

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION**

R. WAYNE KLEIN, the Court-Appointed Receiver
of U.S. Ventures, LC, Winsome Investments Trust,
and the assets of Robert J. Andres and Robert L.
Holloway.

Plaintiff,

v.

MICHELE PETTY,

Defendant.

ORDER:

- 1) DENYING DEFENDANT'S
AMENDED MOTIONS TO
DISMISS AND FOR MORE
DEFINITE STATEMENT
(DKT. 29); AND**
- 2) GRANTING IN PART AND
DENYING IN PART
PLAINTIFF'S MOTION TO
STRIKE AND FOR MORE
DEFINITE STATEMENT
(DKT. 31)**

Case No. 2:11-cv-01099-RJS

Judge Robert J. Shelby

This receivership case arises from an underlying action brought in January 2011 by the Commodity Futures Trading Commission against Defendants U.S. Ventures, LC; Winsome Investment Trust; Robert J. Andres; and Robert L. Holloway ("CFTC Action"). It is alleged in the CFTC Action that the Defendants operated a Ponzi scheme. *See* Case No. 2:11-CV-000099-BSJ. R. Wayne Klein was appointed as Receiver in the CFTC Action. He is charged with recapturing investor funds allegedly misappropriated in the Ponzi scheme. He was reappointed as Receiver on September 28, 2011 (Dkt. 2 at ¶ 4), and thereafter filed this action seeking to recover improper payments that Defendant Michele Petty allegedly received from at least one CFTC defendant. (Dkt. 2 at ¶ 7.)

Before the court are Defendant's combined Amended Motion to Dismiss and for a More Definite Statement (Dkt. 29) and Plaintiff's combined Motion to Strike Defendant's Amended Answer and Jury Demand, and for More Definite Statement. (Dkt. 31.) Plaintiff has opposed

Defendant's Motion. (Dkt. 32.) Defendant has filed no opposition to Plaintiff's Motion.

Plaintiff filed a Request to Submit for Decision on April 2, 2014. (Dkt. 34.) Oral argument has not been requested.

For the reasons discussed below, the court DENIES Defendant's Amended Motion to Dismiss and for More Definite Statement. It GRANTS IN PART and DENIES IN PART Plaintiff's Motion to Strike Defendant's Amended Answer and Jury Demand, and for a More Definite Statement.

I. Defendant's Amended Motion to Dismiss.

Defendant has filed an Amended Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction and for Improper Venue and *Forum Non Conveniens*. (Dkt. 29.) In February 2012, Defendant filed a nearly identical Motion to Dismiss (Dkt. 6) which the court denied in a prior Memorandum Decision. (Dkt. 22.)

The court has carefully reviewed Defendant's Amended Motion to Dismiss, and identifies in her briefing only two new contentions concerning the court's subject matter jurisdiction not previously addressed in response to her first Motion to Dismiss. First, Defendant now contends that the court lacks subject matter jurisdiction because the ability of the Plaintiff-Receiver to be "reappointed indefinitely effectively nullifies the statute of limitations and results in a lack of due process and a violation of Defendant's rights." (Dkt. 29 at 2.)¹ This is the entirety of Defendant's argument on that contention. Defendant directs the court to no legal authority to support it.

¹ This argument differs slightly from the statute of limitations argument in Defendant's prior Motion to Dismiss, asserting that the receiver had not timely filed a Notice of Receivership in the Western District of Texas as required by 28 U.S.C. § 754. (Dkt. 6 at 2.)

The court declines to grant Defendant's Motion to Dismiss on the basis of this unclear and unsupported argument. The court further observes that there is good reason to allow a receiver to be reappointed and to promptly file complaints in districts where receivership property may be located. 28 U.S.C. § 754. As this court has noted, "[b]ecause a receiver could not know the locations of all receivership property or where all possible defendants resided at the time of the receiver's appointment, courts allow the reappointment of a receiver to allow him sufficient time to file the notices required under section 754." *Klein v. Bruno*, 2013 WL 6158752, at *3-4 (D.Utah Nov. 25, 2013) (citations omitted). "Permitting a receiver to reassume jurisdiction in this manner is consistent with the role and purpose of a federal receivership" because if this were not the rule, "a receiver would be forced to file the required documentation in all ninety-four federal districts to protect jurisdiction over any potential, but presently unknown, receivership assets-a result that would produce a needless waste of time and lead to dissipation of assets otherwise returnable to defrauded investors." *Terry v. June*, 2003 WL 22125300, at *3 (W.D.Va. Sept. 12, 2003) (citations omitted).

Second, Defendant argues that the court lacks subject matter jurisdiction because the Plaintiff-Receiver has no standing to assert claims against her. Defendant argues that the Securities and Exchange Commission (SEC) owns the claims asserted in this case pursuant to a court-approved settlement between the SEC, Holloway, and U.S. Ventures. Defendant contends any right of reimbursement that may be found here belongs exclusively to the SEC. (Dkt. 29 at 2-3.)

