

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.

**DEFENDANT'S REPLY TO
RECEIVER'S RESPONSE TO
DEFENDANT'S PARTIAL
MOTION TO DISMISS
(Pursuant to Rule 12(b)(1))**

Philip E. Gaucher ("Gaucher" or "Defendant") hereby replies to Thomas L. Taylor III's ("Receiver") Response to Gaucher's Partial Motion to Dismiss the Receiver's Second Amended Complaint ("Receiver's Response") and would show the Court the following:

1. Gaucher Acted as an Agent

The Receiver's argument that Gaucher did not act as an "agent, affiliate or representative" of Brock is not supported by the cited deposition testimony.¹ When read carefully, the testimony referenced in the Response only establishes that Gaucher received funds from Vendetta Partners and reinvested those funds in Vendetta Partners through Clovis.²

¹ Capitalized terms (unless otherwise noted) have the meaning set forth in the parties' respective filings.

² The remaining cited testimony likewise merely shows that Gaucher discussed the Vendetta Partners investment with other Clovis members. Indeed, the Court heard such testimony during its quasi-bench trial held on February 12, 2015. Similarly, the referenced testimony of Brock indicates that he was not aware of the intricacies and terms of the Clovis investment in Vendetta Partners, such as the side letter and security interest. The fact, however, that Brock did not

Gaucher does not deny that he received such funds. This fact, however, was pursuant to an arrangement and agreement with Brock for whom he was acting as agent. In this regard, the Receiver fails to cite those portions of Gaucher's deposition that most fully discussed Brock's commission vis-à-vis Gaucher (excerpts from which are attached as **Exhibit A**). Here, under questioning by the Receiver's counsel, Gaucher stated that his fee "was half of the fee that Bill Brock was to receive." Gaucher Depo. 73: 16-17. Receiver's counsel then introduced as Exhibit 22 to the deposition e-mail correspondence between Gaucher and Vendetta's chief administrative officer concerning the first transfer of these funds. In the e-mail, Gaucher states that he "appreciate[s] [Vendetta] transferring funds *on Bill's behalf* per our agreement" (emphasis added). Gaucher Depo. 74: 3-25 – 75: 1-7 and Exhibit 22.

The fact that Vendetta Partners sent the funds directly to Gaucher is not dispositive on the question of whether Gaucher was acting as an agent affiliate or representative of Brock. Indeed, it is not, to say the least, unknown that an agent would actually be compensated for work he performs on behalf of his principal. Rather, this testimony shows that Gaucher's fee was received "through his agreement with Brock" (*See* Cmplt ¶ 61 cited previously in Defendant's Motion). Indeed, the very fact that Gaucher was compensated from funds that were part of the Brock commission itself establishes that he was acting on behalf of and for the benefit of Brock with respect to the type of claim released under the Settlement Agreement. The Receiver's own pleadings also support the contention that, at least with respect to the Vendetta Intermediary Fees, Gaucher's receipt of funds was derivative of Brock's commission. *See, e.g.*, Receiver's Trial Brief (Enforcement Case Doc. No. 186 at 6 (stating that "Clovis, through its member Gaucher, was aware that William Brock received a 6% commission of approximately \$173,100

negotiate this transaction has no bearing on whether or not Gaucher acted as a representative or agent of Brock when first introducing the Clovis members to the Vendetta Partners principals.

for the Clovis investment”). It is this commission, the entire 6%, which is one of many of the transfers from Vendetta Partners to Brock addressed by the Settlement Agreement. When the Receiver released his claims against Brock, and his agents, affiliates, and representatives as to such transfers, he rendered moot the possibility that he could then seek to recover this particular commission from Gaucher or any other agent, representative or affiliate of Brock.

