IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THOMAS L. TAYLOR III, solely in his capacity as Court-appointed Receiver for Robert A. Helms, et al., Plaintiff,	§	
V.	§	A-15-CV-648-LY-ML
GRADY H. VAUGHN III. Defendant.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE:

Before the Court are Receiver's Motion for Partial Summary Judgment Against Defendant Grady H. Vaughn III filed November 12, 2015 [Dkt. #7]; Appendix in Support of Receiver's Motion for Partial Summary Judgment Against Defendant Grady H. Vaughn III filed November 12, 2015 [Dkt. #8]; Response to Receiver['s] Motion for Partial Summary Judgment Against Defendant Grady H. Vaughn III filed December 15, 2015 [Dkt. #15]; Receiver's Reply in Support of His Motion for Partial Summary Judgment Against Defendant Grady H. Vaughn III filed January 8, 2016 [Dkt. #20]; and Appendix in Support of Receiver's Reply in Support of Motion for Partial Summary Judgment Against Defendant Grady H. Vaughn III filed January 8, 2016 [Dkt. #21].

The Motions were referred by United States District Judge Lee Yeakel to the undersigned for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. After reviewing the motions and related

briefing, the relevant case law, as well as the entire case file, the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

Plaintiff Thomas L. Taylor III ("Receiver"), the court-appointed Receiver in a separate but related matter ("Enforcement Case"),[1] filed this suit on July 30, 2015, against Defendant Grady H. Vaughn III ("Vaughn"). In the Enforcement Case, plaintiff Securities and Exchange Commission ("SEC") alleged that several defendants, namely Robert A. Helms ("Helms") and Janniece S. Kaelin ("Kaelin"), [2] operated a Ponzi scheme to defraud investors, principally via the defendants' company Vendetta Royalty Partners, Ltd. ("Vendetta") and other businesses operated by defendants (collectively, "Vendetta Defendants").[3] In the Enforcement Case, the SEC alleged, inter alia, that Helms and Kaelin, through entities under their control, violated the antifraud provisions of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") through the offer and sale of securities in the form of limited partnership interests issued by Vendetta, Vesta, and Iron Rock. *Helms*, Dkt. #1, 3, 4. The SEC further alleged that Helms and Kaelin implemented a Ponzi scheme through the Vendetta Defendants. *Id.*

As part of that litigation, the District Court assumed exclusive jurisdiction and took possession of the "Receivership Assets" and the "Recoverable Assets of the Receivership

[1] The Enforcement Case is styled *Securities and Exchange Commission v. Robert A. Helms, et al.*, 1:13-cv-1036-ML (W.D. Tex. 2013). The parties in that case consented to the undersigned's jurisdiction, and the case was assigned to the undersigned's docket for all purposes on September 29, 2014 . *Helms*, Dkt. #118.

[2] In addition to Helms and Kaelin, the SEC named the following individual defendants: Deven Sellers ("Sellers"); and Roland Barrera ("Barrera").

[3] In addition to Vendetta Royalty Partners, Ltd., the entities named in the Enforcement Case are as follows: Vendetta Royalty Management, LLC; Vesta Royalty Partners, LP; Vesta Royalty Management LLC; Iron Rock Royalty Partners, LP; Iron Rock Royalty Management LLC; Arcady Resources, LLC; Barefoot Minerals, G.P.; G3 Minerals, LLC; Haley Oil Company, Inc.; Lake Rock, LLC; SeBud Minerals, LLC; and Technicolor Minerals, G.P.

Defendants" (collectively, the "Receivership Estate"). [4] *See Helms*, 1st Am. Order Appointing Receiver, May 27, 2014 [Dkt. #76]. The District Court appointed Taylor to serve as Receiver of the Receivership Estate and granted him "all powers and authority or a receiver at equity" as well as certain enumerated powers. *Id.* ¶ 4. The District Court specifically directed and authorized the Receiver to "take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto." *Id.* ¶ 7. Additionally, among the Receiver's enumerated powers, the court authorized the Receiver to "investigate the manner in which the financial and business affairs of the Receivership Defendants were conducted and . . . to institute such actions and legal proceedings . . . as the Receiver deems necessary and appropriate." *Id.* ¶ 43. Relevant to the case at bar, the order directed that the "Receiver may seek . . . disgorgement of profits, assert turnover, [and] avoidance of fraudulent transfers." *Id.*

In this action, the Receiver seeks disgorgement of funds and avoidance of transfers from Vendetta to Vaughn in the amount of $442,254.35. Mot. Summ. J. [Dkt. #7] at 8. The Receiver asserts Helms and Kaelin incurred obligations and transferred funds to, and for the benefit of, Vaughn, both in his individual capacity and through a limited partnership, Upland Energy Partners, LP ("Upland Partners"), which Vaughn created as an investment vehicle for investing in Vendetta. *Id.* at 7–8. Vaughn admits he controlled Upland Partners through its general partner, Upland Resources, LLC ("Upland Resources"), of which he was the sole owner. App. [Dkt. #8] 144 ("Vaughn Depo." 50:17–51:1). Specifically, the Receiver alleges Helms and Kaelin caused the following transfers to be made to Vaughn from accounts in the names of Vendetta Defendants: $126,909.59 to Vaughn directly; $130,000 to Upland Resources for

[4] Upon consent and transfer, the Magistrate Court assumed jurisdiction.

Vaughn's benefit; and $35,344.76 to third-parties for Vaughn's benefit. Mot. Summ. J. at 7–8. In addition to these payments, the Receiver alleges Vaughn retained $150,000 of investment funds from Upland Partners' investors in satisfaction of Vendetta's compensation obligations. *Id.* at 8. The Receiver maintains that because these transfers made to Vaughn were made from Vendetta, which was operating as a Ponzi scheme, they were presumptively made with the intent to hinder, delay, or defraud creditors. *Id.* at 9. The Receiver further alleges that these transfers are fraudulent and thus avoidable under the Texas Uniform Fraudulent Transfer Act ("TUFTA") and subject to disgorgement under a theory of unjust enrichment. *Id.* at 1. The Receiver now moves for partial summary judgment on these claims.[5]

II. STANDARD OF REVIEW

Courts "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Courts, however, need not sift through the record in search of triable issues. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006).

The moving party bears the initial burden of informing the court of the basis for its belief that there is no genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this showing, the burden shifts to the nonmovant to establish that there is a genuine issue of material fact such that a reasonable jury might return a verdict in its favor.

[5] The Receiver has also asserted causes of action against Vaughn for aiding, abetting, and participating in Helms' and Kaelin's scheme, but has not moved for summary judgment on these claims. *See* Receiver's Quarterly Status Report for the Quarter Ending March 31, 2016 [Dkt. #312], *in Helms*. Thus, these claims are not currently before the Magistrate Court.

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986). The nonmoving party, however, "cannot satisfy this burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006) (quoting *Freeman v. Tex. Dep't of Crim. Justice*, 369 F.3d 854, 860 (5th Cir. 2004)). Indeed, courts resolve factual controversies in favor of the nonmoving party "only when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts." *Olabisiomotosho v. City of Hous.*, 185 F.3d 521, 525 (5th Cir. 1999) (citing *McCallum Highlands, Ltd. v. Wash. Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995)).

