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.	§	**CAUSE NO. 15-cv-648**
GRADY H. VAUGHN III	§	
Defendant.	§	

RESPONSE TO RECEIVERS MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT GRADY H. VAUGHN III

The Receiver's Motion for Partial Summary Judgment Against Defendant Grady Vaughn (hereafter "Motion") should be denied because it is premature and ultimately fails to carry its burden. As demonstrated herein, the Motion is premature because it has been filed before defendant Grady H. Vaughn ("Mr. Vaughn") has had access to discovery. Further, the Motion fails to establish any right of recovery. Ultimately, the evidence shows that Mr. Vaughn worked diligently to preserve the value of investors' assets in Vendetta and was in no way part of any alleged *Ponzi* scheme. To seek funds from him in the manner alleged here is punitive and unwarranted.

I. Mr. Vaughn worked to preserve the value of investments in Vendetta.

The Receiver's Motion incorrectly attempts to cast Mr. Vaughn as an individual who was predominantly out raising money for the alleged *Ponzi* scheme. VAUGHN AFFIDAVIT, ¶ 3. That is simply untrue. *Id.* Other than his own investment group (Upland Energy Partners "Upland

Partners"), Mr. Vaughn brought in no other investors or monies and the Receiver can point to none. *Id*. Mr. Vaughn was hired and paid by Vendetta for legitimate business work. *Id*. His work was solely designed to improve Vendetta's legitimate business interests and preserve (and enhance) the value of investments in Vendetta. *Id*. His consulting fee, essentially an earned wage, is not fraudulent and the Receiver overreaches by claiming against it here. *Id*.

Vendetta originally sought out Mr. Vaughn as a potential investor in the late spring or early summer of 2012. *Id*. at ¶ 4. At that time, Mr. Vaughn's eldest son, Grady Hamilton Vaughn, asked him to meet with and potentially invest in Vendetta. APPX 000132-000196 (Vaughn Depo 41:13-43:23). On or about July 16, 2012, Mr. Helms sent Mr. Vaughn an email asking if Mr. Vaughn's investor group would be interested in buying out some existing Vendetta partners who wished to exit the Vendetta partnership. *Id*. at 60:19-61:10.

At that time, Mr. Vaughn performed the due diligence that was available to him as an outside investor. VAUGHN AFFIDAVIT, ¶ 5. He visited Vendetta's Austin facilities on multiple occasions to discuss the operations with Vendetta representatives. APPX 000132-000196 (Vaughn Depo at 49:12-50:9). He reviewed Vendetta's investor materials, including a map of the Vendetta mineral interests, and a copy of the Vendetta Limited Partnership Agreement and the Vendetta private placement memorandum. *Id*. at 54:16-55:8. He reviewed a list of Vendetta assets (producing properties and/or royalty and mineral interests) that Vendetta provided to him. *Id*. at 57:11-16. At that time, as an outside potential investor, Mr. Vaughn was not given access to the Vendetta accounting books and records. *Id*. at 62:14-15. Based on his research as an outside, potential investor Vendetta appeared to be a fund: with a strong asset base of mineral properties; in its fifth year of existence; with $45,000,000 of assets under management consisting of mineral and royalty interests under more than 18,000 producing wells in over 200 counties of

22 states plus Canada; with management having over 15 years of experience and a significant personal investment in Vendetta. Further, Mr. Vaughn's own son, who had worked with Helms and Kaelin for years, recommended the investment to him. VAUGHN AFFIDAVIT, ¶ 5.

Based on that information, the Vendetta offering appeared to be a legitimate and potentially profitable investment. *Id*. at ¶ 6. So, Mr. Vaughn and a group of other individuals (predominantly his personal friends) agreed to form Upland Partners as an investment vehicle. *Id*. Upland Partners was formed on September 18, 2012 as a Delaware entity. It has limited partners, and its general partner is Upland Resources LLC, a Delaware entity that had existed and operated since January 1, 2005 ("Upland Resources"). *Id*. Mr. Vaughn is the manager for Upland Resources. *Id*.

Upland Partners ultimately raised $1,350,000. *Id*. at ¶ 7. Of that, pursuant to the Upland Energy Partners Private Placement Memorandum, the Upland Partners general partner, Upland Resources, was entitled to and took a 10% management fee. Upland Energy Partners, LP Private Placement of Limited Partnership Interests, APPX_000607. Of the remainder, $1,200,000 was invested in Vendetta also pursuant to the PPM. *Id*. at APPX_000604-000605.

After that investment and as time passed, Mr. Vaughn looked further into Vendetta's operations. VAUGHN AFFIDAVIT, ¶ 8. It became apparent that Vendetta's business practices were lacking in many ways. *Id*. Mr. Vaughn's wife suggested to him that his years of experience in the oil and gas business could greatly help Vendetta's management and could fix some of the business problems facing Vendetta. *Id*. So, Mr. Vaughn offered to help Helms and Kaelin straighten out some of the disorganized, inefficient business practices at Vendetta. *Id*. They agreed and hired him as a consultant to help organize Vendetta's business. *Id*.

Mr. Vaughn was not hired as part of Vendetta's sales or marketing team. *Id*. at ¶ 9. Instead, he was hired to improve Vendetta's operations and install "best practices." *Id*. Some examples of his contributions to Vendetta include:

- Mineral Leasing – Mr. Vaughn studied and gave advice regarding current market conditions (terms, leasing parameters, etc.) to management and others regarding the many basins in which Vendetta minerals were located. He pushed Vendetta to make the best deal feasibly possible in order to maximize the portfolio's value.
- Mr. Vaughn fostered efforts to communicate with existing Vendetta limited partners as openly and responsively as possible. Far from fostering any secrecy from the investors, Mr. Vaughn actively promoted openness with investors and helped establish a single point of contact individual to help accomplish open, responsive communication.
- Mr. Vaughn pushed to restructure and improve the Vendetta accounting department.
- Mr. Vaughn identified a search firm which was hired to locate advisory board candidates for Vendetta.