2. Gaucher Did Not Have To Be Named in the Settlement Agreement.

The Receiver’s second argument is essentially based on the Texas Supreme Court’s holding in *Duncan v. Cessna Aircraft Co.*, 665 S.W. 2d 414 (Tex. 1984), namely, that for Gaucher to have been released as to the Receiver’s claim for the Vendetta Intermediary Fees, he needed to be “named in [the] release” – which he was not. A close reading of *Duncan* and the other cited cases, however, demonstrates that the release at issue in this case, and the relationship of the parties, including Gaucher, is quite distinguishable from *Duncan* and the cited progeny. In *Duncan*, the plaintiff signed a settlement agreement which released the pilot and owner of an aircraft that had crashed and killed her husband as well as “any other corporations or person whomsoever responsible therefore, whether named herein or not....” *Id.* at 418. Not surprisingly, the Court found that this language was too vague to release Cessna, the manufacturer of the aircraft.

With respect to the release contained in the Settlement Agreement that Brock and the Receiver executed in this case, however, Gaucher is not so remotely positioned. He is not just “any other...person”. He testified at a hearing held in the Enforcement Case and, as noted above, the transaction which forms the basis of the Receiver’s present claim against him has been discussed and addressed in pleadings filed in the Enforcement Case. Certainly, Gaucher was not “unknown” to the Receiver at the time the Settlement Agreement was executed. *Id.* at 422.

Indeed, the Receiver executed the Settlement Agreement more than two months *after* filing the instant lawsuit. Moreover, the very subject matter of the Settlement Agreement is something with which Mr. Gaucher was intricately tied, namely the payment of commissions in investments in Vendetta Partners.

It is important, also, to remember that *Duncan* states that a release is valid as to a particular person if, although he is not referred to by name, is referred to “with such descriptive particularity that his identity or his connection with the tortious event is not in doubt.” *Id.* at 419. That Brock used others to assist in obtaining investors for Vendetta Partners also was not unknown to the Receiver. Indeed, in his Motion for Entry of Order Rejecting the Secured Claim of Clovis (Enforcement Case Doc. 95), which this Court recently granted, the Receiver noted that, with respect to the Vendetta Intermediary Fees, “Brock had received at least \$110,000 in transfers between November 30, 2012 and January 25, 2013 related to the Clovis transaction. [citation omitted] The Receiver has made demand upon Brock to return all commissions and other fees he received (*or which were paid for his benefit from Receivership entities*) related to the offer and sale of Vendetta Partners and Iron Rock Partners...” (Doc. 95 at 14) (emphasis added).

Of course, Texas courts post-*Duncan* have found similarly unnamed persons to be encompassed with the scope of parties released under a settlement agreement. In *Randall v. Dallas Power & Light Co.*, 745 S.W.2d 397, 401 (Tex.App.-Dallas 1987), *rev'd on other grounds*, 752 S.W.2d 4 (Tex.1988), for example, the court found that a release of an employer and its “agent, servant” released an employee where “his identity or connection with the tortious event cannot be doubted.” *See also Schomburg v. TRW Vehicle Safety Systems, Inc.*, 242 S.W.2d 911, 915 (Tex.App. – Dallas 2008) (term “component suppliers” sufficient to release unnamed

seatbelt manufacturer in release of carmaker). The words “agents” and “representatives” as used in the Settlement Agreement were clearly not meaningless and must of necessity refer to someone or some class of persons. Based upon the testimony of Gaucher and the statements made by the Receiver in pleadings regarding the arrangement between Brock and the Defendant, Gaucher clearly falls within the pale of this particular category of releasees.

