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.	§	**CAUSE NO. 15-cv-648**
GRADY H. VAUGHN III	§	
Defendant.	§	

OBJECTIONS TO REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to Federal Rule of Civil Procedure 59, Defendant Grady Vaughn submits the following objections to the Report and Recommendation of the United States Magistrate Judge (Docket No. 27 and hereafter the "Report"). Mr. Vaughn objects to the Report in its entirety. As described in more detail herein, the Report applies an incorrect summary judgment standard and applies an incorrect legal standard to Mr. Vaughn's affirmative defense. The Report incorrectly resolves factual disputes (instead of determining whether a genuine issue of material fact exists) and disregards competent summary judgment evidence. The Report also improperly accepts late-offered hearsay documentation from the Receiver. The Report also ignores corporate formalities and the distinction between Mr. Vaughn and separate legal entities in an effort to award the Receiver with $150,000 that has never belonged to the Receivership in any way shape or form. Every portion of the Report is subject to error and objection as described herein and

therefore Mr. Vaugh requests a de novo review of all issues presented in the Motion for Summary Judgment.

I. The Report applied an incorrect summary judgment standard.

Mr. Vaughn objects that the Report does not apply the correct standards for summary judgment. As one example, the Report relies on a Texas state court case for the proposition that a defendant responding to a summary judgment motion must "establish[] an affirmative defense as a matter of law." Report, p. 5 (citing *Bassett v. Am. Nat. Bank*, 145 S.W.3d 696, 696 (Tex. App. – Fort Worth, 2004, no pet.). That Texas opinion has no relevance to this Federal proceeding. Further, the Report misquotes the Texas opinion. The *Bassett* opinion does not require non-moving defendants to establish affirmative defenses as a matter of law. Rather *Basset* states that a defendant *moving* for summary judgment on its own affirmative defense must establish the defense as a matter of law.

The Report errs by repeatedly requiring Mr. Vaugh, the non-movant, to establish his affirmative defenses as a matter of law. For example, the Report requires Mr. Vaughn to "proof [sic] his affirmative defense and establishing [sic] that he received the transfers for reasonably equivalent value (and with objective good faith)." Report, p. 23. The appropriate standard in this circuit is that where a plaintiff moves for summary judgment on an affirmative defense for which the defendant bears the burden of proof, the plaintiff must first point out the absence of evidence of an essential element of the affirmative defense. *See, e.g. Bank One, N.A. v. Prudential Ins. Co. of Am.*, 878 F.Supp. 943, 926 (N.D. Tex. 1995) (citing Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986)). The defendant then need only present evidence demonstrating a genuine issue of material fact as to that disputed element. By requiring Mr. Vaughn to do more than demonstrate a genuine issue of material fact, the Report erred.

II. The Report did not apply the correct legal standard for reasonably equivalent value.

The Report likewise applies the incorrect standard for determining reasonably equivalent value under Texas law. The Report appropriately recognized that "The Fifth Circuit recently certified a question to the Texas Supreme Court regarding the perspective from which to measure 'reasonably equivalent value.' Report, p. 24. The Report incorrectly stated, however, that this question was unresolved and in fact ignored the Texas Supreme Court's ruling on that issue. *Id*.; *see also Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 577 (Tex. 2016). Because it ignored the appropriate standard, the Report's findings on reasonably equivalent value are objectionable in their entirety.[1]

Under the Texas Supreme Court's expansive view of "reasonably equivalent value", Mr. Vaughn has amply demonstrated his entitlement to that defense. Under TUFTA, the appropriate question is "whether the debtor received value (i.e. whether the debtor received consideration with objective, economic value, not merely consideration with some subjective, ephemeral or emotional value) and whether the value exchanged was reasonably equivalent."[2] *Janvey*, 487 S.W.3d at 581. Here, the summary judgment evidence provided by Mr. Vaughn, and indeed by the Receiver, demonstrates that Mr. Vaughn was a consultant hired by Vendetta to provide consulting services. Mr. Vaughn did in fact provide those services and was paid for them. Mr. Vaughn incurred legitimately reimbursable business expenses and was likewise reimbursed for those.

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[1] As one example, the Report relies heavily on the distinction between promotional and non-promotional services. *See, e.g.* Report, pp. 25 ("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."). That distinction is meaningless. TUFTA does not contain different standards for reasonably equivalent value based on whether the debtor was operating a *Ponzi* scheme. *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 582 (Tex. 2016).

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III. The Report improperly denied Mr. Vaughn's request for a continuance.

Mr. Vaughn objects to the Report's denial of Mr. Vaughn's request for a continuance of the summary judgment proceeding. Under Rule 56(f), a party "clearly" meets it burden of demonstrating a need for a continuance where the party has had no access to discovery. *Xerox Corp. v. Genmoora Corp*., 888 F.2d 345, 354 (5th Cir. 1989). Mr. Vaughn demonstrated that the summary judgment motion was filed before discovery began in this case and that he therefor had no access to discovery. As such, Mr. Vaughn clearly met his burden. In denying that request, the Report ignores the appropriate Rule 56 standard and this governing authority.

