UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
Case No. 8:20-cv-00325-T-35AEP

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRIAN DAVISON, et al.,

Defendants.
_____/

MOSES & SINGER LLP'S OPPOSITION TO DEFENDANT BRIAN DAVISON'S OBJECTIONS TO THE REPORT AND RECOMMENDATION ON THE MOTION TO MODIFY ASSET FREEZE AND NOTICE OF CHARGING LIEN

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Moses & Singer LLP (the "Firm") submits this response to the objections (Docket No. 870, the "Objection Brief") of defendant Brian Davison to the Report and Recommendation of Magistrate Judge Mac R. McCoy dated March 21, 2023 (Docket No. 860, the "R&R").

PRELIMINARY STATEMENT

This case began with an emergency application by the Securities & Exchange Commission ("SEC") to, among other things, freeze the assets of Mr. Davison. Following an investigation, Mr. Davison faced a major SEC enforcement action regarding his business practices, which were labeled a massive Ponzi scheme by the SEC. With disgorgement and penalties, Mr. Davison was facing a potential damages award in excess of $100 million – money that Mr. Davison did not have, especially since the SEC successfully froze his assets.

Mr. Davison retained Moses & Singer LLP (the "Firm") to represent him pursuant to an engagement letter (the "Engagement Letter") dated February 20, 2020. *See* Docket No. 795, Ex. A. As a former SEC Senior Trial Counsel, the undersigned is aware that in most Ponzi scheme prosecutions, the ultimate judgment entered against the defendant requires a payment in an amount that can never be fully paid, leaving the defendant not only destitute, but with substantial debts for the rest of their lives. Notwithstanding the significant challenges in this case, the Firm succeeded in negotiating a resolution that not only prevented the typical post-litigation result of a defendant being left with no prospect of financial well-being, but preserved a sizeable pool of assets for Mr. Davison and his family. The total value of the amount preserved was more than $1 million. The prospect of such a favorable resolution was almost certainly one of the reasons Mr. Davison hired the Firm.

However, well before this advantageous resolution could be achieved, Mr. Davison ran out of funds to pay counsel. He made various representations that payment would be forthcoming, but to no avail. See Docket No. 795, ¶ 13.

Confronted with a substantial debt to the Firm and the prospect of additional expensive litigation, Mr. Davison agreed to enter into the Reaffirmation Agreement that, *inter alia*, acknowledged his debt to the Firm to secure the Firm's continued representation of him. *See* Docket No. 795, Ex. B. Pursuant to that agreement, Mr. Davison provided the Firm with "a security interest or interests in [his] assets that would only become effective if and when the SEC's injunction is lifted." *Id*. Consequently, and in reliance on Mr. Davison's promise, the Firm continued to represent Mr. Davison with the understanding that its fees were secured by Mr. Davison's interest in his frozen assets and would be paid from those funds once unfrozen.

Notwithstanding his written promises to the Firm, and without any prior notice to the Firm, Mr. Davison sought a partial lifting of the injunction and the release of funds to him and his successor counsel, Stanley Padgett. Docket No. 746. Accordingly, to protect its rights, the Firm filed a notice of a charging lien on those proceeds. Docket No. 755. Mr. Davison objected, and after several rounds of briefing, Magistrate Judge Mac R. McCoy issued the R&R enforcing the Firm's charging lien "such that Moses & Singer LLC is entitled to $571,208.08 plus interest." Docket No. 860, at 17.

As reflected in the R&R, Judge McCoy considered multiple submissions by each party, including Docket Entries 746, 754, 755, 765, 794 and 795. *See* R&R at 2-8. After a review of these submissions, Judge McCoy requested supplemental briefing. This additional briefing included a statement by the SEC that it "takes no position on the issues surrounding the charging lien or whether it is appropriate," (Docket No. 848) as well as additional submissions by Mr. Davison (Docket No. 849) and the Firm (Docket No. 859), regarding, *inter alia*, the arbitration agreement in the parties' Engagement Letter. *See* Docket No. 795, Ex. A.

