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, et al.,

Defendants.
_____/

DEFENDANT BRIAN DAVISON'S RESPONSE TO RECEIVER'S OBJECTION TO REPORT AND RECOMMENDATION

The Magistrate Judge issued a Report and Recommendation denying the Receiver's motion for an order to show cause (Doc. 918). In his objection (Doc. 923), the Receiver has appointed himself judge and jury. Namely, the Receiver has decided that he need not satisfy the elements of civil contempt before obtaining a contempt sanction or judgment.

Further, the Receiver has summarily decided—without any evidentiary hearing, witness testimony, or judicial finding—that Brian Davison lied about how many and which coins he owned and should therefore be sanctioned. But that is not what the law actually allows. Instead, to obtain the relief he seeks, the Receiver must prove that Mr. Davison had the ability to turn over coins he never owned.

Because the Receiver cannot satisfy this essential element for civil contempt (i.e., Mr. Davison's ability to comply), the Court should overrule the Receiver's objections to the Magistrate Judge's Report and Recommendation.

Legal Standard

A party objecting to a magistrate judge's report and recommendation must do so within fourteen days after receiving a copy of the report. 28 U.S.C. § 636(b)(1)(C). The failure to object within fourteen days to a factual finding or legal conclusion in a report and recommendation waives any challenge to the district court's adoption of those unobjected-to findings and conclusions. *See* 11th Cir. R. 3-1; *Butler-Stern v. Memmott*, 756 F. App'x 901, 904 n.2 (11th Cir. 2018) ("[W]e generally do 'not review a magistrate judge's findings or recommendations' where, as here, 'a party fail[s] to object to those recommendations below' after the [magistrate] judge informs the party of the time period for objecting and the consequences for failing to do so."); (Doc. 918 at 19).

The district court reviews de novo those portions of a report and recommendation to which a party specifically objects. *See* § 636(b)(1)(C); *see also Harman v. Standard Ins. Co.*, 564 F. Supp. 3d 1187, 1189 (M.D. Fla. 2021). The district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." § 636(b)(1)(C).

The decision on how to treat a report and recommendation is within the district court's discretion. *See Kosher v. Protective Life Corp.*, 649 F. App'x 774, 777 (11th Cir. 2016) (citation omitted). If an objecting party fails to offer specific objections to a

finding or conclusion, the district court has no duty to conduct de novo review. *Id.* (citation omitted). Rather, the objecting party must offer a specific objection that identifies "the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection." *Id.* (citation omitted); *see also Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988) ("Frivolous, conclusive, or general objections need not be considered by the district court.").

At all times, the objecting party bears the burden of establishing factual or legal error in a report and recommendation. *See Chase v. Haskell Co.*, No. 1:22-CV-03941-JPB, 2023 WL 3763807, at *1 (N.D. Ga. June 1, 2023) (citing *United States v. Schultz*, 565 F.3d 1353, 1361 (11th Cir. 2009)). The Receiver lodges three specific objections to the Report and Recommendation. *See* (Doc. 923 at 11–19). As a result, the Receiver waives all other objections to the Report and Recommendation. *See* 11th Cir. R. 3-1. But even the Receiver's three specific objections fail to establish any error.

Argument

The Receiver puts forth three objections. First, the Receiver argues that the Magistrate Judge ignored the availability of Mr. Davison's exempt assets. (Doc. 923 at 11–12). Second, the Receiver argues that the Court should enter a judgment requiring Mr. Davison to pay the difference between the coins he never owned and the coins he turned over. (*Id.* at 12–17). Third, the Receiver argues that the Report and Recommendation "sets a dangerous precedent because it would allow defendants like

Davison to lie under oath with impunity." (*Id.* at 17–19). None of these objections provides a basis for the Court to sustain the Receiver's objections.

1. The Receiver cannot show that Mr. Davison had the ability to comply with the relevant portion of the Final Judgment; thus, Mr. Davison's exempt assets are irrelevant.

The essence of the Receiver's first objection is that Mr. Davison, through his exempt assets, has the ability to pay or purge himself of contempt. (Doc. 923 at 11–12). But the Receiver puts the cart before the horse. For the Court to even consider Mr. Davison's ability to pay or purge a contempt judgment, the Receiver must first establish by clear and convincing evidence the elements of civil contempt. *See Brown v. Omni Mgmt. Grp. LLC*, No. 8:18-CV-1772-T-35-CPT, 2020 WL 7401272, at *2 (M.D. Fla. Nov. 12, 2020).

The Receiver cannot show that Mr. Davison had the ability to comply with the Final Judgment's requirement that he turn over 480 platinum coins and 61 American Eagle coins because Mr. Davison never owned 480 platinum coins or 61 American Eagle coins. Rather, no one disputes that Mr. Davison owned and turned over to the Receiver 480 silver coins and 58 American Eagle coins.

That Mr. Davison allegedly could use his exempt assets to pay or purge himself of contempt is irrelevant because the Receiver cannot first establish a necessary element to obtain a contempt judgment or sanction: Mr. Davison's ability to comply with the Final Judgment's requirement to turn over 480 platinum coins and 61 American Eagle coins. The Receiver wishes to bypass the elements of civil contempt and go directly to Mr. Davison's ability to pay or purge a contempt sanction but cites

no law supporting that position.[1] The Receiver cites no caselaw to support his argument because none exists. *See Ga. Power Co. v. NLRB*, 484 F.3d 1288, 1291 (11th Cir. 2007). The Court should decline the Receiver's invitation to skip over the proper procedure for finding contempt and overrule the Receiver's first objection.