In denying the request for continuance the Report further errs by making factual findings on contested evidence and "presumptions" from facts not reflected in the record. As one example, the Report "presumes" that Mr. Vaughn's own personal baking records will demonstrate that many of the Vendetta entities' payments for which the Receiver seeks reimbursement were not made to Vaughn, but rather to other parties. Report, p. 7. This is unsupported by any factual record and is admitted to be a "presumption." This is further problematic in that by definition payments from the Vendetta entities to third parties would never have touched Mr. Vaughn's accounts.

IV. The Report incorrectly applies issue preclusion.

The Report improperly applies issue preclusion to the finding that a *Ponzi* scheme exists in this case. It is undisputed that any prior finding of a *Ponzi* scheme was in either a default or in a proceeding where admittedly the defendants did not seriously question key evidence. That does not qualify as fully and vigorously litigating the issues.

V. The Report incorrectly finds factually disputed transfers to Mr. Vaughn.

The Report improperly finds that $292,254.35 was transferred to Mr. Vaughn or for his benefit. *See* Report, pp.17-18. The Report bases this figure solely on purported evidence provided by the Receiver in his Reply brief. Pursuant to the court's local rules, Mr. Vaughn has had no opportunity to respond or object to the Reply brief and it is therefore inappropriate for the Court to consider new evidence provided in a Reply.

Furthermore, the evidence upon which the Report relies is hearsay. The documents found in the Reply brief at 619-719 bear the logo of Austin Telco Federal Credit Union, Amegy Bank, and Whitney Bank. They also include checks that bear the Vendetta Royalty Management name, and also checks from unknown entities such as Barefoot Minerals (*See*, e.g. Docket 21-1 at p. 52). The documents also include unexplained highlights on various entries. Such highlights presumably attempt to establish that certain entries reflect transfers to Mr. Vaughn. Each of these documents is hearsay. The Receivers' affidavit purporting to authenticate these documents indicates they are a combination of documents received from the FBI and from non-party subpoenas (but does not clearly define which documents derive from which source). Regardless, the Receiver includes no business records affidavit or other form of testimony that would establish such records qualify for an exception to hearsay.[3] These various documents are not statements by Mr. Vaughn and are not statements that can be attributed to him. Additionally, even were the Court to accept the documents, there is no evidence by which the monetary figure found by the Report can be derived from the documents presented. The red highlights are unsupported by evidence and should be disregarded to the extent they purport to demonstrate transfers to Mr. Vaughn.

[3] At various times, the Report attempts to excuse the Receiver's failure to prove up its evidence by noting that the Receiver is considered Vendetta's records custodian. *See, e.g.* Report, p. 22. This does not save the evidence in question because the Receiver has offered no affidavit. The only affidavits available are from Mr. A. Goforth, who is not the Receiver and thus not the record's custodian. Furthermore, even a records custodian must prove up the requisite factual predicate for admissibility.

Furthermore, the Report incorrectly holds that the documents found in 720-728 "reflect the same values" as the documents in 619-719. Report, p. 17. First, the documents found in 720-728 bear the name of American National Bank, Northern Trust Company, and Austin Telco Federal Credit Union. These entities are not Mr. Vaughn and therefore any statements therein are hearsay. The Receiver has offered evidence of no applicable hearsay exception. Thus the documents should be excluded in their entirety. Second, the documents do not appear to match the Report's $292,254.35 factual finding. The numbers in documents 619-719 do not add up to that figure (or any other of the Report's figures). The numbers in 619-719 further contain numerous duplicates (e.g. Docket Nos. 21-5 and 21-6, 21-11 and 2-12) entirely unexplained entries (e.g. Docket Nos. 21-19, 21-22 and 21-26), and at least one reversed transaction (Docket No. 21-30). In short, these documents are unexplained, unreliable, and do not as a matter of fact support the Report's finding.

The $292,254.35 is a disputed factual figure and the Report errs by resolving that factual question. As the movant, the Receiver bears the burden of demonstrating that number as a matter of law and has not done so. Indeed, the exact elements and method of the supposed calculation leading up to the $292,254.35 are so undefined that Mr. Vaughn cannot even begin to address any part of that figure.

VI. The Report errs by requiring Mr. Vaughn to pay monies Vendetta paid to other persons/entities.

Mr. Vaughn objects to the Report's finding that the Receiver is entitled to $35,344.76 "paid out by Vendetta to third parties for Vaughn's rent and cleaning services." Report, p. 18. Mr. Vaughn disputes that the Receiver has presented competent summary judgment evidence

establishing that figure.[4] Furthermore, even if such figure is established the summary judgment evidence does not establish that such monies were paid for Vaughn's benefit.

