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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.

**RECEIVER'S REPORT ON AND
RESPONSE TO OBJECTIONS TO
THE RECEIVER'S
RECOMMENDATIONS ON THE
CLAIMS PROCESS**

Case No. 2:11CV00099 BSJ

Judge Bruce S. Jenkins

R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of U.S. Ventures, LC ("USV"), Winsome Investment Trust ("Winsome"), and the assets of Robert J. Andres ("Andres") and Robert L. Holloway ("Holloway") (the "Receivership Entities"), submits this response to the objections that have been submitted ("Objections Response") by Claimants who disagree with the Receiver's Report and Recommendations on Claims Process ("Claims

Report”). Doc. No. 233, Claims Report. This Objections Response describes actions taken by the Receiver to disseminate the Claims Report, explains changes and corrections to the recommendations in the Claims Report, and responds to the objections that have been filed.

I. PROCEDURAL HISTORY OF THE CLAIMS PROCESS

The claims process began with an order from this Court on May 21, 2012 approving the claim form and claims procedures. Doc. No. 157, Order Approving Proof of Claim Form and Claim Review Process. Investors and other potential claimants were notified of the claims process by mail, email, website postings, and a newspaper notice.¹ The deadline for filing claims was July 31, 2012. The Receiver filed his Claims Report on December 20, 2012. Doc. No. 233, Claims Report.

II. NOTICE TO CLAIMANTS

On December 20, 2012, the Receiver sent copies of the Claims Report to all 143 claimants. For 138 claimants, the Claims Report was sent via email. Copies were sent to 173 email addresses for those 138 claimants, resulting in some claimants receiving more than one copy of the report. An additional five copies of the report were mailed to claimants where the claimant had not provided an email address.

The Claims Report was also posted to the Receivership website on December 20, 2012. The Claims Report was posted prominently at the top of the website and remains there.

The Claims Report notified Claimants that any objections needed to be filed with the Court by January 22, 2013.

Some claimants contacted the Receiver after receiving the Claims Report asking

¹ A detailed explanation of actions taken to advertise the availability of the claims and of the claims review process can be found in the December 20, 2012 Claims Report.

questions or seeking additional information. The Receiver provided additional information and explanation in response to these requests.

III. CORRECTIONS AND CHANGES TO THE CLAIMS REPORT

Since the date of the Claims Report, further analysis and communications with claimants have resulted in a few changes to the information in the Claims Report:

1. Claim #1057: Exhibit 3 to the Claims Report had the correct allowable claim amount of \$90,600.00, but the investment amount should have been \$140,000.00 and the total distributions should have been listed as \$49,400.00.
2. Claim #1041: This claimant notified the Receiver that this claim should have reflected acceptance of the Receiver's recommendation.
3. Claim #1143: This claim was recommended initially for an allowable amount of \$84,000.00. Further investigation by the Receiver showed that one \$8,000.00 distribution had gone to a different person than the claimant, so this claim should show an allowable claim amount of \$92,000.00. The claimant has accepted this recommendation.

IV. OBJECTIONS FILED

Two timely objections have been filed to the recommendations in the Claims Report. A third objection to the recommendations in the Claims Report was untimely filed. The Receiver provides his initial response to these three objections below.

A. CLAIM NO. 1116

This claim involves RCH2, LLC, which was submitted by Lon A. Jenkins, the court-appointed receiver for RCH2 and Novus Technologies.² The Receiver recommended an allowable claim amount of \$2,988,538.00 for RCH2, but RCH2 believes its claim should be \$3,423,538.00. The difference of \$435,000.00 relates to monies sent to US Ventures by an entity named Springridge, LLC. RCH2 believes that the Springridge funds were assets of the RCH2 receivership estate and should be part of its allowable claim. Doc. No. 239, Objection to Receiver's Recommendation of Allowable Claim Amount for Claim No.1116 ("RCH2 Objection"). The Receiver disagrees.

1. Disputed Question: The dispute between the Receiver and RCH2 is quite narrow and straightforward: Was Springridge, LLC under the complete and exclusive control of Robert Casey Hall such that all of Springridge's monies and assets belonged to Hall and only to Hall. If so, Springridge's claim would appear to belong to RCH2. If not, the claim is not one that can be asserted by RCH2, and the claim should be reduced by the amount of Springridge's investment.

2. Summary of Claimant's Argument: RCH2's objection cites to an order of its receivership court that Mr. Jenkins was appointed to be the receiver of "the interests of RCH2 and [] Hall in . . . Springridge, LLC[.]" *Id.* at 3. The objection asserts that since Hall "was in sole control of Springville [sic] . . . the amounts invested by Springridge with U.S. Ventures or Holloway comprise a legitimate and allowable portion of Claim No. 1116 . . ." *Id.* In support of this position, RCH2 asserts that i) the SEC's recommendation that Jenkins be appointed as receiver must have been based on the SEC's understanding that Hall had a controlling interest in

² Mr. Jenkins also submitted a claim for Novus Technologies, another entity included in his receivership. The recommended claim amount for that claim is not being contested.

