09-10761

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RALPH S. JANVEY,
Appellant
v.
JAMES R. ALGUIRE, et al.,
Appellees

Consolidated with
09-10765

RALPH S. JANVEY,
In his Capacity as Court-Appointed Receiver,
Appellant
v.
JIM LETSOS, et al.,
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 PAULA MARLIN

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FOR THE FIFTH CIRCUIT

RALPH S. JANVEY,

Appellant,

v. **Appeal No. 09-10761**

JAMES R. ALGUIRE, et al.,

Appellees.

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.

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Eugene N. Bulso, Jr.

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STATEMENT OF FACTS

On July 28, 2009, Paula Marlin was named as a "Relief Defendant" in the Second Amended Complaint filed by the Receiver. *See* Appendix in Support of Receiver's Amended Complaint Naming Relief Defendants, No. 03-09-CV-724, Dkt. 15 (July 28, 2009), at page 12, row 40.[1] Mrs. Marlin was not served with process prior to the hearing (July 31) and Order (August 4) that form the basis for this appeal. Notwithstanding his delay in formally adding her to this case, however, the Receiver has been aware of her presence and interest in this dispute since February 2009, when more than $660,000 in her brokerage account (#NNCO11041) at Pershing LLC was frozen. Mrs. Marlin files this brief in an effort to prevent the Receiver's unprecedented effort to strip her of her assets because of the mere happenstance that the proceeds of a matured CD that she purchased from Stanford International Bank, Ltd. ("SIB") were deposited and kept in a Pershing brokerage account, rather than withdrawn or deposited with another financial firm.[2]

Mrs. Marlin has lost the use of her funds, and faces the Receiver's efforts to have her forfeit those funds, despite the fact that she is an entirely

[1] Mrs. Marlin is also identified by the Receiver as an "interested party" in Appendix A of its Brief. (Tab A, page 12, row 36).

[2] Although Mrs. Marlin technically might not be barred as a matter of law from raising the issues of this appeal before the trial court on remand, as a practical matter the decision of this Court will be binding upon her in any proceedings on remand.

innocent investor who was among the many who were lured into purchasing SIB CDs. Indeed, as he must, the Receiver admits this point in the Amended Complaint:

> The Receiver does not allege at this time that any of the Relief Defendants participated in the fraudulent scheme at issue in the SEC's case or otherwise committed any wrongdoing. Rather, the Relief Defendants are added in a nominal capacity solely to facilitate return of assets to the Receivership Estate.

Receiver's Amended Complaint Naming Relief Defendants, no. 3:09-cv-724, Dkt. 14 ¶ 9.

SUMMARY OF ARGUMENT

The Receiver is aware that he is proceeding against the great weight of precedent in his effort to strip Ms. Martin of her assets. The SEC itself, the actual plaintiff in the underlying litigation, opposes the novel arguments being presented by the Receiver. In an effort to circumvent the well-established law in this area, the Receiver has declined to base his efforts upon the Texas version of the Uniform Fraudulent Transfers Act, TEX. BUS. & COM. CODE ANN. §§ 24.001, *et seq*. Although fraudulent transfer statutes are the typical means by which receivers seek to recoup funds improperly paid by securities law defendants, they provide explicit defenses for innocent investors who have provided value for the transfers in question. Thus, under the Texas version of the UFTA, even if it is shown that a transfer made by a debtor is fraudulent as to creditors under § 24.005(a),[3] such "[a} transfer or obligation is not voidable . . . against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." TEX. BUS. & COM. CODE ANN. §§ 24.009(a).

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[3] The general rule in federal decisions applying the UFTA is that the existence of a Ponzi scheme can demonstrate the initial fraudulent intent for the transferor under § 24.005(a) and its variants. For purposes of this Appeal, Mrs. Marlin has no independent means of determining whether the Defendants in the underlying SEC action, including SIB, were actually operating a Ponzi scheme. For ease of reference, however, she will accept that characterization solely for purposes of the pure legal issues at stake in this appeal.

