UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

Case No. 8:20-CV-325-T-35MRM

BRIAN DAVISON;
BARRY M. RYBICKI;
EQUIALT LLC;
EQUIALT FUND, LLC;
EQUIALT FUND II, LLC;
EQUIALT FUND III, LLC;
EA SIP, LLC;

Defendants, and

128 E. DAVIS BLVD, LLC, et al.,

Relief Defendants.
_____/

RECEIVER'S OBJECTION TO REPORT AND RECOMMENDATION

On January 17, 2023, Burton W. Wiand, as receiver for EquiAlt, LLC ("**EquiAlt**") and related entities (the "**Receiver**") filed a 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) (the "**Motion for Order to Show Cause**"). On May 16, 2023, the Magistrate Judge issued a Report and Recommendation (Doc. 918) (the "**R&R**") denying the

Motion for Order to Show Cause without prejudice. The Receiver objects to the R&R because the Magistrate Judge reached factual conclusions that were inconsistent with the evidence before him, misunderstood or misconstrued Brian Davison's settlement with the SEC and the assignment of all his assets to the Receiver, and failed to properly apply the pertinent analysis for finding contempt. In addition, the R&R uses circular reasoning to reject three alternative proposals and leaves the Receiver with no remedy except more discovery and expensive, burdensome motion practice.[1]

BACKGROUND

This dispute arises from the settlement of (1) the SEC's enforcement action **and** (2) the Receiver's independent claims against Brian Davison. Specifically, the SEC charged Davison with perpetrating a massive Ponzi scheme and defrauding over 1,500 individuals of more than $180 million, including many seniors who entrusted Davison with their retirement funds. Davison made false representations that EquiAlt and other entities he controlled would (1) raise money from participants, (2) invest 90% of that money in real estate, and (3) pay returns between 8% and 12% to the victims of the scheme. **None of this was true**. Davison only invested a small portion of the money he raised in real estate, he paid purported returns from earlier

[1] The Receiver has no objection to the portion of the R&R that recommends denial of Davison's Motion to Amend Judgment (Doc. 768).

investors' principal investment amounts, and his scheme was insolvent from its inception. For example, when the SEC sued Davison and froze his assets in 2020, the scheme was generating $500,000 per month in income but accruing interest obligations on debentures sold to investors in excess of $1.2 million per month. Further, $30 million dollars of debentures had matured, but EquiAlt and Davison had no ability to pay them because, in part, he and his codefendant misappropriated tens of millions of dollars for their personal benefit. The SEC sought to enjoin Davison from further violations of the federal securities laws as well as disgorgement of his illegal profits and the imposition of a civil penalty.

The Receiver also had claims against Davison on behalf of the Receivership Entities, including breach of fiduciary duty, unjust enrichment, and the avoidance of fraudulent transfers. *See, e.g., Wiand v. Lee*, 753 F.3d 1194, 1203 (11th Cir. 2014) (holding receivership entities had claim against Ponzi perpetrator "because he harmed the corporations by transferring assets rightfully belonging to the corporations and their investors in breach of his fiduciary duties"). The SEC did not (and, in fact, could not) assert such claims against Davison. The Receiver's claims were separate and distinct from the claims underlying this enforcement action, and the Receiver was thus not bound by certain defenses that Davison invoked against the SEC. As a result, the Receiver estimates that his claims were worth more than $100 million.

On or about May 17, 2021, the SEC and Davison entered into a settlement agreement, consent judgment, and assignment to resolve the SEC's claims arising from the EquiAlt scheme. *See* Doc. 767-1 (the "**Assignment**"); *see also* Doc. 355 & 355-1 (the "**Final Judgment**"). Davison agreed, among other things, 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. R&R at 2. Davison and the SEC negotiated that amount, which represents the illegal profits Davison made from the scheme minus more than $8 million of deductions pursuant to *Liu v. S.E.C.*, 207 L. Ed. 2d 401, 140 S. Ct. 1936, 1937 (2020) (limiting disgorgement). These agreements, however, did not resolve the Receiver's claims against Davison.

