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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.

**THE RECEIVER'S OPPOSITION TO
BOTTORF AND HAMLIN'S MOTION TO
INTERVENE AND NOTICE OF SUIT**

Case No. 2:11CV00099 BSJ

District Judge Bruce S. Jenkins

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, by and through his

attorney of record, hereby files this Opposition to Bottorf and Hamlin's Motion to Intervene and Notice of Suit.

INTRODUCTION

In the Motion to Intervene and Notice of Suit (the "Motion"), Steve Bottorf and Daren Hamlin ask the Court to allow them to intervene so they can pursue claims they may have against Winsome or the Receivership Estate. Despite being well aware of the claims process, Bottorf and Hamlin have failed to submit a claim to the Receiver.

Contrary to the conclusory argument advanced by Bottorf and Hamlin in the Motion, they cannot intervene in this action. For Bottorf and Hamlin to be able to intervene in this action as a matter of right, they must show, among other things, that they will be substantially prejudiced should they not be allowed to intervene. They simply cannot show prejudice. The Court has already taken into account the interests of alleged creditors to Winsome, such as Bottorf and Hamlin, when it established the claims procedure, which allows them to make a claim with the Receiver in a process overseen by the Court.

Nothing prevented Bottorf and Hamlin from making a timely claim against the assets of Winsome through the claims procedure established by the Court. Indeed, the Receiver notified Bottorf of the initiation of the claims process in May 2012, two months before the claims deadline. Having missed the claims deadline, nothing prevented Bottorf or Hamlin from submitting a late claim to the Receiver. Such an approach would have given the Receiver an opportunity to recommend that the claim be allowed or rejected. Bottorf and Hamlin would then have the opportunity to have the Court rule on the Receiver's recommendation along with the objections that were filed in a timely manner. Instead, Bottorf and Hamlin submitted a claim

form directly to the Court as part of their motion to intervene and the Receiver had to obtain a copy of their claim form from the Court.

Courts have consistently held that making a claim in the claims procedure, rather than intervention in the enforcement action, is the proper vehicle for bringing claims against the assets of entities placed in receivership. *See, e.g., Commodity Futures Trading Commission v. Chilcott Portfolio Management*, 725 F.2d 584, 586 (10th Cir. 1984). Therefore, the Receiver respectfully requests that the Court deny the Motion. In addition, the Receiver believes any claim by Bottorf and Hamlin should be disallowed.

BACKGROUND

On January 25, 2011, the Receiver was appointed in this action. *See* 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, Doc. No. 15. In the Order, the Court "directed and authorized" the Receiver to take exclusive control of US Ventures, Winsome, and the assets of Holloway and Andres. *Id.* ¶ 27(c). The Receiver was also ordered to preserve and manage all receivership assets, and to "otherwise protect the interests of customers, clients, pool participants or investors" of US Ventures and Winsome by "[c]ollect[ing] money owed to the [Receivership Defendants]." *Id.* ¶ 27(e)-(h).

Pursuant to the claims process established by the Court on May 21, 2012, creditors of Winsome received notice that Proof of Claim forms were available, which were required to be submitted to the Receiver. *See generally* Receiver's Memorandum in Support of Motion for Approval of Claim Form and Claim Review Process, Doc. No. 115; *see also* Order Approving Proof of Claim Form and Claim Review Process and attached forms, Doc. No. 157. Initially, the

Receiver classified the claims as "allowed," "reduced," or "rejected," pursuant to guidelines approved by the Court. *Id.* The Receiver then notified each claimant of the Receiver's determination and also of the preliminary allowable claim amount. *Id.* Claimants were then able to accept the Receiver's recommendation or submit additional documentation in support of the claim. *Id.* The Receiver then reviewed any documentation or information submitted in response to his initial preliminary allowable claim amount, and filed with the Court his recommendations. *Id.* Claimants then had an opportunity to file an objection to the Receiver's recommendation. *Id.* Based on the number and nature of the objections, the Receiver suggested to the Court a process the Court could employ to resolve the objections. *Id.* After the objections are resolved, the Receiver will publish a final allowable claim amount for each claimant, which will be used by the Receiver to make a pro-rata distribution of the available funds. *Id.* Significantly, the claims process is the "exclusive method" for making claims against the assets of the receivership. Order Approving Proof of Claim Form and Claim Review Process and attached forms, at 9, Doc. No. 157.

