IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THOMAS L. TAYLOR III, solely in his capacity as Court-appointed Receiver for Robert A. Helms, *et al.*, Plaintiff,	§	
v.	§	Civil Action No. 15-cv-627-LY
MICHAEL SAMOUCE, MARK KYLE and APPLIED QUANTITATIVE SOLUTIONS, LLC, Defendants.	§	

RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT MICHAEL SAMOUCE

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The undisputed material facts[1] establish that defendant Michael Samouce ("Samouce") received payments of commissions for recruiting investors to purchase securities underlying a fraudulent Ponzi scheme perpetrated by Robert Helms ("Helms") and Janniece Kaelin ("Kaelin") through Vendetta Royalty Partners, Ltd. ("Vendetta"), Technicolor Minerals, G.P. ("Technicolor") and other entities under their control. These payments were transferred (1) from accounts of Technicolor to Samouce directly; and (2) from accounts of Vendetta, for Samouce's benefit, to defendant Applied Quantitative Solutions, LLC ("AQS").

Pursuant to controlling decisions of the U.S. Court of Appeals for the Fifth Circuit, transfers from a Ponzi scheme are presumptively made with intent to defraud. *Janvey v. Brown*, 767 F.3d 430, 439 (5th Cir. 2014) (quoting *Janvey v. Alguire*, 647 F.3d 585, 598 (5th Cir. 2011)); accord *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) (citing *Scholes v. Lehmann*, 56 F.3d 750, 757 (7th Cir. 1995)). Accordingly, Plaintiff Thomas L. Taylor III ("Receiver")[2] moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (the "Rules") with respect to causes of action Counts I and II of his Complaint [Clerk's Docket No. 1]: (I) the avoidance of transfers made to, and for the benefit of, Samouce pursuant the Texas Uniform Fraudulent Transfer Act, TEX. BUS. & COM. CODE §§24.001 *et seq*. ("TUFTA") and (II) disgorgement of these amounts which unjustly enriched Samouce.[3]

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[1] The Receiver has filed an Appendix contemporaneously with, and in support of, this Motion. The Receiver incorporates the Appendix herein by reference.

[2] Court-appointed receiver in *SEC v. Helms, et al.*, No. 1:13-cv-1036-ML (W.D. Tex. 2013) (the "Enforcement Action") ("EA Dkt. #_") for defendants Helms, Kaelin, Deven Sellers ("Sellers"), Roland Barrera ("Barrera"), Vendetta, Vendetta Royalty Management, LLC ("Vendetta Management"), Vesta Royalty Partners, LP ("Vesta"), Vesta Royalty Management, LLC, Iron Rock Royalty Partners, LP ("Iron Rock"), Iron Rock Royalty Management, LLC, Arcady Resources, LLC, Barefoot Minerals, GP ("Barefoot"), G3 Minerals, LLC, Haley Oil Company, Inc., Lake Rock, LLC, SeBud Minerals, LLC, Technicolor, and all entities they own or control (collectively the "Vendetta Defendants"). EA Dkts. #11, 76.

[3] The Receiver reserves for trial all relief requested in the Complaint and not expressly sought

I. Summary Judgment Standard

Summary judgment is appropriate under Rule 56 "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The movant bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate[] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).[4]

Once the movant meets its burden, the non-movant "must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Celotex*, 477 U.S. at 325). "This burden is not satisfied with 'some metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id*. (citations omitted). Instead, the non-moving party must "come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original).

Additionally, if the non-movant wishes to defeat summary judgment by relying on any affirmative defenses, he bears the burden to "come forward with summary judgment evidence sufficient to raise an issue of material fact on each element of the defense." *Barrington Group,*

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herein, including without limitation Samouce's joint and several liability with other Defendants, costs and reasonable attorney's fees, and all liability and damages arising from causes of action Counts III – VI for, respectively, Aiding, Abetting or Participation in Breaches of Fiduciary Duties; Aiding, Abetting or Participation in Fraud; Aiding, Abetting or Participation in Conversion; and Civil Conspiracy. Compl. at ¶¶80, 88 – 102.

[4] A movant may move for summary judgment upon "materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1)(A).

Ltd., Inc. v. Classic Cruise Holdings S. DE. R.L., 2010 U.S. Dist. LEXIS 3738, at *15, 2010 WL 184307 (N.D. Tex. Jan. 15, 2010) (quoting *Bassett v. Am. Nat'l Bank*, 145 S.W.3d 692, 696 (Tex. App.—Fort Worth, 2004, no pet.)).[5]

II. The evidence conclusively establishes that Helms and Kaelin perpetrated a fraudulent Ponzi scheme through the entity Vendetta Defendants and that the transfers to, or for the benefit of, Samouce came from the Ponzi scheme

A. Helms and Kaelin Operated a Fraudulent Ponzi Scheme

This Court has twice held in the Enforcement Action that Helms and Kaelin operated a fraudulent Ponzi scheme[6] through Vendetta and other entities under their control. *See SEC v. Helms*, 2015 U.S. Dist. LEXIS 29149, at *19 – 22 (W.D. Tex. Mar. 10, 2015) ("*Helms I*"); *SEC v. Helms*, 2015 U.S. Dist. LEXIS 110758, at *39 – 42 (W.D. Tex. Aug. 21, 2015) ("*Helms II*").[7]

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[5] There is only one statutory affirmative defense to a TUFTA §24.005(a)(1) claim. It requires the defendant to establish that he received a fraudulent transfer ***both*** in exchange for "reasonably equivalent value" ***and*** with "objective" good faith. TUFTA § 24.009(a); *Byron*, 436 F.3d at 560 (quoting *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995)). Samouce cannot establish the statutory affirmative defense because, as detailed *infra*, at §III(A), "broker services" on behalf of a Ponzi scheme do not constitute reasonably equivalent value as a matter of law. See *Byron*, 436 F.3d at 560. Nor can Samouce establish objective good faith because, *inter alia*, his promotion of the Vendetta Offering was done unlawfully as an unregistered broker undisclosed to the SEC, and for compensation in excess of amounts disclosed to the SEC and potential investors. *See infra*, at §III(B). Failure by Samouce to establish a triable issue of material fact with respect to ***either*** value ***or*** good faith requires entry of summary judgment.