To settle the Receiver's claims, Davison assigned all his assets, except for certain express exclusions, to the Receiver:

> (1) Davison assigns and shall deliver and turn over all assets reflected on Exhibit "A" (List of Specified Assets to Assign and Turn Over to Receiver) attached hereto and made apart hereof or, where necessary, execute the appropriate quitclaim in connection with real estate properties. Mr. Davison will keep all assets reflected on Exhibit "B" (List of Assets to be Retained by Davison) attached hereto and made a part hereof. This General assignment serves to assign to the Receiver the Specified Assets **and all assets owned or controlled by Davison** other [than] those assets specifically excluded in Exhibit B.

767-1 at 2 (emphasis added); *see also id.* at 2 ("By virtue of this Assignment, the Receiver foregoes any claims that the Receiver would have against Davison, his wife, or the entities he controls….").[2]

The Assignment is the only settlement document executed by and thus binding on the Receiver. Importantly, the Receiver would not have settled his claims without the assignment of all Davison's assets. The Court ordered Davison to swear under oath that the matters contained in the Assignment were true and correct:

> As part of his disgorgement obligation, Davison shall execute a general assignment of assets to be provided to the Receiver warranting that he has disclosed all owned assets valued at more than $5,000 to the Receiver and **assigned all owned assets except those excluded** in the assignment. The Assignment shall be signed and notarized and contain a statement by Davison under oath that all of the information contained therein is **true and correct**.

Doc. 355-1 at 8. The Assignment reflects Davison's agreement to turn over all his assets – not just the assets listed on Exhibit A – in satisfaction of the Receiver's claims. The Receiver insisted upon these provisions because his claims against Davison far exceeded the SEC's disgorgement demand. As

[2] The R&R misses this important point. *See, e.g.*, R&R at 2 ("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)."). As explained throughout this objection, the Assignment is not limited to the assets on Exhibit A. Davison committed all his assets to the Receiver, except household goods worth less than $5,000 and those on Exhibit B. It is thus impossible for the Receiver to obtain a windfall because the Assignment is extremely broad and not limited by *Liu* or the SEC's negotiated disgorgement amount.

mentioned above, the SEC gave Davison a credit of more than $8 million pursuant to *Liu*, but that case does not apply to the Receiver's claims. *See Wiand v. Family Tree Estate Planning*, Case No. 8:21-cv-361-SDM-AAS (M.D. Fla. March 24, 2023), Doc. 229 at 15 (holding that *Liu* does not preempt Florida law, including the Receiver's fraudulent transfer claims). By agreeing to deliver all his assets, except those specifically excluded on Exhibit B to the Assignment, Davison bought his freedom from further litigation and damages. *See* Doc. 767-1 at 2.

Shortly after the Court entered the Judgement, Davison met with the Receiver at his former home to turn over his physical assets. Davison delivered several valuable watches, jewelry, and what he asserted to be 480 platinum coins, as listed in Exhibit A to the Assignment that Davison executed as "true and correct" under oath. In delivering the coins, Davison even remarked on the "shininess" of the platinum. An expert the Receiver retained, however, determined that the coins were silver – not platinum, which is more valuable than silver. For example, as of this filing, an ounce of platinum is worth $1,127 whereas an ounce of silver is worth $23.40. Davison denied the coins were silver until he was shown the phrase "fine silver" on the coins themselves. Davison has never explained why he had silver coins instead of platinum, where he acquired the silver coins, and why he lied under oath about possessing the platinum coins.

Given these circumstances, the Magistrate Judge was far too credulous of Davison's repeated misrepresentations, but the R&R nevertheless contains several undisputed facts. Specifically, the Magistrate Judge certified…

> 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).