Defendant offers no evidentiary support for her contentions. She neither specifically identifies the agreement supporting this argument, nor attaches a copy of it to her Amended Motion to Dismiss.

But in opposing Defendant's Motion, Plaintiff provides the court with a copy of a Consent Judgment signed by U.S. Ventures and Holloway in a separate case brought by the SEC against them and other entities. (Dkt. 32-1, *Consent Judgment* in Case No. 2:07-cv-00235-TC.) The SEC case concerned claims for sales of unregistered securities by Defendant Novus Technologies, LLC and its principals. (Dkt. 1, *Complaint* in Case No. 2:07-cv-00235-TC.) U.S. Ventures and Holloway allegedly received investor funds from Novus and its principals and were therefore named in the SEC case as "Relief Defendants." *Id.* U.S. Ventures and Holloway consented on March 2, 2010 to entry of a judgment ordering them to: 1) repay \$1,100,000 plus interest; and 2) assign "to the Court-appointed Receiver all right, title and interest" in specific funds frozen and liquidated by J.P. Morgan Chase Bank. U.S. Ventures and Holloway acknowledged in the Consent Judgment that the SEC had waived the repayment demand based on sworn statements of their financial condition. The SEC retained a right to petition the court for an order requiring the \$1,100,000 plus interest repayment from U.S. Ventures and Winsome if it were discovered that the sworn financial statements contained fraudulent, misleading, inaccurate or incomplete material. The court entered final judgment in the SEC case on May 25, 2010. (Dkt. 32-2.)

The CFTC Action underlying this case and in which the Plaintiff-Receiver was appointed was filed in 2011, after final judgment in the SEC case. (Dkt. 1 in Case No. 2:11-cv-00099-BSJ.) The CFTC Action concerns a scheme that allegedly took place from 2005 to at least 2008 and involved investment in a "commodity pool" for trading commodity futures. *Id.* U.S. Ventures, Winsome, and others are named as Defendants and direct participants in the scheme. *Id.*

Considering these facts and having reviewed the Consent Judgment entered in the separate SEC case, the court concludes that the Consent Judgment does not divest the Plaintiff-Receiver of any ability and obligation to seek to recover assets from Petty for the benefit of the CFTC Action investors. (*See* Dkt. 32-3, Order in Case No. 2:11-cv-00099-BSJ, at 7-8 (obligating Receiver to recover funds, property and other assets “wherever situated” under the control of U.S. Ventures and Winsome).) The Consent Judgment appears to relate to a different fraudulent scheme, was entered in a separate case brought by the SEC, and by its own terms does not clearly affect the Plaintiff-Receiver’s ability to bring the claims he now asserts.

For the foregoing reasons and the reasons set forth in the court’s prior Memorandum Decision (Dkt. 22), the court DENIES Defendant’s Amended Motion to Dismiss. (Dkt. 29.)

II. Defendant’s Amended Motion for More Definite Statement.

Defendant has filed an Amended Motion for More Definite Statement asserting numerous purported deficiencies in Plaintiff’s Complaint. (Dkt. 29 at 5-8.) Nearly all of the alleged deficiencies Defendant now identifies were previously raised in Defendant’s prior Motion for More Definite Statement (Dkt. 6), which the court has already denied. (Dkt. 22.)

Under Rule 12(e), *Federal Rules of Civil Procedure*, a party may “move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.” In denying Defendant’s prior Motion for More Definite Statement, the court found Plaintiff’s “Complaint provides detailed allegations concerning the underlying alleged Ponzi scheme at issue, including dates of operation, the parties operating it, funds it took in, losses it suffered, and commissions and distributions it paid.” (Dkt. 22 at 13.) The court concluded that Plaintiff’s Complaint was not so “vague or ambiguous that [the Defendant] cannot reasonably prepare a response.” *Id.*

The court's prior evaluation of Plaintiff's Complaint has not changed. Defendant's Amended Motion for More Definite Statement is denied.²

III. Plaintiff's Motion to Strike Defendant's Amended Answer and Jury Demand.

Nearly two years after filing her first Answer, Defendant filed an Amended Answer and—for the first time—a Jury Demand. (Dkt. 30.) Plaintiff moves to strike both. (Dkt. 31.) Defendant has not opposed Plaintiff's Motion.

Plaintiff first moves to strike the Amended Answer pursuant to Federal Rule of Civil Procedure 15(b)(2), under which Defendant may amend her original Answer “only with the opposing party's written consent or the court's leave.” Defendant neither obtained Plaintiff's consent nor the court's leave before she filed her Amended Answer. To date, she has not sought leave of court to file an Amended Answer. Under Rule 15, the court finds that Plaintiff's unopposed Motion is well taken and should be granted.

Second, Plaintiff moves to strike Defendant's newly-asserted jury demand as untimely. A party waives a right to a jury trial if she fails to make a timely demand within fourteen days after the last pleading directed to the issue is served. Fed. R. Civ. P. 38(b). Defendant has asserted her jury demand nearly two years after she filed her initial Answer. (Dkt. 6.) It is clearly untimely.

