

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

H. THOMAS MORAN, II,  
in his Capacity as Receiver of  
the Assets of Lifetime Capital,  
Inc. and Certain Affiliated Persons  
and Entities,

Plaintiff,

Case No.: 3:05-cv-72

vs.

DAVID W. SVETE,

Judge Thomas M. Rose  
Magistrate Judge Michael J. Newman

Defendant.

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**ORDER: (1) GRANTING RECEIVER'S MOTION TO LIFT THE STAY (DOC. 213);  
AND (2) DIRECTING SVETE TO SHOW CAUSE.  
REPORT & RECOMMENDATION<sup>1</sup> THAT RECEIVER'S COMPLAINT BE  
DISMISSED WITH PREJUDICE**

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This case is before the Court on Receiver's motion to lift the stay. Doc. 213. On December 10, 2013, the Court issued an Order denying Receiver's prior motion to lift the stay without prejudice to refile. Doc. 210. That Order detailed the factual and procedural history of this case and the since-closed bankruptcy case filed by Defendant David W. Svete in the United States Bankruptcy Court for the Central District of California, which resulted in him receiving a discharge. *In re Svete*, No. 9:12-BK-11696 (Bankr. C.D. Cal. filed Apr. 23, 2012). The parties were ordered to advise the Court in writing by January 10, 2014<sup>2</sup> as to their positions on the impact of Svete's bankruptcy discharge on the instant case. Doc. 210 at PageID 2346.

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<sup>1</sup> Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

<sup>2</sup> The Court, cognizant of Svete's incarceration and his *pro se* status in this case, purposely afforded the parties an extended period of time to file their briefs. Doc. 210 at PageID 2346. The Court, acting in the interest of justice, has waited a significant period of time beyond the deadline to issue this Report and Recommendation. *See Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008).

The Court is mindful of the Sixth Circuit's prior directive to determine whether there are one or more agreements by the parties to arbitrate, and whether the specific disputes at issue in this litigation fall within the "substantive scope" of those agreements. *Moran v. Svete*, 366 F. App'x 624, 632 (6th Cir. 2010). After Receiver filed a motion for summary judgment, resolution of the arbitration issue was deferred and the Court intended to perform the required analysis in conjunction with a ruling on Receiver's motion. *See* doc. 178 at PageID 2104-05. Svete's bankruptcy filing then resulted in this case being stayed. Doc. 193.

### **I. Receiver's Claims**

Receiver has advised the Court he believes that all of his claims against Svete were discharged as a result of the bankruptcy case. Doc. 211 at PageID 2350. Receiver also advised the Court of his desire for the stay to be lifted so that he can now move for summary judgment on Svete's counterclaims.<sup>3</sup> *Id.* Despite the extended briefing schedule and additional time past the deadline, Svete has not filed a response to the Court's Order. Receiver subsequently filed a motion to lift the stay on February 4, 2014 and reiterated his intent to file a motion for summary judgment on Svete's counterclaims. Doc. 213.

Receiver has asserted sixteen claims for relief including fraud, breach of fiduciary duty, federal Racketeering Influenced and Corrupt Organization (RICO) Act claims (18 U.S.C. § 1962(a)-(d)), corrupt activities in violation of state law (Ohio Rev. Code § 2923.34), civil conspiracy, deceit and misrepresentation, breach of contract, fraudulent transfer, unjust enrichment, alter ego, constructive trust and equitable lien, and violations of the Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204, 116 Stat. 745). Doc. 1 at PageID 19-40. Any and all claims Receiver has, by his own admission, were discharged as a result of the bankruptcy case. *See* doc.

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<sup>3</sup> Receiver's prior summary judgment motion addressed the merits of his claims, not Svete's counterclaims.

211 at PageID 2350; doc. 213 at PageID 2356. The Court agrees with Receiver's assertion that his claims were so discharged. *See* doc. 210 at PageID 2344-46. It is therefore unnecessary for the Court to analyze whether Receiver's claims are within the scope of the arbitration agreement.

## **II. Svete's Counterclaims**

As best the Court can tell, it appears from a careful review of Document 61 that Svete has attempted to plead three counterclaims. Doc. 61 at PageID 527-34. The first counterclaim does not seek substantive relief; rather, it seeks an Order to compel arbitration of Receiver's claims against him. *Id.* at PageID 529-30. Seeking to compel arbitration serves as a defense or challenge to litigation in this Court; it is not an affirmative counterclaim for relief. *See Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 718 (6th Cir. 2012) (“[A]s a practical matter, an enforceable contractual right to compel arbitration operates as a quasi-jurisdictional bar to a plaintiff's claims, providing grounds for dismissal of the suit. It is therefore unsurprising that defendants routinely raise the right to arbitration in their answer, whether it is technically required by Rule 8 or not.”).