A nonmoving defendant may prevail by either raising genuine issues of material fact on an element of the plaintiff's claim or by establishing an affirmative defense as a matter of law. *Bassett v. Am. Nat. Bank*, 145 S.W.3d 692, 696 (Tex. App.—Fort Worth, 2004, no pet.). "A defendant relying on an affirmative defense in opposing a summary judgment must come forward with summary judgment evidence sufficient to raise an issue of material fact on each element of the defense." *Id.* In determining whether a genuine issue exists for trial, the court will view all of the evidence in the light most favorable to the nonmovant. *Cooper Tire & Rubber v. Farese*, 423 F.3d 446, 456 (5th Cir. 2005). The court will "resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. We do not, however, in the absence of any proof, assume that the non-moving party could or would prove the necessary facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075. (5th Cir. 1994) (en banc).

III. REQUEST FOR CONTINUANCE

As an initial matter, Vaughn argues that summary judgment is premature and seeks relief under Federal Rule of Civil Procedure 56(d), asking that the court deny or defer considering the

motion until he has had an opportunity to conduct full discovery.[6] Resp. [Dkt. #15] at 6–8. In support of his continuance request, Vaughn states in his affidavit that he would seek documents and information concerning:

> the facts underlying the alleged *Ponzi* scheme, facts demonstrating the purpose for which I was retained by the Vendetta entities, my lack of knowledge concerning any alleged wrongdoing, the value I provided to the investors in Vendetta, my own victimization at the alleged *Ponzi* scheme (if such scheme is proven), the fact that at least some of the alleged payments for which the Receiver seeks reimbursement were not made to me or for my benefit."

Resp. ("Vaughn Aff.") ¶ 14.

Under Rule 56(d), if a summary judgment nonmovant "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," the court may defer ruling on or deny the summary judgment motion, provide the nonmovant with time to obtain affidavits or conduct discovery, or issue any other appropriate order. FED. R. CIV. P. 56(d). To obtain a continuance for purposes of obtaining discovery, the summary judgment nonmovant must demonstrate: "(1) why he needs additional discovery, and (2) how the additional discovery will likely create a genuine issue of material fact". *Chenevert v. Springer*, 431 F. App'x 284, 287 (5th Cir. 2011) (citing *Steams Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 534 (5th Cir. 1999). Moreover, the nonmovant must explain specifically why it is unable to present evidence creating a genuine issue of material fact and how a continuance would remedy this inability. *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 720–21 (5th Cir. 1999), *cert. denied*, 531 U.S. 917 (2000). "The non-moving party may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts in opposition to summary judgment. If it appears that further discovery will not provide evidence creating a

[6] While the motion cites to Rule 56(f), it is apparent to the court that Vaughn's counsel was simply using the previous enumeration of Rule 56. Rule 56(d) now encompasses former Rule 56(f).

genuine issue of material fact, the district court may grant summary judgment." *Id.* (internal citations omitted).

The undersigned finds that Vaughn has not made the requisite showing to support his Rule 56(d) request. The undersigned does not quarrel with Vaughn's assertion that the Receiver moved for partial summary judgment early in this case—indeed, prior to the District Court's entry of a scheduling order. *See* Resp. at 6. Yet, nothing in the Federal Rules precludes such an early filing. *See* FED. R. CIV. P. 56(b) (stating that "a party may file a summary judgment motion *at any time* until 30 days after the close of discovery"). In fact, as will be further discussed below, the timing of the motion is not surprising in this case since many of the material facts underlying the Receiver's claims were previously litigated and are not subject to dispute. *See infra* subpart III(A). Ultimately, however, it is Vaughn's own statements that torpedo his request: none of his "vague assertions" regarding a need for additional discovery demonstrates how additional discovery will likely create a genuine issue of material fact. *See Chenevert*, 431 F. App'x at 287; *see also Bauer v. Albermarle Corp.*, 169 F.3d 962, 968 (5th Cir. 1989) (citing as inadequate "vague assertions of the need for additional discovery").

Furthermore, as the Receiver points out, Rule 56(d) motions only "when facts are unavailable to the nonmovant." FED. R. CIV. P. 56(d). Several of the categories of discovery which Vaughn purports to need additional time to acquire are documents that should be in his own possession or at least, accessible by him. For example, Vaughn states he seeks documents and information concerning his "the fact that at least some of the alleged payments for which the Receiver seeks reimbursement were not made to me or for my benefit." Vaughn Aff. ¶ 14. Such information and documents presumably would have been available to Vaughn via his own banking records, yet he did not attach these to his response. Because Vaughn has only outlined

vague categories of discovery he claims to need, and because he has not explained how this additional discovery will likely create a genuine issue of material fact, his motion for a continuance under Rule 56(d) must fail. *See Chenevert*, 431 F. App'x at 287; *see also Access Telecom, Inc.*, 197 F.3d at 720 (denying continuance where nonmovant did not "persuasively indicate that it was deprived of any relevant information); *RTC v. Marshall*, 939 F.2d 274, 278 (5th Cir. 1991) (requiring the nonmovant to show how additional discovery would lead to unresolved issues of fact).

IV. THE TUFTA CLAIM

To void a transfer under TUFTA, the Receiver has the burden to prove the elements as to each fraudulent transfer by a preponderance of the evidence. A transfer is fraudulent "if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay, or defraud any creditor of the debtor." TEX. BUS. & COM. CODE § 24.005(a)(1); *Janvey v. Brown*, 767 F.3d 430, 438 (5th Cir. 2014). Accordingly, the Receiver must show the debtor–transferor—here Vendetta or the Vendetta Defendants—made the transfers to Vaughn with actual intent to defraud any of their creditors. *Brown*, 767 F.3d at 438–39 (quoting *Janvey v. Alguire*, 647 F.3d 585, 598 (5th Cir. 2011)).

In the Fifth Circuit, the existence of a Ponzi scheme creates the presumption that a transfer is made with actual intent to defraud the transferor's creditors. *Byron*, 436 F.3d at 558. This is because a Ponzi scheme is, "as a matter of law, insolvent from its inception." *Id.* "'[T]he transferee's knowing participation is irrelevant under the statute' for purposes of establishing the premise of . . . a fraudulent transfer." *Brown*, 767 F.3d 439 (quoting *SEC v. Res. Dev. Intern., LLC*, 487 F.3d 295, 301 (5th Cir. 2007)). Accordingly, if the Receiver can establish by a preponderance of the evidence that Vendetta operated as a Ponzi scheme, the undersigned will

presume that any transfers from Vendetta were made with the requisite fraudulent intent. *Byron*, 436 F.3d at 558.

If the debtor's actual intent to defraud is established, then the Receiver is entitled to "avoidance of the transfer or obligation"—i.e., to recover judgment for that amount. TEX. BUS. & COM. CODE §§ 24.008(a), 24.009(b); *see also Res. Dev. Int'l, LLC*, 487 F.3d at 301 (explaining that it is the debtor's fraudulent intent, and not the transferee's knowing participation required for purposes of establishing the existence of a fraudulent transfer under the statute). Under the statute, such "judgment may be entered against: (1) the first transferee of the asset or the person for whose benefit the transfer was made; or (2) any subsequent transferee. . . ." EX. BUS. & COM. CODE § 24.009(b). As applied to the case at bar, then, the court may enter judgement against Vaughn for the transfers he received directly from the Vendetta Defendants and for transfers made from Vendetta to Upland Resources which were (1) for Vaughn's benefit or (2) subsequently transferred to Vaughn.

