

**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.

_____ /

**RESPONSE OF BRIAN AND NICOLE DAVISON TO RECEIVER'S
OBJECTION TO OMNIBUS SUBPOENA ORDER**

Brian and Nicole Davison file this response to the Receiver's objection to the Magistrate Judge's Omnibus Order. (Doc. 924). In his objection, the Receiver fails to show that the Magistrate Judge committed a mistake in the factual findings. The Receiver also fails to prove that the Magistrate Judge misapplied or failed to apply statutes, caselaw, or procedural rules. As a result, the Receiver fails to meet his burden in overturning the Magistrate Judge's Omnibus Order. The Davisons respectfully requests that the Court overrule the Receiver's objections.

Legal Standard

A party may object to a magistrate judge's non-dispositive pretrial order within fourteen days after receiving a copy of that order. Fed. R. Civ. P. 72(a). The district court must consider timely objections and "modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.*

A finding is clearly erroneous when, although evidence supports the finding, the district court, on review of all evidence, is left with the definite and firm conviction that the magistrate judge committed a mistake. *TemPay Inc. v. Biltres Staffing of Tampa Bay LLC*, 929 F. Supp. 2d 1255, 1259–60 (M.D. Fla. 2013) (citation omitted). An order is contrary to law if it fails to apply or misapplies relevant statutes, caselaw, or procedural rules. *Id.* (citations omitted).

That the district court might have decided the issue differently than the magistrate judge is not sufficient to overturn a magistrate judge's order when two permissible views of the issue exist. *Illominate Media Inc. v. CAIR Florida Inc.*, No. 19-CV-91179-RAR, 2022 WL 708754, at *1 (S.D. Fla. Feb. 3, 2022) (citation omitted). Further, the party objecting to a magistrate judge's order bears the burden of demonstrating that the order is clearly erroneous or contrary to law. *Id.* (citation omitted).

Here, a complete review of the Omnibus Order and relevant evidence shows that the Magistrate Judge committed no mistake in granting in part and denying in part the Davisons' objections to the subpoenas. Nor did the Omnibus Order fail to apply or misapply any relevant statute, caselaw, or procedural rules.

Argument

The Receiver objects to the Magistrate Judge's Omnibus Order. (Doc. 924). To begin, the Receiver's objection is unclear about which findings he objects to as clearly erroneous and which conclusions he objects to as contrary to law. This lack of clarity is possibly due to the Receiver's lack of discussion about Rule 72(a)'s standard or

review—or any caselaw for that matter. *See* (Doc. 924 at 8–12). That said, the Receiver puts forth two grounds for his objection: (1) The Receiver is entitled to discovery on all of Mr. Davison’s assets; and (2) Nicole Davison is also bound by the assignment. *See id.* But, for both grounds, the Receiver fails to meet his burden of demonstrating that the Magistrate Judge’s order is clearly erroneous or contrary to law.

1. The Magistrate Judge correctly concluded that Rule 26(c)(1) limits the Receiver’s discovery requests to the missing coins.

The Magistrate Judge concluded that the Receiver’s discovery requests must conform with the Federal Rules of Civil Procedure. (Doc. 919 at 6) (citing Rule 1). Relying on Rule 26(c)(1), which requires discovery requests to be relevant and proportional to the needs of the case, the Magistrate Judge concluded that the only relevant discovery requests were those tailored toward the issue of the missing coins because that is the only live dispute. (Doc. 919 at 6). As a result, the Magistrate Judge granted in part and denied in part Mr. Davison’s motion and narrowed “the topics of the [Receiver’s] subpoenas to those concerning the missing coins.” *Id.* at 5–6.

The Magistrate Judge correctly concluded that the Federal Rules of Civil Procedure apply to the Receiver’s discovery requests and limits those requests based on relevancy and proportionality under Rule 26(c)(1). The Receiver points to no statute, caselaw, or procedural rule stating differently. *See TemPay Inc.*, 929 F. Supp. 2d at 1259–60. Rather, the crux of the Receiver’s objection is that his other discovery requests unrelated to the missing coins are relevant and proportional to a nonexistent sanction the Magistrate Judge declined to grant in the Report and Recommendation

denying the Receiver's motion for an order to show cause. *See* (Doc. 924 at 8–11). In other words, before the Court can determine whether civil contempt occurred, and before the Court can decide what sanction to impose, and before the Receiver issues discovery requests relevant to that undetermined sanction, the Magistrate Judge should have allowed discovery into that not-yet-issued sanction.

The Receiver has the law backwards. In the Report and Recommendation, the Magistrate Judge correctly found that Mr. Davison never had the ability to comply with the Final Judgment directing him to turn over the missing 480 platinum coins and 3 gold coins because he never owned those missing coins. *See* (Doc. 918 at 12–13) (“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.”). As a result, the Magistrate Judge concluded that the Receiver failed to prove a necessary element for civil contempt. *See id.*

The Magistrate Judge correctly applied the law governing civil contempt. First, the moving party must establish three elements, including ability to comply, with clear and convincing evidence. Second, if the moving party is successful, then the responding party must produce evidence explaining his noncompliance at a show-cause hearing. Third, the Court decides whether civil contempt occurred. Fourth, if the Court finds civil contempt, the Court determines what sanctions to issue. Fifth—and finally—the moving party can obtain discovery on assets that could satisfy the contempt sanction. *See* (Doc. 918 at 9–15).

