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Court-Appointed Receiver of U.S. Ventures, LC,
Winsome Investment Trust, and the assets of Robert
J. Andres and Robert L. Holloway*

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

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| <p>R. WAYNE KLEIN, the Court-Appointed Receiver of U.S. Ventures, LC, Winsome Investment Trust, and the assets of Robert J. Andres and Robert L. Holloway,</p> <p style="text-align: right;">Plaintiff</p> <p>vs.</p> <p>MICHELE PETTY,</p> <p style="text-align: right;">Defendant</p> | <p>Case No. 2:11-cv-01099-DN</p> <p>MOTION TO STRIKE DEFENDANT’S AMENDED ANSWER, AND JURY DEMAND, AND MOTION FOR MORE DEFINITE STATEMENT WITH RESPECT TO DEFENDANT'S "CROSS ACTION"</p> |
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Plaintiff R. Wayne Klein, the Court-Appointed Receiver (the “Receiver”) of US Ventures LC (“US Ventures”), Winsome Investment Trust (“Winsome”), and all of the assets of Robert J. Andres (“Andres”) and Robert L. Holloway (“Holloway”) (collectively, the “Receivership Defendants”), by and through his undersigned counsel, hereby submits this Motion to Strike

Defendant's Amended Answer, Jury Demand, and Cross Action, *see* Doc. No. 30, and Motion for a More Definite Statement with respect to a purported "Cross Action" filed in this case, *see* Doc. No. 5.

INTRODUCTION

Defendant Michele Petty ("Petty"), who is an attorney representing herself in this action, has filed an amended answer, jury demand, and "cross action" ("Amended Answer") almost two years after she filed her initial Answer to the Receiver's Complaint.¹ Petty did not seek leave from the Court to file the Amended Answer as required by Rule 15 of the Federal Rules of Civil Procedure. Therefore, the Amended Answer should be stricken.

Further, Petty's Amended Answer and her original Answer both include a "Cross Action," which may be intended to be a counterclaim against the Receiver or may simply be Petty's attempt to reserve her rights to seek her fees and costs under Rule 54(d) if she is found to be the prevailing party in this case. The Court's docket does not show that a counterclaim has been filed in this matter, and if the Cross Action is intended to be a counterclaim, the Receiver cannot file a responsive pleading through the Court's filing system. In any event, Petty's intention is unclear since a "cross action" is not recognized by the Federal Rules of Civil Procedure. As a result, the Receiver respectfully moves the Court for an order requiring a more definite statement with respect to the Cross Action filed in this case.

¹ Petty also filed an "amended" Motion to Dismiss in the Amended Answer. The Receiver will respond to the "amended" Motion to Dismiss within the timeframes allowed by the Court.

ARGUMENT

I. THE COURT SHOULD STRIKE DEFENDANT’S AMENDED ANSWER BECAUSE IT IS FILED IN VIOLATION OF RULE 15(a) AND THE SCHEDULING ORDER.

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, a party may only amend a pleading twenty-one days after service of the pleading if the party obtains written consent from the opposing party or if the party successfully moves the Court for an order allowing amendment. Fed. R. Civ. P. 15(a). Pursuant to the Scheduling Order entered by this Court, the deadline to file a motion seeking to amend the pleadings in this case was January 24, 2014. *See* Doc. No. 27.

Here, Petty initially filed her initial Answer on February 21, 2012. *See* Doc. No. 5. She served her Amended Answer on January 24, 2014, and it was filed with the Court on January 28, 2014. *See* Doc. No. 30. Petty, however, failed to seek leave from the Court or obtain permission from Plaintiff’s counsel to file an amended pleading. As a result, this Court should strike the Defendant’s Amended Answer.

II. THE COURT SHOULD STRIKE THE JURY DEMAND BECAUSE IT IS UNTIMELY.

A party may demand a jury trial no later than fourteen days after the last pleading directed to the issue is served. *See* Fed. R. Civ. P. 38(b). A court should not grant a party’s request for a jury trial when the failure to make a timely jury demand results from inadvertence of the moving party. *See Dill v. City of Edmond, Okl.*, 155 F.3d 1193, 1208 (10th Cir. 1998).

Here, Petty initially filed her Answer February 21, 2012, and she did not request a trial by jury in her Answer. *See* Doc. No. 5. Petty's request for a jury now, which is two years too late, is made without providing any justification for her untimely demand. As a result, the Receiver asks the Court to strike Petty's jury demand.

III. THE AMENDED "CROSS ACTION" AGAINST THE RECEIVER SHOULD BE STRICKEN, AND THE ORIGINAL "CROSS ACTION" SHOULD BE CLARIFIED.

Petty asserts a "Cross Action" against the Receiver and attempts to amend her Cross Action in her most recently filed pleading. *See* Doc. No. 5 at pp. 19-20; *see also* Doc. No. 30 at pp. 19-20. As discussed above, the amended "Cross Action" should be dismissed because Petty failed to seek leave from the Court to file the amended Cross Action as required by Rule 15 of the Federal Rules of Civil Procedure.

Further, the Receiver cannot prepare a meaningful response to Petty's amended Cross Action or the original Cross Action filed in this case. A "cross action" is not recognized by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 13. There is no co-defendant to file a cross claim against in this action, and, to the extent that the Cross Action is intended to be a counterclaim, the Court has not docketed a counterclaim in this matter, and the Receiver is unable to file an Answer to the Cross Action through the Court's filing system, if an answer is required.

It is possible that Petty is merely seeking her fees and costs in the Cross Action as may be allowed by Rule 54(d) if she is the prevailing party, and she is not intending the Cross Action to be a counterclaim. In any event, the Receiver asks the Court to require Petty to file a more

definite statement with respect to her Cross Action originally filed in this matter. In making this Motion for a More Definite Statement, the Receiver does not waive any rights or defenses he may have to a counterclaim filed by Petty in this action.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that this Court strike the Defendant's Amended Answer, Jury Demand and Cross Action, Doc. No. 30, and requests a more definite statement with respect to the "Cross Action" originally filed in this matter in Doc. No. 5.

DATED this 17th day of February, 2014.

MANNING CURTIS BRADSHAW & BEDNAR LLC

/s/ David C. Castleberry
David C. Castleberry
Christopher M. Glauser
Attorneys for Receiver for US Ventures, LC, Winsome
Investment Trust, and the assets of Robert J. Andres and
Robert L. Holloway

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **MOTION TO STRIKE DEFENDANT'S AMENDED ANSWER, AND JURY DEMAND, AND MOTION FOR MORE DEFINITE STATEMENT WITH RESPECT TO DEFENDANT'S "CROSS ACTION"** to be served in the method indicated below to the Defendants in this action this 17th day of February, 2014.

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/s/ David C. Castleberry