

Jeffery J. Owens, #10973
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, Utah 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508
Attorney for Roberto E. Penedo

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF UTAH

<p>U.S. COMMODITY FUTURES TRADING COMMISSION,</p> <p>Plaintiff,</p> <p>v.</p> <p>U.S. VENTURES LC, a Utah limited liability company, WINSOME INVESTMENT TRUST, an unincorporated Texas entity, ROBERT J. ANDRES and ROBERT L. HOLLOWAY,</p> <p>Defendants.</p>	<p>OBJECTION TO RECEIVER’S REPORT AND RECOMMENDATION ON CLAIMS PROCESS</p> <p>Case No. 2:11 CV00099 BSJ</p>
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Robert E. Penedo (“Mr. Penedo”), by and through counsel Strong and Hanni law firm hereby objects to the Receiver’s Report and Recommendations on Claims Process as it pertains to Mr. Penedo’s claim, which was assigned Claim No. 1117.

RELEVANT FACTS AND BACKGROUND

1. Beginning in 2006, China Railway HuaChuang United Investment Co., Ltd. (“China Railway”), Pursca Investment Group, Ltd. (“Pursca”), RIO Systems, Inc. (“RIO”), and Fundacion Guatemalteco Americana (“FundaGuam”) formed a joint venture that planned to construct an oil refinery in Guatemala, and in 2007, entered into a Memorandum of Understanding memorializing the plan. These entities formed a Nevada corporation known as GPR Holdings, LLC (“GPR Holdings”). *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

2. Mr. Penedo was the president of FundaGuam at the time. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

3. Mr. Penedo was told that the total expected cost, investment and capital outlays required to obtain necessary approvals, develop, and construct the refinery was anticipated to be approximately Seven Billion, Two Hundred Million Dollars (\$7,200,000,000.00). *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

4. It was Mr. Penedo’s understanding that China Railway was to be the main source of actual construction funding for the refinery project, while RIO, together with an affiliated financial company Winsome Investment Trust (“Winsome”) would provide other types of funding. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

5. RIO Systems was given the primary responsibility to secure the necessary government approvals for construction on behalf of the joint venture GPR Holdings. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

6. Pursca was given the primary responsibility of acquiring crude products required to operate the refinery. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

7. FundaGuam is a nonprofit Guatemalan humanitarian aid foundation that provides various forms of humanitarian aid to the people of Guatemala. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

8. As president of FundaGuam, Mr. Penedo had close personal contacts with various members of the Guatemalan government, which contacts were considered critical to the approval and overall success of the refinery project. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

9. In an effort to help persuade the Guatemalan government to issue the necessary approvals and permits, GPR Holdings and Winsome planned to make an initial donation to FundaGuam of Five Million Dollars (\$5,000,000), and planned to make continuing additional future donations. In addition, RIO Systems and Winsome planned to grant FundaGuam a 10% ownership interest in the refinery. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

10. In October, 2006, RIO Systems, on behalf of GPR Holdings, hired Mr. Penedo to act as a facilitator and lobbyist to the Guatemalan government. In connection with this, the parties entered into a Refinery Agreement, which is attached hereto as Exhibit B.

11. Pursuant to the Refinery Agreement, as payment for Mr. Penedo's lobbying services, RIO agreed to pay Mr. Penedo an up-front sum of Four Million Dollars (\$4,000,000.00), agreed to reimburse all travel and general expenditures, and agreed to grant Mr.

Penedo a 1% ownership interest in the completed refinery project. *See* Refinery Agreement, attached hereto as Exhibit B.

12. As a result of this contract with RIO, Mr. Penedo resigned his position as President of FundaGuam in 2008 as agreed. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

13. Mr. Penedo was told, and it was his understanding at the time the Refinery Agreement was signed, that RIO intended to assign its rights and obligations under the Refinery Agreement to Winsome, or that Winsome would otherwise be assuming RIO's obligation, and that Winsome would actually be making the payments directly to Mr. Penedo. Mr. Penedo understood this to be appropriate pursuant to Sections 5.5 and 6.2 of the Refinery Agreement, and had no objections. It was Mr. Penedo's understanding that RIO and Winsome were somehow affiliated with each other and/or related to one another, though he did not understand the precise relationship between them. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

14. Mr. Penedo did not receive a copy of the assignment or assumption document, but nevertheless was told and otherwise led to believe that Winsome was obligated to Mr. Penedo for payment for Mr. Penedo's services. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

15. Mr. Penedo proceeded to travel to Guatemala, set up and participate in meetings between officials from RIO, Winsome, GPR, and the President of Guatemala, as well as set up

meetings with many other influential persons in the Guatemalan government. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

