09-10761

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RALPH S. JANVEY,

Plaintiff-Appellant-Cross-Appellee

v.

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. MARQUETTE; GAIL G. MARQUETTE,

Defendants-Appellees-Cross-Appellants

JAMES R. ALGUIRE; VICTORIA ANCTIL; SYLVIA AQUINO; JONATHAN BARRACK; NORMAN BLAKE; ET AL; TIFFANY ANGELLE; MARIE BAUTISTA; TERAL BENNETT; SUSANA CISNEROS; RON CLAYTON; ET AL 3; HANK MILLS; ROBERTO ULLOA; JAY STUART BELL; GREGORY ALAN MADDUX; DAVID JONATHAN DREW; ANDRUW RUDOLF BERNARDO JONES; CARLOS FELIPE PENA; JOHNNY DAVID DAMON; BERNABE WILLIAMS; PATRICIA A. THOMAS, in her capacity as independent executor of the estate of Christopher Allred; PATRICIA A. THOMAS; ROLAND SAME TORN; PAULA MARLIN,

Defendants-Appellees

Consolidated with

09-10765

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

Plaintiff-Appellant

v.

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

Defendant-Appellee

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division Docket No. 3:09-CV-724-N

REPLY BRIEF OF CROSS-APPELLANTS-APPELLEES, JOSEPH BECKER ET AL.

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MARTHA WITMER, BRUCE STONE, and SHARON WITMER ("Joseph Becker *et al."* or the "Louisiana Retirees"), filed a cross appeal of the two issues that are set forth in their brief at pages 39 to 42. The Receiver has filed a response to the cross appeal issues. The Louisiana Retirees are filing this Reply Brief in response to the arguments of the Receiver.

SUMMARY OF THE ARGUMENT

Considerable weight should be accorded to the SEC's construction of the statutory scheme, which the agency is responsible for administering. The SEC agrees with the position of the Louisiana Retirees on Cross Appeal Issue No. 1 that the principal amount invested by innocent investors should not be subject to disgorgement. Additionally, the SEC agrees with the position of the Louisiana Retirees on Cross Appeal Issue No. 2 that all accounts (including interest and principal) of the Louisiana Retirees should be unfrozen until the Receiver sets forth a detailed plan of equitable disgorgement. The Receiver has made no attempt to argue that disgorgement of innocent investors is an equitable remedy that existed as of 1789 which is permissible under the holding of *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 322, 119 S.Ct. 1961, 1969-1970, 144 L.Ed.2d 319 (1999).

ARGUMENT AND AUTHORITIES

1. CONSIDERABLE WEIGHT SHOULD BE ACCORDED TO THE SEC'S CONSTRUCTION OF THE STATUTORY SCHEME, WHICH THE AGENCY IS RESPONSIBLE FOR ADMINISTERING.

As stated at page 1 of the SEC's Amicus Brief, the SEC is responsible for administering the federal securities law.[1] The Receiver has made no attempt to refute the legal principal that considerable weight should be accorded to the SEC's construction of a statutory scheme it is entrusted to administer. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). If the view of the SEC represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, the case law has universally held that a court will not overturn the view of the SEC unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *Chevron*, *supra*. The Receiver has fallen woefully short of presenting the type of facts or arguments required to prevail over the position of the SEC that the principal amount invested by innocent investors is not subject to disgorgement. Further, the Receiver makes no

[1] "The Securities and Exchange Commission is the agency principally responsible for the enforcement of the federal securities laws and the protection of the investing public. *See* Sections 19 and 20 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77s, 77t; Section 21 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78u." SEC's Amicus Brief, page 1.

attempt to qualify its disagreement with the SEC under the standard established by *Chevron* based upon the argument that the SEC view is not "one that congress would have sanctioned."

