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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 TO
COMPEL PRODUCTION OF
DOCUMENTS ON HARD DRIVE
OF ROBERT ANDRES**

Case No. 2:11CV00099 BSJ

Judge Bruce S. Jenkins

R. Wayne Klein, the Court-Appointed Receiver¹ (the "Receiver"), by and through his
counsel of record, hereby moves for permission to access and view all electronic files on a

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."

computer owned by Winsome and controlled by Andres – despite Andres’s claim that most of the files are privileged.

STATEMENT OF FACTS

Andres Is Required to Provide the Receiver Access to Computerized Records

On January 25, 2011, this Court entered an order appointing a receiver and requiring Winsome and Robert Andres to turn over to the Receiver all records of Winsome and related companies, including computer records. *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* (“Order”) (dkt. no. 15).

The Order is replete with provisions requiring Andres to cooperate with the Receiver and provide business records of Winsome and other companies controlled by Winsome or Andres (“Receivership Entities”):

- “Defendants . . . are immediately restrained and enjoined from . . . concealing . . . any documents that relate to the business practices or business . . . of Defendants and their subsidiaries or affiliates.” Order at ¶ 23.
- “[T]he Receiver shall immediately be allowed to inspect the books, records, and other documents of Defendants and their agents, including, but not limited to, electronically stored information, tape recordings and computer discs, . . . and to copy said documents, information and records” Order at ¶ 24.
- “Defendants . . . shall cooperate fully with the Commission and/or the Receiver to locate and provide to representatives of the Commission and/or the Receiver all books and records of Defendants” Order at ¶ 25.

- “The Receiver is directed and authorized to . . . [a]ssume full control of the corporate Defendant” Order at ¶ 27(a).
- “[T]he Defendants . . . shall immediately . . . deliver over to the Receiver . . . [p]ossession and custody of documents of the Defendants” Order at 27(b).
- “The Defendants . . . shall cooperate fully with and assist the Receiver. This cooperation and assistance shall include . . . providing any password required to access any computer or electronic files in any medium” Order at ¶ 29.

Andres Has Refused and Thwarted the Receiver’s Requests for Records of Winsome and Andres

Despite these clear mandates from the Court, Andres provided very few records to the Receiver before August 23, 2011. The volume of records that were provided before that date is miniscule in comparison to what would be expected in light of the size and complexity of the enterprises operated by Winsome and the \$92.7 million that was deposited into bank accounts of Winsome and affiliated companies. The few records Andres provided to the Receiver before August 23, 2011 are:

Date	# Docs	# Pages	Description	Event
2/28/11	4	17	Two affidavits signed in 2008, two copies of a 2010 settlement agreement between Winsome and USV.	Sent via e-mail
3/22/11	12	27	UCC filing, Andres letter written to Federal Reserve, correspondence from an attorney Andres was seeking to (but did not) engage.	Delivered at first day of deposition
3/29/11	2	962	Flash drive containing 177 spreadsheet files listing daily amounts owed to investors from July 06 to April 07, a two-page document with investor account names.	Delivered at second day of deposition.

The Receiver has made frequent requests to Andres that he deliver Winsome documents to the Receiver. With the exception of the documents listed in the chart above, those requests have been ignored.²

Actions Taken by the Receiver to Obtain a Copy of Winsome's Computer Hard Drive

On August 23, 2011, the Receiver made a special trip to Houston to meet with Andres. The meeting was at Andres' request, to discuss his proposal that he be allowed to pursue claims against others in his own name. The Receiver had insisted that Andres make his computer available for copying at that meeting. The Receiver had arranged for a computer forensic specialist to make a copy of the hard drive on the Winsome computer. At that time, Andres claimed that the computer contained many privileged documents and refused to allow the Receiver access to those documents. Andres claimed there were two types of privileged documents on the computer: (i) documents relating to legal services he provided to others; and (ii) documents relating to communications between Andres and attorneys representing him personally.

The Receiver proposed a compromise, which was reduced to writing. A copy of this compromise agreement is attached as Exhibit 1. Under the compromise:

- The computer forensic specialist was allowed to copy the computer drives at that time;
- Andres was given ten days to provide the Receiver with a list of files or

² In some instances, when confronted with his failure to keep promises to deliver documents, Andres stated that he had few hard copy documents and that most of his documents were kept electronically on his computer and fax machine.

documents that he claims are privileged;

- The Receiver would avoid accessing or reviewing any data on the hard drive copy for ten days;
- For any files or documents that Andres claimed were privileged, Andres was required to provide an explanation of the basis for the claim of privilege; and
- The Receiver would not access or review any data or documents that were subject to a claim of privilege without the consent of Andres or order by this Court.