[6] A Ponzi scheme is a "fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments." *Alguire*, 647 F.3d at 597 (quoting BLACK'S LAW DICTIONARY 1198 (8th ed. 2004)). "[I]n a classic Ponzi scheme, as new investments [come] in …, some of the new money [is] used to pay earlier investors." *United States v. Setser*, 568 F.3d 482, 486 (5th Cir. 2009). In a Ponzi scheme, "investors are promised high returns on their investments, and prior investors are paid distributions from new investors' contributions, rather than a legitimate, underlying business concern." *Helms II*, at *40 (citing *Janvey v. DSCC, Inc.*, 712 F.3d 185, 188 n.1 (5th Cir. 2013)).

[7] In each *Helms* opinion, the Court relied on the declarations and/or live testimony of Danielle Supkis Cheek ("Cheek"), president of D. Supkis Cheek, PLLC ("DSC PLLC"), in finding that Helms and Kaelin perpetrated a Ponzi scheme through the entity Vendetta Defendants. *See Helms I*, at *9 – 12, and *Helms II*, at *5 – 11. The Ponzi scheme evidence herein is materially identical to the evidence presented in the declaration of Cheek submitted by the SEC in support

Moreover, Samouce admits that Helms and Kaelin operated a fraudulent Ponzi scheme through Vendetta, Technicolor and other entities.[8]

Beginning in 2011, upon a private placement memorandum dated June 1, 2011 [APPX_000251 – APPX_000280] (the "PPM"), Helms and Kaelin raised proceeds from the public through a private placement offering of Vendetta securities pursuant to the Securities Act of 1933 and Regulation D thereunder (the "Vendetta Offering"). Through the PPM, Helms and Kaelin represented that Vendetta would use 99.14% of investor proceeds for the "Purchase cost of Royalty Interests"; 0.76% of investor proceeds for "Loan Repayment"; and 0.10% of investor proceeds to pay "Promotional Expenses". [APPX_000267]. In other words, Helms and Kaelin represented that Vendetta generated revenues from a portfolio of "Royalty Interests" acquired using 99.14% of investor funds, from which profits (*i.e.*, revenues less expenses) were then paid to investors as partnership distributions. *See also* [APPX_000298] ("Every dollar that comes in goes out in acquisitions. … Revemue [*sic*] then comes in and the bills are paid. … After the overhead is paid, the revenue is then distributed to our partners."). In reality, Vendetta made partnership distributions in amounts far greater than royalty ***revenues*** generated by the oil-and-

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of its Motion for Summary Judgment against Vendetta Defendants Helms and Kaelin. EA Dkt. #259-1 at pp. 1 – 36. Evidence presented herein regarding the comingling and conflation of assets of the Vendetta Defendants is materially identical to the evidence presented in the declaration of Cheek [EA Dkt. #60-2] submitted by the Receiver in support of his Motion to Amend the Order Appointing Receiver, which Motion was granted by the Court. EA Dkt. #76.

[8] Samouce admits Complaint ¶3 (including that "Helms and Kaelin perpetrated their fraudulent Ponzi scheme … through Vendetta Partners[,] … Technicolor Minerals, [and] Barefoot Minerals …"), although he denies knowledge of the Ponzi scheme "[until] after the fact". Answer at ¶3 [Dkt. #9]. Samouce also admits Complaint ¶5 (including that Helms and Kaelin "misappropriated tens of millions of dollars of [investor] proceeds … including to pay … Ponzi payments"), although he denies knowledge of these facts "until after operations and [Samouce's] involvement ceased". Answer at ¶5. A transferee's knowledge is immaterial when determining whether a transfer was made with fraudulent intent. *Helms I*, at *19 (citing *Brown*, 767 F.3d at 439).

gas portfolio -- let alone in excess of any purported *profits* which might have remained after expenses were paid from those revenues.

Analysis by DSC PLLC, the forensic accounting firm engaged by the Receiver, confirms that once the Vendetta Offering commenced, every investor distribution was a Ponzi payment -- since cumulative royalty income fell well below both (i) cumulative partnership distributions, and (ii) cumulative business expenses. In this regard, cumulative net royalty income received by Vendetta Defendants equaled $3,925,295. [APPX_000003]. Partnership distributions paid during this time period totaled $8,692,836. *Id*. Business expenses paid by the Vendetta Defendants during the same time period totaled at least $12,851,455. [APPX_000013].[9] Accordingly, there were never profits from which to pay partnership distributions, which necessarily were made with later investors' funds[10] -- the hallmark of a Ponzi scheme. *Setser*, 568 F.3d at 486.

Specifically, but without limitation, the following partnership distributions were made using investor proceeds: (i) $187,836 on August 17, 2011; (ii) $650,000 on January 25, 2012; (iii) $222,000 on November 30 – December 1, 2012; and (iv) $255,841 on December 6 – 8, 2012. *See Helms I* at *9-10; *Helms II* at *5-8.[11] Helms and Kaelin also made a Ponzi payment from the very last investment into their scheme -- a $500,000 investment into Iron Rock in mid-

[9] This amount is calculated as: [$8,824,624: Business Expenses] + [$1,838,370: Commissions & Investor Recruiting] + [$2,617,961: Amegy & Other Loan] – [$50,000: Disclosed Maximum Promotional Payments] – [$379,500: Disclosed Maximum Amegy Loan Payments]. *See* APPX_000013 - APPX_000014. Because the Vendetta Offering did not reach the $50,000,000 maximum offering amount [APPX_000251], this calculation of business expenses is necessarily understated.

