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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

U.S. COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

vs.

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

Defendants.

**RECEIVER'S OPPOSITION TO SUSAN
JOHNSON'S MOTION FOR ORDER
APPROVING CLAIM FOR JOHNSON**

Case No. 2:11CV00099 BSJ

District Judge Bruce S. Jenkins

R. Wayne Klein, the Court-Appointed Receiver ("Receiver") of U.S. Ventures LC,
Winsome Investment Trust, and all of the assets of Robert J. Andres and Robert L. Holloway, by
and through his undersigned counsel, opposes Investor Susan Johnson's Motion for Order

Approving Submission of Claim No. 1145 After the Claims Bar Date (the "Motion"). The Receiver respectfully requests that the Court deny the Motion filed by Susan Johnson ("Johnson") because: (1) her claim form was submitted untimely, (2) she was involved in promoting the Winsome investment fraud, (3) the claim form submitted by Johnson contains false statements under oath, and (4) allowing new claims to be recognized at this late date will substantially delay the goal of distributing funds to defrauded victims, will increase the costs to the Receivership Estate, and will delay closing the Receivership Estate.

BACKGROUND

On May 22, 2012, the Court approved commencement of a claims process to identify allowable claimants for assets of the Winsome receivership and to determine the amount of allowable claim for each allowable claimant. *See* Order Approving Proof of Claim Form and Claim Review Process (the "Order"), Doc. No. 157. In connection with approval of the claims process, the Court approved the claim form, instructions to the claim form ("Instructions"), the guidelines to be used in evaluating the claims submitted ("Guidelines"), the form and method of giving notice to potential claimants, and a bar date of July 31, 2012 for submission of claims. *See id.*; *see also* Declaration of Receiver R. Wayne Klein in Opposition to Susan Johnson's Motion for Order Approving Claim ("Klein Declaration"), ¶ 3, attached as Exhibit A.

The same day—May 22, 2012—the Receiver sent notice of the commencement of the claims process to all potential claimants he was able to identify. *Id.* ¶ 4. This notice was provided via email for persons for whom the Receiver had email addresses. *Id.* ¶ 5. The email notice included a link to a cover letter from the Receiver ("Cover Letter"), the claim form, Instructions, and Guidelines. *Id.* ¶ 6. Notice of the claims process was sent to Susan Johnson on

May 22, 2012 via email to the email address: susanjohn374@hotmail.com. *Id.* ¶ 7. This email was sent to an address used by Susan Johnson in her dealings with Winsome, and the email was not returned as undeliverable. *Id.* ¶ 8. The Cover Letter, Instructions, and claim form all specifically warned that claims needed to be submitted by July 31, 2012 or they might be disallowed. *Id.* ¶ 10. The Guidelines and Instructions also prominently warned that claims could be disallowed if they contained false information or if the claimant had been involved in promoting the fraud scheme. *Id.* ¶ 11.

In addition, the Receiver posted notice of the claims process on the receivership website at <http://www.kleinutah.com/index.php/receiverships/us-ventures>. *Id.* ¶ 12. Information on the website about the claims process was posted at the top of the website and remained in that prominent location until well after the bar date for submission of claims. *Id.* ¶ 13. Moreover, the Receiver published notice of the claims process in the national newspaper *USA Today*, weekly for three weeks beginning May 29, 2012. *Id.* ¶ 14.

Johnson signed a claim form on May 6, 2013, which the Receiver received on June 24, 2013. The same day, on June 24, 2013, the Receiver sent Johnson a “Notice of Rejected Proof of Claim,” which noted the late filing and other grounds for rejection. *Id.* ¶ 15. The Receiver rejected Johnson's claim because her claim was untimely, she was a third-party marketer who introduced another investor to the Winsome fraud and was entitled to receive commission based on the investments of another investor, and she provided the Receiver with false and incomplete information. *Id.* ¶ 16.

ANALYSIS

I. JOHNSON'S MOTION SHOULD BE DENIED BECAUSE HER CLAIM WAS SUBMITTED UNTIMELY AND SHE HAS UNREASONABLY DELAYED BRINGING THIS MOTION.

Courts recognize the purpose of setting claim deadlines and the importance of denying claims submitted after the bar date. In *SEC v. Hardy*, 803 F.2d 1034 (9th Cir. 1986), investors appealed the decision of a district court denying their claims filed after the bar date, and, on appeal, the *Hardy* court affirmed the ruling of the district court. The *Hardy* court identified factors to be used in evaluating the fairness of a claims deadline, and noted that the procedure for requiring claims by a specific date was fair. *Id.* The Ninth Circuit reasoned: "Accordingly, the district court's decision to establish deadlines for filing claims, and to bar untimely claims, is reasonable in light of the complexity of the receivership and the procedure employed to notify potential claimants." *Id.* at 1039.