Id. By these and other similar activities, Mr. Vaughn did not work to solicit new investors in Vendetta. *Id*. at ¶ 10. Instead, he consistently worked to preserve and improve the value of investments made in Vendetta. *Id*.

In return for his work, Mr. Vaughn was paid a regular consulting fee and certain reimbursable expenses. *Id*. at ¶ 11. Mr. Vaughn was paid $10,000 per month for his full time employment with Vendetta. *Id*. Further, Mr. Vaughn was and is a Colorado resident. *Id*. Rather than relocate to Austin, Texas, Vendetta paid for him to have living accommodations there. *Id*.

Mr. Vaughn worked to improve the value of investments in Vendetta every day from the fall of 2012 to November 2013. *Id*. at ¶ 12. In all that time he was paid only his consulting fee and reimbursement for expenses.

II. Argument

The Receiver's motion never explicitly states the specific causes of action, affirmative defenses, or other matters upon which it seeks judgment. Likewise, the Receiver never explicitly states the specific elements of the relevant causes of action or defenses and how each of those elements is subject to summary judgment. However, in reviewing the motion, it appears that the Receiver moves for summary judgment on Counts I and II of its Complaint. Count I seeks the avoidance of certain financial transfers pursuant to the Texas Business and Commerce Code § 24.005(a)(1). COMPLAINT, ¶¶ 78-84. Count II seeks return of (presumably) those same funds and payment of additional funds under an unjust enrichment theory. *Id*. at 85-89. It also appears that the Receiver intends to move for summary judgment on Mr. Vaughn's affirmative defense that he received any funds from Vendetta in good faith and for value provided. TEX. BUS. AND COMM. CODE § 24.009(a)(1).

As shown further herein, the Receiver's Motion should be denied for a number of reasons. First, the Motion should be denied or at a minimum continued under Rule 56(f) because it is filed before Mr. Vaughn has had access to discovery in this case. Second, the motion should be denied because the Receiver has failed to offer competent summary judgment evidence demonstrating either that improper payments were made to Mr. Vaughn or that a *Ponzi* scheme exists. Third, the Motion should be denied because Mr. Vaughn has a legitimate good faith defense and the Receiver has not offered evidence to the contrary. Fourth, the Motion should be

denied because the Receiver has not established his unjust enrichment claim as a matter of law and, in fact, the Receiver's unjust enrichment grossly overreaches.

A. This Motion should be denied or continued under Rule 56(f).

The United States Supreme Court and the Fifth Circuit both recognize that parties need complete discovery prior to ruling on a motion for summary judgment. For example, the Fifth Circuit has held that "summary judgment should not … ordinarily be granted before discovery has been completed." *Xerox Corp. v. Genmoora Corp.*, 888 F. 2d 345, 354 (5th Cir. 1989). Likewise, the Supreme Court has recognized that a motion for summary judgment may be denied or continued if that nonmoving party has not had an opportunity to make full discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 1986).

In this case, Mr. Vaughn has not yet had access to discovery. This case is in its most nascent stage. While the parties have conducted their Rule 26(f) conference, the plaintiff has not yet submitted the Rule 26(f) report to the Court for consideration. Likewise, the Court has not yet entered any scheduling or discovery order. The discovery period has barely opened and in that short time, no discovery has yet occurred.

Further the lack of discovery here is particularly one sided and prejudicial against Mr. Vaughn because the plaintiff has already had ample discovery. The Court appointed Mr. Taylor as receiver over two years ago on December 3, 2013. *SEC v. Helms, et al.*, 1:13-cv-1036, p. 2 (W.D. Tex. December 3, 2013) (Docket No. 11). Since that time, Mr. Taylor has had complete access to the Vendetta entities' files, the SEC's resources, retained experts, his own attorneys and other investigative agents. *See, id*. All of this has been funded by the generous assets seized by and for the Receiver. Mr. Taylor has also had access to discovery from Mr. Vaughn and from

the Upland Entities by way of a subpoena served on Mr. Vaughn. *See* Subpoena to Mr. G. Vaughn (April 14, 2014) (Attached as Exhibit B).

In contrast, Mr. Vaughn is an individual who is not a party to the *SEC v. Helms* litigation and who lacks the Receiver's functionally unlimited assets. Mr. Vaughn has had no opportunity to conduct discovery whatsoever. And, indeed, the Receiver has not shared any evidence concerning the Receiver's alleged claims with Mr. Vaughn prior to this case's filing.

Thus, proceeding to summary judgment on this record, or lack thereof, places Mr. Vaughn in a fundamentally unjust position. As described *infra*, Mr. Vaugh has defenses and responses to each of the Receiver's positions. Indeed, the fact that Mr. Vaugh has a response to each of these issues even in light of the Receiver's enormous head start demonstrates that the Court should have serious questions concerning the Receiver's claims altogether.

Accordingly, Mr. Vaugh explicitly requests that the Court deny the motion or continue it under Federal Rule of Civil Procedure 56(f). Under Rule 56(f), "the party seeking more time should present affidavits that contain specific facts explaining the failure to respond by counter affidavits demonstrating the existence of a genuine issue of fact." *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 354 (5th Cir. 1989). The continuance motion should show "how postponement of a ruling on the motion will enable the party, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact since it may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." *Id.* A party "*clearly*" meets this burden when it has had no access to discovery. *Id.* ("Xerox clearly met this burden. It was not seeking additional discovery, but discovery at all.").

