IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION	§	
Plaintiff,	§	
Vs.	§	**Case No. 3:16-cv-01735-D**
CHRISTOPHER A. FAULKNER, et al.	§	
And	§	
TAMRAM. FREEDMAN and JETMIR AHMEDI, Relief Defendants.	§	

OPPOSER PDM HOLDINGS, LLC REQUESTS PERMISSION TO FILE THIS MOTION and SUPPLEMENTAL DECLARATION and REQUESTS AN ORDER DIRECTING THE RECEIVER TO TREAT OPPOSER PDM HOLDINGS, LLC AS A SECURED CREDITOR OF DEFENDANT

Receiver has refused Opposer's Offer not to Contest Receiver's Voiding, Liquidation, and Sale of Opposer's Conveyances, i.e., if the Receiver would treat Opposer as a Secured Party in this matter

Opposer considered the Receiver's position in the Receiver's Omnibus Reply that royalties cannot be collected based on Opposer's allegedly defective assigned royalty interests. Opposer also decided, in a spirit of cooperation, that the Receiver might increase the value of the Defendant's Estate if Receiver could sell an entire royalty pool through EnergyNet.com. With these things in mind, Opposer contacted the Receiver with a proposed offer.

Specifically, Opposer offered not to oppose liquidation and voiding of Opposer's assigned interests if, before any assets of the Estate are distributed to unsecured creditors, the Receiver would agree to distribute to Opposer $105,831.80. This amount represents the $150,000 purchase price paid by Opposer for Opposer's secured overriding royalty interests minus the $44,168.20 that were paid to Opposer in the form of royalties from 2013-2015. This is far less than Opposer hoped to receive in return for the assignments, but is believed to represent an equitable resolution of the matter given that Opposer is a secured party. THE RECEIVER DECLINED OPPOSER'S OFFER.

It appears from these actions and the Omnibus Response to Objections to Receiver's Proposed Plan of Distribution (hereafter "Receiver's Omnibus Response") that the Receiver contends that the recorded assignments of overriding royalty interests to Opposer were fraudulent. Opposer attaches a copy

of a 2015 case from the United States District Court for the Western District of Texas indicating that, in order to decide whether the recorded assignments are fraudulent, the Court should consider the provisions of the Texas Uniform Fraudulent Transfer Act (TEX. BUS. & Com. Code § 24.005, hereafter referred to as "TUFTA"). *Securities and Exchange Commission v. Robert A. Helms, et al.*, Cause No. A-13, CV 1036 ML (W. Dist. Tx, Austin Div. March 10, 2015) (copy attached as Ex. A, hereafter referred to as the "Helms case"). Thomas L. Taylor also was the Receiver in the Helms case.

Opposer requests the Court to consider the provisions of the TUFTA, and to permit entry of Opposer's Supplemental Declaration submitting evidence related to Opposer's affirmative defenses under TUFTA.[1] **Opposer's evidence establishes that, under TUFTA, Opposer should be shielded from the Receiver's claims of fraudulent transfer because Opposer received the transfer of the assignments from the Defendant in good faith and in exchange for reasonably equivalent value.**

Accordingly, Opposer requests permission to file this motion briefing the Court on TUFTA. Opposer also requests the court to issue an ORDER directing the Receiver TO TREAT OPPOSER PDM HOLDINGS, LLC AS A SECURED CREDITOR OF DEFENDANT.

I. TUFTA SUPPORTS TREATING OPPOSER AS A SECURED CREDITOR OF DEFENDANT

In the Helms case, the District Court for the Western District of Texas explained as follows:

> To void a transfer under the Texas Uniform Fraudulent Transfer Act ("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. *Janvey v. Brown*, 767 F.3d 430, 438 (5th Cir. 2014 (quoting TEX. BUS. & Com. Code § 24.005(a)(1)).

Ex. A, p.12.[2]

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[1] The Court indicated in its Memorandum Opinion and Order dated July 26, 2019, that parties holding conveyances would have an opportunity to object if the Receiver attempted to sell a contested royalty interest before clearing title to that interest. The Court stated in Footnote 3 that it would consider objection to any such sales agreement at that time. However, Opposer submits that it would be wise to decide whether Opposer, and possibly other conveyance holders, should be treated a secured parties at an early date. It is possible that other objectors to the sale of their interests would agree to similar terms as Opposer. This could increase the value of the resulting estate.

