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

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

Plaintiff,

v.

PHILIP E. GAUCHER,

Defendant.

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

Philip E. Gaucher ("Gaucher") hereby moves to dismiss Thomas L. Taylor III's ("Receiver") First Amended Complaint (hereinafter "Cmplt."), in its entirety, for the reasons set forth below.

INTRODUCTION

In the First Amended Complaint, the Receiver seeks the return of specific amounts of money from two separate entities: $86,565 from Vendetta Royalty Partners, Ltd. ("Vendetta Partners"), and $76,000 from Barefoot Minerals, G.P. ("Barefoot Minerals"). (*See* Cmplt. ¶ 58). Nothing else. According to the allegations, these payments each served different purposes. Alleged transfers from Vendetta Partners derive from an agreement between William J. Brock ("Brock") and Gaucher to split a commission payment that belonged to Brock. (*See* Cmplt. ¶ 55). Transfers from Barefoot Minerals were payments Gaucher allegedly received for marketing an offering from Iron Rock Royalty Partners, LP ("Iron Rock"). (*See* Cmplt. ¶ 9). Because the

two types of alleged transfers came from different entities and served two very different purposes, the Court must evaluate them separately.

With regard to the $86,565 transferred from Vendetta Partners, the Receiver alleges that Brock "received from Vendetta Partners a 6% commission . . . for recruiting investors into the Vendetta Offering," and that "Brock agreed to split his . . . 6% commission with Gaucher." (Cmplt. ¶ 55). However, as even the Receiver admits (again accepting as true the Receiver's allegations), Gaucher was a mere intermediary who was not involved in marketing the assets of Vendetta Partners. Accordingly, it is incorrect to characterize any money that Gaucher may have obtained through this alleged agreement with Brock as a "commission." (*See* Cmplt. ¶ 61). Gaucher received, if anything, a mere intermediary fee from monies that were owed to Brock (hereinafter **"Vendetta Intermediary Fees"**).

The Receiver's claims regarding the Vendetta Intermediary Fees are moot because the Receiver has already obtained the relief he seeks in the underlying First Amended Complaint, in that Gaucher returned these funds to Vendetta Partners immediately after he received them, long before this lawsuit was filed. Any and all Vendetta Intermediary Fees that Gaucher may have received were reinvested through Clovis Capital Ventures, LLC ("Clovis") into Vendetta Partners. Accordingly, the relief sought in the Complaint, namely "return of those funds to the Receivership Estate" (Cmplt. ¶ 71), and "complete and exclusive control . . . of the transfers received by Gaucher" (Cmplt. ¶ 76), has already occurred, is therefore moot, and accordingly leaves the Court without subject matter jurisdiction over those claims, which it should dismiss pursuant to Rule 12(b)(1).

With regard to the $76,000 transferred from Barefoot Minerals, the Receiver alleges that these payments (hereinafter **"Barefoot Consulting Fees"**) related to marketing services Gaucher

performed for "the Iron Rock Offering," (Cmplt. ¶ 9; *see* Cmplt. ¶ 62), which was a future prospective investment vehicle that never materialized (*see* Cmplt. ¶¶ 36, 38). Other than alleging that Barefoot Minerals was "inextricably intertwined" with other entities (Cmplt. ¶ 4), the Receiver does not allege that Barefoot Minerals had any investors, and he thus does not (and cannot) allege that Barefoot Minerals was operating as a Ponzi scheme, as he must to assert his claim under the Texas Uniform Fraudulent Transfer Act ("TUFTA"). The Receiver attempts to circumvent this omission by alleging the commingling of funds between Barefoot Minerals and other entities. (*See* Cmplt. ¶¶ 4, 38, 41, 43-45, 47). Even if these allegations were sufficient to establish that Barefoot Minerals—the alleged transferor—was operating as a Ponzi scheme, which they are not, the Receiver makes no allegations about the specific source of the Barefoot Consulting Fees. Thus, the Receiver does not allege, as he must, that the Barefoot Consulting Fees were transferred to Gaucher from a Ponzi scheme. Accordingly, just as the Vendetta Intermediary Fee claims should be dismissed under Rule 12(b)(1), the Barefoot Consulting Fee claims set forth in Count I should be dismissed under Rule 12(b)(6).