R&R at 16. The Receiver does not object to any of these factual determinations. Indeed, they should be dispositive – to induce the settlement of the Receiver's claims, Davison lied under oath that Exhibit A of the Assignment was "true and correct." It was false because it contained the phantom platinum coins, omitted the silver coins, and misnumbered the gold coins. *See* R&R at 6 ("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."). This undisputed, *prima facie*, material breach of the Assignment entitles the Receiver to damages and sanctions regardless of Davison's ability to produce the pertinent coins:

> Mr. Davison agrees that any material misrepresentation concerning any of the matters contained herein or the affidavit executed by him in connection with this Assignment, or his failure to satisfy any of the obligations contained in this Assignment … shall constitute a material

> breach hereof and as such, may entitle the Receiver to seek such remedies as may be appropriate, including, but not limited to, entry of a judgment for any unpaid sums … or seeking an order from the Receivership Court for the immediate turnover of any undisclosed property and, where appropriate, sanctions for Contempt.

Doc. 767-1 at 3. The Magistrate Judge even made clear that Davison is solely responsible for his failure to comply with the Court's order and the Assignment. *Id.* at 8 ("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."). But the R&R stops short of affording the Receiver a remedy for this undisputed misconduct in favor of yet more discovery and unnecessary process.

Indeed, the Magistrate Judge placed no import on Davison's contemptuous provision of a sworn document, as directed by the Court, identifying assets he possessed, including the platinum coins. The sworn statement was provided through experienced New York securities counsel and attorneys from the Trenam law firm. The Magistrate Judge ignored this conduct and gave credence to the assertion that Davison simply made a $500,000 mistake. It is not reasonable to conclude that a person such as Davison, who was a prolific investor in metals and collectibles, was "mistaken" when he falsely swore that he possessed approximately $500,000 of platinum coins. The Magistrate Judge improperly turned the burden on the Receiver to prove Davison had the coins despite Davison's sworn statement.

As explained below, the Court should bring finality to this matter by either directing the turnover of substitute, exempt, or excluded assets from Exhibit B to the Assignment or by entering a compensatory money judgment against Davison in the amount of approximately $530,000.[3]

ARGUMENT

To hold a party in civil contempt, "[t]he 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." R&R at 10 (*citing Ga. Power Co. v. N.L.R.B.*, 484 F.3d 1288, 1291 (11th Cir. 2007)). Contempt sanctions are subject to an abuse of discretion standard of review. *See F.T.C. v. Leshin*, 719 F.3d 1227, 1230 (11th Cir. 2013). As such, district courts have wide discretion in fashioning an equitable remedy for civil contempt.[4] *Id.*

According to the R&R, an order to show cause is not justified here because the Receiver has not proven that Davison had the ability to comply

[3] The prices of gold, silver, and platinum fluctuate. In previous filings, the Receiver estimated the difference between the coins at approximately $511,000. Today, it appears to be closer to $530,000. If the Court enters a money judgment, it should use the "spot" prices on the day of the order.

[4] In addition, the Court's power to supervise an equity receivership and determine the appropriate action to be taken in the administration of the receivership is extremely broad. *See, e.g., S.E.C. v. Vescor Capital Corp.,* 599 F.3d 1189, 1194 (10th Cir. 2010); *S.E.C. v. Elliott,* 953 F .2d 1560, 1566 (11th Cir. 1992); *S.E.C. v. First City Fin. Corp.,* 890 F.2d 1215, 1230 (D.C. Cir. 1989); *S.E.C. v. Hardy,* 803 F.2d 1034, 1037 (9th Cir. 1986). The Court's wide discretion derives from the inherent powers of an equity court to fashion relief. *See Vescor Capital Corp.,* 599 F.3d at 1193-94. The purpose of establishing a receivership is "to protect

with the pertinent order. R&R at 11 ("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."). In other words, the Receiver purportedly must prove that Davison owned 480 platinum (as opposed to silver) coins as well as the three additional gold coins. The Magistrate Judge determined, however, "that the Receiver has fallen just short of that burden" because "the evidence currently weighs in favor of finding that [Davison] never had possession of 480 platinum coins or the three additional gold coins." *Id.* at 12-13. Without ever being in possession of those assets, Mr. Davison purportedly could not comply with the Court's Final Judgment by turning those assets over to the Receiver. *Id.* at 13. The Magistrate Judge's conclusion ignored that Davison admitted these facts, including his possession of the coins, under oath. The Receiver should not have to disprove Davison's sworn statement. If he did not possess the coins, he necessarily committed perjury in contempt of this Court and in material breach of the Assignment.

