Case No. 09-10761

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RALPH S. JANVEY,

Plaintiff – Appellant – Cross-Appellee,

V.

JAMES R. ALGUIRE; VICTORIA ANCTIL; SYLVIA AQUINO; JONATHAN BARRACK; NORMAN BLAKE; ET AL; JAY STUART BELL; GREGORY ALAN MADDUX; DAVID JONATHAN DREW; ANDRUW RUDOLF BERNARDO JONES; CARLOS FELIPE PENA; JOHNNY DAVID DAMON; BERNABE WILLIAMS; GAINES D. ADAMS; NEN FAMILY TRUST; JEFF P. PURPERA, JR.; CHERAY ZAUDERER HODGES; LUTHER HARTWELL HODGES; ET AL 1; JOSEPH BECKER; TERRY BEVEN; KENNETH BIRD; JAMES BROWN; MURPHY BUELL; ET AL 2; JAMES RONALD LAWSON; DIVO HADDED MILAN; SINGAPORE PUNTAMITA PTE., LTD.; NUMA L. MARQUETT; GAIL G. MARQUETTE,

Defendants – Appellees – Cross-Appellants

TIFFANY ANGELLE; MARIE BAUTISTA; TERAL BENNETT; SUSANA CISNEROS; RON CLAYTON; ET AL 3; HANK MILLS; ROBERTO ULLOA; CHRISTOPHER ALLRED; PATRICIA A. THOMAS; ROLAND SAM TORN,

Defendants – Appellees

Consolidated With
09-10765

RALPH S. JANVEY, in his Capacity as Court-Appointed Receiver,

Plaintiff – Appellant

V.

JIM LETSOS; FELIPE GONZALEZ; CHARLOTTE HUNTON; RICHARD O. HUNTON; CHARLES HUNTON,

Defendants – Appellees

On Appeal from the United States District Court for the
Northern District of Texas, Dallas Division C.A. No. 3:09-CV-0724-N

BRIEF OF APPELLEE ROLAND SAM TORN

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Appellant/Cross-Appellee and Related Entities

1. Ralph S. Janvey, Receiver

2. Stanford International Bank Ltd.

3. Stanford Group Company

4. Stanford Capital Management, LLC

5. Stanford Financial Group

6. The Stanford Financial Group Bldg Inc.

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C. Appellees/Cross-Appellants

The following Appellees have filed a cross appeal: Joseph Becker, Terry Beven, Kenneth Bird, James Brown, Murphy Buell, John C. Busceme, Virginia Buscheme, John B. Buscheme, Robert Bush, Gene Causey, Joseph Schultz, Darrell Courville, William Dawson, Deborah Dougherty, Gwen Fabre, Richart Feucht, Joan Feucht, Kendall Forbes, Deborah Forbes, Lynn Gildersleeve, Willa Mae Gildersleeve, Robert V. Gildersleeve, Gordon C. Gill, Robert Graham, Jason Graham, Martha Johnson, Benton B. Johnson, William Bruce Johnson, Jennifer Savoic, Dennis Kirby, Kerry R. Kling, Teresa Michelle Lamke, Don Landers, Laura Lee, Troy Lillie, Ron Martsen, Susan Martsen, Billie Ruth McMorris, Ronald McMorris, Virginia McMorris, Thomas Moran, Arthur Ordoyne, Bennie O'Rear, Claudia O'Rear, Mary Ann Paternostro, Larry Perkins, Charles Sanchez, Mamie Sanchez, Thomas Slaughter, Larry Smith, James Stegall, Carol Stegall, Walter Stone, Terry Tullis, Ron Valentine, Anthony Ventrella, Olivia Sue Warnock, Arthur Waxley, Charles White, Kenneth Wilkewitz, Martha Witmer, Bruce Stone, Sharon Witmer, Gaines D. Adams, Nen Family Trust, Jeff P. Purpera, Jr., Cheray Zauderer Hodges, Luther Hartwell Hodges, Eric Tucker, Jennifer Tucker, Robert S. and Alice D. Greer, Michael and Betty Wheatley, Mississippi Polymers, Inc., J. Michael Gaither, Geneve Sue Palmer, Robert E. Palmer, J. Russell Mothershed, The Second Amended and Restated Robert A. Houston Revocable Trust, Robert A. Houston, Angel Delio Nieuw, Maria P.C. Nieuw-Cael, Country Hill Investment, N.A., Murfield Investments Inc., Phillip E. Marrett, George R. Graves III, Thomas H. Turner, Daneco B.V., DVX Capital, IRM Investments, Inc., Stichting Particulier Fonds El Tributo, James Ronald Lawson, Divo Milan Haddad, Singapore Puntamita Pte., Ltd., Numa L. Marquette, and Gail G. Marquette.

