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Court-Appointed Receiver

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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U.S. COMMODITY FUTURES TRADING  
COMMISSION,

Plaintiff,

vs.

U.S. VENTURES LC, a Utah limited liability  
company, WINSOME INVESTMENT,  
TRUST, an unincorporated Texas entity,  
ROBERT J. ANDRES and ROBERT L.  
HOLLOWAY,

Defendants.

**OPPOSITION TO DEFENDANT  
ROBERT J. ANDRES' MOTION TO  
CORRECT/CLARIFY ACTIONS OF  
RECEIVERSHIP**

Case No. 2:11CV00099 BSJ

The Honorable Bruce S. Jenkins

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R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of U.S. Ventures LC,  
Winsome Investment Trust, and all the assets of Robert J. Andres and Robert L. Holloway  
(collectively, the "Receivership Entities"), respectfully submits this Opposition to Defendant

Robert J. Andres' Motion to Correct/Clarify Actions of Receivership (the "Motion") and requests that the Court deny the Motion.

### **INTRODUCTION**

Rather than paying restitution to the victims of his fraudulent scheme, Robert Andres is costing his victims more money by forcing the Receiver to expend Receivership funds to respond to Andres's untimely attack on the Court's June 6, 2014 Default Judgment. Andres's Motion seeks to revisit a final judgment that Andres made no contemporaneous effort to challenge and has not addressed in any way in more than two years since it was entered. The Motion was not brought "within a reasonable time" as required by Fed. R. Civ. P. 60(c). As a defaulted non-party, Andres also has no standing to seek any relief in this case, nor does he have standing for the relief he seeks related to other cases over which this Court has no jurisdiction and to decisions of law enforcement authorities who are not subject to this Motion. For these reasons, as further set forth below, the Court should deny Andres's Motion.

### **ARGUMENT**

Fed. R. Civ. P. 60 provides that a party seeking relief from a final judgment must do so within one year if the relief is sought due to mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud, and "within a reasonable time" if the judgment is void or satisfied or if there is another reason that justifies the relief sought. Fed. R. Civ. P. 60(b)-(c). A judgment is final if the Court determines that there is no just reason for delay in entering the judgment. Fed. R. Civ. P. 54(b). Here, the Court expressly ordered the Clerk to enter the

Default Judgment, finding “no just cause for delay.” *See* Dkt. 358 at ¶ 69. Thus, the Default Judgment is a final order subject to Rule 60.

All of the relief Andres seeks relates to the Court’s final Default Judgment.<sup>1</sup> For example, Andres seeks to amend the amount and nature of the penalties, restitution, and injunctive relief ordered against him in the Default Judgment. *See* Motion at 9-10 (arguing civil and criminal penalties should be amended, that Andres should not be jointly and severally liable with Holloway and for change to injunctive relief, all of which was ordered in the Court’s June 6, 2014 Default Judgment); *see also* Default Judgment (Dkt. 358). Andres did not, however, challenge the Default Judgment within one year. Therefore, he cannot argue mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud. *See* Fed. R. Civ. P. 60(b)-(c). Andres also does not, and cannot, argue that the judgment is satisfied or void. Thus, he must identify some “other reason that justifies relief” *and* prove that he sought that relief “within a reasonable time.” *Id.* He can do neither.

**I. ANDRES DID NOT BRING HIS MOTION “WITHIN A REASONABLE TIME.”**

Andres undisputedly had notice of this case from its outset, as he sought and received an extension to file an Answer. *See* Default Judgment at 2. Despite that extension, he did not file an Answer, nor did he appear or make any effort to participate in the proceedings for over three

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<sup>1</sup> As noted below, Andres does seek some relief related to other decisions by other courts and parties not subject to this Motion, such as decisions made in the criminal case against him or actions by the Receiver in separate cases filed to recover Receivership assets. However, Andres has no standing, and this Court has no jurisdiction, to address such matters from cases not involving the Receivership Estate. Thus, the only issue for the Court to address is Andres’s request to amend the June 6, 2014 Default Judgment.