The Privilege Log Created by Andres Claimed Privilege for Most Files

On September 12, 2011, Andres sent to the Receiver a privilege log 18 pages long. A copy of this privilege log is attached as Exhibit 2. The privilege log identified three formats of documents for which Andres was claiming a privilege (.pdf, .doc, and .pst formats). The log contained little explanation of the basis for the privilege he was claiming. As described below, the Receiver believes that the vast majority of the “privileged” files are ordinary business records of Winsome and that there is no legitimate basis for Andres to claim a privilege for those records.

1. “PDF” Files. These are computer files containing scanned images of documents. Andres identified 90 files to which he asserts a privilege. He does not identify the basis for the privilege as to any of these documents. Based on the file names assigned to these documents by Andres, the Receiver believes that most of them relate to matters under investigation by the Receiver. For example:

a. Ruby Gemstone³ There are five files labeled “Ruby,” including one that says it is a photo and two that state they are appraisals. This appears to relate to a precious gem and may represent an asset that belongs to the Receivership. The Receiver needs to access these files to determine the value, status, and location of this asset.

b. RIO Systems/Guatemala Refinery There are eleven files with the label RIO, Guatemala, Eduardo, or FundaGuam. These appear to relate to an investment program involving efforts to construct a refinery in Guatemala. To date, the Receiver has identified \$2.2 million in payments from Receivership Entities for this project. In addition, the Receiver has filed suit against RIO Systems and others, seeking to recover payments made. Additional lawsuits are planned against other recipients of funds related to these projects. These computer files are needed for the Receiver’s ongoing efforts to recover payments made pursuant to this investment scheme.

c. Staz/Yu The computer hard drive has four files with labels for Staz. The Receiver believes this is a company controlled by Andres. Therefore, Staz is included as one of the companies that should be in the possession and control of the Receiver. Some of these document labels refer to Yu (believed to be the person who claimed to have \$10 billion on deposit at the Federal Reserve Board) and Citibank (a possible source of recovery).

d. Guerrero A file is labeled Guererro. The Receiver has found records indicating that a person named Guerrero sent money to Andres or one of the Receivership

³ The underlined headings are the names of the computer files that Andres said were privileged.

Entities. Consequently, this appears to be a document relating to the operation of the Receivership Entities and should be made available to the Receiver.

e. JC – BMW The Receiver believes this file relates to a BMW automobile that Winsome purchased for Jerome Carter. The Receiver believes that information in this file would assist him in seeking recovery of assets from Carter (who has already been sued by the Receiver).

f. CA – Discovery Response In November 2007, the California Department of Corporations ordered Andres and Winsome to desist and refrain from unlawfully selling securities. The Receiver suspects that this file relates to information Andres sent to California securities regulators. If so, the contents of this file are relevant to the work of the Receiver and constitute business records of the Receivership Entities.

g. Payton Three .pdf files have labels referencing Payton. The Receiver suspects these relate to Kathryn Payton – to whom \$455,125.00 was sent by the Receivership Entities. The Receiver believes these records would assist him in understanding the purposes of the payments to Payton and whether funds can be recovered for victims.

h. Perkins – Settlement If this file relates to a settlement agreement with an investor, it is a record of the Receivership Entities and would be highly relevant to identifying another person with more information about the operations of the Receivership Entities and possibly indicating a source of recovery of funds.

i. Scogin – Ltr Confirming Funds The Receiver believes this label indicates the file contents would have information about funds that Scogin – a third-party marketer

– sent to Winsome. This is a record of the Receivership Entities.

j. Cindy Moore Prom Note The Receiver has filed suit against Cindy Moore, seeking recovery of \$3.04 million paid to Moore or to others on her behalf. If this file contains a copy of a promissory note relating to Cindy Moore, it would assist the Receiver in his litigation against Moore and might identify assets that can be recovered.

k. Shiloh Inv doc 150M Based on this file label, the Receiver believes this might contain information about an investor. If so, the record should be available to the Receiver and might contain information about a victim and possibly about potential recoveries. There is also a second file folder with the name Shiloh in the title.

l. CarolB There are three files with labels beginning with CarolB. The Receiver suspects these relate to Carol Ballard, the wife of Clayton Lynn Ballard. The Receiver has sued Clayton Lynn and Carol Ballard seeking the recovery of \$2.1 million in payments made to them and to others on their behalf.

m. O – 500MT JV This file and two others beginning with O are suspected of relating to Tetsuo Oyamada, the person claiming to own 500 metric tons of gold in a Swiss bank. The label “JV” suggests there was a joint venture agreement with “O.” If a joint venture agreement exists with Winsome and because Winsome claimed the Swiss gold was an asset of Winsome, these are records of Receivership Entities and are relevant to the efforts of the Receiver to determine where funds have been spent and what might be recovered.

n. Trust SS4 – LS The Receiver suspects this relates to Lewis Scogin, a marketer for Winsome. The Receiver believes these files are relevant to his investigation

of Scogin and potential recoveries from Scogin.

