IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

H. THAYNE DAVIS, Plaintiff, vs. LIFETIME CAPITAL, INC., and DAVID W. SVETE, Defendants.	: : : : : : : : :	Case No. 3:05-cv-00072 (Judge Thomas M. Rose) (Magistrate Michael J. Newman) **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases:

Federal Cases:

State Cases:

Statutes and Rules:

Pursuant to FEDERAL RULE OF CIVIL PROCEDURE 56, the court-appointed receiver of the assets of LifeTime Capital, Inc. ("LTC"), H. Thomas Moran, II (the "Receiver"), moves for judgment in his favor and against Defendant David W. Svete's ("Svete"), and states as follows:

I. SUMMARY

A. BACKGROUND.

Svete formed LTC in 1997, and also caused to be incorporated Madison Air. In 1998, Svete allegedly sold his LTC stock to Madison Air. However, because Svete at all times controlled Madison Air, he continued to control LTC. In conjunction with LTC, Svete formed, operated, and controlled a number of other entities created to perform various services for LTC. For example, Svete formed Medical Underwriters, Inc. to assess life expectancies for LTC. Although Svete claimed that MUI and its physicians were independent, Svete (and others at his direction) altered (or in some cases fabricated) life expectancies. The life expectancies that formed the bases for determining the values of the insurance policy LTC and its investors invested in were too short, LTC did not set aside enough money to pay premiums for the entire life of the policies. After Svete had raided corporate coffers to the point that LTC was insolvent, he abandoned it. Svete was subsequently convicted of conspiracy, mail fraud, and interstate transfer of money obtained by fraud. *United States v. Svete*, 521 F.3d 1302, 1305 (11th Cir. 2008); *United States v. Svete* (*Svete II*), 556 F.3d 1157, 1160 (11th Cir. 2009) (En Banc).

On February 19, 2004, H. Thayne Davis, a LTC investor, sued LTC and Svete for fraud and breach of contract arising from LTC's sale of viaticals to him. *Davis v. LifeTime Capital, Inc.*, 3:04-cv-59 (S.D. Ohio). Davis sought appointment of a receiver to take control, and to administer the assets of, LTC for the benefit of its investors. The Court appointed Mr. Moran as the Receiver. Subsequent to his appointment, the Receiver confirmed that Svete and others

acting at his direction had fraudulently created false life expectancies. Further, the Receiver discovered that Svete and others acting at his direction had looted LTC.

On February 22, 2005, the Receiver filed the above-captioned parallel action against Svete. Simplified, the Receiver sued Svete alleging that, after he sold his LTC stock to Madison Air in 1998, he nonetheless continued to maintain complete control of the full day-to-day operations of LTC through Madison Air. Then, during his tenure as de facto CEO, significant funds were diverted from LTC to independent Svete-controlled entities doing business with LTC – specifically, Wealth Strategies, Inc., A.C. Group, Inc., A.C. Financial, Inc., Sovereign Enterprises, Inc., Waterford International, LLC, Medical Underwriting, LLC, Medical Underwriting, Inc., Natlis Capital, Inc., Madison Air, Inc., Bluecrest Group, LLC, Volcano Enterprises, LLC, Omni Limited, Banque de Financier, Ltd., Marble Capital Partners, Inc., and Umbrella Capital, LLC.[1] See Complaint [Doc. No. 1]. Using his inside control as de facto CEO, Svete caused LTC:

[1] The United States established at trial that Svete created A.C. Group, Inc. as a holding company for a number of companies including Wealth Strategies, Inc. and A.C. Financial, Inc. for the purpose of selling viatical contracts. Svete eventually made it appear that A.C. Group, Inc. had discontinued its association with LTC. Additionally, Svete created, founded and/or funded Sovereign Enterprises, Inc. (as a holding company), Medical Underwriting, Inc., Natlis Capital, Inc. (to acquire life insurance policies for LTC), and Bluecrest Group, LLC (to provide post-investment servicing). Additionally, Svete made or controlled management decisions at LTC and the other companies. The Government established:

> In order to insulate themselves from the actions of these companies and to make it appear that these interrelated companies were actually independent, Svete and [Doug] Kordell created documents to make it appear that Svete had sold his interests in LifeTime, MUI, and other companies to Anderson Marshall or others. In addition, Svete and Kordell prepared documents, including promissory notes, marketing agreements, and consulting agreements whereby LifeTime, Natlis, and other corporate entities purportedly obligated themselves to Svete individually or

- to engage Medical Underwriters, LLC to provide sham life expectancies;
- to hire Wealth Strategies, an allegedly independent company, to provide marketing services to LTC;
- to hire AC Financial, an allegedly independent company, as LTC's primary broker/agent for the sale of viatical products; and
- to hire Bluecrest Group, an allegedly independent company, to manage the LTC portfolio of insurance policies.
- Prior to resigning and selling his stock in LTC, Svete, on behalf of LTC, signed an Advertising and Marketing Agreement with Omni by which it ultimately paid Omni at least $15,000,000;
- In mid-1997, Svete, prior to signing the consulting agreement, was appointed LTC's exclusive marketing agent. In 1999, LTC repurchased the exclusive marketing rights from Svete for $2,000,000;
- LTC loaned $3,000,000 to Volcano Partners & Management effectuated by a letter from Svete to Madison Air directing LTC to make the "loan;" and
- Svete directed the removal of $1,900,000 from LTC's premium reserve account effectively rendering LTC insolvent and unable to meet its contractual obligations.

Id.

B. MOTION FOR SUMMARY JUDGMENT

The Receiver moves for summary judgment against Svete for damages he inflicted on LTC.[2] On January 21, 2004, the Government filed an indictment (the Government filed a Superseding Indictment on August 18, 2004) against Svete and others in relation to Svete's (and

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a Svete-controlled corporation, such as Sovereign, for certain rights or services allegedly provided.

Finally, Svete caused funds to be withdrawn from LTC via loans or "funds due certain Svete companies for services rendered."

[2] Although the Receiver asserted claims on behalf of LTC and the investors, subsequent to filing of the Complaint, the Sixth Circuit concluded that the Receiver did not have standing to sue for damages inflicted solely on investors. *See Liberte Capital Group, LLC v. Capwill*, 248 F. App'x 650, 656 (6th Cir. Sept. 20, 2007).

his corporations') sale of viaticals to investors. After a three week trial, the jury convicted Svete of one count of conspiracy to commit mail fraud, wire fraud and interstate transportation of money taken by fraud in violation of 18 U.S.C. § 371; one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h); five counts of mail fraud in violation of 18 U.S.C. § 1341; and three counts of interstate transportation of money taken by fraud and aiding and abetting in violation of 18 U.S.C. § 2314.

The Receiver is entitled to summary judgment for two reasons. First, Svete's criminal convictions estop him from denying civil liability to LTC pursuant to the doctrine of offensive non-mutual collateral estoppel. *See* Proposition III.A., *infra*. According to the Court, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979), the doctrine may be applied when: (1) the precise issue or fact was actually litigated in the previous case; (2) the determination of the issue or fact was necessary to the outcome of the previous case; (3) the prior proceeding is final on its merits; and (4) the nonmoving party had a full opportunity to litigate the issue in the previous case. All of the elements are present in this case.