That explicit exception to the provisions of the UFTA is undoubtedly the reason why the Receiver's counsel forthrightly admitted at the July 31 hearing: "Again, we're not pursuing statutory fraudulent transfer claims, and for good reason." Transcript of Proceedings (July 31, 2009), at 25 lines 6-7 (statements of Mr. Sadler). Thus, it apparently does not trouble the Receiver in the least to seek to plead his way around well-established authority protecting those good faith investors who had a legitimate claim to their distributions. Fortunately, even the Receiver's circuitous route does not present him with a clear path to stripping Mrs. Marlin's assets. His argument overlooks the fact that the provisions of UFTA and their close analogues in the Bankruptcy Code are themselves premised upon the long-established common law of fraudulent transfers. *See* ***In re Bledsoe***, 569 F.3d 1106, 1114 (9th Cir. 2009); ***In re Maryland Property Associates, Inc.,*** 309 Fed. Appx. 737, 750 (4th Cir. Jan. 26, 2009). *See also* ***F.T.C. v. Direct Marketing Concepts, Inc.,*** Civ. No. 04-11136-GAO, --- F.Supp.2d ----, 2009 WL 2707554 , at *7 (D. Mass. Aug. 13, 2009) (equitable remedy of disgorgement is permissible against a "relief defendant" only if he possesses ill-gotten gains and has no legitimate claim to the property.). Thus, the Receiver's efforts to avoid adverse precedent by characterizing his actions as "equitable" or "nonstatutory" are unavailing and he cannot prevail against Mrs. Marlin, given that she has a legitimate claim to the Pershing Account funds by virtue of having, in good faith, provided a reasonably equivalent value for the redemption of her CD.

ARGUMENT

I. The Receiver Misinterprets and Misapplies the Governing Law regarding Pro Rata Distribution of the Assets of a Ponzi Estate.

The Receiver's effort to strip Mrs. Marlin of all her funds in the Pershing Account, including both her original investment and the modicum of gain that she was paid on the SIB CD is premised upon the phrase "Equality is Equity," which the Receiver has torn from the Supreme Court's decision in the seminal Ponzi case, ***Cunningham v. Brown***, 265 U.S. 1, 13 (1924). The Receiver's elevation of that phrase to a slogan, however, does not stop all analysis. The Receiver's position would stretch those words well beyond their original context and serve to inflict further injury upon a small subset of Stanford's victims.

In the original Ponzi case, the Supreme Court was faced with a factual scenario quite distinct from that before this Court. There, when word began to circulate that Mr. Ponzi was insolvent, the investors commenced a run upon the bank, which "developed into a wild scramble [on] August 2." ***Id.*** at 8. Those who managed to get to the front of the line retrieved their investments, while those less fleet of foot were left to seek recovery in the bankruptcy. *See* 265 U.S. at 8-11. The investors who were the target of the equitable disgorgement action before the Court were among those who arrived at the front of the refund line after finding out about Ponzi's tottering finances; therefore, unlike Mrs. Marlin, they were not innocent of knowledge and acting in good faith when they received the return of their investment. This factual background is strikingly absent from the Receiver's argument, and shows the deficiencies in his position. It is only in light of the widespread publicity and resulting run on the bank that one can grasp the meaning of the Supreme Court's language:

> ***After August 2d*** the victims of Ponzi were not to be divided into two classes, those who rescinded for fraud and those who were relying on his contract to pay them. They were all of one class, actuated by the same purpose to save themselves from the effect of Ponzi's insolvency. Whether they sought to rescind, or sought to get their money as by the terms of the contract, they were, in their inability to identify their payments, creditors, and nothing more. It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankrupt law. Those who were successful in the race of diligence violated not only its spirit, but its letter, and secured an unlawful preference.

Id. at 13 (emphasis added). The highlighted word are crucial—they show that the Court's decision stands merely for the proposition that a redeeming investor who had knowledge of the Ponzi scheme is not entitled to retain his refund to the detriment of the other defrauded investors. Its reference to "equality is equity" and avoiding the creation of two classes of investors is wholly inapplicable to investors whose CDs were redeemed before they had any notice or inkling of the alleged wrongdoing of the underlying defendants. Thus, it fails to support the Receiver's position in this case.[4]