3. The TUFTA Claim as to the Vendetta Intermediary Fee Was Released.

The Receiver’s third argument in response is somewhat derivative of the first. The Receiver argues that his claims against Gaucher under TUFTA should proceed because they can be made against a “first” or “subsequent transferee”. As noted above, however, the fact that Gaucher *received* funds from Vendetta Partners does not change the fact that the commission itself was made for Brock’s benefit and was considered a commission to Brock. Because Brock apparently desired, presumably for his convenience, that Gaucher’s portion of his commission be paid directly by Vendetta and deducted from the funds paid to Brock does not undercut the fact that, as stated in the Receiver’s own Proposed Findings of Fact and Conclusions of Law in the Enforcement Action, “William Brock received a 6% commission for the Clovis investment” and ... Gaucher received “half of *Brock’s* 6% commission” (emphasis added). (Enforcement Case Doc. No. 189 ¶¶ 28 & 29). Although Gaucher ultimately received part of this commission – as did the Receivership Estate if you follow this meme to its logical conclusion – Gaucher as shown above fell into the category of persons released in connection with the transfer of these monies. Moreover, in this Motion at least, Gaucher does not maintain that *all* claims the Receiver may have against him are made moot by the Settlement Agreement. It is only the Receiver’s claim relating to the Brock commission for the Clovis investment – the Vendetta Intermediary Fee -- that was released by the Receiver and should now be dismissed as moot pursuant to this Motion.

CONCLUSION

For the foregoing reasons, and those set forth in Defendant's Motion, the Court should dismiss the Receiver's Vendetta Intermediary Fee claims pursuant to Rule 12(b)(1).

Submitted this 3rd day of June, 2015.

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

Charles G. Miller
Texas Bar No. 14061810

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Attorneys for Philip E. Gaucher

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing **REPLY TO RECEIVER'S RESPONSE TO DEFENDANT'S PARTIAL MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system to the following person:

Andrew M. Goforth
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4550 Post Oak Place Drive, Suite 241
Houston, Texas 77027
Tel: 713.626.5300
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Counsel for Plaintiff

Submitted this 3rd day of June, 2015.

/s/ William R. Terpening _____
William R. Terpening

EXHIBIT A

PHILIP GAUCHER
SECURITIES & EXCHANGE COMM. VS. HELMS

July 18, 2014
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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

4 SECURITIES AND EXCHANGE COMMISSION,
5
6 Plaintiff,
7
8 vs. CASE NO. 1:13-CV-1036-LY
9
10 ROBERT A. HELMS, JANNIECE S. KAELEN, DEVEN SELLERS,
11 ROLAND BARRERA, VENDETTA ROYALTY PARTNERS, LTD,
12 VENDETTA ROYALTY MANAGEMENT, LLC, VESTA ROYALTY
13 PARTNERS,LP, VESTA ROYALTY MANAGEMENT, LLC, IRON
14 ROCK ROYALTY PARTNERS, LP, IRON ROCK ROYALTY
15 MANAGEMENT, LLC, ARCADY RESOURCES LLC, BAREFOOT
16 MINERALS, G.P., G3 MINERALS, LLC, HALEY OIL
17 COMPANY, INC., LAKE ROCK, LLC, SEBUD MINERALS LLC,
18 AND TECHNICOLOR MINERALS, G.P.,
19
20 Defendants.

21 DEPOSITION OF: PHILIP GAUCHER
22
23 DATE: July 18, 2014
24
25 TIME: 1:10 p.m.

LOCATION: Law Offices of
Nexsen Pruet, PLLC
Carillon Building
227 West Trade Street
Charlotte, North Carolina

TAKEN BY: Counsel for the Defendants

REPORTED BY: Carolyn M. Beam
Court Reporter

Page 2

1 APPEARANCES OF COUNSEL:
2
3 ATTORNEYS FOR THE DEFENDANT
4 THOMAS L. TAYLOR, III,
5 VENDETTA ROYALTY PARTNERS, LTD,
6 VENDETTA ROYALTY MANAGEMENT, LLC

7 THE TAYLOR LAW OFFICES
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15
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Flagler Center Tower
505 South Flagler Drive, Suite 1100
West Palm Beach, FL 33401
(561) 650-0460
shawkins@jonesfoster.com

ALSO PRESENT:
Avery Chapman, Esq. (Via Phone)
(INDEX AT REAR OF TRANSCRIPT)