The primary issue for this Court's resolution is whether the facts and issues as found by the jury in Svete's criminal case are the same essential facts at issue in this case. The Receiver submits that they are. All of the facts necessary to establish the criminal convictions for his fraudulent scheme to defraud investors and pilfer money from LTC rendering it insolvent are also necessary to impose civil liability on Svete. For instance, in finding that Svete engaged in a scheme to commit mail fraud, the jury necessarily determined that Svete committed the elements of common law fraud, breach of fiduciary duty, conversion, and unjust enrichment. S*ee* Proposition III.A.3.a., b., c., and e. *infra*. Correspondingly, the jury's conclusion that Svete was engaged in a conspiracy to defraud and to launder money proves the necessary elements of a

civil conspiracy claim. Proposition III.A.3.d, *infra*. Finally, the facts necessary to establish a scheme to defraud as well the conspiracy counts are also necessary to establish Svete's liability for civil RICO pursuant to 18 U.S.C. § 1962(c) and (d). Proposition III.A.3.f, *infra*.

The Receiver is also entitled to summary judgment against Svete as a sanction for Svete's willful refusal to participate in discovery. *See* Proposition III.B, *infra*. The Receiver's counsel traveled to Texas to depose Svete regarding LTC and the Svete-controlled companies. Svete sought a blanket invocation of his Fifth Amendment rights. The Receiver's counsel contacted the Court who, after hearing argument, directed Svete to proceed, and to assert his privilege on a question-by-question basis. The court further warned Svete that his failure to proceed could result in sanctions. Notwithstanding the Court's clear instructions, Svete provided nothing but evasive and incomplete answers. The following day, Svete again refused to proceed, and the Court again ordered him to comply with discovery on pain of sanction. Svete simply refused to answer any further questions.

As the Receiver argues in Proposition III.B.2, *infra*, the FEDERAL RULES OF CIVIL PROCEDURE provide that a party may move to compel disclosure when a deponent has provided evasive or incomplete answers. FED. R. CIV. P. 37(a). If the recalcitrant party fails to obey an order to compel, the Court is free to impose such sanctions as are necessary. FED. R. CIV. P. 37(b)(2). Such sanctions may include entering default judgment. *Id*. As note in Proposition III.B.3, *infra*, in considering the appropriate sanction, the Court must determine whether the party's failure to cooperate was due to willfulness, bad faith or fault, whether the opponent was prejudiced, and whether the non-cooperating party was warned. *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997). Here, Svete acted willfully, the Receiver was prejudiced and the Court warned Svete twice that the failure to proceed could result in sanctions.

II. MATERIAL FACTS AS TO WHICH NO GENUINE DISPUTE EXISTS.

1. From January 1, 1997 through September 21, 2001, Svete devised and operated a scheme to defaud the investors of LTC and LTC itself. *See* Superseding Indictment attached as Exhibit 1 at 9; Affidavit of Benjamin Beard attached as Exhibit 2 at ¶ 6.

2. To that end, Svete began creating interrelated corporations attempting to give the appearance of independence. *See* Exhibit 1 at 10; Exhibit 2 at ¶ 6.

3. Thus, Svete created, or caused to be created, LTC to sell life settlement investments. *See* Exhibit 1 at 1; Exhibit 2 at ¶¶ 6, 8; *United States v. Svete* (*Svete I*), 521 F.3d 1302, 1305 (11th Cir. 2008) attached as Exhibit A to Exhibit 2.

4. Investors provided the money necessary for LTC to purchase life insurance policies. *See* Exhibit 1 at 2-3; Exhibit 2 at ¶ 6.

5. On receipt of investor money, a portion was used to pay operating and sales commissions while a portion was set aside in a Premium Reserve Account ("PRA") to pay premiums on the underlying life insurance policies when they came due. *See* Exhibit 1 at 11; Exhibit 2 at ¶ 6.

6. Additionally, Svete created, or caused to be created, Wealth Strategies, Inc. to manage the sale of viaticals to investors. *See* Exhibit 1 at 3; Exhibit 2 at ¶ 6.

7. Svete created, or caused to be created, A.C. Group, Inc., a holding company for other companies that sold a variety of financial investment products including viaticals. *See* Exhibit 1 at 3; Exhibit 2 at ¶ 6.

8. Svete created, or caused to be created, Sovereign Enterprises, Inc., a holding or management company for other Svete-controlled companies. *Id*.

9. Svete founded and funded Natlis to acquire life insurance policies to be used as viatical investments sold by LTC. *See* Exhibit 1 at 4; Exhibit 2 at ¶ 6.

10. Svete founded and funded Bluecrest Group to provide servicing of the viatical investments including the payment of life insurance premiums. *See* Exhibit 1 at 4; Exhibit 2 at ¶¶ 6, 8; *Svete I*, 521 F.3d at 1306.

11. Svete created, or caused to be created, Madison Air. *See* Exhibit 1 at 5; Exhibit 2 at ¶ 6.

12. At various times, Svete described himself as the owner, chief executive officer, consultant, and/or marketer of LTC, Natlis, Madison Air, A.C. Group, Bluecrest Group, Volcano Enterprises, LLC, Wealth Strategies, Inc., and Sovereign Enterprises, Inc. *See* Exhibit 1 at 5; Exhibit 2 at ¶ 6.

13. Svete hired Ron Girardot ("Girardot") to oversee operations at the Svete-controlled companies. *See* Exhibit 1 at 6; Exhibit 2 at ¶¶ 6, 8; *Svete I*, 521 F.3d at 1305.

14. After working at A.C. Group, Svete assigned Girardot to work for Sovereign Enterprises, Inc. where he also dealt with LTC and related companies. *See* Exhibit 1 at 6; Exhibit 2 at ¶¶ 6, 8; *Svete I*, 521 F.3d at 1305.

15. Svete appointed Girardot to serve as president and CEO of LTC in April 1998. *See* Exhibit 1 at 15; Exhibit 2 at ¶ 6.

16. Girardot was, for a time, president of Bluecrest Group with full control over the PRA. *See* Exhibit 1 at 6; Exhibit 2 at ¶¶ 6, 8; *Svete I*, 521 F.3d at 1305.

17. Ian Walcott (Walcott) incorporated Madison Air. *See* Exhibit 1 at 7; Exhibit 2 at ¶ 6. Walcott also acted as an officer of Bank of Finance. *Id*.

18. Anderson Marshall acted as a director of Madison Air, who, on behalf of Madison Air, purchased Svete's interest in LTC. *See* Exhibit 1 at 7; Exhibit 2 at ¶ 6.

19. Svete used the entities he created, or caused to be created, to conceal his true controlling interests in the numerous corporations. *See* Exhibit 1 at 10; Exhibit 2 at ¶¶ 6, 8; *Svete I*, 521 F.3d at 1305.

20. For instance, on August 24, 1998, shortly after creating Madison Air, Svete created documents indicating that he had transferred his interest in LTC to Madison Air. *See* Exhibit 1 at 11, 16; Exhibit 2 at ¶ 6.

21. However, although Svete gave the appearance of giving up control of LTC, he continued to exercise day-to-day control. *See* Exhibit 1 at 12; Exhibit 2 at ¶¶ 6, 8; *Svete I*, 521 F.3d at 1305.

