

1 BEFORE THE FIFTH CIRCUIT COURT OF APPEALS

2

RALPH JANVEY, §

3 §

Appellee, §

4 § CIVIL ACTION NO.

v. §

5 § 09-10761

JAMES ALGUIRE, et al, §

6 §

Appellants. §

7

8

9 \* \* \* \* \*

10

ORAL ARGUMENTS BEFORE

11

SENIOR JUDGE WILL GARWOOD

12

JUDGE EDWARD C. PRADO

JUDGE JAMES L. DENNIS

13

November 2, 2009

14

(Via Online Recording)

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1           \* \* \* \* \*

2           PROCEEDING

3           \* \* \* \* \*

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5           ORAL ARGUMENT

6           MR. SADLER: This case arises

7 out of one of the largest Ponzi schemes ever to be

8 perpetrated in the United States. It is rivaled

9 probably only by the Madoff Ponzi scheme scandal.

10 There are thousands of victims scattered across

11 almost all of the 50 states, as well as victims in

12 other countries. Since this scheme collapsed and

13 following the filing of a lawsuit by the SEC, which

14 was in February, the receiver has been doing what

15 receivers always do when these Ponzi schemes

16 collapse, and that is, carry out the specific

17 court-ordered duty.

18           And we have a very specific

19 court-ordered duty to prosecute litigation to

20 recover assets traceable to this estate, and we're

21 doing that simply so that those assets can be  
22 brought back into the estate and used to compensate  
23 all the victims of this fraud; and there are  
24 thousands.

25           That duty and how we are carrying out

1 really brings us to why we're here today on this  
2 appeal and two fundamental legal questions for you,  
3 the resolution to which will really affect how this  
4 receivership proceeds. The first basic question is,  
5 as it always is in Ponzi schemes -- and we've all  
6 read about them. The way a Ponzi scheme works is,  
7 funds are taken in by fraud, and then they are  
8 diverted to all manner of different purposes.

9           One purpose for the diversion of the  
10 funds is to pay out selectively to mask the fraud  
11 and to keep it going. Because, of course, someone  
12 running a Ponzi scheme, as soon as they stop making  
13 those payments to some investors, people make claims  
14 and the fraud is exposed.

15           And so the first important question  
16 for this panel is, when funds are taken by fraud  
17 from one investor and then are simply turned around  
18 and used to selectively make partial payments to  
19 other investors, do those funds remain assets  
20 traceable to the estate which our court-ordered

21 mandate requires us to return to the estate to  
22 benefit all the victims of the fraud and to use  
23 those as compensation for those victims? And that  
24 is the first fundamental question before you.  
25 I submit to you that if you follow

1 the case of SEC versus George -- and it is cited in  
2 our briefs, it is discussed extensively -- and it is  
3 a case from the Sixth Circuit involving Ponzi  
4 schemes, involving claims against investors who  
5 receive preferential payments. And the Sixth  
6 Circuit decided that those investors had to return  
7 the money they received. Not just a portion of it,  
8 not just what might have been called interest, but  
9 they had to return all of it even though there was  
10 no allegation of wrongdoing, even though there was  
11 no allegation of complicity.

12           And the Sixth Circuit in SEC versus  
13 George relied on this Court's opinion in Forex  
14 Management for the proposition that investors who  
15 were paid with other investors' stolen money have no  
16 preferential right to retain that money, and that  
17 deals -- yes, sir?

18           JUDGE GARWOOD: Is that a legal  
19 difference between paying a -- somebody for services  
20 or buying something with what you call stolen money,

21 or are you using it to pay some other investor who

22 has a claim?

23 MR. SADLER: There can be a

24 difference, and the other case that we cite to this

25 Court --

1           JUDGE GARWOOD: What is the  
2 legal basis for the difference? If it's stolen  
3 funds -- it's really not stolen funds, actually.  
4 It's not -- it's funds acquired by fraud.

5           MR. SADLER: Yes, sir. And  
6 under SEC versus George the simple holding of that  
7 case is those funds that are used to pay investors  
8 cannot be retained preferentially by those investors  
9 to the harm of others who are equally innocent. And  
10 your question is what is the difference?