years between being served with the Complaint and the Court's entry of the Default Judgment. *Id.* During that time, the CFTC submitted evidence and filings supporting the Default Judgment, which Andres did not challenge. He then did nothing about the Default Judgment for two and a half more years before filing the present Motion. Andres's actions are plainly not "within a reasonable time" to challenge the Default Judgment. *See U.S. v. Lyman*, 166 F. 3d 349 (10th Cir. 1998) (unpublished) (finding that motion to set aside default filed 8 months after default was untimely; citing cases finding such motions untimely when filed 115 days, four months, and "almost four months" after default); *In re Bench*, 556 B.R. 500 (D. Utah 2016) (holding motion to set aside default untimely when it was filed 17 months after default); *In re Bryan*, 429 B.R. 1, 12 (D. Colo. 2010) (finding motion filed 19 months after default was not timely).

Notably, the Default Motion and Default Judgment are not the only filings served on Andres. He has also been served with copies of the Receiver's filings throughout this case, which the Receiver served on him as a courtesy, despite Andres being a defaulted non-party. *See, e.g.*, Receiver's 23rd Status Report (Dkt. 447) at 6 (indicating service by U.S. Mail on Andres); *see also* Fed. R. Civ. P. 5(2) ("No service is required on a party who is in default for failing to appear."). This is in addition to all filings being publicly available on the Court's electronic docket and on the Receiver's website. *See* <http://www.kleinutah.com/index.php/receiverships/us-ventures>. Thus, Andres has actual notice of all of the Receiver's actions in this case, including many of the specific actions raised in his Motion. *See, e.g.*, Ninth Status Report of R. Wayne Klein, Receiver (Dkt. 261) at 8 (explaining that the Receiver mediated with Wright, Lindsey & Jennings ("WLJ") resulting in WLJ agreeing

make a settlement payment to the receivership); *see also* Dkts. 102 and 253 (Orders approving settlements with WLJ); *see, e.g.*, Tenth and Twenty-First Status Reports (Dkts. 292 and 435) (describing collection efforts against Ursula Andres). Indeed, the Receiver's Status Reports describe all of the Receiver's actions, including recoveries, settlements, litigation, distribution of funds, costs and expenses, and other efforts to recover Receivership funds. Andres's undisputed receipt of and access to all filings in this case reinforces the unreasonableness of his failure to seek relief, particularly when he offers no explanation for his delay or failure to participate in this case.

To the extent Andres has questions about the proceedings in which he chose not to participate, he can review the public docket and the documents served on him by the Receiver. The Court should not obligate the Receiver to deplete Receivership assets to the detriment of Andres's victims by responding to arguments and requests for information that are untimely and that seek information already in Andres's possession. It would be enormously prejudicial to allow Andres to alter the Default Judgment when Andres failed to appear, object at the time it was entered, or make any effort to raise these issues when they were being litigated.

**II. NO "OTHER REASON" JUSTIFIES RELIEF BECAUSE ANDRES LACKS STANDING AND SEEKS INFORMATION AND RELIEF THAT HE HAS ALREADY RECEIVED OR TO WHICH HE IS NOT ENTITLED.**

In addition to not being brought "within a reasonable time," Andres's Motion fails to identify any "other reason that justifies" the relief he seeks. Fed. R. Civ. P. 60(b)-(c). As an initial matter, Andres has no standing to seek relief in this case because he is a defaulted party. *C.f. Amazon, Inc. v. Cannondale Corp.*, 2006 WL 650682, \*9 (D. Colo. March 10, 2006)

(holding that defaulted entity did not destroy diversity jurisdiction because after default, default entity was no longer a party to the case); *see also* Fed. R. Civ. P. 5(a)(2) (“No service is required on a party who is in default for failing to appear”).

