UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No.: 8:20-cv-325-MSS-MRM

BRIAN DAVISON, BARRY M. RYBICKI, EQUIALT LLC, EQUIALT FUND, LLC, EQUIALT FUND II, LLC, EQUIALT FUND III, LLC, EA SIP, LLC, 128 E. DAVIS BLVD, LLC, 310 78TH AVE, LLC, 551 3D AVE S, LLC, 604 WEST AZEELE, LLC, 2101 W. CYPRESS, LLC, 2112 W. KENNEDY BLVD, LLC, 5123 E. BROADWAY AVE, LLC, BLUE WATERS TI, LLC, BNAZ, LLC, BR SUPPORT SERVICES, LLC, BUNGALOWS TI, LLC, CAPRI HAVEN, LLC, EA NY, LLC, EQUIALT 519 3RD AVE S., LLC, MCDONALD REVOCABLE LIVING TRUST, SILVER SANDS TI, LLC, TB OLDEST HOUSE EST. 1842, LLC, STATE OF FLORIDA DBPR, DIVISION OF HOTELS AND RESTAURANTS, CHARLES FARANO and SCOTT STALLMO,

Defendants.
_____/

REPORT AND RECOMMENDATION

Pending before the Court are the Receiver's Renewed Verified Motion for an Order to Show Cause Why Brian Davison Should Not Be Held in Contempt For

Failure to Comply with the Court's Order ("Motion for Order to Show Cause") (Doc. 767) and Davison's Renewed Motion to Alter or Amend the Final Judgment Pursuant to Fed. R. Civ. P. 60(b)(1) and 60(b)(5) ("Motion to Amend Judgment") (Doc. 768). The matters are ripe for review and have been referred to the Undersigned for a report and recommendation.

For the reasons explained below, the Undersigned recommends that the Motion for Order to Show Cause (Doc. 767) be DENIED WITHOUT PREJUDICE, and the Motion to Amend Judgment (Doc. 768) be DENIED.

I. Factual Background

The motions at issue concern the same factual background. As the result of a negotiated resolution, the Court entered Final Judgment against Mr. Davison in August 2021. (Docs. 355, 355-1). The Final Judgment requires Mr. Davison to pay disgorgement of $24,600,000, interest of $913,060, and a civil penalty of $1,500,000, for a total amount of $27,013,060. (Doc. 355-1 at 6). In relevant part, the Final Judgment provides that "any obligation of Davison to satisfy the disgorgement, prejudgment interest, and civil penalty payments, due to the [Plaintiff] as set forth above, shall be deemed satisfied by Davison, if he, within 30 days of entry of this Final Judgment, disgorges" a set of "assets to the Court-appointed Receiver." (*Id.* at 6-7). Among those assets are 480 platinum American Eagle and 61 gold American Eagle coins. (*Id.* at 8). In addition, Mr. Davison entered into an assignment with the Receiver ("Assignment") in which he agreed to turn over all assets on Exhibit A of that Assignment, including the platinum and gold coins. (Doc. 767-1 at 2, 9).

All parties agree that Mr. Davison did not produce 480 platinum coins and 61 gold coins. (*See, e.g.*, Docs. 767, 797). Mr. Davison instead produced 480 silver American Eagle and 58 gold American Eagle coins. (Doc. 797 at 6). The failure to produce 480 platinum and the remaining three gold coins prompted the motion practice now before the Court. The Receiver seeks to hold Mr. Davison in contempt for his alleged failure to comply with the Final Judgment. (Doc. 767). Mr. Davison on the other hand seeks to amend the Final Judgment to reflect that he never possessed those missing coins or has otherwise satisfied the Final Judgment. (Doc. 768).

II. Analysis

The Undersigned begins by analyzing the Motion to Amend Judgment because if the Final Judgment should in fact be amended, the Motion for Order to Show Cause may become moot. Because the Undersigned recommends that the Motion to Amend Judgment be denied, the Undersigned then turns to the Motion for Order to Show Cause.