[2] Under Tex. Bus. Comm. Code Section Section 24.005 (a) (emphasis added):

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with **actual intent** to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) **without receiving a reasonably equivalent value in exchange for the transfer or obligation**, and the debtor:

> The Court in the Helms case further explained, that:
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> 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. *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cr. 2006).
>
> * * *
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> Once the Receiver establishes the existence of a Ponzi scheme, the burden shifts to [an Opposer] to establish any applicable TUFTA affirmative defenses by a preponderance of the evidence. *Am. Cancer Soc'y v. Cook*, 675 F.3d 524, 527 (5th Cir. 2012) [other citations omitted]. **[An Opposer] may shield itself from the Receiver's claims if it provides it received transfers from [the Defendant] in good faith and 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") § 12.40.081).

Ex. A, p. 12 (emphasis added).

A. OPPOSER PURCHASED THE ASSIGNED OVERRIDING ROYALTY INTERESTS WITH 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.'" *Warfield v. Byron, et al.,* 436 F.3d 551, 560 (5th Cir. 2006) (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).

> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

1. The State of Public Knowledge at the Time of Opposer's Purchase

At the time that Opposer purchased the overriding royalty interests from Breitling Royalties, Chris Faulkner was appearing on a regular basis on news channels as an expert on issues related to the shale industry, including overriding royalty interests. Supplemental Declaration of Paula D. Morris in Support of Opposer's Response to Receiver's Omnibus Reply, ¶ 2 (hereafter the "Opposer's Supp. Decl.") Before purchasing the overriding royalty interests from Breitling Royalties, Opposer's Manager (Paula D. Morris) checked publicly available sites regarding Defendant's financial condition at the time and found nothing to indicate that Breitling Royalties was involved in a fraudulent scheme, or was insolvent. Opposer's Supp. Decl., ¶ 3.

2. Opposer Had No Expectation of a Speedy Return at an Unreasonably High Rate

Unlike in the Helms case, Opposer had no expectation of a speedy return on Opposer's investment at an unreasonably high rate.

The Opposer in the Helms case (Clovis) "expected to receive 'between a 2.5x to 3x return'" within three months of the initial investment. The Court in the Helms case considered Clovis' expectation to be one of a speedy return at an unreasonably high rate.

In contrast, the amount paid for Opposer's assigned overriding royalty interests in the BR-Jericho Property was $150,000. Declaration in Support of Opposition of Claimant Paula D. Morris Appearing Pro Se on Behalf of PDM Holdings, LLC to the Receiver's "Plan" of Distribution (hereafter "Opposer's First Decl."), ¶¶ 5-19. The "Projected Net Monthly Cash Flow to Investors" from the BR Jericho Property was 10.4%. Opposer's Supp. Decl., ¶¶ 4-5. It was projected by Mire & Associates Petroleum Consultants in 2012 that the BR Jericho properties "should produce royalty income for over fifty (50) years." Opposer's Supp. Decl., ¶¶

In other words, **Opposer did not even expect to recoup Opposer's initial investment for a little over 9.6 years** ($150,000 divided by $15,600 projected royalty income). Opposer's only expectation to receive profit was dependent on the properties continuing to produce at a reasonable rate for over 9.6 years.

Given the risk undertaken by Opposer that the BR Jericho Properties might not live up to expectations, and given the inherent necessity to rely on third parties to continue working the wells on the Property, a 10.4% Projected Net Monthly Cash Flow to Investors seemed imminently reasonable to Opposer, if not low. A 10.4% "Net Monthly Cash Flow to Investors" certainly cannot be considered "a speedy return" on Opposer's investment "at an unreasonably high rate."

B. The Value of the Consideration received by the Debtor was Reasonably Equivalent to the Value of the Asset Transferred or the Amount of the Obligation Incurred

The mineral interests assigned to Opposer and filed in the respective counties represent a perfected security interest in a **".00450000% interest** in and to the overriding royalty associated with the lands and leases described in the assignment." Ex. B, Opposer's First Decl.

A security interest always qualifies as reasonably equivalent value because a secured creditor is not allowed to collect more than the amount of debt for which the security interest provides collateral." Like a loan, a "trigger event" allows Opposer to recover its full investment. See *Perkins v. Haines*, 661 F.3d 623, 627 (11th Cir. 2011).

Furthermore, assuming the properties performed as projected, $150,000 was reasonably equivalent to the value of the .0045000% interest in such overriding royalties.

C. OTHER FACTORS OUTLINED IN TEX. BUS. COMM. CODE SECTION 24.005(b) WEIGH AGAINST A FINDING THAT DEFENDANT'S TRANSFER OF OVERRIDING ROYALTY INTERESTS TO OPPOSER WERE FRAUDULENT

Section 24.005 (b) provides that "In determining actual intent under Subsection (a)(1) of this section, consideration may be given to a number of factors." Consideration of a number of these factors weighs against a finding that the Defendant had actual intent to hinder, delay, or defraud any creditor of the debtor.