11          JUDGE GARWOOD: Yeah.

12          MR. SADLER: And the difference  
13 in this case, which goes to the holding of not only  
14 SEC versus George and the Kimberlynn Creek Ranch  
15 case -- which is the other case we're asking you to  
16 follow and to adopt, and it's discussed extensively  
17 in our briefs. These two cases, George and  
18 Kimberlynn Creek Ranch, we're asking you to follow,  
19 we're asking you to adopt their holdings; and if you  
20 do, almost all of the issues in this appeal are not

21 only resolved, but resolved in the receiver's favor.

22           But the difference is this: We are

23 not saying that people who received payments do not

24 have a legitimate claim against the estate. This is

25 very much like a bankruptcy preference action where

1 the trustee --

2 JUDGE GARWOOD: Are you willing  
3 to be judged by the standards by which a bankruptcy  
4 preference is judged?

5 MR. SADLER: We want to be  
6 judged by the standards of the SEC versus George  
7 case, because that's --

8 JUDGE GARWOOD: You are willing,  
9 then, to be judged by bankruptcy preference  
10 standards?

11 MR. SADLER: Yes, sir.  
12 Bankruptcy -- I'm drawing an analogy here.  
13 Bankruptcy has a --

14 JUDGE GARWOOD: You don't want  
15 to follow that analogy?

16 MR. SADLER: I'm sorry, sir?

17 JUDGE GARWOOD: You do not want  
18 to follow the bankruptcy preference analogy; is that  
19 correct?

20 MR. SADLER: No, sir. I think

21 the bankruptcy preference analogy works, and  
22 here's why: Because what a bankruptcy trustee does  
23 is no different than what we're doing in this  
24 respect. The bankruptcy trustee is appointed over  
25 an insolvent debtor -- we have an insolvent debtor

1 here -- and when he identifies payments made  
2 by that insolvent debtor within the preference  
3 period defined by the statute -- and that's one  
4 difference, there is actually a statutory preference  
5 period -- he goes to that debtor and says, You have  
6 no right to retain that money. You may have a valid  
7 claim. You may have a contract that needed to be  
8 paid or some bill that needed to be paid, but you  
9 have no preferential right to retain that money.  
10 And that really is the principle applied in SEC  
11 versus George.

12           JUDGE PRADO: In George the four  
13 investors weren't completely innocent, were they, as  
14 opposed to what we have here?

15           MR. SADLER: Your Honor, and I  
16 know the SEC tries very, very hard to suggest that  
17 the investors who were ordered to disgorge in that  
18 case were somehow complicit or not innocent, but the  
19 fact of the matter is when you read the George case  
20 and you read the George holding, it says these

21 people are accused of no wrongdoing. They are found

22 to have not committed any wrongdoing.

23           And that is the fundamental precept

24 of a case like SEC versus George and Kimberlynn

25 Creek Ranch: How do we deal with people who were

1 paid proceeds of fraud? How do we have a mechanism  
2 to return those funds to the estate? And the George  
3 case, the Cavanaugh case, the Colello case, the  
4 Kimberlynn Creek Ranch case say you can be innocent,  
5 you can be accused of no wrongdoing. And that was  
6 exactly the situation in George. Those people were  
7 not found to have been complicit or to have engaged  
8 in any wrongdoing.

9           Now, the SEC has come in and in their  
10 amicus brief they say, Well, now, these people  
11 really were guilty. But that's not what the Sixth  
12 Circuit based its decision on, and it's certainly  
13 not appropriate, I think, to try to undermine the  
14 precedential value of the George case by coming in  
15 and saying, Well, there were these other facts that  
16 were not presented to the Court and were not part of  
17 the record but that should change the result.

18           So the answer to your question is, in  
19 all of these cases -- if you look at George, if you  
20 look at Kimberlynn Creek Ranch, if you look at

21 Cavanaugh, if you look at Colello -- all of those  
22 people are ordered to return funds they received  
23 without a finding that they've committed any  
24 wrongdoing. And the fundamental principle it is, is  
25 I understand the distinction between stolen as in a

1 thief robs it at gunpoint versus taken by fraud.

2           But if we go all the way back to the  
3 original Ponzi scheme case, the Cunningham case, and  
4 the principle announced there is what's being  
5 followed in all these cases, which is, among equally  
6 innocent investors -- and they're all for this  
7 purpose being treated as equally innocent -- no one  
8 has a preferential right to retain funds that were  
9 simply taken from one investor to another. And  
10 that's --

11           JUDGE GARWOOD: Let me ask you  
12 about --

13           MR. SADLER: Yes, sir?

14           JUDGE GARWOOD: -- I still don't  
15 get your answer to the bankruptcy preference. I  
16 thought you didn't have a bankruptcy preference if  
17 you paid full value.

