IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
Civil Action No: 1:13-cv-1036

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ROBERT A. HELMS, ET AL.,

Defendants,

and

WILLIAM L. BARLOW, and GLOBAL CAPITAL VENTURES, LLC,

Relief Defendants, solely for the purposes of equitable relief.

INTERVENOR CLOVIS CAPITAL VENTURES, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 16(e) of the Local Rules of the Western District of Texas, Intervenor, Clovis Capital Ventures, LLC ("Clovis") submits the Proposed Findings of Fact and Conclusions of Law. Clovis reserves the right to supplement these proposed findings.

FINDINGS OF FACT

1. Clovis Capital Ventures, LLC ("Clovis") is a limited liability company organized on November 30, 2012. Clovis is a limited partner in Vendetta Royalty Partners, Ltd. ("Vendetta Partners"). Vendetta was organized and marketed as a standard limited

partnership that would hold and distribute royalty interests from approximately 2,000 oil and gas wells located principally in Texas.

2. In the summer of 2012, Bill Brock ("Brock") approached Philip Gaucher ("Gaucher") about an investment in Vendetta Partners. Gaucher, along with Douglas Smith ("Smith") and Avery Chapman ("Chapman") formed Clovis for the exclusive purpose of investing in Vendetta Partners. Messrs. Gaucher, Smith and Chapman are the sole members, respectively, of the limited liability companies which are themselves the members of Clovis.

3. None of Messrs. Gaucher, Smith or Chapman had prior business experience with mineral royalty rights or interests and limited partnerships such as Vendetta Partners nor did they personally know Robert Helms ("Helms") and Janniece Kaelin ("Kaelin"), the Vendetta Partners principals.

4. Clovis was a late investor to Vendetta Partners. Vendetta Partners began soliciting investors in at least July 2011 raised upwards of $40 million from Clovis and other investors. Like the other investors in Vendetta Partners, unfortunately, Clovis was misled by Helms and Kaelin about, inter alia, the use of investment proceeds from the limited partners. Specifically, Helms and Kaelin represented to Clovis that its investment would be used to purchase additional interests in oil and gas producing properties for Vendetta Partners, which would increase its attractiveness to and facilitate the sale of the partnership or its properties (the "Vendetta Portfolio") to an institutional investor.

5. Clovis ultimately invested $2.885 million in Vendetta Partners in exchange for its limited partnership interest and to allow Vendetta Partners, Clovis understood, to purchase additional properties for the Vendetta Portfolio.

6. Instead of purchasing new properties, Vendetta Partners used Clovis' money, among other things, to pay partner distributions to existing limited partners and to pay Vendetta Partnership expenses. In particular, Clovis' investment was used to pay at least $122,000 in overdue quarterly distributions to other existing limited partners. The Receiver has not sought to recover these funds for Clovis.

7. In order to induce Clovis to make its investment of $2.885 million, Helms and Kaelin agreed that Clovis' investment could be secured by certain properties in the Vendetta Portfolio. Instead of immediately conveying title to these interests to Clovis, Helms and Chapman, as lawyer for Clovis, negotiated and executed a contract whereby certain overriding royalty interests associated with producing properties in Crockett and Schleicher counties (the "Ozona Interests") would be transferred to Clovis if the contemplated sale of the Vendetta Portfolio failed to close on February 28, 2013.

8. On November 30, 2012, Clovis and Vendetta Partners executed a Side Letter Security Agreement ("Side Letter") embodying the parties' agreement. Under the terms of the Side Letter, title to the Ozona Interests vested in Clovis upon the occurrence of certain trigger events, and Clovis, at its election, could liquidate the interests and retain an amount of the proceeds not to exceed the amount of its original investment. Clovis would not have invested in Vendetta Partners but for its ability to obtain this collateral. In accordance with the terms of the Side Letter, Vendetta Partners executed a Collateral

Assignment of Overriding Mineral Interests Assignments pursuant to which Vendetta Partners agreed to collateralize and place into third party escrow two Assignment, Conveyance and Mineral Deeds in favor of Clovis to secure its capital contributions into Vendetta Partners. These deeds were executed by Vendetta Partners as Grantor in favor of Clovis, also on November 30, 2012.

9. Notices of Interest related to the property interests conveyed by Vendetta Partners, and executed by both Clovis and Vendetta Partners were recorded in the real property records of Crockett and Schleicher counties.

10. At the time of Clovis' investment, Helms and Kaelin represented to Clovis and other potential limited partners and investors that the Vendetta portfolio would be sold by the end of February 2013 to such an institutional buyer.

