

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.

**SUPPLEMENTAL REPLY IN  
SUPPORT OF  
MOTION TO DISMISS**

Philip E. Gaucher (“Gaucher”) hereby files this Supplemental 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).

**INTRODUCTION**

The Receiver recently filed a Supplemental Response to Defendant’s Motion to Dismiss (“Supplemental Response”) (Doc. No. 20) to alert the Court of a recent decision by the Fifth Circuit in *Janvey v. Golf Channel, Inc.*, 2015 WL 1058022 (5th Cir. March 11, 2015). In his Supplemental Response, the Receiver indicates that he “does not oppose the filing of a supplemental reply by Gaucher with respect to the effect of the *Golf Channel* opinion on his Motion to Dismiss.” (Doc. No. 20 at 4). Consistent with that consent, and within the time provided for by LR 7(f)(2), Gaucher hereby files this Supplemental Reply in Support of his Motion to Dismiss the Receiver’s First Amended Complaint.

As a further preliminary note, the Receiver's new argumentation with regard to *Janvey* relates *only* to the alleged transfers from Vendetta Royalty Partners, Ltd. ("Vendetta Partners") in the amount of \$86,565, which have been referred to as the Vendetta Intermediary Fees. (See Doc. No. 16 at 2). The Receiver's new *Janvey* arguments *do not relate* to the alleged transfers from Barefoot Minerals, G.P. in the amount of \$76,000, which have been referred to as the Barefoot Consulting Fees. (See Doc. No. 16 at 2-3). With regard to the Barefoot Consulting Fees, Gaucher rests on the arguments set forth in his motion and incorporated memorandum of law (Doc. No. 16) and his reply in support thereof (Doc. No. 19). With regard to the Vendetta Intermediary Fees, Gaucher supplements his prior arguments as follows.

#### ARGUMENT

Gaucher has argued that the Receiver's claims with regard to the Vendetta Intermediary Fees are moot—meaning that the Court therefore has no subject matter jurisdiction over them—because Gaucher already returned the full \$86,565 comprising the Vendetta Intermediary Fees to Vendetta Partners. (See Doc. No. 16 at 4-5, and Doc. No. 19 at 1-3). Gaucher did not return the Vendetta Intermediary Fees to Vendetta Partners in the form of an asset worth that amount, nor did he return that money by providing services to the Vendetta Partners investment scheme representing a substantially equivalent value. Rather, he returned that money in cash. The Receiver now attempts to compare this situation to the Fifth Circuit's recent decision in *Janvey*. However, *Janvey* provides little to no guidance on Gaucher's arguments regarding the Vendetta Intermediary Fees because there are significant factual distinctions between *Janvey* and the instant case.

In *Janvey*, Stanford International Bank, Ltd. ("Stanford") paid the Golf Channel, Inc. ("Golf Channel") \$5.9 million in exchange for a marketing package which mostly involved the

Golf Channel advertising Stanford in association with the Golf Channel's coverage of professional golf tournaments. *See* 2015 WL 1058022, at \*1. After the SEC sued Stanford for operating a Ponzi scheme, and after the court in that case appointed a receiver, the receiver sued the Golf Channel to recover the full \$5.9 million paid to the Golf Channel by Stanford under the Texas Uniform Fraudulent Transfer Act ("TUFTA"). *See id.* at \*2. The Fifth Circuit ruled in favor of the receiver in that case, concluding that the Golf Channel's marketing efforts on behalf of Stanford did not qualify as "value" under TUFTA, in large part because "[c]onsideration having no utility from a creditor's viewpoint does not satisfy the statutory definition." *Id.* at \*3. More specifically, the Fifth Circuit explained that "[w]hile Golf Channel's services may have been quite valuable to the creditors of a legitimate business, they have no value to the creditors of a Ponzi scheme." *Id.* at \* 4; *see id.* ("Services rendered to encourage investment in such a scheme do not provide value to the creditors.").

Here, Gaucher is not arguing that he provided value to Vendetta Partners by providing any particular services or marketing efforts on behalf of Vendetta Partners. Rather, he is arguing that an infusion of United States currency—*i.e.*, a transfer of cash in the amount of \$86,565—provided value to Vendetta Partners. Because cash is qualitatively different than marketing services, the Fifth Circuit's ruling in *Janvey* should not guide the Court in evaluating Gaucher's arguments.

The Receiver emphasizes a particular phrase in the Fifth Circuit's *Janvey* opinion that reads in full as follows: "Each new investment in the Stanford Ponzi scheme *decreased* the value of the estate by creating a new liability that the insolvent business could never legitimately repay." *Id.* at \*4 (emphasis in original). Again, however, the "investment" with which *Janvey* was concerned involved the provision of marketing services on behalf of Stanford. Here, the

comparable “investment” is not the provision of services but, rather, a transfer of cash. To follow the Receiver’s argument to its illogical conclusion, the Receiver is arguing that a cash infusion into Vendetta Partners decreased the value of Vendetta Partners. It is quite a strained interpretation of the term “value” to argue that cash does not qualify as “value” for purposes of TUFTA. Nevertheless, it seems that the Court would be required to reach that conclusion if it were to ascribe any significance to the Receiver’s arguments as they relate to *Janvey*.

**CONCLUSION**

For the foregoing reasons, and for those set forth in his motion and incorporated memorandum of law (Doc. No. 16) and his reply in support thereof (Doc. No. 19), Gaucher respectfully requests that the Court dismiss the Receiver’s First Amended Complaint in its entirety.

Submitted this 7th day of April, 2015.

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

Charles G. Miller  
Texas Bar No. 14061810

NEXSEN PRUET, PLLC  
227 West Trade Street, Suite 1550  
Charlotte, NC 28203  
Telephone: (704) 338-5358  
Facsimile: (704) 805-4735  
wterpening@nexsenpruet.com

*Attorneys for Philip E. Gaucher*

**CERTIFICATE OF SERVICE**

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

Andrew M. Goforth  
The Taylor Law Offices, P.C.  
4550 Post Oak Place Drive, Suite 241  
Houston, Texas 77027  
Tel: 713.626.5300  
Fax: 713.402.6154  
Email: [goforth@tltaylorlaw.com](mailto:goforth@tltaylorlaw.com)

*Counsel for Plaintiff*

Submitted this 7th day of April, 2015.

/s/ William R. Terpening  
William R. Terpening