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

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| THOMAS L. TAYLOR III, SOLELY IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR ROBERT A. HELMS, ET AL., | § | |
| *Plaintiff*, | § | |
| v. | § | Civil Action No. 1:14-cv-965-LY-ML |
| PHILIP E. GAUCHER, | § | |
| *Defendant*. | § | |

**RECEIVER'S RESPONSE TO GAUCHER'S MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Plaintiff Thomas L. Taylor III ("Receiver"), Court-appointed Receiver for defendants[1] in the enforcement action styled *SEC v. Helms, et al.*, Civil Action No. 1:13-cv-01036-ML (W.D. Tex. 2013) (the "Enforcement Action")[2], respectfully files this Response to Defendant Philip Gaucher's Motion to Dismiss and Incorporated Memorandum of Law (Doc. 16) (the "Motion to Dismiss") with respect to the Receiver's First Amended Complaint (Doc. 14) (the "Complaint").

## I.
## PRELIMINARY STATEMENT

Defendant Gaucher sets forth three unavailing contentions in support of his Motion to Dismiss. With respect to the funds fraudulently transferred to Gaucher by Helms and Kaelin

[1] Robert A. Helms ("Helms"), Janniece S. Kaelin ("Kaelin"), Deven Sellers, Roland Barrera, Vendetta Royalty Partners, Ltd. ("Vendetta Partners"), Vendetta Royalty Management, LLC, Vesta Royalty Partners, LP ("Vesta Partners"), Vesta Royalty Management, LLC, Iron Rock Royalty Partners, LP ("Iron Rock Partners"), Iron Rock Royalty Management, LLC, Arcady Resources, LLC, Barefoot Minerals, G.P. ("Barefoot Minerals"), G3 Minerals, LLC, Haley Oil Company, Inc. ("Haley Oil"), Lake Rock, LLC, Sebud Minerals, LLC and Technicolor Minerals, G.P. ("Technicolor Minerals") (collectively the "Vendetta Defendants").

[2] *See* Enforcement Action Docs. 11, 76 (the "Orders Appointing Receiver").

from an account in the name of Barefoot Minerals (the "Barefoot Transfers"), Gaucher asserts that the Receiver fails to allege that these funds were transfers from a Ponzi scheme. Mot. pp. 3, 7. This contention ignores dozens of paragraphs of detailed allegations in the Complaint with respect to Helms' and Kaelin's operation of the Vendetta Defendants as a single fraudulent enterprise and Ponzi scheme. *See, e.g.,* Compl. ¶¶4-5, 23-24, 39-53. Gaucher also fails to recognize that upon motion of the Receiver supported by the same facts -- regarding Helms' and Kaelin's operation of the Vendetta Defendants as a single fraudulent enterprise -- this Court entered the First Amended Order Appointing Receiver (Doc. 76), collapsing the Receivership estates of the numerous Vendetta Defendants into a single Receivership Estate. *See* Compl. ¶4. As further alleged by the Receiver, this Court also has "issued its *ex parte* Temporary Restraining Order … against all Vendetta Defendants upon evidence and allegations by the Commission that Helms and Kaelin were operating a Ponzi scheme." Compl. ¶5.

Second, Gaucher attempts to avoid liability for funds fraudulently transferred to him by Helms and Kaelin from an account in the name of Vendetta Partners (the "Vendetta Transfers") with the transparently specious assertion that he "returned" the Vendetta Transfers to Vendetta Partners by using these funds to purchase equity from Vendetta Partners through Clovis Capital Ventures, LLC ("Clovis"), an entity under his control. Mot. pp. 4-5. Gaucher's use of the Vendetta Transfers after receiving them does not affect the Receiver's right to avoid the Vendetta Transfers in the first instance -- the Receiver may obtain judgment for amounts fraudulently transferred against "the first transferee of the asset or the person for whose benefit the transfer was made …." TUFTA §24.009(b). Gaucher was both "the first transferee" of the Vendetta Transfers and "the person for whose benefit" the Vendetta Transfers were made. Moreover, any purchase of equity in Vendetta Partners by Clovis with the Vendetta Transfers