VII. The Report errs by awarding Vendetta monies that Mr. Vaughn has never possessed and that Vendetta has never owned.

Mr. Vaughn objects to the Report's finding that Mr. Vaughn retained $150,000 of monies paid by Upland Partners' investors and the Report's finding that such money constitutes a "transfer" from Vendetta. First, the Report improperly conflates Mr. Vaughn, Upland Resources LLC, and Upland Energy Partners, LP. Report, p. 18 and n. 9; *see also* Response to Receiver's Motion for Partial Summary Judgment Against Defendant Grady H. Vaughn III, p. 3 (describing the various legal entities). The Receiver has neither pled nor proved any veil piercing theory that would justify disregarding the corporate form and distinction between those various entities.

Second, the Report improperly concludes that Mr. Vaughn retained such funds in reliance on an email found at App 587 (Docket No. 8-45). That document, however in no way states that Mr. Vaughn ever possessed the purported $150,000 or that the monies came from Vendetta. In fact, the document specifically states that "Upland" retained those funds and that such funds were from Upland investors (not Vendetta). Further, even if the court were to disregard the document's plain language and find that the document contradicted Mr. Vaugh's testimony to the contrary, at most that would create a fact issue for a jury. It is impermissible for the Report to make a conclusive factual finding in response to contradictory evidence.

Third, the Report improperly finds that the alleged $150,000 constitutes a "transfer" from Vendetta. It is undisputed that such funds were never in Vendetta's possession or monies to

[4] The Report incorrectly states that Mr. Vaughn did not challenge the amount of these supposed payments but rather only whether they were made for his benefit. Report, n. 9. Mr. Vaughn challenged both the amount and whether they were for his benefit. *See, e.g.* Response to Receiver's Motion for Summary Judgment, pp. 8-9. Further, the $35,344.76 appears to be a subset of the $292,254.35 figure and thus the same defects in proof discussed *supra* apply to the $35,344.76 figure.

which Vendetta had a legal claim. The only "transfer" subject to TUFT are those "the debtor made". *See, e.g.* Tex. Bus. & Comm. Code §§ 24.005(a), 24.006(a).

VIII. The Report improperly disregards competent summary judgment evidence.

Mr. Vaughn further objects to the Report's disregard of his affidavit concerning work performed as a consultant. Report, pp. 25-27. Mr. Vaughn presented a competent affidavit demonstrating specific facts and tasks he performed for Vendetta. This testimony creates a genuine issue of material fact as to services provided by Mr. Vaughn to Vendetta and their value. The Report incorrectly disregards that affidavit and demands additional documentation. Summary judgment is not meant to weigh the evidence, but rather to determine if there is a genuine issue of material fact. By disregarding Mr. Vaughn's evidence, weighing evidence, and making factual findings the Report errs.

IX. The Report errs by granting an unsubstantiated unjust enrichment claim.

Mr. Vaughn objects to the Report's rulings concerning the unjust enrichment claim. The Report lists neither the elements of an unjust enrichment cause of action nor any evidence supporting any such element. The Report does not consider the authority holding that unjust enrichment does not exist as an independent cause of action. *See, e.g. R.M. Dudley Constr. Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App. – Waco 2008, pet. denied). The Report disregards the evidence provided by Mr. Vaughn detailing services he provided for the monies that he received. The Report does not state how it calculates the damages awarded under this claim. It appears, however, that the Report includes monies that were paid to and/or possessed by other legal entities. The Report thus improperly ignores the difference between Mr. Vaughn and other persons or legal entities. The Report thus also improperly orders Mr. Vaugh to disgorge funds

which he never received or possessed. The Report also improperly orders Mr. Vaughn to pay the Receivership $150,000 raised by and owned by the Upland entities. The Receivership has never owned or possessed those funds and thus they cannot be subject to an unjust enrichment claim.[5]

X. The Report improperly grants pre- and post-judgment interest.

Mr. Vaughn further objects to the Report's findings concerning pre and post judgment interest. Such findings are premature in that the Receiver is not entitled to recovery. The interest findings should be reserved for trial and post-trial proceedings.

XI. Conclusion

Summary judgment is meant to be a limited remedy. By reaching to resolve literally every issue in this litigation through summary judgment, the Report falls into numerous errors. The Report's errors, as demonstrated by the specific objections pointed out herein, touch on every issue. Therefore, Mr. Vaughn objects to the Report in its entirety and requests de novo review of all issues presented in the Receiver's Motion for Summary Judgment.

Respectfully submitted,

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ATTORNEYS FOR GRADY VAUGHN

[5] Indeed, should such funds be transferred to the Receivership, the Receivership itself would receive an unearned windfall that should be subject to an unjust enrichment claim from the Upland entities.

CERTIFICATE OF SERVICE

I hereby certify that, on August 8, 2016 I caused service of the above and foregoing instrument via filing with the Court's CM/ECF system

/s/ R. Ritch Roberts
R. Ritch Roberts