Similarly, because the Receiver's unjust enrichment claim (Count II) with regard to Barefoot Minerals relies on the existence of a Ponzi scheme (*see* Cmplt. ¶ 75), which was insufficiently pled, it likewise fails, leaving no claims before the Court.

For these reasons, the Court should grant Gaucher's motion to dismiss the First Amended Complaint in its entirety.

ARGUMENT

I. VENDETTA INTERMEDIARY FEES.

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

With regard to the $86,565 comprising the Vendetta Intermediary Fees, Gaucher immediately reinvested those monies in Vendetta Partners. (*See* Affidavit of Philip E. Gaucher, attached hereto as Exhibit A).[1] Vendetta Partners is an entity that falls within the definition of "Vendetta Defendants" and "Receivership Estate." (*See* Cmplt. ¶¶ 1-2). Accordingly, the Vendetta Intermediary Fees have already been "return[ed] . . . to the Receivership Estate" (Cmplt. ¶ 71), and the relief sought by the Receiver with regard to those funds (in both Count I and Count II) is moot, which deprives the Court of subject matter jurisdiction over those claims.

"Mootness is the doctrine of standing in a time frame." *La. Env't Action Network v. City of Baton Rouge*, 677 F.3d 737, 744 (5th Cir. 2012). In other words, whereas the standing doctrine requires that "requisite personal interest . . . must exist at the commencement of litigation," principles of mootness require that these interests "must continue throughout" the case. *Id.* If a particular issue in a case becomes moot, "a federal court has no constitutional authority to resolve the issues that it presents." *Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir. 2008); *see e.g.*, *O'Brien v. Calvo*, 2013 WL 1247521, at *5 (E.D.N.Y. March 27, 3013) (concluding, in context of claim challenging excess tax withholdings, that "claim for monetary relief is moot" where "plaintiff concedes that . . . defendants have returned a

[1] Because Gaucher is challenging the Court's subject matter jurisdiction under Rule 12(b)(1), the Court may consider documents outside the four corners of the First Amended Complaint without converting the motion to dismiss into a motion for summary judgment. *See Oaxaca v. Roscoe*, 641 F.2d 386, 391 (5th Cir. 1981) ("A factual attack on the subject matter jurisdiction of the court . . . challenges the facts on which jurisdiction depends and matters outside of the pleadings, such as affidavits and testimony, are considered.").

sum of money to him greater than the tax withheld"). Rule 12(b)(1) of the Federal Rules of Civil Procedure is the proper vehicle for dismissing a moot claim for lack of subject matter jurisdiction. *See Hopkins v. Viva Beverages, LLC*, 2014 WL 1612365, at *3 (N.D. Tex. April 21, 2014) ("Because mootness is a function of standing, it would normally be properly dealt with by a motion under Rule 12(b)(1).").

Here, accepting the allegations as true, the $86,565 in alleged Vendetta Intermediary Fees were fees received by Gaucher pursuant to his agreement with Brock as described herein. In Count I of the First Amended Complaint, the Receiver seeks "return of those funds to the Vendetta Defendants." (Cmplt. ¶ 71). Likewise, in Count II, the Receiver contends that such funds are "property of the Receivership Estate." (Cmplt. ¶ 77). However, this relief has already been afforded to the Receiver because long before the filing of the underlying First Amended Complaint, Gaucher invested all of those funds into Vendetta Partners (*see* Exhibit A), which is an entity that falls within the definition of "Vendetta Defendants" and "Receivership Estate." (*See* Cmplt. ¶¶ 1-2). Accordingly, because the Receiver's claims for relief with regard to the Vendetta Intermediary Fees are moot, the Court does not have subject matter jurisdiction over those claims and must dismiss them pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Even if the Court rejects Gaucher's Rule 12(b)(6) argument for dismissal of the claims concerning the Barefoot Consulting Fees, *infra*, it should dismiss all claims pertaining to the $86,565 in Vendetta Intermediary Fees and allow this case to proceed only with respect to claims concerning the $76,000 in Barefoot Consulting Fees.