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the estate property and ultimately return that property to the proper parties in interest," and a receiver is vested with the duty and authority to marshal and preserve assets to effectuate an orderly, efficient, and equitable administration of the receivership estate. *Credit Bancorp, Ltd.,* 93 F. Supp. 2d at 476-77 (emphasis added); *Vescor Capital Corp.,* 599 F.3d at 1197 (observing "in a case involving a Ponzi scheme, the interests of the [r]eceiver are very broad and include not only protection of the receivership *res,* but also protection of defrauded investors and considerations of judicial economy").

I. THE R&R IGNORES THE AVAILABILITY OF DAVISON'S EXEMPT ASSETS, WHICH COULD RESOLVE THIS MATTER

In assessing Davison's purported inability to pay or to purge himself of contempt, the R&R ignores Davison's potential substitute assets. As mentioned above, Davison received a disgorgement credit from the SEC under *Liu* in excess of $8 million. As also mentioned, Davison committed all his assets to the Receiver aside from household goods worth less than $5,000 and those assets expressly listed on Exhibit B to the Assignment. Excerpts from that exhibit include…

- Bank Accounts:
    - Bank of America XXX8041 – The Brian D. Davison Revocable Trust - $322,480.86
    - Chase XXS5756 – Davison Capital - $24,639.50
    - Chase XXX3995 – Brian and Nicole Davison - $169,642.20
- Watches and Jewelry:
    - Patek Philippe 5711A[5]
    - Patek Philippe 5711R
    - Rolex Sub LV
    - Rolex DJ 31 RGN.
    - Davison ring, 6.51 c
- Vehicles:
    - 2019 Toyota 4Runner (VIN JTEBU5JR3K5685197)
    - 2012 Ford Fiesta (VIN 3FADP4BJ5CM134343)
    - 2015 Mercedes ML 350 (VIN 4JGDA5JB9FA616063)
    - 2012 SeaRay 300 (SERV1690I112)

[5] Davison laundered much of his ill-gotten gains through watches. These are no ordinary timepieces. The footnoted watch appears to be valued at more than $100,000.

Doc. 767-1, Ex. B. In addition to these tangible items, Davison retained interests in three businesses, including breweries, certain internet domains, art, additional coins, $500,000 in Merrill Lynch accounts, and most personal property worth less than $5,000 from his residence. *Id.* He is no pauper. The idea that Davison can only be purged of contempt by delivering the exact coins he either lied about having in the first place or subsequently liquidated is without merit and leaves the Receiver hostage to Davison's dishonesty. *See infra* § III (describing same as a "monstrous doctrine").

II. THE COURT SHOULD ENTER A JUDGMENT REQUIRING DAVISON TO PAY THE DIFFERENCE IN VALUE BETWEEN THE COINS HE PROMISED AND THE COINS HE PROVIDED

Civil contempt is "an area where the district court has extremely broad and flexible powers" and "wide discretion in fashioning an equitable remedy." *F.T.C. v. Leshin*, 719 F.3d 1227, 1231 (11th Cir. 2013) (quotation 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) (emphasis added); *see also Leshin*, 719 F.3d at 1231 (same). The Eleventh Circuit has "repeatedly stressed that 'the district court's discretion in imposing non-coercive sanctions is particularly broad and only limited by the

requirement that they be compensatory.'" *Leshin*, 719 F.3d at 1231 (quoting *Howard Johnson Co. v. Khimani,* 892 F.2d 1512, 1521 (11th Cir.1990)).

> Indeed, the Supreme Court has observed that district courts possess particularly expansive and flexible powers in these circumstances: "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 193, 69 S.Ct. 497, 93 L.Ed. 599 (1949); *cf. AT&T Broadband v. Tech Commc'ns, Inc.,* 381 F.3d 1309, 1316 (11th Cir.2004) ("[W]hen the public interest is involved ..., [the district court's] equitable powers assume an even broader and more flexible character." (alterations in original) (internal quotation marks omitted)).