If the Receiver establishes the existence of a Ponzi scheme, the burden shifts to Vaughn to establish any applicable TUFTA affirmative defenses by a preponderance of the evidence. *Am. Cancer Soc'y*, 675 F.3d at 527; *see GE Capital Commercial, Inc. v. Worthington Nat'l Bank*, 754 F.3d 297, 301 (5th Cir. 2014) (recounting the district court's jury instruction regarding burden to show good faith, an element of the affirmative defense). Vaughn may shield himself from the Receiver's claims if he proves he received transfers from Vendetta (1) in good faith and (2) in exchange for reasonably equivalent value. TEX. BUS. & COM. CODE § 24.009(a); *Byron*, 436 F.3d at 558 (quoting Uniform Fraudulent Transfer Act ("UFTA") § 19.40.081). Under TUFTA, a transferee gives value for a transfer if "in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied." *Id.* § 24.004(a).

A. The Receiver's Burden: Existence of a Ponzi Scheme and Transfers Received

1. The Receiver Has Established That Vendetta Operated as a Ponzi Scheme

The undersigned has twice held in the Enforcement Case that Helms and Kaelin operated Vendetta and other entities under their control as a Ponzi scheme. *See SEC v. Helms*, No. A-13-cv-1036-ML, 2015 WL 1040443, at *7 (W.D. Tex. Mar. 10, 2015) ("The evidence establishes that at some point prior to the Clovis investment, Vendetta Partners became a classic Ponzi scheme.") ("*Helms I*"); *SEC v. Helms*, No. A-13-cv-1036-ML, 2015 WL 5010298, at *13 (W.D. Tex. Aug. 21, 2015) ("*Helms II*") ("The SEC has therefore established that Helms and Kaelin operated a Ponzi scheme, which is, by definition, a 'fraudulent scheme.'"). In *Helms I*, the undersigned conducted a "quasi-bench trial" on Intervenor Clovis Capital Ventures, LLC ("Clovis")'s purported security interest in certain oil and gas producing properties owned by Vendetta. *Helms I*, at 2-3. At this quasi-bench trial, the undersigned took testimony from witnesses from both parties, including that of Danielle Supkis Cheek ("Cheek"), a forensic accountant employed by the Receiver. Cheek testified as an expert witness that Vendetta operated as a Ponzi scheme. *Id.* at 6. The undersigned relied on Cheek's testimony as well as the other evidence presented at the quasi-bench trial in determining that Vendetta was a Ponzi scheme. Likewise, in granting the SEC's summary judgment motion in *Helms II*, the undersigned determined that the record supported a finding that Vendetta was a Ponzi scheme. *Helms II* at 13. The Receiver argues, therefore, that Vaughn is collaterally estopped from relitigating the issue that Vendetta operated as a Ponzi scheme. The undersigned agrees.

Collateral estoppel, or issue preclusion, may be applied to bar relitigation of an issue previously decided by a court of competent jurisdiction where: (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in

the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine. *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 391 (5th Cir. 1998) (quoting *Copeland, et al. v. Merrill Lynch & Co., et al.*, 47 F.3d 1415, 1422 (5th Cir. 1995). "'Complete identity of parties in the two suits is not required.'" *Robin Singh Educ. Servs. Inc. v. Excel Test Prep Inc.*, 274 F. App'x 399, 404 (5th Cir. 2008) (quoting *Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989)). In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the seminal Supreme Court case setting out the parameters of the *offensive* use of collateral estoppel—the type at issue here—the Court observed that "[t]he general rule should be that in cases . . . [where] the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Id.* at 330–31. The Court emphasized, however, that the trial court has *broad* discretion to determine whether collateral estoppel is appropriately employed offensively to preclude issue relitigation. *Id.* at 331; *see also Winters*, 149 F.3d at 392 (highlighting the Supreme Court's grant of broad discretion to trial court's determination of whether offensive collateral estoppel is appropriate).

In this case, the only disputed collateral estoppel element is Vendetta's existence as a Ponzi scheme was fully and vigorously litigated in either of the prior actions—the February 2015 "quasi-bench trial" resulting in *Helms I* or the undersigned's review of the SEC's summary judgment motion resulting in *Helms II*.[7] *See* Resp. at 11–12 (arguing that the prior orders on which the Receiver relies for issue preclusion did not "fully and vigorously" litigate the issue of

[7] Vaughn also seeks to challenge the application of issue preclusion in this action by arguing that the prior orders on which the Receiver relies are "interlocutory" and therefore cannot support preclusion. Resp. at 11. Vaughn's challenge lacks merit—summary judgment in *Helms I* was granted on August 21, 2015, and a Final Judgment as to Defendants Helms, Kaelin, Sellers, and Barrera was subsequently entered on October 21, 2015. *Helms*, Dkt. #292. Vaughn provides no support for his claim that the prior orders relied on by the Receiver are interlocutory in nature.

whether Vendetta operated as a Ponzi scheme). Vaughn argues that the prior orders on which the Receiver relies did not "fully and vigorously" litigate the issue. As to *Helms I*, Vaughn argues the relevant issue was not fully and vigorously litigated because the defendants in that action did not "seriously question" the credentials of the SEC's expert witness, whose declaration and testimony the undersigned relied on in determining that Vendetta was a Ponzi scheme, nor did they present their own expert witness. Vaughn objects to the imposition of issue preclusion based on Helms *II* because the defendants did not file a response to the SEC's motion for summary judgment.

To support his position, Vaughn cites the Fifth Circuit's decision in *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131. In *Universal American*, the Court of Appeals declined to apply offensive collateral estoppel based on its determination that *Parklane*'s "full and vigorous[]" litigation requirement mandated conflict-free representation. That case, however, is inapposite. *Universal American* involved a carrier action for indemnification. There, the Fifth Circuit determined there was a conflict of interest between indemnitor and indemnitee which counseled against the application of offensive collateral estoppel from a prior arbitration proceeding. *See id.* ("A defendant having a conflict of interest with a putative indemnitor on a particular issue cannot contest that issue diligently in the *Parklane* sense."). No such conflict existed between the defendants in the prior actions and Vaughn which counsel against the use of offensive collateral estoppel in the case at bar. As a result, the limits placed on offensive collateral estoppel in *Universal American* do not apply here.

Vaughn's specific arguments against issue preclusion are similarly unavailing. Vaughn states that the issue of whether Vendetta operated as a Ponzi scheme has been ruled on "essentially only by default" because the defendants in *Helms II* did not file a response to the

summary judgment motion and because the defendants in *Helms I* did not "'seriously question[]' the Receiver's expert" and did not offer their own expert. As to *Helms II,* Vaughn is correct that the defendants in that case did not file a response to the SEC's summary judgment motion. As a result, the undersigned considered the admissible evidence proffered by the SEC as true. *Helms II* at 1. The undersigned takes issue, however, with Vaughn's contention that the ruling on the summary judgment motion amounted to a "default." Indeed, the undersigned specifically stated in that case that "[o]f course, Defendant's failure to respond to the motion for summary judgment does not permit the Court to enter a 'default' summary judgment in favor of the SEC." *Helms II* at 1, n.1 (citing *Eversley v. MBank Dall.*, 843 F.2d 172, 174 (5th Cir. 1988)). Thus, Vaughn errs when he asserts that the undersigned granted summary judgment "by default."