In this case, Mr. Vaughn has had no access to discovery whatsoever. Thus, as in *Xerox*, he is not seeking additional discovery but rather discovery at all. As further described in the

remainder of this Response, Mr. Vaughn believes that the summary judgment positions are meritless and unproven. Should the Court disagree, however, Mr. Vaughn intends to seek further documents and evidence into: the facts underlying the alleged *Ponzi* scheme, facts demonstrating the purpose for which Mr. Vaughn was retained by the Vendetta entities, documents demonstrating Mr. Vaughn's lack of knowledge concerning any alleged wrongdoing, documents demonstrating value Mr. Vaughn provided to the investors in Vendetta, documents demonstrating that Mr. Vaughn is himself a victim of the alleged *Ponzi* scheme (if such scheme is proven), documents demonstrating that the alleged payments for which the Receiver seeks reimbursement were not made to Mr. Vaughn or for his benefit. VAUGHN AFFIDAVIT, ¶ 14.

As shown herein, the Receiver has misstated or misinterpreted much of the factual record. Mr. Vaughn deserves the opportunity to meet the accusations against him. The Court deserves the opportunity to adjudicate this case on a full and fair record.

B. The Receiver has not proven specific payments to Mr. Vaughn by Vendetta

The Receiver' s Motion at no time attempts to describe any of the specific transfers to Mr. Vaughn and relate those transfers to the alleged *Ponzi* scheme and/or any good faith defense. Instead, the Receiver generally alleges that payments were made and seeks judgment on all of them *en masse*. This failure alone is cause to deny the Receiver's Motion.

However, the Receiver has also failed to offer any competent summary judgment evidence demonstrating what payments are alleged to have been made, the amount of the payments, and/or to whom the payments were made. The Receiver's sole evidence supporting the alleged payments is a declaration offered by Danielle Supkis Cheek. *See* DECLARATION OF DANIELLE SUPKIS CHEEK, at APPX_000024-000028 (hereafter "Cheek Declaration"). It appears that Ms. Cheek is to be an expert witness in this matter. Her declaration does not state that it is

based on her personal knowledge. Her declaration, instead, specifically describes certain accounting background and an analysis of unspecified documentation. *See, e.g. Id.* at APPX_000001 ("As part of my duties for the Receiver, I, along with other DSC PLLC employees, have reviewed certain QuickBooks accounting files that were located on various electronic media held by either the Defendants or related entities."). The Cheek Declaration is not competent summary judgment evidence for a number of reasons.

Rule 56 allows testimony by affidavit or declaration, but only if the affidavit or declaration is "made on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Here, with respect to the alleged payments to Mr. Vaughn, the Cheek declaration meets none of Rule 56's requirements.

First, Ms. Cheek's declaration never states that any of it is based on personal knowledge. *See generally* Declaration of Danielle Supkis Cheek, at APPX_000001-000028. With respect to the alleged payments to Mr. Vaughn, the affidavit is explicitly not based on personal knowledge but rather on unidentified documents from unidentified entities. *Id.* at APPX_000024 ("Table 8 below lists transactions related to Grady H. Vaughn III found in the books and records of VRP and related entities that have been vouched to bank statements."). It is perhaps also possible that an unidentified QuickBooks record was consulted. *Id.* Thus, Ms. Cheek has affirmatively testified that her declaration is not based on personal knowledge, but rather on some sort of document review.

Second, the facts set forth describing the alleged payments are not admissible into evidence. None of the alleged documents upon which Ms. Cheek purportedly relies have been

identified, produced, offered into evidence, or authenticated. Thus, these alleged facts are at best inadmissible hearsay.

Third, there is no indication that Ms. Cheek is competent to testify as to the stated amounts due. Ms. Cheek in no way describes her review of the alleged records, her methodology used to determine the alleged payments, or any other facts that would support her description of the alleged amounts. Indeed, it is impossible to tell whether Ms. Cheek played any role whatsoever in deriving these alleged numbers.

Fourth, Ms. Cheeks' declaration cannot be saved merely by claiming that she is an expert witness. As a threshold matter she has not been disclosed as an expert pursuant to Rule 26(a)(2). Moreover, the Fifth Circuit explicitly rejects this type of conclusory, unsubstantiated summary judgment declaration. *Boyd v. State Farm Ins. Companies*, 158 F.3d 326, 331 (5th Cir. 1998). It is well settled that "for the purposes of summary judgment under Fed. R. Civ. P. 56(e), an expert affidavit must include materials on which the expert based his opinion, as well as an indication of the reasoning process underlying the opinion." *Id.* Without more than credentials and a subjective opinion, an expert's testimony that something "is so" is not admissible. *Id.*; *see also, Michaels v. Avitech Inc.*, 202 F.3d 746, 754 (5th Cir. 2000).

The Cheek Declaration offers no evidence or basis for the purported transfers. While there is some hand-waving at unspecified documents, that does not meet the summary judgment standard. On this record, it is impossible for to prove that any payments were made to Mr. Vaughn or to other persons/entities on his behalf. Moreover, the Cheek Declaration is so vague that even if some payments can be inferred, it is impossible to say what the payments were for, to whom they were made or what specific amounts were paid. Because the purpose, amount and

existence of the purported transfers underpin each part of the Receiver's Motion, the Motion fails in its entirety and should be denied.