had no net effect on Vendetta Partners' net worth -- both the "assets" and "equity" columns on opposite sides of Vendetta Partners' balance sheet increased equally. Had these funds actually been "returned" to Vendetta Partners, its assets (and only its assets) would have increased on its balance sheet. The Court has subject matter jurisdiction over the Receiver's causes of action for the avoidance -- and actual return -- of the Vendetta Transfers to the Receivership Estate.

Third, Gaucher asserts that the Vendetta Transfers were not "commissions" related to investments made by Clovis Capital Ventures, LLC ("Clovis") but rather "intermediary fees." Mot. p. 2. This argument, even if credited, is a distinction without a difference -- transfers from debtors are treated equally under the Texas Uniform Fraudulent Transfer Act, TEX. BUS. & COM. CODE ANN. §§24.001, *et seq*. ("TUFTA"). To the extent Gaucher makes this argument to set up the prospective affirmative defense of exchange of reasonably equivalent value, TUFTA §24.009(a), such defense is belied by Gaucher's admission that he "was not involved" in marketing Vendetta Partners, Mot. p. 2, and therefore exchanged no value whatsoever upon Vendetta Partners for the Vendetta Transfers he received.[3] Under any label, the Vendetta Transfers are avoidable under TUFTA §24.005(a).

Importantly, Gaucher's arguments with respect to the Vendetta Transfers would defeat the very purpose of TUFTA and the mandate of the Receiver pursuant to the Orders Appointing Receiver. In this regard, Gaucher essentially argues that he is entitled not to return the Vendetta Transfers as an equity holder of Vendetta Partners limited partnership interests (through Clovis) in priority to other limited partners. The Receiver was charged by the Court to investigate the

[3] To the extent that Gaucher was involved in marketing Vendetta Partners, such services would not constitute reasonably equivalent value under Fifth Circuit precedents. *See* Compl. ¶13 (citing *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006) ("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.")).

financial affairs of the Vendetta Defendants and, where necessary, initiate litigation for, *inter alia*, the return of fraudulent transfers. Doc. 76 ¶43. Once these fraudulent transfers (and other assets) are collected by the Receiver, he will distribute them in an equitable manner approved by this Court to all defrauded investors. To credit Gaucher's assertion that these funds have been "returned" to the Receivership Estate would place Gaucher in a better position than other claimants, which result would be inequitable.

## II.
## RELEVANT LEGAL STANDARDS

A cause of action becomes moot "when the issues presented … are no longer live or the parties lack a legally cognizable interest in the outcome." *O'Brien v. Calvo*, 2013 U.S. Dist. LEXIS 43546, at * 12-13 (E.D.N.Y. March 27, 2013) (citing *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). When a "case is moot … the federal court lacks subject matter jurisdiction." *Id*. at 13 (citing *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 647 (2d Cir. 1998)). When deciding a motion for lack of subject matter jurisdiction under Rule 12(b)(1), "the court must accept as true all material factual allegations in the complaint…." *Id*. at * 7 (citing *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004); *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998)).

A motion to dismiss under Rule 12(b)(6) is viewed with disfavor and is rarely granted. *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009). When considering a Rule 12(b)(6) motion to dismiss, the Court must determine whether the plaintiff has asserted a legally sufficient claim for relief. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). The Court accepts a plaintiff's factual allegations as true, limits its review to the face of the pleadings, and construes all factual allegations in the light most favorable to the plaintiff. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal citations omitted). In making the required determination, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007).