In determining that the Firm's charging lien should be enforced, Judge McCoy determined that the prerequisites for a charging lien were amply satisfied (R&R at 9-11), and that there was

no dispute regarding the amount paid and the amount owed. *Id*. at 11. The Magistrate further determined that any challenge to the reasonableness of the Firm's fees was more appropriately challenged through arbitration in New York, as per the agreement of the parties. *Id*. at 13-14. He also found that neither enforcing the charging lien, nor a potential arbitration in New York, would disrupt the Receivership. *Id*. at 15-16.

In filing his brief in objection to the R&R, (Docket No. 870, the "Objection Brief"), at no time does Mr. Davison contend that, pursuant to the Engagement Letter, he does not owe these sums for the Firm's representation of him. Instead, he asserts a dozen collateral objections, including some arguments raised for the very first time. Mr. Davison's objections are as weak as they are numerous, and none support rejection of the R&R.

First, Mr. Davison does not cogently dispute that Moses & Singer has satisfied all four requirements for a charging lien: (1) an express or implied contract between attorney and client; (2) an express or implied understanding for payment of attorney's fees out of the recovery; (3) either an avoidance of payment or a dispute as to the amount of fees; and (4) timely notice. If anything, Mr. Davison's refusal to pay the firm on the basis that the fees are "unreasonable," squarely satisfies the third element.

Nor does Mr. Davison dispute the sound law and logic behind the Court's decision not to hold an evidentiary hearing on the topic of the "reasonableness." As the R&R aptly notes, the parties expressly agreed to arbitrate fee disputes; the charging lien simply secures the undisputed principal amount pending resolution of the parties' dispute. Nor does Mr. Davison actually identify any fact to evidence that undermines the propriety of a charging lien so as to necessitate an evidentiary hearing at this stage.

Additionally, Mr. Davison makes entirely novel arguments concerning the "validity" of the Reaffirmation Agreement, which document was attached to the initial notice of charging lien

filed over three months ago. Docket No. 795. To be sure, Mr. Davison does not dispute that he signed the Reaffirmation Agreement or that he owes the sums described in the Reaffirmation Agreement. Rather, he argues that the Reaffirmation Agreement is "inadmissible" as evidence and "invalid" as a contract. As set forth below, these arguments are both improper at this late juncture and without merit under the law.

Finally, Mr. Davison lodges an assortment of collateral attacks on everything from entitlement to interest; to a purported conflict of interest; to the efficiency of an arbitration hearing. At end, Mr. Davison has a lot of objections to paying the Firm for its work. However, none of these objections undermine the validity of the Firm's charging lien. Accordingly, this Court should adopt the R&R.

MR. DAVISON'S SCATTERSHOT OBJECTIONS LACK MERIT

1. The Firm Properly Asserted a Charging Lien Over Mr. Davison's Settlement Proceeds Notwithstanding any Substantively Immaterial Typo in the R&R

Mr. Davison's first objection, and his only valid one, is that the R&R erred by referencing the wrong settlement (Docket No. 760), rather than the settlements between Mr. Davison and the SEC, which are Docket Entries 353, 354 and 355. While the former referenced the resolution between the SEC and Mr. Davison (*see* Docket No. 760 at 13), the Firm's lien was indeed predicated on a prior settlement. While this typographical error in referring to the wrong settlement is irrelevant to the holding, the remedy is simply to correct this substantively immaterial typographical error.

2. The Court Did Not Err in Considering the Reaffirmation Agreement

Mr. Davison's second objection is that the Reaffirmation Agreement is a mere "agreement to agree" and therefore the Court should "reject Report and Recommendation's [sic.] implicit conclusion that the November 5, 2020 letter constitutes a valid contract." Obj. Br. p. 6. However,

the Court did not, implicitly or explicitly, rule that the Reaffirmation Agreement is a valid or enforceable contract. Rather, in determining that the Firm satisfied the first two requirements for a charging lien – a contract between attorney and client and an understanding for payment of attorney's fees out of the recovery – the Court held as follows:

> The Undersigned finds that the first three requirements are easily satisfied. First, there is an express contract—the Engagement Letter—between Moses & Singer LLP and Defendant Mr. Davison. (Doc. 795-1). There is also the second agreement, dated November 5, 2020, ("Reaffirmation Agreement") in which Defendant Mr. Davison reaffirmed his obligation to pay the existing invoices. (Doc. 795-2). Second, the Engagement Letter contains an express understanding for payment of attorney's fees out of the released assets in this action, and the Reaffirmation Agreement reaffirms that commitment.