Springridge, ii) the only principal of Springridge listed on records of the Utah Division of Corporations was Hall, iii) the Springridge articles of organization list Hall as the initial manager of Springridge and show Hall's home address as the designated office of Springridge,³ and iv) the November 2012 records of the Utah Division of Corporations list Hall's home address as the address for Springridge. *Id.* at 3 – 4. RCH2 insists that the “cumulative effect of the foregoing leads to the inescapable conclusion that Robert Casey Hall was the sole control person of Springridge” *Id.* at 4. Consequently, RCH2 asserts that Springridge's investments in U.S. Ventures should be part of the receivership estate of RCH2. *Id.*

3. Receiver's Response. The Receiver does not contest the accuracy of the records of the Utah Division of Corporations, but does not agree that the information cited leads to the inescapable conclusion that Hall was the sole control person for Springridge. To the contrary, the Receiver believes that the following information leads to the conclusion that Hall was not the only control person of Springridge.

Springridge's Investment Funds were sent to US Ventures by Robert England, not Hall.

The most compelling indication that Hall was not the sole control person of Springridge is that none of the five payments sent to US Ventures by Springridge were sent by Hall. *See* Chart Summarizing Payments from Springridge, LLC, attached as Ex. 1 to Declaration of Receiver Wayne Klein in Support of Receiver's Response to Objections to the Report on Claims Process ("Klein Declaration"), attached as Ex. A. While the bank account from which the investments were sent to US Ventures listed Hall's name along with Springridge, Robert England was a signatory on the Springridge bank account and he is the one that directed the bank to send each of the five payments to US Ventures, as more fully explained below:

³ Hall was also the organizer of the company.

- \$100,000 transfer on March 2, 2007. In a March 2, 2007 fax to the operations manager at the Bank of American Fork, Robert England signed as the authorized representative of Springridge, confirming a verbal request from Hall to send \$100,000.00 to US Ventures. *See* Facsimile from Robert D. England to Tonya Hawkins, dated March 2, 2007, attached as Ex. 2 to Klein Declaration, attached as Ex. A. The Receiver does not know why the bank wanted England to provide confirmation of Hall's request.
- \$300,000 transfer on March 13, 2007. A wire transfer request form to send \$300,000.00 to US Ventures from the bank account of Springridge was signed by Robert England, not Hall. The address of Springridge shown on this bank record is an office building in Draper, Utah, not the home of Hall. Customer Wire Request Form dated March 13, 2007, attached as Ex. 3 to Klein Declaration, attached as Ex. A.
- \$10,000 transfer on March 20, 2007. The wire transfer request form to send this payment to US Ventures also was signed by England and not Hall. Customer Wire Request Form dated March 20, 2007, attached as Ex. 4 to Klein Declaration, attached as Ex. A.
- \$15,000 transfer on March 30, 2007. The wire transfer form for this payment was signed by England, not Hall. Customer Wire Request Form dated March 30, 2007, attached as Ex. 5 to Klein Declaration, attached as Ex. A.
- \$10,000 transfer on April 6, 2007. A \$10,000.00 check drawn on the bank account of Springridge was given to US Ventures on April 6, 2007. The check is signed by England, not Hall. Check dated April 6, 2007, attached as Ex. 6 to Klein Declaration, attached as Ex. A.

Hall was not the only Signatory to the Springridge Bank Account. Exhibit 6 to the Klein Declaration contains copies of six checks written on the Springridge bank account. *Id.* The six checks were written to six different payees. *Id.* All six are signed by England; none are signed by Hall. *Id.* The fact that all the payments from Springridge to US Ventures were authorized by England, not Hall, and that checks to at least five other payees were signed by England, demonstrates that Hall was not the only authorized signer on the Springridge bank account.

Articles of Organization. While the articles of organization list Hall as the initial manager, they state “Management of the Company shall be vested in its managers.” Articles of Organization of Springridge, LLC, attached as Ex. 7 to Klein Declaration, attached as Ex. A. The use of the plural, *managers*, suggests that Hall was not the only manager.⁴ *Id.*

Registered Agent. While the articles of organization listed Hall as the initial manager, he was not listed as the registered agent. Knute A. Rife was listed as the registered agent, suggesting that Hall was not the sole person having responsibility for the company. *Id.*

Address. While Hall’s home address was listed in the articles of organization and the 2012 online records of the Utah Division of Corporations, that was not always the company’s address. During the time that Springridge was sending money to US Ventures, the company used an address of 11650 South State Street, Suite 300, Draper, Utah. *See* Customer Wire Request Forms, attached as Exhibits 3, 4, and 5 to Klein Declaration, attached as Ex. A. The preprinted address on the Springridge checks listed the Draper business address, not Hall’s home address. Checks, attached as Ex. 6 to Klein Declaration, attached as Ex. A.

⁴ Even if Hall were the only manager of Springridge, that would not demonstrate that he was the sole owner – or an owner at all – of Springridge. Limited liability companies can and do have managers who are not owners of the company.