22. Moreover, "Svete made or controlled management decisions at the various companies." *See* Exhibit 1 at 5; Exhibit 2 at ¶¶ 6, 8; *United States v. Svete* (*Svete II*), 556 F.3d 1157, 1160 (11th Cir. 2009) (En Banc) attached as Exhibit B to Exhibit 2.

23. Beginning in December 1997 and continuing throughout the life of LTC, Svete caused funds to be withdrawn from LTC accounts for his personal use. *See* Exhibit 1 at 13; Exhibit 2 at ¶ 6. The transactions were identified as loans to others, were transferred by wire internationally to nominee entities, or were denominated as funds due certain Svete-controlled companies for services rendered which were not in fact rendered. *Id*.

24. Svete accomplished these fraudulent transfers with the aid of Girardot and others. *See* Exhibit 1 at 11-12; Exhibit 2 at ¶ 6.

Omni Limited

25. On or about December 20, 1997, Svete stated that he executed an advertising and marketing agreement with Omni Limited, a West Indies company, whereby LTC agreed to pay Omni Limited $15,000,000 by June 1, 1998. *See* Exhibit 1 at 14; Exhibit 2 at ¶ 6.

26. On December 31, 1997, Svete caused the withdrawal from LTC funds of $2,000,000 wired to Omni Limited. *See* Exhibit 1 at 14; Exhibit 2 at ¶ 6.

27. On March 28, 1998, Svete arranged for a wire transfer of $6,000,000 to Omni Limited for a "marketing research project." *See* Exhibit 1 at 15; Exhibit 2 at ¶ 6.

28. On May 29, 1998, Svete and Girardot transferred $5,000,000 by wire from LTC for the benefit of Omni Limited to a bank in the Channel Islands. *See* Exhibit 1 at 15; Exhibit 2 at ¶ 6.

29. No independent evidence corroborates that Omni Limited actually provided services in return for the $13,000,000 payments to Omni Limited. *See* Affidavit of H. Thomas Moran, II, attached as Exhibit 3 at ¶ 8.

Bank of Finance

30. On May 27, 1998, Svete withdrew from LTC funds and transferred by wire $1,585,970 to an account maintained at Bank of Finance. *See* Exhibit 1 at 16; Exhibit 2 at ¶ 6.

31. On February 22, 1999, Svete instructed Roger Lange, the then-president of LTC, to identify a $1,200,000 policy payment as part of a Bank of Finance investment in viaticals. *See* Exhibit 1 at 17; Exhibit 2 at ¶ 6.

32. On February 19, 1999, Bank of Finance allegedly purchased a viatical, but the same person signed for LTC and as a representative of Bank of Finance. *See* Exhibit 1 at 17; Exhibit 2 at ¶ 6.

33. On March 2, 1999, Svete caused the creation of a client statement showing that LTC had received $2,234,970 from Bank of Finance to purchase viaticals. *See* Exhibit 1 at 17; Exhibit 2 at ¶ 6.

34. On March 15, 1999, Svete instructed Roger Lange to place death benefit proceeds received from a matured policy in an escrow account for the benefit of Bank of Finance. *See* Exhibit 1 at 18; Exhibit 2 at ¶ 6. The very same day, the funds were wired from LTC to an account in St. Vincent & the Grenadines for the benefit of Bank of Finance. *Id*.

35. No independent evidenced supports that Bank of Finance invested in viaticals. *See* Exhibit 3 at ¶ 14.

The Sale of Svete's "Marketing Rights" and the Svete Consulting Agreement

36. On July 1, 1999, LTC paid Svete $2,000,000 for the exclusive right to market viaticals to investors. *See* Exhibit 1 at 19; Exhibit 2 at ¶ 6. LTC executed a $2,000,000 promissory note in favor of Svete. *Id*.

37. Also on July 1, 1999, LTC and Svete executed a consulting agreement by which Svete agreed to provide consulting services for one year for $500,000 per month plus 3% of the monthly investment funds in excess of $5,000,000. *See* Exhibit 1 at 19; Exhibit 2 at ¶ 6.

38. No independent evidence demonstrates that Svete's "marketing rights" were worth $2,000,000, or that it was good business judgment for LTC to purchase them at all. *See* Exhibit 3 at ¶ 17. Similarly, no independent evidence exists that Svete provided consulting services to LTC or that his consulting services would be worth $6,000,000 and a percentage of investment funds. *Id*.

Volcano Enterprises, LLC

39. In January 2000, Svete created two Nevis corporations, Marble Capital Partners, Inc. and Umbrella Capital, LLC which owned 100% of Marble. *See* Exhibit 1 at 20; Exhibit 2 at ¶ 6.

40. On February 3, 2000, Anderson Marshall, as a director of Madison Air, ordered LTC to wire $3,000,000 to Volcano Enterprises, LLC as a "loan." *See* Exhibit 1 at 20; Exhibit 2 at ¶ 6. The next day, Svete caused the creation of Volcano Enterprises, LLC, a Canadian corporation. *See* Exhibit 1 at 21; Exhibit 2 at ¶ 6.

41. Once formed, Volcano Enterprises signed a promissory note payable to Svete for $3,000,000. *Id*.

42. On March 15, 2000, Marble Capital Partners, Inc. executed a $3,000,000 promissory note payable to Volcano Enterprises, LLC. *Id*.

43. On March 20, 2000, Umbrella Capital, LLC executed a $3,000,000 promissory note payable to Marble Capital Partners, Inc. *Id*.

44. On July 27, 2000, Svete represented to the British Exchange Commission that the $3,000,000 being held in the Bank of Montreal was his money. *Id*.

45. LTC records do not show that the $3,000,000 loan was repaid.[3] *See* Exhibit 3 at ¶ 24.

[3] Canadian authorities seized the $3,000,000. The Receiver ultimately recovered $1,800,000 of those funds through a series of compromises and settlements approved by various courts.

The PRA

46. On April 19, 2000, Girardot, as president of Bluecrest, directed that $1,967,750.93 be withdrawn from the PRA and paid to Svete. *See* Exhibit 1 at 22; Exhibit 2 at ¶ 6.

47. LTC records do not reflect that the $1,967,750.93 was repaid.

48. As the jury in Svete's criminal case found, Svete's collective actions resulted in the diversion of $21,000,000[4] from LTC rendering it insolvent and incapable of operating as a going concern. *See* Exhibit 3 at ¶ 27.

III. ARGUMENTS

A. SVETE'S CRIMINAL CONVICTIONS PRECLUDE HIM FROM DENYING CIVIL LIABILITY.

1. Issue Preclusion in General.

Issue preclusion (collateral estoppel) prohibits re-litigation "of a fact or issue when that fact or issue was necessarily adjudicated in a prior cause of action and the same fact or issue is presented in a subsequent suit." *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 589 (6th Cir. 2009). The doctrine applies to preclude re-litigation of issues and facts in a civil case previously determined in a criminal case. *See, e.g., Zack v. Comm'r of Internal Revenue*, 291 F.3d 407, 415 (6th Cir. 2002); *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978) (concluding that issues necessary and essential to a criminal conviction, whether by guilty plea or jury verdict, may be precluded in a subsequent civil proceeding). Thus, plaintiffs in civil racketeering litigation may utilize the doctrine of collateral estoppel. *Lewisville Props., Inc. v. Cauble*, 849 F.2d 946, 949 (5th Cir. 1988).

[4] The jury entered a special verdict finding that, as to Svete, $21,000,000 was involved in and traceable to property that was involved in the money laundering conspiracy.