11. Neither Vendetta Partners nor assets of the Vendetta Portfolio were ever sold to such a buyer and on December 3, 2013, the Securities and Exchange Commission ("SEC") filed a complaint against Helms, Kaelin, Vendetta Partners and others alleging securities fraud by the Defendants and seeking appointment of a receiver. That same day, this Court entered a Temporary Restraining Order restraining and enjoining the Defendants from further violations of the Anti-Fraud and Broker-Dealer registration provisions from the federal securities laws and entered an order appointing Thomas L. Taylor III ("Receiver") as Receiver for the Defendants.

CONCLUSIONS OF LAW

1. The Receiver bears the burden of proof in seeking a declaration from the Court that Clovis' security interest is invalid and that the assets collateralizing Clovis' investment with Vendetta Partners are unencumbered. *See Ray v. Clements*, 700 F.3d 993, 1007 (7th Cir. 2012) (equity); *In re Davison*, 738 F.2d 931, 936 (8th Cir. 1984) (value).
2. Receiver's Motion is an inappropriate motion for declaratory judgment, and will be treated as a motion for summary judgment. Thus the Receiver bears the burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. The Receiver has not met this burden.
3. Vendetta Royalty Management, LLC ("Vendetta Management") executed the Side Letter as general partner of Vendetta Partners.
4. The Side Letter granted a valid security interest because the general partner of Vendetta Partners had authority to offer the security interest and execute the Side Letter.
5. The Limited Partnership Agreement gives the general partner of Vendetta Partners explicit authority to encumber and convey partnership assets.
6. Vendetta Management had the authority to grant Clovis the security interest and Clovis was entitled to rely on that authority without conducting an independent inquiry. Vendetta Management had no obligation to seek the consent of the limited partners, but the limited partners nevertheless consented to the granting of a security interest to Clovis. Thus, Vendetta Management's decision to grant Clovis a security

interest was consistent with, and not contrary to, the Limited Partnership Agreement on which the Receiver relies.

7. Vendetta Management (as agent) had apparent authority to so act on behalf of Vendetta Partners (the principal). "Apparent authority is based on the doctrine of estoppel, and one seeking to charge the principal through apparent authority of an agent must establish conduct by the principal that would lead a reasonably prudent person to believe that the agent has the authority that he purports to exercise." *Biggs v. United States Fire Ins. Co.*, 611 S.W.2d 624, 629 (Tex. 1981); *see Walker Ins. Serv. v. Bottle Rock Power Corp.*, 108 S.W.3d 538, 550 (Tex. Ct. App. 2003) (explaining that a party can "establish apparent authority" by "show[ing] that a principal . . . knowingly permitted an agent to hold himself out as having authority").
8. Vendetta Partners permitted Vendetta Management, the agent, to hold itself out as having authority to act on behalf of the principal.
9. Clovis gave value for its security interest in the form of its investment of $2.885 million because under the Texas Uniform Commercial Code, "a person gives value for rights if the person acquires them . . . in return for any consideration sufficient to support a simple contract." Tex. Bus. & Com. Code Ann. § 1.204(4) (emphasis added). Moreover, the Side Letter specifically spells out the connection between Clovis' capital investment and the security interest at issue, explaining that the security interest was "part of the inducement to [Clovis] to invest capital with [Vendetta Partners]."
10. No additional consideration was necessary to support Vendetta Partner's promise to convey the interest in the Ozona Interests to Clovis. "A single performance or return

promise may furnish consideration for multiple promises," *Alex Sheshunoff Mgmt. Serv., L.P. v. Johnson*, 209 S.W.3d 644, 660 n.4 (Tex. 2006) (citing Retatement (Second) of Contracts § 80).

11. Clovis' investment, coming at "[t]he very end" of the Vendetta Partners enterprise (Rec'r. Depo. 49:11), was more meaningful, in comparison to earlier investments in Vendetta Partners. Vendetta Partners represented in the Side Letter that Clovis' money, unlike earlier invested money, would be used to purchase additional properties and would enhance the overall value of the portfolio just prior to its sale. Accordingly, on a dollar-to-dollar comparison, Clovis' money was more meaningful to Vendetta Partners than earlier arriving money. Although no additional consideration was necessary for the security interest, this constituted additional consideration.

12. The transfer to Clovis is not voidable by the Receiver under TUFTA. Pursuant to § 24.009(a) of the Texas Business and Commerce Code, "[a] transfer or obligation is not voidable under Section 24.005(a)(1) . . . against a person who took in good faith and for a reasonably equivalent value." Because Clovis acquired the security interest in good faith and for reasonably equivalent value, the Receiver cannot rely on TUFTA in an attempt to invalidate Clovis' security interest.