Specifically:

(1) No one associated with Opposer was an insider in relation to the Breitling Royalties or Defendant (Opposer's Supp. Decl., ¶8);

(2) The debtor gave Opposer possession and control of the recorded deeds to the overriding royalty interests (Exhibit B to Opposer's First Decl., ¶ 19-20);

(3) The transfer of overriding royalty interests to Opposer were publicly recorded and not concealed, (Exhibit B to Opposer's First Decl., ¶ 19-20);

(4) To the best of Opposer's knowledge, the transfer of Opposer's **.00450000% interest** in and to the overriding royalty associated with the BR-Jericho Properties was not a transfer of substantially all of the debtor's assets at the time the transfer was made.

II. THE CASES CITED IN THE RECEIVER'S OMNIBUS RESPONSE ARE DISTINGUISHABLE FROM THE PRESENT CASE

None of cases cited by the Receiver in the Receiver's Omnibus Response **involved a Receiver invalidating perfected security interests in order to liquidate such interests and distribute the liquidated property to unsecured creditors.**[3]

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[3]The Poivey case does not support the Receiver's position. In that case, the Poivey couple (debtor) opposed the Bankruptcy Trustee, arguing that mineral Rights held by one of the couple were exempted altogether from the Poiveys' consolidated bankruptcy estate. *In re Poivey*, Case No. 17-26408-bhl at 10-11 (Bankr. E.D. Wis. Jan 24, 2018). Opposer does not contend that mineral rights must be altogether exempted from the Defendant's estate. Opposer merely requests that Opposer's assigned interests in overriding royalties be treated as perfected security interests and given preference with respect to the interests of unsecured creditors in this case.

The original Ponzi case cited by Receiver (the "Cunningham case") involved funds in account at the Hanover Trust Company that were depleted when investors requested a return of their original investment- without interest- according to the Defendant's agreement. The return of the funds occurred just after the date that Ponzi's insolvency was broadly announced *Cunningham v. Brown*, 265 U.S. 1, 9 (1924). Neither the Cunningham case nor other the other cases cited with the Cunningham case support invalidating perfected security interests in order to distribute the assets to secured and unsecured creditors.

The Receiver also cites the "Global One Case" to support his Plan; however, the Global One Case merely involved an attempt by Opposers to recover funds which allegedly were placed in a separate, dedicated bank account by the Defendant. *CFTC v. PrivateFX Global One,* 778 F. Supp. 775 (S. D. Tex. 2011) (hereafter the "Global One case"). The Global One case does not support invalidating perfected security interests in order to distribute the assets to secured and unsecured creditors. Nor do the cases cited therewith. The Highway 76 North case cited with the Cunningham case does not support the Receiver's Plan. *United States v. 13328 and 13324 State Highway 75 North,* 89 F.3d 551 (9th Cir. 1996). In the Highway 76 North case, a Defendant had transferred funds from one account containing primarily the Opposer's funds and a smaller amount of other client's funds to his personal account and used those transferred funds to purchase a vacation home. The issue was whether the proceeds of the sale of the Defendant's vacation home should be distributed solely to the Opposer because the funds could primarily be traced back to the Opposer. **The Highway 76 North case did not involve liquidating perfected security interests to distribute the liquidated assets to unsecured creditors.**

The "Basic Energy case" involved $500,000 that was placed in an escrow account subject to an escrow agreement. *Basic Energy & Affiliated Resources*, 273 F.3d 657 (6th Cir. 2001). After thirty days, if an acceptable loan had not been secured for the Defendant, the escrow agreement required that the $500,000 in the escrow account be returned to the Defendant's attorney ("McClorey"). In agreeing to forward these funds, the Escrow Investors had been promised that McClorey would return their money if an acceptable loan had not been secured within thirty days; in addition, the Escrow Investors were promised a ten-percent return on their deposits.

An escrow agreement is **not** a perfected security agreement. The Court agreed that the funds in the Escrow account were part of the Defendant's estate and subject to equitable distribution by the Receiver.

The Credit Bankcorp case also does not support the Receiver's Plan. *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 83-89 (2d Cir. 2002). The issue in the "Credit Bancorp" case was whether shares of stock transferred to accounts of Credit Bankcorp ("CBL") under an agreement called the "CBL Credit Facility Agreement" ("SECO CFA") and what the parties referred to as the "Trustee Engagement Letter" ("SECO TEL") could be included in the receivership estate of CBL for *pro rata* distribution to defrauded victims CBL appointed a trustee, but retained "the sole right to transfer some or all of the Assets to other Accounts...." and did so. *Id.* at 83-84. The court found that "although CBL solicited investments with documents indicating in some respects the anticipated use of a trust arrangement, the documents knowingly executed by SECO to transfer its Vintage shares in fact and in law accomplished an outright transfer of share ownership from SECO to CBL." *Id.* at 87. Accordingly, it was not necessary for the Court to decide "whether the equitable interests of the settlor of an *inter vivos* trust may be adjusted by a *pro rata* distribution ordered by a district court." **The Credit Bankcorp case did not involve liquidating perfected security interests to distribute to unsecured creditors.**