A. Motion to Amend Judgment

Mr. Davison moves under Fed. R. Civ. P. 60(b)(1) and (5) to amend the Final Judgment. (Doc. 769 at 5). He first argues that he is entitled to relief under Rule 60(b)(5) because he "has satisfied the financial terms of the Final Judgment." (Doc. 769 at 5). Mr. Davison contends that because the Receiver has received assets totaling a value more than the judgment against him, he is entitled "to a satisfaction of the financial aspects of the Final Judgment." (*Id.* at 6). Second, he maintains that

this Court should amend the Final Judgment under Rule 60(b)(1) because he made mistakes as to the number of gold coins he had and whether he possessed platinum or silver coins. (*Id.* at 12).

Both the Receiver and Plaintiff oppose the relief Mr. Davison seeks. (Docs. 792, 796). The Receiver begins by noting that the Final Judgment requires satisfaction through the disgorgement of assets. (Doc. 792 at 4). The Receiver argues, therefore, that because Mr. Davison has not produced all of the gold coins or the platinum coins as required by the Final Judgment, the Court should not recognize the judgment satisfied under Rule 60(b)(5). (*Id.* at 14). As for mistake under Rule 60(b)(1), the Receiver asserts that Mr. Davison has not met his burden. (*Id.* at 18).

Similarly, Plaintiff argues that Mr. Davison has not satisfied the judgment to entitle him to relief under Rule 60(b)(5). (Doc. 796 at 5-6). Nor, Plaintiff contends, has Mr. Davison established the type of "mistake" that entitles him to relief under Rule 60(b)(1). (*Id.* at 6).

1. Rule 60(b)(5)

Under Rule 60(b)(5), a "court may relieve a party or its legal representative from a final judgment" when "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). "The section of [R]ule 60(b)(5) which provides relief when judgments are satisfied applies when damages are paid before trial or a tortfeasor or obligor has paid the judgment

debt." *Gibbs v. Maxwll House, A Div. of Gen. Foods Corp.*, 738 F.2d 1153, 1155 (11th Cir. 1984). Mr. Davison relies on that provision, arguing that the Final Judgment has been satisfied. (Doc. 768 at 5-9).

The Undersigned finds Mr. Davison's arguments regarding his satisfaction of the monetary element of the Final Judgment to be unpersuasive. It is true that the Final Judgment holds Mr. Davison liable "for a total of $27,013,060." (Doc. 355-1 at 6). But the Final Judgment also establishes that "any obligation of [Mr.] Davison to satisfy the disgorgement, prejudgment interest, and civil penalty payments . . . shall be deemed satisfied by Davison if he, within 30 days of entry of this Final Judgment, disgorges [certain] assets." (*Id.* at 6-7). The Final Judgment identifies those assets, (*id*. at 7-8), which specifically includes "Platinum American Eagles (480)" and "Gold American Eagles (61)," (*id*. at 8). Importantly, the Final Judgment does not condition satisfaction of the judgment on payment of the $27,013,060; rather, the turnover of the specified assets satisfies the judgment, regardless of the value of the assets. (*Id.* at 6-7). In fact, the Final Judgment provides that Mr. "Davison agrees that once he turns over the aforementioned property and assets, he relinquishes all legal and equitable right, title and interest in the property and assets ('Funds'), and no part of the Funds shall be returned to him." (*Id.* at 9). Thus, simply because the Receiver may have possession of assets in excess of $27,013,060 does not mean, by the plain terms of the Final Judgment, that Mr. Davison has satisfied the judgment against him.

