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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.

**RECEIVER'S MOTION TO
DEEM CLAIM NO. 1070 ABANDONED
AND FOR PERMISSION TO PAY
SECOND INTERIM DISTRIBUTION**

Case No. 2:11CV00099 BSJ

Judge Bruce S. Jenkins

R. Wayne Klein, the Court-Appointed Receiver (the "Receiver"), by and through his
counsel of record, hereby moves for Court approval to deem one of the claims abandoned and to
make a second interim distribution to 90 claimants in the amount of \$601,145.44.

I.
BACKGROUND

On June 30, 2014, the Court granted the Receiver's motion proposing a plan of distribution and approved an initial distribution in the amount of \$2,316,530.20.¹ Of this amount, \$1,000,004.65 was approved for distributed to all allowed claimants using the all-claimant methodology and \$1,316,525.55 was approved for distribution using the rising tide methodology. The Court also ordered that \$682,218.00 of these amounts be held back pending final resolution of the disputed claims and resolution of late-filed claims. The order further provided that future distributions would be allocated using solely the rising tide methodology.

The Receiver sent out 118 distribution checks in early July 2014 totaling \$1,634,312.20. All distribution checks except one have been cashed. The claim involving the uncashed check is discussed below.

The Court considered and disallowed several claim objections, including late-filed claims, such as the claim by Susan Johnson.² The disputed claim by Zaman Ali was denied by this Court on June 30, 2015.³ The Court's denial of the claim by Roberto Penedo was recently affirmed by the Tenth Circuit on October 27, 2015.⁴

¹ Docket No. 367.

² Docket No. 383.

³ Docket No. 368.

⁴ Case No. 14-4077 (Order and Judgment, Oct. 27, 2015) (10th Cir. 2015)

II.

CLAIM NO. 1070 BY LYNN SHARP

Lynn Sharp filed Claim #1070 on July 30, 2012. The Receiver mailed distribution checks in early July 2014, including a check to Sharp in the amount of \$9,060.00. Eventually, all distribution checks were cashed, except the check to Sharp. When Sharp's check remained uncashed, the Receiver made numerous efforts to contact Sharp, including:

- August 6, 2014: an email was sent to Chevazz Brown, the attorney who had prepared the claim for Sharp. The Receiver notified Brown that Sharp's distribution check had been mailed, but was still uncashed. The Receiver offered to send a replacement check if the original check had been lost;
- November 12, 2014: another email to was sent to Brown, informing him that the check had not been cashed;
- April 13, 2015: an email was sent to Sharp, asking whether she intended to cash the distribution check;
- April 13, 2015: phone messages were left at two telephone numbers identified by Sharp in her claim form. The messages requested information whether she had received the distribution check;
- April 14, 2015: the Receiver received notice from a co-worker of Sharp that Sharp had died in 2014, before the distribution checks had been mailed. The Receiver was given information about the domestic partner of Sharp and the partner's attorney;

- April 17, 2015: the Receiver sent a letter to David Bonham, the attorney for the husband/boyfriend of Sharp seeking identification of the authorized representative for Sharp's estate. Bonham never responded to the Receiver's correspondence;
- April 17, 2015: the Receiver sent another email to Brown, asking if he knew the identity of Sharp's personal representative. Brown responded that the attorney at his firm who represented Sharp (John Clayton) had moved to another firm. Brown stated he would forward the information to Clayton;
- April 22, 2015: the Receiver sent an email to Clayton asking whether he represented the estate of Sharp or knew the identity of the personal representative. Clayton represented that Bonham represented the husband of Sharp and the estate of Sharp.

None of the Receiver's efforts to identify someone who represents Sharp's estate or someone authorized to receive the distribution sent to her have been successful. As a result, the Receiver asks the Court to deem Sharp's claim abandoned and that the funds sent to her as part of the initial distribution be reallocated for distribution to the remaining allowed claimants.

III.

SECOND INTERIM DISTRIBUTION

The Receiver believes it is appropriate to make a second interim distribution at this time. The Receiver first determined that the Receivership cannot be closed within the next few months. This determination is based on two factors: a) there is one litigation matter still not concluded (because we are awaiting the entry of final judgment and payment of the judgment

amount) and b) there are judgments recently assigned for collection and it is premature to know what recovery can be obtained from those collection efforts.

