

MANNING CURTIS BRADSHAW
& BEDNAR LLC

David C. Castleberry [11531]

dcastleberry@mc2b.com

Aaron C. Garrett [12519]

agarrett@mc2b.com

170 South Main, Suite 900

Salt Lake City, UT 84101-1655

Telephone (801) 363-5678

Facsimile (801) 364-5678

*Attorneys for Plaintiff R. WAYNE KLEIN, the
Court-Appointed Receiver of U.S. Ventures, LC,
Winsome Investment Trust, and the assets of Robert
J. Andres and Robert L. Holloway*

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

R. WAYNE KLEIN, the Court-Appointed
Receiver of U.S. Ventures LC, Winsome
Investment Trust, and the assets of Robert J.
Andres and Robert L. Holloway,

Plaintiff,

vs.

FUNDACION GUATEMALTECO
AMERICANA and ROBERTO E. PENEDO,

Defendants.

Case No.

**COMPLAINT TO AVOID
FRAUDULENT TRANSFERS, FOR
CONSTRUCTIVE TRUST AND
OTHER PROVISIONAL REMEDIES
AND FOR DAMAGES**

Plaintiff R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of U.S.
Ventures LC ("US Ventures"), Winsome Investment Trust ("Winsome"), and all of the assets of

Robert J. Andres (“Andres”) and Robert L. Holloway (“Holloway”) (collectively, the “Receivership Defendants”), by and through his undersigned counsel, states and alleges as follows:

NATURE OF THE PROCEEDING

1. The Receivership Defendants had been operating a classic Ponzi scheme since at least 2005 by obtaining funds from investors through violation of the federal commodities laws and using the funds from investors to pay bogus returns to earlier investors. In the course of the Ponzi scheme, the Receivership Defendants made material misrepresentations and omissions, misappropriated funds, and committed fraud as a commodity pool operator, all in violation of the Commodity Exchange Act (“CEA”).

2. On January 24, 2011, the Commodity Futures Trading Commission (the “CFTC”) filed a Complaint against the Receivership Defendants in the United States District Court for the District of Utah, Case No. 2:11CV00099 BSJ (“CFTC Action”). This suit alleges, among other things, that the Receivership Defendants operated an investment program in violation of the registration, licensing, and anti-fraud requirements of the federal commodities laws. In essence, the CFTC alleges that the Receivership Defendants engaged in a Ponzi scheme whereby over \$50 million was fraudulently taken from investors.

3. On January 25, 2011, the Receiver was appointed by the District Court to act as receiver in connection with the CFTC Action, on September 28, 2011, the Court entered an Order Reappointing Receiver, and on January 4, 2012, the Court entered a Second Order Reappointing Receiver.

4. On October 7, 2011, the Receiver filed a Notice of Receivership with the Northern District of Georgia pursuant to 28 U.S.C. § 754.

5. The instant action is brought by the Receiver as part of his continuing duty to: (i) recapture and return investor funds that were sent to US Ventures and Winsome and then diverted by the Receivership Defendants in the course of their massive Ponzi scheme, and (ii) avoid fraudulent transfers, seek a constructive trust, and obtain other provisional remedies and recover damages.

THE DEFENDANTS

6. Defendant Fundacion Guatemalteco Americana, also known as FundaGuam (“Fundacion”) received multiple payments from Winsome without having provided any funds, services, or other benefit to Winsome. These payments were identified in records of Winsome as being for “travel,” for “RIO Systems,” “advance,” or for “Guatemala refinery.” Under information and belief, Fundacion’s principal place of business is in Alpharetta, Georgia.

7. Defendant Roberto E. Penedo (“Penedo”) is the president of Fundacion and the person who directed its activities and who received the benefit of payments made from Winsome to Fundacion. Under information and belief, Penedo is a citizen of Alpharetta, Georgia.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this lawsuit because this lawsuit is ancillary to the CFTC Action and the appointment of the Receiver by this Court.

9. This Court has personal jurisdiction over the defendants in this matter pursuant to 28 U.S.C. § 754 and 28 U.S.C. § 1692.