## IV.
## ARGUMENT AND AUTHORITY

### A. The Receiver's Allegations of Helms' and Kaelin's Fraudulent Ponzi Scheme Adequately Establish that the Barefoot Transfers to Gaucher were made from a Ponzi Scheme and are Avoidable Pursuant to TUFTA

1. The Receiver unambiguously alleges that Helms and Kaelin operated a single fraudulent Ponzi scheme through Vendetta Partners, Barefoot Minerals, Iron Rock Partners, and other Receivership entities under their control.

The Receiver specifically alleges (and the Court must presume as true) that Helms and Kaelin operated the entity Vendetta Defendants (including without limitation Vendetta Partners, Barefoot Minerals and Iron Rock Partners) as a single fraudulent enterprise, and that the fraudulent enterprise operated by Helms and Kaelin was a Ponzi scheme. The Barefoot Transfers and Vendetta Transfers (together the "Transfers") made to Gaucher were, therefore, *transfers made from a Ponzi scheme* and are avoidable by the Receiver pursuant to TUFTA (or,

alternatively, eligible for disgorgement under the equitable doctrine of unjust enrichment). *Janvey v. Alguire*, 647 F.3d 585, 598 (5th Cir. 2011) ("proving that [a transferor] operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made.").

The Receiver's allegations that the entity Vendetta Defendants were "operated by Helms and Kaelin as a single fraudulent enterprise," Compl. ¶4, are fully supported by detailed factual allegations in the Complaint. In this regard, the Receiver alleges that "Helms and Kaelin obfuscated their fraudulent scheme through the conflation and comingling of funds between and among the entity Vendetta Defendants, including Vendetta Partners and Barefoot Minerals." Compl. ¶41. The Receiver alleges that more than "4,500 discrete transactions have been identified" which represent "related-party movements of funds and showing a continuous flow of funds among and between, and on behalf of, the entity Vendetta Defendants and Helms and Kaelin." Compl. ¶41. The flow of funds among the Vendetta Defendants between January 1, 2010 and December 3, 2013 are alleged in detail through summaries prepared by the Receiver's forensic accountant, D. Supkis Cheek PLLC. Compl. ¶41.

Specifically, and without limitation, the Receiver alleges the gross cash inflows to and outflows from Barefoot Minerals to other Vendetta Defendants, including over $590,000 transferred to Barefoot Minerals from Vendetta Partners and Vendetta Management and over $2,000,000 transferred from Barefoot Minerals to Vendetta Partners. Compl. ¶41(a) and (b). Moreover, the Receiver alleges approximately $275,000 in investor funds transferred from Iron Rock Partners[4] to Barefoot Minerals between June 27 and August 2, 2013, Compl. ¶¶38, 41(c),

[4] These transfers represent over one-half of investor proceeds raised by Iron Rock Partners prior to the Commission's Enforcement Action. Compl. ¶38. In this regard, Gaucher's assertion that the "Receiver's own allegations make clear that Iron Rock was not orchestrating a Ponzi scheme," Mot. p. 8, is also belied by the totality of the Receiver's allegations. The Receiver alleges numerous transfers between Iron Rock and other entities in Receivership conflating their

and that 98% of the amount of the Barefoot Transfers was made to Gaucher on June 27, 2013. Compl. ¶58. The Receiver further alleges that approximately $2,750,000 in funds transferred among the Vendetta Defendants cannot be reconciled and are unaccounted for. *See* EA Doc. 60-2 p. 9, Table 5 (incorporated by reference into the Complaint at ¶4). Additionally, the Receiver has established Helms' and Kaelin's use of Barefoot Minerals with respect to the fraudulent use of investor funds in or about October 2010 and April 2011 to purchase oil and gas interests in Illinois for Vendetta Defendants Haley Oil and Barefoot Minerals. Compl. ¶¶44-47.

