Case No. 09-10761

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 MILAN HADDAD; 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; PATRICA A. THOMAS, in her capacity as independent executor of the estate of Christopher Allred; PATRICIA A. THOMAS; RONALD SAM 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 GONZALEZ; CHARLOTTE HUNTON; RICARDO O. HUNTON, CHARLES HUNTON,

Defendants – Appellees

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

REPLY OF GAINES D. ADAMS, ET AL.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

INTRODUCTION AND SUMMARY

Nothing prevented the Receiver from filing a lawsuit stating recognized causes of action against the Investors and asking for a pre-judgment account freeze under the Federal Rules of Civil Procedure. In fact, that is exactly what the District Court instructed him to do. Instead he proceeded down a different path—one opposed by the SEC, the court-appointed Examiner, and ultimately the District Court. He asks this Court to expand a single case beyond its stated ruling to give him equitable powers never before exercised by a court-appointed receiver. While it is true that Congress and the federal courts provide extraordinary remedies to aid the *SEC* in its civil enforcement and collection efforts, there is no legal authority that gives the Receiver those same powers in this case.

This is especially true here, where the Receiver is trying to clawback money from investors. When suing innocent investors—many of whom are already victims of the Stanford investment scheme—the Receiver cannot ask that equity allow him to cheat rules of procedure and recognized causes of action. What the Receiver desires is not even equitable. It would deal a total loss to all investors who, by happenstance, kept their money in a United States brokerage account. He would then use their funds to make distributions to other Stanford investors, the vast majority of whom are located abroad and will never be subject to the same clawback claims in their own

countries. Equity requires consistent treatment among all Stanford investors no matter where they are located.

Just as the Receiver cannot prevail on the equities in this case, he cannot prevail on the merits of his claims addressed in the Investors' cross-appeal. For example, he cannot recover interest from investors who received less than their total principal investment. The District Court already declined to recognize the Receiver's attempted claim in equity. If he is going to proceed with claims to clawback interest, it will be as a typical cause of action under the Uniform Fraudulent Transfer Act ("UFTA"). Many of the Investors are "net losers" who received less than their total principal investment. They have an affirmative defense under the UFTA to keep both their principal and interest. Since the Receiver is not likely to prevail on his claims against them, there is no reason to continue freezing their funds.

The Receiver is also not likely to succeed on claims against Investors' accounts that are exempt from execution and attachment. He apparently concedes this point by ignoring it in his Reply / Response Brief. This Court should, therefore, reverse the District Court's freeze of any funds held in exempt accounts.

This Court should also reverse the asset freeze because the District Court issued it without notice or an opportunity to be heard and it remains in effect without any evidentiary support. If the Receiver cannot prove the amount of his claims against Investors' interest, he cannot possibly prevail on them.

Finally, the Receiver cannot escape the fact that the freeze order is essentially a pre-judgment attachment that cannot be appealed under 28 U.S.C. § 1292(a)(1). He sidesteps this issue by artfully describing it as a freeze order "based on federal securities laws." (Appellant's Reply / Resp. Br. at 23.) But the cases he cites show that only the SEC can obtain that kind of pre-judgment order. Therefore, the Court should explore whether the freeze order's essential nature is that of a pre-judgment attachment that cannot be appealed.

ARGUMENT

I. The Receiver Cannot Prevail On Claims Against Innocent Investors Who Are Net Losers

The District Court erred by continuing to freeze an amount equal to the interest paid to "net losers"—i.e., investors who received less than their total principal investment. Although the Receiver has tried to advance a new and specious claim in equity, the District Court declined to recognize it. Therefore, if the Receiver is to proceed against the funds characterized as interest that remains frozen, it will have to be through a cause of action recognized under the Uniform Fraudulent Transfer Act ("UFTA").