10. Venue is proper in this Court under 28 U.S.C. § 754.

THE RECEIVER, STANDING, AND STATUS OF THE CFTC ACTION

11. On January 25, 2011, in the CFTC Action, the District Court entered an Order Granting Plaintiff's [CFTC's] *Ex Parte* Motion for Statutory Restraining Order (the "Order"). This Order included the appointment of a receiver. The Receiver was appointed as receiver of US Ventures and Winsome, together with any business entities owned by any Receivership Defendant. Pursuant to that Order, the Receiver was to take control of the funds, assets, and property of the Receivership Defendants wherever situated, and is fully authorized to pursue this action against Defendants.

12. Since the filing of the CFTC's action, defaults have been entered against Holloway and US Ventures; preliminary injunctions have been entered against all defendants in that action.

THE FRAUDULENT PONZI SCHEME

US Ventures

13. US Ventures was a Utah limited liability company headquartered in Salt Lake City, Utah that was run by Holloway. US Ventures claimed to be engaged in the trading of commodity futures in a manner that generated high investment returns for investors, with returns averaging 1% per day. US Ventures claimed to have very few days with losses; many investors were told there had been only one day of losses since the inception of trading.

14. US Ventures never registered any of its investment offerings under the securities laws or commodities laws. Neither Holloway nor US Ventures was registered with the National

Futures Association during this time period, as required. Neither Holloway nor US Ventures was licensed to sell securities during this time period.¹

15. Beginning in February 2005 and continuing through April 11, 2007, Holloway and US Ventures sold securities in the form of investment contracts, profit participation agreements, and interests in a commodity pool to investors. Holloway and US Ventures also acted as commodity pool operators and commodity trading advisers for the funds raised from investors. During this time period, Holloway and US Ventures raised over \$27 million from investors.

16. Holloway and US Ventures opened and maintained nine commodity futures trading accounts in the name of US Ventures with three Futures Commission Merchants (“FCM”).

17. US Ventures was to receive 30% of the net trading profits for each day that US Ventures earned profits. However, US Ventures was responsible to cover trading losses out of its own funds on days where trading resulted in losses.

18. Despite representations to investors that the commodities trading rarely resulted in losses, over 40% of the trading days resulted in losses. The average losses on unprofitable trading days were significantly greater than the average gains on profitable days. As a result, the aggregate losses exceeded the aggregate profits earned.

19. US Ventures sent \$25.9 million to brokerage accounts at the three FCMs. Between February 2005 and April 2007, US Ventures lost \$10,186,494.62 in commodities

¹ Holloway had been licensed to sell a limited range of securities between 1981 and 2001.

trading. The remaining \$15,731,483.38 was withdrawn, almost all of it to pay distributions and returns of principal to investors.

20. Notwithstanding these losses, US Ventures paid itself commissions and paid distributions to investors based on reports of profits during this time period. Account statements were prepared and sent to investors reporting consistent profits. Investors were given daily reports by US Ventures showing that the trading had never incurred losses during the time the investors were in the investment pool.

21. Of the twenty five months in which commodity futures were traded, twenty had losses. Four of the first five months of trading resulted in losses for the month. At least as early as November 2005, US Ventures was insolvent, owing investors significantly more than the value of holdings in its brokerage accounts.

22. Despite incurring significant trading losses, US Ventures reported profits to investors. Many investors withdrew funds from US Ventures, either as profit distributions or withdrawals of their investments. Because US Ventures was not making a profit, these payments to investors were made from the investment principal of existing investors or from amounts that were sent to US Ventures by other investors.

23. This means that US Ventures was operating as a Ponzi scheme from at least November 2005.

Winsome Investment Trust

24. Winsome described itself as a private trust, headquartered in Houston, Texas. Winsome was run by Andres, who had complete and sole authority over the trust.

25. Andres and Winsome solicited individuals and entities to send funds for participation in a commodity futures pool that Winsome said it managed or controlled. Some of the participants (investors) were told that US Ventures was doing the trading; others were led to understand that Winsome would be conducting the commodities trading.