Absence of Best Evidence. Notably missing from the RCH2 objection is either of the two sources of the best evidence whether there was only one manager – or multiple managers – of Springridge. One source of best evidence would be an affidavit or sworn testimony of Mr. Hall that he was the sole manager and owner of Springridge. Another source would be authenticated business records of the company identifying the managers and owners of the company. This might include stock ownership records, minutes of company meetings, the operating agreement of the company, financial records showing the sources of initial capital for the company, and bank account documents listing persons authorized to make withdrawals from the company bank accounts. The absence of these types of records should at least create a presumption against the unverified and uncorroborated assertions in the objection – in light of the contrary evidence described above.

Lack of Good Faith. RCH2's objection describes how Hall solicited over \$3 million from other investors and sent that money to US Ventures. Doc. No. 237, RCH2 Objection at 2. Hall apparently "promis[ed] investors monthly returns ranging from 3% to 10%." *Id.* Ordinarily, claims by a promoter of an investment scheme would be denied, as the promoter would be unable to meet his burden of demonstrating good faith. In light of Mr. Jenkins' role as receiver for RCH2 and other entities, the Receiver has recommended that those payments that can clearly be traced as having come into US Ventures from the RCH2 receivership entities be permitted as a claim against the US Ventures/Winsome Receivership Estate.⁵ However, the equitable justifications for permitting claims for transactions by companies that were themselves running frauds becomes too tenuous when the transactions cannot be clearly identified as having

⁵ The two claims submitted by the RCH2 and Novus receiver already total \$3,549,904.00 in recommended allowable claims. This amount constitutes 21% of the total recommended allowable claims, meaning that more than one-fifth of the monies recovered in the current Receivership will be paid over to another receiver.

come from – and only from – the person whose assets were placed in receivership.⁶

Conclusion. In this case, it is not clear (much less “inescapable”) that the monies sent to US Ventures by Springridge were monies belonging only to Robert Hall. Therefore, the \$435,000.00 that Springridge sent to US Ventures should not be allowed as part of the claim of the RCH2 receivership.

B. CLAIM NO. 1117

This claim involves Roberto Penedo. On January 17, 2012, the Receiver sued Penedo and Fundacion Guatemalteco Americana (“Fundacion”), seeking the recovery of \$962,000.00 paid to Penedo and Fundacion by Winsome. Winsome paid monies to Penedo and Fundacion that were taken from innocent investors based on promises the money would be used for commodities trading. The payments to Penedo and Fundacion were for the benefit of RIO Systems (“RIO”), a company owned by Clayton L. Ballard, a friend of Andres. Winsome made these payments when it had no obligation to do so and when Winsome received no benefit from the contract. Now, Penedo seeks to turn the Receiver’s lawsuit on its head by arguing that these payments from Winsome to him are instead evidence that Winsome is the successor to a contract between him and RIO, and that he is now owed \$76 million by Winsome. *See generally* Doc. No. 238, Objection to Receiver's Report and Recommendation on Claims Process (“Penedo Objection”). Penedo seeks to appear less greedy by asserting that while he is owed \$76 million, he will claim only \$4.4 million from the Receivership Estate. *Id.*

1. Disputed Questions. The issues underlying Penedo’s objection are whether: a) the contract between Penedo and RIO was assigned to Winsome, making Winsome liable to

⁶ It should be recognized that Springridge itself was not placed in receivership. The RCH2 receivership includes only Hall’s interests *in* Springridge. Stipulated Order Appointing Receiver at ¶ 2, attached as Ex. A to RCH2 Objection, Doc. No. 237.

Penedo, and b) Penedo's claim against RIO – or Winsome – is an allowable claim against the Receivership Estate.

2. Summary of Claimant's Argument. On October 23, 2006, Penedo and Fundacion entered into a contract with RIO relating to a refinery the parties hoped to build in Guatemala. *Id.* at 2 – 4. The refinery was never built. On October 23, 2006, Winsome began sending money to Penedo and Fundacion for RIO until September 2008. *Id.* at 5. Penedo asserts that the contract he had with RIO was assigned by RIO to Winsome and that Winsome's payments to him and Fundacion evidence that assignment. *See generally id.* Penedo asserts that he is owed \$4,000,000.00 in unpaid fees, \$615,000.00 in unreimbursed travel and related expense, and \$72,000,000.00 for his 1% interest in the value of a refinery that was never built. *Id.* at 6. Accordingly, Penedo is pursuing a claim of \$4,418,000.00 against the Winsome recovery fund. *Id.*

3. Receiver's Response. The Receiver believes there is no factual or legal basis for Penedo to assert that Winsome is responsible for any monies he might be owed by RIO. The Receiver believes that Penedo's objection is an attempt to gain leverage he can use to defend against the Receiver's lawsuit seeking the recovery of \$962,000.00 paid to Penedo and Fundacion. The Receiver believes the following shows that Winsome is not responsible for the contractual obligations of RIO Systems:⁷

Winsome Not a Party to the Contract. The October 23, 2006 refinery contract ("Refinery Agreement") is between Penedo, Fundacion, and RIO. Refinery Agreement, attached as Exhibit B to Penedo Objection, Doc. No. 238. Winsome is not a party to the contract and is not