R&R, p. 9.

In other words, the Court held that the sums are due under the Engagement Letter (a fact that Mr. Davison does not dispute) and that the Engagement Letter contains an understanding for payment of attorney's fees out of the released assets in this action (a fact that Mr. Davison does not dispute). The Reaffirmation Agreement, meanwhile, lists the amount presently owed under the Engagement Letter and "reaffirms" Mr. Davison's obligations under the Engagement Letter to pay the fees out of the released assets. Whether or not the Reaffirmation Agreement is itself an "enforceable contract," Mr. Davison does not and cannot deny that he owes the Firm the principal amount of $571,208.08 pursuant to the Engagement Letter, which sum the parties agreed would be paid out of the funds released in this action. Accordingly, Mr. Davison's second objection should be denied.

3. <u>Arguments Regarding the Admissibility of the Reaffirmation Agreement Fail</u>

Mr. Davison's third objection is that the Reaffirmation Agreement would not be admissible in an evidentiary hearing because it would face an attack based on lack of authentication. This argument – made without reference to any legal authorities – is meritless.

Fed. R. Evid. 901(b) sets out a non-exclusive list of examples of evidence that support a finding that the "item is what the proponent claims it is." As courts in this District have held, in the Eleventh Circuit, the authenticity standard is "fairly liberal." *Washington v. Vogel*, 880 F. Supp. 1534, 1538-39 (M.D. Fla. 1995) (holding that FRE 901 only requires "some competent evidence in the record to support authentication . . . [including] "circumstantial evidence" and that "Conclusive proof of authenticity is not required."). Here, in addition to the circumstantial evidence of authenticity (*e.g.*, no objection by Mr. Davison, the presumptions of regularity that applies to business records, etc.), FRE 901(b)(1) was satisfied as there was testimony by a witness "that an item is what it is claimed to be." Namely, this document was annexed to a Declaration by the undersigned under penalty of perjury introducing and explaining the circumstances behind the making of this agreement. *See* Docket No. 795, paras. 12-15.

Furthermore, Mr. Davison's failure at any time to object or raise any questions of authenticity to the Magistrate Judge bars him from doing so now. Courts in this District have repeatedly held that "when reviewing a motion previously referred to a magistrate judge for consideration, a district court may decline to consider any arguments not first raised to that magistrate judge." *Medi-Weightloss Franchising, USA, LLC v. Sadek*, 2010 WL 1837764 (M.D.Fl. Apr. 29, 2010); *see also American Home Assur. Co. v. Weaver Aggregate Transp., Inc*. 89 F. Supp.3d 1294, 1300 (M.D. Fla. 2015); *Minsurg Intern., Inc. v Frontier Devices*, 2011 WL 678561, *3 (M.D. Fla. Feb. 7, 2011). This reflects a well-established rule across jurisdictions. *See, e.g., Ridenour v. Boehringer Ingelheim Pharm., Inc*., 679 F.3d 1062, 1067 (8th Cir. 2012) (Just as parties cannot present arguments to the appellate court that they did not raise before the district court, "[p]arties must take before the magistrate, 'not only their "best shot" but all of their shots.' ") (citation omitted); "It would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate. Parties must take before the magistrate, 'not

only their 'best shot' but all of their shots." *Borden v. Secretary of Health & Human Services*, 836 F.2d 4, 6 (1st Cir.1987).