o. WIT There are seven files beginning with WIT in the document name. The Receiver believes these are a reference to Winsome Investment Trust. These document names include references to Scogin, CLB (believed to be Clayton Lynn Ballard), and Sellers (another married couple sued by the Receiver). The Receiver believes these documents relate to the business of Winsome and have information important to the continuing work of the Receiver.

p. Sellers CT Notice This file appears to relate to Al and Cherylyn Sellers, two people who helped Andres market Winsome. The Sellers have been sued by the Receiver for over \$144,000.00. The contents of this file are expected to be relevant to the Receiver's ongoing investigation and his lawsuit against the Sellers.

q. RA FOSSBERG (Bahamas) It may be that this file describes bank accounts or funds sent to the Bahamas by Winsome or Andres. There is nothing in the document name to suggest it relates to legal services provided by or for Andres. In fact, the Fossberg name is identified in two of the "WIT" files described above, suggesting that Fossberg had connections to Winsome and that these are records relating to the business of Winsome.

r. 15A – 4M AFFS3A Amend The Receiver believes this document relates to American Financial Freedom Society, which had financial transactions with Winsome. The label suggests that AFFS was to provide to – or receive from – Winsome the sum of \$4 million. The Receiver believes this information would be helpful in his ongoing investigation.

s. *Other Files* There are other files with names where the contents and purpose of the documents are unclear, but where the Receiver suspects the documents relate to the business of Winsome – and not legal services provided by or for Andres. These document names include references to “Loan – Triumph Fee,” “Visa Invitation” (three such documents – which might relate to the many overseas transfers by Winsome), “ATFI – Funds,” “2-CD-ICC-Myrup” (which might be a reference to certificates of deposit), “3-JVA” (which might refer to amendments to joint venture agreements used by Winsome), “Travel Visa,” “JD-NFX_Business_Summary” (which may relate to Joseph Dixon, who received money from Winsome), and “wyattindictment” (which may be relevant in light of Winsome having paid legal defense fees for Jerome Carter, Al Sellers, Jesus Baca, and others).

2. “DOC” Files The second category of files on the computer contained documents created using a word processing program. Instead of providing a list of “privileged” files, Andres said that all .doc files are privileged except those for which he granted specific permission to access. Andres provided a list of a limited number of documents that he said were non-privileged and available for review by the Receiver.⁴ The Receiver has not reviewed any of these supposedly privileged files. As with the .pdf files, the file names for many of these documents suggest that they are business records of Andres and Winsome and that they do not qualify for the assertion of any legitimate privilege. The following are samples of some of the

⁴ The first document on this list is labeled “19 – Perfect Woman.” It is a picture of a naked woman with sayings about what makes a woman perfect. The Receiver suspects Andres placed this as the first document on the non-privileged list as a perverted joke on the Receiver.

names of files that Andres has asserted are privileged:

a. Accounting 2008 WIT and Accounts Receivables WIT. The document names clearly suggest these are business records of Winsome. There are other files with 2006 and 2007 accounting records. As such, Andres would have no basis for asserting a privilege in precluding the Receiver from reviewing these computer files.

b. Internet Accounts and Passwords and Business Internet Passwords The Order requires Andres to provide a full accounting of all assets (¶ 16), access to all records of accounts held at financial institutions (¶ 18), and “any password required to access any computer or electronic files” (¶ 29). The titles of these documents suggest the files contain exactly the types of information Andres is specifically ordered to provide to the Receiver. The Receiver believes Andres has no basis for asserting that these records are privileged.

c. Irrevocable Stock or Bond Power This document title suggests that Winsome received (or gave) a power of attorney over stocks and bonds. If so, these are potential assets of the Receivership Estate and this information would assist the Receiver in his efforts to “determine the location and disposition of customer funds” (Order at ¶ 8).

d. Text Msgs 2008 Text messages that Andres sent or received during 2008 would be highly relevant to the investigation being conducted by the Receiver. Other files show text messages for 2006 and 2007. The Receiver knows of no basis for asserting that these messages are privileged.

e. To Do, Business Diary, and Mtgs The titles of these files suggest that they are records of business dealings of Winsome and Andres. These are records of Receivership Entities and the ability to review these documents is important for the Receiver to be able to carry out his mandate from the Court.

f. BofA Accounts and Wire Coordinates These documents appear directly related to financial transactions by Andres, Winsome, and other Receivership Entities. These are necessary for the work of the Receiver and there does not appear to be any valid basis for Andres' claim that these records are privileged.

g. JOINT VENTURE Original 500MT Gold This is an example of a document critically needed by the Receiver. Millions of dollars were spent by Winsome supposedly obtaining access to 500 metric tons of gold being held at UBS Bank in Switzerland. This gold was listed as an asset on balance sheets prepared and used by Winsome to solicit investment funds. If Winsome has any interest in 500 tons of gold, the Receiver needs this information to attempt to recover that asset. If the promise of 500 tons of gold was a fraud perpetrated on Winsome by others, the Receiver needs this information to be able to identify the fraudsters and determine whether any recovery can be made. There are another four documents referencing UBS. The Receiver knows of no basis for Andres to claim these documents are privileged.