Still, even conceding Vaughn's arguments regarding the deficiencies presented by defendants' lack of a response in *Helms II*, the undersigned finds his complaints regarding *Helms I* lack merit and border on the disingenuous. A closer look at *Helms I* reveals the holistic nature of that litigation—specifically defendants' active participation in it:

> Clovis' counsel and Helms each cross-examined Cheek regarding her experience and training investigating Ponzi schemes, the definition of a Ponzi scheme, and the charts included in her declaration. However, neither seriously questioned Cheek's qualifications or credibility, and neither presented an expert to offer an opposing opinion. Therefore, the Court finds Cheek's live testimony and declaration testimony to be credible and persuasive.

Helms I at 8.

Contrary to Vaughn's description, the defendants in *Helms I* did not sit idly by while the undersigned ruled on the issue of whether a Ponzi scheme existed by default. Rather, each defendant cross-examined the plaintiff's expert witness on various elements of her testimony: from her experience, to her training, to the evidence upon which she relied. To the extent the defendants did not challenge Cheek's qualifications or credibility, it seems possible such

questions would not have gained any traction. Following this cross-examination of Cheek, the undersigned deemed the expert's testimony and declaration to be credible and thus properly relied on it in determining that Vendetta operated as a Ponzi scheme. As is proper at a bench trial, the undersigned considered all of the evidence presented and made determinations as to which evidence was credible. Based on this review of the evidence, the undersigned "easily conclude[d]" that Vendetta was a Ponzi scheme. *Helms I* at 14.

Furthermore, as the Receiver points out, the inquiry into whether an issue was "fully and vigorously" litigated in a prior action is not an inquiry into the tactics and strategy employed during discovery and at trial but rather into the *incentives* of the defendants in the prior action to litigate that issue. *See* 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4223 (2d ed. 1990) ("Issue preclusion is available in most circumstances without any need to prove the quality of the first litigation and decision."). *Cf. Parklane*, 439 U.S. at 332 (finding there was "no unfairness" in applying offensive collateral estoppel where "incentives" of party to litigate identical issue was equally strong in both actions). Indeed, in a situation that parallels that of the *Parklane* petitioners, Helms and Kaelin would have had every incentive to litigate the SEC lawsuit fully and vigorously "in light of the serious allegations made in the SEC's complaint . . . as well as the foreseeability of subsequent private suits that typically follow a successful Government judgment." *Id.* Clovis likewise would have had "every incentive" to litigate its claim in *Helms I* since the SEC was seeking to invalidate a purported security interest which could have placed Clovis's $2.7 million claim against the Receivership Estate in priority to all others. In other words, Clovis's incentives to "fully and vigorously" litigate the issue of whether Vendetta operated as a Ponzi scheme match that of Vaughn's.

Finally, Vaughn does not present any "special circumstances" that would make it unfair to apply offensive collateral estoppel to him. *See Bradberry v. Jefferson Cty., Tex.*, 732 F.3d 540, 549 (5th Cir. 2013) (observing that "equitable consideration"—i.e., considerations of fairness—"apply only to 'offensive collateral estoppel'").[8] Vaughn's argument that the prior orders relied on by the Receiver were "interlocutory" is perhaps an attempt to allege a special, unfair circumstance. The undersigned, however, has already discounted the premise behind this argument. *See supra* note 2.

In addition to relying on issue preclusion to prove the existence of a Ponzi scheme, the Receiver also cites liberally to the declaration of Danielle Supkis Cheek (the "Cheek Declaration") and offers it in support of his motion. *See generally* Mot. Summ. J. Vaughn raises several objections to the Cheek Declaration, which he believes prove the Declaration violates the requirements of Federal Rule of Civil Procedure 56. Namely, he asserts (1) it does not state whether it is based on personal knowledge; (2) it relies on documents that have not been identified, produced or authenticated and thus constitutes inadmissible hearsay; and (3) it does not give any indication that Cheek is competent to testify as to the stated amounts due. Resp. at 9–10. Vaughn further argues that these objections cannot be dismissed "merely by claiming she is an expert witness" because the Receiver failed to disclose her as an expert as required by Federal Rule of Civil Procedure 26(2)(2).

Because the Receiver has established the existence of the Ponzi scheme through offensive collateral estoppel, the undersigned need not delve into Vaughn's arguments as to whether the

[8] *Parklane* listed three special circumstances that would make issue preclusion unfair, none of which apply in this case: (1) whether the plaintiff easily could have joined the previous action but chose not to; (2) whether the defendant had little incentive to defend vigorously (e.g., he was sued only for nominal damages or if future suits were not foreseeable); and (3) whether the judgment upon which the plaintiff seeks to rely is itself inconsistent with a previous judgment in favor of the defendant. *Winters*, 149 F.3d at 391.

Cheek Declaration represents competent summary judgment evidence to support the finding of the existence of a Ponzi scheme. It appears, however, that many if not all of Vaughn's arguments against the Cheek Declaration would be moot had the Receiver properly disclosed Cheek as an expert witness pursuant. For example, Vaughn's complaint that Cheek's Declaration is not based on personal knowledge because she relies on her analysis of document review would fail: "[u]nlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge of observation." *Daubert v. Dow Pharm. Inc.*, 509 U.S. 579, 591 (1993) (citation omitted); *see also, e.g.*, *Salinas v. State Farm Fire and Cas. Co.*, Civil Action No. B-10-194, 2012 WL 5187996, at *6 (S.D. Tex. Feb. 23, 2012) (relying on expert testimony over objection that expert relied on work of others). Likewise, were Cheek properly designated an expert in this action, Vaughn's argument that her Declaration impermissibly relies on hearsay and unauthenticated documents would fail: an expert may rely on such evidence if that evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions of inferences upon the subject." FED. R. EVID. 703.

The District Court set the Receiver's deadline for designating experts and serving the materials required by Federal Rule of Civil Procedure 26(a)(2)(B) as June 17, 2016, but the Receiver did not file anything. *See* Sched. Order [Dkt. #25] ¶ 2. It is not clear to the undersigned why the Receiver failed to designate Cheek as an expert prior to the deadline set by the District Court, especially since Vaughn highlighted this deficiency in his Response, which was filed in December 2015. To date, the Receiver has not requested an extension for leave to file past the deadline, even though failure to adhere to the expert witness requirements of Rule 26(a) can support sanctions as extreme as exclusion of the witness from testifying at trial. *E.g.*, *Wilkins v. Montgomery*, 751 F.3d 214, 224 (4th Cir. 2014). As it stands, then, the Receiver has

failed to properly designate Cheek as an expert in this matter and thus left himself open to Vaughn's objections. Nevertheless, the undersigned concludes that through the application of issue preclusion, the Receiver has established that Vendetta Partners was a Ponzi scheme. The undersigned thus presumes any transfers from Vendetta Partners to Vaughn were made with actual intent to defraud. *See Byron*, 436 F.3d at 558 (existence of Ponzi scheme satisfies Receiver's burden of showing fraudulent scheme).

2. The Receiver Has Proven the Transfers Alleged

Next, the undersigned reviews the specific transfers alleged by the Receiver and Vaughn's objections to the Receiver's evidence where relevant. To reiterate, the Receiver seeks to avoid as fraudulent the following transfers from Vendetta to Vaughn: $126,909.59 to Vaughn directly; $130,000 to Upland Resources for Vaughn's benefit; and $35,344.76 to third-parties for Vaughn's benefit, for a sum of $292,254.35. In addition to these payments, the Receiver alleges the $150,000 of Upland Partners' investment funds retained by Vaughn was retained in satisfaction of Vendetta's compensation obligations and thus constitutes an avoidable transfer. Altogether, the Receiver asserts Vaughn is liable for actual damages of $442,254.35.