4. <u>There is No Conflict of Interest in Filing a Charging Lien</u>

Mr. Davison's fourth objection is that there is an inherent conflict of interest in the Firm filing a charging lien while continuing to represent Mr. Davison. If this objection had any merit, the entire law surrounding the assertion of charging liens would be upended. Lawyers are, of course, entitled to be paid for their services and permitted to ensure that their clients live up to their contractual obligations. Moreover, there is a reason why the Magistrate Judge did not address it: it is legally irrelevant. Mr. Davison has separate counsel in Mr. Padgett. The Firm has not played and does not currently play any active role in representing Mr. Davison. Moreover, the lien is predicated on the prior representation of Mr. Davison, and his failure to pay what he contractually owes the Firm for that representation.[1]

5. <u>The Court Did Not In Fact Rule on Whether Mr. Davison Waived Any Objection to the Reasonableness of the Firm's Fees.</u>

Mr. Davison's fifth objection is that, "despite the lack of briefing from Mr. Davison on the issue of waiver, the Magistrate Judge concluded that Mr. Davison waived any objection to the reasonableness of Moses & Singer's fees." Obj. Br. p. 8. This is simply not true. In fact, the Court concluded that it was not required to consider the reasonableness of fees at issue, finding that "it is not the duty of this Court to step in and determine an alternate amount." R&R, p. 11 (*citing Grunow v. Nova Cas. Co.*, 2021 WL 4976531, at *11 (S.D. Fla. Aug. 13, 2021), *report and recommendation adopted sub nom. Willis v. Nova Cas. Co.*, 2021 WL 4451368 (S.D. Fla. Sept. 29, 2021), *aff'd*, 2023 WL 334567 (11th Cir. Jan. 20, 2023).

[1] In light of Mr. Davison's refusal to live up to his commitments to the Firm and attacks on the Firm, the Firm intends to formally be substituted as counsel or, if necessary, seek leave to withdraw as counsel.

Meanwhile, it is not a "due process" violation for the Court to note that, "if it were" to review the Firm's fees for reasonableness, the fact that Mr. Davison never objected to the Firm's invoices until now would result in a waiver of such objections. However, as made clear in the R&R, arbitration is the appropriate forum to resolve any fee dispute between Mr. Davison and the Firm. The R&R does not deprive Mr. Davison of his "due process" opportunity to contest the reasonableness of the Firm's fees before an arbitrator. To the extent that, as Mr. Davison claims, he "has evidence he could [introduce] at an evidentiary hearing disputing Moses & Singer's claim of waiver," he will have that opportunity. However, for the multitude of reasons articulated in the R&R, this Court is not the proper forum to adjudicate Mr. Davison's fee dispute. Accordingly, Mr. Davison's fifth objection should be denied.

6. <u>Mr. Davison Had Ample Opportunity To, And Did, Submit Evidence</u>.

Mr. Davison's sixth objection is that the R&R makes findings based on evidence submitted by the Firm without having an evidentiary hearing during which Mr. Davison could have presented evidence. Initially, it bears noting that the only "evidence" submitted by the Firm in support of its charging lien a certification of counsel, attached to which were the Engagement Letter and Reaffirmation Agreement, both of which were undisputedly signed by Mr. Davison and the Firm. Mr. Davison had ample opportunity, across two briefs, to dispute that the Firm met the requirements for a charging lien under Florida law. He failed to do so, instead focusing almost entirely on the "reasonableness" of the Firm's fees. This strategic decision by Davison – to argue against the reasonableness of the fees rather than against the elements required for a charging lien – does not amount to a "due process" violation.

Meanwhile, to be certain, Mr. Davison indeed submitted two exhibits totaling fifteen (15) pages in his brief in opposition to the charging lien. *See* Docket No. 765. In no way was he "deprived" of the opportunity to present evidence to contest the required elements for a charging

lien. It is likewise highly misleading to suggest that "the Magistrate Judge made findings based on evidence Moses & Singer submitted without accepting evidence from Mr. Davison at an evidentiary hearing." The Magistrate Judge received evidence from Mr. Davison; however, none of that undercut the Firm's right to a charging lien. As such, Mr. Davison's vague arguments related to his inability to submit certain undisclosed "evidence," should be rejected. The requirements for a charging lien have been met. Mr. Davison's sixth objection should be denied.

7. <u>There is No Material Dispute of Fact as to Whether the Required Elements for a Charging Lien Are Satisfied.</u>

Mr. Davison's seventh objection is that there exists some undisclosed, unarticulated dispute over "the Engagement Letter, the Reaffirmation Agreement, or the fact that Defendant Mr. Davison has already paid $291,700," and therefore "disputes of fact exist for the requirements needed for a valid charging lien under Florida law." Obj. Br., p. 10.