F.T.C. v. Leshin, 719 F.3d 1227, 1231 (emphasis added). The Supreme Court has also "acknowledged that a court can issue a money judgment as a remedy for civil contempt." *See id.* (*citing De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 220 (1945)).[6]

Here, the Receivership Estate has sustained an "actual loss" due to Davison's misconduct. Specifically, Davison promised 480 platinum American Eagle coins and 61 gold American Eagle coins (Doc. 355-1), but he delivered 480 silver coins and 58 gold coins (*see* Docs. 767, 767-2, 768, 768-1). Whether a deliberate misrepresentation or a negligent mistake, the Receivership Estate nevertheless suffered an actual loss of at least $530,000 due solely to Davison's

[6] "[F]ederal courts have always had jurisdiction to enforce their judgments." *Sequoia Fin., Inc. v. Warren*, 2017 WL 445713, at *2 (M.D. Fla. Feb. 2, 2017); *Cordius Tr. v. Kummerfeld Assocs., Inc.*, 658 F. Supp. 2d 512, 524 (S.D.N.Y. 2009) ("Federal courts have broad discretion to fashion remedies as equity requires to ensure compliance with their orders."); *Damus v. Nielsen*, 328 F.R.D. 1, 3 (D.D.C. 2018) ("The Court has the relevant authority as part of its inherent power to enforce its judgments, and it is clear that appropriate discovery should be granted where significant questions regarding noncompliance with a court order have been raised.").

conduct. *See* R&R at 8, Doc. 767 at 9. As such, the Court should enter a money judgment against him in that amount.[7]

The Magistrate Judge considered this exact remedy but rejected it due to Davison's purported inability "to comply with the Final Judgment":

> 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.

R&R at 14 n. 2 (emphasis added). The implied conclusion that the Receiver must prove Davison's ability to pay a money judgment is both circular and erroneous because the entry of a money judgment is not coercive but compensatory in nature. The Assignment expressly contemplates the entry of a judgment as a remedy for a material breach of its terms and conditions. *See*

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[7] Davison argued that the Receiver cannot seek contempt because he is purportedly attempting to enforce the SEC's money judgment, but the R&R correctly rejected that argument, explaining that disgorgement is different from the collection of a judgment. R&R at 15 n. 3. Conversion of Davison's disgorgement obligation with respect to the coins into a money judgment does not breathe any new life into Davison's argument because the Eleventh Circuit has expressly endorsed that procedure as a compensatory remedy for civil contempt. *Leshin*, 719 F.3d at 1235. ("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. The conversion did not run afoul of the election of remedies doctrine because it only covered the unpaid remainder of the disgorgement order. Leshin's objections fail because they rely either on misreading the record or conflating the distinct principles governing compensatory and coercive contempt sanctions."). The Assignment expressly contemplates the entry of a judgment as a remedy for a material breach of its terms and conditions. *See* Doc. 767-1 at 3.

Doc. 767-1 at 3. A judgment would compensate the Receivership Estate for the difference in value between the coins that were promised and the coins that were provided.[8] Again, the Eleventh Circuit's decision in *Leshin* is instructive:

> Leshin fails to grapple with the difference between compensatory civil contempt sanctions and coercive civil contempt sanctions. To be sure, for a coercive sanction, ability to pay is a complete defense. *See Maggio v. Zeitz,* 333 U.S. 56, 71-74, 68 S.Ct. 401, 92 L.Ed. 476 (1948); *Newman v. Graddick,* 740 F.2d 1513, 1524-25 (11th Cir.1984) (where contempt is "designed to compel a person to do what the court has ordered him to do," then the contemnor "must be given the opportunity to bring himself into compliance," and "inability to comply is a complete defense"). It is futile to punish defendants in an attempt to compel them to do that which they cannot do. In contrast, for a compensatory civil contempt sanction, "in order to purge themselves of contempt," defendants must "pay the damages caused by their violations of the decree." *Clark v. Boynton,* 362 F.2d 992, 998 (5th Cir.1966) (internal quotation mark omitted). In other words, the contempt ends when the contemnor pays the full amount.
>
> **For a compensatory contempt sanction, in contrast to a coercive one, inability to pay is no defense.**

