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.	§	Civil Action No. 15-cv-648-LY
GRADY H. VAUGHN III, Defendant.	§	

RECEIVER'S RESPONSE TO DEFENDANT'S OBJECTION TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION TO GRANT THE RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Vaughn's Objection (Dkt. 28, the "Objection") to the Report and Recommendation of Magistrate Judge Lane (Dkt. 27, the "Report") to grant the Receiver's Motion for Partial Summary Judgment (Dkts. 7, 8, the "Motion") should be overruled, and this Court should adopt the Report in full. In his Objection, Vaughn merely reasserts arguments from his Response to the Receiver's Motion (Dkt. 15) (the "Response") which were rightly rejected by Magistrate Judge Lane, and fails to offer any legal basis for rejecting any aspect of the Report.[1]

A. The Court Properly Denied Vaughn's Request for Continuance

Vaughn's Rule 56(d) request for a continuance to conduct discovery was properly denied. As stated in *Xerox Corp. v. Genmoora Corp.*, 888 F. 2d 345, 354 (5th Cir. 1989), the case on which Vaughn relies for his request for continuance, a continuance motion must show how a continuance will enable the movant, by discovery, to rebut the Receiver's showing of the absence of a genuine issue of fact for trial. It cannot merely rely on vague assertions that additional discovery will produce needed, but unspecified, facts. *Id*. Vaughn must give the court

[1] The Receiver also incorporates by reference his Reply (Dkts. 20, 21) in support of his Motion.

"some idea of how the sought-after discovery might reasonably be supposed to create a [material]factual dispute." *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1292 (5th Cir. 1994). Vaughn failed to offer the required specificity in his Response brief, or otherwise demonstrate the requested relief would create a factual dispute. The relief requested was properly denied.

B. Vaughn Raises No Genuine Issue of Material Fact Regarding the Ponzi Scheme

Vaughn offers no legal support for his objection to the Report's finding that issue preclusion bars relitigation of the Ponzi issue previously decided (Report at 10-17). Obj. at §IV. Rather he vaguely regurgitates the argument from his Response which was rejected by the Court -- that the Ponzi scheme was not fully and vigorously litigated because adverse parties did not "seriously question key evidence." *Id*. The relevant parties had the required incentive to dispute the finding of a Ponzi scheme, which is all the law requires. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (U.S. 1979). The Report's finding of a Ponzi scheme is sound and should be adopted.

C. Vaughn Raises No Genuine Issue of Material Fact with Respect to his Affirmative Defenses

Because the Ponzi scheme is established, all transfers from, and obligations of, the Ponzi scheme to Vaughn (or for his benefit) were made with "actual intent to hinder, delay or defraud creditors" pursuant to TUFTA[2] §24.005(a)(1). Report at 8-9 (citing, *inter alia*, *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2004)). Vaughn fails to raise a genuine issue of fact for trial with respect to each element of his affirmative defense: that he received ***each*** transfer or obligation ***both*** with objective good faith ***and*** in exchange for reasonably equivalent value. TUFTA §24.009(a).

[2] Texas Uniform Fraudulent Transfer Act, TEX. BUS. & COM. CODE §§24.001 *et seq*.

1. The Court Uses the Correct Standard for a Non-Movant Asserting an Affirmative Defense to Oppose Summary Judgment

Vaughn misconstrues the summary judgment standard used in the Report -- Judge Lane correctly relies on Texas law requiring Vaughn, as a "defendant relying on an affirmative defense in opposing a summary judgment," to "come forward with summary judgment evidence sufficient to raise an issue of material fact on each element of the defense." Report at 5 (quoting *Bassett v. Am. Nat. Bank*, 145 S.W.3d 692, 696 (Tex. App.—Fort Worth, 2004, no pet.)). Receiver, as movant, is required only to put forth evidence that would defeat the affirmative defense -- Vaughn must raise a triable issue of fact with respect to that evidence (and with respect to each element of that defense). He failed to do so.[3]