26. Much of the money gathered by Winsome was received from third-party marketers – individuals who solicited others and were paid commissions for bringing in investors or were paid a percentage of the profits the investors were reported to have earned.

27. Between October 2005 and April 2007, Andres and Winsome collected over \$42 million from investors – either directly or through third-party marketers.

28. In mid-2006, Andres and Holloway reached an agreement that as Andres raised additional funds from investors, Andres would no longer send those funds to US Ventures. Under this arrangement, US Ventures agreed to change its accounting records to reflect the receipt of investments in the amounts reported by Andres to Holloway – even though Andres was no longer sending money to US Ventures or Holloway.

29. Out of the more than \$42 million Winsome received from investors before April 2007, Winsome sent \$24.7 million to US Ventures. The remainder was retained by Andres and Winsome. This money was used to make distribution payments to other investors, for other investment programs being pursued by Andres and Winsome, and for the personal uses of Andres, including payments to his wife.

SEC Lawsuit, Asset Freeze

30. On April 11, 2007, the SEC filed a lawsuit in the United States District Court for the District of Utah, Central Division, against Novus Technologies and other defendants. The SEC lawsuit named US Ventures and Holloway as relief defendants. At the request of the SEC, the court entered orders freezing the assets of Holloway and US Ventures. *SEC v. Novus Techs., LLC*, No. 2:07-CV-00235 (D. Utah, filed Apr. 11, 2007).

31. The freeze of US Ventures' assets applied to its bank accounts and FCM brokerage accounts. At that time, the bank accounts had aggregate balances of less than \$500.00 and the brokerage accounts had aggregate negative balances – meaning all the money had been lost in trading, paid out to investors, or used to pay personal expenses.

Winsome Investments After April 2007

32. After the assets of US Ventures were frozen by the Court in April 2007, US Ventures ceased conducting any commodities trading. Winsome, however, continued to solicit and accept funds from investors (directly and through third-party marketers). Investors were told a variety of stories, including representations that commodities trading was still taking place and that Winsome had other investment projects it was pursuing.

33. Between April 11, 2007 and December 10, 2010, Winsome collected an additional \$33,752,843.91 from investors.

34. When the CFTC filed suit against the Receivership Defendants on January 24, 2011, the bank and brokerage accounts for the defendants had aggregate account values of less than \$1,000.00.

35. At the time that the US Ventures commodities trading program was halted by the asset freeze, US Ventures owed more than \$30 million to Winsome. Winsome owed at least this amount to its investors. Because US Ventures had no assets and its commodities brokerage accounts had net negative values, Winsome's share of the value of the US Ventures trading account was zero. This means US Ventures had liabilities of more than \$30 million and zero assets.

36. Because the vast majority of Winsome's assets during the period from October 2005 to April 2007 consisted of a derivative interest in the value of the US Ventures commodities trading accounts and because the net value of these accounts declined steadily, culminating in a complete loss of all account value by April 2007, Winsome owed more to its investors than the value of Winsome's interest in US Ventures. This resulted in Winsome's US Ventures investment having negative equity at least as early as November 2005.

37. As noted above, Winsome took from investors at least another \$33,752,843.91 after April 2007. Winsome owed returns of principal to these investors as well as the interest or profit participations reported to investors in periodic account statements.

38. To the extent the investor funds were used to make distribution payments or returns of principal to other investors or were used by Andres for personal uses, these expenditures did not result in Winsome acquiring or holding any assets.

39. To the extent the investor funds were used in other investment projects pursued by Andres and Winsome, those investment projects did not result in tangible assets or payments

to Winsome, meaning the expenditures resulted in decreases in the net worth of Winsome, rather than increases. For example:

a. Andres caused Winsome and related companies to spend at least \$6.4 million in an effort to purchase several companies related to Aerospace Consulting Corp. After paying more than \$4.2 million directly for the purchase of Aerospace, Winsome was found in default and declared to have forfeited any interest in the company.

b. More than \$2.3 million was spent for a privately-funded project in Mexico called National Infrastructure Development Master Plan and for efforts to receive approval to build an oil refinery in Guatemala. The funds paid to Fundacion and Penedo were paid in furtherance of this scheme. Winsome has not received any of the \$20.2 million it was promised for these projects.