Under the UFTA, a court-appointed receiver may only recover "net profits" paid to investors, meaning the difference between what an investor "put in at the beginning and what he had at the end." *Scholes v. Lehmann*, 56 F.3d 750, 757-58 (7th Cir. 1995). This means Investors may redeem money from an investment scheme

"dollar for dollar" up to the value they put in but they cannot make a net profit above that. *In re Indep. Clearing House Co.*, 77 B.R. 843, 859 (D. Utah 1987). Since the Investors who are net losers never realized a return equaling their total principal investment, they have a right to keep all their returns whether they are characterized as principal or interest. Therefore, if this Court upholds the District Court's ruling, it must also reverse the continued freeze of funds characterized as interest held by net losers.

II. The Receiver Cannot Prevail On Claims Against Investors' Accounts That Are Exempt From Execution

The Receiver has not shown that he is likely to succeed on his claims against interest held in Investors' accounts that are exempt from judgment. In fact, he understandably ignores the issue altogether in his Reply / Response Brief. The District Court's order continues to freeze funds characterized as interest contained in Investors' IRA accounts, SEP accounts, and a pension plan that makes distributions to retirees. The Receiver does not dispute the fact that, under state law, he cannot collect a judgment against those accounts or subject them to pre-judgment attachment.[1] Therefore, there is no legal or practical basis for continuing the freeze of those accounts.

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[1] Although the Receiver says those accounts contain "money that Stanford looted from thousands of innocent investors," that is not necessarily true. At least one Investor has IRA accounts frozen that do not contain anything that can be traced to Stanford or its CDs. (Appellant's Reply / Resp. Br. at 7.)

III. The District Court Froze Investors' Interest Without Proper Notice And Continues The Freeze Without Evidentiary Support

The District Court also erred by issuing the freeze order without notice or an opportunity to be heard and keeping it in effect without evidentiary support. It began when the Receiver decided the Temporary Restraining Order and Order Appointing Receiver gave him authority to freeze Investors' personal accounts at Pershing LLC or JP Morgan even though neither order mentions the Investors or their accounts. (SEC Supp. R. 73-82.)

The District Court converted the Temporary Restraining Order to an injunction on March 2, 2009. (*Id.* 128-33.) Although there was a scheduled a hearing, it refused to permit the Investors' counsel to appear or present evidence. Instead, it entered the Preliminary Injunction afterwards by an "agreed" order and without notice. (*Id.*) As explained in the Investors' brief on cross-appeal, such procedures do not comply with Federal Rule of Civil Procedure 65(a)(1).

The Receiver points to the hearing on July 1, 2009, as the first instance where Investors had notice and an opportunity to be heard. (Appellant's Reply / Resp. Br. at 25.) However, only one lawyer for a small group of investors was allowed to speak for about three minutes. No one at that hearing even presented arguments or evidence supporting the continued freeze against interest and the Receiver has never shown the Court or the Investors that he can accurately calculate those amounts. Therefore, the

latest freeze order is not based upon evidence but simply upon an earlier order that was improper when entered.

IV. The District Court's Order Dealt With A Pre-Judgment Attachment That Cannot Be Appealed

There is no reason to describe the account freeze as anything other than a pre-judgment attachment. The District Court instructed the Receiver to "assert claims against individual investors . . . together with claims for prejudgment attachment." (SEC Supp. R. 2042) (emphasis added.) The Receiver, however, knew he could not meet the requirements for a pre-judgment attachment under Federal Rule of Civil Procedure 64 and Texas law. Therefore, he ignored that order and now describes the asset freeze as a "freeze order . . . based on federal securities law." (Appellant's Reply / Resp. Br. at 23.) This is a mischaracterization exposed by the very cases he cites.