There is no such dispute, nor does Mr. Davison attempt to identify one with any specificity. Meanwhile, if there were, "an avoidance of payment or dispute as to the amount of fees" is literally a required element for a charging lien under Florida common law. *See* R&R p. 8, *citing Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1385 (Fla. 1983). Thus, Mr. Davison's argument that a "factual dispute" exists as to the reasonableness of the Firm's fees, is not an argument against the validity of a charging lien. Moreover, as the Court itself notes, such a factual dispute as to "whether he waived any dispute to the reasonableness of Moses & Singer's fees" (Obj. Br., p. 7) is premature and "not properly before this Court." *Id.*

Meanwhile, the unsupported notion that the Reaffirmation Agreement is not "valid" – whatever that means – was never before raised, including in Mr. Davison's Objection to Notice of Charging Lien (Docket No. 765) or Supplemental Brief (Docket No. 849). As it is a novel and entirely unsupported argument, raised for the first time in his Objection Brief, it must be rejected.

See, e.g., cases cited in reference to Objection No. 3.[2] Mr. Davison's seventh objection must be denied.

8. **Mr. Davison Does Not Have a "Right" to Brief the Case Law Cited in the R&R**

For his eighth objection, Mr. Davison, citing to Seventh Circuit law, argues that the R&R improperly relied on "nonbinding caselaw that neither party cited nor discussed." Obj. Br. 11. This argument is without merit. While it may be true that District Courts are not "obligated to research and construct legal arguments on behalf of the parties," Courts are, of course, permitted to research the law and are not obligated to simply adopt the cases cited by one party or the other *Id.*, *quoting Anderson v. Catholic Bishop of Chicago*, 759 F.3d 645, 649–50 (7th Cir. 2014). Courts regularly cite cases that were not cited by the parties and rest findings on legal grounds not articulated by the litigants. If this were not the case, the common law would be written by victorious litigants and not the Courts.

Moreover, to be certain, Mr. Davison had ample opportunity to brief all issues related to reasonableness prior to the R&R. In addition to submitting a fulsome brief objecting to the Firm's notice of charging lien, the Magistrate Judge *sua sponte* issued an order directing supplemental briefs on the issues of: (i) "whether the Court may evaluate the reasonableness of the attorney's fees associated with the Notice of Charging Lien considering the arbitration provision cited above"; (ii) "whether the Court would impliedly adjudicate the reasonableness of the fees if it recognized the validity of the charging lien;" (iii) "what state's law governs … the validity of the charging lien;" and (iv) "what state's law governs … the applicability of the arbitration provision

[2] Mr. Davison's arguments concerning Moses Singer's "failure to file an exhibit or witness list" are a complete red herring. The Magistrate Judge's Scheduling Order of March 14, 2023 required the parties to file exhibit and witness lists on or before March 28, 2023. Docket No. 857 at 2. However, as the Magistrate issued the Report and Recommendation on March 21, 2023 – or a week prior to the date such filing was to take place – there was no obligation to do so.

in the parties' engagement agreement." Docket No. 821. Mr. Davison submitted a 10-page brief addressing these issues. He had ample opportunity to address case law concerning the propriety of holding a hearing on the "reasonableness" of the amount of a charging lien. His arguments were not adopted.

Moreover, with the exception of *Pandisc* and *Warrington*, discussed below, Mr. Davison does not actually dispute the R&R's application of Florida law on the issue of reasonableness of fees, essentially conceding that the law is not in his favor. Accordingly, Mr. Davison's eighth objection should be denied.

9. **The R&R Did Not Err in Citing *Pandisc v. 321 Music LLC*, 2010 WL 1531479 (S.D. Fla. Apr. 16, 2010) ("*Pandisc*")**

Mr. Davison's Ninth Objection is that the Court's "reliance on *Pandisc* is incongruent with other portions of the Report and Recommendation." Obj. Br. 11-12. In particular, the Objection Brief argues that it is inconsistent for the R&R to deny Mr. Davison's objection to the Firm's charging lien, while also concluding that the Court lacks subject matter jurisdiction to adjudicate Mr. Davison's objection to the reasonableness of the Firm's fees. *Id*.[3]