c. Over \$3 million was spent to free up an inheritance for Cindy Moore, that supposedly was being improperly withheld. Moore promised Winsome \$24.8 million for its help in securing the release of the large inheritance. Winsome has received no benefit from these payments.

d. In an August 2006 balance sheet, Winsome claimed an ownership interest in 100,000 acres of land in the Bahamas, precious metals, collections of coins and stamps, and 500 metric tons of gold. Winsome and Andres expended investor funds to acquire interests in these assets, but has none of these assets and has demonstrated no rights to these assets – to the extent they even exist.

e. Winsome and Andres paid over \$1.1 million of investor funds to companies that promised licensing rights and access to contracts valued at \$100 million.

Winsome has no assets to show for these expenditures.

f. At least \$140,000.00 was spent by Winsome trying to claim \$500 million in “U.S. Treasury Checks” that the Federal Reserve Bank of New York was supposedly holding for a Wilfredo Saurin. An interest in these funds was supposedly transferred from Saurin to another individual named Antonio Yu, and from Yu to Winsome. There is no reasonable basis to believe this money is being held by the Federal Reserve and Winsome has no demonstrable claim to the funds.

g. Winsome paid more than \$680,000.00 at the request of Jerome Carter and for a Mexican company named Grupo Corporativo. Winsome was promised a 1/6th interest in a 1% commission on an €800 million transaction and possibly other benefits. No commission was received and no assets are owned or possessed by Winsome resulting from these expenditures.

h. More than \$800,000.00 was spent trying to secure a loan through a company named Magna Pinpoint. The loan was variously described as resulting in Winsome receiving \$10 million, \$50 million, or \$200 million. None of these funds ever came to Winsome.

i. Over \$4.7 million of investor funds was spent trying to secure the release of \$550 million supposedly impounded by British and European Commission authorities. Winsome was to have been the custodian of these funds when they were released from impound. No funds were ever delivered to Winsome from this endeavor.

j. Winsome paid \$250,000.00 as an advance fee to a supposed wealthy businessman from Dubai, to secure a \$20 million loan to Winsome. Winsome never received any funds from the advance fee it paid.

k. Andres expended over \$160,000.00 of investor funds to open a restaurant in Las Vegas. The restaurant was never opened and these expenditures yielded no assets for Winsome.

40. In total, Winsome spent over \$35 million of investor monies for commodities trading at US Ventures or for investment projects (like those described in the prior paragraph) that were being pursued separately by Andres. None of the \$35 million spent by Andres and Winsome resulted in any assets for Winsome.

41. Notwithstanding that these projects resulted in the loss of \$35 million, Andres and Winsome continued to issue account statements to investor showing that their account values were increasing. Thus, Winsome was liable to investors for the more than \$35 million in investor funds that were lost in these investment projects and for interest and accumulated profits on those investment funds.

42. Because expenditures for these investment programs yielded no assets or tangible benefit, these expenditures exacerbated Winsome's negative equity position. The insolvency that began in November 2005 as a result of losses by US Ventures was significantly worsened by these investment projects.

43. As a result, Winsome initially became insolvent at least as early as November 2005 and its insolvency significantly worsened as time passed. At every point after November 2005, Winsome's liabilities exceeded its assets.

Winsome Operated as a Ponzi Scheme

44. As described above, Winsome received significant amounts of money from investors. It did not send all the investor money to US Ventures or use the funds for other investment projects.²

45. At least as early as December 5, 2005, Winsome began making distribution payments to investors.

46. Many of these distribution payments were not paid out of funds that Winsome received from US Ventures and were not paid with profits that Winsome had earned from other investment projects. As a result, these distributions could have been paid only with funds given to Winsome by other investors.

47. US Ventures lost money in its commodities trading activity every month between October 2005 and April 2006. Despite this, US Ventures and Winsome paid distributions to investors during this time period. Because US Ventures had lost money, these distributions could have come only from the principal investment amounts of investors or from funds provided by new investors.

² Substantial amounts were converted by Andres or diverted to other uses.