II. BAREFOOT CONSULTING FEES.

A. The Receiver's TUFTA Claim With Regard To The Barefoot Consulting Fees Should Be Dismissed For Failure To State A Claim Pursuant To Federal Rule Of Civil Procedure 12(b)(6) Because The Complaint Does Not Sufficiently Allege That The Barefoot Consulting Fees Were Transferred With Actual Intent To Hinder, Delay, Or Defraud.

The Receiver relies exclusively on Section 24.005(a)(1) of TUFTA to assert Count I. That section provides that "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor." Tex. Bus. & Com. Code Ann. § 24.005(a)(1). With regard to the Barefoot Consulting Fees, the Receiver's Count I fails to sufficiently allege actual intent and must therefore be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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

Here, the Receiver relies exclusively on the existence of a Ponzi scheme to satisfy his pleading requirement of alleging actual intent to hinder, delay, or defraud. (*See* Cmplt. ¶¶ 66-67). However, the Fifth Circuit principle on which the Receiver attempts to rely requires a showing that the "*transferor*[] operated as a Ponzi scheme." *Janvey v. Brown*, 767 F.3d 430, 439

(5th Cir. 2014) (emphasis added). The alleged transferor is Barefoot Minerals. (*See* Cmplt. ¶ 58). Therefore, in order to satisfy the "actual intent" prong of TUFTA by establishing the existence of a Ponzi scheme, the Receiver must allege that Barefoot Minerals was operating as a Ponzi scheme. However, the Receiver fails to do so. At most, the Receiver alleges that "assets of the Vendetta Defendants, including without limitation Vendetta Partners and Barefoot Minerals, were . . . inextricably intertwined." (Cmplt. ¶ 4). However, the *sine qua non* of a Ponzi scheme is that "money contributed by later investors generates artificially high dividends or returns for the original investors." *Janvey v. Alguire*, 647 F.3d 585, 597 (5th Cir. 2011). The Receiver does not allege that later investments in Barefoot Minerals were the source of dividends paid to earlier investors. Indeed, the Receiver does not allege that Barefoot Minerals had any investors at all. For this reason alone, the Receiver cannot show that Barefoot Minerals was operating as a Ponzi scheme, and thus he cannot satisfy the actual intent prong of TUFTA. *See Am. Cancer Soc'y v. Cook*, 675 F.3d 524, 526 (5th Cir. 2012) ("Not all securities frauds are Ponzi schemes."); *United States v. Setser*, 568 F.3d 482, 486 (5th Cir. 2009) ("[I]n a classic Ponzi scheme, as new investments c[o]me in . . ., some of the new money [i]s used to pay earlier investors.").

The Receiver further alleges that the funds Gaucher purportedly received from Barefoot Minerals were payments for marketing efforts on behalf of Iron Rock. (*See* Cmplt. ¶¶ 9, 62). To the extent the Receiver seeks to rely on Iron Rock as the Ponzi entity with regard to the Barefoot Consulting Fees, Gaucher responds in two ways. First, Iron Rock was not the transferor of the Barefoot Consulting Fees, and, as such, is not the proper entity to evaluate. *See Janvey*, 767 F.3d at 439 (requiring a showing that the "*transferor*[] operated as a Ponzi scheme" (emphasis added)). Second, even if Iron Rock could be considered the transferor, which it cannot, the

Receiver's own allegations make clear that Iron Rock was not orchestrating a Ponzi scheme and indeed never even had the opportunity to do so. (*Compare* Cmplt. ¶ 36 (alleging in conditional future tense that Iron Rock "represented that it *would* engage in business activities equivalent to those of Vendetta Partners" (emphasis added)), *with* Cmplt. ¶ 38 (clarifying that Iron Rock never materialized, and thus had no opportunity to even become a Ponzi scheme, because "[a]t the commencement of the Enforcement Action and the appointment of the Receiver, only one investor had subscribed to the Iron Rock Offering")).[2]

