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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

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.

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER REGARDING
CLAIM NO. 1117**

Case No. 2:11CV00099 BSJ

District Judge Bruce S. Jenkins

On June 6, 2013, the Court held a bench trial to consider Claim No. 1117, which was submitted by Roberto E. Penedo ("Penedo") to R. Wayne Klein (the "Receiver"), Receiver for U.S. Ventures LC ("US Ventures") and Winsome Investment Trust ("Winsome"). At issue at the trial was whether Penedo could present sufficient evidence demonstrating that Winsome was

legally obligated to make payments to Penedo. *See* Scheduling Order re Evidentiary Hearing on Claim No. 1117, Doc. No. 250.

Following a trial on the merits, the Court took the matters submitted under advisement. After carefully considering the evidence presented by the parties as well as the law and facts relating to the Claim, the Court finds in favor of the Receiver and against Penedo, and renders the following Findings of Fact, Conclusions of Law, and Order on Claim No. 1117.

FINDINGS OF FACT

Penedo's Claim

1. Penedo is a native of Guatemala, who currently resides in Arkansas. *U.S. Commodity Futures Trading Commission vs. U.S. Ventures LC et al.*, Transcript of One-Day Bench Trial held on June 6, 2013 regarding Claim No. 1117 ("Trial Testimony") 20:9-13.
2. The Receiver was appointed as receiver for Winsome and US Ventures in connection with an action filed by the Commodity Futures Trading Commission against US Ventures, Winsome, and Robert Holloway and Robert Andres. *Id.* 112:20-24.
3. Robert Andres began to operate Winsome in the fall of 2005 until the Receiver took control of Winsome after his appointment. *Id.* 113:2-9; 115:1-19.
4. In his capacity as Receiver, the Receiver prepared a claim form, a claims procedure and a claims guideline that would allow claimants to make a claim on the receivership estate of US Ventures and Winsome. *Id.* 123:5-124:9.
5. Penedo claims that he is owed \$4,000,000 by Winsome pursuant to alleged verbal agreements. *Id.* 63:22-25.

6. Penedo claims that he incurred expenses in the amount of \$615,000 while lobbying for the refinery, *id.* 64:1-4, and that he received \$197,000 as reimbursement for those expenses, *id.* 36:20-22.

7. As a result, Penedo filed a claim against the Receivership Estate in the amount of \$4,418,000. Proof of Claim Form, Stipulated Exhibit No. 18;¹ Trial Testimony 63:17-21.

8. Penedo's claim was rejected by the Receiver. Notice of Rejected Proof of Claim, Stipulated Exhibit No. 19.

Penedo Has Not Provided Sufficient Evidence to Support his Claim that Winsome was Contractually Obligated to Pay Him \$4,418,000

9. To Support his Claim No. 1117, Penedo asserts that he provided lobbying services pursuant to a Refinery Agreement for a company called RIO Systems, Inc. ("RIO"). Refinery Agreement, Stipulated Exhibit No. 1.

10. The lobbying by Penedo was to aid RIO in building a refinery in Guatemala. *Id.*

11. The Refinery Agreement, which was effective as of October 23, 2006, was executed by RIO, Penedo, and Fundacion Guatemalteco Americana ("FundaGuam"). *Id.*

12. Under the Refinery Agreement, Penedo was promised a 3% equity stake in the refinery in exchange for 90 days of lobbying services. *Id.* ¶ 2.1; Trial Testimony 28:19-29:3.

13. Winsome is not a signatory to the Refinery Agreement or even mentioned in the agreement. Refinery Agreement, Stipulated Exhibit No. 1.

14. The Refinery Agreement was amended at least nine times. *See* Amendments to Refinery Agreement, Stipulated Exhibit Nos. 2-10.

¹ The parties stipulated to the admission of a number of exhibits in the Stipulated Order re Evidentiary Hearing on Claim No. 1117, Doc. No. 266, and all of the exhibits referenced in the Findings of Fact refer to documents to which the parties stipulated their admission.