[10] As previously held by this Court, Helms and Kaelin also misappropriated at least $8,442,116 through personal spending, including without limitation at least (i) $137,460 for a 23-day trip around the world during March – April 2012; (ii) $247,415 for Kaelin's daughter's wedding in Hawaii; (iii) $111,600 for airfare, including for the wedding; (iv) $102,440 for tuition; and (v) $287,928 for mortgage payments. *Helms II*, at *8 – 9; *see also* APPX_000015 – APPX_000016.

[11] *See also* EA Dkt. #5-22 (Hahn declaration) at 8 – 9; EA Dkt. #186-1 (Cheek declaration) at 8 – 11.

2013. *Helms II* at *6-7; APPX_000179 – APPX_000180 (Helms Depo. 275:6 – 277:9). Helms testified that he and Kaelin used $100,000 of that investment to buy out a Vendetta investor. *Id*.

Moreover, and as Samouce admits, Helms and Kaelin obfuscated their fraudulent scheme through the conflation and comingling of funds between and among the entity Vendetta Defendants.[12] "[C]ommingling of funds is a common characteristic of a Ponzi scheme." *Helms II*, at *40 (citing *In re LLS Am., LLC*, 2013 Bankr. LEXIS 2684, 2013 WL 3305393, at *7 (Bankr. E.D. Wash. Jul. 1, 2013)). In this regard, over 4,500 discrete transactions have been identified in the QuickBooks files and banking records of the Vendetta Defendants representing related-party movements of funds, showing a continuous flow of funds among and between the Vendetta Defendants, including Vendetta and Technicolor. APPX_000017 – APPX_000024[13]; *see also* EA Dkt. #60-2 (Cheek Declaration).[14]

This evidence establishes conclusively that the Vendetta fraud, directed by Helms and Kaelin and accomplished through the operations of Vendetta, Barefoot, Technicolor and other

[12] Samouce admits Complaint ¶5 (including that Helms and Kaelin "obfuscated their scheme by comingling vast sums of money among the Vendetta [Defendants] … and engaging in sham transactions and accounting entries"), although he denies knowledge of these facts "until after operations and [Samouce's] involvement ceased". Answer at ¶5.

[13] For example, the books and records of Vendetta and Vendetta Management show gross cash inflows from Technicolor of 288,305.60 and 44,653.66, respectively, and gross cash outflows to Technicolor of (264,061.66) and (156,067.99), respectively. APPX_000017 – APPX_000024. Moreover, the books and records of Technicolor show gross cash inflows from Vendetta and Vendetta Management of 266,313.59 and 172,949.36, respectively, and gross cash outflows to Vendetta and Vendetta Management of (289,305.60) and (66,653.66), respectively. *Id*.

[14] Helms and Kaelin also obfuscated their Ponzi scheme by using Technicolor and its assets in sham accounting transactions to give the appearance of legitimate royalty revenues. Enforcement Action relief defendant William Barlow executed a series of documents at Kaelin's request that she told him were releases for funds that had been transferred to his account. APPX_000194 – APPX_000201 (Barlow Depo. 33:22 – 62:15). In reality, these documents were signature pages for deeds conveying to Vendetta certain properties which he did not own. *Id*. These properties already were owned by Helms and Kaelin through Technicolor, since approximately 2009. APPX_000126 (Helms Depo. 61:2-13); APPX_000438 – APPX_000442 (*e.g.*, compare APPX_000440 to APPX_000453).

Vendetta Defendants, was a Ponzi scheme. As cited above, this Court has twice found in the Enforcement Action -- based on evidence materially identical to that cited herein -- that Helms and Kaelin perpetrated a Ponzi scheme. See *Helms I*, at *19 – 22; *Helms II*, at *39 – 42.

B. Helms and Kaelin paid Samouce Commissions for Recruiting Investors into the Ponzi Scheme

Because Helms and Kaelin operated a Ponzi scheme, the transfers made from that scheme were presumptively made with intent to defraud under TUFTA. *Brown*, 767 F.3d at 439. Helms and Kaelin deployed a team of brokers to promote the Vendetta Offering who were neither registered with, nor disclosed to[15], the SEC. The compensation of these brokers also was not disclosed to the SEC in the Form D and far exceeded the limits represented to potential investors in the PPM.[16]

Samouce and Defendant Mark Kyle ("Kyle") were two unregistered brokers[17] who promoted the Vendetta Offering, acting through Defendant AQS, an entity they wholly owned and/or controlled. APPX_000051 (Samouce Depo. 24:7 – 13).[18] Kyle executed a contract on

[15] Helms executed and caused to be filed with the SEC a "Form D Notice of Exempt Offering of Securities," dated August 15, 2011 ("Form D") [APPX_000292 – APPX_000297]. In this Form D, Helms represented that (i) the first sale in the Vendetta Offering had yet to occur; (ii) Vendetta Management, Helms, and Kaelin were the only "promoters" of the Vendetta Offering; and (iii) no promoter had received, or would receive, any sales compensation, commissions or finder's fees. *Id*. at §§3, 7, 12, 15. As further detailed *infra*, at §III(B), each of these representations was false.

[16] *See*, *e.g.*, *Helms II*, at *22 – 27, 39, 46 – 54 (finding Vendetta Defendants Sellers and Barrera violated federal securities laws as brokers in the unregistered offer and sale of Vendetta securities); APPX_000292 – APPX_000297; APPX_000267.

[17] Samouce asserts that his actions were proper because he was a registered "finder" with the state of Texas (*see* 7 Tex. Admin. Code § 115.1(a)(9)). Answer ¶¶7, 59. As detailed *infra*, at §III(B)(2), Samouce's conduct was both unlawful under federal securities laws and well beyond the conduct of a finder permitted under Texas law.