48. Between March 2006 and July 2008, there were more than one hundred instances in which Winsome paid funds to investors where the monies used for those payments could have come only from other investors.

AMOUNTS RECEIVED BY FUNDACION AND PENEDO

49. During the period from October 23, 2006 through September 24, 2008, Fundacion and Penedo received direct payments from Winsome in the sum of \$962,000.00.

50. The payments that Fundacion received from Winsome, which were made on behalf of and for the benefit of Penedo, were:

a. On October 27, 2006, a wire transfer payment in the amount of \$75,000.00 from the account of Winsome at Bank of America.

b. On November 15, 2006, a wire transfer payment in the amount of \$35,000.00 from the account of Winsome at Bank of America.

c. On November 29, 2006, a wire transfer payment in the amount of \$125,000.00 from the account of Winsome at Bank of America.

d. On December 22, 2006, a wire transfer payment in the amount of \$100,000.00 from the account of Winsome at Bank of America.

e. On January 11, 2007, a wire transfer payment in the amount of \$100,000.00 from the account of Winsome at Bank of America.

f. On February 26, 2007, a wire transfer payment in the amount of \$65,000.00 from the account of Winsome at Bank of America.

g. On October 26, 2007, a wire transfer payment in the amount of \$20,000.00 from the account of Winsome at Bank of America.

h. On November 28, 2007, a wire transfer payment in the amount of \$40,000.00 from the account of Winsome at Bank of America.

i. On March 24, 2008, an electronic transfer payment in the amount of \$170,000.00 from the account of Winsome at Bank of America.

j. On May 7, 2008, a wire transfer payment in the amount of \$35,000.00 from the account of Winsome at Bank of America.

51. The payments that Penedo received directly from Winsome were:

a. On October 23, 2006, an electronic transfer payment in the amount of \$4,000.00 from the account of Winsome at Bank of America.

b. On February 7, 2007, an electronic transfer payment in the amount of \$7,500.00 from the account of Winsome at Bank of America.

c. On February 20, 2007, an electronic transfer payment in the amount of \$7,500.00 from the account of Winsome at Bank of America.

d. On March 2, 2007, an electronic transfer payment in the amount of \$9,000.00 from the account of Winsome at Bank of America.

e. On March 28, 2007, an electronic transfer payment in the amount of \$15,000.00 from the account of Winsome at Bank of America.

f. On April 4, 2007, an electronic transfer payment in the amount of \$10,000.00 from the account of Winsome at Bank of America.

- g. On May 16, 2007, an electronic transfer payment in the amount of \$2,000.00 from the account of Winsome at Bank of America.
- h. On July 3, 2007, an electronic transfer payment in the amount of \$5,000.00 from the account of Winsome at Bank of America.
- i. On July 13, 2007, an electronic transfer payment in the amount of \$5,000.00 from the account of Winsome at Bank of America.
- j. On July 26, 2007, an electronic transfer payment in the amount of \$6,000.00 from the account of Winsome at Bank of America.
- k. On August 1, 2007, an electronic transfer payment in the amount of \$5,000.00 from the account of Winsome at Bank of America.
- l. On August 21, 2007, an electronic transfer payment in the amount of \$20,000.00 from the account of Winsome at Bank of America.
- m. On November 21, 2007, an electronic transfer payment in the amount of \$5,000.00 from the account of Winsome at Bank of America.
- n. On January 22, 2008, an electronic transfer payment in the amount of \$5,000.00 from the account of Winsome at Bank of America.
- o. On February 7, 2008, an electronic transfer payment in the amount of \$5,000.00 from the account of Winsome at Bank of America.
- p. On February 7, 2008, a second electronic transfer payment in the amount of \$1,000.00 from the account of Winsome at Bank of America.

q. On February 26, 2008, an electronic transfer payment in the amount of \$5,000.00 from the account of Winsome at Bank of America.

r. On March 4, 2008, an electronic transfer payment in the amount of \$5,000.00 from the account of Winsome at Bank of America.

s. On March 20, 2008, an electronic transfer payment in the amount of \$5,000.00 from the account of Winsome at Bank of America.

t. On April 3, 2008, an electronic transfer payment in the amount of \$35,000.00 from the account of Winsome at Bank of America.

u. On May 27, 2008, an electronic transfer payment in the amount of \$10,000.00 from the account of Winsome at Bank of America.

v. On July 3, 2008, an electronic transfer payment in the amount of \$10,000.00 from the account of Winsome at Bank of America.

w. On September 24, 2008, an electronic transfer payment in the amount of \$15,000.00 from the account of Winsome at Chase Bank.