In short, it is hard to see how the Court's citation to *Pandisc* for a jurisdictional matter that Mr. Davison does not even dispute,[4] is incongruous with the Court's determination that the Firm satisfies the requirements for a charging lien. A charging lien is, by definition "the right of an attorney to… encumber money payable to the client until the attorney's fees have been properly

[3] The Court cited *Pandisc* once, for the uncontroverted premise that a dispute over attorneys' fees alone "does not give this Court subject matter jurisdiction to adjudicate fee disputes between counsel and clients outside of the equitable ancillary jurisdiction that arises from a properly enforced charging lien." 2010 WL 1531479, at *1 n.1.

[4] To be certain, the Objection Brief does not argue that the Court has subject matter jurisdiction over any fee dispute between Mr. Davison and the Firm. Rather, it argues that arbitration over fees would delay the Receivership.

determined and paid." Attorney's Lien, Black's Law Dictionary (11th ed. 2019). The Firm has satisfied the elements for a charging lien to encumber Mr. Davison's settlement proceeds pending any further determination at arbitration. Meanwhile, ample authority holds that the Firm is not required to establish the "reasonableness" of its outstanding fees in order to obtain a charging lien. *See, e.g., Willis v. Nova Cas. Co.*, 2021 WL 4451368 (S.D. Fla. Sept. 29, 2021), *aff'd*, No. 21-13778, 2023 WL 334567 (11th Cir. Jan. 20, 2023); *Rodriguez v. Altomare*, 261 So. 3d 590 (Fla. 4th DCA 2018); *Gossett & Gossett, P.A. v. Mervolion*, 941 So. 2d 1207 (Fla. 4th DCA 2006).

Moreover, a reading of *Pandisc* reveals that the Objection Brief mischaracterizes the basis for its findings. The Objection Brief suggests that the court in *Pandisc* lacked subject matter jurisdiction to adjudicate a fee dispute because the record was underdeveloped. Not so. The Court in *Pandisc* actually held that the record was not sufficiently developed to adjudicate Counsel's charging lien as there had yet to be any "tangible recovery" on behalf of the client nor agreement for payment out of the proceeds. *See, Id.* at *2 ("the motion is notably silent as to what the tangible recovery now is and how the contingency fee agreement would be applied to such recovery."). That is not the case here, where it is undisputed that the settlement corpus represents "tangible recovery" on behalf of Mr. Davison while the Engagement Letter and Reaffirmation Agreement contain an understanding for payment of attorney's fees out of the released assets in this action. *See* R&R, p. 9. Accordingly, for all of the above reasons, Mr. Davison's ninth objection must be denied.

10. **The R&R Does Not Contain Inconsistent Conclusions Regarding the Firm's Entitlement to Interest**

The Objection Brief's tenth Objection is that, because there is a dispute over the amount of fees, logically, "the Magistrate Judge could make no finding on what the principal amount of any fees award would be for Moses & Singer." Obj. Br., p. 13. The Objection Brief further argues

that briefing or evidence on the issue of the principal amount would have established that the Firm's claim is unliquidated, therefore precluding interest.

However, there was ample briefing reflecting the amount of the charging lien, and nowhere did Mr. Davison dispute the principal amount owed: $571,208.08. Nor, until now, has Mr. Davison ever argued that interest should not be applied to that amount, despite the Firm clearly seeking such interest from the inception. Rather, at all junctures, Mr. Davison has argued that the amount is unreasonable (but not unliquidated) because the Firm allegedly charged excess rates and billed excess hours. *See, e.g.,* Docket No. 765, p. 3-9. However, Mr. Davison appears to acknowledge and concede that through September 30, 2020, the Firm charged $862,908.08; that Mr. Davison paid $291,700.00; and that the Firm is now seeking the outstanding principal amount of $571,208.08. *See, e.g.,* Notice of Objection to Notice of Charging Lien, Docket No. 765, p. 5 (listing the amount billed, the amount paid, and the amount outstanding).

Accordingly, while Mr. Davison is free to argue that the fees are unreasonable and pursue arbitration on that issue, there is nevertheless no dispute as to the outstanding principle amount: $571,208.08. Accordingly, the R&R is correct that the Firm's claim is liquidated as it involves a sum certain, and the Firm is entitled to interest thereon. Mr. Davison's tenth objection should be denied.