2. The Court Uses the Correct Standard Regarding Reasonably Equivalent Value

Vaughn's reliance on the recent Supreme Court of Texas opinion in *Janvey v. Golf Channel*, 487 S.W.3d 560 (Tex. 2016) -- entered four months following the submission of the Receiver's Motion and relevant response papers to the Court -- is misplaced. Obj. at 3. As an initial matter, Vaughn's claim that the question of determining reasonably equivalent value is resolved in the Fifth Circuit is incorrect -- the Supreme Court of Texas opinion answered a certified question from the Fifth Circuit, which has yet to issue its appellate opinion in the case -- which opinion will be binding on courts in this Circuit. Nor is the status of the *Golf Channel* case grounds to reject the Report's ruling on reasonably equivalent value in its entirety.

Moreover, the *Golf Channel* case is entirely distinguishable from the case at bar. Golf Channel sold commercial airtime to an unaffiliated third-party (Stanford) wholly separate from

[3] Vaughn's focus on the Court's language regarding a transferee "establishing any applicable TUFTA affirmative defenses by a preponderance of the evidence" refer to the Court's discussion of TUFTA's shifting burdens generally. Report at 8-9. The Court cites the correct legal standard in determining summary judgment in the Report, in requiring Vaughn to raise a genuine issue of material fact with respect to each element of the defense. *Id.* at 5. Vaughn failed to do so.

the Ponzi scheme. 487 S.W.3d at 560. Vaughn sits in a position the opposite of Golf Channel's. Far from being an "unknowing vendor[or] service provider[]", Vaughn is an insider to the Ponzi scheme -- both through his son, Vaughn Resp. at 20, and through his own work on behalf of the scheme. Vaughn raised $1,350,000 on behalf of the Ponzi scheme from public investors. Additionally, Vaughn worked closely with the Ponzi scheme perpetrators on a daily basis at the Vendetta offices for over a year. He is simply not in a comparable position to Golf Channel, which sold advertising time on its cable network to Stanford.[4] The Report's findings and conclusions regarding reasonably equivalent value should be adopted.

D. Vaughn Raised No Genuine Issue of Material Fact with Respect to the Transfers and Obligations to Him, and for His Benefit

The transfers and obligations found to have been made from and by the Ponzi scheme were established by the Receiver's summary judgment evidence, which is admissible and indisputable. Vaughn's assertion that bank records of Vendetta and other Receivership Entities are hearsay because they contain the name of the financial institution in which these Receivership Entities held accounts is nonsensical. Obj. at 5-6. All banking records contain such information. These records also establish the accountholders/transferors -- namely, Vendetta Royalty Management, LLC ("VRM"), Vendetta Royalty Partners, Ltd. ("Vendetta") and Barefoot Minerals, GP ("Barefoot") and Iron Rock Royalty Partners, Ltd. ("IRRP") -- all of which are Receivership Entities and established as part of the Ponzi scheme. As the Report states, the Receiver is the records custodian for the Receivership Entities, Report at 17-18, and the banking account records of these entities are admissible as evidence of the transfers made

[4] As detailed further below, at §F, Vaughn has failed to address -- let alone raise a triable issue of fact with respect to -- any fraudulent transfers/obligations of the Vendetta Ponzi scheme to him (or for his benefit) prior to November 14, 2012 (when Vaughn purports to have commenced his "consulting" work for Vendetta). Additionally, as detailed below, Vaughn lacked objective good faith with respect to the Ponzi scheme on September 28, 2012 at the latest. Accordingly, there is no issue of material fact with respect to the elements of the affirmative defense for any transfer/obligation established in the record. TUFTA §24.009(a).

from those accounts.[5]