52. In addition to the payments described above, the Receiver alleges, based on information and belief, that Fundacion and Penedo received other amounts in excess of those amounts described above.

53. Fundacion and Penedo did not provide any value to Winsome in exchange for the transfers they received from Winsome, including any transfers made to others on their behalf.

FIRST CLAIM FOR RELIEF
**(For Avoidance and Recovery of Fraudulent Transfers Against
Fundacion and Penedo)**

54. The Receiver restates and incorporates by this reference paragraphs 1 through 53 above, as though set forth herein in full.

55. The payments made by Winsome to Fundacion and Penedo during the period October 23, 2006 through September 24, 2008, which are more particularly described in Paragraphs 50 and 51 above, were made by Winsome with actual intent to hinder, delay, or defraud its investors. These investors mostly consist of innocent investors who gave money to Winsome and Andres believing the money was being invested profitably on their behalf. Those transfers to Fundacion, for the benefit of and on behalf of Penedo, and to Penedo directly, were made without Winsome receiving reasonably equivalent value in exchange, when Winsome was either insolvent or had become insolvent as a result of such transfers.

56. The payments made by Winsome to Fundacion and Penedo are avoidable by the Receiver under applicable law, including Utah Code §§ 25-6-5, 25-6-6, and 25-6-8.

57. The Receiver is entitled to damages from Defendants in the sum of not less than \$962,000.00, with interest as provided by Utah law from the date of each payment, plus any additional amounts proven at the trial of this case.

SECOND CLAIM FOR RELIEF
**(For Constructive Trust and Other Provisional Remedies
Against Fundacion and Penedo)**

58. The Receiver restates and incorporates by reference paragraphs 1 through 57 above, as though set forth herein in full.

59. By reason of the facts set forth above, Fundacion and Penedo were the recipients of monies wrongfully and fraudulently obtained by Receivership Defendants, thereby diminishing the amounts available to pay the creditors of Winsome.

60. Fundacion and Penedo have been unjustly enriched as a result of the wrongful and fraudulent acts, to the detriment of the creditors of Winsome.

61. Accordingly, in equity, a constructive trust should be impressed upon the assets acquired by Fundacion and Penedo with the monies transferred to them or their control by Receivership Defendants.

62. The Receiver also is entitled to one or more of the additional remedies provided for pursuant to Utah Code §25-6-8(1)(b) and (c).

PRAYER FOR RELIEF

WHEREFORE, the Receiver prays for judgment against Fundacion and Penedo as follows:

1. For judgment against all Defendants for an amount equal to all payments received by her from Receivership Defendants, which total is in excess of \$962,000.00, plus interest on each payment at the statutory rate from the date of such payment until judgment is entered.

2. A judgment imposing a constructive trust in favor of the Receiver over all monies and assets obtained with those monies that Fundacion and Penedo received from Receivership Defendants.

3. For post-judgment interest as allowed by Utah law.

4. For costs of suit, including reasonable attorney fees.

5. For such other and further relief as the Court may deem just and proper.

DATED this 17th day of January, 2012.

MANNING CURTIS BRADSHAW & BEDNAR LLC

/s/ Aaron C. Garrett
David C. Castleberry
Aaron C. Garrett
Attorneys for Receiver for US Ventures, LC, Winsome
Investment Trust, and the assets of Robert J. Andres and
Robert L. Holloway

Plaintiff:

Wayne Klein
Court-Appointed Receiver of US Ventures, LC,
Winsome Trust, and the assets of Robert J. Andres
and Robert L. Holloway
299 South Main, Suite 1300
Salt Lake City, UT 84111