The record evidence conclusively establishes that the $292,254.35 transferred to Vaughn directly or for his benefit constitutes fraudulent transfers. The Receiver has provided bank statements, check copies, and wire transfers from the books and records of Vendetta establishing the transfer amounts. *See* Reply App. [Dkt. #21] 619–719. The Receiver has also attached bank statements produced by Vaughn himself which reflect these same values. *Id.* 720–758. This evidence is admissible as the Receiver qualifies as Vendetta's record custodian. *See Byron*, 436 F.3d at 559 (citing *United States v. Jones*, 554 F.2d 251, 252 (5th Cir. 1977)) (rejecting defendant's evidentiary objections to Receiver's reliance on bank records in establishing

existence of Ponzi scheme because Receiver "qualified as . . . record custodian"). Furthermore, Vaughn concedes Vendetta paid him around $10,000 a month from the fall of 2012 to November 2013, an amount which dovetails with the $126,909.56 in transfers the Receiver seeks. Vaughn Aff. ¶¶ 11–12. As to the $35,344.76 paid out by Vendetta to third parties for Vaughn's rent and cleaning services, Vaughn does not dispute the specific amount, but rather whether the payment was made for *his* benefit. *See* Resp. at 14 n.1 ("Mr. Vaughn further challenges any of the purported transfers to third parties. While working for Vendetta any work related expenses Mr. Vaughn incurred were not for his own benefit, but rather were for Vendetta's."). The undersigned finds Vaughn's objection unavailing. The fact remains that Vendetta paid Vaughn's rent and Vaughn's cleaning service—i.e., transfers were made from Vendetta on his behalf, as part of his compensation for his work for Vendetta. To the extent that Vaughn wants to argue he provided reasonably equivalent value in exchange for these services, he may do so by asserting his affirmative defense under TUFTA. What he cannot do, however, is dispute that this money was transferred from Vendetta to a third party for his benefit.

Next, the Receiver seeks to "clawback" $150,000 of Upland Partners investor funds which were retained by Vaughn. Mot. Summ. J. at 8–9. Vaughn admits that Upland Partners raised $1,350,000, of which $1,200,000 was invested in Vendetta.[9] *E.g.*, Resp. at 3. The Receiver asserts that Vaughn retained the remaining $150,000 in satisfaction of promotional expenses Vendetta was obligated to pay to Vaughn. Mot. Summ. J. at 8. Vaughn disputes that he retained the $150,000 figure, countering that he only retained a 10% "management fee" which he was entitled to under the Upland Partners Private Placement Memorandum ("PPM") based on his role as representative of the general partner, Upland Resources. Resp. at 3.

[9] Vaughn does not dispute that he controlled Upland Partners. Vaughn Depo. 50:12-21 (conceding that he owns all of Upland Resources). Nor does he dispute that his assistant occasionally directed Kaelin to transfer funds for Vaughn through Upland Partners. Vaughn Depo. 233:4-11, 233:24-234:3

Despite Vaughn's contention that he only retained a 10% management fee from the Upland Partners investment funds, the Receiver has pointed to evidence in the record establishing that Vaughn retained the full $150,000 from the funds raised. *E.g.*, App. 587. Other than claiming he retained an amount less than $150,000, Vaughn does not point to any evidence establishing this contention. Thus, the amount claimed by the Receiver remains unrebutted. *See Byron*, 436 F.3d at 557 (observing that nonmoving party cannot satisfy its burden with "conclusory allegations" or "unsubstantiated assertions").

Having established that Vaughn retained the full $150,000, the undersigned next examines whether that amount is recoverable by the Receiver. While Vaughn attempts to couch the funds he retained from Upland Partners as a legitimate fee received for managing the limited partnership, the undersigned finds these funds are more accurately viewed as Vaughn's commission fee retained in satisfaction of the broker and promotional services he engaged in on behalf of Vendetta. The record establishes that Vaughn met with Helms and Kaelin to discuss Vendetta investment opportunities on or around July 2012. App. 199–200; *see also* Vaughn Depo. 42 (noting that he first met with Kaelin in "spring or summer of 2012"). By August of 2012, Vaughn had entered into an agreement with Helms and Kaelin to recruit investors for Vendetta. Appx 201–203. Vaughn proceeded to recruit investors for Vendetta by creating Upland Partners in September 2012. *See* Resp. at 3 ("Mr. Vaughn and a group of other individuals . . . agreed to form Upland Partners as an investment vehicle."). Vaughn has admitted that Upland Partners had no operating assets and was "formed strictly to invest in Vendetta." Vaughn Depo. 53.

The record further makes clear that the Helms and Vaughn agreed that the $150,000 of Upland Partners investor funds retained by Vaughn satisfied the commission payments Vendetta

was obligated to pay Vaughn for his promotional services on behalf of Vendetta. *See* App. 587 (noting that Vaughn would retain the $150,000 in investor's cash from Upland Partners in lieu of receiving the agreed upon commission Vendetta owed him for recruiting capital investment into Vendetta). While Vaughn states these retained funds represent a proper management fee, he neither describes his purported management duties, nor provides the court with any evidence of such management activities. Thus, this $150,000 retained by Vaughn serves as the functional equivalent of a commission fee paid out by Vendetta. Indeed, the only reason this money did not come directly from Vendetta's coffers is that Vaughn preempted that process. It is clear, however, that these funds were retained in satisfaction of Vendetta obligations and thus subject to avoidance under TUFTA. TEX. BUS. & COM. CODE § 24.005; *see also Byron*, 436 F.3d at 560 (finding that payments received for securing new investments into Ponzi scheme are avoidable); *In re Ramirez Rodriguez*, 209 B.R. 424, 434 (Bankr. S.D. Tex. 1997) (stating that "as a matter of law, the Defendants gave no value to the debtors [Ponzi scheme operators] for the commissions attributable to investments made by others pursuant to the verbal agreement with [the debtors]."). Vaughn created Upland Partners to secure investment in and promote Vendetta and Vendetta alone; to the extent he retained any uninvested Upland Partners' funds, he did so as a commission.

Vaughn objects to the record evidence the Receiver provides to establish that the $150,000 served as a commission fee, arguing that it constitutes inadmissible hearsay. Resp. at 17 (stating that "the Receiver cites only to three inadmissible, hearsay documents APPX_000584, APPX_000585-586, and APPX_000587-000597"). Vaughn does not elaborate on his hearsay objection or specify the issues with the various documents cited. The undersigned presumes he objects to the documents listed because they are emails sent from Helms to Vaughn

or other parties. *See* App. 585–87. The objected-to documents also contain letters sent from Helms to Vaughn or vice versa. App. 591–92, 96–97.

