

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff,

v.

C.A. No. 4:11-MC-00040

U.S. VENTURES LC, a Utah limited liability
company, WINSOME INVESTMENT
TRUST, an unincorporated Texas entity,
ROBERT J. ANDRES and ROBERT L.
HOLLOWAY,

Defendants.

WILLIAM T. CORNELIUS; R.P.
CORNELIUS; and CORNELIUS & SALHAB

Plaintiffs,

v.

R. WAYNE KLEIN, RECEIVER FOR U.S.
VENTURES LC and WINSOME
INVESTMENT TRUST,

Defendant.

MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1), R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") for U.S. Ventures LC ("U.S. Ventures"), Winsome Investment Trust ("Winsome"), and all the assets of Robert J. Andres ("Andres") and Robert L. Holloway ("Holloway") (collectively the "Receivership Defendants"), by through his counsel of record, hereby moves the Court to dismiss the

complaint filed by William T. Cornelius, R.P. Cornelius, and Cornelius & Salhab ("Plaintiffs"), and in support would show as follows:

INTRODUCTION

All lawsuits against the Receiver have been stayed by the United States District Court, District of Utah (the "Utah Court"). In violation of this stay, the Plaintiffs filed a lawsuit against the Receiver without first obtaining leave from the Utah Court to pursue this action. Because this Court lacks jurisdiction to hear this dispute, this action should be dismissed.

BACKGROUND

On January 24, 2011, the Commodity Futures Trading Commission (the "CFTC") filed a Complaint against the Receivership Defendants in the Utah Court, Case No. 2:11CV00099 BSJ ("CFTC Action"). The Receivership Defendants had been operating a Ponzi scheme since at least 2005 by obtaining funds from investors through violation of the federal commodities laws and using the funds from investors to pay false returns to earlier investors. In the course of the Ponzi scheme, the Receivership Defendants made material misrepresentations and omissions, misappropriated funds, and committed fraud as a commodity pool operator, all in violation of the Commodity Exchange Act ("CEA"). The CFTC alleges, among other things, that the Receivership Defendants operated an investment program in violation of the registration, licensing, and anti-fraud requirements of the federal commodities laws. *See id.* In essence, the CFTC alleges that the Receivership Defendants engaged in a Ponzi scheme where over \$50 million was fraudulently taken from investors.

On January 25, 2011, the Utah Court entered an Order Granting the CFTC's *Ex Parte* Motion for Statutory Restraining Order, Expedited Discovery, Accounting, Order to Show Cause re Preliminary Injunction and Other Equitable Relief (the "SRO"), a copy of which is attached as

Exhibit A. As part of the SRO, the Utah Court placed U.S. Ventures, Winsome, and all the assets of Andres and Holloway under the control of the Receiver, and enjoined the Receivership Defendants from acting on behalf of Winsome or U.S. Ventures. *See Exhibit A*, at 9 - 13. The SRO provides that all parties seeking "relief from Defendants' Assets . . . are enjoined and stayed from taking any action to establish or enforce any claim . . . against . . . the Receiver [or] receivership assets . . . including but not limited to . . . [c]ommencing, prosecuting, litigating, or enforcing any suit." *Id.*, ¶ 30. Shortly after his appointment, the Receiver filed a Notice of Receivership with this Court. *See* Notice of Receivership (Doc. No. 1).

On February 28, 2011, the Utah Court entered an Order of Preliminary Injunction and Other Equitable Relief Against US Ventures LC and Winsome Investment Trust (the "Preliminary Injunction Order"), a copy of which is attached as **Exhibit B**. In the Preliminary Injunction Order, the Court ordered that the SRO "shall remain in full force and effect until further order of this Court." **Exhibit B** at 4.

On October 3, 2011, Plaintiffs filed a declaratory action against the Receiver. *See* Pls.' Complaint, (Doc. No. 2). The complaint was filed in response to a letter from the Receiver wherein the Receiver asks that funds improperly paid by Winsome to Plaintiffs be returned to the receivership estate. *Id.* ¶ 3. Plaintiffs did not obtain leave from the Utah Court to bring this action.

ARGUMENT

All actions against the Receiver are stayed pursuant to the Utah Court's SRO. Because Plaintiffs' have failed to comply with the SRO by obtaining leave from the Utah Court to file this complaint, the Plaintiffs' complaint should be dismissed. "It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained." *Barton v. Barbour*, 104 U.S. 126, 127 (1881). "Although the *Barton* decision is more than 125 years old,

federal courts have consistently and explicitly affirmed the doctrine's continuing vitality." *Seaman Paper Co. of Mass. v. Polsky*, 537 F. Supp. 2d 233, 236 (D. Mass. 2007). If a party brings an action against a receiver and has not sought leave of the court appointing the receiver to bring the lawsuit, the non-appointing "court lacks subject-matter jurisdiction" to hear the claim. *Clanton v. North Pacific Group, Inc.*, No. 2:10-CV-57KS-MTP, 2010 WL 2944562, at *6 (S.D. Miss. July 22, 2010); *see also Seaman Paper Co.*, 537 F. Supp. 2d at 238-39 (dismissing claim against receiver for lack of subject-matter jurisdiction).

Where a court determines it lacks subject-matter jurisdiction, it "must dismiss the action." Fed. R. Civ. P. 12(h)(3) (emphasis added). In *Clanton*, the plaintiffs sued a receiver appointed under 28 U.S.C. § 754, and asked the court for declaratory relief with respect to covenants not to compete in contracts they had entered into with the entity in receivership. *Clanton*, 2010 WL 2944562, at *2. Although the receiver in *Clanton* moved to dismiss the plaintiffs' claims based upon improper venue, the court found that it lacked subject-matter jurisdiction and dismissed the action because the court appointing the receiver enjoyed exclusive jurisdiction over the receivership estate. *Id.* at *6; *see also Fleegeer v. Clarkson Co. Ltd.*, 86 F.R.D. 388, 395 (N.D. Tex. 1980) (dismissing claim against receiver because leave of court appointing receiver had not been obtained). In *Fleegeer*, plaintiffs brought a shareholder derivative suit against a company that was controlled by a Canadian court-appointed receiver without seeking leave from the Canadian court. 86 F.R.D. at 390. The court dismissed plaintiffs' claims because a receiver "cannot be sued here [in Texas] without leave of the appointing court." *Id.* at 395.

Here, the SRO provides that all parties seeking "relief from Defendants' Assets . . . are enjoined and stayed from taking any action to establish or enforce any claim . . . against . . . the Receiver [or] receivership assets . . . including but not limited to . . . [c]ommencing, prosecuting,

litigating, or enforcing any suit." **Exhibit A**, ¶ 30. Without seeking leave of the Utah Court, Plaintiffs' request for declaratory relief violates the SRO. As a result, this Court lacks subject-matter jurisdiction over their claim, and this action must be dismissed as a matter of law.

CONCLUSION

Based on the foregoing, the Receiver respectfully requests that the Court dismiss Plaintiffs' complaint, and for such other and further relief to which he has shown himself justly entitled.

DATED this 24th day of October, 2011.

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*Attorney for R. Wayne Klein,
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Trust and U.S. Ventures LC*

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing *Motion to Dismiss* be served electronically through the Court's CM/ECF System and mailed, certified mail, return receipt requested, this 24th day of October, 2011 to the following:

Berry Dunbar Bowen, Esq.
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*Attorney in Charge for William Cornelius;
R.P. Cornelius; and Cornelius and Salhab*

/s/ Alex B. Roberts

Alex B. Roberts