Nor does the Wealth Management case support the Receiver's Plan. *SEC v. Wealth Mgmt.*, LLC, 628 F.3d 323, 333 (7th Cir. 2010). From 1985-2003, Wealth Management managed a large number of client's funds held in segregated accounts, separately managed, and typically invested in common instruments such as stocks, bonds, and highly liquid stock and bond funds. However,

The Receiver contends that Opposer is "similarly situated" to other "victims of Faulkner's fraudulent scheme." However, Opposer is not a member of some vague class of royalty investors. Opposer is a secured creditor of Defendant, and is not "similarly situated" to the unsecured creditors of Defendant.

The Receiver argues that "[i]t would be inequitable to reward certain investors for "the merely fortuitious fact that the defrauders spent the money of the other victims" in a different way, citing *United States v. Durham*, 86 F.3d 70, 72 (5th Cir. 1995). However, as a matter of law, secured creditors are treated as a separate class from unsecured creditors. Whether or not a perfected security interests exists is a legal, not an equitable matter.

The Receiver erroneously attempts to place the burden upon Opposer to trace the funds used to purchase the overriding royalty interests assigned to Opposer and, apparently, to prove that those funds were not commingled with others. The Receiver cites a number of cases to support an argument that a "tracing-based" distribution is inequitable. However, the cases relied upon by the Receiver do not relate to property subject to a perfected security interest. In those cases, the Claimant is asking the Court to create a constructive trust. In such a case, a Claimant is required to trace funds.

Opposer does not ask the court to create a constructive trust. Rather, Opposer asks the Court to uphold its perfected security interests in the overriding royalties that were obtained for reasonable value and in good faith, as discussed below in relation to TUFTA. The Receiver should not be permitted to simply invalidate Opposer's perfected security interests in overriding royalties, liquidate those secured assets, and distribute funds from the sale of those assets to unsecured creditors without ensuring that Opposer at least recoups the price paid for those secured assets.

Conclusion

For the foregoing reasons, Opposer respectfully requests that Opposer be granted permission to file this motion and supporting brief and evidence.

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in 2003, Wealth Management established six unregistered investment pools that were similar to hedge funds and invested $102 million of $131 million of funds from client's accounts in these pools. The SEC commenced an enforcement action and proposed a plan of distribution. Opposers were clients who had requested redemption of their investment about a year before suit, alleging that they were creditors. **The Wealth Management case did not involve liquidating perfected security interests to distribute to unsecured creditors.**

The Receiver does not even contend that the Forex Asset Management case involves invalidating perfected security interests in order to distribute the assets to secured and unsecured creditors. *SEC v. Forex Asset Mgmt, LLC*, 242 F.3d 325 (5th Cir. 2001). By Receiver's own admission, the funds involved were funds in a bank account that were transferred to a brokerage account.

The Durham case involved a fraudulent "advance fee loan financing business." *United States v. Durham*, 86 F.3d at 72-73. The frozen funds at issue in the Durham case were located in a single bank account of the Defendant. *Id.* **The Durham case does not involve invalidating perfected security interests in order to distribute the assets to secured and unsecured creditors.**

Opposer also asks the Court to issue an ORDER directing the Receiver TO TREAT OPPOSER PDM HOLDINGS, LLC AS A SECURED CREDITOR OF DEFENDANT in this case.

Opposer asks the Court to issue an ORDER (a) granting the Receiver to right to void and liquidate Opposer's assigned mineral interests on the condition that (b) the Receiver distribute to Opposer the amount of $105,831.80 from the Estate in return for its secured interests in overriding royalties before any Estate assets are distributed to unsecured creditors.

Respectfully submitted,

By: s/Paula D. Morris

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2019, I filed the foregoing MOTION entitled OPPOSER PDM HOLDINGS, LLC REQUESTS PERMISSION TO FILE THIS MOTION and SUPPLEMENTAL DECLARATION and REQUESTS AN ORDER DIRECTING THE RECEIVER TO TREAT OPPOSER PDM HOLDINGS LLC AS A SECURED CREDITOR OF DEFENDANT, the SUPPLEMENTAL DECLARATION OF PAULA D. MORRIS in support of same, and the proposed ORDER granting same using the Court's electronic filing system. I also certify that I sent a true and correct copy of the foregoing documents by First Class Mail by August 15, 2019 to the parties not amenable to service using the Court's electronic filing system:

s/Paula D. Morris
Paula D. Morris