

MANNING CURTIS BRADSHAW
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Court-Appointed Receiver

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff,

v.

U.S. VENTURES LC, a Utah limited liability
company, WINSOME INVESTMENT
TRUST, an unincorporated Texas entity,
ROBERT J. ANDRES and ROBERT L.
HOLLOWAY,

Defendants.

**MEMORANDUM IN SUPPORT
OF RECEIVER'S THIRD MOTION
FOR PERMISSION TO FINALIZE
SETTLEMENT AGREEMENTS**

Case No. 2:11CV00099 BSJ

Judge Bruce S. Jenkins

R. Wayne Klein, the Court-Appointed Receiver¹ in this matter (the "Receiver"), by and
through his counsel of record, submits his memorandum in support of his motion for permission

¹ The Receiver has been appointed over U.S. Ventures LC ("USV"), Winsome Investment Trust ("Winsome"), and all the assets of Robert J. Andres ("Andres") and Robert L. Holloway ("Holloway"), (collectively, the "Receivership Defendants.")

to finalize settlement agreements described below.

BACKGROUND

On January 25, 2011, the Court entered an Order Granting Plaintiff's Ex Parte Motion for Statutory Restraining Order, Expedited Discovery, Accounting, Order to Show Cause re Preliminary Injunction and Other Equitable Relief (the "Receivership Order"). (Doc. #15.) With the Receivership Order, the Court placed U.S. Ventures, Winsome, and all the assets of Andres and Holloway under the control of the Receiver. (*See generally id.*) In the Receivership Order, the Court directed and authorized the Receiver to investigate the activities of the Receivership Defendants. (Doc. #15.) In carrying out his responsibilities, the Receiver was authorized to: "Initiate, defend, compromise, [or] adjust . . . any actions . . . necessary to preserve or increase the assets of the Defendants . . . or to recover payments made improperly by the Defendants." (*Id.* ¶ 27(i)).

As a result of the financial analysis and investigation conducted to date, the Receiver has made demand on numerous parties for the return of payments improperly paid by Receivership Defendants. The Receiver has already filed suit against many parties, seeking the recovery of payments made improperly. In two of the following instances, the recipients of funds have agreed to settle with the Receiver without the need for the Receiver to initiate litigation against them. In the third case, the settlement will resolve a lawsuit the Receiver has already filed. The Receiver now seeks confirmation of the following settlements (collectively defined as the "Settlement Agreements"):

1. Wright, Lindsey & Jennings, LLP. Wright, Lindsey & Jennings ("WLJ") is a well-respected law firm based in Little Rock, Arkansas. WLJ was retained to provide legal

services to Winsome in connection with two types of work. The first engagement, in November 2007, was to negotiate and close financings for projects being pursued by Winsome. A second, separate engagement agreement was signed in July 2008 under which WLJ was to provide advice and documentation for a loan Winsome was seeking from Magna Pinpoint. Winsome paid \$341,000.00 to WLJ for these services. In addition, Winsome paid \$368,758.05 to WLJ for professional services that WLJ provided to RIO Systems, another company closely affiliated with Winsome.

The Receiver began an investigation into Winsome's relationship with WLJ in April, 2011. WLJ has cooperated fully with the Receiver's investigation and provided substantial information and voluminous documents requested by the Receiver. In early December, 2011, the Receiver and WLJ entered into settlement discussions relating to certain claims that the Receiver indicated he planned to assert against WLJ.

These settlement discussions culminated in a settlement agreement signed on December 30, 2011. Under the terms of this settlement agreement, WLJ has paid \$425,000.00 to the Receiver. WLJ has also released any claims against Winsome for payment of additional legal fees that are owed to WLJ by Winsome. In return, the Receiver has agreed to release claims against WLJ for the monies paid by Winsome to WLJ as fees (including fees paid for services provided to RIO Systems) and claims against WLJ for alleged fraud or intentional misconduct that would not be covered by WLJ's insurance policy. The agreement does not release claims the Receiver might assert against WLJ seeking damages for malpractice, negligence, breach of fiduciary duty, and breach of contract. The settlement also provides that WLJ is admitting no liability. WLJ has stated it strenuously denies any liability for the conduct of Elgin Clemons and

says it is entering into this settlement to avoid expenses, litigation costs, and time of its attorneys and staff in defending a lawsuit over the settled issues.

This is a partial settlement of claims that the Receiver expects to assert against WLJ. The Receiver expects to file suit seeking recovery of significantly larger amounts from WLJ based on claims that were not part of this settlement.