On March 3, 2011, Bottorf sent a completed questionnaire response to the Receiver. *See* Questionnaire from Steve Bottorf, dated February 28, 2011, attached as Ex. A. The Receiver used information from the questionnaire to identify potential claimants and to determine email addresses to use in sending out notices when the claims process was initiated. *See* Email from Wayne Klein to Steve Bottorf, dated February 19, 2014, attached as Ex. B. Hamlin has never sent any questionnaire response or investment documentation to the Receiver. *Id.*

On May 22, 2012, the Receiver sent notice of the claims process to Bottorf. *See* Email from Keith Williams to Steve Bottorf and others, dated May 22, 2012, attached as Ex. C; *see*

also Claimant Instructions, attached as Ex. D. Neither Hamlin nor Bottorf submitted a claim form to the Receiver, even though the claims process was posted on the Receiver's website and even though Bottorf has admitted that he has been following the Receiver's website and has read all of the materials posted on the website. *See* Email exchange between Wayne Klein and Steve Bottorf, dated Feb. 20 and 21, 2014, attached as Ex. E. Since December 2011, the Receiver has posted 26 different items on his website relating to the claims process. *Id.*

On May 23, 2014, nearly two years after the deadline for submitting claims, Bottorf and Hamlin signed a Claim Form. *See* Claim Form, attached as Ex. F. The Claim Form was not received by the Receiver until June 17, 2014. In the Claim Form, Bottorf and Hamlin seek allowance of a claim for \$100,000. *Id.* Hamlin received a \$2,500.00 distribution on March 2, 2007; however, this information is entirely absent from the Claim Form. *See* Bank Records Showing Transactions with Bottorf and Hamlin, attached as Ex. G.

Further, in the Claim Form, in response to question 4.A, Bottorf and Hamlin represent that that "Steve Bottorf is a 50% investor in Daren Hamlin's investment." Claim Form, Ex. F. Hamlin invested \$50,000 on February 1, 2007. Bank Records, Ex. G. Bottorf invested \$50,000 on March 5, 2007. *Id.* The investments were not made together or even in the same month. In his questionnaire, Bottorf stated (on page one and on the signature page) that there was no joint investor. Questionnaire, Ex. A. While the claim form instructions urged claimants to send documentation supporting their claims, such as joint venture agreements or other documentation showing the circumstances under which they invested in Winsome or the nature of their supposed joint investment, Bottorf and Hamlin failed to send any documentation underlying their claim.

ARGUMENT

I. THE MOTION TO INTERVE NE SHOULD BE DENIED.

A party is permitted to intervene as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure only in limited circumstances. Bottorf and Hamlin argue that they are permitted to intervene because they are similarly situated to a "class" involved in this action.¹ The Receiver construes the Motion filed by Bottorf and Hamlin as arguing that they are permitted as a right to intervene in this lawsuit under Rule 24.

Courts routinely deny motions to intervene in these circumstances. *See Chilcott*, 725 F.2d at 586; *see also CFTC v. Heritage Capital Advisory Servs.*, 736 F.2d 384, 386-87 (7th Cir. 1984) (affirming district court's denial of motion to intervene when there was a "claim procedure established by the district court"). For example, in *Chilcott*, the CFTC instituted an action against various entities, alleging that they violated the Commodity Exchange Act and defrauded investors. 725 F.2d at 585. At the request of the CFTC, a receiver was appointed over the entities involved in the violations and fraud. *Id.* An individual sought to intervene in the action so he could sue one of the entities placed in receivership based on the allegation that he had transferred \$70,000 to the entity's bank account. *Id.* The district court denied the motion. *Id.* On appeal, the *Chilcott* court affirmed the trial court's decision, and noted that the claims process established by the district court was the preferable vehicle for resolving claims. *Id.* Otherwise, numerous other persons would be encouraged to intervene and ask for leave to initiate litigation with the receiver. *Id.*

¹ Bottorf and Hamlin erroneously referenced a class action in their Motion. Arguments relating to a class action are not addressed in this Opposition Memorandum since no such class exists.