Other arguments put forth by Vaughn against these banking records are equally unavailing. Barefoot is not an "unknown entity," as claimed by Vaughn -- transfers from that entity to, or for the benefit of, Vaughn were established in the Receiver's Motion, *see* Dkt. 8-1 at para. 47, as were transfers from VRM, Vendetta and IRRP. Moreover, Vaughn's assertion that the red highlights in these records [APPX_000619-719] are somehow "unexplained" is a nonstarter. A cursory review of the documents shows that these highlights correspond to the itemized transfers listed in the Receiver's Motion evidence. Dkt. 8-1 at para. 47 [APPX_000024-28]. A cursory review of this evidence further demonstrates that Vaughn's assertion that these "documents do not appear to match the Report's $292,254.35" figure, Obj. at 6, is wholly without merit. The itemized transfers at APPX_000024-28, which are supported by the banking records at APPX_000619-719, total $292,254.35. This amount cannot be disputed.

It is clear that Vaughn attacks the admissibility and accuracy of the Receiver's evidence because he is not able to dispute it, and therefore raise a triable issue of fact to defeat summary judgment. If the transfers established in the Receiver's evidence were not made as that evidence shows, Vaughn has possession of records which could raise such a factual issue -- his own banking records. Vaughn has not offered a single document into the record, however. As noted in the Report, the only evidence offered by Vaughn was his own self-serving, conclusory affidavit. But "conclusory allegations, speculation, and unsubstantiated assertions[, without more,] are inadequate to satisfy the nonmovant's burden…" in challenging summary judgment. Report at

[5] Vaughn fails to assert any legal basis for the proposition that the appendix material filed with the Receiver's Reply brief (Dkt. 21) -- which correspond directly to the transfers itemized in the Receiver's Motion appendix (compare APPX_000024-28 [Dkt. 8-1] to APPX_000619-758 [Dkt. 21-1 and -2]) -- cannot be considered by the Court. Local Rules permit the nonmovant to seek leave to file response papers after the movant files his Reply. L.R. CV-7(f)(1). Vaughn failed to do so. The Receiver would not have opposed such leave.

26. [6]

E. Vaughn Has Not Raised a Factual Dispute with Regard to Funds Transferred to Third-Parties or Vendetta's $150,000 Commission Obligation

Mr. Vaughn fails to raise a triable issue of fact with respect to the $35,344.76 in rent and cleaning services that the Receiver has established were paid by the Ponzi scheme on his behalf.[7] He asserts only that these payments "were for Vendetta's [benefit]." Resp. at 14 n.1. Such a self-serving, "unsubstantiated assertion" is "'inadequate to satisfy the nonmovant's burden'". *Mosley v. White*, 464 Fed. Appx. at 213. Vendetta paid these funds on Mr. Vaughn's behalf, for his benefit, which payments are voidable under TUFTA. *Id.* § 24.009(b)(1).

Vaughn's arguments regarding the $150,000 in funds retained by him as commissions for his Ponzi-promoting activities demonstrate a misunderstanding of the TUFTA statute. Vaughn asserts that these amounts cannot be voided because they were not transferred by the Ponzi scheme. Obj. at 7. However, TUFTA permits the voiding of obligations which were fraudulently made. *Id.* §24.005(a). The Receiver established that Vendetta obligated itself to compensate Vaughn for the investments which he secured for the Ponzi scheme. Mot. at 11-14; Reply at 5-6. In satisfaction of these obligations, Vaughn retained $150,000 of the funds he raised form investors -- rather than investing these amounts and receiving payment from Vendetta. This distinction is without a difference under TUFTA. How Vendetta satisfied its fraudulent obligation is immaterial, because the obligation may be voided in either case.

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[6] Vaughn wrongly asserts that the Report "disregards" his affidavit as evidence. Obj. at 8. This is not the case – the Reports states the law that "[w]hile an affidavit is competent summary judgment evidence, it is not necessarily *sufficient* summary judgment evidence." Report at 26 (citing *Mosley v. White*, 464 F. App'x 206, 213 (5th Cir. 2010) ("without more, 'conclusory allegations, speculations, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden' and defeat a motion for summary judgment.")). Vaughn offered no summary judgment evidence beyond his affidavit.

