IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
Civil Action No: 1:14-cv-965

THOMAS L. TAYLOR III, Solely in His Capacity as Court-Appointed Receiver for Robert A. Helms, et al.,

Plaintiff,

v.

PHILIP E. GAUCHER,

Defendant.

MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW (Pursuant to Rules 12(b)(1) and 12(b)(6))

Philip E. Gaucher ("Gaucher") hereby moves to dismiss Thomas L. Taylor III's ("Receiver") Complaint for the reasons set forth below.

INTRODUCTION

The Receiver alleges that William J. Brock ("Brock") "received from Vendetta Partners a 6% commission . . . for recruiting investors into the Vendetta Offering," and that "Brock agreed to split his 6% commission with Gaucher." (Complaint, hereinafter "Cmplt." ¶ 37). The Receiver then erroneously lumps together alleged payments from two separate entities—$86,565.00 from Vendetta Royalty Partners, LP ("Vendetta Partners") and $76,000.00 from Barefoot Minerals, G.P. ("Barefoot Minerals")—and attributes them all to this alleged arrangement between Brock and Gaucher, making no attempt to differentiate the payments or explain why payments for a single alleged reason would be transmitted from two separate entities. (*See* Cmplt. ¶ 38). Assuming, *arguendo*, the truth of the allegations, these payments

(from Vendetta Partners on the one hand and from Barefoot Minerals on the other hand) served two significantly different purposes.

Any transfers made from Barefoot Minerals were entirely unrelated to any arrangement between Brock and Gaucher; the Complaint makes no allegations to the contrary. Again accepting the allegations as true, merely for purposes of the Motion to Dismiss, any transfers made to Gaucher from Barefoot Minerals were made in exchange for consulting services Gaucher performed with regard to a *future prospective investment* opportunity that never even materialized. Further, even if that investment opportunity did materialize, it would be altogether separate and apart from Vendetta Partners. The Receiver's vague and unsupportable contentions with regard to these alleged fees (hereinafter "Barefoot Consulting Fees") (*see* Cmplt. ¶¶ 37-38 (relying on Brock-Gaucher arrangement to allege transfers from Barefoot Minerals)), reveal the Receiver's total lack of knowledge about that entity or about any payments flowing from that entity.

Consistent with this lack of knowledge, the Receiver fails to sufficiently plead a violation of the Texas Uniform Fraudulent Transfer Act ("TUFTA") (Count I) with regard to the alleged Barefoot Consulting Fees. Indeed, even the most artfully drafted Complaint would fail to do so because those payments related to a prospective investment vehicle (distinct from the Vendetta Partners' investment opportunity) which never even materialized. Accordingly, because it never occurred, it could not possibly be deemed a Ponzi scheme, and the Receiver could never show or allege otherwise. Similarly, because the Receiver's unjust enrichment claim (Count II) with regard to Barefoot Minerals relies on the existence of a Ponzi scheme (*see* Cmplt. ¶ 55), which was insufficiently pled, it likewise fails.

Unlike the alleged Barefoot Consulting Fees, the payments allegedly transmitted from Vendetta Partners may be attributable to Gaucher's arrangement with Brock. However, as even the Reciver admits (again accepting as true the Receiver's allegations), Gaucher was a mere intermediary who was not involved in marketing the assets of Vendetta Partners. Accordingly, it is incorrect to characterize any money that Gaucher may have obtained through this alleged agreement with Brock as a "commission." (*See* Cmplt. ¶ 39). To the contrary, Gaucher received, if anything, a mere intermediary fee from monies that were due and owing to Brock (hereinafter, "Vendetta Intermediary Fees"). Any and all Vendetta Intermediary Fees that Gaucher may have received in this regard were reinvested through Clovis Capital Ventures, LLC ("Clovis") into Vendetta Partners. Accordingly, the relief sought in the Complaint, namely "return of those funds to the Receivership Estate" (Cmplt. ¶ 52), and "complete and exclusive control . . . of the transfers received by Gaucher" (Cmplt. ¶ 57), has already occurred, is therefore moot, and accordingly leaves the Court without subject matter jurisdiction over those claims.

ARGUMENT

I. BAREFOOT CONSULTING FEES.

A. The Receiver's TUFTA Claim With Regard to the Barefoot Consulting Fees Should Be Dismissed For Failure to State A Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6) Because the Complaint Does Not Allege that the Barefoot Consulting Fees were Transferred with Actual Intent to Hinder, Delay, or Defraud.