15. The amendments to the Refinery Agreement were also executed by RIO, Penedo, and FundaGuam. *Id.*

16. Winsome is not a signatory to the amendments to the Refinery Agreement or even mentioned in any of the amendments. *Id.*

17. Penedo also referenced a Memorandum of Understanding ("MOU") that was entered into by China Railway HuaChuang United Investment Co., Ltd., Pursca Investment Group, Ltd., RIO, and FundaGuam in 2007 related to the refinery project in Guatemala. Memorandum of Understanding, Stipulated Exhibit No. 11.

18. Like the Refinery Agreement, Winsome is not a signatory or even mentioned in the MOU. *Id.*

19. On March 15, 2010, FundaGuam and RIO entered into another agreement, which was signed by Clayton Ballard ("Ballard") on behalf of RIO and by Penedo on behalf of FundaGuam, and like the other agreements, Winsome is not a signatory or even mentioned in the agreements. *See Social and Economic Development & Implementation Agreement for the MesoAmerica Project, Stipulated Exhibit No. 12.*

20. Penedo claims that the parties amended the Refinery Agreement verbally, and that Penedo was promised \$4,000,000 for his services. Trial Testimony 63:22-64:4.

21. Penedo also claims that he should be reimbursed his expenses even though he has no proof any expenses. *Id.* 64:1-4. ("Q. And it's your testimony that you were owed \$615,000 in expenses even though you have no proof of these expenses; isn't that right? A. Yes.").

22. At the trial, Penedo testified that he understood that Winsome and RIO were partners. *Id.* 33:8-12.

23. Penedo admits that he had not seen a partnership agreement involving RIO and Winsome, nor was Penedo able to offer testimony regarding any specific conversations demonstrating that RIO and Winsome were partners. *Id.* 33:16-17 ("Q. Did you ever see any kind of partnership agreement? A. No."); *id.* 47:2-13 ("Q. Who told you that Winsome and RIO were partners? A. Mr. Andres and Mr. Clayton Ballard. Q. What specifically was said? A. That is when we started discussing, like I mentioned earlier, when we start discussing the services they want me to provide them and they said that they are – Q. So who said what? I'm trying to get – what did Mr. Ballard say to you, do you remember? A. Mr. Castleberry, I can tell you concerning the whole meeting, but I cannot exactly recall exactly who say this, who say that, but the whole meeting was like I mentioned to you.").

24. Penedo also testified that before the Refinery Agreement was effective that RIO had assigned its rights under the Refinery Agreement to Winsome. *Id.* 48:11-49:7. ("Q. Now you have testified that you believed RIO assigned its rights to Winsome Investment Trust relating to this refinery agreement; isn't that right? A. Yes. Q. And when did that – as far as you understand, when did that assignment occur? A. I can tell you from the beginning – I cannot exactly tell you when, but I can tell you from the beginning that was according to our conversation, according to what I understood, that they were partners. That was my clear understanding in all of this. Q. What is the beginning, the beginning of what? A. September 2006, our conversations. Q. Now it's true, is it not, that you have no documents showing that RIO Systems, Inc. assigned any rights to Winsome Investment Trust related to this agreement. A. I don't have any written documents. Q. So it's your testimony today that from the very beginning, even before the refinery agreement was signed, [that] in September 2006, RIO had assigned its rights to Winsome Investment Trust? A. We can interpret it that way, yes.").

25. No evidence was presented, other than Penedo's statements at trial, that Winsome and RIO were partners or that RIO had assigned its rights under the Refinery Agreement to Winsome.

26. In February 2006, RIO agreed to pay Robert Andres \$20,256,000 "for value received." Promissory Note, Stipulated Exhibit No. 43.

27. Winsome is not a party to the promissory note, which shows, at most, that RIO owed a contingent debt to Andres, not to Winsome. *Id.*

28. Ballard, who is a principal of RIO, testified that Winsome did not have any contractual obligations under the MOU, the Refinery Agreement, or any of the addenda to the Refinery Agreement to make payments to Penedo for his services. *Id.* 105:10-18.

