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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

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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.

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**THE RECEIVER'S MEMORANDUM IN  
SUPPORT OF SECOND MOTION FOR  
REAPPOINTMENT OF RECEIVER**

Case No. 2:11CV00099 BSJ

Judge Bruce S. Jenkins

Wayne Klein (the "Receiver"), as duly court-appointed 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 Parties"), by and through his counsel of record, hereby submits his Memorandum in Support of Second Motion for Reappointment of Receiver.

## INTRODUCTION

Since his appointment, the Receiver has initiated actions against various defendants on behalf of the Receivership Parties to recover assets and property for the benefit of the investors and creditors of the Receivership Parties. The Court enjoys subject matter jurisdiction over each of these actions pursuant to its ancillary jurisdiction under 28 U.S.C. § 1367. *See Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (holding that receiver's state law claims are ancillary to the federal court enforcement action that resulted in the appointment of the receiver). Venue for these actions is appropriate with the Court pursuant to 28 U.S.C. § 754, and courts also recognize that a district court appointing a receiver may exercise personal jurisdiction over defendants who reside outside of this district as long as the Receiver timely files notices in the jurisdictions where these potential defendants reside. *See Haile v. Henderson National Bank*, 657 F.2d 816 (6th Cir. 1981) (holding that district court could exercise personal jurisdiction over defendants who resided outside of the geographical jurisdiction of the district court as long as the proper documents under 28 U.S.C. § 754 were filed in district where the defendants resided).

Because a receiver could not know the locations of all receivership property or where all possible defendants resided at the time of the receiver's appointment, courts allow for the reappointment of a receiver to allow him sufficient time to file the notices required under 28 U.S.C. § 754. *S.E.C. v. Vision Comm., Inc.*, 74 F.3d 287 (D.C. Cir. 1996) ("the court may reappoint the receiver and start the ten-day clock of § 754 ticking once again."). After each reappointment, the "10-day clock" for making the appropriate filings in other districts under 28 U.S.C. § 754 is "reset." *Warfield v. Arpe*, 2007 WL 549467 at \*12 (N.D. Tex., Feb. 22, 2007).

Since his appointment and reappointment, the Receiver has worked diligently to identify the districts where property of the Receivership Parties is located and where parties reside

against whom he may seek to initiate legal actions, and he has filed appropriate notices in 42 jurisdictions. Based on his investigation, the Receiver has identified six additional jurisdictions in which he is required to file the appropriate notices under 28 U.S.C. § 754. Therefore, the Receiver respectfully asks the Court to grant his Second Motion for Reappointment of Receiver (the "Motion") so that he may file the required notices in these additional jurisdictions within ten days from the reappointment.

### **BACKGROUND**

1. On January 24, 2011, the U.S. Commodity Futures Trading Commission initiated this action to halt the Receivership Parties from continuing to harm the interests of those individuals who have invested with the Receivership Parties and to enjoin the defendants from continuing to violate the Commodity Exchange Act. *See generally* Complaint (Doc. No. 1).

2. 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 "SRO"). *See* SRO (Doc. No. 15).

3. As part of the SRO, the Court placed the Receivership Parties under the control of the Receiver, and vested the Receiver with the power to "[i]nitiate, defend, compromise, adjust, intervene in, dispose of or become a party to any actions or proceedings in state, federal, or foreign court necessary to preserve or increase the assets of the Defendants, to carry out his or her duties pursuant to this Order or to recover payments made improperly by the Defendants or entities in receivership." *Id.* at 9.

4. After his appointment, the Receiver filed copies of the Complaint and the Order appointing him as receiver in two judicial districts where the CFTC had identified property likely

belonging to the Receivership Parties in accordance with 28 U.S. C. § 754. *See* Declaration of Wayne Klein, attached as Exhibit A, ¶ 4.

5. On February 28, 2011, the Court entered an Order of Preliminary Injunction and Other Equitable Relief Against U.S. Ventures and Winsome (the "Preliminary Injunction Order"). Prelim. Inj. Order (Doc. No. 32).

6. In the Preliminary Injunction Order, the Court ordered that the SRO "shall remain in full force and effect until further order of this Court." *Id.*

7. On September 28, 2011, the Court entered an Order Reappointing Receiver. *See* Order (Doc. No. 77).

8. After his reappointment, the Receiver filed 40 Notices of Receivership in 40 different jurisdictions within ten days of his reappointment. *See* Exhibit A, ¶ 7.

9. Since his reappointment on September 28, 2011, the Receiver has become aware of other previously-unidentified property of the Receivership Parties located in six other judicial districts where he has not yet filed appropriate notices of the receivership, and also of claims for relief he may assert in those jurisdictions on behalf of the Receivership Parties. *Id.* ¶ 8.