A. The Receiver's own Fifth Circuit Precedent fails to Support his Position.

The lack of support for the Receiver's position is demonstrated by his reliance upon precedent of this Court that is actually adverse to his argument. In ***SEC v. Forex Asset Mgmt, LLC***, 242 F.3d 325, 328 (5th Cir. 2001), this Court held that all assets of a fraudulent investment scheme were to be returned *pro rata* to its wronged investors based upon the '"percentage of [the investor's] loss as measured against the losses of all of the unpaid claimants.'" As explained in detail by the Receiver, a couple (the Whitbecks) whose investment in the scheme was readily traceable to certain funds in the receivership was not permitted to recoup a greater share of the estate distribution than other investors. *See* Appellant's Brief at 20. The Receiver, however, neglected to address the portions of the ***Forex*** opinion in

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[4] The remaining authorities cited by the Receiver at pages 16-17 of his brief also provide no support for his position. None of them involved innocent investors who received a return of their principal prior to the unveiling of the fraud. *See, e.g.,* ***SEC v. Colello***, 139 F.3d 674, 676 (9th Cir. 1998) ("nominal" defendant was originally named as a participant in the fraud and invoked Fifth Amendment); ***CFTC v. Kimberlynn Creek Ranch***, 276 F.3d 187, 191-92 (4th Cir. 2002) ("relief defendants" received "substantial ill-gotten gains" and were related to the underlying defendants—*see* ***CFTC v. IBS, Inc.***, 113 F. Supp. 2d 830, 853 (W.D.N.C. 2000)); ***SEC v. Elfindepan, S.A.***, no. 1:00-cv-742, 2002 WL 31165146 (M.D.N.C. Aug. 30, 2002) ("relief defendants" had fraudulently obtained funds from underlying wrongdoer and therefore had no legitimate claim to the funds they received); ***SEC v. Cavanagh***, 155 F.3d 129, 136 (2d Cir. 1998) (no legitimate claim to ill-gotten funds given to relief defendant as a gift); ***SEC v. Egan***, 856 F. Supp. 401, 402 (N.D. Ill. 1993) (relief defendant must disgorge "illegally obtained profits").

which prior distributions to investors were addressed. In ***Forex***, over half of the investors had already "had their investments returned to them," were not included in the distribution of the estate, and did not have those investment returns "clawed back." *See* 242 F.3d at 328 n.3. Simply put, those returns of investment were outside of the estate and those who received them were not "net losers" entitled to further distributions. Moreover, the Whitbecks, who were seeking the full return of the estate funds traceable to their investment, had themselves received a $22,000 return of principal, which served to reduce their losses for purposes of the *pro rata* distribution. *Id.* at 328 n.4. That pre-receivership return of principal, however, was not clawed back; it merely was deducted dollar for dollar from the amount of the Whitbecks' losses prior to the calculation of the *pro rata* distribution. Thus, the ***Forex*** decision drew upon the implication of the quoted language in the original Ponzi case and did not penalize those investors who happened (in good faith) to receive returns on their investments prior to the unveiling of the fraud.[5]

The procedure followed in ***Forex*** is consistent with all other known authority in this area. From the time of the original Ponzi decision in ***Cunningham*** to the present, no court has taken the approach espoused by the

[5] The Receiver's other Fifth Circuit case, ***United States v. Durham***, 86 F.3d 70 (5th Cir. 1996), is simply inapposite. There, the only funds at issue were those already present in the wrongdoer's estate; no question of retrieving funds from investors was presented. Consequently, it is of no moment that the court followed the time honored principle that distributions from within the fraudfeasor's estate be made on a *pro rata* basis.

Receiver and forced innocent investors to forfeit funds that they had received in good faith prior to the unveiling of the fraud. The reason for this is simple. Such investors, as shown below, are deemed to have paid reasonably equivalent value, in good faith, and therefore have a legitimate claim to the principal amount of their original investment.

B. The Overwhelming Majority of Precedent Provides that, at Most, Innocent Ponzi Investors Must Disgorge only Payments Received in Excess of their Original Investment.

The cases are legion in which courts have approved claw backs of distributions in excess of the original investment, while leaving the original investment (or the amount thereof) in the hands of the innocent investor.[6] *See, e.g.*, ***Scholes v. Lehmann***, 56 F.3d 750, 755-58 (7th Cir. 1995) ("All that he is being asked to do is to return the net profits of his investment—the difference between what he put in [the Ponzi scheme] at the beginning and what he had at the end."); ***Sender v. Buchanon***, 84 F.3d 1286, 1290 (10th Cir. 1996) (innocent investor must disgorge amounts received in excess of her original investment). *See also* ***Smith v.***

[6] Mrs. Marlin has not received (and is not scheduled to receive) distributions in excess of her original investment. The District Court's Order only authorized the release of an amount equal to her original investment in the SIB CD at issue. In addition, even if the District Court's Order is affirmed, Mrs. Marlin will still be left with a loss of over $780,000 as a result of her investment in a second SIB CD that was not scheduled to mature until March 27, 2013. She is, thus, a "net loser" under any set of circumstances.