Further, in a case decided last year, *Bendall v. Lancer Management Group, LLC*, 523 Fed.Appx. 554 (11th Cir. 2013), two individuals attempted to submit claims on a receivership estate after the bar date established by the district court. The district court in *Bendall* denied these claims, concluding that the individuals had "failed to file a proof of claim, contingent or otherwise, by the claims bar date." *Id.* at 556. On appeal, the ruling of the district court was upheld, and the *Bendall* court concluded that the claims at issue in that case were appropriately barred as untimely by the district court's case management order setting the claims bar date. *Id.* at 557. The *Bendall* court also emphasized that an "action by a trial court in supervising an equity receivership is committed to his sound discretion and will not be disturbed unless there is

a clear showing of abuse. *Id.* (citing *S.E.C. v. Safety Fin. Serv., Inc. v. Ark. Loan & Thrift Corp.*, 674 F.2d 368, 373 (5th Cir. 1982)).

In the Motion, Johnson cites to several cases decided between 1927 and 1940 for the proposition that courts cannot deny late-filed claims so long as some funds remain undistributed. As the *SEC v. Hardy* and *Bendall v. Lancer Management Group, LLC* cases show, the cases cited by Johnson do not reflect the current state of the law. Moreover, for reasons described below in section IV, such a standard would make administration of a receivership estate lengthier, more expensive, and almost impossible to ever conclude as new claims could continue to be asserted on the receivership estate.

Here, the bar deadline for filing claims was July 31, 2012. Klein Declaration, ¶ 10. Exhibit A. Johnson's claim was signed on May 6, 2013—more than ten months after the claims bar date. Johnson asserts, incorrectly, that she was not given notice of the claims process. The Receiver sent a link to the claim form and associated documents to Johnson on May 22, 2012. *Id.* ¶ 7. This notice was sent to the email address susanjohn374@hotmail.com, the email address Johnson used in her dealings with Winsome, and this email was not returned as undeliverable. *Id.* ¶ 8. In addition, claims information was posted on the Receivership website on May 22, 2012. *Id.* ¶ 12. This included copies of the claim form and associated documents. Notice was also published in the national newspaper *USA Today* once weekly for three weeks. *Id.* ¶ 14. The claims bar deadline was prominently noted in the claims materials sent directly to Johnson. *Id.* ¶¶ 6-10. This included the Cover Letter, the Claim Form itself, paragraphs 1 and 8 of the Guidelines, and paragraph 6 of the Instructions. *Id.* Moreover, the website and the newspaper notice both noted the deadline for submission of claims. *Id.* ¶¶ 13, 14. Thus, not only was

Johnson given direct notice of the claims process, but notice was available on the Internet and for three weeks in a national newspaper.

On June 24, 2013, the Receiver sent Johnson a “Notice of Rejected Proof of Claim,” which noted the late filing and other grounds for rejection. *Id.* ¶¶ 15, 16. In the Notice of Rejected Proof of Claim, the Receiver notified Johnson that if she did not agree with the Receiver's findings, she should “file a motion with the Court asking to be considered at this late date and explaining why the claims process should be halted and revised to include you.” Notice of Rejected Proof of Claim at 2, attached as Exhibit 5 to Klein Declaration, Exhibit A. Notably, Johnson waited another seven months after receiving this rejection to file her motion. Johnson has not explained why she waited over half a year before seeking an order from the Court allowing her late-filed claim. Accordingly, Johnson's Motion should be denied.

II. JOHNSON'S MOTION SHOULD BE DENIED AND HER CLAIM REJECTED BECAUSE JOHNSON ASSISTED IN PROMOTING THE WINSOME FRAUD.

The Receiver has found documents showing that Johnson was the sales intermediary between Winsome and investors Larry Koch and Beverly Darilek. *Id.* ¶ 17. Koch and Darilek agreed to invest \$100,000.00 with Winsome in August 2006 based on an investment agreement labeled “For Your Growth and Susan Johnson Joint Venture Agreement.”¹ *Id.* ¶ 18. Under that investment agreement, Koch and Darilek would receive only 70% of the anticipated profits of the business. *Id.* Johnson would receive 10% of the profits. *Id.*

This joint venture agreement states: “**PARTY-B** has knowledge of investment possibilities capable of exceeding normal investment returns. . . .” *Id.* It also recites that the

¹ “For Your Growth” is a company operated by Johnson’s sister, Connie Patterson. Patterson separately marketed Winsome to numerous other investors and Patterson received substantial payments from Winsome. On October 31, 2013, Judge Waddoups granted judgment for the Receiver against Patterson in the amount of \$1,966,417.00. *Klein v. Patterson*, 2:11-cv-723-CW, Doc. No. 102.

