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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE  
COMMISSION,

2:09-cv-0665 LKK DAD

Plaintiff,

v.

ANTHONY VASSALLO, KENNETH  
KENITZER, and EQUITY  
INVESTMENT MANAGEMENT AND  
TRAINING, INC.,

Defendants.

\_\_\_\_\_  
ARCANUM EQUITY FUND, LLC and  
VESTIUM MANAGEMENT GROUP,  
LLC, parties in interest.

\_\_\_\_\_  
MICHAEL CALLAHAN and  
MATTHEW TUCKER, parties in  
interest.

ORDER

By order filed December 11, 2009 (Doc. No. 202), this case was referred to a  
United States Magistrate Judge pursuant to Local Rule 302(a) for an evidentiary hearing to  
resolve disputed issues of fact related to the Receiver’s motion to order disgorgement of \$2.0  
million transferred to Michael Callahan and Matthew Tucker (Doc. No. 171).

1           On July 21, 2010, the magistrate judge filed findings and recommendations herein  
2 which were served on all parties and which contained notice to all parties that any objections  
3 were to be filed within twenty-one days after being served with the findings and  
4 recommendations. Party-in-interest Callahan filed timely objections to the findings and  
5 recommendations, and the Receiver filed a timely reply. In accordance with the provisions of 28  
6 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this  
7 case. Having carefully reviewed the entire file, the court finds the findings and recommendations  
8 to be supported by the record and by proper analysis.

9           **A.     Specific Findings and Recommendations**

10           Callahan objects to these findings and recommendations on several grounds.  
11 First, Callahan objects to several specific findings. Callahan objects to the magistrate judge’s  
12 finding that he should be held jointly and severally liable for the disgorgement of the \$2.0  
13 million. He specifically argues that the magistrate judge did not prove any of the elements of  
14 misrepresentation as cited by the court and taken from Agosta v. Astor, 120 Cal. App. 4th 596,  
15 603. See Objection at 5: 19-25; 6-7. Callahan argues that (1) there was no specific  
16 misrepresentation ever pled; (2) there was no finding of knowledge of falsity; (3) there was no  
17 finding of intent to defraud; (4) there was no finding of justifiable reliance; and (5) EIMT was  
18 not injured by Callahan but due to a breach of contract by the exit buyer StoneCrest and Tucker.  
19 Id.; 8: 6-8. Callahan further argues that since there was no evidence that he received the \$2.0  
20 million, there is no basis for disgorgement. Obj. at 10: 11-16. For the reasons described in the  
21 Findings and Recommendations, the court finds these objections to lack merit. See Findings and  
22 Recommendations at 12: 12-17; 13: 1-10; 17: 6-7. 17: 19-26; 18: 1-16; 20: 10-24; 21: 10-14.

23           **B.     The Authority of the Magistrate Judge**

24           Callahan contends that the magistrate judge exceeded his authority in conducting  
25 the evidentiary hearing. He asserts that the evidentiary hearing was for a “specific and limited  
26 purpose, e.g. to resolve issues of fact as to whether the asset at issue was held in constructive

1 trust.” Obj. at 3: 24-25, 4: 1. Callahan’s argument is without merit because the court did not  
2 merely order the magistrate judge to conclude whether the \$2.0 million was held in constructive  
3 trust. The purpose of the hearing, as outlined by the court, was to settle several factual disputes  
4 in order to determine whether Callahan should be held jointly and severally liable for the entire  
5 \$2.0 million of fraudulently obtained EIMT assets or whether he should be held liable for only  
6 the \$125,000 he received as a fee for “facilitating” the transaction at issue. See Order, Doc. No.  
7 202, Dec. 11, 2009, at 5: 15-17; 6: 3-5, 7: 11-16.

8           The primary factual dispute concerning the court was whether the CMO was ever  
9 purchased and if so whether the transaction was legitimate. The second factual dispute,  
10 assuming the CMO was never purchased or the transaction was not legitimate, was whether  
11 Callahan knew that the statement he made to EIMT concerning the purchase of the CMO were  
12 false and whether Callahan intended to defraud EIMT. If Callahan was aware of and involved in  
13 the fraudulent scheme being perpetrated by Tucker, he would be a joint tortfeasor; therefore, he  
14 would be jointly and severally liable for disgorgement of the full \$2.0 million. Both of these  
15 factual disputes were addressed in the court’s Order, dated Dec. 11, 2009, which referred this  
16 matter to the magistrate judge.