Offensive non-mutual collateral estoppel may be applied where (1) the precise issue or fact was raised and actually litigated in the previous case; (2) the determination of the issue or fact was necessary to the outcome of the previous case; (3) the prior proceeding ended in a final judgment on the merits; and (4) the party against whom estoppel is used had a full opportunity to litigate the issue or fact in the previous case. *United States v. Sandoz Pharm. Corp.*, 894 F.2d 825, 826-27 (6th Cir. 1990). In addition to these four elements, the Supreme Court, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979), discussed several policy considerations. The Court should, therefore, also consider whether the party seeking application of the doctrine could have participated in the previous case and whether the opposing party had an incentive to vigorously litigate the issues in the previous case. In determining the facts and issues precluded, the Court may look to the judgment of conviction and the indictment. *Buchanan County v. Blankenship*, 496 F. Supp. 2d 715, 720 (W.D. Va. 2007).

Applying the *Parklane* elements in this case, Svete's convictions for (1) conspiracy to commit mail fraud, wire fraud and interstate transportation of money taken by fraud, (2) conspiracy to commit money laundering, (3) mail fraud and (4) interstate transportation of money obtained by fraud collaterally estop him from arguing that he is not liable for the civil causes of action here. Undoubtedly, Svete cannot contest that the Government's criminal prosecution ended in final judgment (the United States Supreme Court denied certiorari on March 22, 2010, *see Svete v. United States*, 130 S. Ct. 1881 (2010)) or that he did not have a full and fair opportunity to litigate the facts and issues in his criminal trial.[5] Similarly, Svete cannot claim that he did not have the incentive to vigorously defend himself in his criminal trial. The Receiver, a private party, could not have joined as a party in the criminal case. However, the

[5] Indeed, Svete took the stand in his own defense at his criminal trial.

Receiver testified as a material witness at trial and during sentencing on behalf of LTC and its investors.

Thus, at issue here is the extent to which the final judgment on the facts supporting the essential elements of the crimes of which Svete was convicted estops him from relitigating the essential elements of the civil claims now before the Court. *See Podell*, 572 F.2d at 35.

2. Svete's Criminal Convictions.

a. Conspiracy in Violation of 18 U.S.C. § 371.

A jury convicted Svete and Girardot on one count of conspiracy to commit mail fraud, wire fraud and interstate transportation of money taken by fraud in violation of 18 U.S.C. § 371. *See* Amended Judgment of Svete attached as Exhibit 4; Judgment of Girardot attached as Exhibit 5. Charme Austin pleaded guilty.[6] *See* Judgment of Austin attached as Exhibit 6.

The jury found that (1) Svete "knowingly and willfully joined in an agreement with" others to (2) commit an offense (mail fraud, wire fraud, and interstate transportation of money obtained by fraud), and (3) "there was at least one overt act in furtherance of the agreement." *United States v. Jamieson*, 427 F.3d 394, 402 (6th Cir. 2005). Even assuming Svete was unaware of certain overt acts, he was liable for any overt acts of another conspirator so long as such acts were foreseeable and performed in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

The overt acts the Government pleaded as instrumental to the conspiracy were necessarily material to the jury's conviction. Among the pleaded overt acts were numerous

[6] "[A] guilty plea is an admission of all the elements of a formal criminal charge. . . ." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). And, a court may accept a guilty plea only if it is satisfied that sufficient evidence exists to prove defendant's guilt. *Santobello v. New York*, 404 U.S. 257, 261 (1971).

instances of wire fraud and interstate transportation of stolen money which directly injured LTC. For instance:

- Svete caused the withdrawal and wire transfer of $2,000,000 overseas for the benefit of Omni Limited purportedly as payment under a "marketing agreement" between LTC and Omni Limited. *See* Exhibit 1 at 14.

- Svete arranged a $6,000,000 wire transfer for the benefit of Omni Limited. *Id*. at 15.

- Svete caused the withdrawal and wire transfer of $1,585,970 to an overseas account at the Bank of Finance. *Id*. at 16.
- Svete and Girardot caused the wire transfer of $5,000,000 for the benefit of Omni to an account in the Channel Islands. *Id*.

- Svete caused to be wire transferred $1,300,000 for the benefit of Bank of Finance to a bank in St. Vincent & the Grenadines. *Id*. at 18.

- Svete caused to be transferred by wire $3,000,000 for the benefit of Volcano Enterprises, LLC in a Canadian Bank after creating a transaction that made it appear that the $3,000,000 represented a valid loan. As detailed in the Receiver's factual recitation, to give the appearance of legitimacy, Svete effectuated the transfer through a series of transactions using companies he created specifically to engage in the transaction.

b. Conspiracy in Violation of 18 U.S.C. § 1956(h).

A jury likewise convicted Svete and Girardot of a conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). *See* Exhibit 4; Exhibit 5. By special verdict, the jury also concluded that, as to Svete, $21,000,000 was involved in and is traceable to property that was involved in the money laundering conspiracy. *See* Special Verdict attached as Exhibit 7. To establish a money laundering conspiracy, the government must prove (1) that two or more persons conspired to commit the crime of money laundering, and (2) that the defendant knowingly and voluntarily joined the conspiracy. *United States v. Prince*, 618 F.3d 551, 553-54 (6th Cir. 2010) (citing *Whitfield v. United States*, 543 U.S. 209, 212 (2005)).

Essential to the jury's conviction of Svete for conspiracy to launder money and its order that he pay $21,000,000 in restitution, is that the $21,000,000 constituted the proceeds of

criminal activity and that Svete was actually involved in money laundering. On the one hand, Svete obtained funds from investors by misrepresenting the nature and value of the investments in viaticals. On the other, he took the money from the investors and diverted it to his personal use.

c. Mail Fraud and Aiding and Abetting.

The jury convicted Svete and Girardot of five counts of mail fraud in violation of 18 U.S.C. § 1341. *See* Exhibit 4; Exhibit 5. Mail fraud consists of (1) a scheme to defraud, (2) use of the mail or wire in furtherance of the scheme, and (3) intent to deprive the victim of money or property. *United States v. Warshak*, 631 F.3d 266, 310 (6th Cir. 2010). A scheme to defraud must involve "[i]ntentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed." *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). To allege intentional fraud, there must be "proof of misrepresentations or omissions which were 'reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 153 (6th Cir.1987) (citation omitted). To establish aiding and abetting, the Government was required to show that Svete "in some way associated himself with a venture such that his participation was intended to bring about the crime or make it succeed." *United States v. Clark*, 928 F.2d 733, 736 (6th Cir. 1991).