⁷ Because the Receiver believes that Winsome is not liable for any contractual obligations of RIO, this Objection Response does not address any of the merits of Penedo's claims against RIO.

mentioned anywhere in the contract. *Id.* The contract is signed by Clayton Ballard, Penedo, and a representative of Fundacion. *Id.* It is not signed by Andres or anyone purporting to represent Winsome. *Id.*

No Written Agreement by Winsome to Assume Duties Under the Contract. Paragraph 5.5 of the Contract provides that any party that would assume obligations under the Contract must do so in writing. *Id.* There is no indication that Winsome ever provided a written agreement to provide “funding or participation” under the Contract. See Klein Declaration, ¶ 11, attached as Ex. A.

Assignment of the Contract Must be in Writing. Paragraph 6.2 of the Contract provides that no party could assign its rights without the “prior written consent of all other Parties.” Refinery Agreement, attached as Exhibit B to Penedo Objection, Doc. No. 238. Accordingly, unless Penedo and Fundacion gave written consent, RIO’s rights could not be assigned to Winsome. Neither Penedo nor Fundacion has provided a copy of the written consent of the assignment that Penedo asserts occurred. Therefore, even if Penedo were correct that RIO’s obligations under the Refinery Agreement were assigned to Winsome, the assignment would be invalid absent prior written consent by Penedo. After reviewing tens of thousands of pages of documents, the hard drive of Winsome, and flash drives provided by Andres, the Receiver has found nothing to suggest that RIO’s interests in the Refinery Agreement were assigned to Winsome. See Klein Declaration, ¶ 10, attached as Ex. A.

Ballard Testified the Contract was not Assigned to Winsome. In December 2012, Clayton Ballard testified in a deposition that RIO has never assigned its rights under the Refinery Agreement to anyone and that he and RIO are still trying to get the refinery project to completion. See excerpts from Ballard Deposition at 83, attached as Ex. 8 to the Klein

Declaration, attached as Ex. A. Ballard recently provided an affidavit to the Receiver affirming that the Refinery Agreement was never assigned to Winsome. *See* Affidavit of Clayton Lynn Ballard, ¶¶ 10 – 13, attached as Ex. 14 to the Klein Declaration, attached as Ex. A.

Winsome not an Affiliate or Subsidiary of RIO. Paragraph 6.2 allows RIO to assign the Refinery Agreement “to any affiliate and/or subsidiary of RIO.” Refinery Agreement, attached as Exhibit B to Penedo Objection, Doc. No. 238. Thus, unless Winsome were an affiliate or subsidiary of RIO, any assignment would be ineffective without the prior written consent of Penedo and Fundacion. *Id.* Winsome was not owned by RIO and there was no common ownership of RIO and Winsome. *See* Affidavit of Clayton Lynn Ballard, ¶¶ 12, attached as Ex. 14 to the Klein Declaration, attached Ex. A. Winsome was under the exclusive control of Robert Andres. In his deposition, Andres testified that he was the sole person in control of Winsome. *See* excerpts from Andres Deposition at 44 – 45, attached as Ex. 9 to Klein Declaration, attached as Ex. A. Andres stated he was “the sole trustee;” there were no officers or other trustees besides Andres. *Id.* There were no “partners or anyone taking a role in the management of the business.” *Id.*⁸ In his affidavit prepared in support of his claim, Penedo declares that he believed that Winsome was an affiliate of RIO. Affidavit of Roberto E. Penedo, ¶ 13, attached as Ex. A to Penedo Objection, Doc. No. 238. However, Penedo’s subjective belief – even if it existed back in 2006 – does not make Winsome an affiliate of RIO. In fact, Penedo's subjective belief is directly contradicted by Ballard, who is an owner of RIO. *See* Affidavit of Clayton Lynn Ballard, ¶¶ 12, attached as Ex. 14 to the Klein Declaration, Ex. A. The Refinery Agreement might have allowed assignment to an actual affiliate or subsidiary of RIO, but not to an entity

⁸ Similarly, Clayton Ballard testified that he and his partner, Porchie Grady, were the only owners of RIO Systems, each owning 50% of the stock. *See* excerpts from Ballard Deposition, at 26, 90, attached as Ex. 8 to Klein Declaration, attached as Ex. A.

that Penedo *believed*⁹ was an affiliate – if it was not, in fact, an affiliate. In his review of documents recovered in this Receivership, the Receiver has found nothing to indicate that Winsome was an affiliate or subsidiary of RIO. Klein Declaration, ¶ 12, attached as Ex. A.