[18] Samouce admits sentences 1 and 2 of Complaint ¶7 ("Two such 'brokers' who offered the securities underlying the Ponzi scheme were Defendants Samouce and Kyle, notwithstanding that they were not licensed to do so. Samouce and Kyle acted through Defendant [AQS], an

behalf of AQS through which Vendetta agreed to pay Samouce and Kyle in cash through AQS upon receiving investor proceeds. APPX_000246 – APPX_000248. In exchange for promoting the Vendetta Offering, Helms and Kaelin agreed to pay Samouce and Kyle (including through AQS) commissions of at least 6% based upon the amount of investor proceeds they raised. *Id.*[19] Samouce and Kyle raised over $10,000,000 for the Vendetta Offering. *Id.*[20]

Samouce and Kyle agreed to divide the compensation they received from Vendetta (through AQS) on a 50% / 50% basis. APPX_000054, 000072, 000074 (Samouce Depo. 36:14, 36:21 – 22, 105:18 – 24, 106:3 – 10, 113:16 – 114:22); APPX_000093 (Kyle Depo. 31:18 – 24). Accordingly, 50% of the commissions transferred to AQS were transferred for Samouce's benefit, and 50% were transferred for Kyle's benefit.

Between August 2, 2011 and August 22, 2012, Helms and Kaelin made 33 transfers totaling $672,236.55 from accounts in the name of Vendetta to defendant AQS. APPX_000024 – APPX_000026.[21] Consistent with Samouce and Kyle's agreement, one-half of this amount was for the benefit of Samouce. APPX_000054, 000072, 000074 (Samouce Depo. 36:14, 36:21 – 22, 105:18 – 24, 106:3 – 10, 113:16 – 114:22); APPX_000093 (Kyle Depo. 31:18 – 24).

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entity they wholly owned and/or controlled, and which was not registered with any governmental regulatory body for the offer and sale of securities."). Answer ¶7.

[19] As further detailed *infra*, at §III(B)(1), Samouce knew or should have known that the payment of such commissions conflicted with the Form D disclosures to the SEC [APPX_000292 – APPX_000297] and were in excess of the limits placed on promotional expenses in the Vendetta PPM. [APPX_000267].

[20] In fact, AQS sued Vendetta asserting damages for its failure to pay compensation upon the basis that Samouce and Kyle raised over $10,000,000 in the Vendetta Offering (*Applied Quantitative Solutions, LLC v. Vendetta Royalty Partners, Ltd.*, Case No. D-1-GN-13-001629 (353rd Judicial District Court for Travis County, Texas)). APPX_000282 – APPX_000291.

[21] The Receiver has discovered that certain of the transfers to AQS totaling $50,000.00 alleged in Complaint (Exhibit A) were double-counted in Vendetta accounting records. Accordingly, the Receiver asserts transfers of $672,236.55 were made to AQS as detailed in the attached Cheek Declaration. APPX_000024 – APPX_000026.

Additionally, between February 16 and May 7, 2012, Helms and Kaelin also made five transfers totaling $54,165.36 from accounts in the name of Technicolor directly to Samouce. APPX_000024 – APPX_000025. In total, $390,283.64 was transferred from the Vendetta Ponzi scheme to, or for the benefit of, Samouce.

III. As a matter of law, the commissions paid to, and for the benefit of, Samouce were fraudulent under TUFTA and, therefore, are subject to recovery by the Receiver

TUFTA provides that "a transfer made … by a debtor is fraudulent as to a creditor … if the debtor made the transfer … with actual intent to hinder, delay, or defraud any creditor of the debtor." TUFTA §24.005(a)(1). If the debtor's actual intent to defraud[22] is established, then the Receiver is entitled to "avoidance of the transfer" -- namely to "recover judgment for the value of the asset transferred." *Id*. §§24.008(a)(1), 24.009(b). Such "judgment may be entered against: (1) the first transferee of the asset or the person for whose benefit the transfer was made; or (2) any subsequent transferee…." *Id*. §24.009(b). Accordingly, this Court may enter judgment against Samouce not only for the transfers he received directly from Technicolor as the initial transferee, but for the transfers made by Vendetta to AQS which were either (i) for Samouce's benefit or (ii) subsequently transferred to Samouce.

In this case, the undisputable summary judgment evidence conclusively establishes actual intent to defraud. Pursuant to controlling decisions of the U.S. Court of Appeals for the Fifth Circuit, "proving that [a transferor] operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made." *Brown*, 767 F.3d at 439 (quoting *Alguire*, 647 F.3d at 598; *Res.*

[22] The intent at issue in subsection 24.005(a)(1) is that of the "debtor" and not that of the person or entity who received the transfer. "The statute focuses on the intent of the transferor rather than the transferee." *In re IFS Fin. Corp.*, 417 B.R. 419, 438 (Bankr. S.D. Tex. 2009). In fact, "'the transferees' knowing participation is irrelevant under [TUFTA]' for purposes of establishing the [actual fraud] premise …." *SEC v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir. 2007) (quoting *Byron*, 436 F.3d at 559).

Dev. Int'l, 487 F.3d at 301). Transfers made from a Ponzi scheme "are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception." *Quilling v. Schonsky*, 247 F. App'x 583, 586 (5th Cir. 2007) (affirming summary judgment in favor of receiver) (citing *Byron*, 436 F.3d at 558). The transfers at issue were made from the Vendetta Ponzi scheme, and therefore were made with fraudulent intent and are avoidable under TUFTA.

A. Samouce Did Not Provide Reasonably Equivalent Value for the Transfers from the Vendetta Ponzi Scheme as a Matter of Law

The TUFTA affirmative defense, TUFTA §24.009(a), is not available to Samouce. Controlling decisions of the Fifth Circuit hold that "broker services" for recruiting investors into a Ponzi scheme do not constitute "reasonably equivalent value" as a matter of law. *Byron*, 436 F.3d at 560 ("It takes cheek to contend that in exchange for the payments he received, the … Ponzi scheme benefitted from his efforts to extend the fraud by securing new investments. This argument is unacceptable.") (citing *Ramirez Rodriguez v. Dunson (In re Ramirez Rodriguez)*, 209 B.R. 424, 434 (Bankr. S.D. Tex. 1997) (stating that "as a matter of law, the Defendant gave no value to the [Ponzi scheme operators] for the commissions attributable to investments made by others"); *Martino v. Edison Worldwide Capital (In re Randy)*, 189 B.R. 425, 438 – 39 (Bankr. N.D. Ill. 1995) (as illegal services premised on illegal contracts, broker services provided in furtherance of a Ponzi scheme do not provide reasonably equivalent value); *Dicello v. Jenkins (In re Int'l Loan Network, Inc.)*, 160 B.R. 1, 16 (Bankr. D.D.C. 1993) (investors who talked up Ponzi scheme, even if they had a contract, conferred no value since enforcing an illegal contract exacerbates harm to defrauded creditors)).