The Receiver's allegations that the single fraudulent enterprise operated by Helms and Kaelin was a Ponzi scheme, Compl. ¶5, are also fully supported by detailed factual allegations in the Complaint. In this regard, the Receiver alleges that

> the accumulated losses of the entity Vendetta Defendants show that their operations were not funding distributions. Additionally, cash reserves of the entity Vendetta Defendants were always relatively low, and could not have been a source of distributions to investors. The only remaining source of funds with which to pay distributions to investors was equity cash inflows from more recent investors.

*Id*. ¶40. The Receiver further alleges that the equity inflows of the Vendetta Defendants first approach, and then surpass, those entities' net equity amounts, which is consistent with a Ponzi scheme. EA Doc. 95-2 ¶9 (incorporated into the Complaint by reference at ¶5, n.3). Moreover, the Receiver alleges extensive Ponzi payments throughout the relevant time period, beginning at least as early as August of 2011, Compl. ¶50, and continuing throughout the next two years and

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assets, Compl. ¶36-38, 41, that Iron Rock Partners represented that it would engage in business activities equivalent to those of Vendetta Partners, Compl. ¶36, that the Iron Rock offering was orchestrated by Helms and Kaelin as a continuation of their fraudulent scheme, Compl. ¶34, and further that Helms and Kaelin misappropriated the proceeds raised in the Iron Rock Offering, including transferring approximately $275,000 in investor funds from Iron Rock Partners to Barefoot Minerals, Compl. ¶38, including on the same day Barefoot Minerals transferred $75,000 to Gaucher. *Id*. ¶¶38, 58. As alleged by the Receiver, Iron Rock, like Barefoot Minerals, was used by Helms and Kaelin to perpetrate their fraudulent Ponzi scheme.

beyond -- including allegations that the equity contributions of Clovis to Vendetta Partners were used to make Ponzi payments to earlier investors. Compl. ¶¶52-53. Clovis' investment proceeds were also transferred to Technicolor Minerals and Iron Rock Partners. EA Doc. 95-2 pp. 12-14 (incorporated by reference into the Complaint at ¶5, n.3).

These allegations, taken as true by the Court, clearly establish that Helms and Kaelin operated the entity Vendetta Defendants as a single fraudulent Ponzi scheme. These allegations raise the Receiver's causes of action above the speculative level. *Twombly*, 550 U.S. at 555.

2. The Court should reject Gaucher's assertions that the Receiver fails to allege that Barefoot Minerals was a part of the Ponzi scheme operated by Helms and Kaelin and that the Barefoot Transfers were made from a Ponzi scheme.

The allegations in the Complaint are detailed, substantial and establish that Helms and Kaelin operated Vendetta Partners, Barefoot Minerals, Iron Rock Partners and other Receivership entities under their control as a single fraudulent enterprise and Ponzi scheme. The Transfers made to Gaucher by Helms and Kaelin -- whether from accounts in the name of Vendetta Partners or Barefoot Minerals -- were made from a Ponzi scheme.

Gaucher attempts to misdirect the Court by asserting that the Barefoot Transfers cannot have been made from a Ponzi scheme because Barefoot Minerals did not have investors, asserting that the "Receiver does not allege that later investments in Barefoot Minerals were the source of dividends paid to earlier investors." Mot. p. 7. Gaucher's argument regarding Barefoot Minerals' investors (or lack thereof) is a straw man. The Receiver does allege, in detail, that Barefoot Minerals -- a key component of the fraudulent enterprise operated by Helms and Kaelin -- was operating as a Ponzi scheme. Compl. ¶4, 11, 24, 38, 41-48, 50-52.