In support of his position, Mr. Davison relies on *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268 (11th Cir. 2009). He cites that case, along with the two Fifth Circuit cases relied on by the Eleventh Circuit in that decision, for the proposition that it is within the discretionary powers of this Court to amend the Final Judgment so that the Receiver does not receive a windfall. (Doc. 768 at 6-7). But the Receiver is not at risk of receiving a windfall. The Final Judgment contemplates that Mr. Davison must turn over certain assets, including the coins, to satisfy the Final Judgment, and, by not doing so, Mr. Davison has not satisfied the Final Judgment. (Doc. 355-1 at 7-8). Mr. Davison is not entitled to a return of those assets should their total value exceed the $27,013,060 for which he is liable. (*Id.* at 9). Thus, this case is readily distinguishable from *AIG Baker* and the cases cited by the Eleventh Circuit in that decision. *AIG Baker*, 579 F.3d at 1273-74 (affirming district court's decision to grant Rule 60(b)(5) motion regarding an arbitration award for tax payments when evidence demonstrated that the party had already paid some taxes to the taxing authority); *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697, 698 (5th Cir. 1955) (reversing district court's decision to deny Rule 60(b) relief when a defendant allegedly failed to make one of eighteen installment payments but later found copies of documents that conclusively proved that the defendant had made the disputed payment); *Johnson Waste Materials v. Marshall*, 611 F.2d 593 (5th Cir. 1980) (reversing district court's denial of motion to amend judgment after the defendant discovered cancelled payroll checks along with other evidence that demonstrated that the plaintiffs should have been awarded less at trial).

In sum, the Undersigned finds that Mr. Davison has not established that he is entitled to relief under Rule 60(b)(5).

2. Rule 60(b)(1)

Under Rule 60(b)(1), a "court may relieve a party or its legal representative from a final judgment" for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). "Relief is appropriate under this subdivision . . . 'in only two instances: (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge had made a substantive mistake of law or fact in the final judgment or order.'" *Vickery v. Medtronic, Inc.*, No. CV 12-00731-CB-C, 2014 WL 12606505, at *2 (S.D. Ala. Apr. 8, 2014) (quoting *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000)). "Excusable litigation mistakes are not those which were the result of a deliberate and counseled decision by the complaining party." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999). "Rather, the kinds of mistakes remediable under a Rule 60(b)(1) motion are litigation mistakes that a party could not have protected against, such as counsel acting without authority." *Id.*[1]

[1] Another requirement for a motion filed under Rule 60(b)(1) is that it be filed "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). The Court entered the Final Judgment on August 5, 2021, and Mr. Davison filed the motion *sub judice* on January 17, 2023. (Docs. 355-1, 768). Although that is beyond the one-year deadline, Mr. Davison originally filed his request in his motion on July 26, 2022. (Doc. 605). The Court denied that motion without prejudice with leave to renew after some third-party discovery. (Doc. 708). Because the original request was timely filed, the Undersigned perceives no timing problem with the current motion.

The Undersigned finds that the mistake at issue here is not the kind of mistake that Rule 60(b)(1) contemplates for amending the judgment. Taking him at his word, Mr. Davison erred in counting his gold coins and submitting that he had platinum coins instead of silver. (Doc. 768 at 9). The mistake, therefore, was entirely attributable to Mr. Davison: he could have ensured that the assets he claimed to have were actually in his possession. "Rule 60(b) is not designed to help [a] party that has stipulated to certain facts or has not presented known facts helpful to its cause when it had the chance, or to provide relief due to ignorance nor carelessness on the part of a litigant or his attorney." *Munoz v. Bd. of Trustees of Univ. of Dist. of Columbia*, 730 F. Supp. 2d 62, 68 (D.D.C. 2010) (internal citations and quotations marks omitted). Put simply, Rule 60(b)(1) is not "designed to give a [litigant] a second bite at the apple by changing the factual allegations where the [litigant] has no excuse for failing to include the correct factual information" in the first instance for the Court's consideration. *Id.* The mistakes of not counting the number of gold coins and recognizing whether the other coins were platinum or silver are certainly things Mr. Davison could have protected against. *Yapp*, 186 F.3d at 1231. Therefore, the Undersigned does not find that Mr. Davison made an excusable litigation mistake such that relief under Rule 60(b)(1) would be appropriate.