Suarez (In re IFS Financial Corp.), 2009 WL 2986928, *18-20 (Bankr. S.D. Tex. Sept. 9, 2009) (finding that various defendants had received transfers of fraudulently obtained funds in good faith and for reasonably equivalent value; therefore, funds were not subject to disgorgement).

The Ninth Circuit recently had the opportunity, in a trio of 2008 decisions, to survey and analyze the case law examining transfers to innocent investors in the context of Ponzi schemes and its analysis is instructive. *See* ***Mackenzie v. Barclay***, 525 F.3d 700 (9th Cir. 2008); ***In re Slatkin***, 525 F.3d 805, 814-15 (9th Cir. 2008); ***Donell v. Kowell***, 533 F.3d 762 (9th Cir. 2008).

In ***Mackenzie***, after observing that California's version of UFTA was "similar in form and substance to the Bankruptcy Code's fraudulent transfer provisions" (525 F.3d at 703), the court held that an innocent Ponzi investor could not be forced to disgorge amounts that were not in excess of his investment. ***Id.*** at 708-09. In doing so, the court rejected the bankruptcy trustee's argument to the contrary, which had been accepted by the Bankruptcy Court. ***Id.***

In ***Slatkin***, the court held that "once the existence of a Ponzi scheme is established, payments received by investors as purported profits-i.e., funds transferred to the investor that exceed that investor's initial 'investment'-are deemed to be fraudulent transfers as a matter of law." 525 F.3d at 814. As in the Seventh Circuit's decision in ***Scholes***, however, the ***Slatkin*** court emphasized that "[a]ll the [relief defendants] are being asked to do is return the purported profits on their investment. . . . This will prevent the injustice that would result if the[y] . . . were allowed to retain their purported profit at the expense of other defrauded investors." ***Id.*** at 815.

After resolving the ***Mackenzie*** and ***Slatkin*** appeals, the Ninth Circuit handed down ***Donell v. Kowell***, in which it conducted an extensive analysis of the case law in this area and observed that, in weighing the permissibility of a disgorgement remedy against innocent investors,

> federal courts have generally followed a two-step process. First, to determine whether the investor is liable, courts use the so-called "netting rule." *See* Mark A. McDermott, *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers,* 72 AM. BANKR. L.J. 157, 168-69 (1998) (surveying federal district court and bankruptcy cases). Amounts transferred by the Ponzi scheme perpetrator to the investor are netted against the initial amounts invested by that individual. If the net is positive, the receiver has established liability, and the court then determines the actual amount of liability, which may or may not be equal to the net gain, depending on factors such as whether transfers were made within the limitations period or whether the investor lacked good faith. If the net is negative, the good faith investor is not liable because payments received in amounts less than the initial investment, being payments against the good faith losing investor's as-yet unsatisfied restitution claim against the Ponzi scheme perpetrator, are not avoidable within the meaning of UFTA. . . .
>
> Second, to determine the actual amount of liability, the court permits good faith investors to retain payments up to the amount invested, and requires disgorgement of only the "profits" paid to them by the Ponzi scheme. *See*

> ***In re Lake States Commodities, Inc.***, 253 B.R. 866, 872 (Bankr.N.D.Ill.2000) (collecting cases). Payments of amounts up to the value of the initial investment are not, however, considered a "return of principal," because the initial payment is not considered a true investment. Rather, investors are permitted to retain these amounts because they have claims for restitution or recision [sic] against the debtor that operated the scheme up to the amount of the initial investment. Payments up to the amount of the initial investment are considered to be exchanged for "reasonably equivalent value," and thus not fraudulent, because they proportionally reduce the investors' rights to restitution. . . . If investors receive more than they invested, "[p]ayments in excess of amounts invested are considered fictitious profits because they do not represent a return on legitimate investment activity." ***Lake States***, 253 B.R. at 872.