## ARGUMENT

### **I. PERSONAL JURISDICTION OVER DEFENDANTS IN RECEIVERSHIP ACTIONS IS BASED ON 28 U.S.C. § 754.**

Courts have uniformly recognized that district courts may exercise personal jurisdiction over defendants who reside in other districts in receivership actions as long as the receiver timely files notices of receivership pursuant to 28 U.S.C. § 754 in the districts where the defendants reside. *See, e.g., Haile*, 657 F.2d 816; *Terry v. Walker*, 369 F. Supp. 2d 818, 819 (W.D. Va. 2005). In *Haile*, a receiver, who was appointed in an action pending in the Middle District of

Tennessee, filed suit in that district against defendants who resided in Alabama. *Id.* at 818-821. The defendants moved to dismiss the complaint for lack of personal jurisdiction. *Id.* at 821. Based on the defendants' argument that they did not have the requisite minimum contacts with Tennessee for the court to exercise personal jurisdiction over them, the district court dismissed the complaint. *Id.* The receiver appealed the district court's decision, and the Sixth Circuit reversed. *Id.* at 822 – 824. According to the *Haile* court, the district court enjoyed personal jurisdiction over the Alabama defendants because the receiver had filed a copy of the order appointing him and a copy of the complaint in the Northern District of Alabama pursuant to 28 U.S.C. § 754. *Id.* The *Haile* court held that where personal jurisdiction is based on 28 U.S.C. § 754, the "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) does not apply.

Subsequent decisions have recognized that due process is satisfied through the application of 28 U.S.C. § 754 as long as exercise of jurisdiction "is not so extremely inconvenient or unfair that it outweighs the congressionally articulated policy of allowing personal jurisdiction." *Terry*, 369 F. Supp. 2d at 821. The burden is on the defendant to prove that due process is not satisfied. *See Peay v. Bellsouth Medical Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000). Courts have noted that "[w]hen the defendant is located within the United States. . . any inconvenience will rarely rise to a level of constitutional concern." *Terry v. June*, No. Civ. A. 303CV00052, 2003 WL 22125300, \*3 (W.D. Va. Sept. 12, 2003).

**II. REAPPOINTMENT OF THE RECEIVER ALLOWS THE RECEIVER TO FILE THE NOTICES WITHIN THE TEN-DAY WINDOW REQUIRED BY 28 U.S.C. § 754.**

Courts recognize that the Receiver may be reappointed so that he can file the required documents under 28 U.S.C. § 754 within ten days from such reappointment. *See S.E.C. v. Vision*

*Comm., Inc.*, 74 F.3d 287 (D.C. Cir. 1996) (noting that where the receiver did not file copies of complaint and order of appointment in proper judicial district within ten days of his appointment "the court may reappoint the receiver and start the ten-day clock of § 754 ticking once again"); *Warfield v. Arpe*, No. 3:05-cv-1457-R, 2007 WL 549467, \*12 (N.D. Tex. Feb. 22, 2007) (finding jurisdiction over defendants where receiver filed complaint and order within ten days of reappointment and noting that "courts have held that a district court may reappoint a federal equity receiver in a securities fraud case in order to 'reset' the 10-day clock under § 754") (collecting cases); *June*, 2003 WL 22125300, \*4 ("Courts having addressed the issue unanimously suggest that an order of reappointment will renew the ten-day filing deadline mandated by Section 754") (collecting cases); *see also Terry*, 369 F. Supp.2d at 820-821 (finding jurisdiction based on filing within ten days of reappointment despite defendants' argument of lack of notice because "[n]otice of the appointment or reappointment is provided not through the Receiver's motion, but through the Receiver's compliance with the procedural requirements of 28 U.S.C. § 754.").

As one such court explained:

Permitting a receiver to reassume jurisdiction in this manner is consistent with the role and purpose of a federal receivership. Were this not the rule, a receiver would be forced to file the required documentation in all ninety-four federal districts to protect jurisdiction over any potential, but presently unknown, receivership assets—a result that would produce a needless waste of time and lead to dissipation of assets otherwise returnable to defrauded investors.

*June*, 2003 WL 22125300, \*3.

Here, the Receiver has filed copies of the Complaint and the Order of his appointment or the Order of this reappointment in 42 judicial districts. Since his reappointment in September 2011, the Receiver has since discovered additional property and claims in six other judicial

districts that he had not identified at the time of his appointment or his reappointment.

Accordingly, the Receiver requests that the Court issue an order reappointing him in this action so that he can file the required documents to obtain jurisdiction over the Receivership Parties' property in these six additional judicial districts.

**CONCLUSION**

For the foregoing reasons, the Receiver respectfully requests that the Court issue an Order of Reappointment in the form that will be submitted to the Court concurrently with the filing of this Motion.

Dated this 30th day of December, 2011

MANNING CURTIS BRADSHAW  
& BEDNAR LLC

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of December, 2011, I caused to be served in the manner indicated below a true and correct copy of the attached and foregoing **THE RECEIVER'S MEMORANDUM IN SUPPORT OF SECOND MOTION FOR REAPPOINTMENT OF RECEIVER** upon the following:

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