2. The Receiver is not entitled to a civil-contempt judgment.

The Receiver's second objection is that the Court should enter a judgment requiring Mr. Davison to pay the difference between the coins he turned over and the coins he mistakenly listed on his assignment. (Doc. 923 at 12–17). Again, the Receiver is not entitled to a contempt judgment without satisfying the necessary elements for civil contempt, which he cannot do. *See Brown*, 2020 WL 7401272, at *2. The Receiver decries this process as "circular and erroneous." (Doc. 923 at 14). It's actually quite linear. First, prove the necessary elements for civil contempt; then determine the sanction or judgment amount and how the contemnor must pay. *See generally Ga. Power Co.*, 484 F.3d at 1291. The Receiver tries to muddy clear waters and conflates "ability to comply" for purposes of finding contempt and "ability to pay" for purposes of paying a contempt judgment. *See* (Doc. 923 at 15–16).

[1] Throughout his objection, the Receiver uses footnotes to raise various arguments. *See* (Doc. 923). The Court should reject this clear attempt to circumvent the Local Rules' page limit. *See Gov't Emps. Ins. Co. v. Glassco Inc.*, No. 8:19-CV-1950-KKM-JSS, 2021 WL 4391717, at *7 n.11 (M.D. Fla. Sept. 24, 2021) ("Any briefing going forward that exploits its footnotes will be summarily struck."); *see also McLain v. Dunn*, No. 5:14-CV-0380-CLS-JEO, 2019 WL 266230, at *1 (N.D. Ala. Jan. 18, 2019) ("[Petitioner's] footnote alluding to otherwise unspecified arguments in his petition and earlier briefing does not qualify as a 'specific objection' [to the Report and Recommendation].")

Every case the Receiver cites to support this objection involved the procedure outlined in this response: the district court first found contempt and then decided the issue of contempt judgment or sanction. *See FTC v. Leshin*, 618 F.3d 1221, 1230–31 (11th Cir. 2010) (affirming district court that entered judgment after finding civil contempt); *FTC v. Leshin*, 719 F.3d 1227, 1230 (11th Cir. 2013) (same);[2] *RES-GA Cobblestone LLC v. Black Constr. and Develop. LLC*, 718 F.3d 1308, 1311–12 (11th Cir. 2013) (affirming district court that entered contempt sanctions after finding contempt); *United States v. Gachette*, No. 6:14-CV-1539-Orl-22EJK, 2020 WL 6566900, *4 (M.D. Fla. Oct. 21, 2020) (recommending contempt sanctions after finding defendant in contempt). As a result, the Receiver has failed to meet his burden in establishing error, and the Court should overrule the Receiver's second objection.

3. There has been no finding that Mr. Davison lied.

The Receiver's final objection is that the Report and Recommendation "sets a dangerous precedent because it would allow defendants like Davison to lie under oath with impunity." (Doc. 923 at 17–19). The problem with this argument is that the Magistrate Judge did not find that Mr. Davison lied in his assignment. *See* (Doc. 918). Nor could the Magistrate Judge make such a finding without an evidentiary hearing and witness testimony. *See Leshin*, 618 F.3d 1221 at 1230–31 (affirming district court that found contempt and issued contempt judgment after an evidentiary hearing); *see also Ga. Power Co.*, 484 F.3d at 1291 ("[W]e will construe any ambiguities or

[2] The *Leshin* decisions from the Eleventh Circuit arise from the same procedural foundation: the district court found contempt and then entered a contempt judgment.

uncertainties in such a court order in a light favorable to the person charged with contempt."). The Receiver's objection based on the "dangerous precedent" set because of Mr. Davison's alleged lie is meritless.

The other argument the Receiver puts forth is that, even if Mr. Davison didn't lie, "he still violated Court order and committed perjury." (Doc. 923 at 18). Based on this, the Receiver reiterates his wish for a contempt judgment without a contempt finding. *See id.* ("[P]erjury is a common ground for contempt sanctions."). Once again, the Receiver cites no caselaw for support. Rather, his citations are inapplicable. *See Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1176 (11th Cir. 2017) (holding that, before a district court can invoke judicial estoppel against a civil litigant in bankruptcy proceedings, "the district court should consider all the facts and circumstances of the case"); *Miller v. Support Collection Unit Westchester Cnty.*, No. 8:09-CV-1898-T-27AEP, 2010 WL 767043, at *8 (M.D. Fla. Mar. 5, 2010) (granting motion to dismiss complaint, which alleged that the defendant misrepresented facts to the court, because perjury and contempt are sufficient deterrents against defamatory statements during judicial proceedings).

No matter how hard he tries, the Receiver cannot escape precedent requiring a contempt finding—which necessarily requires an ability to comply that Mr. Davison did not have—before imposing a contempt sanction or judgment. *See, e.g.*, *Ga. Power Co.*, 484 F.3d at 1291. As a result, the Receiver failed to meet his burden of establishing error through his third objection, and the Court should overrule this objection.

Conclusion

The Receiver's three objections fail to establish error in the Report and Recommendation on the grounds the Receiver puts forth. Rather, the Receiver's quibble is with the law governing civil contempt. Namely, the moving party must establish three necessary elements, including the responding party's ability to comply with the relevant court order, before obtaining a civil judgment or sanction. But the Magistrate Judge correctly found that Mr. Davison did not have the ability to comply with the Final Judgment's requirement that he turn over 480 platinum coins and 61 gold coins because Mr. Davison instead owned 480 silver coins and 58 gold coins. As a result, Mr. Davison respectfully asks that the Court overrule the Receiver's objections to the Report and Recommendation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed via the Court's CM/ECF system on this 12th day of June 2023.

/s/ Stanley T. Padgett
Stanley T. Padgett, Esquire