The payments to, and for the benefit of, Samouce as detailed herein were compensation for promoting, and recruiting investors into, the Vendetta Offering -- "broker services" on behalf

of a Ponzi scheme. Accordingly, Samouce did not exchange reasonably equivalent value as a matter of law, and cannot establish the TUFTA affirmative defense. The Court should grant summary judgment to the Receiver for the avoidance of these transfers.

B. Samouce Did not Receive the Transfers at Issue with Objective Good Faith

Because Samouce did not exchange reasonably equivalent value as a matter of law, the Court need not address whether Samouce acted with objective good faith. *Byron*, 436 F.3d at 560 ("We need not draw a conclusion on good faith, however, as his defense would still fail because he did not receive the transfers … in exchange for reasonably equivalent value."). Nevertheless, the undisputed material facts to not raise a triable fact issue with respect to Samouce's lack of objective good faith.

Good faith under TUFTA "is determined by looking at what the transferee 'objectively knew or should have known instead of examining the transferee's actual knowledge from a subjective standpoint.'" *Byron*, 436 F.3d at 560 (quoting *In re Sherman*, 67 F.3d at 1355). Put another way, "[o]ne lacks the good faith that is essential to the [TUFTA] defense to avoidability if possessed of enough knowledge of the actual facts to induce a reasonable person to inquire further about the transaction." *In re Pace*, 456 B.R. 253, 275 (Bankr. W.D. Tex. 2011) (quoting *SEC v. Cook*, 2001 U.S. Dist. LEXIS 2601, 2001 WL 256172, at *4 (N.D. Tex. Mar. 8, 2001)).[23]

Samouce cannot establish that he received the transfers at issue with "objective" good faith because Samouce's unregistered promotion of the Vendetta Offering -- and the terms under which he was compensated -- directly contradicted disclosures made to the SEC and

[23] While the determination of good faith is a fact-focused inquiry, the Court may determine that Samouce lacked such good faith as a matter of law. *See Spring St. Partners - IV, L.P. v. Lam*, 730 F.3d 427, 439 – 440 (5th Cir. 2013) ("We therefore conclude that Spring Street should prevail on its fraudulent transfer claim … as Ngo has raised no genuine dispute of material fact … that he was a good faith transferee.").

representations made to potential investors, and was unlawful under the Securities Exchange Act of 1934 (15 U.S.C. §§78 *et seq.*) (the "Exchange Act").

1. Samouce's promotion of the Vendetta Offering, and the commissions he received, were not disclosed to the SEC or potential investors

As established *supra*, Vendetta represented to potential investors through the PPM that "Promotional Expenses" were limited to 0.10% of investor proceeds raised. APPX_000267. Additionally, Helms executed and caused to be filed with the SEC the Vendetta Form D in which he represented that (i) as of August 15, 2011 the first sale in the Vendetta Offering had yet to occur; (ii) Vendetta Management, Helms, and Kaelin were the only "promoters" of the Vendetta Offering; and (iii) no promoter had received, or would receive, any sales compensation, commissions or finder's fees. APPX_000292 – APPX_000297 at §§3, 7, 12, 15.

Samouce knew, or should have known, that each of these representations was not true. With respect to the PPM, Samouce reviewed its contents before transmitting it to potential investors, including the limits placed on promotional expenses. APPX_000067 (Samouce Depo. 86:21 – 87:7). Notwithstanding this knowledge, Samouce promoted the Vendetta Offering in exchange for commissions of 6% and higher. APPX_000246 – APPX_000248. This contradiction "would excite the suspicions of a person of ordinary prudence and put him on inquiry of the fraudulent nature" of the Vendetta Offering. *GE Capital Commer., Inc. v. Wright & Wright, Inc.*, 2011 U.S. Dist. LEXIS 3962, at *16 (N.D. Tex. Jan. 13, 2011). This is particularly true of Samouce, who has held Series 2, 7, 63, 65 securities licenses [APPX_000217], although they were inactive at the time he promoted the Vendetta Offering. APPX_000050, 000057 (Samouce Depo. 19:10 – 11, 46:20 – 47:3). Samouce cannot establish objective good faith in light of such contrary conduct. *See also Helms II*, at *49 ("The fact that

Sellers and Barrera both admitted to receiving the PPM and providing [an investor] with the PPM charges them with knowing that their commissions were excessive.").

With respect to the Form D, Samouce recruited the first four investments into the Vendetta Offering made between July 29 and August 2, 2011. APPX_000245. Prior to recruiting these investors, Samouce received and reviewed the Vendetta Offering materials, including the PPM. APPX_000067 (Samouce Depo. 86:21 – 87:7). Accordingly, he knew that the Vendetta securities were being sold pursuant to the Securities Act of 1933 and Regulation D thereunder. APPX_000254. At minimum, a "reasonable person" would have "inquired further" into the terms under which the securities offering he was promoting was being made, particularly someone who previously held numerous securities licenses [APPX_000217]. *In re Pace*, 456 B.R. at 275. Vendetta's failure to disclose Samouce, Kyle and AQS as promoters on the Form D "would excite the suspicions of a person of ordinary prudence and put him on inquiry of the fraudulent nature" of the Vendetta Offering. *Wright & Wright, Inc.*, *supra*, at *16 – 17. Whether Samouce (a) unreasonably failed to review the Form D, or (b) reviewed it, knew it contained false disclosures, and continued to promote the Vendetta Offering anyway, his conduct does not constitute "objective" good faith, and summary judgment should be granted.