The Receiver wishes to bypass the first four steps of civil contempt and go directly to discovery into an unissued sanction but cites no support for that proposition. *See* (Doc. 924 at 8–11). Instead, the Receiver takes issue with the governing law the Magistrate Judge correctly applied. *See id.* at 11 (“The Court should not require the Receiver to prove Mr. Davison’s ability to comply in the R&R while simultaneously denying the Receiver the ability to inquire through subpoenas into such collateral sources in the Omnibus Order.”). But that is precisely what the law requires. *See Checkers Drive-In Rests. Inc. v. One Hundred Twenty LLC*, No. 8:11-CV-2462-T-35-MAP, 2012 WL 13106395, at *1 (M.D. Fla. Jan. 4, 2012); *see also Brown v. Omni Mgmt. Grp. LLC*, No. 8:18-CV-1772-T-35-CPT, at *2 (M.D. Fla. Nov. 12, 2020). As a result, the Receiver has failed to meet his burden of proving that the Magistrate Judge misapplied or failed to apply statutes, caselaw or procedural rules. *See TemPay Inc.*, 929 F. Supp. 2d at 1259–60.

2. The Magistrate Judge correctly found and concluded that the subpoena against Mrs. Davison unduly burdens her and fails to establish relevance.

In the Omnibus Order, the Magistrate Judge granted Nicole Davison’s motion to quash and, alternatively, for protective order. (Doc. 919 at 9). The Magistrate Judge found it appropriate to quash the subpoena directed toward Mrs. Davison’s assets. (*Id.* at 7–9). The Magistrate Judge based this decision on several undisputed facts: The Receiver put forth no evidence showing that Mrs. Davison possesses the Receiver’s requested, discoverable information; the SEC stated on the record that Mrs. Davison

was not involved in the businesses at issue in this case; and Mrs. Davison has a privacy interest in her financial information. (*Id.* at 7–8).

The Receiver makes no attempt to disprove the Magistrate Judge’s findings. (Doc. 924 at 12). Nor does the Receiver point to any statute, caselaw, or procedural rule the Magistrate Judge misapplied to failed to apply (*Id.*). Instead, the Receiver points to boilerplate language (i.e., “his wife”) included in an assignment signed by Mr. Davison—not Mrs. Davison. (*Id.*); *see also Russell v. United States*, 845 F. App’x 818, 821 n.4 (11th Cir. 2021) (“We have said that the ‘mere incantation of such boilerplate language’ cannot convert the nature of relief sought.”) (citation omitted). On the basis of a document she never signed, the Receiver incorrectly concludes that Mrs. Davison is in fact a party to this case. (Doc. 924 at 12).

The Court should reject the Receiver’s argument as frivolous. *See Gulisano v. Burlington Inc.*, 34 F.4th 935, 943 (11th Cir. 2022) (rejecting arguments as frivolous where “there were no facts to support it” and “because it ignored basic principles of corporations law”). No factual or legal basis supports the Receiver’s argument. Mrs. Davison is not listed on the Court’s docket as a party. Neither the SEC nor the Receiver served Mrs. Davison with a copy of the Complaint. (Doc. 8); *see Fed. R. Civ. P.* 4(a)(1)(B) (requiring summons to “be directed to the defendant”).

Further, as the Magistrate Judge recognized, the SEC is on the record stating that Mrs. Davison had no involvement in Mr. Davison’s businesses. (Doc. 704-1 at 21:2–8). Marriage to a defendant does not automatically bestow party status on a spouse. *See generally Drott v. Park Electrochemical Corp.*, No. CV 11-1596-PHX-JAT,

2012 WL 1344729, at *8 (D. Ariz. Apr. 18, 2012). Thus, the Receiver failed to meet his burden of proving that the Magistrate Judge clearly erred in finding that Mrs. Davison is not a party or that that conclusion was contrary to law.

3. The Receiver failed to meet his burden to overturn the Omnibus Order.

Ultimately, the Receiver's objection is "full of sound and fury, signifying nothing." *See Strickler v. Walmar Stores East LP*, No. 2:18-CV-781-FtM-38MM, 2020 WL 4261303, at * 2 (M.D. Fla. July 24, 2020) (quoting *Macbeth*). The Receiver has failed to show how, based on a review of all the evidence, the Magistrate Judge committed a mistake in a factual finding. *TemPay Inc.*, 929 F. Supp. 2d at 1259–60. Nor does the Receiver cite—let alone discuss—any statute, caselaw, or procedural rule the Magistrate Judge misapplied or failed to apply. *See id.* As a result, the Receiver failed to meet his burden in establishing that the Magistrate Judge's Omnibus Order is clearly erroneous or contrary to law.

Conclusion

The Magistrate Judge correctly concluded that Rule 26(c)(1) limits discovery to the issue of the missing coins. And the Magistrate Judge correctly found and concluded that the Receiver's subpoena to nonparty Mrs. Davison is overly burdensome and irrelevant. The Receiver's objection fails to establish that the Magistrate Judge's Omnibus Order is clearly erroneous or contrary to law. Therefore, the Davisons respectfully ask the Court to overrule the Receiver's objection to the Magistrate Judge's Omnibus Order.

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