h. Joint Interest Agreement – T. Oyamada Other records reviewed by the Receiver indicate that Tetsuo Oyamada claimed to be the owner of gold at UBS Bank in Switzerland. This document (along with 27 other files referenced below) is expected to assist the Receiver in identifying and recovering assets listed on balance sheets created by

Winsome or identifying where funds were expended by Winsome in an effort to claim an interest in gold.

i. HistorySourceFunds If this document shows the sources of funds sent to Winsome or Andres, it will assist the Receiver in his investigation.

j. PROMNOT There are five documents beginning with this term and a sixth that is labeled "SAMPLE PROMNOTE." The Receiver suspects that these are promissory notes issued by Winsome or Andres and that the documents will reveal the sources of funds sent to Winsome. These documents might contain information about potential recoveries for victims.

k. Projects Vulcan ExecSum, AC2, AIG and KPMG - Ltr The Vulcan project is the device that supposedly neutralizes chemical waste. There are three files with Vulcan in the name. AC2 refers to Aerospace Consulting Corporation, which owns the intellectual property rights to this device. There are ten files containing AC2 as part of the file name. AIG is believed to be Aerospace Innovations Group. There are seven files with AIG as part of the title. Winsome sent over \$1.2 million to Aerospace Innovations Group. Winsome paid funds to the accounting firm KPMG relating to Aerospace. To date, the Receiver has identified over \$6 million of Winsome funds used for the Aerospace (Vulcan) project. These documents would assist the Receiver in completing his investigation into the sources and uses of this \$6 million.

l. WIT and Trust Ltr At least 21 documents have WIT or Winsome in the

document name, indicating they relate to the business of Winsome.⁵ One of these has “pyramid” as part of the document name. An additional ten documents have the word “Trust” in the name, suggesting these relate to Winsome Investment Trust. These are records of Receivership Entities and are important in enabling the Receiver to complete his investigation.

m. Abdulkaki – Texas Contract for Deed The Receiver has sued Nina and Mazen Abdulkaki, alleging they received more in distributions than they paid to Winsome. The name of this document suggests that there may have been real estate transferred between the Abdulkakis and Winsome (or Andres). If so, the Receiver needs more information about that transaction. There is a second document relating to Nina Abdulkaki.

n. PrivPlaceAgree –4M-10M Transaction The name of this document suggests that Winsome was participating in a private placement of securities in an amount between \$4 million and \$10 million. This information is needed as part of the Receiver’s investigation.

o. Lawsuit – PHood-WIT Answer There are three documents listing “Lawsuit – PHood” in the title. It appears that Winsome was sued and these files contain information relating to this litigation. These are business documents; they are not privileged.

p. Lisa Pham Litigation Settlement and Perkins - Settlement There are two

⁵ Two of these reference “Rolex,” suggesting that Winsome funds were used to purchase a Rolex watch. Andres has not delivered a Rolex (or any other assets) to the Receiver.

documents referencing Lisa Pham in the title. This document suggests that she sued Winsome. The Receiver is investigating Pham, seeking to determine the reasons for payments to her from Winsome – when she made no payments to Winsome. Similarly, there are documents suggesting a lawsuit by, and settlement with, “Perkins.” The Receiver needs information about these lawsuits and settlements.

q. Nuckolls Nuckolls is the person who created Winsome Investment Trust. Nuckolls has refused to answer questions from the Receiver. Information in six files containing Nuckolls in the titles would provide information the Receiver does not have about the early activities of Winsome and the role of Nuckolls in forming and operating Winsome.

r. *Regulatory Inquiries* As noted earlier, Andres and Winsome were ordered by California to cease illegal sales of securities. Andres and Winsome were also investigated by the Arkansas Securities Commission relating to sales of securities. The Texas bar conducted an inquiry based on a complaint filed by a Winsome investor. The “.doc” files on Andres’ hard drive contain two files that appear to relate to the Arkansas investigation (including one that says it is a “sanitized” strategic memorandum). There are five documents that appear to relate to the California enforcement matter. Two documents appear to relate to the Texas bar inquiry. These are business records of Winsome, and there is no indication they include privilege content.

s. *Insiders* Many of the files that Andres claims are privileged appear to relate to marketers for Winsome. In many cases, these insiders are recipients of substantially more money from Winsome than they sent to Winsome. Documents on the

hard drive appear to relate to the following insiders:

- i. Al and Cherylyn Sellers (for whom Winsome paid criminal defense legal fees) – four files;
- ii. Jesus Baca (for whom Winsome paid criminal defense fees) – six files;
- iii. Ken Bussa (who has been sued by the Receiver for \$904,000) – four files;
- iv. CarolB (who has been sued by the Receiver) – four files;
- v. Pursca, (a company controlled by Warren Chiu, a marketer for Winsome) and Warren Chiu – 12 files;
- vi. Oyamada (the person claiming to control gold in a Swiss bank) – 27 files (including a “fee agreement”);
- vii. RIO (Ballard’s company that was seeking to build a refinery in Guatemala) – 36 files;
- viii. Cindy Moore (for whom Winsome spent over \$3 million) – 19 files;
- ix. Connie Patterson (a third-party marketer that the Receiver has sued) – two files;
- x. Lewis Scogin (a third-party marketer) – three files; and
- xi. Antonio Yu (the person behind the claimed \$10 billion being held

at the Federal Reserve Board) – 8 files.⁶

t. Other Files Other file names that appear to be business related and

among the types of records that should be in the possession of the Receiver include:

Trust Declaration Ma Shuchun	CD Order terms	Computer work required
Corporations Franchise (3)	Corporations List	WIT Agreement Cover
4%_Loan_Irrevocable_FPA	BBlankNonSolicitation	WIT%20CIS1
AuthorizationtoVerify(Prov)	BBlankClientInformation	LOI-CIS Docs (2)
Incorporation files (7 co's)	Irrevocable Assignment	Loan – Lending Fee Agmt (7)
LS – L I-Falcon Agreement	LV – CONFIDENTIAL	Master Agrmnt – Earnings
Mayomi – 1Credo Crude Oil	MEIP – Refinery Guatemala	Milam Earnings Fee
MS – Investor GoZone Bonds	ATFI – Funds (8 files) ⁷	Cerulean (5 files) ⁸
Payton (4 files) ⁹	Plum Blossom (3 files) ¹⁰	Porchie-Beck Stock
Charter Yield (7 files) ¹¹	China – Guatemala (26 files)	Ruby1 – Front View
Staz – CitiBank	TermSheet – DeLoach Distrib.	FRB (2 files)
Incorporation Letters (8 files)	Visa Invitation (9 files)	WHD LoanAgreement (3)
Wycliffe Status Report	Yuma (six files) ¹²	ZX – WI – GRACE – Hansard

“PST” Files These electronic files contain copies of e-mails sent by Winsome. On August 23, 2011, Andre gave the Receiver a flash drive with copies of joint venture agreements that he said he had sent to investors. Andres is insisting that all .pst files other than those he provided to the Receiver are privileged. The Receiver has analyzed the .pst files on the hard drive, without

⁶ The titles of some of these documents suggest their contents. One says “Yu – Epsilon 5B Loan WIT.” Another says “Yu – FRB Notification Sanitized.”

⁷ Some of these documents refer to “WIT TRUSTEE’s Affidavit” and “PROM NOTES.”

⁸ This is believed to be a company formed by Andres relating to a second attempt to have Holloway trade commodities. There are two documents, one of which references Warren Chiu’s company PURSCA.

⁹ As noted earlier, Payton received funds from Winsome without sending any money to Winsome. There appears to have been a property transfer contemplated or consummated with her.

¹⁰ This is a Chinese company that supposedly was helping with the Guatemala refinery project.

¹¹ This was a company located in the Caribbean created by Winsome.

¹² Yuma is believed to be a company controlled by Andres.

viewing any of the e-mails on the computer. This analysis reveals that the computer has approximately 7,650 e-mails from the period of February 2004 to March 2008. This includes approximately 3,900 e-mails Andres sent to others and 3,750 e-mails that he received from others up to March 2008.¹³

The Receiver compared file names and dates of e-mails from the computer hard drive, for the period January 2008 to March 2008, to the copies of e-mails that Andres provided to the Receiver on a flash drive (which Andres said were non-privileged). That comparison found that during this three-month period, Andres sent 697 e-mails and received approximately 540 e-mails. Of this total, Andres gave us copies of three as being non-privileged. This leaves some 1,237 e-mails that Andres claims are privileged. However, the identities of the recipients and senders of these e-mails and the subject lines demonstrate that the overwhelming majority of e-mails are to or from people related to Winsome: investors, third-party marketers, or business associates. These include Lewis Scogin (marketer), Elgin Clemons (attorney for Winsome),¹⁴ Cindy Moore (recipient of funds), Robert Holloway (co-defendant), Warren Chiu (marketer), Vern Twymann (marketer), Isaac Sternheim (overpaid investor), Connie Patterson (marketer), Jerome Carter (marketer), RIO Systems and Lynn Ballard (business partner), and Wayne Warr (marketer).

¹³ Due to limitations on what the Receiver is able to review, he does not know the reason there are no e-mails for the period after March 2008. It may be that those files have been deleted or that Andres has used a different computer to send e-mails after March 2008. A third possibility, that Andres has sent and received no e-mails after March 2008 is inconsistent with documents that the Receiver has obtained from others – documents that show Andres sending and receiving e-mails well into 2011.