2. Samouce unlawfully promoted the Vendetta Offering as an unregistered broker

Samouce also cannot demonstrate objective good faith because he unlawfully promoted the Vendetta Offering as an unregistered broker.[24] Pursuant to the Exchange Act, a broker or dealer effecting transactions in, or inducing or attempting to induce the purchase or sale of, any

[24] Samouce's lack of good faith in this regard is enhanced by the fact that he promoted the Vendetta Offering with Defendant Kyle, who had never held a securities license. APPX_000089 (Kyle Depo. 15:20 – 16:12).

security is acting unlawfully unless that broker or dealer is registered to do so. 15 U.S.C. § 78o(a)(1).[25]

This Court recently held that Vendetta Defendants Sellers and Barrera violated 15 U.S.C. § 78o(a)(1) as unregistered brokers through their activities "to solicit investors to purchase limited-partnership interests in Vendetta." *Helms II*, at *51 – 53, 53 – 54 (citing *SEC v. StratoComm Corp*., 2 F.Supp. 3d 240, 262 – 63 (N.D.N.Y. 2014)) (reconsideration denied October 21, 2015, EA Dkt. 291). The Court found that Sellers was hired to solicit investors to purchase limited-partnership interests in Vendetta; contacted and negotiated with an investor; relayed the transaction terms; and received a large transaction-based bonus that depended on how much money he raised. *Helms II*, at *52. The Court found that Barrera contacted and negotiated with an investor; relayed the transaction terms; received a transaction-based bonus; and played a central role in securing a hefty investment of $3,050,000. *Id*., at *53. These activities were held to be analogous to the conduct at issue in *StratoComm*, and thus violations of the Exchange Act. *Id*. at *51 – 53.

For the same reasons, Samouce unlawfully effected transactions in, or induced or attempted to induce the purchase or sale of, Vendetta securities. Like Sellers, Samouce was hired

[25] In determining if a person is a broker, courts have considered "whether the person: (1) is an employee of the issuer; (2) received commissions as opposed to a salary; (3) is selling, or previously sold, the securities of other issuers; (4) is involved in negotiations between the issuer and the investor; (5) makes valuations as to the merits of the investment or gives advice; and (6) is an active rather than passive finder of investors." *Helms II*, at *51 (citing *SEC v. Martino*, 255 F.Supp. 2d 268, 283 (S.D.N.Y. 2003)). Courts also consider "whether the person: (1) solicited investors to purchase securities, (2) was involved in negotiations between the issuer and the investor, and (3) received transaction-related compensation." *Id*. (citing *SEC v. Earthly Mineral Solutions, Inc.*, 2011 U.S. Dist. LEXIS 36767, 2011 WL 1103349, at *3 (D. Nev. Mar. 23, 2011); *SEC v. Hansen*, 1984 U.S. Dist. LEXIS 17835, 1984 WL 2413 (S.D.N.Y. Apr. 6, 1984)); *SEC v. U.S. Pension Trust Corp*., 2010 U.S. Dist. LEXIS 102938, 2010 WL 3894082, at *21 (S.D. Fla. Sept. 30, 2010) (compiling list of 11 factors courts consider when determining whether someone is a broker)).

to solicit investors to purchase limited-partnership interests in Vendetta [APPX_000246 – APPX_000248]; contacted and relayed the transaction terms to numerous investors [APPX_000228 – APPX_000244, APPX_000249 – APPX_000281]; negotiated terms with numerous investors [APPX_000236 ("I have gotten the principles with VRP to agree to let a group I have assembled including you to invest with an effective date of April 1st, 2012")]; and received large transaction-based commissions that depended on how much money he raised. APPX_000245; APPX_000024-25. Samouce (along with Kyle, each acting through AQS), raised over $10,000,000 for Vendetta [APPX_000282 – APPX_000291], compared to the $3,050,000 secured by Sellers and Barrera. *Helms II*, at *53. Accordingly, Samouce was a broker not registered with the SEC to offer or sell Vendetta securities, and acted unlawfully. Therefore, Samouce cannot raise a material issue of fact over whether he received the transfers at issue with objective good faith.

While Samouce has asserted that his conduct was proper because "he was a registered 'Finder' with the state of Texas," Answer ¶7, such registration is immaterial because "he also performed the functions of a broker and thereby breached the Broker Provisions of the Exchange Act." Order Denying Barrera Motion for Reconsideration, EA Dkt. 291 at 6 (citing *Cornhusker Energy Lexingon, LLC v. Prospect St. Ventures*, No. 8:04CV586, 2006 U.S. Dist. LEXIS 68959, *19 (D. Neb. Sept. 12, 2006)). A "finder" must register as a broker dealer if he is "performing the functions of a broker-dealer." *Id*. at 5 (citing *Cornhusker Energy* at *18-19).[26]

[26] Samouce's conduct also was unlawful under Texas law. TEX. REV. CIV. STAT. ART. 581-4(C), (H) ("The term '[broker]' shall include every person … other than an agent, who engages in this state…in selling, offering for sale or delivery or soliciting subscriptions to or orders for, …or to invite offers for any security or securities and every person or company who deals in any other manner in any security or securities within this state."), ART. 581-12 ("no person…shall…offer for sale, sell or make a sale of any securities in this state without first being registered as in this Act provided.").

Additionally, Samouce's conduct was well outside the limited scope a Finder. Under Texas law a Finder shall not:

> (1) participate in negotiating any of the terms of an investment; (2) give advice to an accredited investor or an issuer regarding the advantages or disadvantages of entering into an investment; (3) conduct due diligence on behalf of a potential issuer or potential investor, provide valuation, or provide other analysis to an accredited investor or an issuer regarding an investment; … or (7) disclose information to an accredited investor or to an issuer other than the information described in subsections (b) and (c) of this section.