29. Ballard testified that RIO never assigned its rights under the Refinery Agreement to Winsome. *Id.* 105:21-25.

30. Ballard testified that Winsome paid some debts of RIO, but there was no written obligation for Winsome to do so. *Id.* 107:1-3.

31. Ballard testified that Winsome was never an affiliate or subsidiary of RIO. *Id.* 107:14-16.

32. Ballard also testified that in October of 2012, Penedo approached Ballard and asked that Ballard sign an affidavit stating that RIO had assigned its rights in the Refinery Agreement to Winsome, but Ballard refused to sign Penedo's affidavit because it was not true or accurate. *Id.* 110:5-111:1.

Penedo Has Not Shown How His Lobbying Services Benefited Winsome

33. Penedo has not produced any copies of any bills he sent Winsome, RIO, or anyone else for his services related to his lobbying efforts under the Refinery Agreement. *Id.* 73:5-8; 125:11-14; 130:10-15.

34. When asked what he did for the \$4,000,000 he claims, Penedo responded by saying that he arranged more than 100 meetings with Guatemalan authorities, with the Catholic Church, and with big oil companies in Ukraine and Russia. *Id.* 65:17-24.

35. Penedo also testified that he met "with the president of congress as well as the president of Guatemala." *Id.* 67:9-10.

36. When asked the name of the "president of congress", Penedo responded by saying that he could not remember but that his "name sounds foreign." *Id.* 67:13-21.

37. Penedo has no personal knowledge of any permits issued by the Guatemalan government for the refinery, nor does he have any personal knowledge of any permits being issued as a result of his lobbying efforts. *Id.* 70:19-71:10.

38. The refinery has never been built. *Id.* 63:3-4.

CONCLUSIONS OF LAW

RIO Did Not Assign Its Rights Under the Refinery Agreement to Winsome

1. In order for Penedo to hold Winsome financially responsible for payments that Penedo says are due him from RIO, Penedo bears the burden of proving that RIO had assigned its rights under the refinery agreement to Winsome or that Winsome had agreed to assume contractual obligations from RIO to Penedo.

2. Penedo has failed to carry his burden of proof to show that RIO had assigned its rights under the Refinery Agreement to Winsome.

3. Penedo alleges that the assignment of the Refinery Agreement to Winsome took place in September or October 2006; however, Penedo entered into the Refinery Agreement and numerous amendments to the Refinery Agreement with RIO after the time Penedo postulates that RIO assigned its rights to Winsome.

Winsome Was Not Contractually Obligated to Pay RIO's Debts to Penedo

4. No writing obligates Winsome to pay Penedo \$4,000,000 plus reimbursements for expenses, and Penedo's vague description of verbal agreements between RIO and Winsome, which are uncorroborated by any written documents, is insufficient to carry his burden of proof to show that Winsome was contractually obligated to pay Penedo \$4,00,000 plus reimbursement for expenses.

5. Although Penedo testified that he understood that Winsome was contractually obligated to pay him \$4,000,0000 plus reimbursement for expenses based on "verbal agreements," he has failed to provide testimony with respect to the specific representations that led him to believe that Winsome was under an obligation to pay him \$4,000,000 or for reimbursement of expenses.

6. While Penedo has claimed that RIO provided Andres a promissory note for \$20,256,000, the fact that RIO may have owed Andres money does not demonstrate that Winsome was contractually obligated to pay Penedo money for lobbying services Penedo performed for RIO pursuant to the Refinery Agreement entered into with RIO.

7. The more compelling evidence introduced at the trial demonstrates that Winsome did not have an obligation to make the payments to Penedo.

8. RIO's owner, Ballard, provided testimony that RIO, FundaGuam, and Penedo were the only parties to the Refinery Agreement, that Winsome has never been affiliated with RIO, and that Winsome had no contractual obligation to make payments to Penedo.