2. John E. DeLoach Mr. DeLoach invested \$180,000.00 directly with Winsome. He separately loaned \$347,305.00 to Andres personally. DeLoach was paid \$195,000.00 by Winsome. The Receiver asserted that the \$15,000.00 that DeLoach was paid in excess of the monies he sent to Winsome were excess profits that must be returned. DeLoach argued that he was underpaid by more than \$330,000.00 because of funds he had sent to Andres in addition to the monies he sent directly to Winsome. In recognition of the significant losses DeLoach has suffered in his dealings with Andres, the Receiver agreed to settle with DeLoach for a return of \$10,000.00 of the overpaid amount. The settlement agreement provides that DeLoach waives any claim to future funds recovered by the Receiver but he retains the right to proceed against Andres for the funds sent directly to Andres.

3. G. John Runia The Receiver filed suit against Mr. Runia in October 2011 alleging he received \$88,107.47 from US Ventures without having sent any monies to US Ventures. The lawsuit was necessary because Runia had failed to respond to inquiries from the Receiver. After the lawsuit was filed, Runia provided information to the Receiver showing that he had sent \$125,000.00 to US Ventures International and acknowledged being paid a total of \$123,032.47 by US Ventures. The Receiver was able to determine that \$115,000.00 of the funds that Runia sent to US Ventures International had been forwarded to US Ventures, leaving Runia

overpaid by \$8,032.47. The Receiver has agreed to settle with Runia for \$7,500.00. The settlement agreement also provides that Runia: i) will waive any claims for recovery from the Receivership Estate, ii) is assigning to the Receiver his claims against Story and US Ventures International, iii) will provide information and documents to the Receiver, and iv) affirms that he was not aware of the fraud during the time he was investing, did not solicit others to invest, and did not receive any commissions. Upon approval of the settlement by this Court, the Receiver will dismiss the lawsuit against Runia.

ANALYSIS

The Receiver respectfully requests that the Court allow him to finalize the Settlement Agreements. Courts recognize that a "receiver has the power, when so authorized by the court, to compromise claims either for or against the receivership and whether in suit or not in suit." *SEC v. Bancorp*, 2001 WL 1658200 *2 (S.D.N.Y. 2001) (quoting 3 Ralph Ewing Clark, *A Treatise on the Law and Practice of Receivers*, § 770 (3d Ed. 1959). "In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *see also Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 325 (10th Cir. 1984). The *Jones* court explained:

In assessing whether the settlement is fair, reasonable and adequate the trial court should consider: (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.

Id.

Here, each of the Settlement Agreements is "fair, adequate, and reasonable." Each of the Settlement Agreements was negotiated fairly and honestly, and is the result of an arm's length transaction. The Receiver's settlement with WLJ is believed to be the best resolution of this portion of a very complicated matter. While the Receiver believes his claims based on the payments to WLJ by Winsome were strong, WLJ identified defenses that it believed would mitigate or defeat the Receiver's claims. This resolution has the advantages of: a) resolving some of the claims against WLJ, thereby narrowing the claims and the remaining litigation, b) providing a significant sum of money that can be used to fund ongoing and further litigation against targets (including WLJ), c) reducing the expenditure of the attorneys' fees and Receiver fees that would be incurred in litigation on a broader range of claims, d) reducing the uncertainty of the result that might be achieved in litigation, and e) eliminating claims that WLJ might be able to assert as a creditor of Winsome for unpaid legal fees.

The settlement with John DeLoach provides for a return of \$10,000.00 out of the \$15,000.00 overpaid to DeLoach, with the discount serving as a recognition of significant losses DeLoach has suffered in his dealings directly with Andres. The settlement avoids the expenditure of attorneys fees and receiver time that otherwise would be required for this case and takes into account the enormous losses DeLoach suffered in his other dealings with Andres. In light of these factors, the Receiver believes this settlement agreement is just and fair.

The settlement with John Runia returns 93% of his overpayment to the Receivership, gives the Receiver Runia's rights to recover against David Story, and information that Runia has relating to US Ventures, US Ventures International, and Story. The Receiver believes this

arrangement is just and fair for the Receivership Estate.

Therefore, the Court should allow the Receiver to finalize the Settlement Agreements.

CONCLUSION

For the foregoing reasons, the Receiver asks the Court to authorize the Receiver to finalize the Settlement Agreements described in this memorandum.

DATED this 30th day of January, 2012.

MANNING CURTIS BRADSHAW
& BEDNAR, LLC

/s/ David C. Castleberry
David C. Castleberry
Aaron C. Garrett
*Attorneys for R. Wayne Klein, Court-
Appointed Receiver*

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2012, I caused to be served in the manner indicated below a true and correct copy of the attached and foregoing **MEMORANDUM IN SUPPORT OF RECEIVER'S THIRD MOTION FOR PERMISSION TO FINALIZE SETTLEMENT AGREEMENTS** upon the following:

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