In sum, the Undersigned finds that Mr. Davison has not established that he is entitled to relief under Rule 60(b)(1) or (5). Accordingly, the Undersigned recommends that Mr. Davison's Motion to Amend Judgment (Doc. 768) be denied.

B. Motion for Order to Show Cause

Having recommended that Mr. Davison's Motion to Amend Judgment be denied, the Undersigned now turns to the Receiver's Motion for Order to Show Cause. (Doc. 767). The Receiver first contends that the Final Judgment (Doc. 355-1) is a valid order of the Court that is clear and unambiguous. (Doc. 767 at 12). Mr. Davison failed to comply with that order, the Receiver maintains, by not producing the requisite platinum and gold coins. (*Id.*). The Receiver also contends that Mr. Davison's failure to comply with the Final Judgment is of his own making; in other words, Mr. Davison had the ability to comply with the judgment and did not. (*Id.* at 12-14). The Receiver points to other alleged instances of Mr. Davison failing to comply with court orders. (*Id.* at 14-17). Finally, the Receiver emphasizes that contempt is an appropriate remedy because he is not seeking to collect a money judgment. (*Id.* at 17).

In opposition to the motion, Mr. Davison argues that the Receiver has not met the legal standard for civil contempt. (Doc. 797 at 9-12). He primarily asserts that the Receiver has not established by clear and convincing evidence that he had the ability to comply with the Final Judgment. (*Id.* at 12). Mr. Davison claims that he does not have the coins and that he made a mistake when he said he did. (*Id.* at 13-14). Mr. Davison also maintains that because he, in good faith, attempted to comply by turning over the assets he did possess, he has demonstrated an adequate defense to civil contempt. (*Id.* at 15-16). Even if there were not a complete defense, Mr. Davison contends that because he has satisfied the judgment's monetary value and

contempt remedies are limited to actual damages, the Receiver cannot use contempt to collect on the missing coins. (*Id.* at 16-17). To the extent the Receiver is attempting to collect the monetary value of the coins, Mr. Davison argues that contempt cannot be used to collect a money judgment. (*Id.* at 17-18). Finally, Mr. Davison calls on the Court to reject the Receiver's attempt to extract additional resources from him. (*Id.* at 18-19).

"Courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Brown v. Omni Mgmt. Grp., LLC*, No. 8:18-cv-1772-T-35CPT, 2020 WL 7401272, at *2 (M.D. Fla. Nov. 12, 2020) (citing *Shillitani v. United States*, 384 U.S. 364, 370 (1966)). "In a civil contempt proceeding, the petitioning party has the burden to establish by 'clear and convincing' proof that the underlying order was violated." *Id*. (citing *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984)). "This burden of proof is more exacting than the 'preponderance of the evidence' standard but, unlike criminal contempt, does not require proof beyond a reasonable doubt." *Jordan v. Wilson*, 851 F.2d 1290, 1292 (11th Cir. 1988). "The clear and convincing evidence must establish that: (1) the allegedly violated order was valid and lawful; (2) the order was clear and unambiguous; and (3) the alleged violator had the ability to comply with the order." *Ga. Power Co. v. N.L.R.B.*, 484 F.3d 1288, 1291 (11th Cir. 2007) (original typeface omitted). "Once this *prima facie* showing of a violation is made, the burden then shifts to the alleged contemnor to produce evidence explaining his noncompliance at a 'show cause' hearing." *Chairs v.*

Burgess, 143 F.3d 1432, 1436 (11th Cir. 1998) (internal quotation marks omitted). "Civil contempt sanctions may be imposed for either or both of two distinct purposes, to coerce compliance with a court order, and to compensate the complainant for actual losses sustained by him as the result of the defendants' contumacy." *In re Chase & Sanborn Corp.*, 872 F.2d 397, 400-01 (11th Cir. 1989).