Donell v. Kowell, 533 F.3d 762, 771-72 (9th Cir. 2008) (citation and footnotes omitted).

These Ninth Circuit decisions, which rigorously examined the law governing disgorgement of proceeds from innocent investors in Ponzi schemes, are compelling and this Court should join in their conclusion. They consider and reject the very arguments made by the Receiver in this case and faithfully carry on the principles followed from the time of the original Ponzi case through the present. The Receiver's transparent effort to avoid this well-settled law by facilely characterizing his efforts as "nonstatutory" unfairly seeks to impose further injury on Mrs. Marlin and others in a small pool of Stanford victims and cannot be permitted to succeed.

C. The Cases from Other Circuits cited by the Receiver Fail to Support his Arguments.

In a futile effort to bolster his effort to obtain undue recoveries from innocent investors, the Receiver cites numerous cases that purportedly support his novel position. In doing so, however, he unavoidably undercuts his argument. For example, none of the numerous cases cited in the Receiver's 29 line footnote 2 involved a situation in which innocent investors were made to disgorge their original principal investment amounts that had been returned to them by the Ponzi wrongdoer prior to the unveiling of the scheme. Rather, each of those cases is consistent with the general proposition that the disgorgement remedy, if appropriate in the first place, is limited to return of "profits" or "ill-gotten" or "illegally-obtained" *gains* from so-called relief defendants. As summed up by one of the authorities included by the Receiver in his note 2, "As to relief defendants, it is axiomatic that we may impose equitable relief on a third party against whom no wrongdoing is alleged if it is established that the third party possesses illegally-obtained ***profits but has no legitimate claim*** to them." ***S.E.C. v. Infinity Group Co***., 993 F. Supp. 324, 331 (E.D. Pa. 1998) (citing ***S.E.C. v. Cherif***, 933 F.2d 403, 414 n.11 (7th Cir. 1998)), *aff'd*, 212 F.3d 180 (3d Cir. 2000)) (emphasis added).

The unpublished Third Circuit case cited by the Receiver at pages 25-26 of its brief, ***SEC v. Infinity Group Co.***, 226 Fed. Appx. 217 (3d Cir. 2007), is also clearly distinguishable. There, an investor sought preferential treatment in distributions from the estate of the Ponzi operator because of the fact that his check was purportedly still subject to a internal bank hold when the wrongdoer's accounts were frozen. In holding that the district court had not erred in holding that the check should be combined with the rest of the estate for distribution, the Third Circuit merely followed the common rule that all funds in the estate of the wrongdoer should be distributed *pro rata* among the defrauded investors. Moreover, in reaching this decision, the Third Circuit distinguished a prior decision in which checks were mistakenly placed into the receivership estate the day *after* the accounts were frozen. *See **Anderson v. Stephens***, 875 F.2d 76, 79-80 (4th Cir. 1989) (discussed in note 4 of ***Infinity Group*** decision).

The ***Anderson*** decision, unlike ***Infinity Group***, is readily analogous to the present dispute. There, the checks in question were not deposited by the underlying wrongdoer until after the estate was frozen and were then mistakenly negotiated by the banks. The district court ruled that those late deposits should be consolidated with the remainder of the estate and the checkwriters be treated in the same manner as those who invested prior to the freeze; thus, they would receive only a small *pro rata* percentage of their investment. On appeal, the Fourth Circuit reversed, holding that the District Court had abused its discretion in including the late-depositers and their funds in the *pro rata* distribution. 875 F.2d at 81.   In the words of the Fourth Circuit, "Both law and equity dictate that the investors whose checks were deposited after the freeze order are entitled to a full return of their funds." Id. at 79. Although the court acknowledged that its decision would result in some innocent investors being made nearly whole while others would receive only pennies on the dollar, the timing of the deposits proved to be decisive. ***Id.*** at 81.