Amendments to the Refinery Agreement. The Refinery Agreement was amended at least nine times, with the last amendment being dated October 11, 2007. *See* Third through Ninth Written Amendments to Refinery Agreement, attached as Ex. 10 to Klein Declaration, attached as Ex. A; *see also* Klein Declaration, ¶ 15, attached as Ex. A. On November 30, 2007, RIO signed another agreement with China Railway and PURSCA. *Id.*.. None of these amendments to the Contract or the November 30, 2007 agreement with China Railway had Winsome as a signatory, or even referenced Winsome. *Id.*; *see also* Memorandum of Understanding, attached as Ex. 11 to Klein Declaration, attached as Ex. A; *see also* excerpts from Ballard Deposition, at 79, 82, attached as Ex. 8 to Klein Declaration, attached as Ex. A. By November 30, 2007, Winsome had provided \$661,000.00 in funding to Penedo and Fundacion. *See* Spreadsheet Summarizing Payments to Penedo and Fundacion, attached as Ex. 12 to Klein Declaration, attached as Ex. A; *see also* Klein Declaration, ¶ 17, attached as Ex. A. If Winsome’s payment of RIO expenses meant that the Refinery Agreement had been assigned, as Penedo asserts, then the Refinery Agreement would have been assigned to Winsome on October 23, 2006 – the day Winsome began making payments to Penedo and Fundacion. Thirteen months later, however, the Refinery Agreement had been revised nine times and an additional agreement had been

⁹ Penedo’s affidavit lacks the type of information that would make it more credible and useful. The affidavit contains many statements containing indirect information, such as “I was told,” “It was my understanding,” “I understood,” and I “was assured.” Affidavit of Roberto E. Penedo, ¶¶ 3, 4, 13, and 16, attached as Ex. A to Penedo Objection, Doc. No. 238. Penedo’s affidavit does not identify who told him the information, gave him the “understanding,” or provided the “assurances,” nor does it state when he acquired the information, understanding, and assurances. *Id.*

signed with another party that was to provide funding for the project (China Railway). *See* Memorandum of Understanding, attached as Ex. 11 to Klein Declaration, attached as Ex. A. Despite this, Winsome has not been made a party to the Refinery Agreement, any of the nine revisions to the Refinery Agreement, or the Memorandum of Understanding with China Railway. The fact that the Refinery Agreement was revised – frequently – after Winsome made payments to Penedo and Fundacion shows that the payments by Winsome to Penedo is not evidence of an assignment of the Refinery Agreement to Winsome or any partial performance.¹⁰ Moreover, the \$661,000.00 paid to Penedo and Fundacion were paid at a time that the governing documents explicitly stated that RIO was the responsible party under the Refinery Agreement.

Winsome Received no Benefit from Payments to Penedo and Fundacion. In his deposition, Andres testified that Winsome received no benefit from the payments made to others on behalf of RIO Systems. *See* excerpts from Andres Deposition, at 531-32, attached as Ex. 9 to Klein Declaration, attached as Ex. A. Thus, Penedo seeks validation of his attempts to recover over \$4 million from Winsome when he paid no monies to Winsome and Winsome received no benefit from payments it sent to Penedo and Fundacion.

Ballard Disputes the Testimony of Penedo. Penedo prepared an affidavit for Clayton Ballard to sign. *See* Affidavit of Clayton Lynn Ballard, ¶¶ 8 – 9 and exhibit 1 thereto, attached as Ex. 14 to the Klein Declaration, attached as Ex. A. This draft affidavit given to Ballard from Penedo recites many of the assertions from Penedo's objection. *See id.* Ballard refused to sign the proposed affidavit because it was inaccurate. *Id.*

¹⁰ This information was provided to Penedo in the Receiver's notice that his claim was rejected. Because Penedo did not include this explanation in his objection, the Receiver is providing it to the Court. *See* Notice of Rejected Proof of Claim, dated December 17, 2012, attached as Ex. 13 to Klein Declaration, attached as Ex. A.

Claims Process Permits Different Classes of Claims. The Court's May 21, 2012 order approving the claim form and claim review process included approval of "Instructions for Proof of Claim Form" submitted by the Receiver. See Doc. No. 157, Order Approving Proof of Claim Form and Claim Review Process.¹¹ Instruction No. 3 provides:

Classes of Claims. After evaluation of the Claims, the Receiver may recommend to the Court that Claims be divided into more than one class, with higher percentages of Claims being paid to certain classes. *Claims that may be assigned to classes receiving lower percentages of (or no) recovery might include Claims for non-investment business dealings with the Receivership Entities, Claims by family members or business associates, Claims by persons who may have had knowledge of the true financial condition of the Receivership Entities, Claims by persons who were marketers or received compensation for soliciting other investors, or who otherwise may not have acted in complete good faith, Claims based on goods or services that were provided to Receivership Entities, and Claims containing false or misleading information (such as Claims that fail to acknowledge receipt of distributions).*

Id. (emphasis added).

From the inception of the Claims process, the Receiver made it clear that he might recommend that business associates or those who had non-investment dealings with the Receivership Entities be treated differently and assigned to a Class receiving no recovery. The Receiver's recommended denial of Penedo's claim is consistent with the plan – laid out in the beginning – to direct recovered funds to victims of the investment scheme, not to unhappy business associates – and certainly not to persons who already received over \$960,000.00 in improper payments.

