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

MARK W. RASMUSSEN, RECEIVER FOR ARISEBANK,	§	
Plaintiff,	§	
vs.	§	
RICHARD SMITH, JR., and KURT F. MATTHEW, JR.,	§	**Civil Action No. 3:18-cv-1034-M**
Defendants.	§	

REPLY IN SUPPORT OF RECEIVER'S MOTION FOR SUMMARY JUDGMENT

Mark W. Rasmussen, the Court-appointed Receiver for AriseBank and its affiliates in No. 3:18-cv-186-M, *Securities and Exchange Commission v. AriseBank, et al*., United States District Court for the Northern District of Texas, files this Reply in Support of his Motion for Summary Judgment against Defendants Richard Smith, Jr. and Kurt F. Matthew, Jr.

I. PRELIMINARY STATEMENT

In response to the Receiver's Motion for Summary Judgment (Dkt. 21, the "Motion") and Brief in Support (Dkt. 22, the "Brief"), Smith and Matthew have now filed a joint response (Dkt. 26, the "Response"). Distilled to its essence, the Response appears to make the following arguments:

- The Receiver has not established actual fraud in connection with the PIVX-coin transfer to Smith, or Smith's later transfer of some of that value to Matthew. (Resp. at 3-4) The Receiver cannot do so at summary judgment because "intent, like knowledge, is a question of fact generally reserved for the jury." (Resp. at 7-8)

- AriseBank received value from the Term Sheet and, as a result, a genuine issue of material fact exists as to whether that value was "reasonably equivalent" to the PIVX transferred. (*See* Resp. at 4-6, 7-8)

- The real value of the PIVX coins was $200,000, not $1.3 million as stated by the Receiver. (Resp. at 7)

As discussed in more detail below, these arguments are misplaced. First, the Receiver does not need to establish actual fraudulent intent because the Motion seeks summary judgment under the *constructive fraud* prong of section 24.005(a) of the Texas Uniform Fraudulent Transfer Act ("TUFTA").[1] Second, the claim that the Term Sheet somehow provided value to AriseBank is a mere conclusory assertion, unsupported by any evidence, including any language in the Term Sheet itself. Third, the claim that the PIVX coins were worth only $200,000 is based on a misstatement of Smith's deposition testimony and is also unsupported by any evidence.

In truth, the Response is more notable for what it omits than for what it includes. It includes no new summary-judgment evidence—no affidavits, no documents, and no testimony—thus eschewing any attempt to challenge the factual record submitted with the Receiver's Motion and cited in the Appendix in Support (Dkt. 23, "App."). Even more striking, the Response focuses almost entirely on the Receiver's fraudulent-transfer claim: there is *no mention whatsoever* of the Receiver's conversion claim, and only a solitary sentence on the unjust-enrichment claim—a bare assertion, without explanation, that the claim fails "for the same reasons." (Resp. at 5)

[1] Tex. Bus. & Comm. Code Ann. §§ 24.001-24.013.

II. DISCUSSION

A. The Receiver's Fraudulent-Transfer Claim Does Not Depend on Establishing Actual Intent to Defraud

As the Receiver explained in the Brief, this Motion seeks summary judgment under the *constructive fraud* prong of section 24.005(a) of TUFTA. (Resp. at 17-18) That prong simply does not require any allegation or proof of actual intent to defraud.

B. The Response's Assertion That AriseBank Obtained Something of Value Is Unsupported

The Motion and supporting evidence established that AriseBank received nothing of value from Smith or Matthew in connection with the deposit or down payment of 95,000 PIVX coins. It is undisputed, of course, that AriseBank never received any ownership interest in the nonexistent "bank." Smith also purports to claim that his software had value, but the evidence cited in the Motion demonstrated that the software was entirely without value to AriseBank because it was delivered—if at all—only after AriseBank had ceased operations when the Receiver was appointed and after the Receiver demanded that Smith return the AriseBank deposit. (*See, e.g.,* Resp. at 8-10, 15)[2]

Smith and Matthew now seem to argue that the Term Sheet itself somehow provided value to AriseBank. In a section titled, "Facts Related to the Transactions and Value Given," Smith and Matthew assert that, "[e]ven though the Term Sheet is not a final contract …, it is a contract." (Resp. at 5-6) In the immediately prior section, "Value Given Authorities," the Response cites cases for the proposition that, at least in some circumstances, "unperformed

[2] There is evidence the software had no value to anyone. At his deposition, Smith claimed he advertised the software for "$10 million a year," but in the same paragraph admitted that he has *no customers* paying for it. For his part, Jared Rice, CEO of AriseBank, said the parties "never talked about [the software]." (Rice Dep. at 70:10-19 (App. at 90)) His view was that he "was acquiring a bank" and he "didn't care about the software." (*Id.*)

promises" can suffice to establish value, thus defeating fraudulent-transfer claims. (Resp. at 4-5) Presumably, the reader is supposed to conclude that the Term Sheet provided value because it contained "unperformed promises" that could have benefited AriseBank.

This argument is deficient because it fails to identify any "unperformed promises" in the Term Sheet that could have provided value to AriseBank. That failure is not surprising because, as discussed in the Brief, the Term Sheet was a preliminary, nonbinding statement of possible terms and conditions for a deal. (Brief, p. 5-6) The Term Sheet contains no promise by the buyer to pay anything and no promise by the sellers to deliver a bank, Smith's software, or anything else.

