: Employers of Contractors § 429 (1965)); *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991) (adopting Section 343(A) of the Restatement (Second) concerning known or obvious dangers); *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (adopting rule of

liability stated in § 46 of the Restatement (Second) of Torts relating to intentional infliction of emotional distress).

Notably, the South Carolina's current, traditional analysis for choice of law – *lex loci delicti* for torts and *lex loci contractus* for contracts – is based on the older, now superseded Restatement view of the law. *See, e.g., Rauton v. Pullman Co.*, 183 S.C. 495, 502, 191 S.E. 416, 419 (1937) (explaining that the law of the place of the injury governs in tort claims and citing to the Restatement, Conflict of Laws, § 382, *et seq.*). As a result, there would be nothing inappropriate about this Court taking the opportunity to update the choice of law rules to follow the modern view shown in the Second Restatement.

For the reasons set forth above, under South Carolina's existing choice of law framework, a fraudulent conveyance claim is best classified as a tort, such that *lex loci delicti* applies. Under that rule, South Carolina is the place of the injury and is the state whose law should apply to the claim. Nevertheless, this Court may wish to consider adopting the "most significant relationship" approach set forth in the Second Restatement, which could provide a better framework for choice of law analysis in the future, and a more predictable and practical approach for Ponzi scheme cases involving fraudulent transfers.[6]

[6] Although the Court need not delve into the public policy backstop that prevents application of other states' laws that violate South Carolina public policy, there is undoubtedly a public policy in favor of uniformly handling Ponzi scheme cases effected and operated out of this State and impacting a number of victims here, rather than allowing an uncertain patchwork of state laws to apply depending on where a "net winner" happened to have lived at the time one of his "profit" payments was sent. A contrary result might encourage those who were participating in the scheme to set up their bank accounts for receipt of net winnings in jurisdictions with different laws, even though South Carolina has a clear and overriding interest in preventing, discouraging and regulating Ponzi schemes operating in the State and ensuring the fair treatment and compensation of its victims.

III. South Carolina Substantive Law Applies to the Unjust Enrichment Claim

The second certified question asks, "[u]nder South Carolina choice of law rules, the substantive and procedural law of which jurisdiction applies to the Receiver's unjust enrichment claim?" (Order, ECF No. 102 at 6.) South Carolina's general choice of law rules are discussed above, including how claims classified as torts look to the *lex loci delicti*, while claims classified as contracts looks to the *lex loci contractus* for issues concerning formation, validity, and interpretation, and to the law of the place of performance for issues concerning performance. *See Lister*, 329 S.C. at 143-144; 494 S.E.2d at 454-455.

The Receiver is unaware of any reported case clearly applying South Carolina's choice of law rules to a claim of unjust enrichment. Indeed, a claim of unjust enrichment does not fit neatly into the "tort v. contract" categorization of South Carolina's traditional choice of law, but similar to fraudulent conveyance is an equitable claim. Many courts that have addressed the choice of law for an unjust enrichment claim, including a South Carolina federal court applying New Jersey's choice of law rules, have followed the Second Restatement approach discussed above. For example, in *Hadidi v. Intracoastal Land Sales, Inc.*, No.: 4:12-cv-535-RBH, 2014 U.S. Dist. LEXIS 86173, *28 (D.S.C. June 25, 2014), the U.S. District Court for the District of South Carolina applied New Jersey's choice of law rules (required because the case had been initiated in New Jersey and transferred to South Carolina), which follow the "most significant relationship" test of the Second Restatement § 221 for unjust enrichment claims. As discussed in the preceding sections, South Carolina is the State with the "most significant relationship" to the issues in this case. While the court in *Hadidi* was applying New Jersey's choice of law rules, numerous other states follow a similar approach to unjust enrichment claims as set forth in the Second Restatement. *See In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 59-60

(D.N.J. 2009) (explaining that New Jersey law would apply to plaintiff's unjust enrichment claim pursuant to the "most significant relationship" test articulated in the Second Restatement "in the event of a conflict between the states' unjust enrichment laws," and that test "is used by Illinois, Missouri, New Jersey, and Washington").

Outside of this Second Restatement approach, there is very little clear case law explaining whether an unjust enrichment claim should be considered a tort claim or a contract claim for the type of traditional choice of law analysis South Carolina currently follows. Some courts appear to suggest that the claim is best classified as a contract claim (even though no contract exists), while others classify it as a tort claim. *Compare Arabian AMOCO v. Anderson*, No. 88-3574, 1989 U.S. App. LEXIS 22472, at *3 (4th Cir. Apr. 5, 1989) (unpublished) ("We find that the district court was correct in applying *lex loci delicto*" to the claim for unjust enrichment under Saudi law), *with Elliot AmQuip, LLC v. Bay Elec. Co.*, No. ELH-10-3598, 2011 U.S. Dist. LEXIS 59234, at *41 (D. Md. June 2, 2011) (explaining that Maryland's rule of *lex loci contractus* would apply to claims of breach of contract and quantum meruit). A South Carolina bankruptcy court has explained that a different equitable claim – for promissory estoppel – "requires application of the laws of the state in which each Plaintiff suffered its injury." *Arabi Gin Co. v. Plexus Cotton, Ltd. (In re Joseph Walker & Co.)*, 522 B.R. 165, 217 (Bankr. D.S.C. 2014).