11. **Mr. Davison Cannot Credibly Argue Against Application of *Warrington*, Having Himself Argued that "This Court is Bound to Apply *Warrington*"**

Mr. Davison's eleventh objection concerns the Court's use of the word "bound." Specifically, Mr. Davison argues that *Warrington v. Rocky Patel Premium Cigars, Inc.*, No. 22-12575, 2023 WL 1818920 (11th Cir. Feb. 8, 2023) ("*Warrington*"), concerning what standard to apply to the issue of waiver, is unpublished and therefore non-binding. However, the Court does not apply *Warrington* as binding. Instead, it finds that "the issue of waiver is not properly before

this Court." R&R p. 13. The Court notes, as *dicta*, that "even if the Court were to decide the waiver issue, Defendant Mr. Davison's citations to case law demonstrate only that waiver occurs when a party chooses to litigate instead." *Id.*, p. 14. However, the R&R explicitly states that the issue of what standard to apply – and therefore the issue of the application of *Warrington* – is premature:

> The issue of waiver is likely premature, so a decision on what standard to apply would also be premature. But even if the Court were to rule on the potential waiver of arbitration, the Undersigned finds that, as Defendant Davison acknowledges, *Warrington* would apply.

Id. at fn. 4.

Moreover, as reflected in the Objection Brief, citing to an unpublished decision is not impermissible, but rather "a district court shouldn't simply cite to one of our unpublished opinions as the basis for its decision without separately determining that it is persuasive." Opj. Br., p. 14-15, *citing McNamara v. Government Employees Insurance Company*, 30 F.4th 1055, 1060–61 (11th Cir. 2022). Here, *Warrington* was plainly not "the basis for [the Court's] decision," as the Court did not even rule on the issue of waiver. *Id.*

Moreover, Mr. Davison himself described *Warrington* as "binding." In his supplemental brief, Davison wrote, "Mr. Davison recognizes that this Court is bound to apply *Warrington* but contends that *Warrington* wrongly decided the issue expressly left open in *Morgan* insofar as it applied a federal standard of waiver to arbitration provisions." Dkt. No. 849, p. 7. As such, Mr. Davison's concern that the Court adopted his own word ("binding") in a section of the Report and Recommendation that is clearly *dicta* and not "the basis for its decision," is not a basis to disrupt the R&R. Mr. Davison's eleventh objection should be denied.

12. **The Charging Lien Will Not Disrupt the Receivership**

Finally, Mr. Davison claims that the charging lien will disrupt the Receivership, even though, somehow, having the funds disbursed into his current counsel's account would be unproblematic. (As noted, the original proposed order had these assets being sent to Mr. Padgett; *see* Docket No. 746 ¶ 1.[5] It is hard to understand how providing these fees to one lawyer is less of an interference than giving them to another. Notably, neither the SEC nor the Receiver have made this argument. Instead, the SEC took the contrary position when it advised the Court that "It is important to note that the charging lien does not involve the SEC, the money it is owed by Davison, or the Final Judgment." Docket No. 848 at 5.

Nor would any arbitration relating to fees owed pose concerns for the Receivership. Notably, Mr. Davison is unable to adduce any evidence of any tangible harms, either suggested or through a declaration or affidavit, to the administration of the receivership based on an arbitration regarding the amount of fees owed. If any such legitimate concerns existed, one would expect either the SEC or the Receiver to identify them.

[5] This proposed order provided that: "The account held at Bank of America, Account number XXXXX8041, held in the name of The Brian D. Davison Revocable Trust, is no longer frozen. Bank of America is directed to mail a check for the proceeds of that account made payable to Brian Davison, to Davison's counsel, Stanley T. Padgett, Padgett Law, P.A., 201 E. Kennedy Blvd., Ste. 600, Tampa, FL 33602, and close the account."

CONCLUSION

The Court should deny Mr. Davison's Objections, with the exception of Objection Number 1, and adopt the Report and Recommendation.

Dated: New York, New York
April 25, 2023

Respectfully submitted,
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