investors “requested to participate in mostly automated trading utilizing past experiences which have been successful . . . known to **PARTY-B** and to which **PARTY-B** shall monitor on behalf of **PARTY-A**. . . .” *Id.*

This document was signed by Johnson. *Id.* Thus, it was Johnson who was claiming to have knowledge of automated trading and it was Johnson who was promising to monitor the investments on behalf of Koch and Darilek. *Id.* Whether or not Johnson had knowledge of the automated trading or whether she actually monitored the investments—as promised—the agreement she signed claimed that she had such expertise and that she would provide that monitoring service. *Id.* Indeed, that is why she was to be paid 10% of the profits earned by Koch and Darilek. *Id.* Koch and Darilek affirmed that Johnson solicited their investment. *Id.* ¶ 19. Question B.2 on the claim form asked: “Who explained the investment to you or solicited your investment?” Koch and Darilek responded: “Connie Patterson (as For Your Growth) and Susan Johnson.” *Id.*

The Receiver has also found a Form 1099 tax notice that Winsome created for Johnson dated December 31, 2005. *Id.* ¶ 20. This notice, taken from the hard drive of Andres’ computer, reports payments to Johnson of \$1,672.00 during 2005. *Id.* The Receiver has not been able to determine whether this amount represented profits from Johnson’s own investment or her share of profits from investments she solicited from other investors before Koch and Darilek. *Id.*

Further, Johnson seems to argue that the Receiver has a duty to automatically make distribution payments to all persons who sent money to Winsome as long as the persons are known to the Receiver. Motion at 8. Such a standard would impose a high administrative burden on the Receiver to identify which funds sent to Winsome were sent for investment or

other purposes, would negate many of the requirements of the claim form (such as requiring the claim forms to be signed under oath), and would nullify several claims process requirements (such as the filing deadline, the prohibition on false statements, and the disqualification of insiders). Instead, Johnson should be held to the same requirements that all other allowable claimants satisfied: filing a timely claim, signing it under oath, being required to provide truthful information, and being subject to disqualification for involvement in Winsome's promotional efforts.

III. JOHNSON'S MOTION SHOULD BE DENIED AND HER CLAIM REJECTED BECAUSE HER VERIFIED CLAIM FORM SOUGHT UNJUSTIFIED AMOUNTS AND INCLUDED OTHER FALSE STATEMENTS.

When Johnson signed her claim form on May 6, 2013, she affirmed: "I/we do [hereby] declare under penalty of perjury that the above information is correct to the best of my/our knowledge and belief." *See* Exhibit A to Declaration of Susan Johnson dated January 20, 2014, doc. no. 318-2. The Guidelines warned claimants that their claims could be denied if the claim form contained false information, specifically including the failure to list distributions received. *See* Guidelines ¶ 8, attached as Exhibit 1 to the Klein Declaration, Exhibit A. Similarly, the Instructions warned that if the amount claimed was based on false or misleading information, the claim could be denied. *See* Instructions for Proof of Claim Form, ¶ 2, attached as Exhibit 1 to the Klein Declaration, Exhibit A. Insisting on this condition was especially critical in this case since such a large percentage of investors invested through, or received distributions from, third party marketers. Investors might list only the distributions they received directly from Winsome and omit distributions received from others. If that occurred, the investors would receive higher distributions than otherwise would be merited. As a result, the Guidelines and Instructions

placed special emphasis on the importance of claimants accurately acknowledging all payments they received—on pain of having inaccurate claims rejected.

Johnson's claim form only acknowledged receiving \$4,000.00 in distribution payments from Winsome. *See* Exhibit A to Declaration of Susan Johnson dated January 20, 2014, doc. no. 318-2. The Receiver, however, found that at least \$24,000.00 was paid directly to Johnson in distributions. Klein Declaration, ¶ 21, Exhibit A. Johnson now acknowledges receipt of the additional \$20,000.00 in distributions that were not listed on her claim form, saying it was inadvertently missed. Motion at 4-5.

Johnson's omissions, however, are not limited to the \$20,000.00 she belatedly acknowledges. The Receiver sued two of Johnson's daughters who received payments from Winsome without sending investment funds to Winsome. *Id.* ¶ 22. Johnson signed affidavits and other documents that her daughters used in that litigation to oppose the Receiver's recovery actions. *Id.* ¶ 23. In those documents, Johnson asserted that the funds paid to Tsakas and Barrientes were distributions from her investment funds. *See* Declaration of Susan Johnson dated March 29, 2013, doc. no. 318-1. If the statements that Johnson made in those lawsuits are accurate, then Johnson's distributions from Winsome were as follows: i) \$4,000.00 listed on her claim form, ii) \$20,000.00 distribution on April 16, 2008, iii) \$12,250.00 sent to Tsakas, and iv) \$20,000.00 sent to Barrientes—a total of \$56,250.00. This is \$52,250.00 more than she acknowledged on her claim form. Klein Declaration, ¶ 24, Exhibit A. Johnson's failure to accurately list all these distributions on her claim form should disqualify her claim. Further, the Receiver has also identified another \$52,384.00 payment from Winsome that may have been sent to Johnson, indicating that Johnson may have received even more payments than those listed

above. *Id.* ¶ 25. This payment was made in January 2006 and the Receiver could have subpoenaed bank records if Johnson had submitted a timely claim. *Id.* However, the seven-year record retention requirement for banks has now expired, making it unlikely the Receiver could obtain records from the bank to verify the recipient of these funds. *Id.*