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1 PHILIP GAUCHER
2 being first duly sworn, testified as follows:
3 EXAMINATION
4 BY MR. GOFORTH:
5 Q. All right. Mr. Gaucher, my name is
6 Andrew Goforth. And I represent Thomas Taylor,
7 III, who's been appointed as the receiver over
8 Vendetta Royalty Partners, among others, in the SEC
9 enforcement action in Austin, Texas. And I have
10 Exhibit 1 marked and placed before you. And let's
11 go ahead and do 2 as well.
12 (GAUCHER EXH. 1, First Amended Order
13 Appointing Receiver, marked for identification.)
14 (GAUCHER EXH. 2, First Amended Order
15 Appointing Receiver, marked for identification.)
16 THE COURT REPORTER: And two and three?
17 BY MR. GOFORTH:
18 Q. These are two orders appointing
19 Mr. Taylor as the receiver. They were entered by
20 Judge Yeakel in Austin.
21 And it's pursuant to these orders
22 that -- that you've been subpoenaed here today. Do
23 you recognize these documents? Have you ever
24 received them?
25 A. I do. I have. I have not read them.

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1 MR. GOFORTH: Okay. All right. And
2 I'm going to mark Exhibit 3.
3 (GAUCHER EXH. 3, Subpoena to Testify at
4 a Deposition in a Civil Action, marked for
5 identification.)
6 BY MR. GOFORTH:
7 Q. Which is -- this is --
8 A. Oh, yeah.
9 Q. -- a subpoena issued to you in regards
10 to your testimony today. There is a notice of
11 deposition on the back few pages of the Exhibit.
12 Have you received this?
13 A. Yes.
14 Q. Okay. And the subpoena also requests
15 that you produce documents as requested on Exhibit
16 A. Have you reviewed Exhibit A?
17 A. Yes, I have.
18 Q. Okay. And have you produced documents
19 as requested?
20 A. I have. And I do believe they're now
21 sitting in our waiting room, I believe.
22 Q. Okay. All right. Well, let me start
23 off with a little background. Where do you live?
24 A. New York, New York.
25 Q. New York, New York. Okay. And



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1 same date.
 2 Q. Okay. All right. So what amount of
 3 money did you receive as your finder's fee?
 4 A. Can you be more specific?
 5 Q. Was it a percentage of the amount
 6 invested?
 7 A. In aggregate, over the three tranches,
 8 I received approximately \$80,000 in -- in finder's
 9 fees.
 10 Q. Okay. And did you receive one for each
 11 of the three capital contributions --
 12 A. That's correct.
 13 Q. -- that we discussed previously? Okay.
 14 And how was the amount of your finder's fee
 15 calculated?
 16 A. It was half of the fee that Bill Brock
 17 was to receive.
 18 Q. Okay. And do you recall what that
 19 number was?
 20 A. I believe it was three percent.
 21 Q. Okay. That Mr. Brock received or that
 22 your half was?
 23 A. That my half was.
 24 (GAUCHER EXH. 22, Email string entitled
 25 Re: Wire, dated 12/3/2013, marked for

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1 identification.)
 2 BY MR. GOFORTH:
 3 Q. Okay. All right. Okay. I'll mark
 4 Document 22. And this is an email chain between
 5 you and Michael Watson, whose signature line says
 6 chief administrative officer. The bottom email, at
 7 the bottom of page one, states: Mr. Gaucher,
 8 Janniece is on her way to the bank as I type this
 9 email to wire \$34,500 to your bank account. Do you
 10 recall for which of the investments by Clovis that
 11 amount of money was related to?
 12 A. No. But the dates could probably tell
 13 you.
 14 Q. Okay. Okay. This email being sent on
 15 Monday December 3rd, I'll reference you back to the
 16 previous exhibit, which stated that wire would go
 17 out Monday. I'm sorry, 20, Exhibit 20.
 18 A. Yeah.
 19 Q. So that email was sent on November
 20 30th. Is that correct?
 21 A. Uh-huh.
 22 Q. And it states that the wire will go out
 23 Monday. Does this \$34,500 appear to be related to
 24 the November 30th transaction?
 25 A. I don't know.