Here, there is no genuine dispute over the first two elements of the contempt *prima facie* case: (1) there is a valid and lawful order, and (2) the order is clear and unambiguous. The Final Judgment is an order of the Court. (Doc. 355-1). And the Final Judgment, including the Assignment, is clear and unambiguous in that Mr. Davison must produce a certain set of assets, including the platinum and gold coins. (*Id*. at 8). The crux of the issue, then, is whether the Receiver has established by clear and convincing proof that Mr. Davison had the ability to comply with the Final Judgment. For the reasons explained below, the Undersigned finds that the Receiver has not met that burden.

In support of the notion that Mr. Davison had the ability to comply with the Final Judgment, the Receiver stresses that "it was Mr. Davison, through counsel, that communicated to the SEC and the Receiver that he was in possession of 480 platinum coins and 61 gold coins." (Doc. 767 at 13 (citing Doc. 767-5)). The Receiver attached to his motion an email from Mr. Davison's counsel confirming to the Receiver's counsel that Mr. Davison was in possession of the coins. (Doc. 767-5 at 4 ("Mr. Davison currently has 61 Gold American Eagles at home . . . . [H]e does have 480 Platinum American Eagles.")).

For his part, Mr. Davison submits through declarations to the Court that he does not have and has never had 480 platinum coins or the three missing gold coins. (*See, e.g.*, Doc. 797-1 at 2 ("I have never owned any other set of 480 coins. After I learned of this case I never sold, transferred, concealed, or gave away any set of 480 coins.")). The Court previously permitted some third-party discovery to learn more about where Mr. Davison had purchased the coins. (Doc. 708). That discovery posed more questions than it answered: there was no evidence that Mr. Davison had purchased a set of 480 silver or platinum coins. (*See* Doc. 797-1). Subsequently, Mr. Davison represents that he has "reviewed all of the personal credit card statements in [his] possession," including the time frame of December 2013 to December 2020, and discovered no purchase for the coins. (Doc. 797-1 at 3). He also reviewed his relevant bank records. (*Id.*). In reviewing both his credit card statements and his bank records, Mr. Davison could not "locate a charge, check or wire transfer that would correspond to the purchase of either 480 silver or platinum coins." (*Id.* at 4).

The burden is on the Receiver to show by clear and convincing evidence that Mr. Davison had the ability to comply with the Court's order. *Brown*, 2020 WL 7401272, at *2. The Undersigned finds that the Receiver has fallen just short of that burden. In doing so, the Undersigned does not discount the fact that Mr. Davison affirmatively represented to the Receiver, the SEC, and this Court that he had all the assets listed in the Assignment, including the missing coins, in his possession. But upon review of the materials submitted by Mr. Davison, the evidence currently weighs in favor of finding that he never had possession of 480 platinum coins or the

three additional gold coins. Without ever being in possession of those assets, Mr. Davison could not comply with the Court's Final Judgment by then turning over those assets to the Receiver.

The Receiver attributes dishonest motives to Mr. Davison in not turning over the required coins. (Doc. 767 at 15 ("While Davison might characterize his noncompliance as either inadvertent, unintentional, or immaterial, that is not the case.")). Yet the requirements for a *prima facie* case of contempt do not include an analysis in into the alleged contemnor's subjective intent. *FTC v. Leshin*, 719 F.3d 1227, 1232 (11th Cir. 2013) ("'[I]n a civil contempt proceeding the question is not one of intent but whether the alleged contemnors have complied with the court's orders.'") (citation omitted). It matters only that there was a court order that was valid, lawful, clear, and unambiguous and for which the contemnor had the ability to comply. The Receiver has not submitted evidence that demonstrates by clear and convincing evidence Mr. Davison actually had possession of the missing coins.