Gaucher offers no authority to support the proposition that each entity used by fraudfeasors in perpetrating a Ponzi scheme must offer securities to investors. In fact cases cited by Gaucher are either distinguishable or irrelevant to the issues at bar. Mot. p. 6. For example,

Gaucher cites the case of *Janvey v. Brown*, 767 F.3d 430, 439 (5th Cir. 2014) for the proposition that the presumption of fraudulent transfer "requires a showing that the '*transferor*[] operated as a Ponzi scheme.'" Mot. p. 6-7 (emphasis in Motion to Dismiss). In that case, the Court of Appeals stated that it was "well-established that the Stanford principles operated *the Stanford entities* as a Ponzi scheme, and the existence of the Ponzi scheme establishes fraudulent intent." *Id*. (emphasis added). While that case involved TUFTA actions against "investors who received back their principal, as well as supposed interest on this principal" from Stanford International Bank, Ltd. (the entity which issued the fraudulent securities at issue), *id*. at 434, the Court of Appeals has made similar holdings with respect to other transferors within the Stanford Financial Ponzi scheme. *See, e.g., Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 189 (5th Cir. 2013) (affirming summary judgment with respect to transfers made by, *inter alia*, control persons Allan Stanford and James Davis to various political committees).

Gaucher next asserts that the Receiver's causes of action must fail because the Receiver purportedly "does not allege that the source of the Barefoot [Transfers were] a Ponzi scheme." Mot. p. 9; *see also id*. ("the Receiver makes no allegation that the Barefoot [Transfers] were sourced in, or were traceable to, Ponzi scheme funds."). Again, the Receiver has made extensive allegations that assets of the Vendetta Defendants were consistently and continuously conflated and comingled, including allegations of comingling of over $3,000,000 between Barefoot Minerals, Vendetta Partners, Vendetta Management and Iron Rock Partners. Compl. ¶¶38, 40. The Receiver further alleges that "Helms and Kaelin obfuscated their fraudulent scheme through the conflation and comingling of funds between and among the entity Vendetta Defendants." Compl. ¶41. The Receiver's allegations clearly establish that the Barefoot Transfers were made from the Ponzi scheme.

Gaucher concedes that the Receiver need not prove at the Motion to Dismiss stage that the Barefoot Transfers are traceable to, and derives from, illegally obtained Ponzi funds. Mot. p. 9. However, Gaucher wrongly asserts that the Receiver has not even made the allegation. *Id*. To the contrary, the Receiver's allegations, viewed in their entirety, clearly allege that funds attributable to the Vendetta Defendants were transferred from the fraudulent Ponzi scheme to Gaucher. Compl. ¶38-43, 54-58. Gaucher's contention that the Receiver has failed to allege that the Barefoot Transfers were made from the Vendetta Ponzi scheme falls of its own weight in light of the totality of the Receiver's allegations. Accordingly, the Court should deny Gaucher's Motion to Dismiss with respect to the causes of action asserted regarding the Barefoot Transfers.

**B. The Court has Subject Matter Jurisdiction over the Receiver's Causes of Action**

1. The Receiver's causes of action are not moot because Gaucher did not "return" the Vendetta Transfers to Vendetta Partners through the purchase of equity in Vendetta Partners by Clovis

This Court's subject matter jurisdiction for the Receiver's causes of action seeking the return of the Vendetta Transfers is not lost due to the purported purchase of equity in Vendetta Partners by Clovis using the Vendetta Transfers. Gaucher's use of these funds after receiving them from Vendetta Partners has no effect on the Receiver's causes of action, and these funds have not been "returned" to the Receivership Estate.

The purported purchase of equity interests by Clovis in Vendetta Partners using the Vendetta Transfers was not a "return" of these funds to Vendetta Partners. Vendetta Partners accepted these funds in an exchange of assets: cash assets from Clovis, which were exchanged for equity interests in Vendetta Partners. "The primary consideration in analyzing the exchange of value for any transfer is the degree to which the transferor's net worth is preserved." *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006).

Gaucher received the Vendetta Transfers from Vendetta Partners and chose to contribute those funds to Clovis, which then chose to use those funds to purchase equity from Vendetta Partners.[5] The equity purchase by Clovis increased both Vendetta Partners' assets and its equity on opposite sides of its balance sheet. Therefore, there was no net effect with respect to Vendetta Partners' net worth. Had the Vendetta Transfers actually been returned to Vendetta Partners, its balance sheet would have increased with respect to its assets, with no corresponding increase as to equity. Under those circumstances, Vendetta Partners' net worth would have increased by the amount of Vendetta Transfers actually returned to Vendetta Partners. Such a "return" simply did not occur.