In lieu of alleging that Barefoot Minerals or Iron Rock were operating as a Ponzi scheme, an omission that is fatal to the Receiver's claims with regard to the Barefoot Consulting Fees, the Receiver purports to establish the actual intent prong of TUFTA by alleging the commingling of money between and amongst Barefoot Minerals and several other allegedly related entities. (*See* Cmplt. ¶¶ 4, 38, 41, 43-45, 47). Even if the Receiver sufficiently alleges a Ponzi scheme with respect to some of these other entities, which Gaucher denies, allegations of mere commingling are insufficient because, as explained herein, the Receiver must allege that the *transferor* of the funds was perpetrating a Ponzi scheme. Such a showing requires allegations that "money contributed by later investors generates artificially high dividends or returns for the original investors." *Janvey*, 647 F.3d at 597. The Receiver does not allege that Barefoot Minerals had any investors at all.

[2] Because Iron Rock was a separate investment vehicle altogether, and because, as the Receiver alleges, Gaucher received the Barefoot Consulting Fees for marketing efforts on behalf of Iron Rock only (*see* Cmplt. ¶¶ 9, 62), Gaucher would have had no way of knowing that the Barefoot Consulting Fees came from illegally obtained Ponzi funds, if in fact that were the case, which the Receiver does not even allege. Thus, regardless of the original source of the funds, Gaucher at all times operated in good faith in purportedly receiving money for work performed on behalf of an investment entity that never materialized.

More importantly, the Receiver's commingling allegations are insufficient because he does not allege that the source of the Barefoot Consulting Fees was a Ponzi scheme. Indeed, other than alleging that Barefoot Minerals transferred $76,000 to Gaucher (*see* Cmplt. ¶ 58), the Receiver makes no allegations whatsoever about the source of these funds. In virtually every fraudulent transfer case, courts rely on proof or specific allegations that the funds were sourced in, or were traceable to, a Ponzi scheme. *See, e.g.*, *Janvey*, 647 F.3d at 598 (explaining, in context of preliminary injunction motion, that "declarations sufficiently establish that [a Ponzi scheme principal] paid the . . . Defendants *from the alleged Ponzi scheme*" (emphasis added)); *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) (explaining, in context of summary judgment in claw-back action, that "[t]he Receiver satisfied his burden with evidence of Appellants' receipts from [an investment entity] and evidence that [the investment entity] was a Ponzi scheme"); *Janvey v. Castaneda*, 2014 WL 5285655, at *2 (N.D. Tex. Sept. 12, 2014) (denying motion to dismiss claw-back action because "the Plaintiffs allege . . . CD proceeds *from the Ponzi scheme* were transferred to [the defendant]" (emphasis added)).

Here, the Receiver makes no allegation that the Barefoot Consulting Fees were sourced in, or were traceable to, Ponzi scheme funds. The Receiver certainly alleges that funds in general were transferred between Barefoot Minerals and other entities. But he does not allege that the specific Barefoot Consulting Fees—the $76,000 at issue—are traceable to, and derive from, illegally obtained Ponzi funds. At the motion to dismiss stage, the Receiver need not prove this fact. However, the Receiver must at least make the allegation.[3] For this additional

[3] *Kirpatrick v. Jasmine Inc.*, 2012 WL 1116471 (N.D. Tex. April 2, 2012), provides a good example of what the Receiver should have, but failed to, allege. That SEC enforcement action involved an equitable disgorgement claim by a receiver against a transferee of funds in the context of an oil and gas investment scheme perpetrated by an entity named Sunray Oil Company ("Sunray"). The receiver moved for summary judgment. To establish that the

reason, the Receiver's TUFTA claim, as it relates to transfers allegedly made from Barefoot Minerals, fails to state a claim for which relief can be granted and must be dismissed pursuant to Rule 12(b)(6).[4]

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

As explained herein, the Receiver's First Amended Complaint fails to sufficiently allege the existence of a Ponzi scheme with respect to Barefoot Minerals. Count II of the Receiver's First Amended Complaint, alleging unjust enrichment, is premised on the existence of a Ponzi scheme. (*See* Cmplt. ¶ 74). Because Count II respecting Barefoot Minerals must necessarily rise and fall with the Receiver's ability to sufficiently allege the existence of a Ponzi scheme, and the

