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.

PARTIAL MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW (Pursuant to Rule 12(b)(1))

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

INTRODUCTION

The First Amended Complaint 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. (*See* Cmplt. ¶ 58). With regard to the transfers from Vendetta Partners (hereinafter "Vendetta Intermediary Fees"), the Receiver alleges that these payments derive from an agreement between William J. Brock ("Brock") and Gaucher to split a commission payment that belonged to Brock. (*See* Cmplt. ¶ 55). On January 20, 2015, Gaucher filed a Motion to Dismiss the First Amended Complaint in its Entirety. (*See* Doc. No. 16). The Court has not yet ruled on that motion.

In a separate but related matter styled *Taylor v. Helms, et al.*, 1:13-cv-1036, the Receiver filed a Motion for Order Approving Proposed Settlement, in which the Receiver sought approval of a settlement agreement between the Receiver and Brock (hereinafter "Settlement Agreement").[1] On February 12, 2015, the Court approved the Settlement Agreement, making it final and enforceable.[2] The Settlement Agreement releases Brock and all of his "agents," "affiliates," and "representatives" from all claims that the Receiver might have. (*See* Exh. A, Exh. 1 at 6). Because Gaucher operated as Brock's agent, affiliate, and representative with regard to the Vendetta Intermediary Fees through his arrangement with Brock, the Receiver's claims relating to the $86,565 in Vendetta Intermediary Fees are moot and the Court, therefore, has no subject matter jurisdiction over them and must dismiss them pursuant to Rule 12(b)(1).

ARGUMENT

I. THE INSTANT MOTION IS TIMELY AND PERMISSIBLE.

Federal Rule of Civil Procedure 12(h)(3) provides that "[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court *must* dismiss the action." (emphasis added). Because the Court may consider subject matter jurisdiction at any time, a Rule 12 motion based on subject matter jurisdiction is an exception to the general rule requiring consolidation of motions under Rule 12. *See* Fed. R. Civ. P. 12(g)(2) ("*Except as provided in Rule 12(h)(2) or (3)*, a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." (emphasis added)); *Derisme v. Hunt Leibert Jacobson, PC*, 2010 WL 3417857, at *4 (D. Conn. Aug. 26, 2010) ("Rule 12(g)(2) explicitly incorporates as an exception Rule 12(h)(3), which permits the Court to consider the defense of lack of subject matter jurisdiction at

[1] The Motion for Order Approving Proposed Settlement is attached hereto as Exhibit A.
[2] The Court's Order Approving the Settlement Agreement is attached hereto as Exhibit B.

any time."); *Montin v. Estate of Johnson*, 2009 WL 250048, at *2 (D. Neb. Feb. 2, 2009) ("Defendants are correct in their assertion that the Rule 12(g)(2) limitation on successive motions do not prohibit motions relative to subject matter jurisdiction.").

Accordingly, the fact that Gaucher has filed an earlier motion to dismiss does not in any way prohibit him from filing an additional motion to dismiss based on subject matter jurisdiction, especially where, as here, Gaucher asserts claims based on information not available at the time of filing the first motion to dismiss the First Amended Complaint. *See, e.g.*, *Davenport v. Garcia*, 2014 WL 6879920, at *2 & n.6 (C.D. Cal. Nov. 30, 2014) ("The instant Rule 12(b)(1) Motion constitutes Defendants' second motion to dismiss. Although Federal Rule of Civil Procedure 12(g)(2) ordinarily prohibits parties from filing successive motions to dismiss, the mootness defense . . . was not available to Defendants when they filed their first motion." (internal citation omitted)); *In re Khan*, 2011 WL 4543962, at *1 n.2 (Bankr. E.D. Tenn. Sept. 29, 2011) ("The Defendant is permitted to filed a second Motion to Dismiss . . . because it has raised standing and subject matter jurisdiction which may be raised at any time."); *Derisme*, 2010 WL 3417857, at *4 ("The Second Motion to Dismiss is thus also proper to the extent that it asserts the defense of lack of subject matter jurisdiction.").