To the extent Vaughn objects to documents containing statements made by Helms or Kaelin,[10] these statements would be admissible under Federal Rule of Evidence 801(d)(2)(E) as statements made by his alleged co-conspirators. Under Rule 801(d)(2(E), an opposing party's statement is not considered hearsay if it was "made by the party's coconspirator during and in furtherance of the conspiracy." In the Complaint, the Receiver has charged Vaughn with conspiracy, alleging that Vaughn "conspired with Helms and Kaelin to effect the offering of [Vendetta] securities by unlawful means" through the "unlawful offer and sale of securities through unlicensed 'brokers' and the undisclosed compensation of those 'brokers' through the misappropriation and conversion of assets of the Vendetta Entities." Compl. [Dkt. #1] ¶¶ 13, 96–99. Many of the statements complained of were made by Helms or Kaelin in furtherance of the conspiracy—i.e., in furtherance of compensating Vaughn for his recruitment of investors into Vendetta. "Statements regarding the payment of money for services rendered in accomplishing the illegal goals of a conspiracy can be considered to be 'in the course and in furtherance of the conspiracy.'" *United States v. Garcia*, 995 F.2d 556, 561 (5th Cir. 1993) (quoting *United States v. Miller*, 664 F.2d 94, 98–99 (5th Cir.), *cert. denied*, 459 U.S. 854 (1981)). The conspiracy need not even be unlawful for the hearsay exclusion to apply. As the Fifth Circuit has explained, "the statement may be made in furtherance of a 'lawful joint undertaking.' A conspiracy may be shown 'merely by engaging in a joint plan[] . . .that was non-criminal in nature.' Thus, 'a statement is not hearsay if it was made during the course and in furtherance of a common plan or endeavor with a party." *United States v. Nelson*, 732 F.3d 504, 516 (5th Cir. 2013) (internal

[10] The undersigned notes that Vaughn's own statements would not be considered hearsay under Federal Rule of Evidence 801(d)(2)(A).

citations omitted). Furthermore, many of the statements in these documents are not being offered to prove the truth of the matter asserted therein, making them, by definition, not hearsay . *See* FED. R. EVID. 802. Finally, to the extent that Vaughn complains that the Receiver's reliance on books and business records of the Receivership entities constitutes inadmissible hearsay, the undersigned notes that the Receiver qualifies as Vendetta's record custodian. *Byron*, 436 F.3d at 551 (citing *Jones*, 554 F.2d at 252). Therefore, these documents would be admissible under the business records exception to the hearsay rule. *See id.*

Having found the Receiver established both Vaughn's receipt of transfers from Vendetta and that the fraudulent intent behind these transfers due to their emanating from a Ponzi, the burden shifts to Vaughn to prove any affirmative defense under TUFTA.

B. Vaughn's Burden: Affirmative Defense

Under TUFTA, a transfer is not voidable as fraudulent under Section 24.005(a)(1) if the transferee took in good faith and for reasonably equivalent value. TEX. BUS. & COM. CODE § 24.009. Given the fact that the Receiver has proven Vendetta operated as a Ponzi scheme, all transfers from Vendetta to Vaughn are presumptively fraudulent. *E.g.*, *Brown*, 767 F.3d at 439; *accord Warfield*, 436 F.3d at 558. Therefore, the sole issue is whether Vaughn can prove his affirmative defense by a preponderance of the evidence: that he received these transfers in good faith and in return for reasonably equivalent value. *See, e.g.*, *Janvey v. Golf Channel, Inc.*, 792 F.3d 539, 544 (5th Cir. 2015) (noting defendant's burden to prove TUFTA affirmative defense once plaintiff has proven existence of Ponzi scheme).

1. Reasonably Equivalent Value

The Receiver has established that Vaughn received or benefitted from transfers from Vendetta, or otherwise retained funds in satisfaction of obligations of Vendetta totaling

$442,254.35. Specifically, the Receiver established that Helms and Kaelin caused $126,909.59 in transfers to be made from Vendetta to Vaughn directly, $130,000 to Upland Resources LLC for Vaughn's benefit; and $35,344.76 to third-parties for Vaughn's benefit. *See supra* section IV(A)(2). Finally, the Receiver has shown there is no genuine dispute of fact that the uninvested $150,000 balance of Upland Partners investment funds was retained by Vaughn to satisfy Vendetta promotional expenses. Mot. Summ. J. at 8; *see also* App. 585–586. Thus, to retain these funds, Vaughn must prove that he exchanged reasonably equivalent value.

As an initial matter, the undersigned notes that Vaughn mistakes who bears the burden of proof to show that he exchanged reasonably equivalent value for the transfers received. He states, "as the movant, the Receiver has the initial burden of raising a fact issue with respect to Mr. Vaughn's . . . affirmative defense." Resp. at 14; *see also id.* ("[T]he Receiver provides no evidence to support its assertion that Mr. Vaughn worked exclusively as a broker for Vendetta."). To support his claim under TUFTA, the Receiver bore the burden to prove Vaughn received transfers from Vendetta that were made with actual intent to defraud. *Byron*, 436 F.3d at 558. As discussed above, the Receiver has satisfied this burden. *See id.* ("The Receiver satisfied his burden with evidence of [defendants'] receipts from RDI and evidence that RDI was a Ponzi scheme."). Thus, once the Receiver satisfies his burden, it becomes Vaughn's burden—and Vaughn's burden alone—to proof his affirmative defense and establishing that he received the transfers for reasonably equivalent value (and with objective good faith). *See id.* ("While the Receiver's proof satisfied his burden under the UFTA to recover the transfers, . . . [defendant] failed to supply any competent evidence that he received the transfers in exchange for reasonably equivalent value.").

Having clarified who bears the burden of proving the affirmative defense, the undersigned next examines what constitutes "reasonably equivalent value" under TUFTA and the proof Vaughn has put forward in an attempt to satisfy this condition. Pursuant to TUFTA, "[v]alue is given for a transfer or obligation if, in exchange for the transfer . . . an antecedent debt is secured or satisfied." TEX. BUS. & COM. CODE § 24.004(a). Whether the property or service exchanged categorically had any value under TUFTA is a question of law. *Golf Channel*, 792 F.3d at 544. It remains an open question in the Fifth Circuit as to whether "value" and "reasonably equivalent value"—terms of art under TUFTA—are measured from a creditor's viewpoint or from that of a buyer in the marketplace. *See id.* at 544–545 (explaining the tension between competing authorities). The Fifth Circuit recently certified a question to the Texas Supreme Court regarding the perspective from which to measure "reasonably equivalent value." *Id.* at 547. Regardless of how this question is resolved—i.e., no matter whether value is properly measured from the creditor's viewpoint or from that of the buyer in the marketplace—the undersigned finds that Vaughn has not provided sufficient evidence to raise a genuine issue of material fact that he received the transfers from Vendetta in exchange for reasonably equivalent value.

The Receiver characterizes the transfers made to Vaughn as compensation for his promotion of the Vendetta scheme. Mot. Summ. J. at 6. The Receiver next argues that these services do not confer value as a matter of law. *See Byron*, 436 F.3d at 560. Vaughn in turn argues that the transfers to him from the Ponzi scheme were "for non-promotional items such as earned wages and business reimbursements." Resp. at 18. Vaughn states he was hired and paid by Vendetta for "legitimate business work" and that the transfers he received amount to a "consulting fee," which he argues is equivalent to an earned wage and is therefore not fraudulent.

If, as alleged by the Receiver, Vaughn received the transfers from Vendetta in exchange for his broker services and other conduct promoting Vendetta, then the Receiver would be correct that these services would have no value as a matter of law. *See, e.g.*, *Byron*, 436 F.3d at 559–560 (holding that broker services furthering a Ponzi scheme have no value as a matter of law); *In re Ramirez*, 209 B.R. at 434 (stating that "as a matter of law, the Defendant gave no value to the debtors [Ponzi scheme operators] for the commissions attributable to investments made by others pursuant to the verbal agreement with [the debtors]"); *see also Golf Channel, Inc.*, 792 F.3d at 544 (observing that whether property or service exchanged categorically had any value under TUFTA is a threshold question of law).