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E. Appellees

Please refer to Exhibit A to the Brief of Appellant Ralph S. Janvey for a complete list of appellees, who number in the hundreds.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee Roland Sam Torn does not believe that oral argument is necessary. Appellant Ralph S. Janvey's claim to "claw back" principal repayments made to innocent CD purchasers fails under well-established legal principles. The dispositive issue in this appeal has thus been authoritatively decided.

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Has the Receiver offered any reason or authority to justify departing from well-established precedent forbidding "claw back" claims against persons with legitimate claims to funds transferred to them before the receivership?

STATEMENT OF THE CASE

This case arises from the receivership obtained by the Securities and Exchange Commission ("SEC") over various entities controlled by R. Allen Stanford.[1] The appellees purchased and later redeemed certificates of deposit ("CD") offered by one such entity, Stanford International Bank Ltd. ("SIBL") of Antigua. The Receiver obtained a preliminary, *ex parte* order in the receivership proceeding freezing the appellees' securities accounts that allegedly contained proceeds from principal or interest repaid by SIBL on CD redemptions.

On July 28, 2009, the Receiver filed an Amended Complaint adding appellees as purported "relief defendants" and seeking an order requiring them to transfer to him proceeds from their CD redemptions.[2] On July 31, 2009, the district court ruled that the Receiver's claim against the appellees failed as a matter of law as to repayments of principal, and ordered that the

[1] The SEC receivership proceeding is Case No. 3:09-cv-00298-N.

[2] The district court severed the Receiver's "claw back" claims into a separate action, Case No. 3:09-cv-0724-N.

"freeze" on the appellees' securities accounts be lifted except as to claimed CD interest payments into those accounts. R. 477-79.

This Court issued on August 9, 2009 a temporary order staying the effect of the district court's July 31 order. R. 482-83.

STATEMENT OF FACTS

Appellee Roland Sam Torn is the owner and operator of a Christian summer camp for children known as Camp Ozark.

Torn purchased a five-year fixed-rate CD issued by SIBL on February 13, 2008, in the principal amount of $1,000,000.[3] In October 2008, Torn redeemed the CD, and incurred a penalty for early redemption. The proceeds from the CD redemption — $1 million in returned principal and $35,355 in interest (after deduction for the early redemption fee)[4] — were used to purchase United States Treasury "T-Bills", which were, in turn, sold and the proceeds used to purchase Vanguard mutual fund shares in January 2009. The Vanguard mutual fund shares are held in a securities account custodied at Pershing, L.L.C. This account is frozen by the Court's August 9 order. If the district court's order is affirmed, Torn will regain access to at least $1 million in the Pershing account.

[3] Torn moved to intervene in the SEC receivership proceeding, Case No. 3:09-cv-00298-N, on March 30, 2009. The district court denied the motions to intervene on April 20, 2009. Supp. R. 465-72.

[4] The Receiver's expert, Karyl M. Van Tassel, identifies Torn as having received $1,035,355 in SIBL CD proceeds. R. 352.