7 Tex. Admin. Code §115.11(a). If a Finder provides an accredited investor with a description of the issuer's business, it must be 25 words or less in length. *Id*. §115.11(c)(C). Not only did Samouce negotiate the terms of an investment in Vendetta,[27] he gave advice and analysis regarding the advantages of entering into an investment in Vendetta,[28] and provided hundreds of pages of information on Vendetta's business, when he was limited to 25 words. APPX_000230 – APPX_000242; APPX_000249 – APPX_000281. In many cases, Samouce secured investors' subscription to the Vendetta Offering and thereafter provided executed subscription documents to Vendetta and collected the investments from the investor. APPX_000236, 000243.

Samouce did not merely "find" accredited investors and introduce them to Vendetta for a fee. His conduct far exceeded the Finder-related restrictions under Texas law, and rises to the level of providing unlawful broker services in the Vendetta Offering. Accordingly, Samouce cannot raise a triable issue of fact with respect to good faith and defeat summary judgment.

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[27] APPX_000236 ("I have gotten the principles with VRP to agree to let a group I have assembled including you to invest with an effective date of April 1st, 2012").

[28] APPX_000228 ("I truly believe it the best investment I have participated in. The timing is optimal."); APPX_000230 (same); APPX_000236 ("This is an incredible opportunity … I am investing as much as I can …."); APPX_000241 ("I cannot stress how much I stand behind this product which is an excellent opportunity to invest in Oil & Gas with low risk and oversized returns.").

IV. Samouce Must Disgorge the Funds Paid to Him, and for His Benefit, Under the Theory of Unjust Enrichment

"'Unjust enrichment is an equitable principle holding that one who receives benefits unjustly should make restitution for those benefits,' regardless of whether the defendant engaged in wrongdoing." *Janvey v. Alguire,* 846 F. Supp. 2d 662, 673 (N.D. Tex. 2011) (quoting *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied)). "Unjust enrichment occurs when the person sought to be charged has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain." *Id*. "A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) (citations omitted).

In this regard, it is indisputable that Vendetta received money from investors by fraud. *See supra* at §II(A). Samouce unlawfully promoted the Vendetta Ponzi scheme as an unregistered broker, causing investors to transfer their funds into the Vendetta fraudulent Ponzi scheme. *See supra* at §III(B)(2). Samouce received a substantial benefit -- the commissions paid to him and for his benefit -- for recruiting victims into the Vendetta Ponzi scheme upon terms in conflict with representations made to investors. *See supra* at §III(B)(1). Accordingly, Samouce either (a) wrongfully secured a benefit or (b) passively received one which it would be unconscionable to retain. *Grant Geophysical,* at 270. Upon either basis, Samouce must disgorge the benefits he obtained.

Should the Court find a triable fact issue with respect to Samouce's good faith, it still would be unconscionable for Samouce to retain the benefits he obtained in promoting the

Vendetta Offering. The investors Samouce recruited into the Vendetta Offering were defrauded by Helms and Kaelin to the tune of over $10,000,000. APPX_000282 – APPX_000291. Samouce directly profited from Helms' and Kaelin's fraudulent conduct, to the detriment of these investors. It would be unconscionable for Samouce to retain the benefits of Helms' and Kaelin's fraud, while the investors he recruited into the scheme can only make claims for their losses against the Receivership Estate. Indeed the disgorgement of these funds from Samouce would benefit these defrauded investors by increasing the assets available for the ultimate distribution to claimants by the Receiver.

The undisputed material facts show that investors were defrauded through their subscriptions to the Vendetta Offering, and that Samouce -- whether wrongfully or passively -- received a benefit from this fraud which would be unconscionable for him to retain to the detriment of defrauded investors. Accordingly, the Receiver requests that the Court enter summary judgment upon his claim for unjust enrichment and Order Samouce to disgorge the funds transferred from the Vendetta Ponzi scheme to him, or for his benefit.

V. The Receiver is Entitled to Pre- and Post-Judgment Interest

"A district court has discretion to impose a pre and post-judgment interest award to make a plaintiff whole." *GE Capital Commer., Inc. v. Worthington Nat'l Bank*, 2012 U.S. Dist. LEXIS 82631, *53, 2012 WL 2159185 (N.D. Tex. June 13, 2012) (quoting *Williams v. Trader Publ'g Co.*, 218 F.3d 481, 488 (5th Cir. 2000)). An award of prejudgment interest also "is intended to: (1) encourage settlement; and (2) expedite 'both settlements and trials by removing incentives for defendants to delay without creating such incentives for plaintiffs.'" *Arete Partners, L.P. v. Gunnerman*, 643 F.3d 410, 413 (5th Cir. 2011) (citing *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 529 (Tex. 1998); *Cavnar v. Quality Control Parking,*

Inc., 696 S.W.2d 549, 554-55 (Tex. 1985)); *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 930 (Tex. 1988)).

In Texas, "[t]here are two legal sources for an award of prejudgment interest: (1) general principles of equity and (2) an enabling statute." *Johnson & Higgins*, 962 S.W.2d at 528. Equity supports an award of pre-judgment interest in this case. The Receivership Estate has been damaged and denied the use of the money that was fraudulently transferred to Samouce by Helms and Kaelin in perpetrating their fraud. Samouce has had the enjoyment of those funds to the exclusion of the Receivership Estate. Therefore, the Court should award prejudgment interest to compensate Receiver for such delay. *See id.*; *Gunnerman*, 643 F.3d at 413.

In calculating pre-judgment interest on state law claims, such as TUFTA, the Court looks to state law. *Canal Ins. Co. v. First. Gen. Ins. Co.*, 901 F.2d 45, 47 (5th Cir. 1990). In Texas, pre-judgment interest "accrues at the rate for postjudgment interest," *Johnson & Higgins*, 962 S.W.2d at 532, and is calculated as the greater of the prime rate published by the Board of Governors of the Federal Reserve System, or 5%, per year. See *Gunnerman*, 643 F.3d at 415 (citing TEX. FIN. CODE §304.003). The current prime rate published by the Board of Governors of the Federal Reserve System is 3.25%, and has been since 2009. APPX_000456 (Goforth Decl., ¶9); APPX_000461-62. Accordingly, the Court should assess prejudgment interest at an annual rate of 5% a year. Such interest calculates to $53.46 per day with respect to the $390,283.64 transferred to Samouce (or for his benefit). APPX_000456 (Goforth Decl., ¶9); APPX_000460.