The Government alleged in the Superseding Indictment that, as part of the scheme to defraud using the mails, Svete and Girardot wrongfully diverted funds from LTC. *See United States v. Flynn*, 265 F. App'x 434, 443 (6th Cir. Feb. 14, 2008) (unpublished) (noting that the scheme to defraud included defendant's diversion of fraudulently obtained investor funds for her own purposes when she knew they derived from an unlawful scheme). Not only did Svete use

the mails to fleece investors, but, essential to the scheme proven by the Government was Svete's diversion of LTC funds; funds that were supposed to be used to maintain insurance policies and otherwise operate the corporation. The district court instructed the jury that it must find that the defendants devised a scheme "substantially the same as the one alleged in the indictment." *See* Instructions attached as Exhibit 8 at 20, 28. Therefore, to convict Svete of mail fraud, the jury was necessarily required to find that Svete created or caused to be created a number of companies – Wealth Strategies, Inc., A.C. Group, Inc., Sovereign Enterprises, Inc., Bluecrest Group, Madison Air, Volcano Enterprises, Marble Capital Partners, Inc. and Umbrella Capital, LLC – that, like LTC, he controlled.[7] Moreover, Svete created documents and transactions designed to conceal his control of the corporations even though he continued to operate them all. Beginning in December 1997 and continuing through September 2001, Svete caused funds to be withdrawn from LTC for his own personal use. These withdrawals were disguised through voluminous documentation as "legitimate transactions" – marketing agreements, consulting agreements, and loans.

d. Interstate Transportation of Money Obtained by Fraud.

The jury convicted Svete and Girardot of three counts of interstate transportation of money taken by fraud and aiding and abetting in violation of 18 U.S.C. § 2314. *See* Exhibit 4; Exhibit 5. To obtain a conviction, the Government was required to prove that Svete (1) transported or caused to be transported, (2) in interstate commerce, (3) property valued at more than $5,000, (3) with knowledge that it has been fraudulently taken. *United States v. Griffith*, 17 F.3d 865, 872 (6rh Cir. 1994). The jury could infer the requisite knowledge from circumstantial

[7] H. Thomas Moran was also appointed the Receiver of the assets of these companies.

evidence that would convince a reasonable person that the money transferred was obtained by fraud. *See United States v. Scruggs,* 549 F.2d 1097, 1104 (6th Cir.1977).

The Government, then, successfully proved several essential facts pleaded in the Superseding Indictment. As noted above, essential to the Government's case was that Svete engaged in fraud and that he improperly caused LTC to wire over $21,000,000 in interstate and foreign commerce. Additionally, essential to the Government's case was proving that Svete knew he was ordering the transfer of money that was fraudulently taken. Furthermore, Svete ordered LTC to execute certain agreements with Svete-controlled entities by which LTC agreed to pay exorbitant if not completely outrageous prices for alleged services. Moreover, essential to the conviction for transportation of money obtained by fraud was that Svete knew that because life expectancies for viators were artificially short (because he himself was involved in altering the life expectancies), the monies devoted to the PRA were inadequate to pay for premiums on policies whose insureds outlived the bogus life expectancies. Yet, Svete continued to order the diversion of money necessary to operate LTC.

3. The Civil Causes of Action

a. Fraud, Deceit and Misrepresentation.

To establish Svete's liability for fraud, the Receiver must show that Svete either misrepresented or failed to disclose a material fact knowing it was false or with reckless disregard of its truth, intending that LTC rely on it, and that LTC relied on the misrepresentation causing it injury. *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, 604 F. Supp. 2d 1128, 1150 (S.D. Ohio 2009) (citing *Russ v. TRW, Inc.*, 570 N.E.2d 1076, 1083-84 (Ohio 1991)). A duty to disclose can arise from a fiduciary relationship. *Id.*

The Government proved beyond a reasonable doubt that Svete committed mail fraud and interstate transportation of money obtained by fraud. The finding of fraud beyond a reasonable doubt is more than adequate to establish, by a preponderance of the evidence, that Svete committed common law fraud on LTC. Svete made several affirmative misrepresentations, for instance, that the $13,000,000 diverted to Omni Limited was in payment of valid marketing fees. Svete also affirmatively represented that the $3,000,000 to Volcano Enterprises, LLC was a valid loan. Similarly, Svete defrauded by omitting certain material information. Primarily, by developing a complex set of transactions to cover his misappropriation of funds, he concealed his self-dealing from LTC. Of course, all of Svete's material misrepresentations and omissions were antithetical to the proper operation of LTC. Therefore, when considering whether Svete committed mail fraud and transported stolen monies he knew were fraudulently procured, the jury necessarily decided that Svete committed fraud. Applying the doctrine of collateral estoppel, Svete's criminal convictions estop him from arguing that he did not commit common law fraud.

b. Breach of Fiduciary Duty.

To prove a breach of fiduciary duty, plaintiff must "establish the existence of a fiduciary duty, a breach of that duty, and an injury proximately resulting therefrom." *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, 604 F. Supp. 2d at 1148 (citing *Strock v. Pressnell*, 527 N.E.2d 1235, 1243 (Ohio 1988)). A fiduciary relationship "may arise de facto from an informal relationship if both parties understand that a special trust or confidence has been reposed." *Cairns v. Ohio Sav. Bank*, 672 N.E.2d 1058, 1062 (Ohio Ct. App. 1996). Corporate officers owe fiduciary duties to the corporation. *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 617 F. Supp. 2d 700, 718 (S.D. Ohio 2009). A director or officer has a duty of good faith, loyalty to

disclose and to refrain from self-dealing. *DeBoer Structures (U.S.A.) Inc. v. Shaffer Tent & Awning Co.*, 233 F. Supp. 2d 934, 953 (S.D. Ohio 2002). An officer and/or director also has a duty not to waste or mismanage corporate funds. *In re Nat'l Century Fin. Enters. Inc. Inv. Litig.*, 617 F. Supp. 2d at 718.

The jury necessarily concluded that Svete maintained control over LTC and other Svete-related companies. As such, even though Svete sought to remove any trace that he was actually running LTC, he nonetheless exercised full control over the company. Therefore, although not a formal officer or director, Svete was a fiduciary. Because essential to the jury's convictions was that Svete engaged in self-dealing and that he mismanaged corporate funds, Svete is estopped from denying civil liability for breach of fiduciary duty.

c. Conversion.

To establish conversion, plaintiff must prove "(1) a plaintiff's actual or constructive possession or immediate right to possession of the property, (2) a defendant's wrongful interference with the plaintiff's right to possession, and (3) damages." *Urbanek v. All State Home Mortgage Co.*, 898 N.E. 2d 1015, 1021 (Ohio Ct. App. 2008). "Where an action for conversion is based on the conversion of cash, the action will "only lie if identification is possible and there is an obligation to deliver the specific money in question." *Dice v. White Family Cos., Inc.*, 878 N.E.2d 1105, 1109 (Ohio Ct. App. 2007) (citation and quotation marks omitted).

Undeniably, wrongfully looting a corporation's assets without a legal right to do so is conversion. *DeNune v. Consol. Capital of N.A., Inc.*, 288 F. Supp. 2d 844, 854 (N.D. Ohio 2003). The money Svete diverted was investor money that was, or should have been earmarked to the PRA of other corporate purposes. And Svete was duty-bound to use the money for the

purposes represented to investors. The jury convicted Svete of both mail fraud and knowingly transporting stolen money obtained by fraud. In convicting Svete of these offenses, the jury necessarily determined that Svete had converted money rightfully belonging to LTC.

d. Civil Conspiracy.

"[A] civil conspiracy is 'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.'" *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, 604 F. Supp. 2d at 1153 (citing *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, 866 (Ohio 1995)).