¹⁴ As Clemons was the attorney for Winsome and not Andres, any privilege associated with communications with Clemons belongs to the Receiver, not to Andres.

These e-mails relate to the operations of Winsome and interactions with investors¹⁵ – not legal services being provided to or by Andres.

Because virtually all the e-mails appear to relate to the business of Winsome and none indicate that they relate to legal services being provided by Andres, the Receiver believes there he should be allowed to view all .pst files on the computer. Andres has provided no justification for asserting that all .pst files, other than the few he provided, are privileged and should not be reviewed by the Receiver.

Hard Drive Documents Reviewed by Receiver

The Receiver has reviewed all the .pdf, .doc, and .pst files for which Andres did not claim a privilege. These documents were helpful in moving the investigation forward, but they do not contain all the information the Receiver hoped to receive – and needs. The documents the Receiver was allowed to view did not answer questions about why funds were sent to Cindy Moore, SHLTA, Ltd., Hunt, Fortran, Mantis F.M., Mamdouh Talib, and many others. The documents the Receiver has been able to review have contained no information about millions of dollars in payments to release funds supposedly belonging to Mohammed Ali Al Abbar. The Receiver expects that Winsome created and has records relating to these entities and transactions, but is withholding them from the Receiver.

A review of the documents titles for which Andres has claimed a privilege suggests that substantial, valuable information is contained in these documents. The overwhelming majority of documents for which a privilege was asserted appear to be ordinary business records of Winsome. The Receiver suspects that Andres asserted a privilege because the documents reveal

¹⁵ Some of the incoming e-mails are addressed to trustee.winsometruster@gmail.com.

information against his interests. However, that is not a proper basis for asserting a privilege.

Andres Has Failed to Comply with the Terms of the Compromise Agreement

Under the compromise agreement signed by Andres and the Receiver on August 23, 2011 (Exhibit 1), any claim of privilege by Andres was to be accompanied by “an explanation of the basis of the claim of privilege.” In his privilege log, Andres makes only general statements that he has been a practicing Attorney – without asserting the basis for the privilege claimed for particular documents (page 1 at Exhibit 2).

Upon receipt of the so-called privilege log, the Receiver sent an e-mail to Andres stating that the Receiver did not believe the privilege log satisfied the terms of the compromise agreement and asking that Andres provide a detailed privilege log that meets the conditions of the agreement. The Receiver also expressed to Andres the Receiver’s belief that many of the files for which a privilege was asserted were regular business records of Winsome and other Receivership Entities. A copy of this e-mail is attached as Exhibit 3.

Andres never responded to this e-mail from the Receiver. In addition, Andres has never provided additional information justifying the claim of privilege or granting permission to review business documents on the computer that were identified by the Receiver.

In anticipation of this possibility, the Receiver included in the compromise agreement a provision allowing the Receiver to seek Court approval to review documents designated as privileged. That provision provides that the Receiver may seek Court permission to review privileged files if the Receiver believes a privilege claim has been asserted improperly. Because Andres has not provided the type of privilege log required by the compromise agreement and has not responded to the Receiver’s request for justification of his claims – and because it appears

that the overwhelming majority of documents for which a privilege was asserted are regular business records of Winsome – the Receiver is now seeking the Court’s permission to review all documents contained on the computer owned by Winsome and used for the business of Winsome.

The Receiver Believes The Computer Has No Privileged Documents

The two types of documents that Andres said were privileged related to: (i) his communications with an attorney representing him in the case filed by the CFTC, and (ii) his legal representation of clients in non-Winsome matters.

There Appears to be no Communications Between Andres and his Attorney

Because no attorney has made an appearance in the CFTC’s action, there is no indication that any attorney represents Andres. Accordingly, the computer would have no privileged attorney-client communications involving Andres. That means the asserted privilege would not apply to any documents found on the Winsome computer, especially because Andres has not identified any attorneys he has contacted and has not identified any documents that relate, in any way, to attorneys he has engaged, or attempted to engage, as his counsel.

Documents Relating to Legal Services Provided by Andres to Others are Not Relevant

To the extent that any documents on the Winsome computer relate to legal services Andres has provided to others, those documents would be of no interest to the Receiver – so long as they did not relate to Winsome. Therefore, to the extent that the Receiver’s review of all documents on the computer actually reveals that the documents relate to legal services Andres provided for others, the Receiver will cease reviewing those documents and keep their contents confidential. And, since the Receiver is acting in a Court-appointed capacity, his transitory

review of non-relevant attorney-prepared documents would not prejudice the private-practice clients of Andres. Accordingly, the Receiver seeks permission to review all files on the Winsome computer.