A second significant false statement by Johnson in her claim form was her response to Question A.4. Johnson answered “no” to the question: “Were you promised or did you receive compensation based on the amounts that others invested?” *Id.* ¶ 26. As shown in the Koch/Darilek Joint Venture Investment Agreement, Johnson was promised 10% of trading profits from the Koch/Darilek investment. *Id.* ¶ 27. Johnson’s negative response to this question is a demonstrably false statement made under oath.

IV. THE MOTION SHOULD BE DENIED BECAUSE ALLOWING JOHNSON'S LATE-FILED CLAIM WOULD CAUSE SUBSTANTIAL DELAYS AND INCREASE COSTS.

If the Court were to grant Johnson’s motion, i) other potential claimants who had missed the claims deadline would likely submit additional late-filed claims, ii) insiders, relatives of Andres, and other third-party marketers would likely submit claims, and iii) administration of the Receivership Estate would be delayed substantially and incur additional costs

First, if Johnson’s motion is granted, that would mean that the claims deadline was not a bar to filing a claim. Subsequent to the time the Receiver submitted his claims process report and recommendations, he has been contacted by several investors wanting to submit claims. *Id.* ¶ 28. He has told the investors that the deadline had passed and that the Receiver was unable to agree to recommend approval of their claims. *Id.* The Receiver told these investors they would have to make application to the Court for relief from the bar deadline. *Id.* ¶ 29. No other

investors have made such an application to the Court; however, if the Motion is granted, the Receiver believe other investors will seek to file untimely claims. *Id.* ¶ 30.

Second, if third-party marketers, like Johnson, are deemed to not be disqualified from receiving distributions of funds recovered by the Receivership Estate, the Receiver expects that many additional claims would be submitted by insiders and other marketers. *Id.* ¶ 31. If their status as insiders is not a bar to participating in funds recovered by the Receiver, there likely will be additional claims filed, with the amount of allowable claims growing substantially, and will affect the Receiver's position with respect to insiders and third-party marketers in the administration of the Receivership Estate. *Id.* ¶ 32.

Third, reopening the claims process to allow late-filed claims and claims by insiders will substantially delay any distribution of funds and would be expected to significantly increase the number and amount of claims. *Id.* ¶ 33. If the Motion is granted, the Receiver will need to spend additional time evaluating new claims, formulating new recommendations to the Court identifying the allowable claimants, and calculating the percentage recovery for timely and newly-submitted claims. *Id.* ¶ 34. When the Receiver submits such a new report, fairness may require that each of the new claimants and prior claimants should also be given the opportunity to file objections to the report, and those claimants who submitted timely claims may object to any payments going to new claimants. *Id.* ¶ 35. If additional investors are permitted to submit new claims, the question arises whether they should also be given an opportunity to object to the claims distribution methodology recommended by the Receiver. *Id.* ¶ 36. All of this will substantially delay any distribution of funds in the Receivership Estate and efforts to terminate the Receivership Estate. *Id.* ¶ 37. The Receiver has proposed making an initial distribution of

funds; however, if the claims process will be reopened, that initial distribution cannot be made at this time, but would have to await a new claims deadline (if any were imposed), evaluation of new claims submitted, and objections to the Receiver's recommendations on those claims. *Id.* ¶ 38. Contrary to Johnson's assertion, the Receiver and those who have filed timely claims would suffer significant prejudice if the Motion is granted.

CONCLUSION

The Motion should be denied because Johnson had notice of the claims process, yet waited until ten months after the claims deadline to file her claim. She then waited an additional seven months after her claim was rejected to file this motion, making it now 18 months since the claims deadline. Johnson's claim should also be rejected because she was a marketer for Winsome and submitted a verified claim with multiple instances of false information. Finally, the Motion should be denied because allowing new claims to be recognized at this late date will substantially delay the goal of distributing funds to defrauded victims, will increase the costs to the Receivership Estate, and will delay closing the Receivership Estate.

DATED this 7th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RECEIVER'S OPPOSITION TO SUSAN JOHNSON'S MOTION FOR ORDER APPROVING CLAIM FOR JOHNSON** to be served in the method indicated below to the interested parties in this action this 7th day of February, 2014.

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