As noted earlier, to convict Svete of a § 371 conspiracy, the jury was required to find that he knowingly and willfully agreed with others to commit a crime. *Jamieson*, 427 F.3d at 402. Similarly, the jury could not have convicted Svete of a § 1956(h) conspiracy had it not found the same knowing and voluntary agreement with another to illegally launder money. *Prince*, 618 F.3d at 553-54. In convicting Svete of conspiracy to commit mail fraud, wire fraud and interstate transfer of stolen property, the jury clearly concluded that Svete "devised and intended to devise a scheme and artifice to defraud." Moreover, the jury necessarily determined that Svete and others reached an agreement to devise a scheme or artifice to defraud. Therefore, the criminal convictions for conspiracy are preclusive and Svete's liability for common law conspiracy is established.

e. Unjust Enrichment.

"A claim for unjust enrichment requires the claimant to show that a benefit was conferred upon another party, that the other party knew of the benefit, and that it would be unjust to allow the other party to retain the benefit without paying for it." *Wuliger v. Cannella Response Television, Inc.*, ---F. Supp. 2d ---, 2011 WL 3901810, at *8 (N.D. Ohio. Sept. 6, 2011)

(quotation marks omitted) (quoting *Maverick Oil & Gas, Inc. v. Barberton City Sch. Dist. Bd. of Educ.*, 872 N.E.2d 322, 330 (Ohio Ct. App. 2007)).

The convictions for general conspiracy, conspiracy to launder money, mail fraud and interstate transportation of money obtained by fraud, definitely establish that Svete wrongfully caused LTC's assets (a benefit) to be conferred on himself. *DeNune*, 288 F. Supp. 2d at 854. It is simply inequitable to allow Svete to retain the funds he obtained from LTC.

f. Civil RICO.

"RICO provides a private right of action for treble damages to any person injured in his business or property by reason of the conduct of a qualifying enterprise's affairs through a pattern of acts indictable as mail fraud." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008). A criminal prosecution for criminal RICO is not a precondition to the filing of a civil RICO case. *Chisolm v. Transouth Fin. Corp.*, 95 F.3d 331, 336 (4th Cir. 1996). To prevail on a civil claim under 18 U.S.C. § 1962(c),[8] plaintiff must establish "(1) conduct (2) of an enterprise (3) through a pattern of (4) racketeering activity." *Girgis v. Countrywide Home Loans, Inc.*, 733 F. Supp. 2d 835, 854 (N.D. Ohio 2010) (quoting *Arnold v. Petland, Inc.*, 2010 WL 2301194 at *3 (S.D. Ohio June 4, 2010)). In a civil RICO case, plaintiff must also establish that it was injured "by reason of" defendant's RICO violation. 18 U.S.C. § 1962(c). *See also Frank v. D'Ambrosi*, 4 F.3d 1378, 1385 (6th Cir. 1993).

(1) Enterprise

An enterprise is "any individual, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Under § 1962(c), an enterprise is "the instrument through which illegal activity is

[8] Although the Receiver pleaded claims for RICO under § 1962(a) and (b), he moves for summary judgment solely on § 1962(c) and § 1962(d).

conducted." *United States v. Chance*, 306 F.3d 356, 371-72 (6th Cir. 2002). As the Supreme Court has stated:

> [A]n enterprise includes any union or group of individuals associated in fact and . . . RICO reaches a group of persons associated together for a common purpose of engaging in a course of conduct. Such an enterprise . . . is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.

Boyle v. United States, 129 S. Ct. 2237, 2243 (2009) (internal quotations and citations omitted). An association-in-fact is an enterprise if it has a purpose, relationship among the associates and longevity. *Id*. at 2244. *See also In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, 617 F. Supp. 2d at 714 (qu**o**ting *United States v. Turkette*, 452 U.S. 576, 583 (1981)). Some minimal level of organizational structure which enables the association to function as a racketeering organization is required. *VanDenBroeck v. Commonpoint Mtg. Co.*, 210 F.3d 696, 699 (6th Cir. 2000), *abrogated on other ground by Bridge*, 553 U.S. 639 (2008). Proof sufficient to show a pattern of racketeering activity may be sufficient to also prove the existence of an enterprise. *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir. 2006).

Here, Svete, Girardot, Austin and the Svete-controlled entities formed an informal association – an enterprise – to subvert LTC's normal operation. Svete, the person, was associated with the enterprise throughout its life, and participated directly in the conduct of the enterprise's affairs – committing the predicate acts of mail fraud and interstate transfer of fraudulently obtained money. In convicting Svete of mail fraud, interstate transportation of fraudulently obtained money and aiding and abetting, the jury was required to find the defendants devised a scheme "substantially the same as the one alleged in the indictment." *See* Exhibit 8 at 20, 28. The scheme in the Superseding Indictment demonstrated the requisite hierarchical and continuous structure.

The pleaded scheme showed that Svete orchestrated the activities of the enterprise by directing the activities of both individuals like Girardot and Austin, and his companies. Svete created interrelated corporations both to convince investors that the viatical investments were safe so that they would invest their hard-earned money in his fraudulent enterprise, and to conceal the funds he nefariously diverted from LTC. Although Svete gave the appearance of having ceded control of his companies, he nonetheless continued to exercise day-to-day control over management decisions at various companies including LTC. Thus, Svete was the puppet master who directed the entire scheme. Svete stated that he had executed a marketing agreement with Omni Limited. He ordered Girardot to transfer $5,000,000 from LTC to Omni Limited at a Channel Islands bank. Svete instructed Roger Lange, the then-president of LTC, to create a transaction by which it appeared that Bank of Finance had invested over $2,000,000 in viaticals (when it had not) and subsequently paid Bank of Finance the death benefits from several policies. Svete orchestrated a transaction by which he created several companies, caused LTC to loan the companies money, and then claimed to Canadian authorities that the money belonged to him.

Similarly, essential to Girardot's conviction was that Svete hired him to oversee all operations at Svete-controlled companies, and he in fact acted as president of LTC for a period of time. Moreover, as the evidence at trial showed, Girardot was Svete's right-hand-man who knew everything about the venture. *Svete I*, 521 F.3d at 1307. Girardot in fact participated directly in several of the diversions of money from LTC. "These facts illustrate a hierarchical decision-making structure and a division of labor . . . supporting the enterprise element." *Johnson*, 440 at 840.

The evidence at Svete's trial material to his convictions showed that association-in-fact had a common purpose – to take money from investors and convert it to Svete's personal use. Last, the evidence at Svete's trial material to his convictions showed that the enterprise, from the time Svete created his companies and hired Girardot to the time he abandoned LTC, had the requisite continuity. Throughout the period from 1997 through September 2001, the enterprise diverted money from LTC in a series of transactions.

(2) Pattern of Racketeering Activity.

To establish a pattern of racketeering activity, plaintiff must establish "at least two predicate acts . . . within ten years of each other" which "demonstrate 'relatedness' and 'continuity.'" *DeNune*, 288 F. Supp. 2d at 858 (quoting *Vemco, Inc. v. Camardella*, 23 F.3d 129, 133 (6th Cir. 1994). Mail fraud and interstate transportation of fraudulently obtained funds are racketeering activities. 18 U.S.C. § 1961(1). Acts are related if they have "the same or similar purposes, results, participants, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events." *Woodstock Research Info. Servs., Inc. v. Bloodstock Research Info. Servs., Inc.*, 622 F. Supp. 2d 504, 514 (E.D. Ky. 2009).

