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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.

DWAIN J. KILBURG,

Defendant.

Case No. 2:12-cv-00103-BCW

**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 District Court entered an Order Reappointing Receiver, and on January 4, 2012 the District Court entered a Second Order Reappointing Receiver.

4. On January 10, 2012, the Receiver filed a Notice of Receivership with the United States District Court, Northern District of Iowa, pursuant to 28 U.S.C. § 754.

5. The instant action is brought by the Receiver: (i) as part of his continuing duty to 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 DEFENDANT

6. Defendant Dwain J. Kilburg (“Kilburg”), a citizen of Iowa, received payments from US Ventures without having provided any funds, services, or other benefit to US Ventures. Upon information and belief, Kilburg resides in Bellvue, Iowa.

JURISDICTION AND VENUE

7. 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.

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

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

THE RECEIVER, STANDING, AND STATUS OF THE CFTC ACTION

10. 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 Kilburg.

11. 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

12. 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.

13. 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

14. Beginning in February 2005 and continuing through April 11, 2007, Holloway and US Ventures sold securities in the form of investment contracts, profit participation

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

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.

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

16. 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.

17. 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.

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 The remaining \$15,731,483.38 was withdrawn, almost all of it to pay distributions and returns of principal to investors.

19. 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.

20. 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.

21. 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.

22. 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.

SEC Lawsuit, Asset Freeze

24. On April 11, 2007, the SEC filed a lawsuit in the United States District Court for the District of Utah 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).

25. 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.

US Ventures and Winsome Investments After April 2007

26. 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.

27. When the CFTC filed suit in the CFTC Action 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.

28. 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, US Ventures had liabilities of more than \$30 million and zero assets.

AMOUNTS RECEIVED BY KILBURG

29. During the period from February 27, 2006 through March 2, 2007, Kilburg received direct payments from US Ventures in the sum of \$47,839.00.

30. The payments that Kilburg received directly from US Ventures were:

a. On February 27, 2006, a wire transfer payment in the amount of \$5,000.00 from the account of US Ventures at Chase Bank.

b. On April 10, 2006, a wire transfer payment in the amount of \$5,000.00 from the account of US Ventures at Chase Bank.

c. On May 2, 2006, a wire transfer payment in the amount of \$5,000.00 from the account of US Ventures at Chase Bank.

d. On May 22, 2006, a wire transfer payment in the amount of \$5,000.00 from the account of US Ventures at Chase Bank.

e. On November 24, 2006, a wire transfer payment in the amount of \$3,334.00 from the account of US Ventures at Key Bank.

f. On December 1, 2006, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at Key Bank.

g. On December 8, 2006, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at Key Bank.

h. On December 18, 2006, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at Key Bank.

- i. On December 22, 2006, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at Key Bank.
- j. On December 29, 2006, a wire transfer payment in the amount of \$1,167.00 from the account of US Ventures at Key Bank.
- k. On January 2, 2007, a wire transfer payment in the amount of \$1,167.00 from the account of US Ventures at Key Bank.
- l. On January 2, 2007, a second wire transfer payment in the amount of \$500.00 from the account of US Ventures at Key Bank.
- m. On January 5, 2007, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at Key Bank.
- n. On January 12, 2007, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at Key Bank.
- o. On January 19, 2007, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at Key Bank.
- p. On January 25, 2007, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at Key Bank.
- q. On February 2, 2007, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at the Bank of American Fork.
- r. On February 9, 2007, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at the Bank of American Fork.

s. On February 16, 2007, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at the Bank of American Fork.

t. On February 23, 2007, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at the Bank of American Fork.

u. On March 2, 2007, a wire transfer payment in the amount of \$1,667.00 from the account of US Ventures at the Bank of American Fork.

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

32. Kilburg did not provide reasonably equivalent value to US Ventures in exchange for the transfers he received from US Ventures, including any transfers made to others on his behalf.

FIRST CLAIM FOR RELIEF
(For Avoidance and Recovery of Fraudulent Transfers Against Kilburg)

33. The Receiver restates and incorporates by this reference paragraphs 1 through 32 above, as though set forth herein in full.

34. The payments made by US Ventures to Kilburg during the period February 27, 2006 through March 2, 2007, which are more particularly described in Paragraph 30 above, were made by US Ventures with actual intent to hinder, delay, or defraud its investors. These investors mostly consist of innocent investors who gave money to US Ventures and Holloway believing the money was being invested profitably on their behalf. Those transfers to Kilburg

were made without US Ventures receiving reasonably equivalent value in exchange, when US Ventures was either insolvent or had become insolvent as a result of such transfers.

35. The payments made by US Ventures to Kilburg are avoidable by the Receiver under applicable law, including Utah Code § 25-6-5, § 25-6-6, and § 25-6-8.

36. The Receiver is entitled to damages from Kilburg in the sum of not less than \$47,839.00, 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 Kilburg)

37. The Receiver restates and incorporates by reference paragraphs 1 through 36 above, as though set forth herein in full.

38. By reason of the facts set forth above, Kilburg was the recipient of monies wrongfully and fraudulently obtained by the Receivership Defendants, thereby diminishing the amounts available to pay the creditors of US Ventures.

39. Kilburg has been unjustly enriched as a result of the wrongful and fraudulent acts, to the detriment of the creditors of US Ventures.

40. Accordingly, in equity, a constructive trust should be impressed upon the assets acquired by the Kilburg with the monies transferred to him by the Receivership Defendants.

41. 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 Kilburg as follows:

1. For judgment against Kilburg in an amount equal to all payments received by him from US Ventures, Holloway, and related companies, which total is in excess of \$47,839.00, 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 Kilburg received from US Ventures, Holloway, and related companies.
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 20th day of January, 2012.

MANNING CURTIS BRADSHAW & BEDNAR LLC

/s/ Aaron C. Garrett
David C. Castleberry
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Investment Trust, and the assets of Robert J. Andres and
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Plaintiff:

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