Importantly, the Receiver is *not* suing all CD purchasers who received redemption payments from SIBL. First, the Receiver has not sued CD purchasers who received redemption payments before January 1, 2008[5] — even though the alleged Ponzi scheme operated for almost 15 years.[6] Second, the Receiver has not sued investors with securities accounts containing less than $250,000 in assets — those investors' accounts were unfrozen by the Receiver (and their funds released to them) months ago, even if the accounts contained CD redemption proceeds.[7] Third, although the Receiver has named as purported "relief defendants" certain CD purchasers who did not have securities accounts at Pershing or J.P. Morgan, it appears highly unlikely that many of these purchasers are subject to jurisdiction here or that the Receiver has any hope of recovering from them.[8] Accordingly, the Receiver is seeking "claw back" relief of principal and interest from a relatively narrow subset of the entire universe of SIBL CD purchasers over the years — largely comprised of those whose assets he was able to freeze (albeit improperly).

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[5] It is clear from Van Tassel's report that the analysis of CD redemption payments relied on by the Receiver was limited to January 1, 2008 forward. R. 303-15.

[6] Appellant's Brief, p. 5.

[7] Supp. R. 1997 (noting that the frozen "CD proceeds" accounts are limited to those greater than $250,000 in assets).

[8] The Receiver concedes that "it is likely that there will be some persons who redeemed CDs before February 16, 2009 whose redemption proceeds will never be recovered, for one reason or another." Supp. R. 1996.

The Receiver does not allege that Torn or any of the other CD purchasers "participated in the fraudulent scheme at issue . . . or otherwise engaged in any wrongdoing." R. 273. Furthermore, the Receiver admits that the payment received by Torn was in redemption of his CD.[9]

SUMMARY OF THE ARGUMENT

The Receiver asks the Court to dramatically expand his powers in order to claw back funds transferred pre-receivership to bona fide creditors in satisfaction of legitimate legal obligations of the entity in receivership. There is no principled way to distinguish the "relief defendants" targeted by the Receiver from other pre-receivership recipients of Stanford funds *not* sued by the Receiver, including investors who redeemed before 2008, investors with unfrozen Pershing accounts, Stanford employees, politicians, vendors, and so on. It appears the Receiver's action is motivated more by convenience than principle.

The Receiver recognizes he must prove the relief defendants have no "legitimate" claim to the funds they were paid. His argument falls apart on this preliminary question.

[9] Appellant's Brief, p. 10 (explaining the Receiver is suing "several hundred investors who redeemed their CDs for cash before the Receivership).

ARGUMENT

A. The Law Does Not Disturb Most Transfers to Creditors Made Pre-Receivership

In every insolvency, there are — by definition — creditors who are owed money by the entity when insolvency proceedings are commenced. This group is recognized to have claims against the estate, in priority ahead of the entity's owners.

There is also always a second group, consisting of those who received transfers from the entity before the insolvency proceeding. In the case of the Stanford entities, this group is broad, diverse, and commonplace. It includes: Stanford employees who were paid salaries and other compensation; politicians who received campaign contributions; vendors who sold the Stanford entities everything from jet airplanes to ballpoint pens; professionals, including lawyers, accountants, and others; property owners who leased real property to the Stanford entities; taxing entities; and lenders, including but not limited to SIBL's CD purchasers. *Cf.* R. 271.

Everyone in the second group potentially could have fallen instead into the first group — claimants against the estate — except that they were paid by the Stanford entities before the SEC placed them in receivership. Some were paid years ago, while others received payment only days before the receivership.

It may appear unfair that members of the second group received payment in full on their debts, while the creditors in the first group must look to the remaining assets of the insolvent entity for satisfaction and may receive only pennies on the dollar. But what is the alternative? To give a receiver or bankruptcy trustee power to unwind all of the entity's past transactions so that a "more equitable" distribution of assets can be made?