As explained herein, the Receiver relies exclusively on Section 24.005(a)(1) of TUFTA to assert Count I. That section provides that "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor." Tex. Bus. & Com. Code Ann. § 24.005(a)(1). With regard to the Barefoot Consulting Fees, the Receiver's Count I

fails to sufficiently allege actual intent and therefore must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

To overcome a motion to dismiss pursuant to Rule 12(b)(6), the Receiver's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In other words, the allegations must include sufficient facts "to raise a reasonable expectation that discovery will reveal evidence of illegal" misconduct. *Id*. at 556. Bare legal conclusions "are not entitled to the assumption of truth" and are insufficient to state a claim. *Ashcraft v. Iqbal*, 556 U.S. 662, 679 (2009); *see Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.").

Here, the Receiver relies exclusively on the existence of a Ponzi scheme to satisfy his pleading requirement of alleging actual intent to hinder, delay, or defraud. (*See* Cmplt. ¶¶ 47-48). Even accepting, *arguendo*, that the existence of a Ponzi scheme may permit the Receiver to establish actual intent to defraud under TUFTA, the Receiver nevertheless fails to sufficiently plead the existence of a Ponzi scheme with regard to Barefoot Minerals.

The Receiver goes to great lengths to plead the existence of a Ponzi scheme orchestrated by *Vendetta Partners*. However, the Receiver makes virtually no such allegations regarding *Barefoot Minerals*. For instance, with regard to Vendetta Partners, the Receiver makes the following allegations: that Robert Helms ("Helms") and Janniece Kaelin ("Kaelin") "fraudulently offered and sold securities of Vendetta Partners" (Cmplt. ¶ 3, *see* ¶¶ 19, 23, 24); that the Vendetta Partners' offering was "made through private placement memoranda ('PPMs') which contained misleading statements of material fact" (Cmplt. ¶ 3, *see* ¶ 25); that Clovis invested in the Vendetta Partners' offering by subscribing to the Vendetta offering (Cmplt. ¶¶ 5,

18); that Clovis conducted due diligence on its investment with Vendetta Partners, which included traveling to Austin, Texas to investigate "Clovis' subscription to the Vendetta Offering" (Cmplt. ¶¶ 6, 18, 41); that brokers received commissions for bringing investors to the Vendetta Partners' offering (Cmplt. ¶¶ 27, 37); that these commissions violated the Vendetta Partners' PPM (Cmplt. ¶ 39); that new investor funds coming in to Vendetta Partners were paid out to existing partners (Cmplt. ¶ 32); and that investments in Vendetta Partners were laundered through Haley Oil Company, Inc., William Barlow, and Global Capital Ventures, LLC (Cmplt. ¶¶ 33, 35).

Notably, however, the Receiver makes none of these allegations with regard to Barefoot Minerals. In fact, the section of the Receiver's Complaint in which he purports to lay out the facts supporting the existence of a Ponzi scheme (*see* Cmplt. ¶¶ 23-35), is entitled "The *Vendetta Partners* Fraudulent Ponzi Scheme." (emphasis added). Thus, as even the Receiver suggests, Barefoot Minerals was not a part of any Ponzi scheme that Vendetta Partners may have carried out.

The Receiver's repeated reference to the "Vendetta Defendants" generally is insufficient to state a claim with regard to Barefoot Minerals. Although the Receiver attempts to lump Barefoot Minerals together with Vendetta Partners by arguing that the "Vendetta Defendants were inextricably intertwined by Helms and Kaelin, who operated these entities as a single enterprise" (Cmplt. ¶ 47), he makes no mention of Barefoot Minerals in the paragraphs in which he describes this alleged intertwining (*see* Cmplt. ¶¶ 31-35). Indeed, the Receiver makes no allegation that any monies flowed in to Barefoot Minerals or that any monies flowed between Vendetta Partners and Barefoot Minerals. In fact, other than noting that Barefoot Minerals is a Texas limited partnership that operated its business from Austin, Texas (*see* Cmplt. ¶ 17), the

Receiver pleads no facts explaining what Barefoot Minerals is, what it did, or who was involved in its operation. In the least, the Receiver pleads no facts supporting the conclusion that Barefoot Minerals operated a Ponzi scheme, much less that it was involved in a Ponzi scheme being perpetrated by Vendetta Partners and a multitude of other entities. These glaring omissions show that the Receiver has no facts with which to prove that Barefoot Minerals played any role in any Ponzi scheme that Vendetta Partners may have perpetrated. Thus, there is no reason to believe that discovery might reveal such a link, and any factual inference in that regard would be unwarranted in light of the speculative allegations in the Complaint.