The claims procedure allows the Receiver and the Court to deal with the many claims involving Winsome fairly and equitably, and Bottorf and Hamlin should not be allowed to short circuit this process, especially when the bar date for bringing claims was nearly two years ago. If the arguments of Bottorf and Hamlin were accepted and they were allowed to intervene in this case when they never submitted a claim to the Receiver, the claims process would be of little utility and the rights of every other creditor in Winsome would be significantly harmed. Bottorf and Hamlin have not identified any reason why their claims are so unique as to justify such an inequitable result. Thus, the Motion should be denied.

The Receiver also joins with the CFTC in its opposition to the Motion, and asks the Court to deny the Motion for the reasons outlined and identified by the CFTC in its Motion.

II. THE CLAIM SUBMITTED BY BOTTORF AND HAMLIN IN CONNECTION WITH THE MOTION TO INTERVENE SHOULD BE DISALLOWED.

While the Motion to Intervene is improper and should be denied, should the Court decide to address the merits of the claim filed by Bottorf and Hamlin, the Receiver respectfully requests that the Court deny the claim because the claim is unjustifiably late and because the claim form contains false and incomplete information.

First, the claims of Bottorf and Hamlin should be denied because they were submitted nearly two years after the deadline. Notice regarding the claims process was given to Bottorf two months before the claims forms were due at the email address he used to communicate with the Receiver, and Bottorf admitted that he closely followed postings on the Receiver's website. At least 26 postings on the website reference or contain information concerning the Claims Process. If claims such as the ones at issue were accepted at this late date, the Receiver would be forced to evaluate new claim forms, recalculate the amount that accepted claimants would

recover, and prolong the process of closing out the receivership case. Significantly, more individuals who believe they may have claims may come forward with claims for the first time if late claims such as from Bottorf and Hamlin are accepted. The deadline for filing claims was imposed for a reason. Finality is needed.

Second, the claims of Bottorf and Hamlin should be denied because the Claim Form they submitted under penalty of perjury contains false and incomplete information. In the Claim Form, Bottorf and Hamlin seek a claim for \$100,000. *Id.* Hamlin received a \$2,500.00 distribution on March 2, 2007; however, this information is entirely absent from the Claim Form. *See* Bank Records, Ex. G. The claim form shows dashes in the spaces where distributions are to be recorded. Claim Form, Ex. F. Thus, the Claim Form fails to record a distribution received and fraudulently seeks recovery of \$100,000, when the net principal investment amount is \$97,500.

Further, in the Claim Form, in response to question 4.A, Bottorf and Hamlin represent that “Steve Bottorf is a 50% investor in Daren Hamlin’s investment.” *Id.* Hamlin invested \$50,000 on February 1, 2007 and Bottorf invested \$50,000 on March 5, 2007. Bank Records, Ex. G. The investments were not made together or even in the same month. In his questionnaire, Bottorf failed to identify any joint investor. Questionnaire, Ex. A. While Bottorf and Hamlin were requested to send documentation supporting their claims, such as joint venture agreements or other documentation showing the circumstances under which they invested in Winsome or the nature of their supposed joint investment, they have failed to do so. If the claims were accepted, the Receiver would need to expend more time and investor money to follow up with Bottorf and Hamlin about the nature of the joint investment and request

documents illuminating the nature of Bottorf and Hamlin's investment with Winsome.

Therefore, because the claims were submitted nearly 22 months too late and because the claims contain false and incomplete information, the claims of Bottorf and Hamlin should be denied.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court deny the Motion to Intervene. Further, if the Court is inclined to consider the merits of the claims submitted by Bottorf and Hamlin, the Receiver requests that the Court disallow the claims.

DATED this 18th day of June, 2014.

**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 **THE RECEIVER'S OPPOSITION TO BOTTORF AND HAMLIN'S MOTION TO INTERVENE AND NOTICE OF SUIT** to be served in the method indicated below to the Defendant in this action this 18th day of June, 2014.

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INDEX OF EXHIBITS

- A March 3, 2011 Questionnaire Response of Steve Bottorf
- B February 19, 2014 Email from Wayne Klein to Steve Bottorf
- C May 22, 2012 Email from Keith Williams to Steve Bottorf, et al.
- D Claimant Instructions
- E February 20-21, 2014 Email Exchanges Between Wayne Klein and Steve Bottorf
- F Claim Form of Steve Bottorf and Daren Hamlin
- G Bank Records