II. RELEASE VIA A SETTLEMENT AGREEMENT IMPLICATES SUBJECT MATTER JURISDICTION AND RULE 12(b)(1), WHICH PERMITS CONSIDERATION OF DOCUMENTS OUTSIDE THE PLEADINGS.

"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). 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).").

When a party challenges 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 Oaxoaca 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."). Accordingly, because Gaucher is challenging subject matter jurisdiction under Rule 12(b)(1), the Court may consider the Settlement Agreement and related documents in determining the Court's jurisdiction over particular matters. *See C & K NuCo, LLC v. Expedited Freightways, LLC*, 2014 WL 4913446, at *4 n.3 (N.D. Ill. Sept. 30, 2014) (explaining that "the court may look beyond the pleadings to determine whether there is subject matter jurisdiction, and specifically whether the settlement agreement makes Plaintiff's claim . . . altogether moot").

III. THE SETTLEMENT AGREEMENT RELEASES ALL VENDETTA INTERMEDIARY FEE CLAIMS.

In the recitals of the Settlement Agreement, "Brock" is defined to include Brock's "agents, affiliates, [and] representatives." (Exh. A, Exh. 1 at 1). The word "Claim" is likewise defined broadly to include "all . . . causes of action," and it specifically includes claims for

"fraudulent transfer or conveyance" and for "unjust enrichment." (Exh. A, Exh. 1 at 1-2). Thereafter, the Settlement Agreement provides in relevant part as follows:

> 5. **Release of the Brock Parties by the Receiver**. In consideration of the foregoing, and except for the obligations imposed by this Settlement Agreement, which obligations survive in accordance with their terms, the Receiver and the Receivership Entities . . . RELEASE, REMISE, CANCEL, ACQUIT and DISCHARGE the Brock Parties, and their respective past, present, and future . . . agents, affiliates, [and] representatives . . . and all persons . . . in privity with them, from any and all Claims which the Receiver and the Receivership Entities have ever had, or now have, or may have in the future against the Brock Parties based upon events, actions, and/or omissions which occurred prior to and through the Execution Date arising out of, concerning, or relating, directly or indirectly, to the Enforcement Action, the Vendetta Offering, the Iron Rock Offering, the operations, management, and proceed-raising activities of Vendetta Partners, Iron Rock Royalty Partners, or any other Receivership Entity or Enforcement Action defendant, the Receiver, the Receivership Entities, and/or the Receivership Estate, and any other transactions or dealings that the Brock Parties have had with the Receiver of the Receivership Entities.

(Exh. A, Exh. 1 at 6).

Regarding the Vendetta Intermediary Fees, Gaucher was at all times an agent, an affiliate, and a representative of Brock. Indeed, the Receiver expressly acknowledges in the First Amended Complaint that "Gaucher learned of the Vesta . . . Offering[] from Brock" (Cmplt. ¶ 57); "Brock . . . recruited Gaucher to market the Vesta Offering" (Cmplt. ¶ 35); and, importantly, "Brock agreed to split his . . . 6% commission with Gaucher with respect to any investors that subscribed to the Vendetta Offering as a result of Gaucher's promotion of the Vendetta Offering" (Cmplt. ¶ 55). Thus, Gaucher received a mere intermediary fee from monies that were due and owing to Brock. (*See* Cmplt. ¶ 61 (alleging that "the 3% commission [Gaucher] received" was received "through his agreement with Brock")). Gaucher only received 3% of the commission transfers because Brock agreed to split the commissions with him.

These 3% commission transfers are the entire source of the funds that Gaucher is alleged to have received from Vendetta Partners. (*See* Cmplt. ¶ 58). However, as is evident from the

First Amended Complaint, the Vendetta Intermediary Fees were received by Gaucher, if at all, only in a representative capacity on behalf of, and through, Brock, the person to whom the funds truly belonged. *See* Black's Law Dictionary 1079 (8th ed. 2004) (defining "representative" as "[o]ne who stands for or acts on behalf of another"). The Settlement Agreement not only released Brock from further liability but also released Gaucher—Brock's agent, affiliate, and representative—from liability stemming from receipt of the Vendetta Intermediary Fees. This release specifically precludes the Receiver from instituting causes of action for both "fraudulent transfer" and "unjust enrichment" (*see* Exh. A, Exh. 1 at 2), as the Receiver now purports to assert in the underlying First Amended Complaint.