The Receiver also argues that Mr. "Davison could also purchase 480 platinum coins and turn them over to the Receiver in accordance with the Court's order." (Doc. 14). This argument is not without merit. But the Receiver makes no showing of how Mr. Davison could make such a purchase considering the freeze on his assets. (*See* Doc. 10 (order instituting asset freeze)). If Mr. Davison could use funds to purchase the required assets and then turn them over to the Receiver, that would both ensure his compliance with the Final Judgment and demonstrate that he had

the ability to comply with it. The Receiver, however, has not met his burden in demonstrating that fact by clear and convincing evidence.[2]

In sum, the Receiver has not met his burden of demonstrating the *prima facie* elements of contempt. Accordingly, the Undersigned must recommend that the Receiver's motion be denied, but the Undersigned recommends denial without prejudice to allow the Receiver another opportunity to meet his burden. To allow the parties additional information into the missing coins, the Undersigned will issue concurrent with this Report and Recommendation an order on Mr. Davison's pending motion to quash (Doc. 637), which will allow for additional discovery into the missing coins. After receiving and evaluating that discovery, the Receiver should be given the opportunity to bring his motion again.

Alternatively, if the presiding United States District Judge disagrees with the above findings and recommendations and finds that the Receiver has established the

[2] The Receiver proposes two other solutions: (1) Mr. Davison disgorge other assets that he was initially allowed to retain, or (2) Mr. Davison turnover assets or money for the difference in value between the platinum and silver coins. (Doc. 767 at 14, 17). These may be viable options for the parties to resolve the dispute among themselves. But neither solution stems from Mr. Davison's ability to comply with the Final Judgment; in other words, the Receiver relies on a finding of contempt to effectuate these solutions. Because the Undersigned finds that the burden has not been met for a contempt hearing, these solutions are inapplicable at this time. For the benefit of the parties, though, the Undersigned notes that there is some precedent for the Receiver's second solution in that a potential contempt remedy can be granting a compensatory money judgment. *FTC v. Leshin*, 719 F.3d 1227, 1235 (11th Cir. 2013) ("The district court merely did what it could have done from the beginning of the contempt proceeding: it granted a compensatory contempt remedy in the form of a money judgment.").

prima facie case of contempt, the Undersigned recommends that a show cause hearing be set.[3]

In circumstances where a party has disobeyed a court order, the opposing party generally moves "the court to order the [offending party] to show cause why he should not be held in contempt and sanctioned until he complies." *Mercer v. Mitchell*, 908 F.2d 763, 768 (11th Cir. 1990). "If the court finds that the conduct as alleged would violate the prior order, it enters an order requiring the defendant to show cause why he should not be held in contempt and conducts a hearing on the matter." *Id.* The burden shifts to the offending party to show (1) that he did not violate the court order or (2) that his noncompliance was excusable. *Id.*; *Chairs*, 143 F.3d at 1436 (noting that the contemnor bears this burden at a show cause hearing). To satisfy this burden, the offending party may not merely assert an inability to comply but must show "that he has made 'in good faith all reasonable efforts to comply.'"

[3] To this point, the Undersigned is unpersuaded by Mr. Davison's arguments that the Receiver cannot seek contempt because the Receiver is attempting to collect a money judgment. "A disgorgement order is more like an injunction for the public interest than a money judgment." *Steffen v. Gray, Harris & Robinson, P.A.*, 283 F. Supp. 2d 1272, 1282 (M.D. Fla. Sept. 19, 2003) (citing *SEC v. Huffman*, 996 F.2d 800, 802-03 (5th Cir. 1993)). "It is this feature, the similarity to an injunction, that allows disgorgement orders, unlike judgments, to be enforced by civil contempt." *Id.*; *see also SEC v. Bronson*, 602 F. Supp. 3d 599, 615 (S.D.N.Y. 2022) ("Courts in this district have consistently found defendants to be in contempt for failure to comply with disgorgement orders in SEC civil enforcement actions."); *SEC v. Shavers*, No. 4:13-cv-00416, 2022 WL 14318269, at *3 n.1 (E.D. Tex. Oct. 24, 2022) ("[D]istrict courts within the Fifth Circuit permit disgorgement obligations to be enforced through civil contempt sanctions under Rule 70.").