"Not all securities frauds are Ponzi schemes." *Am. Cancer Soc'y v. Cook*, 675 F.3d 524, 526 (5th Cir. 2012). As the Fifth Circuit has explained, the *sine qua non* of a Ponzi scheme is that "money contributed by later investors generates artificially high dividends or returns for the original investors." *Janvey v. Alguire*, 647 F.3d 585, 597 (5th Cir. 2011); *see also United States v. Setser*, 568 F.3d 482, 486 (5th Cir. 2009) ("[I]n a classic Ponzi scheme, as new investments c[o]me in . . ., some of the new money [i]s used to pay earlier investors."). Nowhere in the Complaint does the Receiver allege that money was invested in Barefoot Minerals. Likewise, nowhere in the Complaint does the Receiver allege that dividends were paid out of Barefoot Minerals from later-arriving investments. Indeed, other than making general, speculative, and conclusory allegations to the effect that Barefoot Minerals is one of the Receivership Defendants and that a Ponzi scheme may have been afoot (which no court has yet concluded), the Receiver makes no specific allegation that Barefoot Minerals perpetrated a Ponzi scheme. Therefore, the

Receiver's TUFTA claim, as it relates to transfers allegedly made from Barefoot Minerals, fails to state a claim for which relief can be granted and must be dismissed pursuant to Rule 12(b)(6).[1]

B. Even The Most Artfully Crafted Complaint Could Not Assert A TUFTA Claim With Regard To Barefoot Minerals Because The Barefoot Consulting Fees Relate To A Prospective Investment Vehicle That Never Materialized.

The payments made to Gaucher from Barefoot Minerals, as alleged in Paragraph 38 of the Complaint, were entirely unrelated to the Vendetta Partners' offering and from any scheme that Vendetta Partners may have been orchestrating. The alleged transfers from Barefoot Minerals in the amount of $76,000 (Cmplt. ¶ 38) were payments for consulting services Gaucher performed with regard to a future prospective investment opportunity that would be separate and apart from Vendetta Partners. That future prospective investment opportunity never materialized—there were no investors, there were no incoming investment funds, and there were no outgoing payments. Accordingly, there is no basis in fact with which the Receiver might assert that this future prospective investment opportunity (which never existed in the first place) operated as a Ponzi scheme by using later-arriving investment funds to make payments to earlier investors disguised as dividends. Thus, it is unsurprising that the Receiver, in his Complaint, is unable to allege sufficient facts with which to state a claim with regard to Barefoot Minerals. Simply asserting that all the Receivership Defendants are one in the same does not make it so.

[1] Because the Receiver alleges that specific amounts of money were fraudulently transferred from specific entities, namely Vendetta Partners and Barefoot Minerals (*see* Cmplt. ¶ 38), and because the Receiver fails to state a claim with regard to a sum certain of those alleged transfers, namely the transfers from Barefoot Minerals, the Court can determine, as a matter of law, that the Receiver fails to state a claim for relief with regard to those claims. This is not a mere damages issue in which the parties dispute the amount of damages. To the contrary, the Receiver's allegations concerning a specific portion of the transfers alleged in the Complaint (which in effect compose a separate cause of action altogether), do not satisfy the threshold requirements of Rule 12(b)(6) and must be dismissed. In any event, for the reasons explained herein, the Court should dismiss the Complaint in its entirety and, therefore, need not concern itself with the mechanics of dismissing only portions of a cause of action.

C. The Receiver's Unjust Enrichment Claim Regarding Barefoot Consulting Fees, Which Is Premised On The Existence Of A Ponzi Scheme Involving Barefoot Minerals, Must Likewise Fail.