[7] Vaughn challenges the Receiver's evidence establishing these amounts on the same grounds as all other transferred amounts. The Receiver incorporates his arguments above, and those in his Motion and Reply, with respect to these amounts.

Furthermore, Vaughn has failed to raise a material issue of fact for trial with respect to payments made from (or obligations of) the Ponzi scheme to accounts of Upland Resources. The Receiver established that Vaughn regularly directed that payments to him be made to his Upland account. Mot. at 7, fn. 14; Reply at 4, fn. 11. Vaughn was the sole owner of Upland Resources and created Upland Partners solely to invest in Vendetta. Report at 3. Vaughn has offered no evidence in this regard to raise a fact issue for trial -- as in all other matters, he relies solely on his self-serving affidavit. The Court should adopt the Report in full.

F. Should the Court Not Adopt the Report in Full, It Should Enter Summary Judgment in Favor of the Receiver Upon *De Novo* Consideration of the Record

Should this Court reject any aspect of the Report's findings on Vaughn's failure to raise a triable fact issue regarding the exchange of reasonably equivalent value for the fraudulent transfers/obligations he received, and the conclusions of law drawn in the Report therefrom, the Court nonetheless should enter an Order granting the Receiver's summary judgment based on its *de novo* review of the record.

It cannot be disputed that Vaughn lacked objective good faith as of September 28, 2012 (at the latest). *See, e.g.*, Motion at 20-21, Reply at 7-10. Accordingly, Vaughn cannot assert the affirmative defense with respect to all transfers/obligations of the Ponzi scheme after this date.[8] Moreover, all transfers prior to November 14, 2012 were in exchange for recruiting investors into the Ponzi scheme, which provides no value as a matter of law under binding Fifth Circuit precedent. *Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006). In fact, Vaughn has failed to address these "pre-consulting" payments and obligations of the Ponzi scheme at all, whether with respect to any exchange of reasonably equivalent value or otherwise. His assertions regarding his

[8] TUFTA requires a transferee to demonstrate ***both*** objective good faith ***and*** the exchange of reasonably equivalent value with respect to each fraudulent transfer/obligation made. TUFTA §24.009(a).

"consulting" work certainly cannot apply to these payments. It therefore not in dispute that all transfers from/obligations of the Ponzi scheme were made when Vaughn either lacked good faith, or failed to exchange reasonably equivalent value. They are therefore avoidable under TUFTA and the Receiver is entitled to summary judgment.

Vaughn frames the services he performed for the Vendetta Ponzi scheme singularly under the umbrella of "non-promotional" consulting services. Resp. at 18. However, by his own admission, he did not begin such work until "the Fall of 2012," at which time he began to receive payments of "$10,000 per month" (in addition to rent, cleaning, and other expenses paid on his behalf). Resp. at 5, Dkt. 15-1 ¶12; APPX_000191-192 (Vaughn Depo. 240:15-241:4). The earliest such payment for these purported "non-promotional" consulting services occurred on November 14, 2012. APPX_000024. Prior to November 14, 2012 Vaughn had directly received fraudulent transfers from the Ponzi scheme of $55,763.20. APPX_000024. He also had retained the $150,000 from Upland investors in satisfaction of the fraudulent obligation of Vendetta. Report at 3-4. Because his purportedly "non-promotional" services did not begin until this time, all previous transfers/obligations were necessarily compensation for promotional services -- no value was exchanged for them as a matter of law. *Byron*, *supra*.