The Receiver next determined that because the claim objections and appeals have all been resolved without any obligation being owed to the disallowed claimants, the Receiver no longer needs to retain funds in reserve for payment of these claims. As a result, the Receivership Estate is holding more funds than it needs for continued administration of the estate. As of November 4, 2015, the Receivership Estate bank accounts hold approximately \$685,000.00. The Receiver proposes making a distribution in the amount of \$601,145.44. This amount represents an additional 4.1% of the allowable claim amounts for claimants who have received distributions from US Ventures/Winsome and the Receivership in amounts totaling less than 19.2%.

As noted above, the initial distribution was a hybrid of rising tide methodology and the all-claimant approach. In that initial distribution, all claimants received a share in the distribution. The order approving that initial distribution also provided that “future distributions will be allocated and distributed by the Receiver to allowable claimants using solely the rising tide approach.”⁵

With the additional 4.1% recovery, 91 of the 118 allowable claimants would be entitled to receive a share of the second interim distribution. This includes the 89 claimants who received rising tide and all-claimant payments as part of the initial distribution and two additional

⁵ Docket No. 367 at 3.

investors who were above the 15.1% recovery level of the first distribution, but whose total recovery to date has been less than 19.2%. If the claim of Lynn Sharp is deemed abandoned, as proposed by the Receiver, a distribution of an additional \$601,145.44 to 90 claimants will bring all claimants to a recovery level of at least 19.2%. Attached as Exhibit A is a list of all allowable claimants (by claim number), the amounts of each allowable claim, the amount of initial distribution, and the amount of the proposed second distribution.

The Receiver hopes that during 2016, the remaining judgments can be collected or sold and a third and final distribution can be made. At that point, the Receivership Estate can be terminated.

IV. ANALYSIS

It is well established that federal district courts have broad discretion in fashioning relief in equity receiverships.⁶ So long as the assets are distributed in a “logical way,” a court’s adoption of a distribution plan should not be disturbed.⁷ Because the Court is acting in equity, the overarching test is whether the distribution plan is “fair and reasonable.”⁸

The Court has already determined the distribution methodology to be utilized in this and future distributions. The second interim distribution proposed by the Receiver utilizes the

⁶ *SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 328 (5th Cir. 2001); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 91 (2d Cir. 2002); *SEC v. Hardy*, 803 F.2d 1034, 1037-39 (9th Cir. 1986).

⁷ *SEC v. Forex*, 242 F.3d at 331; *U.S. v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996).

⁸ *SEC. Wealth Mgmt., LLC*, 628 F.3d 323, 332-33 (7th Cir. 2010).

methodology already approved by the Court and conforms to the prior order of the Court.

Therefore, the only remaining question is whether the amount of the distribution is appropriate.

The Receiver desires and intends to return as much to claimants as possible. It is the Receiver's hope that additional funds can be recovered from judgments already obtained and the final judgment expected to be obtained in the Widmark case. While most of the judgments are being collected pursuant to pure contingency agreements, one collection case is still being pursued, at this point, by a law firm being paid on an hourly basis. In addition, the Receiver believes he needs to retain sufficient funds to defend an appeal, should Widmark file an appeal, and to cover ongoing administration expenses and collection matters still being pursued.

V.
CFTC CONSENT

The Commodity Futures Trading Commission has indicated to the Receiver that it supports the relief sought in this motion.

VI.
CONCLUSION

The Receiver respectfully requests that the Court deem the claim submitted by Lynn Sharp abandoned and requests approval to make a second distribution in the amount of \$601,145.44 to the 90 allowable claimants who have received less than 19.2% return of their allowable claim amounts. A proposed Order is attached as Exhibit 2.

DATED this 13th day of November, 2015.

MANNING CURTIS BRADSHAW
& BEDNAR, PLLC

/s/ David C. Castleberry

David C. Castleberry

Christopher M. Glauser

*Attorneys for R. Wayne Klein, Court-
Appointed Receiver*

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RECEIVER'S MOTION TO DEEM CLAIM NO. 1070 ABANDONED AND FOR PERMISSION TO PAY SECOND INTERIM DISTRIBUTION** to be served in the method indicated below to the Parties to this action this 13th day of November, 2015.

VIA FACSIMILE
 VIA HAND DELIVERY
 VIA U.S. MAIL
 VIA FEDERAL EXPRESS
 VIA EMAIL
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/s/ Melissa L. Aguilar