The facts present here are distinguishable from the case relied upon by Gaucher, *O'Brien v. Calvo*, 2013 WL 1247521 (E.D.N.Y. March 27, 3013). In that case, the plaintiff asserted causes of action for the return of taxes withheld by the government. *Id*. at *2. His claims became moot when the government issued him a check in an amount greater than the amount that had been withheld. *Id*. at *13-14. Here, Gaucher did not issue a check to Vendetta Partners for the amount of the Vendetta Transfers; he (through Clovis) exchanged those amounts for additional equity interest in Vendetta Partners. Accordingly, the Court should deny Gaucher's Motion to Dismiss with respect to the causes of action asserted regarding the Vendetta Transfers.

Significantly, Gaucher's arguments in this regard, if successful, would defeat the very purpose of fraudulent conveyance statues and the mandate of the Receiver pursuant to the Orders Appointing Receiver entered by this Court. Gaucher asserts that he is entitled to the benefit of

[5] Gaucher fails to explain how $16,665 in Vendetta Transfers made to him on January 25, 2013, Compl. ¶58, were reinvested by Clovis into Vendetta Partners, given that Clovis' final investment into Vendetta Partners occurred on January 24, 2013. *See* Compl. ¶8; Doc. 95-2 ¶15 (incorporated into the Complaint by reference at ¶5, n.3). Notwithstanding this glaring discrepancy in Gaucher's sworn affidavit testimony, his argument that the Vendetta Transfers were "returned" to Vendetta Partners fails for the reasons stated herein.

the Vendetta Transfers as an equity holder of Vendetta Partners limited partnership interests (through Clovis) in priority to other limited partners, who have not had the benefit of the return of their funds. This Court has directed the Receiver to investigate the financial affairs of the Vendetta Defendants and, where necessary, initiate litigation for, *inter alia*, the return of fraudulent transfers. Doc. 76 ¶43. Once these fraudulent transfers (and other assets of the Receivership Estate) are collected by the Receiver, he will distribute them in an equitable manner approved by this Court to all defrauded investors. The Receiver cannot distribute the Vendetta Transfers to all claimants in an equitable manner unless they are actually returned to the Receivership Estate. To credit Gaucher's assertion that these funds have been "returned" to the Receivership Estate would place Gaucher ahead of other claimants. Such a result would be inequitable, and the Court should not grant Gaucher the relief he seeks.

2. Gaucher was not an "intermediary" recipient of the Vendetta Transfers and is a proper party for the Receiver's causes of action under TUFTA

Gaucher's assertion that he was a mere intermediary recipient of the Vendetta Transfers, which is unavailing on its face, has no bearing on the Receiver's right to the avoidance of the Transfers under TUFTA. The Receiver may obtain judgment for fraudulent transfers against "the first transferee of the asset or the person for whose benefit the transfer was made …." TUFTA §24.009(b). As alleged in the Complaint, Vendetta Partners transferred the Vendetta Transfers to Gaucher, the initial transferee. Compl. ¶58.

Moreover, Gaucher was not an "intermediary" that received these fraudulent transfers but had no interest in them. In this regard, and by way of example, Mr. Gaucher's bank -- which technically received the transfers from Vendetta Partners on Mr. Gaucher's behalf, but held no interest in them -- could be considered such an intermediary. However, Gaucher had a direct (and sole) interest in the Vendetta Transfers, which were transferred for the benefit of Gaucher,

who received these transfers pursuant to an agreement with Brock in exchange for bringing the Clovis investment to Vendetta Partners. Compl. ¶¶55-56. Moreover, even if the Vendetta Transfers were used to purchase equity in Vendetta Partners as Gaucher asserts, such purchase was for the benefit of Gaucher through his interest in Clovis.