C. The Receiver has not proven the existence of a *Ponzi* scheme.

The Receiver attempts to prove that Vendetta operated as a *Ponzi* scheme through a combination of improper expert testimony and offensive collateral estoppel. Specifically, the Motion argues that the Court found that "Helms and Kaelin operated a fraudulent Ponzi scheme through Vendetta and other entities under their control" in *SEC v. Helms et al.*, 1:13-cv-1036 (W.D. Tex. March 10, 2015) and *SEC v. Helms et al.*, 1:13-cv-1036 (W.D. Tex. Aug. 21, 2015). MOTION, p. 3. The Motion then argues that the Cheek Declaration demonstrates that all Vendetta investor distributions were *Ponzi* payments. *Id*. at 4. Both bases are misguided and again the Receiver fails to prove this essential element of its Motion.

First, the prior orders on which the Receiver purports to rely are interlocutory orders that cannot support issue preclusion. The Fifth Circuit has declined to offensively apply collateral estoppel in situations where the ruling at issue was neither final nor subject to appellate review, finding that it would be unfair to apply issue preclusion to such an order. *See, e.g. Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 395-96 (5th Cir. 1998); *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1270 (5th Cir. 1986).

Second, the prior orders on which the Receiver purports to rely did not "fully and vigorously" litigate the issue of whether Vendetta operated as a *Ponzi*. *See, Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, (5th Cir. 1991). For example, in its March 10 Order, the Court noted that neither respondent to the motion "seriously questioned" the Receiver's expert witness nor presented an expert to offer an opposing opinion. *Helms I*, p. 8. Likewise, the Court's August 21, 2015 Order was based on the fact that none of the defendant parties presented

any response to the Receiver's motion for summary judgment. *Helms II*, p. 2. Thus, the matter of whether a *Ponzi* scheme exists or not has been ruled upon essentially only by default.

Third, as described *supra* the Cheek Declaration is not competent summary judgment evidence. As with the purported payments to Mr. Vaughn, Ms. Cheek's testimony concerning the purported Ponzi scheme is entirely unsupported by any evidence. Ms. Cheek does not specifically describe the documents upon which she relies and those documents have not been produced. As before, the Cheek Declaration contains no more than an expert's unsubstantiated opinion saying that something "is so." That is not competent summary judgment evidence. *Boyd v. State Farm Ins. Companies*, 158 F.3d 326, 331 (5th Cir. 1998).

Thus, the Receiver's Motion fails to prove that a *Ponzi* scheme existed in this matter. Since that is an essential element underlying each of the Receiver's claims in this Motion, the Motion should be denied in its entirety.

D. The Receiver offers no evidence that precludes Mr. Vaughn's good faith defense

Even if the Court were to find that the Receiver had proven that a *Ponzi* scheme existed and that certain payments were made to Mr. Vaugh, despite the lack of evidence thereof, the Court's inquiry would not be completed. Even where a transfer is fraudulent under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), "a creditor cannot void the transfer if the transferee proves two elements: (1) that it took the transfer in good faith and (2) that, in return for the transfer, it gave the debtor something of 'reasonably equivalent value.'" *Janvey v. The Golf Channel, Inc.*, 792 F.3d 539 (5th Cir. 2015).

Currently, the question of how to define "reasonably equivalent value" is unknown in this Circuit and in Texas. The Fifth Circuit has recently struggled with how to define "reasonably equivalent value." *See, id.* Ultimately, the tension lies in whether to define value from the

perspective of what the market would pay for an item or whether to define value from the perspective of how the item valued the debtor's creditors (i.e. the investors in the *Ponzi* scheme). *Id*. Because of that uncertainty, the Fifth Circuit has certified the following question to the Supreme Court of Texas:

> Considering the definition of "value" in section 24.004(a) of the Texas Business and Commerce Code, the definition of "reasonably equivalent value" in section 24.004(d) of the Texas Business and Commerce Code, and the comment in the Uniform Fraudulent Transfer Act stating that "value" is measured "from a creditor's standpoint," what showing of "value" under TUFTA is sufficient for a transferee to prove the elements of the affirmative defense under section 24.009(a) of the Texas Business and Commerce Code?

Id.

How to define value may be of great significance in this matter. The Receiver attempts to argue that Mr. Vaughn was paid exclusively for services related to raising additional funds and investors for the purported Vendetta *Ponzi* scheme. MOTION, pp. 10-11. The Receiver argues that such alleged fundraising/brokerage services provide no value to the investors as a matter of law. *Id*. at 10.

That, however, is exactly the question that the Fifth Circuit itself cannot answer. If the services are measured from a perspective of fair market value, then even such brokerage services may provide reasonably equivalent value. *See, e.g. Janvey*, 792 F.3d 539 (questioning whether advertising services for a *Ponzi* provide reasonably equivalent value). Because this question is uncertain and certified to the Texas Supreme Court for resolution, Mr. Vaughn respectfully submits that this matter should not be decided now and that the Receiver's Motion should be denied on that basis.

Should the Court choose to move forward on this issue, however, Mr. Vaughn submits that the Receiver has raised no initial challenge to his affirmative defense and that, even if such challenge has been raised, Mr. Vaughn's summary judgment evidence supports his defense.

i. The Receiver offers no evidence demonstrating that any purported payments to Mr. Vaughn were not for value.

First, as the movant, the Receiver has the initial burden of raising a fact issue with respect to Mr. Vaughn's good faith affirmative defense. The Receiver has not done so. The Receiver attempts to argue that Mr. Vaughn cannot prove that any services he provided were for value by alleging in broad strokes alleging that all of the payments made to Mr. Vaughn are for the purposes of finding new investors in the alleged *Ponzi*. The Receiver, however, makes no effort whatsoever to tie any payments to fundraising activities.