13. Clovis gave value to Vendetta Partners in the form of a $2.885 million investment for which the security interest was transferred "[a]s part of the inducement to [Clovis] to invest capital in [Vendetta Partners]").

14. "As a matter of law, the value of the interest in an asset transferred for security is reasonably equivalent to the amount of the debt that it secures." *First Nat'l Bank of*

Seminole v. Hooper, 104 S.W.3d 83, 84 (Tex. 2003); *see also Van Slyke v. Teel Holdings*, LLC, 2010 WL 2788876, at *7 (Tex. Ct. App. July 15, 2010) ("When Patricia loaned Nationwide $560,000 in cash in exchange for security interests in specific accounts receivables, she, as a matter of law, gave reasonably equivalent value for the security interest."). A security interest always qualifies as reasonably equivalent value because a secured creditor is not allowed to collect more than the amount of debt for which the security interest provides collateral. *See generally In re Gold & Appel Transfer S.A.*, 2013 WL 4824428, at *25 (Bankr. D. Colo. Sept. 6, 2013) ("[T]he extent of a security interest securing repayment of a debt is capped by the underlying debt. That a lender obtains a security interest in property worth far more than the debt owed it does not establish a lack of reasonably equivalent value.").

15. Clovis invested $2.885 million and gave Vendetta Partners money that it represented it would use "solely for the acquisition of key, new mineral royalties to add to the Portfolio prior to Sale in order to maximize the value of the Portfolio at sale." In exchange, Clovis received a limited partnership interest and a security interest allegedly valued at $9.3 million. By providing a $2.885 million investment, and by giving Vendetta Partners the opportunity to purchase additional properties just prior to the sale (which all early investors could not and did not provide to Vendetta Partners), Clovis meets any reasonably-equivalent-value test because it received, in exchange, only a limited partnership interest and a security interest in assets worth only $1.2 million (even if the asset had been worth $9.3 million as represented, Clovis could have recovered only $2.885 million of it).

16. Clovis also acquired the security interest in good faith. Although good faith under TUFTA is determined based on what a person or entity "knew or should have known," *see Warfield*, 436 F.3d at 559-60, a party can generally establish good faith under TUFTA in a Ponzi scheme context by showing that it "had no[] reason to question the legitimacy or security of [its] investments." *In re IFS Fin. Corp.*, 417 B.R. 419, 445 (Bankr. S.D. Tex. 2009). Clovis had no reason to believe Vendetta Partners was anything but a legitimate enterprise.
17. Clovis was a good faith investor. Neither Clovis nor Messrs Gaucher, Smith and Chapman were officers of Vendetta Partners, or sat on any Vendetta Partners boards, executed sham documents, had knowledge of improper conversions of financial investments, or managed Vendetta Partners accounts. Clovis was a passive investor that cannot be described as an "insider" under any definition of that word, and it invested only after conducting extensive due diligence.
18. The Notices of Interest (rather than the assignment documents themselves) were filed for the purpose of facilitating the ultimate sale of the portfolio, not for any purpose related to avoiding security interests on personal property held by any creditor of Vendetta Partners.
19. Because Clovis makes the required showing for this affirmative defense, the Receiver may not rely on TUFTA to void Clovis' security interest.
20. The doctrine of equitable subordination is inapplicable and any general equitable considerations weight in favor of Clovis. The Receiver did not show that Clovis "was aware of [its] participation in [Vendetta Partners'] breach of its [fiduciary] duty," as is required to assert such a claim under Texas law. *Darocy v. Abildtrup*, 345 S.W.3d

129, 138 (Tex. Ct. App. 2011). Clovis was in no way in a position of control over Vendetta Partners. *See Custom Fuel Servs., Inc.*, 805 F.2d at 566 ("The prerequisite to a finding of inequitable conduct is a showing that the claimant is in a position of control over the debtor.").

Respectfully submitted, this the 6th day of February, 2015.

/s/ William R. Terpening
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CERTIFICATE OF SERVICE

I certify that I served the foregoing INTERVENOR CLOVIS CAPITAL VENTURES, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW via the Court's CM/ECF System, which will serve all registered counsel and parties of record as follows:

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I further certify that I served the foregoing INTERVENOR CLOVIS CAPITAL VENTURES, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the unrepresented parties via US Mail as follows:

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This the 6th day of February, 2015.

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