

MANNING CURTIS BRADSHAW
& BEDNAR LLC

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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.

**MEMORANDUM IN SUPPORT
OF RECEIVER'S MOTION FOR
PERMISSION 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, submits his memorandum in support of his motion for permission

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.")

to finalize settlement agreements described below.

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 already filed suit against many parties, seeking the recovery of payments made improperly. In the following instances, the recipients of funds have agreed to settle with the Receiver without the need for the Receiver to initiate litigation against them. The Receiver now seeks confirmation of the following settlements (collectively defined as the "Settlement Agreements"):

1. Annette West. West is a cousin to Robert Andres. In 2008, Andres sent \$10,000.00 to West as a gift. Pursuant to a settlement agreement dated November 1, 2011, West has agreed to return the full \$10,000.00 to the Receiver. Payment has been made to the

Receiver.

2. Aerospace Consulting Corporation. Aerospace is a company formed under Spanish law in 2001. Aerospace owns a U.S. patent for technology that claims to neutralize toxic chemical waste using plasma technology. In 2005, Aerospace filed bankruptcy in New Mexico. In 2006, Winsome entered into an agreement to purchase Aerospace for \$5,500,000.00. Winsome eventually paid \$4,200,000.00, but did not complete the purchase of Aerospace or its technology. As a result of Winsome's failures to make required payments on a timely basis, the purchase price for Aerospace was raised significantly. The \$4.2 million that Winsome did pay was used to pay expenses of the administration of the New Mexico bankruptcy and to make distributions to creditors of Aerospace.

Aerospace has asserted that Winsome still owes it funds pursuant to the purchase agreement. Aerospace had sued Winsome and that lawsuit is pending in the New Mexico bankruptcy court, although that litigation is stayed because of the Court's order appointing a Receiver. For his part, the Receiver has asserted that the transfers to Aerospace were fraudulent and should be returned.

The dispute over the payments from Winsome to Aerospace is extremely complex. Litigation would be complicated because: i) the viability and value of the plasma technology is uncertain, ii) the contract to purchase Aerospace provided that all funds paid by Winsome to Aerospace were non-refundable in the event Winsome failed to make the required payments in a timely manner, iii) the funds paid to Aerospace by Winsome have already been distributed to bankruptcy creditors of Aerospace or expended in administration of the bankruptcy, iv) the equities are not as solidly in favor of the Receiver as with other fraudulent transfers since

Aerospace is operating under bankruptcy court protection and the purchase agreement was approved by the bankruptcy court, and v) there may be significant disagreement over whether the disputes between the Receiver and Aerospace would be decided by the bankruptcy court in New Mexico or this Court.

The Receiver believes that the best course for the Receivership is to work together with the bankruptcy estate for Aerospace in trying to sell the intellectual property assets of Aerospace and dividing the proceeds between the Receivership estate and the bankruptcy estate – rather than litigating with the bankruptcy estate. Under a settlement agreement dated October 31, 2011, Aerospace and the Receiver agree to: i) dismiss all litigation and pending motions against each other, ii) cooperate in the sale of Aerospace assets, and iii) upon a sale of assets, divide the gross proceeds with 50% of the proceeds going to the bankruptcy estate and 50% going to the Receivership estate.² There are no assurances that the assets can be sold for significant value or that a sale will be accomplished in the near future. This agreement is also subject to approval by the New Mexico Bankruptcy Court.

The Commodity Futures Trading Commission has informed the Receiver that it has no objection to the terms of the settlement with Aerospace.

ANALYSIS

The Receiver respectfully requests that the Court allow him to finalize the 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."

² Expenses paid to outside parties that are necessary for the sale, such as patent filing fees, commissions, and other costs of sale will be paid before the gross proceeds are divided between the parties.

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 of the Settlement Agreements was negotiated fairly and honestly, and is the result of an arm's length transaction. The Receiver's settlement agreement with Annette West represents a full return of the money the Receiver has demanded. The Receiver's settlement with Aerospace is believed to be the best resolution of a very complicated matter. This resolution has the advantages of: a) avoiding expenditure of the attorneys' fees and Receiver fees that would be required if the bankruptcy court litigation were to continue in New Mexico, b) avoid jurisdictional battles, and the concomitant costs, that would be incurred as the Receiver would seek to have the legal disputes heard by the Receivership Court while Aerospace would seek to have the disputes heard by the bankruptcy court in New Mexico, c) increase the chance that any value of the patent would not be consumed by legal fees and administrative costs, and d) allow the plasma device to

be marketed by those who are most familiar with its technology and who have been marketing the device previously.³

Therefore, the Court should allow the Receiver to finalize the Settlement Agreements.

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 7th day of November, 2011.

MANNING CURTIS BRADSHAW
& BEDNAR, LLC

/s/ David C. Castleberry
David C. Castleberry
Aaron C. Garrett
*Attorneys for R. Wayne Klein, Court-
Appointed Receiver*

³ As noted earlier, there are substantial uncertainties regarding the value of this technology and the strength of the Receiver's claims for recovery of the \$4.2 million paid towards the purchase price. With this settlement, the Receiver will never know whether he would have prevailed in his fraudulent transfer claims and whether more money could have been recovered if those arguments had been pursued and been successful. However, the Receiver faces a substantial risk of not prevailing on his claims against Aerospace and not obtaining any recovery for the receivership estate.