Moreover, much of the relief Andres seeks is directed toward other cases and parties that are either not before the Court or not subject to Andres’s Motion. For example, Andres’s arguments about the judgment the Receiver obtained against Ursula Andres (*see* Motion at 16) relate to a separate action the Receiver brought to recover Receivership funds that were transferred to Mrs. Andres without consideration. *See, e.g., Klein v. Ursula Andres*, Case No. 2:11-cv-00656, Dkt. 28 (Order granting Receiver’s Motion for Summary Judgment against Ursula Andres) (D. Utah Sept. 10, 2013). Mrs. Andres has not satisfied the judgment entered against her, and all funds that have been recovered on that judgment have been or will be placed into the Receivership assets and used to make distribution payments to Andres’s victims. Andres was *never* a party to that action, and he has no grounds to seek any remedy with respect to actions taken in that separate case, nor would the Court have jurisdiction to provide any such relief. Similarly, the Receiver does not determine what criminal charges the enforcing agencies choose to bring or not to bring in potential criminal actions against Forres McGraw. *See* Motion at 16. Instead, the Receiver’s role is to recover Receivership funds to return to the victims of Andres’s scheme. The Receiver sued McGraw and entered into a settlement agreement that brought a return to the Receivership estate that was approved by the Court and will be described in the Receiver’s next Status Report. Whether law enforcement chose to bring separate criminal

charges against McGraw is irrelevant to the case against Andres and beyond the obligations of the Receiver or the Court.

Much of the relief Andres seeks from the Receiver also relates to the penalties and restitution orders entered in the CFTC's injunctive action and the separate criminal cases filed by criminal prosecutors. It is improper for Andres to attempt in this action to address penalties and restitution entered in separate criminal proceedings. And penalties and restitution ordered by the Court in this case were sought by the CFTC, not the Receiver. Thus, this portion of Andres's Motion has no bearing on the Receiver's duties or obligations. To the extent he seeks such a remedy, such a motion would need to be directed to the CFTC. That motion, however, still would be untimely and without standing for the reasons explained above.<sup>2</sup>

In sum, Andres seeks to undo decisions to which he did not object at the time they were made, which he has never challenged since, and many of which were made by courts and parties not subject to the present Motion. There is no just reason to allow Andres to seek relief under these circumstances. To permit him to do so would undermine the purpose of the Receivership, as it would require the Receiver to expend funds responding to Andres's meritless contentions rather than distributing those funds to victims of his fraud. The present Motion causes such

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<sup>2</sup> It is, of course, not unusual for the penalties sought in a civil case to differ from those sought in a criminal case. The cases have different standards of proof and involve different considerations, such as the number of victims included in each case, case strategies of different attorneys (which, in this case, did not include the Receiver as the CFTC and criminal prosecutors made these decisions), the claims at issue, the possibility of a negotiated settlement or plea agreement, and other reasons. Thus, Andres's argument that the penalties and restitution amounts are somehow improper merely because they are not identical in both the criminal and civil case would fail in all events.

harm. Rather than paying back the restitution that has been ordered, Andres is forcing the Receiver to waste recovered funds in responding to requests that Andres has no standing to make and to inquiries about information that is already available to him. The Court should not permit such abuse of the Receivership process.

**CONCLUSION**

For the foregoing reasons, the Receiver respectfully requests that the Court deny Andres's Motion.

DATED this 2nd day of February, 2017.

MANNING CURTIS BRADSHAW  
& BEDNAR PLLC

/s/ David C. Castleberry

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David C. Castleberry  
*Attorneys for R. Wayne Klein, Receiver*



**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **OPPOSITION TO DEFENDANT ROBERT J. ANDRES' MOTION TO CORRECT/CLARIFY ACTIONS OF RECEIVERSHIP** to be served in the method indicated below to the parties in this action this 2nd day of February, 2017.

VIA FACSIMILE  
 VIA HAND DELIVERY  
 VIA U.S. MAIL  
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/s/ David C. Castleberry

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