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[8] The Receiver also suggested that the Court order Davison to simply purchase the missing coins and turn them over in satisfaction of the Final Judgment. R&R at 13. The Magistrate Judge described this option as "not without merit" but nevertheless rejected it because "the Receiver makes no showing of how Mr. Davison could make such a purchase considering the freeze on his assets." *Id.* According to the R&R, "[i]f 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." *Id.* at 13-14. "The Receiver, however, has not met his burden in demonstrating that fact by clear and convincing evidence." *Id.* at 14.

This conclusion, however, ignores Davison's $8 million *Liu* credit and the valuable assets listed on Exhibit B to the Assignment. Davison indisputably has assets to fund a resolution of this dispute. If the Court determines the provision of substitute coins a proper remedy, the asset freeze is no obstacle. It is a judicial construct – an exercise of the Court's equitable powers, much like a contempt sanction. The Court could also resolve this dispute by lifting the asset freeze for the sole purpose of purchasing and delivering the missing coins. In fact, the Receiver identified the specific accounts that could be unfrozen and transferred. *See* Doc. 767 at 10 n.7 (referencing excluded Merrill Lynch accounts containing approximately $500,000). The R&R overlooks several practical solutions in favor of yet more discovery and unnecessary process.

Leshin, 719 F.3d at 1234 (emphasis added); *RES-GA Cobblestone, LLC v. Blake Const. & Dev., LLC*, 718 F.3d 1308, 1316 n. 9 (11th Cir. 2013) (noting inability to pay challenge "is squarely foreclosed by circuit precedent"); *United States v. Gachette*, 2020 WL 6566900, at *4 (M.D. Fla. Oct. 21, 2020), *adopted*, 2020 WL 6565117 (M.D. Fla. Nov. 9, 2020) ("a disgorgement order establishes a personal liability, which the defendant must satisfy regardless whether he retains the proceeds of his wrongdoing" (quotation omitted)).

If the Court credits Davison's testimony that he never owned 480 platinum coins and 61 gold coins, the Court will likely also conclude that Davison cannot be coerced to return what he never possessed, but that conclusion does not end the inquiry. The Court can still enter a compensatory sanction in the form of a money judgment, as expressly authorized by the Assignment, to compensate the Receivership Estate for the difference between the value of the coins Davison promised and the value of the coins he provided. *See Leshin*, 719 F.3d at 1231-32 (discussing "the general equitable principle … that where the aggrieved party shows entitlement to equitable relief, but a grant appears to be impossible or impracticable, the court may nevertheless proceed with the case, awarding damages *or* a money judgment in lieu of the requested equitable remedy" (quotation omitted)). As the cases above demonstrate, Davison's ability to pay a compensatory money judgment is irrelevant, and the R&R erred by rejecting this remedy on that ground.

It is undisputed that Davison has not satisfied the Final Judgment and that his failure to do so is entirely his own fault. *See* R&R at 8. If the Court does not afford the Receiver a remedy at this stage, including through entry of a money judgment, yet another round of discovery and motion practice will ensue, wasting both Receivership and judicial resources.[9]

III. THE R&R SETS A DANGEROUS PRECEDENT BECAUSE IT WOULD ALLOW DEFENDANTS LIKE DAVISON TO LIE UNDER OATH WITH IMPUNITY

The R&R sets a dangerous precedent because it would allow defendants like Davison to lie to regulators, receivers, and courts with impunity. This dispute presents at least two possible scenarios. First and most probably, Davison lied about the coins he possessed to induce a settlement from the Receiver. The R&R allows defendants to intentionally promise to disgorge valuable assets but later claim to have never owned the assets. According to the R&R, the pertinent regulator or a court-appointed receiver must then disprove the defendant's sworn, initial misrepresentation – a task that would be impossible if the defendant lied about owning the assets in question. In