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transferee "received ill-gotten gains," the receiver relied on a declaration that "state[d] that the $330,000.00 are the proceeds of, or are traceable to the proceeds of, the unlawful activities of Sunray, [and] were derived from Sunray investors through fraud." *Id.* at *4. The district court in that case found even those allegations to be insufficient. The instant case, of course, is at the motion to dismiss stage and not the summary judgment stage. However, *Kirpatrick* nonetheless provides a good example of what the Receiver should have alleged in the instant case. Moreover, although *Kirpatrick* did not involve a TUFTA claim, the burden of establishing that a transferor operated as a Ponzi scheme (as the Receiver must show in the instant case) is akin to the burden of establishing receipt of ill-gotten gains. Therefore, *Kirpatrick* should further instruct the Court on the necessary components of the Receiver's allegations about the source of the Barefoot Consulting Fees, and the insufficiency thereof.

[4] Because the Receiver alleges that specific amounts of money were fraudulently transferred from specific entities, namely Vendetta Partners and Barefoot Minerals (*see* Cmplt. ¶ 58), and because the Receiver fails to state a claim with regard to a sum certain of those alleged transfers, namely the transfers from Barefoot Minerals, the Court can determine, as a matter of law, that the Receiver fails to state a claim for relief with regard to those claims. This is not a mere damages issue in which the parties dispute the amount of damages. To the contrary, the Receiver's allegations concerning a specific portion of the transfers alleged in the First Amended Complaint (which in effect compose a separate cause of action altogether), do not satisfy the threshold requirements of Rule 12(b)(6) and must be dismissed. In any event, for the reasons explained herein, the Court should dismiss the First Amended Complaint in its entirety and, therefore, need not concern itself with the mechanics of dismissing only portions of a cause of action.

Receiver having failed to do so with regard to Barefoot Minerals, Count II must likewise fail as it pertains to Barefoot Consulting Fees.

CONCLUSION

For the foregoing reasons, Gaucher moves the Court to dismiss the Receiver's First Amended Complaint in its entirety because (A) claims related to payments made from *Vendetta Partners* are moot and the Court lacks subject matter jurisdiction over them pursuant to Rule 12(b)(1) because Gaucher reinvested any and all such funds back into Vendetta Partners; (B) TUFTA claims related to payments made from *Barefoot Minerals* are insufficiently pled and must be dismissed pursuant to Rule 12(b)(6); and (C) the Complaint fails to sufficiently allege a Ponzi scheme respecting *Barefoot Minerals*, so Count II pertaining to transfers from Barefoot Minerals, which hinges on the existence of a Ponzi scheme, must likewise fail.

Submitted this 20th day of January, 2015.

/s/ William R. Terpening
William R. Terpening
Admitted Pro Hac Vice

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CERTIFICATE OF SERVICE

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

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Submitted this 20th day of January, 2015.

/s/ William R. Terpening
William R. Terpening

Exhibit A

AFFIDAVIT OF PHILIP E. GAUCHER

I, Philip E. Gaucher, being first duly sworn, depose and say as follows:

1. I am over the age of 18, am competent to testify as to all matters stated herein, and all matters stated herein are based upon my personal knowledge.

2. I am the Defendant in the case styled Thomas L. Taylor III v. Philip E. Gaucher, Civil Action No. 1:14-cv-965, which is proceeding in the United Stated District Court for the Western District of Texas (Austin Division).

3. The Receiver alleges that Vendetta Royalty Partners, Ltd. transferred funds to me in the amount of $86,565.00.

4. All of those funds were reinvested in Vendetta Royalty Partners, Ltd. through Clovis Capital Ventures, LLC.

Submitted this the 20th day of January, 2015.

Philip E. Gaucher

State of North Carolina
County of Mecklenburg

Subscribed and sworn to before me
this 20th day of January, 2015.

Notary Public for the State of North Carolina
My Commission Expires: Feb. 11, 2018

Julia H. Chrismon

JULIA H. CHRISMON
NOTARY PUBLIC
Cabarrus County
North Carolina
My Commission Expires Feb. 11, 2018