The second counterclaim is labeled “demand for receivable.” Doc. 61 at PageID 531. A review of the substance of this counterclaim reveals that it is -- when liberally construed in Svete's favor, *see Brand*, 526 F.3d at 923 -- a breach of contract counterclaim against LifeTime Capital, Inc. (“LCI”) and unspecified LCI creditors. Doc. 61 at PageID 531-32. Svete alleges that he entered into several contracts with LCI, and that he is owed over \$135 million under the terms of these contracts. *Id.* Such contracts included consulting agreements, profit-sharing agreements, and asset sales. *Id.* at PageID 531. Svete also alleges that he made multiple loans to LCI that remain outstanding, and that he incurred expenses on behalf of LCI that have not been reimbursed. *Id.* Svete further alleges that LCI owes him money for judgments entered against

him because LCI agreed to indemnify him. *Id.* Finally, Svete alleges that he is also owed money by unspecified creditors of LCI for expenses he incurred and on account of judgments entered against him because these creditors agreed to indemnify him. *Id.* at PageID 532.

The third counterclaim is labeled as a “demand to invoke indemnification and hold-harmless agreements.” *Id.* at PageID 533. Svete alleges that LCI, LCI’s creditors, and he entered into multiple contracts that contained agreements to indemnify and hold him harmless from all liability and expenses. *Id.* Svete seeks indemnification from LCI and LCI’s creditors for his legal fees and expenses. *Id.*

Svete does not specify the LCI creditors referenced in his second and third counterclaims. Receiver, who asserts the claims of LCI, and Svete are the only parties to this litigation. *See* doc. 9 at PageID 102 (dismissing seven originally-named Defendants for failure to effect service). The deadline to join additional parties expired on July 30, 2007, *see* doc. 58 at PageID 509, and neither party has attempted to join parties at any stage in this litigation. To the extent that Svete seeks to assert counterclaims against anyone other than Receiver, such claims are not properly part of this litigation, and the Court need not consider whether it is appropriate to compel these claims to arbitration.

The counterclaims asserted by Svete against Receiver remain to be examined pursuant to the Sixth Circuit’s mandate concerning arbitration. Before the Court undertakes this exhaustive review, it is appropriate to confirm whether Svete still seeks to compel these counterclaims to arbitration given his lack of recent involvement in this case. Svete, for example, did not file a motion for summary judgment by the November 18, 2011 deadline, and did not file a memorandum in opposition to Receiver’s summary judgment motion. *See* doc. 176 at PageID 1832. Moreover, Svete ceased filing status reports regarding his bankruptcy case after January

2013, despite the fact that the Court's July 5, 2012 Order -- requiring him to file such a report every sixty days -- remains in effect. *See* doc. 193 at PageID 2270. Svete's most recent filing was a motion received June 4, 2013 -- nearly one year ago -- which sought disclosure of *ex-parte* communications. Doc. 202. Svete has responded neither to Receiver's October 30, 2013 status report -- advising the Court that the bankruptcy case was closed -- nor either of Receiver's two motions to lift the stay. *See* docs. 208, 209, 213. Nor did Svete respond to the December 10, 2013 Order requiring him to advise the Court "as to [his] position[] on the effect of the closing of [his] bankruptcy case on this litigation." *See* doc. 210 at PageID 2346.

Accordingly, this Order shall constitute an **ORDER TO SHOW CAUSE**. Svete is **ORDERED** to advise the Court in writing on or before **July 1, 2014** whether he still seeks an Order compelling his counterclaims to arbitration. Svete is **ADVISED** that failure to respond by July 1, 2014 may be construed as an abandonment of his counterclaims and the Court may recommend that the counterclaims be dismissed with prejudice.

### **III. Conclusion**

Receiver's motion to lift the stay (doc. 213) is **GRANTED**. It is **ORDERED** that the stay of this case is **LIFTED** and the Clerk of Courts is directed to **REOPEN** this case on the Court's active docket.

For the foregoing reasons and the reasoning set forth in more detail in Document 210, the Court **RECOMMENDS** that Receiver's complaint (doc. 1) be **DISMISSED WITH PREJUDICE**.

May 27, 2014

s/ **Michael J. Newman**  
United States Magistrate Judge

## NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within **FOURTEEN** days after being served with this Report and Recommendation. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to **SEVENTEEN** days because this Report and Recommendation is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F), and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report and Recommendation objected to, and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within **FOURTEEN** days after being served with a copy thereof. As is made clear above, this period is likewise extended to **SEVENTEEN** days if service of the objections is made pursuant to Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F). Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).