16. In addition, Mr. Penedo made several trips to China to act as a liaison between the various parties. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

17. Immediately after the Refinery Agreement was signed, in October, 2006, Winsome began making payments directly to Mr. Penedo for his services. Mr. Penedo verbally confirmed with Messrs. Ballard and Andres (the principals of RIO and Winsome, respectively) that payments would be made by Winsome, and was assured that Winsome had stepped into RIO's position under the Refinery Agreement and would continue to make the payments. Though Mr. Penedo never received any document showing that the Refinery Agreement had been assigned to Winsome, he understood that to be the case. The fact that Winsome was actually making the payments to Mr. Penedo reinforced that understanding. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

18. Winsome continued making payments pursuant to the terms of the Refinery Agreement until approximately September, 2008, at which point the payments abruptly stopped. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

19. Unbeknownst to Mr. Penedo, Winsome was allegedly operating a ponzi scheme. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

20. At that point, Mr. Penedo had fully performed his obligations pursuant to the Refinery Agreement, and was entitled to full payment for his services. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

21. Mr. Penedo is owed a total of approximately Four Million Dollars (\$4,000,000.00) for unpaid fees, plus the value of 1% of the refinery project, plus approximately Six Hundred Fifteen Thousand Dollars (\$615,000.00) in unreimbursed travel and related expenses. *See* Affidavit of Roberto E. Penedo, attached hereto as Exhibit A.

22. Mr. Penedo submitted a claim form pursuant to the claims process set up by the Receiver in this case, and attached all relevant documents Mr. Penedo had in his possession. *See* Claim Form, attached here to as Exhibit C.

23. Mr. Penedo did not have a copy of any assignment or assumption of the Refinery Agreement between RIO and Winsome, but did submit other evidence and documentation that supported his position that Winsome was obligated to pay him for his services. *See* Claim Form, attached hereto as Exhibit C.

24. The Receiver has recommended that Mr. Penedo's claim be rejected because Mr. Penedo was unable to produce evidence that Winsome was obligated on the contract between Mr. Penedo and RIO.

25. Mr. Penedo's affidavit remains wholly un rebutted by anyone affiliated with Winsome or RIO.

ARGUMENT

In submitting his objection to the Receiver's Report and Recommendation on Claims Process, Mr. Penedo seeks to accomplish two primary objectives. The first is to show that the documentation previously submitted by Mr. Penedo, along with Mr. Penedo's un rebutted testimony by affidavit establish that Winsome was indeed obligated to Mr. Penedo on the

contract between Mr. Penedo and RIO by virtue of an assignment or assumption or other similar mechanism between RIO and Winsome. The second objective is to commence a legal proceeding wherein Mr. Penedo can take advantage of the discovery procedures set forth in the Federal Rules of Civil Procedure to discover additional evidence and documentation that will help him establish his claim.

I. MR. PENEDO'S CLAIM SHOULD BE ALLOWED BECAUSE DOCUMENTATION ATTACHED TO THE PROOF OF CLAIM FORM, WITH MR. PENEDO'S UNREBUTTED AFFIDAVIT, COUPLED WITH EVIDENCE OF PART PERFORMANCE BY WINSOME ESTABLISHES THE AMOUNT AND VALIDITY OF MR. PENEDO'S CLAIM.

On or about August 1, 2012, Mr. Penedo submitted a claim form to the Receiver. The claim form was later amended to provide additional documentation at the request of the Receiver. Mr. Penedo attached various documents to the claim form that established the amount and validity of his claim, including his un rebutted affidavit. The Amended Proof of Claim form is attached hereto as Exhibit C.

The first document attached to the Claim Form was the Refinery Agreement between Mr. Penedo and RIO, along with various amendments thereto. The Refinery Agreement details the terms of the agreement between RIO and Mr. Penedo, and clearly establishes the amount of Mr. Penedo's claim, which is \$4,615,000. The amount of Mr. Penedo's claim is apparently not in dispute. The reason for rejecting Mr. Penedo's claim appears to be the fact that Mr. Penedo was unable to produce a written assignment of the Refinery Agreement from RIO to Winsome. Nevertheless, the simple fact that Mr. Penedo does not have a written assignment of the Refinery Agreement in his possession should not be dispositive of his claim.