If this Court adopts the Second Restatement's "most significant relationship" approach for unjust enrichment and restitution claims, this Court need not resolve the issue of whether an unjust enrichment claim should be classified as a tort or a contract for choice of law purposes. Nevertheless, for the reasons discussed above concerning the Receiver's fraudulent conveyance claim, whether unjust enrichment is viewed as a tort or a contract for choice of law purposes,

South Carolina law would apply. *See supra* Section II. C. (applying tort analysis to fraudulent transfer claim; Section II D. (applying contract analysis to fraudulent transfer claim).

The Receiver notes, however, that there is no conflict at all between the unjust enrichment law of South Carolina and Florida, making this question largely academic and improper for certification. Compare *Inglese v. Beal*, 403 S.C. 290, 297, 742 S.E.2d 687, 690-91 (S.C. Ct. App. 2013) (setting forth the elements for unjust enrichment in South Carolina) *with Rollins, Inc. v. Butland*, 951 So. 2d 860, 876 (Fla. Dist. Ct. App. 2006) (setting forth the elements for unjust enrichment in Florida. Indeed, given that no conflict exists, the certified question on the issue of unjust enrichment improperly requests an advisory opinion, something this Court does not issue, even when considering certified questions. *See Sangamo Weston, Inc. v. National Sur. Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992) (declining to answer questions on certification concerning choice of law that amounted to advisory opinions). The Receiver requested that the U.S. District Court reconsider its certification order for this reason – that there was no real conflict between South Carolina and Florida law – but the U.S. District Court concluded that, once this Court had accepted the request to answer the certified questions, the U.S. District Court lacked the power to rescind the questions. The Receiver, therefore, respectfully requests that this Court either hold that there is no substantive difference in the unjust enrichment law of South Carolina and Florida, and/or that there is no need to answer a certified question on how to apply choice of law rules to this claim. Notwithstanding the foregoing, if the Court does elect to answer the question, South Carolina case law will benefit from a clear decision on how to apply choice of law rules to this claim, including if the Court adopts the Second Restatement "most significant relationship" approach.

IV. South Carolina Procedural Law Applies to Both Claims

The U.S. District Court's certified questions also ask, for both the fraudulent transfer and the unjust enrichment claims, what "procedural" law applies. The discussion above should address all relevant questions as to what South Carolina choice of law rules a court should follow in deciding what *substantive* law to apply. To the extent there is any question about the *procedural* law to apply, however, there should be no dispute that the procedural law of South Carolina, where the forum court is located, applies to the Receiver's claims. *Nash v. Tindall Corp.*, 375 S.C. 36, 39, 650 S.E.2d 81, 83 (S.C. Ct. App. 2007)(Under South Carolina law, "[p]rocedural matters are to be determined in accordance with the law of South Carolina, the lex fori [law of the forum].") This procedural law includes the application of South Carolina's statutes of limitations, which apply even if the substantive law of another state applies. *See Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.,* 368 S.C. 137, 142, 628 S.E.2d 38, 41 (S.C. 2006); *see also Nash*, 375 S.C. 36 at 39, 650 S.E.2d at 83 ("A statute of limitations is a procedural device that operates as a defense to limit the remedy available for an existing cause of action.")

CONCLUSION

For the reasons discussed above, this Court should answer the U.S. District Court's certified questions by concluding that South Carolina's substantive and procedural laws apply to the Receiver's claims for fraudulent conveyance and unjust enrichment.

Respectfully submitted,

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October 25, 2017
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON CERTIFICATION OF QUESTIONS FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA
J. MICHELLE CHILDS, UNITED STATES DISTRICT COURT JUDGE

Appellate Case No. 2017-001652

Beattie B. Ashmore, in his capacity as court-appointed receiver for Ronnie Gene Wilson and Atlantic Bullion and Coin, Inc. Plaintiff,

v.

Jim Dodds Defendant.

PROOF OF SERVICE

I certify that on October 25, 2017, I did cause Ms. Melissa M. Duncan to serve the foregoing BRIEF OF PLAINTIFF ON CERTIFIED QUESTIONS, on all counsel of record by depositing the same in the U.S. Mail, postage prepaid, addressed to Bradford N. Martin, Esq. & Laura W. H. Teer, Esq., BRADFORD NEAL MARTIN & ASSOCIATES, P.A., Post Office Box 10410, Greenville, South Carolina, 29603.

October 25, 2017

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