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1 Q. Okay. Okay. In the top email of this
 2 chain, you state that I appreciate you transferring
 3 the funds on Bill's behalf, per our agreement.
 4 Is that agreement the finder's fee
 5 agreement that you spoke of earlier?
 6 A. With Mr. Brock, yes.
 7 Q. With Mr. Brock. Okay.
 8 (GAUCHER EXH. 23, Email string entitled
 9 RE: wire, dated 12/18/2012, marked for
 10 identification.)
 11 BY MR. GOFORTH:
 12 Q. Okay. This next Exhibit 23 is an email
 13 chain. We can go to page 2. The first email in
 14 this chain that ends on page 3 says -- it's from
 15 Janniece Kaelin to William Brock, copied to
 16 Mr. Helms, subject, wire. She states that the
 17 debtor received \$1,180,000 wire from Clovis, and is
 18 asking Mr. Brock about the six percent commission
 19 paid to him. And states, that is 35,400 to you and
 20 the same amount to Phil. Is that in reference to
 21 your agreement with Mr. Brock regarding the
 22 finder's fee?
 23 A. That's correct.
 24 Q. Okay. The email above that is from
 25 Mr. Brock back to Janniece Kaelin in which he

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1 states, dear Janniece, glad the wire came in. The
 2 math -- I think that the math works this way. And
 3 he says that, for Phil, that you would receive
 4 three percent of \$1.1 million? And that he would
 5 receive three percent of \$1.1 million, plus his
 6 consulting fee of 1.5 percent. And then he would
 7 receive the full six percent on \$80,000.
 8 Is the \$80,000 he references here the
 9 \$80,000 contribution attributed to you as a partner
 10 of Clovis for this investment?
 11 A. I'm sorry. Repeat the question,
 12 please.
 13 Q. Okay. For the 1.18 million dollar
 14 investment, was the amount of that, attributable to
 15 you, as a Clovis partner, \$80,000?
 16 A. I don't, as I stated before, I don't --
 17 I don't know.
 18 Q. Okay. Do you know why Mr. Brock would
 19 partition off that \$80,000 in the calculation of
 20 your finder's fee?
 21 A. I do not.
 22 MR. TERPENING: Objection.
 23 MR. GOFORTH: Okay.
 24 (GAUCHER EXH. 24, Email entitled
 25 Gaucher, dated 12/18/2012, marked for

Re: Wire

Philip Gaucher <pgaucher@gmail.com>

Mon 12/3/2012 7:34 PM

To: Michael Watson <>;

Cc: Robert Helms <>; Janniece Kaelin <>;

Guys,

I appreciate you transferring funds on Bill's behalf per our agreement. I look forward to speaking with you next week.

P

Sent from my iPhone

On Dec 3, 2012, at 6:58 PM, Michael Watson <Michael@vendettaroyalty.com> wrote:

Mr. Gaucher,

I have confirmed that the funds wired to you this afternoon have left our bank and should be in your account first thing tomorrow morning. If they are not, please contact Robert, Janniece or I and we will look into the matter.

Enjoy your evening.

Michael Watson

From: Philip Gaucher [mailto:pgaucher@gmail.com]

Sent: Monday, December 03, 2012 2:06 PM

To: Michael Watson

Subject: Re: Wire

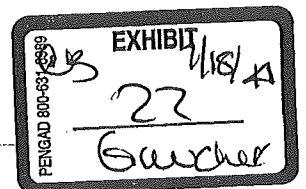
Thank you

On Mon, Dec 3, 2012 at 2:57 PM, Michael Watson <Michael@vendettaroyalty.com> wrote:

Mr. Gaucher,

Janniece is on her way to the bank as I type this email to wire \$34,500 to your bank account. Either Janniece or I will notify you when the wire leaves our bank account.

Michael Watson



Chief Administrative Officer
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