Moreover, the circumstances of this case are significantly different from the cases cited in the Response on the issue of "unperformed promises." In each of those cases, the party opposing the claim of fraudulent transfer was able to point to evidence that the debtor obtained some identifiable and promised benefit in exchange for the transfer at issue, and in each case, the promise had been partially or completely performed. Here, by contrast, the Term Sheet contained no promises valuable to AriseBank, and Smith and Matthew delivered nothing else of value to AriseBank:

- *Bowman v. El Paso CGP Co*., 431 S.W.3d 781 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). The court declined to award summary judgment in a fraudulent-transfer case because the defendant introduced evidence that payments from the debtor to him were loans, and that he had repaid them all and even transferred more money back to the debtor than he had received. *Id.* at 783-84.[3]

- *In re Treasure Valley Opport., Inc*., 166 B.R. 701 (Bankr. D. Idaho 1994). The debtor had contracted for the construction of a manufacturing plant and made two progress payments to the contractor before it defaulted. The court denied the trustee's effort to recover the progress payments as fraudulent transfers because

[3] A similar result was reached in *Weaver v. Kellogg*, 216 B.R. 563, 574 (S.D. Tex. 1997), cited without discussion in the Response. There, the court refused to grant summary judgment voiding alleged insider transfers when there was some evidence the insiders had given new collateral in exchange.

the partial payments gave the debtor an interest in the partially completed plant-construction contract. *Id.* at 704.[4]

- *In re Gardner*, 218 B.R. 338 (Bankr. E.D. Pa. 1998). A Chapter 13 debtor sought to void the transfer of her house to her realtor in exchange for the realtor's promise to take over the mortgage. The court disagreed, based on evidence that, prior to foreclosure, the realtor had paid $14,000 in mortgage payments and $15,000 in home repairs. *Id.* at 345-46.

- *Janvey v. Golf Channel, Inc*., 834 F.3d 570 (5th Cir. 2016). The court-appointed receiver for the failed Stanford Ponzi enterprise sought to recover millions of dollars in advertising fees paid to the Golf Channel cable network to recruit "investors." The receiver sought to void the transfers because the advertising would merely entice new investors into the scheme, providing no benefit to creditors. *See, e.g., id.* at 573. Answering certified questions, the Texas Supreme Court held that "value" could be found when what was provided "confer[red] some direct or indirect economic benefit to the debtor" and, if offered and available to others at market rates, was not vitiated by the fact that the debtor was operating a Ponzi scheme. *Id.* (citing *Janvey v. Golf Channel, Inc.,* 487 S.W.3d 560, 572 (Tex. 2016)).

C. The Response Seriously Misstates Smith's Deposition Testimony on PIVX Coin Value

The Receiver's motion established that the 95,000 PIVX coins were valued at $1,320,500 as of the date of transfer, based on a recognized measure of value. (Rasmussen Decl. ¶ 12 (App. at 5)) Citing Smith's deposition testimony at page 31 (App. at 62), the Response now asserts that Smith received no more than $200,000 for sale of the 95,000 PIVX coins, out of which he paid Matthew $123,000. (Resp. at 7)

This assertion seriously misstates Smith's deposition testimony. The complete discussion of value begins on the prior page, and what Smith actually said is that he converted *some* of the PIVX coins on the Coinbase exchange to obtain $200,000. He refused to quantify whatever else he may have received through other means:

[4] A similar result was reached in *In re Fairchild Aircraft Corp.*, 6.F.3d 1119, 1125-26 (5th Cir. 1992), which is cryptically mentioned in the Response. There, the court rejected an effort to void payments from an insolvent aircraft company to support an affiliate airline when the debtor received concrete benefits from the payments, including avoiding return of aircraft and preserving the possibility of a sale of the affiliate.

> Q. In terms of either dollars, bitcoin, or ethereum or anything -- any way you want to quantify it, what did you get as a result of the -- how much bitcoin, how much ethereum, how much dollars did you get from the sale of the 95,000 PIVX?
>
> A. Not as much as you would think.
>
> Q. Well, I don't know. I might have a different idea about that than you. How much did you get?
>
> A. Probably -- I don't feel comfortable saying because I'm not sure, but I'd feel more comfortable looking back through to see.
>
> Q. You said some of the proceeds were converted to US dollars on Coinbase, right?
>
> A. Yes.
>
> Q. Is that the only way you converted anything to dollars?
>
> A. Yes.
>
> Q. How much in dollars did you get out of Coinbase from these 95,000 PIVX?
>
> A. I'm going to say close to $200,000.
>
> Q. What happened to that $200,000?
>
> A. Basically, probably by the time I sold it back to US dollars, $123,000 went to Kurt for the bank purchase, and I retained probably $70,000 or $80,000, whatever the remainder is, for business.

(Smith Dep. at 30:19-31:19 (App. at 61-62))

D. <u>There Are No Issues of Fact with Respect to the Receiver's Unjust Enrichment and Conversion Claims</u>

The Response fails to address the substance of the Receiver's unjust-enrichment and conversion claims. Thus, it fails to controvert the factual basis set forth in the Receiver's Motion establishing each of the elements of those claims.

III. CONCLUSION

The summary judgment record conclusively establishes that the Receiver is entitled to judgment on his claims against Smith for $1,320,050 and against Matthew for $123,000, and against both defendants for prejudgment and post-judgment interest on the respective amounts, together with costs and attorneys' fees against both defendants as permitted under section 24.013 of the Texas Business and Commerce Code.

Dated: April 10, 2019.

Respectfully submitted,

/s/ James A. Cox

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 10, 2019, the foregoing document was served on counsel of record for Defendants through the Court's electronic filing system.

/s/ James A. Cox
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