Pre-judgment interest begins to accrue on the earlier of 180 days after the date the defendant receives written notice of a claim, or the day suit is filed. *Worthington Nat'l Bank*, at *56 (citing *Primrose Operating Co. v. National Am. Ins. Co.*, 382 F.3d 546, 564 (5th Cir. 2004)).

The Receiver first made demand upon Samouce for the return of the fraudulent transfers made to him on May 19, 2014. APPX_000457-59. Accordingly, the Court should impose pre-judgment interest from November 15, 2014, 180 days following such demand, until the date preceding entry of summary judgment.

Post-judgment interest "shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). It "shall be computed daily to the date of payment … and shall be compounded annually." *Id.* § 1961(b). Post-judgment interest is calculated "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." *Id.* § 1961(a). Accordingly, the Receiver is entitled to post-judgment interest at the applicable federal rate based upon the date of entry of judgment.

VI. Relief Requested

The Receiver respectfully requests the Court enter summary judgment against Defendant Samouce, providing that:

(a) transfers totaling $390,283.64 were made from the Vendetta Ponzi scheme by Technicolor to Samouce, and by Vendetta to AQS for Samouce's benefit;

(b) these transfers were made with actual intent to hinder, delay or defraud creditors of Technicolor and Vendetta;

(c) Samouce did not exchange reasonably equivalent value for these transfers or receive these transfers with objective good faith;

(d) Samouce is liable to the Receiver for actual damages of $390,283.64, plus pre-judgment interest of $53.46 per day from November 15, 2014 until the date of judgment, plus post-judgment interest from the date of judgment until the judgment and interest thereon is paid in full (equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment); and

(e) Receiver is entitled to such other and further relief, at law and in equity, as the Court deems proper under the circumstances.

Dated: October 21, 2015

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.

By: /s/ Andrew M. Goforth

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COUNSEL FOR RECEIVER

CERTIFICATE OF SERVICE

On October 21, 2015, I served the foregoing document on all parties as listed below by U.S. Mail, Electronic Return Receipt Requested, pursuant to Federal Rule of Civil Procedure 5(b)(2)(C).

Via U.S. Certified Mail, Electronic Return Receipt Requested:

Michael Samouce
Mark Kyle
Applied Quantitative Solutions, LLC
2102 Alta Vista Avenue
Austin, TX 78704

/s/ Andrew M. Goforth
Andrew M. Goforth

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THOMAS L. TAYLOR III, solely in his capacity as Court-appointed Receiver for Robert A. Helms, *et al.*, Plaintiff,	§	Civil Action No. 15-cv-627-LY
v.	§	
MICHAEL SAMOUCE, MARK KYLE and APPLIED QUANTITATIVE SOLUTIONS, LLC, Defendants.	§	

JUDGMENT
AGAINST DEFENDANT MICHAEL SAMOUCE

This case is before the Court on Plaintiff and Court-appointed Receiver Thomas L. Taylor III's (the "Receiver")[1] Motion for Partial Summary Judgment ("Motion") [Dkt. # _____], seeking judgment as a matter of law against Defendant Michael Samouce ("Samouce").

The Court, on _____ _____, 20_____ entered a Memorandum and Order granting the Receiver summary judgment against Samouce [Dkt. # _____].

At this time, the Receiver seeks judgment against Defendant Samouce in the amount of $390,283.64, plus accrued pre-judgment interest of $53.46 per day from November 15, 2014 through the date of this Judgment.

[1] Taylor was appointed as receiver for Robert Helms, Janniece Kaelin, Deven Sellers, Roland Barrera, Vendetta Royalty Partners, Ltd., Vendetta Royalty Management, LLC, Vesta Royalty Partners, LP, Vesta Royalty Management, LLC, Iron Rock Royalty Partners, LP, Iron Rock Royalty Management, LLC, Arcady Resources, LLC, Barefoot Minerals, GP, G3 Minerals, LLC, Haley Oil Company, Inc., Lake Rock, LLC, SeBud Minerals, LLC, Technicolor Minerals GP, and any entities they own or control by Order of this Court in the related action styled *SEC v. Helms, et al.*, No. 1:13-cv-1036-ML (W.D. Tex. 2013) [Enforcement Action Dkts. # 11, 76].

The Receiver's Motion was properly served on Samouce on October 21, 2015. Having considered all matters of record, the arguments of counsel, all responses and replies, if any, and the applicable legal authorities, it is hereby

ORDERED, ADJUDGED, and DECREED that the Receiver's Motion [Doc. # _____] is **GRANTED** in all respects. It is further

ORDERED, ADJUDGED, and DECREED that judgment is hereby rendered in favor of the Receiver and against Defendant Samouce in the amount of $_____ (the "Judgment Amount"), consisting of $390,283.64, plus $_____ in accrued prejudgment interest through the date of this Judgment. It is further

ORDERED, ADJUDGED, and DECREED that post-judgment interest shall accrue at the rate of _____% per annum, in accordance with 28 U.S.C. § 1961, from the date of entry of this Judgment until the Judgment Amount and accrued interest are paid in full by Defendant Samouce to the Receiver. It is further

ORDERED, ADJUDGED, and DECREED that the Court shall retain jurisdiction of this matter for the purposes of enforcing the terms of this Judgment.

There being no just reason for delay in the entry of this Judgment, the Court hereby directs the clerk to enter judgment as to Defendant Samouce pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

SIGNED at Austin, Texas this _____ day of _____, 20_____.

_____
LEE YEAKEL
UNITED STATES DISTRICT JUDGE