¹¹ The Order Approving Proof of Claim Form and Claim Review Process appears to have missing pages. The full set of guidelines relating to the Guidelines may be found in Exhibit B to the Memorandum in Support of Motion for Approval of Claim for and Claim Review Process, Doc. No. 115.

Claims Process Requires Documentation. The Court's May 21, 2012 order approving the claim form and claim review process also included approval of "Guidelines Applicable to Claims Review, Reductions, and Rejections." See Doc. No. 157, Order Approving Proof of Claim Form and Claim Review Process. Guideline No. 2 provides:

Claims should be supported by documentation. Because the Receiver has determined that some records of US Ventures and Winsome are missing, incomplete, or inaccurate, records created by the company will not be the primary means of determining the amount of a Claimant's Allowable Claim Amount. *Proof of Claim Forms should be accompanied by supporting documents, such as copies of bank records, providing evidence of the amounts paid to the Receivership Entities and amounts received from them. If Proof of Claim Forms are submitted without supporting documentation, the Receiver may recommend that the Court deny or reduce the Claim, based on what he believes best represents the actual financial transactions that occurred.* In general, claims of cash payments will be denied unless sufficient documentation is provided showing that the funds were actually received.

Id. (emphasis added).

Penedo's claim asserts that the Refinery Agreement was assigned to Winsome. Penedo failed to provide documents supporting this assertion. The "Guidelines" made clear that it was the responsibility of claimants to submit documentation in support of their claims. Penedo has failed to provide the key document that would support his claim – a failure that is especially notable in light of all the countervailing evidence indicating that the Refinery Agreement was not assigned to Winsome.

Conclusion. Penedo has claimed that Winsome owes him \$4,418,000.00 under a contract between Penedo and RIO Systems – a company unaffiliated with Winsome. Penedo bases his demand against Winsome on a theory that RIO's Refinery Agreement with Penedo was assigned to Winsome. However, Penedo provided no documents showing that the Contract was assigned; his only evidence is his own affidavit describing his "understanding" that the Refinery

Agreement was assigned. The overwhelming weight of evidence is that there was no assignment: a) the owner of RIO has testified the Refinery Agreement was not assigned, b) the Refinery Agreement never references Winsome and was repeatedly amended without ever referencing Winsome – despite Winsome having made \$661,000.00 in payments to Penedo and Fundacion during the period in which the Contract was frequently amended, and c) Winsome received no benefits from the payments it made to Penedo and Fundacion. Penedo’s claim should be denied.¹²

C. CLAIM NO. 1095

This claim involves is Zaman Ali. Ali owned a company named M Cubed, which gathered money from other investors and sent some of those funds to Winsome for investment. Doc. No. 244, Statement Opposing Motion of Receiver Seeking Dismissal of Interest in Recovered Investment Funds ("Ali Objection"). Initially, Ali filed a claim in the name of M Cubed, on behalf of investors who supposedly had sent money to M Cubed for investment. Klein Declaration, ¶ 21, attached as Ex. A. This claim was received on July 31, 2012, the deadline for submission of claims. *Id.* The Receiver notified Ali that M Cubed could not submit claims on behalf of investors and that each investor needed to file his own claim. *Id.* Subsequently, all these M Cubed investors filed individual claims. *Id.* ¶ 22. The Receiver is recommending that these late-filed claims be accepted for consideration. On August 30, 2012 Ali submitted a Proof of Claim form for his transactions that was received on September 6, 2012.

¹² Penedo further questions whether the Receiver considered Penedo’s claim in good faith, suggesting that the Receiver’s rejection was “on the basis of racial or ethnic discrimination.” Penedo Objection at 10, Doc. No. 238. Penedo provides no explanation for this accusation, other than appearing to believe that discrimination is the only reason the Receiver might not agree to recommend that Penedo be allowed a \$4 million claim. The Receiver denies knowing Penedo’s racial or ethnic background or that it played any role in evaluation of Penedo’s claim. The Receiver laments that Penedo appears to be trying to bolster his position by inventing a claim of ethnic bias.

Proof of Claim Form submitted by Ali, attached as Ex. 15 to Klein Declaration, attached as Ex. A.

1. Disputed Questions. The reasons for the Receiver's rejection of Ali's claim are that i) the Receiver believes Ali may have received more money than he invested (either from Winsome or money given to him by other investors and retained by him); and ii) Ali has failed to provide documentation to allow the Receiver to determine if Ali is overpaid and has failed to respond to requests from the Receiver for financial information relating to his investment transactions.

2. Summary of Claimant's Argument. Ali is acting *pro se* in filing his objection. Doc. No. 244, Ali Objection. The Receiver has not been able to clearly discern the substance of Ali's objections, but his objections appear to be two-fold: i) that he should be able to submit a claim in the name of M Cubed on behalf of all investors that supposedly invested through him and that any distributions to investors who sent money to M Cubed should be paid to him for further distribution to his investors, and ii) that his individual claim for \$100,000.00 should be accepted.