Nonetheless the court retains discretion to grant a jury trial “on motion” on issues “for which a jury might have been demanded.” Fed. R. Civ. P. 39(b). The Tenth Circuit has stated

² Defendant now claims in her Amended Motion for More Definite Statement that Plaintiff has improperly disregarded Winsome as a separate entity which was sophisticated in investments. (Dkt. 29 at 8.) This is the only new portion of Defendant's Amended Motion for More Definite Statement. But this is a substantive argument Defendant may choose to assert in defending this case. It is not a contention that Plaintiff's Complaint is so “vague or ambiguous that [Defendant] cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e).

that “absent strong and compelling reasons to the contrary, a district court should exercise its discretion under Rule 39(b) and grant a jury trial.” *Nissan Motor Corp. in U.S.A. v. Burciaga*, 982 F.2d 408, 409 (10th 1992) (citations omitted) (per curiam). But “[c]onsistent with that guiding principle,” the Tenth Circuit has also explained that “it would not be an abuse of discretion to deny relief pursuant to Rule 39(b) when the failure to make a timely jury demand results from nothing more than the mere inadvertence of the moving party.” *Id.* (citations omitted) (denying writ for permission to demand jury where petitioner admitted it failed to demand a jury because it had assumed the plaintiff had made a demand).

Defendant has not filed a motion to explain why the court should exercise its broad discretion allow her to assert her late jury demand. The court lacks any reason to permit the jury demand at this time, and concludes that it should be stricken.

Thus, the court GRANTS Plaintiff’s Motion to Strike Defendant’s Amended Answer and Jury Demand. (Dkt. 31.)

IV. Plaintiff’s Motion for More Definite Statement.

Plaintiff has moved the court to require Defendant to file a more definite statement concerning a so-called “Cross Action for Frivolous Suit and for Attorney Fees” in her original Answer filed on February 21, 2012. (Dkt. 6 at 19-20.) Defendant’s “cross action” is set forth in two paragraphs at the end of her Answer and appears to be part of a section entitled “Affirmative Defenses.” Defendant there alleges that this action was brought in bad faith, that Plaintiff is aware of the expense Defendant would incur in defending this action, and that Plaintiff was dilatory in bringing this action. Defendant—a practicing attorney—requests that the court reimburse her time spent “investigat[ing] and defend[ing] this suit at her standard rate of \$300.00

per hour;” dismiss the case; and award her any “attorneys fees and ... such other and further relief as she may show herself justly entitled.” (Dkt. 6 at 20.)

Under Rule 12(e), *Federal Rules of Civil Procedure*, a party may “move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.” Such a motion “must be made before filing a responsive pleading and must point out the defects complained of and the details desired.” Plaintiff argues that he cannot prepare a meaningful response to this “cross action” because 1) it is unclear whether it is simply a request for attorney’s fees and costs—as might be granted to a prevailing party under Federal Rule of Civil Procedure 54(d); 2) it is not cognizable as a cross claim under Federal Rule of Civil Procedure 13 where there is no co-defendant against whom it could be filed; and 3) if it were meant to be a counterclaim, it has not been docketed as such and Plaintiff therefore cannot file an Answer to it on the court’s filing system.

The court concludes that it will not at this time require Defendant to file a more definite statement. First, Plaintiff seeks this relief almost two years after Defendant filed her original Answer and “Cross Claim,” but offers the court no good cause to explain his delay. The Motion is untimely.

Second, the court construes Defendant’s “Cross Claim” as simply a request for attorney fees and other equitable relief as might be granted a prevailing party. Thus, the court concludes that Defendant’s request for attorney’s fees and other relief is not one which demands a responsive pleading. The “Cross Claim” appears at the conclusion of the Answer after various affirmative defenses have been asserted. It is brief. It is not styled as a counterclaim and does not set forth law or elements of any particular cause of action. Rather, Defendant simply asserts

a claim for attorney's fees paid to others and for the time she spends defending this case, as she is also an attorney.

Finally, to the extent that Plaintiff remains uncertain about what Defendant is really claiming, he can seek discovery on the issue. Fact discovery in this case closes on September 15, 2014. (*See* Dkt. 36, Amended Scheduling Order.)

For these reasons, the court DENIES Plaintiff's Motion for a More Definite Statement. (Dkt. 31.)

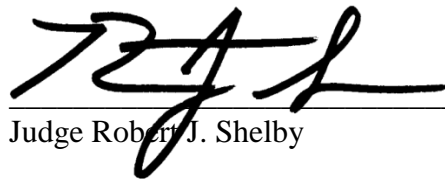
V. Conclusion.

Based upon the foregoing, the court hereby ORDERS:

1. Defendant's combined Amended Motion to Dismiss and for More Definite Statement (Dkt. 29) is DENIED in its entirety;
2. Plaintiff's combined Motion to Strike Defendant's Amended Answer and Jury Demand, and for More Definite Statement (Dkt. 31) is GRANTED IN PART and DENIED IN PART.

SO ORDERED this 12th day of June, 2014.

BY THE COURT:



Judge Robert J. Shelby