In *SEC v. Unifund*, the SEC obtained a preliminary injunction that partially froze accounts for the two defendants accused of insider trading. *SEC v. Unifund, SAL*, 910 F.2d 1028, 1029 (2d Cir. 1990). It obtained the injunction under Section 21(d) of the Exchange Act, which states:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, [or rules of exchanges and other designated entities], it may in its discretion bring an action in the proper district court . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

Id. at 1035 (quoting 15 U.S.C. § 78u(d)). Based on this statute, the SEC obtained a freeze that "functions like an attachment" without complying with Rule 64 as ordinary litigants would. *Id.* at 1041. The Court noted this pre-judgment asset freeze was based on authority that Congress gave the SEC in Section 21(d). *Id.*

The Receiver is mistaken if he believes he can obtain the same kind of freeze in this case. He has no standing under Section 21(d) to request or extend such a freeze. Rather, *SEC v. Unifund* makes it clear that he is the type of ordinary litigant who, under the "general rule" in this circuit, must seek a pre-judgment attachment under Rule 64. *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 560 (5th Cir. 1987).

It is true that the District Court may fashion equitable relief as the facts require, but the Receiver ignores the limits set by the very cases he cites. (Appellant's Reply / Resp. Br. at 24.) For example, in *SEC v. Hickey*, the District Court used its equitable powers to grant the SEC's request for a post-judgment asset freeze against the defendant and his alter ego brokerage company. *SEC v. Hickey*, 322 F.3d 1123, 1131-33 (9th Cir. 2003). The equitable asset freeze was appropriate in that case because: (1) there is a strong federal interest in giving the SEC effective relief to enforce its securities laws; (2) the Court ordered the freeze post-judgment to "effectuate relief already given"; and (3) the non-party brokerage was an alter ego under defendant's "total" control. *Id.* at 1133. None of those factors are present in this case. Here, the SEC opposes efforts to obtain a pre-judgment freeze against innocent investors' assets

that are not subject to Defendants' total control.[2] Again, there is no reason to consider this freeze anything other than a pre-judgment attachment. The Court should, therefore, consider whether it even has jurisdiction to consider this appeal under 28 U.S.C. § 1291(a)(1).

CONCLUSION

If the Receiver is going to proceed against the funds characterized as interest that remain frozen, he will have to do so under recognized causes of action and the rules of civil procedure. He cannot possibly prevail on his claims against net losers who received less than their total principal investment or his claims against accounts exempt from execution and attachment. Therefore, this Court should reverse the District Court's order that continues the freeze as to funds in those accounts. The Court should also reverse the freeze order in its entirety because it was entered without notice to the Investors or an opportunity to be heard and it remains in force without any evidentiary support. Finally, the Receiver cannot escape the fact that the

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[2] The Receiver overstates the control Defendants had over the Investors' accounts. (Appellant's Reply / Resp. Br. at 11.) Defendants may have controlled funds sent to Antigua to purchase CDs from Stanford International Bank, Ltd. Once paid back to the Investors' brokerage accounts at Pershing LLC and JP Morgan, however, the funds were controlled under the normal customer / broker relationship. Those accounts were solely in the Investors' names and were in no way "custodial." (*Id.*) Many contained a portfolio of investments unrelated to Stanford. Some accounts that remain frozen never contained anything that could be traced to Stanford or its CDs. Most importantly, every transaction occurred solely upon the Investors' instructions to their financial advisor and never upon Defendants' instructions. Simply put, these Investors' accounts bear no relation to the Receiver's description or the facts presented in the *Forex* case. *See SEC v. Forex Asset Mgmt., LLC*, 242 F.3d 325, 327 (5th Cir. 2001) (defendant placed investor funds

freeze order is essentially a pre-judgment attachment that cannot be appealed under 28 U.S.C. § 1292(a)(1).

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in a segregated account held in the name of defendant's affiliated company and controlled entirely by the defendant).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 2009, a true and correct copy of this brief was served by electronic means and by certified mail, return receipt requested on the following counsel of record:

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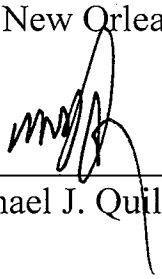

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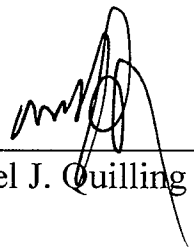
CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief uses a monospaced typeface and contains 175 lines of text, 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. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.



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