As explained herein, the Receiver's Complaint fails to sufficiently allege the existence of a Ponzi scheme with respect to Barefoot Minerals. Count II of the Receiver's Complaint, alleging unjust enrichment, is premised on the existence of a Ponzi scheme. (*See* Cmplt. ¶ 55). Because Count II respecting Barefoot Minerals must necessarily rise and fall with the Receiver's ability to sufficiently allege the existence of a Ponzi scheme, and the Receiver having failed to do so with regard to Barefoot Minerals, Count II must likewise fail as it pertains to Barefoot Consulting Fees.

II. VENDETTA INTERMEDIARY FEES.

A. All Claims Seeking Return Of The Vendetta Intermediary Fees Are Moot And Should Be Dismissed Pursuant To Federal Rule Of Civil Procedure Rule 12(b)(1).

With regard to the Vendetta Intermediary Fees, Gaucher immediately reinvested those monies in Vendetta Partners. (*See* Affidavit of Philip E. Gaucher, attached hereto as Exhibit A).[2] Accordingly, those funds have already been "return[ed] . . . to the Receivership Estate" (Cmplt. ¶ 52), and the relief sought by the Receiver with regard to those funds (in both Count I and Count II) is moot, which deprives the Court of subject matter jurisdiction over those claims.

"Mootness is the doctrine of standing in a time frame." *La. Env't Action Network v. City of Baton Rouge*, 677 F.3d 737, 744 (5th Cir. 2012). In other words, whereas the standing doctrine requires that "requisite personal interest . . . must exist at the commencement of litigation," principles of mootness require that these interests "must continue throughout" the

[2] Because Gaucher is challenging subject-matter jurisdiction, the Court may consider materials outside the pleadings without converting this Motion to Dismiss into a Motion for Summary Judgment. *See Oaxaca v. Roscoe*, 641 F.2d 386, 391 (5th Cir. 1981) ("A factual attack on the subject matter jurisdiction of the court . . . challenges the facts on which jurisdiction depends and matters outside of the pleadings, such as affidavits and testimony, are considered.").

case. *Id.* If a particular issue in a case becomes moot, "a federal court has no constitutional authority to resolve the issues that it presents." *Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir. 2008); *see e.g.*, *O'Brien v. Calvo*, 2013 WL 1247521, at *5 (E.D.N.Y. March 27, 3013) (concluding, in context of claim challenging excess tax withholdings, that "claim for monetary relief is moot" where "plaintiff concedes that . . . defendants have returned a sum of money to him greater than the tax withheld"). Rule 12(b)(1) of the Federal Rules of Civil Procedure is the proper vehicle for dismissing a moot claim for lack of subject matter jurisdiction. *See, e.g.*, *Ansari v. Napolitano*, 2014 WL 3778156, at *1 (N.D. Tex. July 31, 2014).

Here, accepting the allegations as true, the alleged Vendetta Intermediary Fees were fees received by Gaucher pursuant to his agreement with Brock as described herein. In Count I of the Complaint, the Receiver seeks "return of those funds to the Vendetta Defendants." (Cmplt. ¶ 52). Likewise, in Count II, the Receiver contends that such funds are "property of the Receivership Estate." (Cmplt. ¶ 58). However, this relief has already been afforded to the Receiver because long before the filing of the underlying Complaint, Gaucher invested all of those funds into Vendetta Partners (*see* <u>Exhibit A</u>), which is an entity that falls within the definition of "Vendetta Defendants" and "Receivership Estate." (*See* Cmplt. ¶ 1). Accordingly, because the Receiver's claims for relief with regard to the Vendetta Intermediary Fees are moot, the Court does not have subject matter jurisdiction over those claims and must dismiss them pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, Gaucher moves the Court to dismiss the Receiver's Complaint in its entirety because (A) TUFTA claims related to payments made from Barefoot Minerals are insufficiently pled and must be dismissed pursuant to Rule 12(b)(6); and (B) the Complaint fails

to sufficiently allege a Ponzi scheme respecting Barefoot Minerals, so Count II pertaining to transfers from Barefoot Minerals, which hinges on the existence of a Ponzi scheme, must likewise fail; and (C) claims related to payments made from Vendetta Partners are moot and the Court lacks subject matter jurisdiction over them pursuant to Rule 12(b)(1).

Submitted this 22nd day of December, 2014.

/s/ William R. Terpening
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing **MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW** with the Clerk of Court using the CM/ECF system to the following person:

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This the 22nd day of December, 2014.

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