The Vendetta Transfers were made to Gaucher as payment for recruiting Clovis into Helms' and Kaelin's Ponzi scheme, and no other party had any interest in the Vendetta Transfers until Gaucher himself transferred them to Clovis. Accordingly, Gaucher was not a mere intermediary with respect to the Vendetta Transfers and Gaucher's Motion to Dismiss must therefore be denied with respect to the causes of action asserted regarding the Vendetta Transfers.

### C. The Receiver's Causes of Action for Unjust Enrichment are also Supported by the Allegations in the Complaint

The Receiver's cause of action for the return of the Transfers under the equitable theory of unjust enrichment is also adequately pleaded. As detailed above, §III(A)(1), the Receiver has adequately alleged that Vendetta Partners and Barefoot Minerals were used by Helms and Kaelin to perpetrate their fraudulent Ponzi scheme, and that the Transfers unjustly enriched Gaucher to the detriment of the defrauded investors having claims against the Receivership Estate. Compl. ¶26.

Gaucher asserts that because "Count II of the Receiver's First Amended Complaint, alleging unjust enrichment, is premised on the existence of a Ponzi scheme, … Count II must likewise fail" because the Receiver failed to adequately allege a Ponzi scheme with regard to Barefoot Minerals. Mot. p. 10-11. While the Receiver asserts in Count II that he is entitled to the "disgorgement of the transfers made from the Vendetta Ponzi scheme" to Gaucher, the existence of a Ponzi scheme is not a necessary element of a cause of action for unjust enrichment.

Nevertheless, the Receiver has made detailed allegations establishing the existence of a Ponzi scheme. *See, e.g.,* Compl. ¶¶39-53.

To recover on a claim for unjust enrichment, a plaintiff must show that "one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). In the Complaint, Receiver alleges that Gaucher "received funds that in equity and good conscience belong to the Receivership Estate for ultimate distribution to defrauded investors." Compl. ¶74. Receiver alleges that Gaucher did not provide reasonably equivalent value in exchange for the funds he received and that Helms and Kaelin "made transfers of funds from Vendetta Partners and Barefoot Minerals to Defendant … with actual intent to hinder, delay or defraud creditors." Compl. ¶¶11, 13, 59.

Receiver's claims arise out of the fact that the funds transferred to Gaucher were obtained as a result of Helms' and Kaelin's fraud on, and taking undue advantage of, the Vendetta Defendants' investors, and that equity requires that the funds be returned to the Receivership Estate for an equitable distribution to those defrauded investors. *See id*. ¶74-75. In short, Receiver argues that it would be unjust for Gaucher to retain the funds he received from the Vendetta Defendants, as he received those funds as a result of Helms' and Kaelin's fraud or taking of undue advantage. Thus, the Receiver's Count II is not "premised on the existence of a Ponzi scheme," as asserted by Gaucher, notwithstanding that the Receiver's allegations with respect to the Ponzi scheme, and the use by Helms and Kaelin of Barefoot Minerals to perpetrate that Ponzi scheme, are sufficiently pleaded. The Receiver has adequately alleged a cause of action for unjust enrichment against Gaucher, and the Motion to Dismiss with respect to Count II should be denied.

## V.
## CONCLUSION

For the reasons set forth above, the Receiver requests that the Court enter an order (i) denying the Motion to Dismiss and (ii) granting any further relief the Court deems appropriate.

Dated: February 3, 2015

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.

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COUNSEL FOR RECEIVER

## CERTIFICATE OF SERVICE

On February 3, 2015 I electronically submitted the foregoing document with the Clerk of the Court for the U.S. District Court, Western District of Texas, using the CM/ECF electronic filing system. All counsel of record have been served electronically via CM/ECF notice.

/s/ Andrew M. Goforth
Andrew M. Goforth