Indeed, as described *supra*, the Receiver has offered no evidence of any payments to Mr. Vaughn. Even if the Court were to accept the impermissible Cheek Declaration, the document is so vague and conclusory that it is impossible to tie any payments to any alleged fundraising activities. To the extent anything can be gleaned from that conclusory document, the bulk of the payments appear to be for Mr. Vaughn's ordinary $10,000 per month salary, payments to third parties (e.g. Molly Maid of Austin, CWS Corporate LE, and American Airlines).[1] Such payments were not for fundraising. As described *supra*, Mr. Vaughn was hired by Vendetta to improve Vendetta's actual business operations. That is the very definition of preserving investor assets and has always been a service for reasonable value in this district. His salary payments and reimbursed expenses were for value provided.

Further, the Receiver provides no evidence to support its assertion that Mr. Vaughn worked exclusively as a broker for Vendetta. The only Vendetta investment the Receiver even alleges that Mr. Vaughn solicited was Mr. Vaughn's own investment – Upland Energy Partners. There, Vendetta sought out Mr. Vaughn and induced him, as an outsider, to invest. If anything,

[1] Mr. Vaughn further challenges any of the purported transfers to third parties. While working for Vendetta any work related expenses Mr. Vaughn incurred were not for his own benefit, but rather were for Vendetta's. Any transfers not made to Mr. Vaughn or for his benefit cannot be transfers which Mr. Vaughn is responsible for repaying under TUFTA.

Mr. Vaughn is as much a victim of that as any investor. The Receiver presents no evidence whatsoever that Mr. Vaughn received any commission or payment for bringing in an investor outside of Upland Energy Partners. The Receiver presents no evidence of any specific sales pitch or request for investment that Mr. Vaughn allegedly made. The Receiver presents no direct evidence that Mr. Vaughn specifically asked anyone to invest in Vendetta.

Instead, the Receiver cites to numerous irrelevant, hearsay documents without describing any of their content. *See, e.g.* Motion, p. 7. Each of the Receiver's "evidence" however are objectionable and do not support the Receiver's claims.

- APPX_000278-279 is inadmissible hearsay. It appears to be an agenda but includes o description of any items actually discussed. It does not say that Mr. Vaughn was engaged in any specific fundraising activity.

- APPX_000280 is inadmissible hearsay. Mr. Vaughn's name does not appear on this document. The document nowhere states the Mr. Vaughn solicited investments in Vendetta or received payments for doing so.

- APPX_000281 – 284. This document is inadmissible hearsay. Even if considered, this document concerns a request by Ms. Kaelin to Mr. Vaughn, but does not describe action Mr. Vaughn took, if any.

- APPX_000488. This document is inadmissible hearsay.

- APPX_000489. This document is inadmissible hearsay

- APPX_000490-491. Mr. Vaughn's response is the only admissible portion of this document. The remainder is hearsay. Mr. Vaughn's response does not contain any solicitation of investment or payment therefore.

- APPX_000492-493. This document is inadmissible hearsay. Note that the sender entitled "Grady Vaughn" is not the defendant to this action but rather his son, Grady H. Vaughn IV. This is illustrated by the text of the email beginning with "Dad and I." Mr. Vaughn, the defendant in this matter has never had an email address ghv1234@gmail.com. Vaughn Affidavit, ¶ 13.

- APPC_000494-497. This document is inadmissible hearsay. Again, the sender of this email is not the defendant in this matter, but rather his son.

- APPX_000498. This document is inadmissible hearsay. Again, the sender of this email is not the defendant in this matter, but rather his son.

- APPX_000499-514. This document is inadmissible hearsay. Again, the sender of this email is not the defendant in this matter, but rather his son.

- APPX_000515-564. The top email in this chain is inadmissible hearsay. The lower email is merely an email forwarding an unexecuted copy of the Vendetta Limited Partnership Agreement. There is no context or discussion whatsoever. This document appears to have no relevance whatsoever.

- APPX_000565-000567. These emails are inadmissible hearsay. The lower email is sent by Robert Helms to numerous recipients. The top email is not sent by the defendant to this action but rather by his son.

- APPX_000568. This email in no way shows any efforts to raise money for Vendetta or payment therefore. It is merely a note of appreciation from Ms. Kaelin to Mr. Vaughn for his hard work and his response of appreciation therefore.

- APPX_000569 – APPX_000572. This entire email exchange is inadmissible hearsay. Mr. Vaughn plays no apparent role in this exchange. This exchange in no way shows any efforts to solicit investments or payment to Mr. Vaughn therefore.

- APPX_000573. This document is inadmissible hearsay.

Indeed, the only evidence of any conversation that Mr. Vaughn had with a potential investor is one conversation with two individuals who did not invest that occurred incidentally during other business for Vendetta. The Receiver's Motion cites to deposition testimony wherein Mr. Vaughn describes a trip to visit with pre-existing Vendetta partners in Los Angeles. MOTION, p. 7 (citing Vaughn Depo 87:23-95:22). Those investors, with an entity called La Cova, had already invested in Vendetta long before Mr. Vaughn met them. APPX_000153 (Vaughn Depo. 85:23-82:2). In the course of that trip, Mr. Vaughn was present at a meeting with two potential investors. *Id*. at 86:3-23. Mr. Vaughn did not present them with any documents and neither of them invested. *Id*.