The reasoning of the ***Anderson*** Court is directly applicable to the present case. While the Receiver may tout "Equality is Equity," he overlooks the lines that have consistently been drawn in past cases. Thus, from the time of the original Ponzi scheme to the present, redemptions of original investments, received in good faith by innocent investors prior to the unveiling of the fraud, are not subject to forfeiture. So too, if "investments" are made <u>after</u> a receivership commences, those investments are not considered to be part of the *pro rata* pool. While the receiver might term such line drawing as "unfair" or constituting a rule of distribution by "happenstance," just where would he draw the lines? What of the investors who were considering the purchase of CDs but were dissuaded by the tidal wave of publicity that was unleashed in early 2009? Under the Receiver's logic, why should they benefit merely because they were slow to invest or were waiting for other CDs to mature? Similarly, what of those who received returns on their investments, but not "shortly before court intervention"?[7] Since the Receiver seeks to act unfettered by any statutory constraints, one must assume that the only limitation that he would perceive to his reach would be equitable in nature; just where would he have the line be drawn?

The only published authority cited by the Receiver that appears to support his argument is ***SEC v. George***, 426 F.3d 786 (6th Cir. 2005). If taken at face value, however, ***George*** is an anomaly—it would appear to be the only decision permitting a receiver to cause innocent investors to forfeit their original principal investments that had been returned to them before the unveiling of the fraud. Thus, it is one case against a multitude and its reasoning is deficient when compared to the subsequent trio of Ninth Circuit decisions. Moreover, as explained by the SEC in its prior briefing, the underlying facts in ***George*** were actually consistent with the general rule in this area. In short, the "relief defendants" in George were not innocent investors. *See* Opposition of the

[7] The Receiver apparently has never detailed just what time period is encompassed by his reference to those "who cash out shortly before court intervention." Appellant's Brief at 2. Needless to say, whatever time period he chooses to define as "shortly before" will raise the exact same "fairness" issues that he is trumpeting here. The difference, of course, is that whatever line he draws would be far more nebulous than the standard followed for the past 90 years of drawing a line at the point of the fraud's unveiling.

Securities and Exchange Commission, Amicus Curiae, to Motion to Extend Injunction Pending Appeal 12-13 (Aug. 11, 2009).[8]

D. Mrs. Marlin had a Legitimate Claim to the Principal Repayments Received from SIB.

The hollowness of the Receiver's arguments on this Appeal are, perhaps, best demonstrated by the section of his Brief arguing that Mrs. Marlin and the other putative "relief defendants" had no legitimate claim to principal payments made by SIB. *See* Receiver's Brief 28-31. Of the numerous purported authorities cited by the Receiver in his 2 page string cite beginning at page 29, only one, the discreditable ***SEC v. George***, even arguably supports his position. The others are simply inapplicable, involving "relief defendants" that were closely related to or dominated by the wrongdoers and/or that had received substantial funds from the wrongdoers for no consideration. None of those cases involved innocent investors who had merely received their money back.

[8] Although not cited in his Brief, the Receiver has previously cited the unpublished decision in ***Quilling v. 3D Marketing, LLC***, 2007 WL 1058217 (N.D. Tex. Feb. 8, 2007) in support of his argument that innocent third parties may be stripped of even their initial principal investment. *See* Receiver's Motion to Extend Injunction Pending Appeal 10 (Aug. 7, 2009). The decision to drop ***Quilling*** from his arguments was apparently premised upon the fact that, as shown by the SEC, the "investment" at issue in ***Quilling*** was not in the Ponzi securities, but an equity position in the entity operating the Ponzi scheme. Opposition of the Securities and Exchange Commission, Amicus Curiae, to Motion to Extend Injunction Pending Appeal 11-12 (Aug. 11, 2009). Moreover, ***Quilling*** involved a Receiver who was proceeding appropriately under UFTA, which (as shown above) expressly permits the "relief defendant" to escape disgorgement if he has a legitimate claim to the funds. 2007 WL 1058217, at *2.

Moreover, the Receiver cites no precedent whatsoever for the heart of his argument in this section – that the contract claims of Mrs. Marlin and the other "relief defendants" are insufficient to establish a legitimate claim within the meaning of UFTA or its equitable analog. *See* Receiver's Brief at 28-29. The inability of the Receiver to provide support for his position, which is the crux of his entire argument, is not surprising; not only does such support not exist, but precedent is clearly against him, no matter how he characterizes the basis of his action against the "relief defendants."