United States v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988) (quoting *United States v. Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976)).[4]

Moreover, 28 U.S.C. § 636(e) provides in pertinent part:

> (e) Contempt authority.--
>
> (1) In general.--A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.
> . . . .
> (6) Certification of other contempts to the district court.--Upon the commission of any such act--
> . . . .
> (B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where--
> . . . .
> (iii) the act constitutes a civil contempt,
>
> the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

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[4] The *prima facie* requirement that Mr. Davison *had* the ability to comply is different from the defense of a *present* inability to comply. *See SEC v. Greenberg*, 105 F. Supp. 3d 1342, 1346 (S.D. Fla. 2015) ("The SEC's burden is to prove that [the contemnor] 'had the ability to comply with the Final Judgment. The burden then shifts to [the contemnor] to prove his 'present inability to comply.'"). Any arguments from Mr. Davison about his defense to contempt, including his present inability to comply or his good-faith efforts to comply, are more appropriately raised at and following the show cause hearing.

Upon consideration, should the presiding United States District Judge find that Mr. Davison had the ability to comply with the Final Judgment, the Undersigned recommends that the Court grant the Motion for Order to Show Cause and set a show cause hearing. As outlined above, the Undersigned certifies the following facts, none of which the parties dispute: (1) The Court entered a Final Judgment against Mr. Davison that requires him to disgorge to the Receiver within thirty days of entry of the Final Judgment, among other assets, 480 platinum American Eagle coins and 61 gold American Eagle coins, (Doc. 355-1); (2) The Final Judgment requires Mr. Davison to execute a general Assignment with the Receiver, (*id.*); (3) Both the Final Judgment and the Assignment contain provisions approving, when appropriate, sanctions for contempt, (*id.*; Doc. 767-1); (4) Mr. Davison disgorged 480 silver and 58 gold coins, (*See* Docs. 767, 767-2, 768, 768-1); (5) Mr. Davison never disgorged 480 platinum coins or the three remaining gold coins, (Docs. 768-1).

CONCLUSION

Accordingly, the Undersigned **RESPECTFULLY RECOMMENDS** the following:

1. Davison's Renewed Motion to Alter or Amend the Final Judgment Pursuant to Fed. R. Civ. P. 60(b)(1) and 60(b)(5) (Doc. 768) be **DENIED**; and
2. The Receiver's Renewed Verified Motion for an Order to Show Cause Why Brian Davison Should Not Be Held in Contempt For Failure to Comply with the Court's Order (Doc. 767) be **DENIED WITHOUT PREJUDICE**.
3. Alternatively, if the presiding United States District Judge finds that the Receiver has established the *prima facie* elements of civil contempt, the Undersigned recommends that the Receiver's Motion for Order to Show Cause be granted, such that the presiding District Judge should enter an order setting a show cause hearing pursuant to 28 U.S.C. § 636(e) so that Mr. Davison may show cause why the Court should not adjudge him in contempt for failure to comply with the Final Judgment.

RESPECTFULLY RECOMMENDED in Tampa, Florida on May 16, 2023.

Mac R. McCoy
United States Magistrate Judge

NOTICE TO PARTIES

A party has fourteen days from the date the party is served a copy of this Report and Recommendation to file written objections to the Report and Recommendation's factual findings and legal conclusions. 28 U.S.C. § 636(b)(1)(C). A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1. A party wishing to respond to an objection may do so in writing fourteen days from the date the party is served a copy of the objection. To expedite resolution, the parties may also file a joint notice waiving the fourteen-day objection period.

Copies furnished to:

Counsel of Record
Unrepresented Parties