If anything, the Receiver's lack of evidence and inability to understand its own documents should affirmatively demonstrate to this Court that the Receiver simply has no evidence that Mr. Vaughn was a Vendetta fundraiser. The Receiver has spent enormous resources on this case, has had two years with the matter, and has deposed Mr. Vaughn. Despite

that, the Receiver has no direct, admissible evidence that Mr. Vaughn raised any money from any investor other than Upland Partners. Virtually all of the evidence the receiver offers is inadmissible hearsay that the Receiver does not even attempt to fit into a hearsay exception. Indeed, it should deeply trouble the Court that the Receiver, after all of its time and expense, cannot even discern the difference in email sent by Mr. Vaughn's son and Mr. Vaughn.

ii. The Receiver's claim that Mr. Vaugh obtained excessive compensation is incorrect and misstates the record.

The Receiver's argument that Mr. Vaughn promoted the Vendetta Offering for excessive compensation is a fabrication that utterly misstates the record. The Receiver argues that the Vendetta Private Placement Memorandum represented that Promotional Expenses were limited to 0.10% of investor funds raised. The Receiver argues that Mr. Vaughn transmitted that PPM containing the 0.1% limitation to several investors, but instead took commissions beyond that limit in the form of a $150,000 retention of investor funds and the purported $292,254.35 that Vendetta purportedly paid Mr. Vaughn for his services, reimbursements and to third parties. Motion. Pp. 13-14. This argument is so flawed that it is difficult to know where to begin.

First, the Receiver flatly contradicts the record and misleads the Court when he states that "Vaughn received, reviewed and transmitted PPM containing the 0.10% limitation to several potential investors." MOTION, p. 13. In fact, the cited deposition testimony says precisely the opposite. Mr. Vaughn clearly testified that he does not believe he sent or presented any documents to those individuals referenced. APPX_000153 (Vaughn Depo. 87:13-22).

Second, the Receiver presents no evidence that Mr. Vaughn received the purported $150,000 payment or the purported $292,254.35 payments. *See* MOTION, pp. 13-14. Regarding the purported $150,000 payment, the Receiver cites only to three inadmissible, hearsay documents APPX_000584, APPX_000585-586, and APPX_000587-000597. Regarding the

purported $292,254.35 payment, the Receiver cites only to the inadmissible Cheek Declaration discussed *supra*.

Third, even if the Court were to look charitably past the Receiver's utter failure of evidence, it would see that the Receiver misleadingly attempts to compare apples with oranges. The PPM speaks of how Vendetta intends to spend monies that it receives from the sale of Vendetta investment units. *See* APPX_000413. That has nothing to do with the other purported payments. The purported $150,000 payment to which the Receiver seems to refer is neither a payment to Mr. Vaughn nor a Vendetta expenditure. The $150,000 seems to be an amount that the general partner of Upland Partners, Upland Resources, retained from investments by Upland Partners' limited partners combined with some amount of funds that remained in Upland Partners. *See* APPX_000603 (describing that Upland Partners' general partner will retain 10% of the subscriptions in Upland Partners as a management fee). Thus those are funds that neither Vendetta nor Mr. Vaughn directly received and that are in no way Vendetta "promotional expenses". Likewise, the purported $292,254.35 payment, to the extent it can be understood, is for non-promotional items such as earned wages and business reimbursements.

iii. The Receiver's allegations concerning the unregistered sale of securities are unsubstantiated and irrelevant.

The Receiver's allegations concerning the unregistered sales of securities are unfounded and irrelevant. The Receiver presents no evidence establishing the purported elements of being an unregistered dealer. Instead, the Receiver points at a summary judgment against entirely unrelated persons in another case. MOTION, p. 15. The Court's ruling in *Helms II* came about because the specified defendants did not respond to the motion for summary judgment. Thus, it is entirely unclear how a default judgment against entirely unrelated persons has anything to do with the claims against Mr. Vaughn. Further, the Receiver makes no effort whatsoever to tie the

alleged illegal sales to any specific payments to Mr. Vaughn. This argument is entirely irrelevant to the issues presented except as an improper attempt to smear Mr. Vaughn with the unrelated actions of others.

iv. Mr. Vaughn was kept out of Vendetta's financials and had no way of knowing about the alleged *Ponzi* scheme.

When Mr. Vaughn was first approached by Vendetta about potentially investing, he was an outside investor that was not given access to Vendetta's internal financials. Later, when Mr. Vaughn was employed as an independent consultant, he was also given no access to the Vendetta financial records. Mr. Vaughn pushed for restructure of Vendetta's accounting department. But ultimately, Vendetta kept Mr. Vaughn from the financials. Kaelin explicitly told Mr. Vaughn after the Receiver was appointed in this case that "we didn't let you know we had cash flow problems because we were afraid you would leave if you did." VAUGHN AFFIDAVIT, ¶ 15.

Mr. Vaughn worked tirelessly to improve Vendetta's substantive business, its accounting, and to preserve the value of funds invested into it. In short, Mr. Vaughn was the best friend that any investor in Vendetta had.

The Receiver attempts to claim that one isolated email, made before Mr. Vaughn had any relationship with Vendetta, should have caused him to figure out the entire alleged *Ponzi* scheme at issue. The Receiver points to an email from one of Mr. Vaughn's friends on September 28, 2012. MOTION, p. 16 (citing APPX_000276-000277); see also APPX_000173 (Vaughn Depo 166:6). The email raises an issue with purported losses in 2011 and 2012. APPX_000276. The email does not mention any alleged illegality, malfeasance, or wrongdoing of any sort. It simply inquires as to whether the business is worth investment. *Id*.