Here, Svete was convicted of five counts of mail fraud and three counts of interstate transportation of stolen money. The acts are related. The mail fraud was intended to obtain money from investors and the interstate transportation of stolen money was intended to divert that money from LTC. LTC was the victim of numerous instances of diversion of corporate funds.

Acts are continuous if "(1) the predicate acts "involve a distinct threat of long-term racketeering activity, either implicit or explicit;" (2) the acts are "part of an ongoing entity's regular way of doing business;" or (3) the acts are "a regular way of conducing defendant's

ongoing legitimate business." *Id*. (quotation omitted). Courts weigh several factors in determining whether a pattern exists including (1) the length of time the activity existed, (2) the number of different schemes, (3) the number of predicate acts comprising the scheme, (4) the number of victims "(the more the better)," and "the number of perpetrators (the less the better)." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d *Inc. Inv. Litig.*, 1101, 1110 (6th Cir. 1995). Merely because the predicate acts relate to the same scheme does not mean they fail to meet the pattern requirement. *Appley v. West*, 832 F.2d 1021, 1027-28 (7th Cir. 1987).

Svete lured investors to continue to invest more money in what was, in part, a Ponzi scheme through the predicate acts of mail fraud. He was able to divert funds by transferring money obtained by fraud in interstate commerce (and, as the jury necessarily concluded, by money laundering) by using LTC as a cover for his illegal activities. The pattern of racketeering occurred over a period of nearly five years.

(3) Injury.

LTC is entitled to recompense for the harm resulting from the predicate acts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985). "As a general rule, RICO plaintiffs are entitled only to damages to business or property proximately caused by the predicate acts." *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299 (6th Cir. 1989) (concluding that plaintiffs were entitled to damages equaling the amount they invested in the fraudulent scheme).

Svete and others injured LTC by weakening it financially to such an extent that it could no longer operate as a going concern. Moreover, Svete absconded with over $21,000,000 from LTC's treasury. Svete caused wire transfers to Omni Limited of $13,000,000 allegedly pursuant to a marketing agreement between LTC and Omni. No independent evidence corroborates that Omni Limited actually provided any services in return for the $13,000,000 payments.

Correspondingly, Svete caused to be created documentation that established that Bank of Finance purchased viaticals in the amount of $2,234,970. Svete withdrew and transferred $1,585,970 and the death benefit of a large policy to an account maintained at Bank of Finance. No independent evidence supports that Bank of Finance actually paid any money for a viatical investment and most certainly none shows that it invested over $2,000,000.

Additionally, LTC, in July 1999, paid Svete $2,000,000 for his "exclusive marketing rights." LTC records do not support that Svete's marketing rights were worth $2,000,000. LTC made a $3,000,000 "loan" to Volcano Enterprises, LLC the proceeds of which Svete later claimed belonged to him. LTC records fail to show that the "loan" was ever repaid. Finally, on April 19, 2000, Girardot, as president of Bluecrest, directed that $1,967,750.93 be withdrawn from PRA and paid to Svete. LTC records do not show the purposes for which the money was paid, nor do they show that the money was repaid. In all, Svete's actions resulted in the diversion of over $21,000,000 from LTC.

(4) The Conspiracy.

The Receiver also alleges that Svete violated 18 U.S.C. § 1962(d) which prohibits a conspiracy to violate § 1962(c). A plaintiff seeking civil relief pursuant to § 1962 need not show that defendant "agreed to commit two or more predicate acts" or violated §1962(c). *Dowling v. Select Portfolio Servicing, Inc.*, 2006 WL 571895, at * 5 (S.D. Ohio Mar. 7, 2006) (unpublished) (quoting *Salinas v. United States*, 522 U.S. 52, 61-66 (1997)). Rather, "a defendant may be held liable for a conspiracy to violate § 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise." *Id.* (quoting *Smith v. Berg*, 247 F.3d 532, 538 (3d Cir. 2001)).

For the same reasons Svete is estopped from denying liability for violation of § 1962(c), he is estopped to deny liability for a violation of § 1962(d). His direct participation in the RICO enterprise connotes the necessary agreement to participate in a conspiracy.

B. BECAUSE SVETE REFUSED TO PARTICIPATE IN DISCOVERY, THE RECEIVER IS ENTITLED TO JUDGMENT IN HIS FAVOR.

1. The Texas Deposition.

After the Court of Appeals remanded this case for further proceedings, the Receiver sought leave to depose Svete, [Doc. No. 82], which the court granted on November 3, 2010. *See* Order [Doc. No. 85]. The Receiver coordinated Svete's deposition with the Bureau of Prisons and the Big Spring Correctional Facility where Svete is detained. *See* Notice [Doc. No. 95]. On January 24, 2011, Svete arrived at his scheduled deposition with a list of objections and refused to proceed. *See* Tr. January 24, 2011 Hearing attached as Exhibit 9 at 5.

Svete's main objection was that testifying could lead to his self-incrimination. The Court held a hearing by telephone and ordered Svete to proceed with the deposition informing him that he was free to assert his Fifth Amendment privilege. *Id*. at 16. The Court additionally stated, "I'm ordering you to go forward. And if you do not, you could be in jeopardy of risking a default judgment." *Id*. at 18, 20. After submitting to approximately thirty minutes of questioning, Svete returned from lunch and again refused to proceed. *See* Tr. of January 24, 2011 Svete Deposition, Part I attached as Exhibit 10 at 35-40. Svete argued that he appealed the Court's order directing him to proceed to the district court and that his deposition could not proceed until the matter was decided. *Id*. at 35-36. Svete eventually agreed to accept questions but, by the end of the day, Svete had provided only three hours and fifteen minutes of actual

testimony most of which constituted entirely evasive answers. For instance, although Svete created LTC, he was "unable" to explain the basics of how the company operated. *Id*. at 43-58.[9]

The Receiver's counsel sought information regarding the companies central to this matter. Yet, Svete claimed not to recall most of the information surrounding those companies. He could not remember whether he owned AC Group, but subsequently admitted that he transferred ownership of the company at some point. *Id*. at 60-64, 67. Svete "guessed" that AC Group owned Wealth Strategies, Inc., and knew that AC Group owned AC Financial, Inc., AC Consulting, Inc., AC Future, Inc., and AC Insurance Agency, Inc. *See* Tr. of January 24, 2011 Svete Deposition, Part II attached as Exhibit 11 at 128-29. Svete admitted that Medical Underwriters, LLC and Medical Underwriters, Inc. contracted with LTC to facilitate outsourcing of medical underwriting services because he did not like the life expectancies provided. *See* Exhibit 10 at 70-71. He denied having formed either entity. *Id*. Svete did not recall if he owned Sovereign Enterprises. *See* Exhibit 11 at 79. When asked about DWS Enterprises, Svete claimed not to remember his role in it, but knows it was named for him for some reason. *Id*. at 93.

The following day, January 25, 2011, Svete again reappeared for his deposition and refused to proceed. *See* Tr. January 25, 2011 Hearing attached as Exhibit 13 at 4. The Court again ordered him to proceed with the deposition and again warned that failure to comply could result in default. *Id*. at 11-12. Rather than proceeding, Svete refused insisting that he had filed notices of appeal and consequently, the Court was without jurisdiction to order him to proceed.

[9] Weeks after the failed deposition, Svete submitted an errata sheet which essentially reduced most if not all of the meager but somewhat substantive answers to answers of "I do not know," or "I do not recall." *See* Errata Sheet attached as Exhibit 12.