The Receiver is attempting to subject many of the Louisiana Retirees to disgorgement of payments received for the past eight years, starting in the year 2000, while apparently limiting the disgorgement against other groups for shorter time periods. The Receiver has not provided any basis for this type of discriminatory disgorgement. As for the issue of the disgorgement being focused on a limited number of innocent persons, for different time periods, the SEC has stated that a small group of innocent investors should not be subject to clawback for certain policy reasons.[2] Rather than address the arguments of the SEC on this important policy

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[2]See SEC's Amicus Brief at pages 11-12: "Finally, the circumstances of this case do not support an extension of the district court's equitable authority to permit the receiver's claims against the Investor Defendants for the principal payments they received from redemption of their SIB CDs. Most of the investor defendants, a small subset of the Stanford fraud victims, have been sued as a result of the happenstance that they have accounts where the receiver was able to obtain an account freeze. Thousands of other investors likely also have received principal payments, including thousands who are beyond the district court's jurisdiction. *See* Brief of Appellees Jim Letsos, et al. ("Letsos Brief"), at 7-10. It would be unfair to make this small subset of admittedly innocent investors return the funds they invested, or even litigate the receiver's claims, while thousands of other similarly situated investors are not pursued."

See also SEC's Amicus Brief at page 28: "None of the receiver's cases demonstrates that it would be equitable to allow these claw-back claims for principal repayments against the innocent Stanford investors. Such claims would exacerbate the hardship on a small pool of victims who happen to hold funds in identifiable accounts that could be frozen. Although thousands of other investors likely also have received principal payments, these investors are likely beyond the court's jurisdiction. Pursuing claims against a small subset of admittedly

issue, the Receiver, in its reply brief at page two, attempts to summarily dismiss the argument as being irrelevant without addressing the merits of the argument of the SEC or addressing the *Chevron* criteria and discussing why its approach is a better the view than the position of the SEC.[3] Because of the statutes the SEC is entrusted by law to administer, the SEC believes, as a matter of public policy, as stated in its amicus brief, that the inequitable disgorgement of a limited number of innocent investors is relevant to the issue on appeal. At a minimum, *Chevron* holds as a matter of law that the views of the SEC should be considered on an important issue of law of which that federal agency has responsibility for administering. As a matter of law, the Receiver is not afforded the right to argue that the SEC's arguments are not relevant, and then not address the argument. Further, the *Chevron* case creates a high hurdle for the Receiver to jump of "not one that Congress would have sanctioned" before the agency's view is not accepted. By failing to address this important issue

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innocent investors for the return of the funds they invested would come at great cost to these victims and the receivership estate, and with questionable benefit to all of the victims of the Stanford scheme."

[3]The Receiver intentionally limits its response on this issue and merely characterizes the argument of inequitable disgorgement urged by the SEC as follows:

"But this bizarre concept of equity has nothing to do with the issue on appeal".

See Receiver's Reply Brief at page 2.

as raised by the SEC and all of the Appellees by dismissing the argument as irrelevant, the Receiver's argument fails under the criteria of *Chevron*.

2. THE SEC AGREES WITH THE POSITION OF THE LOUISIANA RETIREES ON CROSS APPEAL ISSUE NO. 1 THAT THE PRINCIPAL AMOUNT INVESTED BY THE INNOCENT INVESTORS SHOULD NOT BE SUBJECT TO DISGORGEMENT.

As argued in Cross Appeal Issue No. One at pages 39 to 40 of the Louisiana Retirees' original brief, the meaning of the term "principal" as used in the district court order was unclear to the Louisiana Retirees. For this reason, a protective cross appeal was filed on this issue. The Louisiana Retirees argued that only the payments received in excess of the principal amount invested is subject to disgorgement. This is the position adopted by the SEC in the amicus curiae brief in footnote one and elsewhere.[4]

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[4]See SEC's Amicus Brief at page 2, footnote one: "The term 'principal payments' refers to funds received by innocent investors up to the amount of funds invested. Likewise, the term 'interest payments' in the context of this case refers to funds received by innocent investors beyond the amount of funds invested."