17           Callahan further argues that the scope of the evidentiary hearing was inappropriate  
18 because the inquiry should have been limited to whether the CMO was purchased. Obj. at 3: 15-  
19 25. This argument is without merit for the reasons discussed above. The court clearly outlined  
20 the factual disputes that were relevant to whether Callahan should be held jointly and severally  
21 liable for the entire \$2.0 million of EIMT funds.

22           Callahan argues in support of this point that the Receiver already knew that the  
23 CMO had been purchased; therefore, additional inquiry into the CMO was not warranted. Obj. at  
24 4: 1-14. However, Callahan again misinterprets the court's order. The purpose of determining  
25 whether the CMO was purchased was to assess whether the CMO transaction and Callahan's  
26 involvement were legitimate. A bare assertion that the CMO's were purchased does not end the

1 inquiry; in fact, the magistrate judge found that the purchase of the CMO's in and of itself was  
2 suspicious since Tucker purchased them after he claimed to of already had them in his  
3 possession. See F&R's at 18, n. 29. Furthermore, this argument (and the language Callahan  
4 quotes from the Order to support it) contradicts Callahan's argument that the court ordered the  
5 evidentiary hearing solely to determine whether the funds were held in constructive trust. Thus,  
6 the court finds that the scope of the evidentiary hearing was appropriate.

7 **C. Callahan's Due Process Rights**

8 Callahan's due process arguments are equally without merit. "[F]or the claims of  
9 nonparties to property claimed by receivers, summary proceedings satisfy due process so long as  
10 there is adequate notice and opportunity to be heard." Commodity Futures Trading Comm'n v.  
11 Topworth Int'l, Ltd., 205 F.3d 1107, 1113 (9th Cir. 1999). Callahan's due process rights were  
12 not infringed by the nature of the summary proceeding.

13 Callahan specifically argues that the proceeding "lacked fundamental fairness as it  
14 presented surprise." Obj. at 2: 22-24. However, this argument is premised on the assumption that  
15 the magistrate judge was not authorized by the court to inquire into anything other than whether  
16 the assets were held in constructive trust. Therefore, this argument is without merits for the  
17 reasons discussed above. Callahan further argues that "what transpired was nothing short of an  
18 ambush whereby the rules, scope and intent of the ordered hearing changed without prior notice."  
19 Obj. at 10: 2-25.

20 Callahan contends that he was given no opportunity to conduct discovery nor to  
21 present witness on his behalf. Id. He further contends that the allegations against him were  
22 "previously unknown or vague." Id. The court finds, for the reasons stated above, that the scope  
23 of the evidentiary hearing was appropriate considering the language of the Order referring the  
24 matter to the magistrate judge. Therefore, Callahan was given fair notice, in addition to the  
25 opportunity to petition the magistrate judge for discovery and the chance to present evidence and  
26 witnesses on his behalf.

1           The purpose of the summary proceeding was not to find Callahan guilty of fraud,  
2 neither criminally nor civilly. The purpose of the proceeding was to determine Callahan's  
3 liability in a disgorgement proceeding with regard to funds that had been fraudulently obtained  
4 by his business partner. He is merely entitled to fair notice of the proceeding and an opportunity  
5 to be heard on the matter, which was duly afforded to him by the magistrate judge.

6           **D. Conclusion**

7           For the foregoing reasons, IT IS HEREBY ORDERED that:

- 8           1. The findings and recommendations filed July 21, 2010 (Doc. No. 309) are  
9 adopted in full;
- 10           2. The court finds Michael Callahan jointly and severally liable for the \$2 million  
11 lost by EIMT/Veritas investors in the failed CMO investment; and
- 12           3. Michael Callahan is ordered to disgorge up to \$2 million to the Receiver until  
13 such time as the EIMT investors are made whole in connection with the failed CMO investment.

14 DATED: September 28, 2010.

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18           LAWRENCE K. KARLTON  
19           SENIOR JUDGE  
20           UNITED STATES DISTRICT COURT  
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