The Court later determined (and the district court agreed) that the notices of appeal were filed in bad faith. [Doc. Nos. 109 and 132].

2. Svete Refused to Participate in Discovery.

Pursuant to FEDERAL RULE OF CIVIL PROCEDURE 37(a) "[i]f a party fails to make a disclosure required by Rule 26(a)," or provides "an evasive or incomplete disclosure, answer or response," "any other party may move to compel disclosure and for appropriate sanctions." FED. R. CIV. P. 37(a)(2)(A), 37(a)(3). On January 24, 2011 and January 25, 2011, Moran sought to compel Svete to comply with deposition questioning. The Court held a telephone hearing and, after hearing argument, ordered Mr. Svete to participate in discovery thus granting Moran's motions to compel.

FEDERAL RULE OF CIVIL PROCEDURE 37(b)(2) provides that the Court "*may issue further just orders*" when a party "fails to obey an order to provide or permit discovery." Such sanctions may include "prohibiting the disobedient party from supporting . . . designated . . . defenses," and entering a default judgment. *Id.* A party may violate a discovery order by attending a deposition but refusing to meaningfully answer questions. In *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000), Defendants' designated Rule 30(b)(6) witness appeared for deposition but "provided evasive and non-responsive answers" to material inquiries. On appeal from the district court's entry of summary judgment in favor of plaintiffs, defendants argued that the district court erred in sanctioning it for discovery abuses.

The appellate court disagreed observing, "[t]o the contrary, our review of Berger's deposition testimony in its entirety confirms the observations" of the district court. "Indeed, throughout his lengthy deposition, Berger failed to offer any meaningful testimony about most, if not all, of the items specified in the notice of deposition." *Id.* at 304. *See also Nike, Inc. v. Top*

Brand Co. Ltd., 216 F.R.D. 259, 269 (S.D.N.Y 2003) (concluding that the witness was subject to sanctions for "stonewalling" during his deposition and stating that "[w]hether [the witness] was a guilty party hiding from his bad acts or an innocent party seeking to avoid unwarranted inferences, he knowingly and brazenly violated the Court's discovery order."); *Avionic Co. v. Gen. Dynamics Corp.*, 957 F.2d 555, 558 (8th Cir. 1991) (noting that the record "abundantly support[ed]" the district court's conclusion that the deponent acted willfully when he said he did not remember certain facts because he did not want to answer the questions).

Svete performed similarly to the witnesses in *Black Horse Lane Assoc., L.P.* and *Nike, Inc.* After the Court ordered him to participate in the deposition on January 24, 2011, Svete returned the next day and again refused to proceed. The Court twice ordered Svete to comply, and to assert the Fifth Amendment if he felt it necessary to protect himself. When questioning began, it became clear that Svete would refuse to provide any meaningful information. Instead, he continually professed that he did not remember what duties he performed for LTC, what duties outside companies provided for LTC, and his own relationship with LTC and the outside companies.

3. An Appropriate Sanction for Svete's Willful Refusal to Comply with the Court's Discovery Orders is to Enter Judgment in the Receiver's Favor.

As noted, the federal rules permit the Court to enter any just order as a discovery sanction. In determining whether and how to sanction a recalcitrant party, the Court must consider several factors: (1) whether the party's failure to cooperate was due to willfulness, bad faith or fault; (2) whether the adversary was prejudiced; (3) whether the party was warned that his failure to respond could lead to sanctions. *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997).

As noted in the previous section, Svete's actions were not inadvertent or unknowing. Rather, they were "due to willfulness, bad faith, [and] fault." *Patton v. Aerojet Ordnance Co.*, 765 F.2d 604, 607 (6th Cir. 1985).[10] Moreover, Svete's refusal to participate in discovery prejudiced the Receiver. The Receiver bears the burden of establishing Svete's civil liability. *See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000). Svete knows what duties he performed and the reasons for and manner of his taking vast amounts of money from LTC's coffers. Yet, he refused to reveal them. Consequently, Moran has been hampered in his ability to make any evidentiary showing required of him. Finally, the record is crystal clear: the Court warned Svete twice that his failure to cooperate could result in a default judgment being entered against him.

Svete undoubtedly engaged in behavior deserving of sanctions.[11] The Court must therefore determine the appropriate sanction. Rule 37 expressly authorizes entry of a default judgment as a sanction. Under the circumstances of this case – Svete's continued delay, multiplication of proceedings, and complication of both *Davis* and this case coupled with his

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[10] Even assuming for the sake of argument that Svete's refusal to participate was not in bad faith, he nonetheless acted willfully. As the *Black Horse Lane Assoc., L.P.* court made clear, even good faith refusal to comply with a court order is sanctionable.

[11] His refusal to comply with discovery is but one of many ways in which Svete has frivolously and in bad faith sought to delay this civil action. For instance, on April 2, 2010, the Court entered an Order [Doc. No. 71] requiring Svete to file a motion regarding arbitration on or before May 3, 2010. Svete subsequently sought stays On April 26, 2010 [Doc. No. 72] and on July 26, 2010. On November 3, 2010, the Court denied Svete's third motion for a stay, *see* Order [Doc. No. 85], stating, "[s]ufficient time has elapsed since [the] transfer to allow Defendant to obtain access to his legal papers necessary to file his motion regarding arbitration." *Id*. at 1. The Court ordered Svete to file a motion concerning arbitration on or before December 3, 2010. *Id*. at 2. Svete failed to file the required motion. Rather, on December 16, 2010, almost two weeks after his motion was due, he filed a notice of due process violations [Doc. No. 87], a motion for a complete copy of the record [Doc. No. 88], a motion for an extension of time [Doc. No. 88], and a notice of disability [Doc. No. 90].

most recent deposition misconduct (including his flaunting of direct and clear orders from this Court) – entry of judgment against Svete would be entirely appropriate.

III. CONCLUSION

For all of the reasons stated above, the Receiver is entitled to judgment in his favor and against Svete on his claims for Fraud, Deceit and Misrepresentation, Breach of Fiduciary Duty, Conversion, Civil Conspiracy, Unjust Enrichment and Civil RICO. The facts and issues necessary to establish Svete's civil liability were essential to the jury's conviction of Svete for a conspiracy to defraud in violation of 18 U.S.C. § 371, a conspiracy to launder money in violation of 18 U.S.C. § 1956(h), mail fraud in violation of 18 U.S.C. § 1341, and interstate transportation of money obtained by fraud in violation of 18 U.S.C. § 2314. Thus Svete is collaterally estopped from arguing that he is not liable here. Additionally, because Svete willfully and in bad faith refused to participate in valid discovery to the prejudice of the Receiver, the Receiver is entitled to judgment as a discovery sanction.

WHEREFORE, premises considered, Plaintiff H. Thomas Moran, II respectfully moves the Court for judgment in his favor and against Defendant, David W. Svete, together with costs and fees and any other relief to which he is entitled.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was sent to **David W. Svete**, Pro Se, Reg. #05779-017, FCI Big Spring, Federal Correctional Institution, 1900 Simler Avenue, Big Spring, Texas 79720, by Certified and Regular Mail deliver this 18th day of November, 2011.

BIESER, GREER & LANDIS

By: */s/ Joseph C. Oehlers*
Joseph C. Oehlers