Even assuming that consulting services of the nature Vaughn purports to have provided constituted reasonably equivalent value, the undersigned finds Vaughn has not presented sufficient evidence to establish that he actually provided these services.[11] He has alleged his consulting services in generalities and has not provided sufficient proof of how these services supported the compensation (i.e., transfer amounts) he received from Vendetta. Aside from asserting that he did not receive the payments from Vendetta as compensation for his fundraising activities, he does not provide any affirmative support to prove his role as a consultant. *See* Resp. at 14. Vaughn cites to no case law or statutory authority to explain why his consulting services amount to an exchange of reasonably equivalent value. Rather, to carry his burden of proving that he exchanged reasonably equivalent value for his alleged consulting services, Vaughn has attached a single affidavit—his own—stating that he served as a consultant for

[11] It is not clear to the undersigned that, even assuming the truth of Vaughn's description of his consulting services, that these services would constitute reasonably equivalent value, under either value metric. Indeed, an argument could be made that Vaughn's consulting services acted to prolong Vendetta's existence and thus in turn prolong its ability to recruit investors into its fraudulent scheme. Depending on the nature of the consulting services rendered then, these services might not create any value independent of the fraudulent scheme. *Cf. Alguire*, 2013 WL2451738, at *9 (noting that "literal value provided to a scheme that only extends the fraud, is not value.").

Vendetta and that any money he received constituted an earned wage. *See generally* Resp. at 1–2 (citing to Vaughn's affidavit to prove he "was hired and paid for legitimate business work").

In his response, Vaughn lists examples of his alleged consulting contributions to Vendetta, such as "actively promot[ing] openness with investors and . . . establish[ing] a single point of contact individual to help accomplish open, responsive communication." Resp. at 4. Yet, Vaughn does not attach any documentation to corroborate these assertions. For example, Vaughn does not attach any contractual agreement between himself and Vendetta describing his work as a consultant, nor does he provide any emails or letters exchanged between Helms, Kaelin and himself memorializing any such relationship. While an affidavit is competent summary judgment evidence, it is not necessarily *sufficient* summary judgment evidence. As the Fifth Circuit has stated, "[a]lthough we recognize that the [defendant's] affidavits and reports constitute valid summary judgment evidence, FED. R. CIV. P. 56(c)(4), we have explained that without more, 'conclusory allegations, speculations, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden' and defeat a motion for summary judgment." *Mosley v. White*, 464 F. App'x 206, 213 (5th Cir. 2010) (quoting *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996)); *see also Douglass*, 79 F.3d at 1430 (finding that nonmovant had not carried burden to rebut movant's evidence where he "offered only personal perceptions and speculation").

The undersigned reiterates that because Vaughn is trying to avoid liability by asserting an affirmative defense, it is Vaughn's burden to come forward with sufficient proof to establish that he received the transfers from Vendetta in exchange for reasonably equivalent value. As the Fifth Circuit has explained, when the burden is on the defendant—as it is here—"[t]he ultimate determination to be made by [the] [c]ourt . . . is whether the defendant[]s has put forth sufficient

facts to 'lead a rational jury to find for [him].'" *BMG Music v. Martinez*, 74 F.3d 87, 91 (5th Cir. 1996) (quoting *Capital Concepts Properties 85-1 v. Mutual First, Inc.*, 35 F.3d 170, 174 (5th Cir. 1994)). Furthermore, even though it is not the Receiver's burden to establish that the services Vaughn exchanged did not bestow reasonably equivalent value, the Receiver has pointed to documents in the record demonstrating that Vaughn served Vendetta in a *promotional* capacity, and not a consulting capacity. *See* App. 201–203 ("Vendetta acknowledges and agrees each Vaughn entity will, and I have and will, invest considerable time, money and effort in identifying and establishing relationships with Potential Investors."). By providing the court solely with his own affidavit containing conclusory and self-serving statements, Vaughn has failed to meet his burden. *See id.* Accordingly, because Vaughn has failed to raise any genuine issue of material fact demonstrating that Vendetta received reasonably equivalent value from Vaughn, the Receiver is entitled to summary judgment on his TUFTA claim.

2. Objective Good Faith

Objective good faith "is determined by looking at what the transferee 'objectively knew or should have known instead of examining the transferee's actual knowledge from a subjective standpoint.'" *Byron*, 436 F.3d at 560 (quoting *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir. 1995)). Put another way, a transferee does not act in good faith if there are sufficient facts that should put him on inquiry notice of a debtor's possible insolvency. *In re Sherman*, 67 F.3d at 1355. *See also In re Pace*, 456 B.R. 253, 275 (Bankr. W.D. Tex. 2011) ("One lacks the good faith that is essential to the [TUFTA] defense to avoidability if possessed of enough knowledge of the actual facts to induce a reasonable person to inquire further about the transaction." (internal quotations and citations omitted)). Indeed, knowledge of facts which "would excite suspicions of a person of ordinary prudence and put him on inquiry of the fraudulent nature of an

alleged transfer" destroys any assertion of good faith. *Hahn v. Love*, 321 S.W.3d 517, 526 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *see also Pan American Petro. Corp. v. Verde Oil Co., Inc.*, 367 F.2d 461, 464 (5th Cir. 1966) (reasoning that a subsequent purchaser's "mere suspicion is not sufficient, and the circumstances or facts must be such as, by the use of proper diligence, will lead to a knowledge of fraudulent intent").

The Receiver points out that at least one potential investor raised red flags about Vendetta's operations in an email exchange with Vaughn from September 2012. Mot. Summ J. at 16 (citing App. 276 –77). In this email, the potential investor specifically asked Vaughn "how [Vendetta can] continue to run at a loss" when "through the 9 months of 2011, they LOST $673,320.23" and "[y]ear end 2010 they LOST $205,268.39." App. 276–77. Despite the issues raised in this email exchange, Vaughn did not inquire further into Vendetta's operations. Thus, there is a strong likelihood that Vaughn cannot establish good faith under an objective standard. *Warfield*, 436 F.3d at 559–60. Vaughn's failure to inquire about Vendetta more closely, in light of the suspicions raised to him, raises serious questions about his good faith defense. *See, e.g.*, *In re Pace*, 456 B.R. 253, 275 (Bankr. W.D. Tex. 2011) (quoting *Cook*, 2001 WL 256172, at *2) (noting that the good faith essential to the TUFTA defenses is destroyed if defendant is "possessed of enough knowledge of the actual facts to induce a reasonable person to inquire further").

Moreover, as to his affirmative defense, Vaughn appears to want to have his cake and eat it too. To argue that the transfers from Vendetta to him were made in exchange for reasonably equivalent value, Vaughn seeks to categorize the services he rendered to Vendetta as consulting services based on his being "hired to improve Vendetta's operations and install 'best practices.'" Resp. at 3–4. He specifically states that one of his major endeavors as a consultant was to

"push[] to restructure and improve the Vendetta accounting department." *Id.* at 16. In such a high level consulting role as Vaughn purports to have been engaged, one would expect a more intimate knowledge of the inner-workings of Vendetta than that of, say, an outside investor. Yet in an attempt to preserve the "objective good faith" element of his affirmative defense, Vaughn states he was "kept out of Vendetta's financials and had no way of knowing about the alleged Ponzi scheme." Resp. at 19. Regardless, the undersigned need not draw a conclusion on good faith, as Vaughn's defense still fails because, as discussed above, he did not receive the transfers from Vendetta in exchange for reasonably equivalent value.