Notwithstanding Mr. Penedo's inability to produce a copy of the assignment purporting to assign the Refinery Agreement to Winsome, there is substantial and unrebutted evidence that such an assignment did in fact occur, which evidence cannot simply be ignored. First, Mr. Penedo's affidavit clearly establishes that he was told and understood that the contractual obligations would be assigned to Winsome. Mr. Penedo was at least led to believe that the assignment actually occurred. His testimony is wholly unrebutted. The simple fact that Mr. Penedo does not have a copy of any documents assigning the obligations under the Refinery Agreement to Winsome does not mean that such documents do not exist, or that the arrangement was anything other than what Mr. Penedo's claims. The Refinery Agreement itself permits RIO to assign the Refinery Agreement to an affiliate or subsidiary of RIO. It was Mr. Penedo's understanding that Winsome fell under that provision. Even if such a written assignment does not exist, the Refinery Agreement does not require that any assignment be in writing.

In addition, Mr. Penedo produced emails and a letter from Robert J. Andres to Mr. Penedo that acknowledge Winsome's obligation to pay Mr. Penedo, all of which is attached to the Claim Form, which is in turn attached hereto as Exhibit C. Mr. Penedo also produced photos of himself and Mr. Andres meeting with various persons affiliated with the refinery project, also attached hereto as Exhibit C, which further evidence Winsome's acknowledgement that it was obligated to pay Mr. Penedo.

Perhaps the most important evidence that the Refinery Agreement was assigned to and/or assumed by Winsome is the fact that Winsome actually performed on the Refinery Agreement

and made payments to Mr. Penedo. These payments form the basis of the Receiver's companion lawsuit in state court against Mr. Penedo seeking to reclaim the funds paid. The fact that Winsome made the payments and partially performed RIO's original obligations pursuant to the Refinery Agreement is clear evidence that the contract was indeed assigned, and an acknowledgement of Winsome that it had been assigned.

Even if there is no written assignment or assumption of the Refinery Agreement, it is not fatal to Mr. Penedo's claim, and does not indicate that the Refinery Agreement was not in fact assigned. The Statute of Frauds only requires that certain agreements be reduced to writing. Utah Code Ann. § 25-5-1 et seq. The Refinery Agreement is not within the Statute of Frauds, and any assignment of the Refinery Agreement therefore need not be in writing. Even if an assignment of the Refinery Agreement were required to be in writing pursuant to the Statute of Frauds, the doctrine of part performance would render the Refinery Agreement enforceable against Winsome anyway. *See, e.g., Spears v. Warr*, 2002 UT 24, 44 P.3d 742 (Utah 2002).

The evidence produced by Mr. Penedo that Winsome was obligated to Mr. Penedo on the Refinery Agreement is clear and un rebutted. It is more than enough for the receiver to have recognized Mr. Penedo's claim. Mr. Penedo's unopposed affidavit, combined with the undisputed fact that Winsome made payments to Mr. Penedo pursuant to the Refinery Agreement, along with Mr. Andres' acknowledgement of the obligation all amounts to more than sufficient evidence to determine that the Refinery Agreement was indeed assigned to Winsome, and that Penedo's claim should have been allowed.

Mr. Penedo firmly believes that his claim should be allowed, and that in rejecting his claim, the receiver has ignored substantial critical evidence. Indeed, Mr. Penedo questions whether his claim was actually considered in good faith, or whether it was rejected out of hand on the basis of racial or ethnic discrimination.

II. THE CLAIMS PROCESS DID NOT PERMIT MR. PENEDO TO CONDUCT DISCOVERY TO OBTAIN INFORMATION THAT WOULD SUPPORT HIS CLAIM.

The claims process proposed by the Receiver and approved by the Court required Mr. Penedo to produce evidence that supported his claim against the receivership estate. It did not, however, provide any mechanism by which Mr. Penedo could discover the information or evidence supporting his claim. Mr. Penedo sought to intervene in the receivership case in order to seek discovery that would aid him in producing more complete information for the Claim Form. The receiver opposed the motion to intervene, and the Court indicated in its ruling that the objections process in the mechanism that would permit Mr. Penedo to conduct discovery.

Mr. Penedo now seeks to avail himself of the Federal Rules of Civil Procedure and attendant subpoena powers to accomplish that objective. As such, Mr. Penedo's claim should not be formally rejected until Mr. Penedo has had an adequate opportunity to conduct discovery in an effort to prove his claim.

CONCLUSION

Mr. Penedo provided more than sufficient information for the receiver to conclude that the Refinery Agreement was assigned by RIO to Winsome, and that Winsome was obligated to Mr. Penedo pursuant to the Refinery Agreement. Therefore, the receiver should have approved

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of January, 2013, a true and correct copy of the foregoing **OBJECTION TO RECEIVER'S REPORT AND RECOMMENDATION ON**

CLAIMS PROCESS was served by the method indicated below, to the following:

Manning Curtis Bradshaw & Bednar, LLC
David C. Casteberry
170 South Main Street, Suite 900
Salt Lake City, Utah 84101

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile
- CM-ECF Federal Filing System

/s/ Jackie Ervin