[9] The R&R states that the Receiver can conduct "additional discovery into the missing coins" and "[a]fter receiving and evaluating that discovery, the Receiver should be given the opportunity to bring his motion again." R&R at 14. If Davison never owned the platinum and additional gold coins at issue, no amount of discovery will prove he did. Under the logic of the R&R, if the Receiver cannot prove that Davison owns or owned the coins, Davison cannot be held in contempt because he cannot purge the contempt by delivering coins that he never owned. As explained in Sections I and II, this circular reasoning ignores the availability of substitute assets and compensatory sanctions, and as explained in Section III, it rewards defendants for dishonesty or, at best, recklessness.

other words, Davison lied about having platinum coins, but according to the R&R, he cannot be held in contempt because he lied about having platinum coins. Under this circular reasoning, a defendant immunizes himself by lying, and a regulator or receiver could never hold the defendant in contempt because the defendant cannot turnover something he never owned.

> To hold, as [defendant] maintains, that a court may order a defendant to disgorge only the actual assets unjustly received would lead to absurd results. Under [defendant's] approach, for example, a defendant who was careful to spend all the proceeds of his fraudulent scheme, while husbanding his other assets, would be immune from an order of disgorgement. [Defendant's] would be a monstrous doctrine for it would perpetuate rather than correct an inequity.

Leshin, 719 F.3d at 1234 (*quoting S.E.C. v. Banner Fund Int'l,* 211 F.3d 602, 617 (D.C. Cir. 2000)).

Second, even if Davison was merely reckless about the composition of his coins, he still violated Court orders and committed perjury. His representation under oath that the Assignment is "true and correct" is still false. He still failed to disclose the existence of the silver coins in Exhibit A to the Assignment. His failures are still entirely his own fault, as the Magistrate Judge expressly recognized. And he still failed to deliver "all" his assets to the Receiver, as required by the Assignment. Indeed, perjury is a common ground for contempt sanctions. *Cf. Slater v. United States Steel Corp.*, 871 F.3d 1174, 1187 (11th Cir. 2017) (noting "the bankruptcy court has tools of its own to punish a debtor

who it determines purposefully tried to hide assets," including contempt and referral for prosecution for perjury); *Miller v. Support Collection Unit Westchester Cnty.*, 2010 WL 767043, at *8 (M.D. Fla. Mar. 5, 2010) ("The prospects of criminal prosecution for perjury and punishment for contempt are generally thought to be sufficient to protect the court from acts obstructing the administration of justice."). If anything, Davison's purported recklessness illustrates just how much money he misappropriated from investors in the EquiAlt scheme, given his claimed inability to distinguish between coins worth more than $540,000 and coins worth approximately $11,000. While this difference might be a rounding error to Davison, the missing funds are important to his victims.

Davison indisputably failed to comply with the Court's order by paying the Final Judgment. If he truly cannot comply on an *in rem* basis by transferring the promised coins, he must comply on some other basis. The Receiver has proposed three separate alternatives, all of which are reasonable and supported by governing precedent regarding compensatory sanctions. Inability to pay is not a defense, and in any event, the Receiver has identified specific assets from which Davison could make the requisite payment, including the assets on Exhibit B and the $8 million *Liu* credit. Allowing him to shortchange the Receivership Estate by more than $500,000 through bad faith or even simple negligence would set a dangerous precent.

CONCLUSION

For the foregoing reasons, the Court should reject the R&R to the extent it requires additional discovery and motion practice and ignores the availability of substitute assets and compensatory sanctions. Instead, to bring finality to this matter, the Court should direct the turnover of substitute assets or enter a money judgment against Davison, as a sanction for a material breach of the Assignment, in the amount of approximately $530,000. In addition, the Receiver has no objection to the R&R's analysis of Davison's Motion to Amend Judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

Respectfully submitted,

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