Moreover, to the extent Vaughn has raised a triable issue of fact with respect to the value purportedly exchanged for the "consulting" compensation he received after November 14, 2012, he remains liable under TUFTA because he lacked objective good faith in his receipt of those transfers -- and indeed all transfers made after September 28, 2012. It was on that date that Vaughn received an email (APPX_000276) from an investor he was attempting to recruit which outlined several red flags raised by the financials the investor received, and specifically regarding inconsistencies between the them (showing losses of nearly $900,000 in Vendetta's

first 21 months of operation) and the representations made to him by Vaughn ("You have indicated this is a very profitable venture"). *Id.*

Given the extreme nature of these inconsistencies, Vaughn was thereafter "possessed of enough knowledge of the actual facts to induce a reasonable person to inquire further" about the Vendetta Ponzi scheme. *In re Pace*, 456 B.R. 253, 275 (Bankr. W.D. Tex. 2011). If Vendetta was operating at substantial losses, and was not "a very profitable venture" as Vaughn represented to potential investors, then it could not have made legitimate partnership equity distributions from (non-existent) profits. This, in fact, was the case -- the distributions were Ponzi payments made from new investor proceeds. *SEC v. Helms*, 2015 U.S. Dist. LEXIS 110758, at 86-7 (W.D. Tex. Aug. 21, 2015).

Notwithstanding this knowledge, Vaughn did not inquire further; he never reviewed the purported losses for the time period at issue; he "didn't speak with [the investor] about [the profitability issue] when [he] got the … letter" and "didn't respond" to the investor at all. APPX_000069-70 (Vaughn Depo. 159:18 – 161:2). When shown facts that the "very profitable" company he was promoting was operating at substantial loss, Vaughn "frankly, didn't focus on it." *Id.* It cannot be disputed that Vaughn lacked objective good faith thereafter, and the Receiver is entitled to summary judgment.

G. Vaughn Fails to Raise a Triable Issue of Fact regarding Unjust Enrichment

Contrary to Vaughn's assertion, unjust enrichment is an independent cause of action in Texas. *Team Healthcare/Diagnostic Corp. v. Blue Cross & Blue Shield of Tex.*, No. 3:10–CV–1441–BH, 2012 U.S. Dist. LEXIS 63760, at *20 (N.D. Tex. May 7, 2012) ("While Defendant is correct that some Texas appellate courts do not recognize unjust enrichment as an independent cause of action, the Texas Supreme Court and the Fifth Circuit have recognized unjust enrichment claims.") (citing cases).

Moreover, the Report states that "[u]njust 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.* at 29 (citing *Texas Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 367 (Tex. App.—Dallas 2009, pet. denied) (citations omitted)). These elements were established by the evidence submitted in support of the Receiver's Motion, and Vaughn failed to raise a triable issue of fact with respect to them. The Report correctly found that "the transfers Vaughn received from Vendetta—i.e., the money paid to him by Vendetta—represent a fraudulently obtained benefit," and, at worst, "Vaughn passively received benefit that would be unconscionable for him to retain." Report at 29. The Court should adopt the Report in full with respect to unjust enrichment.

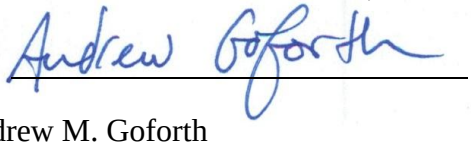
H. Conclusion

This Court should overrule Vaughn's Objection to the Report in every respect. The Report applies admissible evidence to the elements of the Receiver's causes of action for fraudulent transfer and unjust enrichment, and concludes that Vaughn failed to raise triable issues of material fact sufficient to defeat summary judgment. As concluded in the Report, all transfers and obligations of the Vendetta Ponzi scheme to, or for the benefit of, Vaughn are avoidable or disgorgeable as a matter of law. Accordingly, the Court should enter summary judgment in favor of the Receiver as recommended by the United States Magistrate Judge.

Dated: August 22, 2016

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.

By: 

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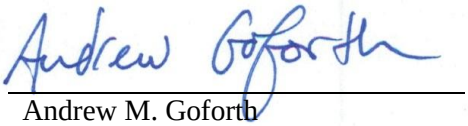
CERTIFICATE OF SERVICE

On August 22, 2016, I filed the foregoing document with the Clerk of the Court for the Western District of Texas using the CM/ECF electronic filing system, through which all counsel of record were served electronically.



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