This power would come at enormous financial cost, as even routine insolvency proceedings would include hundreds or even thousands of actions to "claw back" money. Receivers and their lawyers would be paid large sums as fees to pursue these actions.[10] These fees would be paid out of the estate, reducing the recovery made to claimants. The net position of the insolvent entity itself, however, would not be improved at all, because every dollar successfully clawed back into the entity would be offset by a newly created liability in the form of a claim by the defendant who had been clawed.[11] In fact, the net payout to creditors would be dramatically *decreased* because of the enormous litigation costs incurred by the estate, all

[10] One can imagine the myriad issues to be evaluated and potentially litigated with respect to each claw back action: Does a statute of limitations or laches bar the claim? Would any other affirmative defenses apply? What collection efforts should be pursued against a claw back defendant who is unwilling to pay the claim? What if the defendant is unable to pay the claim? And so on.

[11] This is why, as Chief Judge Posner explained, "[a pre-receivership] transfer for full in the sense of commensurate consideration cannot (in the ordinary case, anyway) hinder, defraud, or otherwise discomfit creditors, because it is merely replacing one asset with another of equivalent value, as with revolving credit." *Scholes v. Lehmann*, 56 F.3d 750, 756 (7th Cir. 1995).

so that money could simply be transferred from one set of creditors (those earlier paid) to another.

In reality, the law has already weighed these factors and limited the power of receivers or trustees to unwind an insolvent entity's transactions with innocent creditors. In bankruptcy, for example, a trustee is given the power to recover certain transfers within a 90-day "preference period," subject to various defenses that may be asserted by the transferee.[12] Most states also have statutes governing fraudulent transfers, which may be used by a receiver or trustee to reclaim improperly transferred funds.[13] But for the most part, the law does not disturb transfers made to innocent parties before an insolvency proceeding.

B. The Receiver's Claim for Disgorgement Is Not Legally Viable

The above background is helpful to place the Receiver's claim in context. The Receiver is not seeking — at this time — to unwind all pre-receivership transactions with the Stanford entities.[14] Instead, he has focused on a relatively narrow group of transferees: Purchasers of SIBL CDs who received redemptions since January 1, 2008. He argues that these

[12] *See* 11 U.S.C. § 547.

[13] In Texas, the relevant statute is TEX. BUS. & COM. CODE § 24.009.

[14] If the Receiver prevails on his argument that he can obtain disgorgement from those holding legitimate claims to funds transferred pre-receivership, the universe of claw back defendants would greatly increase.

transferees are proper "relief defendants" who are subject to "disgorgement."

The Receiver concedes that even in circuits where a disgorgement claim is recognized, it has two elements: the relief defendant "(1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds."[15] Whether or not the Receiver can prove that each CD redemption satisfies the first element, he plainly cannot show that CD purchasers do not have "legitimate claims" at least to the principal amounts.

The Receiver admits, as he must, that the relief defendants' "claim to the funds is based upon their CD contracts with the Bank."[16] Each CD purchaser gave value to SIBL in the form of a principal deposit, which SIBL promised to return (with interest). This single, undeniable fact defeats the Receiver's claim.

Incredibly, the Receiver asserts this fact "cuts the other way because every Stanford investor has the exact same contractual claim."[17] It appears the Receiver's argument is that because *every* CD purchaser has a legitimate claim for the return of principal, the appellees *do not* have a legitimate claim to the return of their principal — truly a stunning *non sequitur*.

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[15] *SEC v. Cavanagh*, 155 F.3d 129, 136 (2nd Cir. 1998).

[16] Appellant's Brief, p. 28.

[17] *Id.*

Recognizing the illogic of his position, the Receiver attempts to confuse the Court by immediately switching from the elements of his disgorgement claim to an entirely different concept: the appropriate rule of distribution for receivership assets. He improperly conflates two separate issues into one. The first concept — whether the Receiver, representing the receivership entities, has a valid claim for disgorgement against the appellees for repayment of funds to the estate — is the issue on appeal. The second concept — whether the Receiver should distribute the assets of the receivership estate to claimants *pro rata* or by some other measure — is an entirely different question. The Receiver's attempt to apply the *pro rata* rule of distribution to justify the claw back from innocent parties of pre-receivership transfers is improper and unsupported by authority.