When claims that a plaintiff purports to assert have been released pursuant to a settlement agreement, the claims are moot, which deprives a Court of subject matter jurisdiction and warrants a dismissal under Rule 12(b)(1). *See Pigford v. Vilsack*, 2014 WL 7174597, at *2 (D.D.C. Dec. 17, 2014) ("Claims that have been resolved by earlier settlement agreements, and therefore present no ongoing controversy, are moot. Accordingly, . . . the Court will analyze the defendant's motion to dismiss . . . as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1)." (internal citation omitted)); *Lindell v. Landis Corp. 401(k) Plan*, 640 F. Supp. 2d 11, 14 (D.D.C. 2009) (reaching same conclusion where "Defendants . . . move[d] to dismiss on the grounds that the claim [was] barred by a settlement agreement entered into . . . in a related case"); *see also Dotson v. Potter*, 180 F. App'x 620, 621 (6th Cir. 2006) (per curiam) (Defendant "filed a motion to dismiss for lack of subject matter jurisdiction, arguing the [plaintiff's] suit was precluded by a settlement agreement. The district court granted the motion to dismiss and this appeal followed. Following our careful review, we affirm." (internal citation omitted)); *see generally United Airlines, Inc. v. McDonald*, 432 U.S. 385, 400 (1977) ("The

settlement of an individual claim typically moots any issues associated with it."); *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 161 (D.C. Cir. 1997) ("The general rule . . . is that complete settlement moots an action."); 13B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3533 (3d ed. 2014) ("Some of the easiest mootness principles apply to cases in which the plaintiff . . . obtains relief by settlement."). Although the Fifth Circuit does not appear to have had the opportunity to squarely address this issue, it has nonetheless concluded that a settlement that releases a party's claims deprives a court of subject matter jurisdiction to adjudicate those claims. *See In re Talbott Big Foot, Inc.*, 924 F.2d 85, 87-88 (5th Cir. 1991).[3]

Based on the foregoing, Rule 12(b)(1) is the proper procedure through which the Court should dismiss claims previously released pursuant to binding and enforceable settlement agreements, because such claims are moot and the Court does not have subject matter jurisdiction over them. Here, because Gaucher was an agent, affiliate, and representative of Brock with regard to the Vendetta Intermediary Fees, the Settlement Agreement involving Brock operates to deprive the Court of subject matter jurisdiction over such claims.[4]

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[3] This Court's prior rulings addressing factually similar motions to dismiss under Rule 12(b)(6)—instead of Rule 12(b)(1)—should not guide this Court in determining the appropriate rule to apply because the moving party in those cases styled their motions as Rule 12(b)(6) motions and, thus, the Court did not have the opportunity or occasion to consider the propriety of that rule (as opposed to Rule 12(b)(1)) in this circumstance. *See, e.g.*, *Harris v. Progressive Ins., Inc.*, 2014 WL 712446 (N.D. Tex. Feb. 24, 2014); *United States v. Lockheed Martin Corp.*, 2010 WL 4607411 (N.D. Tex. Nov. 15, 2010); *Cnty. of El Paso, Tex. v. Jones*, 2009 WL 4730303 (W.D. Tex. Dec. 4, 2009).

[4] It is immaterial that the Settlement Agreement only releases some (but not all) claims now asserted against Gaucher. *See* 13B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3533 (3d ed. 2014) ("A partial settlement moots the settled claims.").

CONCLUSION

For the foregoing reasons, the Court should dismiss the Receiver's Vendetta Intermediary Fee claims pursuant to Rule 12(b)(1).

Submitted this 13th day of May, 2015.

/s/ William R. Terpening
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing **PARTIAL 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 13th day of May, 2015.

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