

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 FOURTH 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 other three cases, the settlements will resolve lawsuits the Receiver has already filed. The Receiver now seeks confirmation of the following settlements (collectively defined as the "Settlement Agreements"):

1. CitiMortgage, Inc. CitiMortgage, Inc. ("CitiMortgage") is a mortgage company that loaned money to Andres for the purchase of Andres' residence at 10802 Archmont Drive in

Houston, Texas. That mortgage is now in default. CitiMortgage claims a secured interest in the Archmont home for unpaid amounts owed on the loan to Andres. The Receiver believes that after paying off the secured interest there still will be some equity in the home available for the Receivership – so long as legal fees do not eat up the equity. This settlement agreement is designed to maximize the equity remaining in the home.

Under the terms of a February 1, 2012 settlement agreement, the Receiver will cooperate with CitiMortgage in getting the asset freeze lifted so CitiMortgage can complete foreclosure proceedings on the home and sell the home. The first \$95,000.00 of net proceeds from the sale will be paid to CitiMortgage in full satisfaction of its secured interest. The next \$40,000.00 in net sales proceeds (if any) will be paid to the Receiver. Any net proceeds above \$135,000.00 will be divided equally between the Receiver and CitiMortgage.

2. W. Erving. C2G Strategies, one of the companies controlled by Andres, loaned \$100,000.00 to W. Erving in October 2009. Erving believed that the money had come from a company controlled by Elgin Clemons and subsequently repaid \$75,000.00 of the loan to Clemons. The Receiver and Erving entered into a settlement agreement on February 1, 2012 pursuant to which Erving will repay \$100,000.00 to the Receivership. The payments will be made in four monthly installments of \$25,000.00 beginning February 15, 2012.

3. Leonard Sternheim. Leonard Sternheim invested \$1 million with Winsome, through a business controlled by Sternheim. He received distributions totaling \$1,153,730.00 from Winsome. The Receiver filed suit against Sternheim on December 2, 2011 seeking a return of funds paid to him. Sternheim has signed a settlement agreement with the Receiver pursuant to which Sternheim will pay to the Receiver the full \$153,730.00 he received in excess of the

amount of his investment and reimburse the Receiver for the court filing fees for the lawsuits against him, I. Sternheim, and the Kluger School. This amount will be paid to the Receiver within 120 days. Upon approval of the settlement agreement and payment of the funds, the Receiver will dismiss the lawsuit filed against Sternheim.

4. Isaac Sternheim. Isaac Sternheim invested \$240,000.00 with Winsome and received distributions totaling \$273,000.00. The Receiver filed suit against Sternheim in December 2011 seeking a return of payments he received. Sternheim signed a settlement agreement with the Receiver on February 15, 2012 in which he will pay to the Receiver the full \$33,000.00 in excess funds that he received within 60 days, with half to be paid within 30 days. Upon approval of the settlement agreement and payment of the funds, the Receiver will dismiss the lawsuit filed against Sternheim.

5. Rabbi Solomon Kluger School. This non-profit educational facility invested \$150,000.00 with Winsome and received \$160,000.00 in distributions. The Receiver filed suit in January 2012 seeking a return of distributions it received from Winsome. Kluger School signed a settlement agreement dated February 15, 2012 pursuant to which it will pay the Receiver the full \$10,000.00 the school received in excess of its investment amount. Half this amount will be paid within 30 days with the remaining amount due within 60 days. Upon approval of the settlement agreement and payment of the funds, the Receiver will dismiss the lawsuit filed against the school.

6. Assed Kalil and Stephen Ponsler. Kalil and Ponsler invested funds with Winsome through a jointly-owned company and received distributions directly to them from Winsome. Under a settlement agreement dated February 13, 2012, the Receiver agreed to offset

their investments against their distributions. In return, Kalil and Ponsler agree to return all distributions they received in excess of their investments. Kalil had invested \$310,000.00 and received distributions of \$325,000. He has returned the \$15,000.00 difference to the Receiver. Ponsler invested \$150,000.00 and received distributions of \$160,000.00. He has returned the \$10,000.00 difference to the Receiver. Upon approval of this settlement by the Court, the Receiver will dismiss the lawsuit against Kalil and Ponsler.

ANALYSIS

The Receiver 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 CitiMortgage is believed to be the best resolution of an asset subject to competing claims. While the Receiver asserts a claim to the residence, there is substantial doubt as to whether he would be able to defeat the security interests of CitiMortgage. It is not certain that the home will be sold for a sufficient price to leave equity in the home. The foreclosure process will take time and require significant court involvement, including approval by this Court to release the home from the asset freeze. The Receiver believes this resolution will reduce the risk that fights between CitiMortgage and the Receiver would incur high legal fees and increase the amount of equity that will be left after paying off the first mortgage.²

The Erving settlement includes a recovery of all funds loaned to him by the Receivership Entities. The final four settlements include recovery of all "overpayments" to these investors. Under these settlements, the investors will retain the amount of principal they invested in Winsome, but will return all amounts in excess of the amounts invested.

All these settlement avoid the expenditure of any more attorneys fees and receiver time that otherwise would be required in actions against these persons. They involve the recovery of at least \$321,730.00, with potentially more – depending on the selling price for Andres' home. Each of these settlements achieves a return of all funds that a court is likely to award to the Receivership. In light of these factors, the Receiver believes all these settlement agreements are

² The Receiver here discloses a potential conflict of interest. He owns 200 shares of Citigroup, a company affiliated with CitiMortgage. The Receiver does not believe that this investment holding has impaired his independence in recommending this settlement.

just and fair and should be approved.

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 17th day of February, 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 17th day of February, 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 FOURTH MOTION FOR PERMISSION TO FINALIZE SETTLEMENT AGREEMENTS** upon the following:

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- VIA HAND DELIVERY
- VIA U.S. MAIL
- VIA FEDERAL EXPRESS
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