Andres Has Been Charged with Wire Fraud

On December 7, 2011, Andres was charged criminally for his activities with Winsome. Indictment of Robert J. Andres, attached as Exhibit 4; *see also* Order Unsealing Indictment, attached as Exhibit 5. In the Indictment, a grand jury decided it had probable cause to find that Andres engaged in a scheme to defraud investors using the United States mails, interstate wire transmissions, and the facilities and means of interstate commerce. Indictment, Exhibit 4. As set forth in the Indictment, Andres is alleged to have fraudulently obtained more than "\$72 million from investors in Winsome by, among other false and misleading statements: (1) misrepresenting the assets and asset allocation of Winsome; and (2) misrepresenting the types of investments into which Andres would place investors' funds. As a result of his scheme, Defendant Andres defrauded investors out of approximately \$35 million." *Id.* ¶ 4.

Further, as outlined in the Declaration of R. Wayne Klein (the "Declaration") and the "Second Status Report of R. Wayne Klein, Receiver," (dkt. no. 66) ("Second Report") submitted by the Receiver in this matter on June 15, 2011, which is incorporated by reference in the Declaration, Andres used Winsome to engage in a massive scheme that defrauded investors out of millions of dollars. Declaration, Ex. 6, ¶¶ 22- 24. As more particularly described in the Second Status Report, Andres operated various schemes to defraud the investors in Winsome, and also pursued various schemes to obtain money to replenish its funds so it could continue its fraud. *Id.* ¶ 23; *see also* Second Report, dkt. No. 66.

Andres Used Winsome Funds to Protect Associates Accused of Crimes and Used Other Attorneys to Hide Transactions

Andres used Winsome funds to pay criminal defense costs for a variety of associates who were charged with crimes. This includes: sending \$225,000.00 to a Texas law firm for the criminal defense costs for Al and Cherylyn Sellers; paying \$89,845.73 to another Texas law firm for the criminal defense fees for Jerome Carter; and paying \$25,000.00 to an Atlanta law firm for the criminal defense of Jesus Baca.

Additional financial payments from Andres to other attorneys, using Winsome funds, included: sending \$100,000.00 to a Florida attorney's trust account, where the funds were wired to Panama – supposedly to pay for the lease of €1 billion worth of Venezuelan bonds; paying over \$300,000.00 to law firms in New York City and Arkansas related to efforts to release seized funds in London supposedly belonging to Dubai businessman Al Abbar; and paying a California law firm to contest allegations of securities violations levied by the California Department of Corporations.

Andres' investment activities have also drawn him into association with others accused for crimes. These include recent criminal charges against the operator of Destiny's Partners, one of the third-party marketers, and seeking to purchase a "gentleman's club" in Las Vegas from the wife of a reputed mobster with a federal fraud conviction. As a result, the Receiver believes that Andres' claim of privilege is designed to avoid discovery of incriminating, rather than privileged, documents on the Winsome computer.

ARGUMENT

The applicability of privileges in federal proceedings is governed by Rule 501 of the Federal Rules of Evidence, which provides: "The common law – as interpreted by United States courts in light of reason and experience – governs a claim of privilege" Because the case brought by the CFTC against Andres is based on federal question jurisdiction, the applicability of the attorney-client privilege and any exceptions thereto are governed by federal common law. *Id.*

"A party claiming the attorney-client privilege must prove its applicability, which is narrowly construed." *In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999) (citing *Intervenor v. United States (In re Grand Jury Subpoenas)*, 144 F.3d 653, 658 (10th Cir.1998)). "The party must bear the burden as to specific questions or documents, not by making a blanket claim." *Id.* (citing *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1276 n. 6 (10th Cir.1998)). Specifically:

[T]o benefit from the attorney-client privilege, the movant must satisfy five elements: (i) the asserted holder of the privilege is or sought to become a client, (ii) the person to whom the communication was made is an attorney, or his subordinate, (iii) the communication is made in connection with the person's role as a lawyer, (iv) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing legal advice, services or assistance, and *not for the purpose of committing a crime or tort*, and (v) no waiver has occurred.

In re Grand Jury 90-1, 758 F.Supp. 1411, 1413 (D.Colo. 1991) (emphasis added).

The Receiver should be allowed to review and analyze the documents he obtained from the computer hard drive of Andres for at least three reasons. First, many of the documents on the hard drive that are supposedly privileged belong to the Receiver, as the court-appointed receiver of Winsome. For example, Andres cannot claim privilege for any documents that: (1) contain

"WIT" in the title, an abbreviation for Winsome Investment Trust; (2) contain "Ruby" in the title, a supposed asset of Winsome; (3) contain "RIO" in the title, a company that supposedly aided Winsome in an investment with an oil refinery in Guatemala; or (4) contain "Yu" in the title, an individual who supposedly claimed to have \$10 billion on deposit at the Federal Reserve Board and who involved Winsome in obtaining this money.

Second, Andres has not met his burden of establishing that the documents he is withholding from the Receiver are privileged. The attorney-client privilege does not include all communications between an attorney and the client. Simply stating that a client and an attorney conversed or discussed a matter is insufficient to protect communications or documents from disclosure. *U.S. v. Johnston*, 146 F.3d 785, 794 (10th Cir.1998), cert. denied, 525 U.S. 1088, 119 S.Ct. 839, 142 L.Ed.2d 694 (1999).

