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UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

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, Plaintiff vs. MICHELE PETTY, Defendant	Case No. 2:11-cv-01099-DN **MOTION TO ENFORCE SETTLEMENT AGREEMENT**

Plaintiff R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of US Ventures LC ("US Ventures"), Winsome Investment Trust ("Winsome"), and all of the assets of Robert J. Andres ("Andres") and Robert L. Holloway ("Holloway") (collectively, the "Receivership

Defendants"), by and through his undersigned counsel, hereby submits this Motion to Enforce Settlement Agreement.

BACKGROUND

The Receiver and Michele Petty entered into a final settlement agreement on August 8, 2014. *See* Agreement and Release, attached as Exhibit A. The written and signed agreement provides, among other things, "Petty will pay $45,000.00 to the Receivership Entities. This amount will be paid within 10 days from the date Petty receives notice from the Receiver that the court has approved the settlement."

The Receiver moved for approval of the settlement from Judge Bruce Jenkins in the case where the Receiver was appointed, *CFTC v. U.S. Ventures LC*, Case No. 2:11-CV-00099 (D. Utah).[1] On September 23, 2014, Judge Bruce Jenkin approved the settlement agreement. *See* Order Approving Settlement Agreement, Exhibit B. On September 26, 2014, the Receiver notified Petty that the settlement agreement had been approved, thus triggering the ten day period in which she was required to pay the $45,000 in full. *See* Email from David Castleberry to Michele Petty, dated September 26, 2014, attached as Exhibit C. Petty missed the payment deadline, which fell on October 6, 2014. The Receiver followed up with Petty on October 22, 2014, noting that the $45,000 payment was overdue. *See* Email from David Castleberry to Michele Petty, dated October 22, 2014, attached as Exhibit D. The Receiver requested that Petty respond "as soon as possible to discuss [her] compliance under the settlement agreement," but

[1] The Receiver's motion for approval of the settlement was inadvertently filed in this case at the same time it was filed in the *CFTC* matter before Judge Jenkins. On October 15, 2014, this Court granted the Receiver's motion "for the reasons set forth in it," noting that the motion "is unopposed." *See Order Granting Receiver's Motion for Approval to Finalize Settlement Agreement.*

Petty did not respond. On October 31, 2014, the Receiver sent another email to Petty warning that if payment was not received by November 7, 2014, the Receiver would move to enforce the settlement agreement. *See* Email from David Castleberry to Michele Petty, dated October 31, 2014, attached as Exhibit E. As of the date of this filing, Petty's payment is more than six weeks overdue and she has still not provided any response to inquiries regarding her failure to comply with the settlement agreement.

ANALYSIS

"A trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *Shoels v. Klebold*, 375 F.3d 1054, 1060 (10th Cir. 2004) (quoting *United States v. Hardage*, 982 F.2d 1491, 1496 (10th Cir. 1993)); *see also Farmer v. Banco Popular of N. Am.*, 557 F. App'x 762, 769 (10th Cir. 2014) (affirming the trial court's enforcement of an agreement to settle a pending case and noting that "[t]he district court has all lawful authority to bring th[e] matter to a prompt and just conclusion"). "Issues involving the formation and construction of a purported settlement agreement are resolved by applying state contract law." *Shoels*, 375 F.3d at 1060. "Under Utah law, courts will enforce settlement agreements 'if the record establishes a binding agreement and the excuse for nonperformance is comparatively unsubstantial.'" *Nature's Sunshine Prods. v. Sunrider Corp.*, 511 F. App'x 710, 714 (10th Cir. 2013) (quoting *Zions First Nat'l Bank v. Barbara Jensen Interior, Inc.*, 781 P.2d 478, 479 (Utah Ct. App. 1989)). "In tandem with the Court's inherent power to enforce settlement agreements is the authority to enter judgment on the compromise

without engaging in a plenary hearing."[2] *Brockman v. Sweetwater Cnty. Sch. Dist. No. 1*, 826 F. Supp. 1328, 1330 (D. Wyo. 1993) (quoting *Petty v. Timken Corp.*, 849 F.2d 130, 132 (4th Cir. 1988)).

Here, the record indisputably "establishes a binding agreement" between the parties. *Nature's Sunshine Prods.*, 511 F. App'x at 714 (quoting *Barbara Jensen Interior*, 781 P.2d at 479). Further, Petty's "excuse for nonperformance" is completely nonexistent. She has failed to provide any response whatsoever to repeated inquiries regarding her overdue payment. Consequently, this Court should exercise its well established "power to summarily enforce [the] settlement agreement entered into by the litigants . . . before it." *Shoels*, 375 F.3d at 1060 (quoting *Hardage*, 982 F.2d at 1496).

Moreover, in light of Petty's willful disregard for her unambiguous obligations and her continued refusal to even engage the Receiver in communication regarding her intentions, this Court should "resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). As a matter of federal common law, federal courts "may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* (quoting *Alyeska Pipeline Serv. Co. v. Wilderness*

[2] Of course, "where material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing." *Hardage*, 982 F.2d at 1496. This Court, however, is certainly not "faced with conflicting . . . representations" concerning "the existence or terms of an agreement to settle." *Id.* at 1496. Indeed, the Receiver has already obtained express judicial approval of the settlement agreement at issue. *See Nature's Sunshine Prods.*, 511 F. App'x at 711, 714 n.3 (affirming the enforcement of a settlement agreement and rejecting appellant's contention that "the district court should have conducted an evidentiary hearing to ensure the record established a binding agreement").

Soc'y, 421 U.S. 240, 258 (1975)) (internal quotation marks omitted).[3] Federal courts have done exactly that in cases like this, where a party's bad faith attempts to avoid contractual duties have needlessly prolonged litigation and necessitated a motion to enforce a settlement agreement. *See, e.g.*, *Tocci v. Antioch Univ.*, 967 F. Supp. 2d 1176, 1201-03 (S.D. Ohio 2013); *Travelers Indem. Co. v. Superior Constr. Co.*, 1989 WL 156369, at *1-3 (E.D. Pa. Dec. 19, 1989).

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that this Court enforce the parties' finalized settlement agreement by entering judgment against Michele Petty in the amount of $45,000 plus interest and all costs associated with collection, including the legal fees associated with preparing this motion and any additional legal fees that may be incurred in securing payment.

DATED this 18th day of November, 2014.

MANNING CURTIS BRADSHAW & BEDNAR LLC

/s/ David C. Castleberry

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Christopher M. Glauser
Attorneys for Receiver for US Ventures, LC, Winsome Investment Trust, and the assets of Robert J. Andres and Robert L. Holloway

[3] The Supreme Court has held that the twin aims of the *Erie* rule—"discouragement of forum-shopping and avoidance of inequitable administration of the laws"—are simply not "implicated by the assessment of attorney's fees as a sanction for bad-faith conduct." *Id.* at 52. This is because "the imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation. Consequently, there is no risk that the exception will lead to forum-shopping." *Id.* at 53. In any event, there is no conflict here between federal and state law, since a Utah statute explicitly provides that a "court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." Utah Code Ann. § 78B-5-825.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **MOTION TO ENFORCE SETTLEMENT AGREEMENT** to be served in the method indicated below to the Defendants in this action this 18th day of November, 2014.

___HAND DELIVERY	Michele Petty
_x_U.S. MAIL	michpetty@aol.com
___OVERNIGHT MAIL	27343 Indian Crest
_x_FAX TRANSMISSION	San Antonio, TX 78261
_x_E-MAIL TRANSMISSION	Telephone: 210-896-9305
_x_USDC ECF NOTICE	Facsimile: 830-714-5195

/s/ Melissa Aguilar