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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.

**RECEIVER'S THIRTEENTH MOTION
AND MEMORANDUM SEEKING
APPROVAL 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, notifies the Court that he has entered into three additional

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.")

preliminary settlement agreements of lawsuits he has filed and moves for approval to finalize those settlements.

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 filed suit against many parties, seeking the recovery of payments made improperly. The following three settlements will resolve lawsuits the Receiver has already filed and bring substantial funds into the Receivership Estate. The Receiver seeks confirmation of the following settlements (collectively defined as the "Settlement Agreements"):

1. Gerald Nowak. Nowak was a friend of Andres who made personal loans to Andres. Andres had Winsome pay \$35,000.00 to Nowak in partial satisfaction of amounts Andres owed to Nowak. The Receiver sued Nowak on January 17, 2012, seeking repayment of

the amounts paid to him. On July 30, 2013, a settlement agreement was reached between the Receiver and Nowak whereby Nowak will pay \$11,000.00 to the Receivership Estate. Nowak has given verified financial information to the Receiver demonstrating financial hardship, making him unable to repay the full amount sought by the Receiver. The settlement amount will be paid in six installments, with the full payment being completed by July 31, 2014. Upon approval of this settlement by the Court and receipt of the first payment, the Receiver will dismiss the lawsuit against Nowak.

2. Jose Sarmiento. Sarmiento was involved in several business ventures with Andres and received \$25,000 from the Receivership Entities. Additional funds were paid by Winsome to a company of which Sarmiento was an officer. The Receiver sued Sarmiento on January 24, 2012, seeking repayment of the funds he received. Sarmiento has provided verified financial information to the Receiver demonstrating financial hardship and claiming an inability to repay the full amount to the Receivership. On August 19, 2013, a settlement agreement was reached between the Receiver and Sarmiento whereby Sarmiento will pay \$5,000.00 to the Receivership Estate. This amount will be paid in minimum monthly installments with the full amount due by July 1, 2014. Upon approval of this settlement by the Court and receipt of the first payment, the Receiver will dismiss the lawsuit against Sarmiento.

3. Judith Bassett. Bassett was a friend of Holloway who made personal loans to Holloway. Holloway had US Ventures pay \$33,007.94 to Bassett in partial satisfaction of amounts he owed to her. The Receiver sued Bassett on January 20, 2012, seeking repayment of the amounts paid to her. On August 23, 2013, a settlement agreement was reached between the Receiver and Bassett whereby Bassett will pay \$25,000.00 to the Receivership Estate. Bassett

has given verified financial information to the Receiver demonstrating financial hardship, such that she is unable to repay the full amount sought by the Receiver. The settlement amount is due immediately. Upon approval of this settlement by the Court and receipt of the settlement payment, the Receiver will dismiss the lawsuit against Bassett.

ANALYSIS

The Receiver requests that the Court allow him to finalize these 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 defendant asserted a financial inability to pay and provided a sworn hardship affidavit.

Nevertheless, the Receiver was able to obtain agreements by which each of these defendants will

make some payments to the Receivership Estate. These settlements will bring \$41,000.00 into the Receivership Estate. In addition, these settlements will avoid additional litigation costs that otherwise would be incurred in pursuing these lawsuits.

Each of the Settlement Agreements was negotiated fairly and honestly, and is the result of an arm's length transaction. In light of these factors, the Receiver believes these settlement agreements are just and fair and should be approved.

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 26th day of August, 2013.

MANNING CURTIS BRADSHAW
& BEDNAR, LLC

/s/ David C. Castleberry
David C. Castleberry
Christopher M. Glauser
*Attorneys for R. Wayne Klein, Court-
Appointed Receiver*

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RECEIVER'S THIRTEENTH MOTION AND MEMORANDUM SEEKING APPROVAL TO FINALIZE SETTLEMENT AGREEMENTS** to be served in the method indicated below to the Defendant in this action this 26th day of August, 2013.

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