V. UNJUST ENRICHMENT

The Receiver also asserts he is entitled to disgorgement of the transfers made from Vendetta to Vaughn pursuant to the doctrine of unjust enrichment. Compl. ¶ 85. "Unjust enrichment is an equitable principle holding that one who receives benefits unjustly should make restitution for those benefits," regardless of whether the defendant engaged in wrongdoing. *Texas Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) (citations omitted). "Unjust enrichment occurs when the person sought to be charged has wrongfully secured a benefit or has passively received one which it would be unconscionable to retain." *Id.* (citation omitted). "A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992) (citations omitted). Texas courts have stated that "recovery under unjust enrichment is an equitable right and is not dependent on the existence of a wrong." *Villareal v. Grant Geophysical, Inc.*, 136 S.W.3d 265, 270 (Tex. App.—San Antonio 2004, pet.

denied) (citing *Bransom v. Standard Hardware, Inc.*, 874 S.W.2d 919, 927 (Tex. App.—Fort Worth 1994, writ denied)).

The undisputed evidence establishes that the Receiver is entitled to summary judgment on his unjust enrichment claim. As already established above, Vendetta operated as a Ponzi scheme. *See supra* section IV(A)(1). Transfers from a Ponzi scheme are per se fraudulent in the Fifth Circuit. Thus, the transfers Vaughn received from Vendetta—i.e., the money paid to him by Vendetta—represent a fraudulently obtained benefit. Even assuming Vaughn obtained these benefits from Vendetta in good faith, the Receiver's unjust enrichment claim would still stand on the theory that Vaughn passively received benefit that would be unconscionable for him to retain. *See Tex. Integrated Conveyer Sys.*, 300 S.W.3d at 367. The money that Vendetta paid Vaughn was never Vendetta's money to distribute. These distributions to Vaughn resulted not from any underlying business concern producing revenue for Vendetta, but rather from a closed loop, recycling new investors' funds to old investors. The undisputed summary judgment evidence establishes that investors were defrauded through their contributions to Vendetta and that Vaughn—either wrongfully or passively—benefited from this fraud to the tune of $442,254.35. Thus, the Receiver is entitled to disgorgement of these wrongfully obtained funds.

VI. PRE- AND POST- JUDGMENT INTEREST

The Receiver requests pre- and post- judgment interest on the amounts that were fraudulently transferred to and/or unjustly enriched Vaughn. The court believes prejudgment interest is appropriate in this case. "A district court has discretion to impose a pre and post judgment interest award to make a plaintiff whole." *Williams v. Trader Publ'g Co.*, 218 F.3d 481, 488 (5th Cir. 2000) (citation omitted). Prejudgment interest may be awarded in cases involving fraudulent transfers. *See In re Tex. Gen. Petroleum Corp.*, 52 F.3d at 1339–40

(finding that the bankruptcy court did not abuse its discretion by awarding prejudgment interest in fraudulent transfer case brought pursuant to the Bankruptcy Code); *see generally Williams v. Performance Diesel, Inc.*, No. 14-00-00063-CV, 2002 WL 596414, at *5 n.12 (Tex. App.—Houston [14th Dist.] Apr. 18, 2002, no pet.) (citation omitted) ("Because the [Uniform Fraudulent Transfer Act] and the United States Bankruptcy Code, are of common ancestry, cases under one are considered authoritative under the other."). The Receiver and the individuals and entities he represents have been damaged and denied the used of the money that was fraudulently transferred to Vaughn. The amount to which the Receiver is entitled has been delayed since this suit was filed against Vaughn. Therefore, the undersigned **RECOMMENDS** that the District Court award prejudgment interest to compensate the Receiver for such delay.

To calculate prejudgment interest on state-law claims such as the TUFTA claim here, courts look to state law. *Canal Ins. Co. v. First Gen. Ins. Co.*, 901 F.2d 45, 47 (5th Cir. 1990). Texas courts have frequently found that equity allows for an award of prejudgment interest in fraudulent transfer cases and have awarded prejudgment interest in such cases. *Floyd v. Option Mortg. Corp.* (*In re Supplement Spot, LLC*), 409 B.R. 187, 209 (Bankr. S.D. Tex. 2009) (citing *Lentino v. Cullen Center Bank & Trust*, No. 14–00–00692–CV, 2002 WL 220421, at *1 (Tex. App.—Houston [14th Dist.] Feb. 14, 2002, pet. denied) (mem. op.); *McDill Columbus Corp. v. University Woods Apartments, Inc.*, No. 06–99–00138–CV, 2001 WL 392061, at *3 (Tex. App.—Texarkana Apr. 19, 2001, pet. denied) (unpublished); *Arlitt v. Weston*, No. 04–98–00035–CV, 1999 WL 1097101, at *2 (Tex. App.—San Antonio Dec. 1, 1999, pet. denied). Furthermore:

> U]nder Texas law, whether entitlement to prejudgment interest is derived from statute or [ ] equity, prejudgment interest accrues at the rate for postjudgment interest and is computed as simple interest. In relevant part, the applicable statute sets postjudgment interest at either the prime rate as published by the Board of

> Governors of the Federal Reserve System on the date of computation or five percent a year if the prime rate as published by the Board of Governors is less than five percent.

Arete Partners, L.P. v. Gunnerman, 643 F.3d 410, 415 (5th Cir. 2011) (footnote, quotation marks, brackets, ellipses, and citations omitted).

The current prime rate published by the Board of Governors of the Federal Reserve is 3.25%. Accordingly, the District Court should assess prejudgment interest at an annual rate of 5% a year, or $60.58 per day based on the $442,254.35 in transfers received by Vaughn or for his benefit. Furthermore, in Texas, prejudgment interest begins to accrue on the earlier of 180 days after the date the defendant receives written notice of a claim or the day suit is filed. *Primrose Operating Co. v. National Am. Ins. Co.*, 382 F.3d 546, 564 (5th Cir. 2004) (citations omitted). Accordingly, prejudgment interest will accrue from December 15, 2014, 180 days after defendant received written notice of the claim against him until the date preceding entry of summary judgment.

The Receiver also seeks postjudgment interest. Postjudgment interest is awarded as a matter of course pursuant to 28 U.S.C. § 1961. Accordingly, the undersigned **RECOMMENDS** that the District Court award post-judgment interest at the appropriate rate until the judgment is fully paid.

To summarize, because the undersigned finds that the transfers from Vendetta to Vaughn were made with fraudulent intent and because disgorgement of the transfers is warranted, the award of pre and post judgment interest is appropriate. Thus, the undersigned **RECOMMENDS** that the District Court award pre- and post- judgment interest as discussed above.

VII. RECOMMENDATIONS

The Magistrate Court **RECOMMENDS** that the District Court **GRANT** the Receiver's Motion for Partial Summary Judgment Against Grady H. Vaughn III [Dkt. #7].

VIII. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED July 25, 2016

MARK LANE
UNITED STATES MAGISTRATE JUDGE