Here, Andres has identified three forms of electronic files -- PDF files, Doc files, and PST files -- that supposedly contain privileged documents. Andres provided this information pursuant to a Compromise Agreement he entered into with the Receiver. Compromise Agreement, Ex. 1. Under the Compromise Agreement, Andres was required to provide an explanation of the basis for the claim of privilege for any files or documents that he claimed were privileged. *Id.*

Despite his agreement with the Receiver to provide a list of files on the computer and an explanation for the basis of the claim of privilege, Andres has not even identified the names of DOC files or PST files he claims are privileged. Privilege Log, Exhibit 2. Further, while Andres provides a list of PDF file that he claims are privileged, he does not provide any explanation as to why they are supposedly privileged, nor does the name of the PDF file suggest why. *Id.* The

Receiver gave Andres a chance to explain why the documents he is withholding are privileged. Email from Wayne Klein to Robert Andres, dated September 12, 2012, Exhibit 3. Andres has ignored this request.

Andres has not identified any people who are legal-services clients of his, and the persons to whom the documents relate do not appear to be clients of Andres. As such, Andres is not able to establish the elements required to create an attorney-client relationship. Moreover, the communications with Andres suggest that the documents at issue were not made in his role as an attorney, but rather in his role as trustee of the Winsome trust. In sum, he has given no reason to believe that any of the documents on the hard drive relate to legal services he provided in a capacity unrelated to the business of Winsome. If the files do not relate to communications with legal clients of Andres or to communications of Andres to his attorneys, the documents are not privileged. Thus, because Andres has not provided any information that can establish that the documents on the computer are privileged, Andres has not met his burden of establishing the applicability of the attorney-client privilege, and the Receiver should be allowed to view the documents on the computer.

Finally, "[t]he attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud." *In re Grand Jury Proceedings*, 857 F.2d 710, 712 (10th Cir. 1988). If the party seeking to review the documents supposedly protected the attorney-client privilege makes a prima facie showing that the documents relate to a crime or fraud, the court need only conduct an in camera review "if there is a possibility that some of them may fall outside of the scope of the exception of the privilege." *Id.* at 713.

As outlined in the Indictment, Andres has been charged with wire fraud for defrauding

investors in Winsome out of approximately \$35 million. Indictment, Exhibit 4, ¶ 4. Further, as explained in the Declaration and the Second Status Report, Andres actively engaged in fraud and breach of fiduciary duty on a massive scale as he conducted the affairs of Winsome.

Declaration, ¶¶ 22-24. As explained above, many of the files that Andres claims are privileged appear to relate to investors in Winsome, marketers for Winsome, or various schemes pursued by Winsome. *Id.* ¶ 17. Other documents appear to relate to instances where Andres used Winsome resources to fund criminal defense costs for his associates who were charged with crimes. *Id.* ¶ 24. Based on the Indictment, the Declaration, and the Second Status Report, a prima facie case has been established that the documents at issue relate directly to a crime or fraud. Significantly, assuming that Andres can establish that the documents are privileged, he has provided no evidence that they fall outside the crime-fraud exception to the attorney-client privilege. Thus, the Court may allow the Receiver to view the documents on the computer at issue.¹⁶

CONCLUSION

The names that Andres has affixed to files on the Winsome computer demonstrate that the vast majority of those documents are regular business records of Winsome. As such, those documents are not the subject of a valid claim of privilege and the Receiver should be granted permission to review all documents on the hard drive of Winsome's computer. Moreover, Andres has refused the Receiver's request to provide a basis for his claim of privilege. Thus, since a basis to believe that the documents are protected by attorney-client privilege has not been

¹⁶ Should the Court desire to conduct an in camera review of the computer files if it feels is a possibility that some of the files are (1) privileged and (2) fall outside the crime-fraud exception to the attorney-client privilege, the Receiver, of course, will provide the Court with the information it needs to conduct the review.

established by Andres, the Receiver respectfully requests the Court issue an order allowing him to review the documents at issue on the hard drive provided by Andres.

DATED this 23rd day of December, 2011.

MANNING CURTIS BRADSHAW
& BEDNAR, LLC

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

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2011, I caused to be served in the manner indicated below a true and correct copy of the attached and foregoing **MEMORANDUM IN SUPPORT OF RECEIVER'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS ON HARD DRIVE OF ROBERT ANDRES** upon the following:

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

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/s/ David C. Castleberry_____

EXHIBITS TO MEMORANDUM

- 1 Agreement on Use of Computer Records
- 2 Privilege Log
- 3 E-mail exchanges between Robert Andres and Wayne Klein
- 4 Indictment – Robert Andres
- 5 Order Unsealing Indictment
- 6 Declaration of R. Wayne Klein