At that time, Mr. Vaughn believed that it was. Mr. Vaughn was an outside investor with no access to the Vendetta financials. Based on his research as an outside, potential investor

Vendetta appeared to be a fund: with a strong asset base of mineral properties; in its fifth year of existence; with $45,000,000 of assets under management consisting of mineral and royalty interests under more than 18,000 producing wells in over 200 counties of 22 states plus Canada; with management having over 15 years of experience and a significant personal investment in Vendetta. Further, Mr. Vaughn's own son, who had worked with Helms and Kaelin for years, recommended the investment to him. VAUGHN AFFIDAVIT, ¶ 5. Mr. Vaughn believed that the company had an attractive portfolio with expanding leases.

Not every discussion about a business should cause one to believe that the business is a fraudulent endeavor. Nothing in this email necessarily points to fraud. This email on its own certainly does not establish any bad faith by Mr. Vaughn as a matter of law.

E. The Receiver's unjust enrichment claim is unproven and grossly overreaches.

The Receiver's unjust enrichment claim perfectly illustrates that this entire proceeding is nothing but blatant overreaching because the Receiver literally seeks funds to which it never possessed, paid or had any right. The Receiver claims that Mr. Vaughn owes the Receivership $442,254.35 for unjust enrichment. Although it does not explain how that number is derived, the only way to arrive at that number based on the Receiver's motion is to add (1) the entire $292,254.35 that Vendetta purportedly paid to Mr. Vaugh or to third parties related to Mr. Vaughn's work for Vendetta and (2) the $150,000 that Upland Partners raised but did not pay in to Vendetta.

Unsurprisingly, the Receiver presents neither argument nor evidence demonstrating why it has a claim to monies raised by and retained by Upland Partners and its general partner Upland Resources. There can be no such basis. Neither Upland Partners nor Upland Resources are receivership entities. The Receiver has no authorization or authority to represent them. Neither

of them is a party to this litigation. Neither of them has complained in any way, shape, or form concerning the management fee paid to Upland Resources. There is neither argument nor evidence that Upland Resources is an alter ego for Mr. Vaughn. There is no evidence whatsoever that any portion of the retained $150,000 was paid by Upland Partners or Upland Resources to Mr. Vaughn.

Requiring Mr. Vaugh to pay that management fee to the Receiver would not be disgorging any wrongful benefit. It would require Mr. Vaugh to pay monies of which there is no evidence he received to a party that had no claim to them. This argument cannot be described as anything other than a gross misuse of the Court's authority granted to the Receiver.

Further, as described *supra* literally everything that the Receiver's Motion describes as an "indisputable" with respect to this claim is wrong and/or seriously disputed. *See* MOTION, p. 18. The Receiver has failed to present competent evidence establishing the alleged *Ponzi* scheme. Mr. Vaughn did not promote the purported Vendetta *Ponzi* scheme and instead worked diligently to preserve investors' assets. Mr. Vaughn did not receive hundreds of thousands of dollars for recruiting individuals into Vendetta investments. The Receiver has failed to present competent evidence of any payments to Mr. Vaughn from Vendetta. Even being charitable with the Receiver's lack of evidence, the payments Mr. Vaugh received were wages for work performed to preserve investors' assets. Finally, Mr. Vaugh had no actual notice of any wrongdoing and no access to information that would have reasonably put him on notice of wrongdoing. The Receiver is not entitled to summary judgment on the unjust enrichment claim and its request should be denied.

F. The Receiver is not entitled to interest at this time.

As described herein, the Receiver has established no right to recovery whatsoever in its

Motion. Further, even if it had, it would not be entitled to a final judgment at this time. Considering pre and post judgment interest now is premature and unnecessary. As such, this request should be denied.

III. Conclusion

For the reasons stated herein, Mr. Vaughn respectfully requests that the Court deny the Receiver's Motion in its entirety.

Respectfully submitted,

/s/. R. Ritch Roberts III
R. Ritch Roberts, III
Texas Bar No. 24041794
rroberts@fhsulaw.com
Fitzpatrick, Hagood, Smith & Uhl, LLP
2515 McKinney Avenue, Suite 1400
Dallas, TX 75201
Tel. 214-237-0900
Fax. 214-237-0901

ATTORNEYS FOR GRADY VAUGHN

CERTIFICATE OF SERVICE

I hereby certify that, on December 14, 2015I caused service of the above and foregoing instrument via filing with the Court's CM/ECF system

/s/ R. Ritch Roberts
R. Ritch Roberts

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.	§	**CAUSE NO. 15-cv-648**
GRADY H. VAUGHN III	§	
Defendant.	§	

AFFIDAVIT OF GRADY H. VAUGHN

I Grady H. Vaughn III do hereby declare under penalty of perjury and in accordance with 28 U.S.C. § 1746, that the following is true and correct:

1. I am over the age of 21 years, of sound mind, and fully competent to testify as to the matters herein. I have never been convicted of a felony or a crime of moral turpitude. I have personal knowledge of every statement herein unless explicitly stated otherwise.

2. I am a party in the foregoing lawsuit and have knowledge of the facts pertaining to that lawsuit.

3. The Receiver's Motion incorrectly attempts to cast me ("Grady H. Vaughn") as an individual who was predominantly out raising money for the alleged Ponzi scheme. That is simply untrue. Other than my own investment group (Upland Energy Partners "Upland Partners"), to my knowledge I brought in no other investors or monies and the Receiver can point to none. I was hired and paid by Vendetta for legitimate business work. My work was solely designed to improve Vendetta's legitimate business interests and preserve (and enhance)

the value of investments in Vendetta. My consulting fee, essentially an earned wage, is not fraudulent and the Receiver overreaches by claiming against it here.

4. Vendetta originally sought me out as a potential investor in the late Spring or early Summer of 2012. At that time, my eldest son, Grady Hamilton Vaughn, asked me to meet with and potentially invest in Vendetta. On or about July 16, 2012, Mr. Helms sent me an email asking if my investor group would be interested in buying out some existing Vendetta partners who wished to exit the Vendetta partnership.