3. Receiver's Response. The Receiver recommends denial of Ali's claim because i) Ali was a marketer, who collected funds from other investors and sent some (but not all) of those funds on to Winsome for investment, ii) Ali has failed to provide documentation requested by the Receiver, and iii) due to the documentation failures, the Receiver has been unable to disprove the apparent evidence that Ali is, in fact, already overpaid. The Receiver believes the following shows that Ali was a marketer who raised money from other investors, likely is overpaid, and has refused to provide documentation that would enable the Receiver to determine whether he is overpaid.

Claims Were Required to be Filed by Actual Investors, Not Marketers. The Receiver notified Ali that claims needed to be submitted by each investor and that the investments could not be aggregated. Klein Declaration, ¶ 22, attached as Ex. A. This was for practical and investor protection reasons. Some of these investors sent money directly to Winsome, while others sent money via M Cubed. As a result, each investor's transactions needed to be evaluated based on his or her actual financial transactions. The Receiver also believes that allowing a marketer to submit claims on behalf of other investors might result in that marketer determining which amounts should be claimed on behalf of each investor – or reallocating the investment amounts among the various investors. Even more worrisome was the risk that if a marketer were allowed to submit claims on behalf of other investors and the resulting distribution were sent to the marketer, there would be no assurances that those proceeds would be allocated equitably among the investors – or even paid to them at all.

Equity Requires Clean Hands. Receiverships operate in equity. This requires that those seeking to receive funds recovered by the Receiver have clean hands. This principle was recognized in the Court-approved Guidelines Applicable to Claims Review. Guideline No. 9 provides that “The Receiver may reject or reduce the recommended amount to be paid on Claims submitted by persons who . . . solicited others to make investments, received compensation based on the investments of others, [or] had close business relationships with the companies, Holloway, or Andres” Doc. No. 115, Guidelines Applicable to Claims Review, Reductions, and Rejections (“Guidelines”), attached as Ex. B to Memorandum in Support of Motion for Approval of Claim Form and Claim Review Process; *see also* Doc. No. 157, Order Approving Proof of Claim Form and Claim Review Process. In the case of Ali, he solicited others to invest in Winsome, vouched for the legitimacy of the Winsome program, and appears to have retained

some of the funds invested by others. Doc. No. 244, Ali Objection. Evidence of Ali's role in encouraging others to invest includes his own words:

- Ali had discussed the Winsome program with “a number of [his] friends.” Doc. No. 244, Ali Objection at ¶ 4.
- Ali rented a hotel conference room so that potential investors could hear about the Winsome investment opportunity. *Id.*
- Ali went to Houston to meet with Andres on behalf of the group of investors gathered by Ali. *Id.*, ¶ 5.
- After meeting with Andres for six hours and reviewing books shown to him by Andres, Ali said he was “impressed” with Andres’ investment program. Ali returned to Calgary. He “immediately gathered [his] friends and briefed them on [his] visit to Houston.” *Id.*
- M Cubed was a company controlled by Ali. It was the vehicle for gathering funds from multiple investors to send to Winsome. *Id.*
- Ali coordinated an effort to gather “funds to get to the one million dollar contract figure.” *Id.*, ¶ 6.
- Ali states that he agreed to advance funds to other investors for investment from existing lines of credit that Ali had. He states that these advances were repaid by the other investors.¹³

Id.

Based on research conducted by the Receiver, it appears that Ali is not licensed in Canada to solicit investments for Winsome. See Klein Declaration, ¶ 23, attached as Ex. A.

¹³ Ali submitted no documentation showing that he advanced funds to other investors and was repaid. The Receiver requested this documentation, but Ali refused to provide it.

Despite his lack of proper licensing, Ali coordinated an effort to get other investors to send \$1 million to Winsome. But for his work in gathering investors, traveling to Houston to investigate Winsome, and vouching for the legitimacy of the Winsome program, his group of investors would not have invested – and lost – substantial funds in Winsome. Ali's significant role in the Winsome fraud disqualifies him from participating in any recovery by the Receiver. Recovered funds should be paid to persons who were defrauded by others, not those who were promoting the Ponzi scheme.

Ali Might be Overpaid. In his amended claim form received on September 6, 2012, Ali claimed he invested \$100,000.00 and that he had received no distributions, making his total claim \$100,000.00. Proof of Claim Form submitted by Ali, attached as Ex. 15 to Klein Declaration, attached as Ex. A. The Receiver believes Ali may have received as much as \$229,800.00 in his dealings with Winsome and as the gatherer of funds for Winsome. This includes: \$60,000.00 wired to M Cubed by Winsome on March 17, 2008. Bank Statement of Winsome Investment Trust, attached as Ex. 16 to Klein Declaration, attached as Ex. A; *see also* Klein Declaration, ¶ 24, attached as Ex. A. On November 28, 2007, another investor TM sent \$50,000.00 to M Cubed. The same day, M Cubed wired \$40,200.00 to Winsome. Klein Declaration, ¶ 25, attached as Ex. A. It does not appear that the remaining \$9,800.00 was sent to Winsome. *Id.*