One of the best analyses of this area is quoted above, in the discussion of the Ninth Circuit's decision in ***Donell v. Kowell***:

> [T]he [law] permits good faith investors to retain payments up to the amount invested, and requires disgorgement of only the "profits" paid to them by the Ponzi scheme. . . . [I]nvestors are permitted to retain these amounts because they have claims for restitution or recision [sic] against the debtor that operated the scheme up to the amount of the initial investment. Payments up to the amount of the initial investment are considered to be exchanged for "reasonably equivalent value," and thus not fraudulent, because they proportionally reduce the investors' rights to restitution. . . . If investors receive more than they invested, "[p]ayments in excess of amounts invested are considered fictitious profits because they do not represent a return on legitimate investment activity."

533 F.3d at 772 (citations omitted). As observed previously, the Ninth Circuit reached this conclusion after a searching analysis of existing law. Thus, the Receiver's bald assertion that the contractual CD rights of Mrs. Marlin and the

other "relief defendants" are insufficient to provide a legitimate claim to their returned principal is simply wrong.

Moreover, this analysis of the "legitimate claim" to amounts not exceeding one's original investment has also been embraced across the board by those bankruptcy courts who, all too frequently, are faced with the clean up of failed investment schemes.[9] For example, in a finely detailed analysis, the bankruptcy court for the Northern District of Oklahoma held that it would be inequitable to claw back any payments made to good faith investors that amounted to no more than their original investments. ***Soulė v. Alliot (In re Tiger Petroleum Co.)***, 319 B.R. 225, 235-40 (Bkrtcy. N.D. Okla. 2004), *following* ***Jobin v. McKay (In re M&L Business Machine Co.)***, 84 F.3d 1330 (10th Cir. 1996). *Accord* ***Collins v. Sellis (In re Lake States Commodities, Inc.)***, 253 B.R. 866 (Bkrptcy. N.D. Ill. 2000) ("Bankruptcy courts have generally allowed Ponzi scheme investors to retain payments up to the amount invested because investors have claims for restitution or rescission against the debtor that operated the scheme. . . Since investors' rights to restitution are proportionately reduced by payments received from a Ponzi scheme, to the extent of invested principal, payments from

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[9] Indeed, the decision in the original Ponzi scheme, which is cited by the Receiver, itself arose from equity proceedings instituted by bankruptcy trustees. *See* ***Cunningham v. Brown***, 265 U.S. 1 (1924).

the debtor are deemed to be made in exchange for reasonably equivalent value.”); ***Rafoth v. Bailey (In re Baker & Getty Financial Services, Inc.),*** 88 B.R. 792 (Bkrptcy. N.D. Ohio 1988) (trustee limited to amounts in excess of original investment when pursuing recovery against innocent investor who received distributions from Ponzi scheme); ***Merrill v. Abbott (In re Independent Clearing House Co.)***, 77 B.R. 843 (D. Utah 1987) (en banc) (bankruptcy trustee could not recover monies received by innocent investors in good faith from Ponzi scheme operator when those distributions did not exceed original investments).

Consequently, by surrendering her SIB CD, Mrs. Marlin provided reasonable value and has a good faith, legitimate claim to the funds she received to the extent that they do not exceed her original CD investment.

II. This Court Should Affirm the District Court’s Order.

The Receiver has attempted to stretch the well-established law governing disgorgement in Ponzi schemes beyond all previous limits. His efforts are supported neither by prior case law nor by equity. Moreover, as shown by the objections of both the SEC and the District Court’s own Examiner to the Receiver’s ploy, it is also unsupported by the public policy of fairly and efficiently providing recompense to all victims of an alleged Ponzi scheme. Consequently, this Court should affirm the District Court’s Order and prevent the Receiver from further victimizing the innocent SIB investors who happen to have maintained accounts with Pershing in early 2009.[10]

Respectfully submitted,

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[10] Mrs. Marlin specifically reserves the right to raise objections to the jurisdiction of the District Court if the claims against her are remanded to any extent. *See* ***SEC v. Collelo***, 139 F.3d 674, 676 (9th Cir. 1998); ***SEC v. Cherif***, 933 F.2d 403, 414 (7th Cir. 1991)

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the Type-volume limitations of F.R.A.P. 32(a)(7)(B) in that its relevant portions contain 5,267 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the style requirements of F.R.A.P. 32(a)(6) in that it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 with 14 point Times New Roman typeface.

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CERTIFICATE OF SERVICE

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