5. At that time, I performed the due diligence that was available to me as an outside investor. I visited Vendetta's Austin facilities on multiple occasions to discuss the operations with Vendetta representatives. I reviewed Vendetta's investor materials, including a map of the Vendetta mineral interests, and a copy of the Vendetta Limited Partnership Agreement and the Vendetta private placement memorandum. I reviewed a list of Vendetta assets (producing properties and/or royalty and mineral interests) that Vendetta provided to me. At that time, as an outside potential investor, I was not given access to the Vendetta accounting books and records. Based on my research as an outside, potential investor Vendetta appeared to be a fund: with a strong asset base of mineral properties; in its fifth year of existence; with $45,000,000 of assets under management consisting of mineral and royalty interests under more than 18,000 producing wells in over 200 counties of 22 states plus Canada; with management having over 15 years of experience and a significant personal investment in Vendetta. Further, my own son, who had worked with Helms and Kaelin for years, recommended the investment to me.

6. Based on that information, the Vendetta offering appeared to be a legitimate and potentially profitable investment. So, a group of other individuals and I (predominantly my personal friends) agreed to form Upland Partners as an investment vehicle. Upland Partners was

formed on September 18, 2012 as a Delaware entity. It has limited partners, and its general partner is Upland Resources LLC, a Delaware entity that had existed and operated since January 1, 2005 ("Upland Resources"). I am the manager for Upland Resources.

7. Upland Partners ultimately raised $1,350,000. Of that, pursuant to the Upland Energy Partners Private Placement Memorandum, the Upland Partners general partner, Upland Resources, was entitled to and took a 10% management fee. Of the remainder, $1,200,000 was invested in Vendetta also pursuant to the PPM.

8. After that investment and as time passed, I further looked into Vendetta's operations. It became apparent that Vendetta's business practices were lacking in many ways. My wife suggested to me that my years of experience in the oil and gas business could greatly help Vendetta's management and could fix some of the business problems facing Vendetta. So, I offered to help Helms and Kaelin straighten out some of the disorganized, inefficient business practices at Vendetta. They agreed and hired me as a consultant to help organize Vendetta's business.

9. I was not hired as part of Vendetta's sales or marketing team. Instead, I was hired to improve Vendetta's operations and install "best practices." Some examples of my contributions to Vendetta include:

- Mineral Leasing – I studied and gave advice regarding current market conditions (terms, leasing parameters, etc.) to management and others regarding the many basins in which Vendetta minerals were located. I pushed Vendetta to make the best deal feasibly possible in order to maximize the portfolio's value.
- I fostered efforts to communicate with existing Vendetta limited partners as openly and responsively as possible. Far from fostering any secrecy from the investors, I

actively promoted openness with investors and helped establish a single point of contact individual to help accomplish open, responsive communication.

- I pushed to restructure and improve the Vendetta accounting department.
- I identified a search firm which was hired to locate advisory board candidates for Vendetta.

10. By these and other similar activities, I did not work to solicit new investors in Vendetta. Instead, I consistently worked to preserve and improve the value of investments made in Vendetta.

11. In return for my work, I was paid a regular consulting fee and certain reimbursable expenses. I was paid $10,000 per month for my full time employment with Vendetta. Further, I was and am a Colorado resident. Rather than relocate to Austin, Texas, Vendetta paid for my living accommodations there.

12. I worked to improve the value of investments in Vendetta every day from the Fall of 2012 to November 2013. In all that time I was paid only my consulting fee and reimbursement for certain expenses.

13. I have never had or used an email address ghv1234@gmail.com.

14. I have not yet had access to discovery from the plaintiff in this case. If the court were to grant a continuance of the summary judgment motion, I would expect to conduct discovery into a number of additional topics through my attorney. I would intend to seek documents and information concerning: the facts underlying the alleged *Ponzi* scheme, facts demonstrating the purpose for which I was retained by the Vendetta entities, my lack of knowledge concerning any alleged wrongdoing, the value I provided to the investors in Vendetta, my own victimization at the alleged *Ponzi* scheme (if such scheme is proven), the fact

that at least some of the alleged payments for which the Receiver seeks reimbursement were not made to me or for my benefit.

15. On one occasion, and after the Receiver was appointed in this case, Ms. Kaelin stated to me that "we didn't let you know we had cash flow problems because we were afraid you would leave if you did."

I state under penalty of perjury that the foregoing is true and correct.

DATED this the 14th day of December, 2015

/s/ Grady H. Vaughn
Grady H. Vaughn

Remainder of page left intentionally blank

AO 88A (Rev. 12/13) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Texas

U.S. Securities and Exchange Commission
Plaintiff
v.
Robert Helms, Janniece Kaelin, Vendetta Royalty Partners, Ltd., et al.
Defendant

Civil Action No. 1:13-cv-1036-LY

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Grady H. Vaughn III

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
U.S. Securities and Exchange Commission Fort Worth Regional Office, Burnett Plaza, Suite 1900 801 Cherry Street, Unit 18, Fort Worth, TX 76102	04/14/2014 9:30 am

The deposition will be recorded by this method: Stenographer

☑ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

See Exhibit A

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 03/28/2014

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Thomas L. Taylor III, Receiver, who issues or requests this subpoena, are:

Thomas L. Taylor III, The Taylor Law Offices, P.C., 4550 Post Oak Place, Ste. 241, Houston, TX 77027; taylor@tltaylorlaw.com; 713-626-5300

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 1:13-cv-1036-LY

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).