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.

REPLY IN SUPPORT OF MOTION TO DISMISS

Philip E. Gaucher ("Gaucher") hereby files this Reply in Support of his Motion to Dismiss Thomas L. Taylor III's ("Receiver") First Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

ARGUMENT

I. VENDETTA INTERMEDIARY FEES[1]

Gaucher previously argued that the Court does not have subject matter jurisdiction over the Receiver's claims with regard to the Vendetta Intermediary Fees because Gaucher already returned the full $86,565 comprising the Vendetta Intermediary Fees to Vendetta Partners, thus making the Receiver's claims in this regard moot and subject to dismissal pursuant to Rule 12(b)(1). (Doc. No. 16 at 4-5). In response, the Receiver contends that Gaucher did not *return*

[1] Gaucher previously defined "Vendetta Intermediary Fees" as the $86,565 that Gaucher is alleged to have received as a finder's fee or intermediary fee, through his arrangement with Bill Brock to split a 6% commission that Brock received from Vendetta Royalty Partners, Ltd. ("Vendetta Partners"). (Doc. No. 16 at 2).

the Vendetta Intermediary Fees to Vendetta Partners; instead, he *exchanged* them for an equity interest. In support of this argument, he emphasizes that "[t]he 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). This law supports Gaucher's position because Vendetta Partners' (*i.e.* the transferor's) net worth was preserved: Vendetta Partners previously possessed $86,565, it allegedly transferred $86,565 to Gaucher, and Gaucher subsequently transferred $86,565 back to Vendetta Partners. Thus, Vendetta Partners' net worth remained the same.

The Receiver contends that Vendetta Partners' net worth did not remain the same because Gaucher, through Clovis Capital Ventures LLC, received an equity interest in Vendetta Partners in exchange for returning the $86,565.[2] According to the Receiver's own allegations, however, that equity interest was meaningless because Vendetta Partners was orchestrating a Ponzi scheme (*see, e.g.*, Doc. No. 14 ¶ 5), nullifying any opportunity to obtain profits. Thus, in effect, Gaucher merely returned the Vendetta Intermediary Fees and nothing more.

Finally, the Receiver appears to argue equity by contending that Gaucher's argument in this regard would inequitably place him ahead of other claimants. Aside from the fact that Gaucher already returned the Vendetta Intermediary Fees to Vendetta Partners and thus will not be placed ahead of other claimants, the equities favor Gaucher. If Gaucher were now required to pay unto Vendetta Partners an additional $86,565 (doubling his loss, for the amount of $173,130), Vendetta Partners, and by extension the Receiver, would be receiving payment twice.

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[2] The Receiver's supporting arguments concerning the manner in which Vendetta Partners documented this investment on its balance sheet (Doc. No. 17 at 11) should be given no weight because the arguments are unsupported by the First Amended Complaint or by any other evidence.

Thus, equitable considerations favor Gaucher, and the Court should dismiss all claims relating to the Vendetta Intermediary Fees under Rule 12(b)(1).

II. BAREFOOT CONSULTING FEES[3]

With regard to the Barefoot Consulting Fees, Gaucher previously argued that the Receiver relies exclusively on Section 24.005(a)(1) of the Texas Uniform Fraudulent Transfer Act ("TUFTA") to assert Count I, and that the Receiver fails to sufficiently allege the requisite "actual intent" under the statute because the Receiver does not allege that Barefoot Minerals was operating a Ponzi scheme. The Receiver responds in several ways.

First, the Receiver attempts to circumvent his pleading obligation with regard to Barefoot Minerals by arguing that all of the "Vendetta Defendants," as defined in footnote 1 of the Receiver's Response Brief, were operating a single fraudulent enterprise, and further, that the single fraudulent enterprise was a Ponzi scheme. (Doc. No. 17, at 6-8). To support this contention, the Receiver first argues that the First Amended Order Appointing the Receiver in the related case *SEC v. Helms*, 1:13-cv-1036, had the effect of "collapsing the Receivership estates of the numerous Vendetta Defendants into a single Receivership Estate." (Doc. No. 17 at 2 (citing ¶ 4 of First Amended Complaint)). However, that Order (appearing at Doc. No. 76 in *SEC v. Helms*), served the purpose of defining multiple entities as the "Receivership Entities," defining the assets of the Receivership Entities as the "Receivership Estate," and appointing the Receiver to marshal and preserve the Receivership Estate. Doc. No. 76 in *SEC v. Helms* does not collapse all of the Vendetta Defendants into a single entity, and it does not obviate the Receiver's obligation in the instant case to allege specific fraudulent transfers and establish the existence of a Ponzi scheme with regard to the transferor entity at issue, Barefoot Minerals.