The Receiver next argues "the relief defendants' contractual claims cannot support the distinction drawn by the district court between principal and interest."[18] Once again, this argument does not logically follow. It could be argued, for example, the district court simply reached the incorrect decision as to CD interest. Or it could also be argued interest payments can and should be treated differently from principal payments, because the purchaser undeniably provided value to SIBL in *at least* the amount of his principal investment. For those CD purchasers who did not

[18] *Id.*

redeem pre-receivership, it will ultimately be up to the Receiver to determine whether to approve claims for principal and interest or only for principal. But it is disingenuous for the Receiver to assert at this stage that there is no basis to treat principal and interest differently, when he may himself treat them differently when approving claims against the estate. In no way does the issue of how to treat CD interest establish that Torn does not have a legitimate claim to the funds he received in repayment of CD principal.

The Receiver's position, by contrast, does suffer from a fatal inconsistency. How can the position of CD purchasers, who were repaid funds contractually owed to them, be distinguished from the myriad other parties who also received payments from the Stanford entities in exchange for value provided before the receivership? Does the Receiver plan to sue the law firms and accountants that provided professional services to Stanford? To sue all Stanford employees, who were paid salaries for work actually performed? To sue vendors who sold and delivered to the Stanford entities various goods over the years? The Receiver's expert opines that "[t]he substantial majority of funds received or utilized by the Stanford Entities . . . was proceeds from the sale of SIB CDs," R. 306, so why has the Receiver singled out only CD purchasers and financial advisors as having received "illegitimate" transfers?

The Receiver offers no principled way to limit his disgorgement claims, if the Court were to accept his argument. He and all future receivers in the Fifth Circuit would be duty-bound to pursue disgorgement claims against any person who had received funds from the insolvent entity regardless of fault, subject only to a vague and unpredictable "cost-benefit" analysis.

C. The Receiver's Other Arguments Are Irrelevant

These are the two arguments the Receiver advances to show that Torn and the other CD purchasers do not have "legitimate" claims to the funds he seeks to claw back: 1) that other investors have the same claim (although theirs are unpaid); and 2) the Receiver cannot distinguish between CD principal and interest. These arguments are meritless.

To conceal the weakness of his position, the Receiver devotes pages and pages of argument to citing cases: a) discussing the rule of distribution to be used for estate assets; b) addressing disgorgement claims against defendants guilty of some wrongdoing; c) addressing disgorgement claims against truly nominal defendants with no legitimate legal or equitable claim to the funds. None of these cases support the Receiver's disgorgement claim against appellees.

As noted above, whether the Receiver should ultimately adopt *pro rata* distribution for assets that are properly part of the estate is irrelevant.

Likewise, the cases addressing disgorgement claims against wrongdoers are irrelevant to Torn, because he is not accused of any wrongdoing. And it is clear that Torn is not truly a nominal defendant, because he has a legitimate claim to the funds he received from SIBL.

D. Adoption of Other Briefs

Torn adopts by reference the briefs filed by the other appellees and cross-appellants in this proceeding, and the arguments and authorities cited in those briefs.[19]

CONCLUSION

Torn, like other CD purchasers, clearly had a legitimate claim to repayment of the principal amount he loaned to SIBL. The Receiver therefore has no legally viable claim against Torn for disgorgement of principal. The district court's order should be affirmed.

PRAYER

Appellee Roland Sam Torn prays the district court's order dated July 31, 2009 be affirmed, that costs of this appeal be taxed against Appellant Ralph S. Janvey, and for any other relief to which he may be entitled.

[19] FED. R. APP. P. 28(i).

Respectfully submitted,

/s/ Cynthia R. Levin Moulton__________

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