**The Statute of Frauds Voids Any Alleged Verbal Agreements
Requiring Winsome to Pay the Debts of RIO**

9. Even if the Court were to consider the ambiguous and unspecified statements Penedo asserts were made and Penedo's argument that those statements represented an agreement by Winsome to pay RIO's obligation under the Refinery Agreement, such an agreement must be set forth in writing.

10. Utah's statute of frauds provides that "every promise to answer for the debt, default, or miscarriage of another" is void unless the agreement is in writing. Utah Code Ann. § 25-5-4(1).

11. Penedo points to no written agreement by Winsome to pay RIO's obligation, and any such alleged verbal agreement that Winsome would pay RIO's expenses, even if it exists, is void.

12. Penedo argues that the Court should apply exceptions to the statute of frauds set forth in Utah Code Ann. § 25-5-6(2) and (3) to find that Winsome undertook an "original obligation" to pay Penedo for his claimed lobbying services or that Winsome benefited from Penedo's lobbying efforts.

13. For Penedo to successfully prove an exception to the statute of frauds based on partial performance, he must do so by clear and convincing evidence. *See, e.g., Wilberg v. Hyatt*, 2012 UT App 233, ¶ 9, 285 P.3d 1249 ("Ultimately, the part performance exception to the statute of frauds must be proved by clear and convincing evidence.")

14. Penedo failed to present clear and convincing evidence that Winsome undertook an original obligation to pay Penedo or that the payments from Winsome to Penedo were “part performance” of an actual agreement by Winsome to assume the obligation to pay a debt to Penedo.

15. Also, Penedo's argument under Utah Code Ann. § 25-5-6(2) or (3) requires that, among other elements, Winsome receive some direct benefit from Penedo. *See, e.g.*, Utah Code Ann. 25-5-6(3) (providing that this section applies where a promise is made "upon consideration beneficial to the promisor"); *Healthcare Services Group, Inc. v. Utah Dept. of Health*, 40 P. 3d 591, 596 (Utah 2002) (finding that statute of frauds might not apply under Utah Code Ann. § 25-5-6(2) "[w]here a promise is an original undertaking of the promisor for its own benefit").

16. Penedo has failed to carry his burden of proof to show that Winsome was benefited by Penedo's lobbying services because, for example, the refinery was never built and there is no proof that permits for the refinery were ever obtained.

17. The Court takes judicial notice that the Receiver filed a separate lawsuit against Penedo, seeking recovery of \$197,000 in payments from Winsome to Penedo. *Klein v. Fundacion Guatemateco Americana and Roberto Penedo*, Case No. 2:12-cv-00049 (D. Utah). On March 3, 2014, Judge Nuffer issued a Memorandum Decision and Order Granting Plaintiff's Summary Judgment, entering judgment of \$197,000 in favor of the Receiver and against Penedo. The Court notes that the instant order is consistent with the findings, conclusions, and order entered by Judge Nuffer.

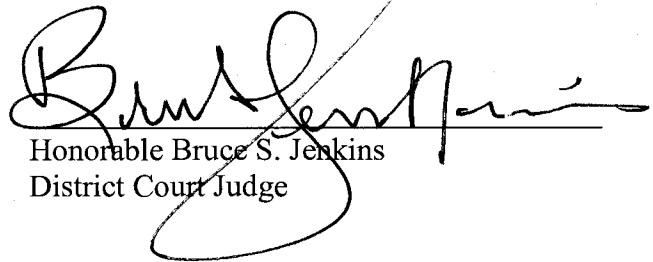
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Court finds that the evidence presented by Penedo is insufficient to demonstrate that Winsome had a legal obligation

to make payments to Penedo or that Penedo's claim against the Receivership Estate should be allowed. As a result, and for good cause appearing, the Court orders that Claim No. 1117 submitted by Penedo in the amount of \$4,418,000 be denied.

DATED this ^{7th} ~~6~~ day of ^{June} ~~March~~, 2014.

BY THE COURT:



Honorable Bruce S. Jenkins
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING CLAIM NO. 1117** to be served in the method indicated below to the Defendant in this action this ___th day of March, 2014.

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