[3] Gaucher previously defined "Barefoot Consulting Fees" as the $76,000 that Gaucher is alleged to have received from Barefoot Minerals, G.P. ("Barefoot Minerals"). (Doc. No. 16 at 2).

The Receiver also directs the Court to several paragraphs in his First Amended Complaint highlighting the alleged commingling of funds between and amongst the entities composing the Vendetta Defendants. (*Id.* (citing ¶¶ 4, 5, 38, 40-41, 44-47, 52-53, 58)). However, Gaucher has already acknowledged these allegations of commingling and has explained why such allegations are insufficient. Specifically, Gaucher previously argued that the relevant inquiry is whether the "*transferor*[] operated a Ponzi scheme," *Janvey v. Brown*, 767 F.3d 430, 439 (5th Cir. 2014) (emphasis added), and that 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). Thus, the focus is on Barefoot Minerals and whether the Receiver has alleged that Barefoot Minerals was operating a Ponzi scheme.[4]

As explained previously (Doc. No. 16 at 7), 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. The Receiver does not respond to this contention by directing the Court to Paragraphs of the First Amended Complaint making these specific allegations. Instead, the Receiver argues that "Gaucher offers no authority to support the proposition that each entity used by fraudfeasors in perpetrating a Ponzi scheme must offer securities to investors." (Doc. No. 17, at 8). This circular reasoning is unpersuasive. The Receiver has the pleading burden to allege that the purported transferor of funds—here, Barefoot Minerals—was operating a Ponzi scheme. The Receiver fails to do so.

[4] The Receiver unsuccessfully attempts to distinguish *Brown* and to rely on *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 189 (5th Cir. 2013), in an effort to persuade the Court that it need not determine whether the actual transferor of the Barefoot Consulting Fees—Barefoot Minerals—was operating a Ponzi scheme. (Doc. No. 17, at 8-9). In neither case did the Fifth Circuit address a party's pleading burden in this respect.

Therefore, with regard to the Barefoot Consulting Fees, the Receiver fails to state a claim for which relief can be granted pursuant to Rule 12(b)(6).

Finally, even if the Receiver had sufficiently alleged that Barefoot Minerals was operating a Ponzi scheme, which he did not, Gaucher previously argued that the Receiver nonetheless fails to allege that the *source* of the Barefoot Consulting Fees was a Ponzi scheme. (Doc. No. 16, at 9). In response, the Receiver again defers to allegations of conflation and comingling of funds. (Doc. No. 17, at 9 (citing ¶¶ 38-43, 54-58)). These paragraphs of the First Amended Complaint allege the existence of a Ponzi scheme. However, in none of those paragraphs does the Receiver make the allegation that the Barefoot Consulting Fees—the $76,000 at issue—were sourced in, or were traceable to, a Ponzi scheme. Perhaps acknowledging this omission, the Receiver instead argues that such missing allegations can be derived from "the totality of the Receiver's allegations" when "viewed in their entirety." (Doc. No. 17). As Gaucher acknowledged before, the Receiver does not have the burden at this stage in the litigation to prove that the Barefoot Consulting Fees were in fact sourced in a Ponzi scheme. (*See* Doc. No. 16 at 9). However, the Receiver must at least make the allegation. Having failed to make this allegation, the Receiver's First Amended Complaint with regard to the Barefoot Consulting Fees must be dismissed pursuant to Rule 12(b)(6).[5]

[5] Because Count II of the Receiver's First Amended Complaint, alleging unjust enrichment, is premised on the existence of a Ponzi scheme, and because the Receiver fails to allege a Ponzi scheme respecting Barefoot Minerals in Count I, Count II must necessarily fail under Rule 12(b)(6). (*See* Doc. No. 16, at 10-11). Although the Receiver correctly contends that establishment of a Ponzi scheme is not a necessary element for an unjust enrichment claim (*see* Doc. No. 17 at 13-14), the Receiver pled his unjust enrichment claim in a manner requiring the existence of a Ponzi scheme. (*See* Doc. No. 14 ¶ 74 ("Gaucher received funds that in equity and good conscience belong to the Receivership Estate for ultimate distribution to defrauded investors and creditors and that Gaucher received through the taking of undue advantage vis-à-vis the investors in the Vendetta Ponzi scheme.")).

CONCLUSION

For the foregoing reasons, and for those set forth in his motion and incorporated memorandum of law (Doc. No. 16), Gaucher respectfully requests that the Court dismiss the Receiver's First Amended Complaint in its entirety.

Submitted this 17th day of February, 2015.

/s/ William R. Terpening
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system to the following person:

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Submitted this 17th day of February, 2015.

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