The Receiver asked Ali for documentation showing what happened to the \$9,800.00 difference and Ali refused to provide either an explanation or documentation. *Id.*; *see also* Letter from Wayne Klein to Kyle Kasuba, dated November 21, 2012, attached as Ex. 17 to Klein Declaration, attached as Ex. A. Between June 26, 2008 and August 2, 2008, three persons (SV, JS, and DM) sent \$125,000.00 to M Cubed for investment. Klein Declaration, ¶ 25, attached as

Ex. A. None of this money appears to have been sent to Winsome. *Id.* The next time M Cubed sent money to Winsome was on March 2, 2009 (seven months later) when \$5,000.00 was sent to Winsome. *Id.* Ali refused to provide the Receiver with any explanation or documentation showing how this \$125,000.00 (or, \$120,000.00) was used. *Id.* In July 2009, investor CM sent \$50,000.00 to M Cubed for investment. *Id.* None of this money appears to have been sent to Winsome.¹⁴ *Id.*

Claims Process Requires Documentation. As noted earlier, the Court's May 21, 2012 order approving the claim form and claim review process also included approval of Guidelines that, among other things, required claimants to support claims with documentation. Ali has refused multiple requests by the Receiver for records showing what Ali did with the funds that were sent to M Cubed by investors. The Guidelines made clear that it was the responsibility of claimants to submit documentation in support of their claims. Ali has failed to provide the key documents that would show whether the \$60,000.00 distribution from Winsome was a return on his investment and whether he retained some of the funds sent to M Cubed by investors and, consequently, was overpaid.

Claims Process Permits Different Classes of Claims. As noted above, the Court's May 21, 2012 allows for the Receiver to assign claims to various classes. From the inception of the claims process, the Receiver made it clear that he might recommend that marketers be treated differently and assigned to a Class receiving no recovery. The Receiver's recommended denial of Ali's claim is consistent with the plan, which was laid out at the outset, to direct recovered

¹⁴ A month later, \$8,000.00 was sent to Winsome by another company that appears related to Ali. It is not known whether any of this was CM's money. If it was, there was no explanation as to how the \$8,000.00 went from M Cubed to the other company. In any event, there has been no explanation as to what happened to the balance of CM's investment.

funds to innocent victims of the investment scheme, not to those who invited others to invest and those who vouched for the legitimacy of Winsome's Ponzi scheme.

Ali's Objection is Untimely. A copy of the Claims Report was sent to Ali on December 20, 2012. Klein Declaration, ¶ 27, attached as Ex. A. The Claims Report explained that any objections needed to be filed within 30 days of the filing of the Claims Report, which was December 20, 2012. Thus, any objections needed to be filed by January 22, 2013.¹⁵ The Receiver exchanged emails with Ali on December 21, 2012 regarding the Claims Report and the process for Ali to file an objection. See Email from Wayne Klein to Zaman Ali, dated December 21, 2012, attached as Ex. 19 to Klein Declaration, attached as Ex. A; see also Klein Declaration, ¶ 27, attached as Ex. A. Despite knowing about the Claims Report and the deadline for filing objections, Ali did not file a timely objection. Ali called the Receiver on January 23, 2013, requesting additional time to file his objection. Klein Declaration, ¶ 28, attached as Ex. A. The Receiver told Ali that the deadline was set by the Court and that the Receiver lacked authority to grant additional time. *Id.* Ali was told he would need to contact the Court to request additional time. *Id.* Despite knowing that the deadline had already passed, Ali waited another two weeks before filing his objection. Ali's objection can and should be denied on this ground alone.

Conclusion. The Receiver has already reviewed the claims of all investors who invested through M Cubed or as a result of solicitations by Ali. These investor claims did not have to be submitted by M Cubed and recovery distributions will be made directly to these investors without going through the hands of Ali. As a result, the only one directly affected by the Receiver's recommendation that Ali's claim be denied is Ali. His claim should be denied because he actively solicited others to invest in Winsome and vouched for the legitimacy of the

¹⁵ The first business day after expiration of the 30-day period was Tuesday, January 22, 2013.

Winsome scheme, he appears to have received more money from Winsome and from other investors than the amount he invested, and he refused to provide documentation that would have enabled the Receiver to fully investigate Ali's claim.

XI. CONCLUSION

The Receiver urges the Court to accept the recommendations included in his December 20, 2012 Report and Recommendations, doc. no. 233, with the corrections noted in Section III, above, and to deny the objections of RCH2, Penedo, and Ali.

In light of the complete documentary record regarding the objections, the Receiver recommends that the Court rule on the objections based on the written record. Alternatively, the Court can set a hearing date for oral argument and the taking of evidence on the objections.

Finally, the Receiver advises the Court his plans to submit a proposed plan of distribution within the next 30 days.

DATED this 8th day of February, 2013.

**MANNING CURTIS BRADSHAW
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/s/ David C. Castleberry

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RECEIVER'S REPORT ON AND RESPONSE TO OBJECTIONS TO THE RECEIVER'S RECOMMENDATIONS ON THE CLAIMS PROCESS** to be served in the method and to the parties indicated below this 8th day of February, 2013.

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