See also SEC's Amicus Brief at page 10: "As demonstrated below, the receiver cannot recover the principal repayments innocent investors received from SIB as fraudulent transfers because the investors received the payments in good faith and for reasonably equivalent value."

See also SEC's Amicus Brief at page 22: "The receiver has not cited, and we are not aware of, a case holding that a receiver may obtain equitable disgorgement of principal repayments from innocent investors in a Ponzi scheme."

See also SEC's Amicus Brief at page 28: "That some courts authorize a pro rata distribution of receivership assets does not mean, therefore, that claw-back claims against innocent investors are appropriate; it would be inequitable to claw back from the Investor

3. THE SEC AGREES WITH THE POSITION OF LOUISIANA RETIREES AS SET FORTH IN CROSS APPEAL ISSUE NO. 2 THAT ALL ACCOUNTS (INCLUDING INTEREST AND PRINCIPAL) OF THE LOUISIANA RETIREES SHOULD BE UNFROZEN UNTIL THE RECEIVER SETS FORTH A DETAILED PLAN OF EQUITABLE DISGORGEMENT.

Footnote 3 at page 17 of the SEC's amicus brief supports the outcome suggested by the Louisiana Retiree in Cross Appeal Issue No. 2 that all amounts, both interest and principal should be unfrozen. The SEC's amicus brief specifically states that "under these facts and the claims asserted here, the freeze should be lifted as to all customers accounts in their entirety."[5] The SEC further explains that until the Receiver can present the issue to the district court and a determination is made by the district court as to whether equitable disgorgement of all interest income of all recipients of funds for the same time periods is required (versus focusing on a small group like the Louisiana Retirees for a different eight year time period), no amounts

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Defendants repayments of their principal investment."

See also SEC's Amicus Brief at page 28: "None of the receiver's cases demonstrates that it would be equitable to allow these claw-back claims for principal repayments against the innocent Stanford investors. Such claims would exacerbate the hardship on a small pool of victims who happen to hold funds in identifiable accounts that could be frozen."

[5] SEC Amicus Brief at page 17, footnote 3: "The Commission, however, reiterates its position before the district court that, as a matter of equity, under these facts and the claims asserted here, the freeze should be lifted as to all customers accounts in their entirety."

should be frozen. For this reason, all of the Louisiana Retiree accounts should be unfrozen and released in their entirety.

4. THE RECEIVER HAS MADE NO ATTEMPT TO ARGUE THAT DISGORGEMENT OF INNOCENT INVESTORS IS AN EQUITABLE REMEDY THAT EXISTED AS OF 1789 WHICH IS PERMISSIBLE UNDER THE HOLDING OF *GRUPO MEXICANO DE DESARROLLO S.A. V. ALLIANCE BOND FUND, INC*., 527 U.S. 308 (1999).

The courts have recently confirmed that disgorgement by receiver is an equitable remedy that is allowable under *Grupo*. However, its application is limited to wrongful misconduct by the person subject to the equitable remedy. *S.E.C. v. Cavanagh*, 445 F.3d 105, 118 -119 (2nd Cir.2006). The *Cavanagh* case discusses the issue relating to disgorgement as a remedy that existed in 1789 and the requirements of wrongful conduct. However, the facts of *Cavanagh* are limited to a disgorgement relating to wrongful conduct. It has no application to the disgorgement of innocent investors. The Receiver has made no attempt to show that equitable disgorgement of an innocent recipient of funds is a remedy that existed in 1789, thus there is no basis for the claims made by the Receiver.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Cross-Appellants-Appellees, Joseph Becker *et al.* in both paper and electronic form has been sent via hand delivery to the office for the Clerk of the United States Court of Appeals for the Fifth Circuit, and a true and correct copy of the Reply Brief of Cross-Appellants-Appellees was served in both paper and electronic form upon the below listed counsel by U.S. mail on this 20th day of October, 2009:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2031 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a monospaced typeface using WordPerfect 10 from WordPerfect Office 2002 in Times New Roman 14-point typeface.

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Dated: October 20, 2009