18           MR. SADLER: And Your Honor,  
19 in questions of bankruptcy, in fraudulent  
20 transfer -- and we've covered this in our

21 briefs -- we're not bringing a fraudulent transfer

22 case. We don't think we're subject to the

23 restrictions of --

24 JUDGE GARWOOD: But you said --

25 MR. SADLER: -- the fraudulent

1 transfer case.

2 JUDGE GARWOOD: You said the

3 bankruptcy.

4 MR. SADLER: Yes, sir.

5 JUDGE GARWOOD: What I want to  
6 know is, in bankruptcy can you get a preference from  
7 a person who paid full value?

8 MR. SADLER: I think within the  
9 90-day statutory preference period preferences are  
10 set aside without regard to value. There's also a  
11 one-year preference period for insiders. The point  
12 about the analogy to the preference action is not  
13 that we're trying to adopt a bankruptcy statutory  
14 process. The point is simply that the arguments we  
15 are making -- which is to say these people who are  
16 the minority of investors who have over \$275 million  
17 in funds currently frozen, those funds were taken  
18 directly from other investors, and the --

19 JUDGE GARWOOD: But I don't, I  
20 still don't understand why those people are any

21 different than the person who sold a car to the  
22 company and made a little profit on his car as a  
23 dealer. Why, why are they different?

24                   MR. SADLER: They are different,  
25 Your Honor, for this reason: We have over 20,000

1 investors who bought these fraudulent CDs. They all  
2 have exactly the same contract claim to be paid on  
3 their CD. The difference is, some of them have been  
4 paid preferentially, and they have been paid 80  
5 percent, 90 percent, a hundred percent.

6           JUDGE GARWOOD: That's exactly  
7 the same in the car case. Some people who got a  
8 note from the company when they sold the car, they  
9 haven't been paid. Some who sold the, sold the car  
10 for cash have been paid. I mean, there's nothing  
11 unique about that.

12           MR. SADLER: Well, the  
13 difference, though, is it would make a difference.  
14 Questions of full value, reasonably equivalent  
15 value, objective good faith, all of that would be  
16 relevant in a fraudulent transfer statutory case  
17 brought under the Bankruptcy Code or brought under  
18 state statute. But under the holding of SEC versus  
19 George what is important is, can we --

20           JUDGE GARWOOD: You're asking us

21 to follow that case, and I'm asking you why we  
22 should adopt that reasoning when the Uniform  
23 Transfer -- Fraudulent Transfer Act and the  
24 Bankruptcy Code and all this seem to proceed on a  
25 different basis.

1           MR. SADLER: They do proceed on  
2 a different basis because they were designed for  
3 different purposes, and I'm glad you asked that,  
4 because that really does get to a fundamental  
5 question here. Because the arguments of many of the  
6 appellees is that you should restrict an equity  
7 receiver in a federal securities fraud case to state  
8 law remedies. I think one of the appellees flat out  
9 says that you should rule that a equity receiver in  
10 a federal securities law case can only bring state  
11 law claims for attachment and state law fraudulent  
12 transfer claims.

13           And I have two things to say about  
14 that. First, there is no case holding that a  
15 federal equity receiver in a federal securities law  
16 case ought to be limited to state law remedies.  
17 This would be the first Court to so hold. It is  
18 also fundamentally contrary to the holdings of the  
19 relief defendant cases like Kimberlynn Creek and  
20 SEC versus George.

21           And here's why, Your Honor. It is  
22 fundamentally unfair for one investor to be paid off  
23 with money taken from another investor when the  
24 principle that is at issue -- and it is a  
25 fundamental principle -- is that all investors, just

1 like it was held in the Forex and in the Durham  
2 case, when we have a Ponzi scheme there's never  
3 enough money to pay everyone off.

4           JUDGE GARWOOD: Why is -- you  
5 say that's the case, but the car dealer who sold the  
6 car for cash, he gets a preference over the other  
7 car dealer who sold it for credit.

8           MR. SADLER: And Your Honor,  
9 there may be differences, and in fact, the  
10 Kimberlynn Creek Ranch case talks about the fact  
11 that if somebody was employed by the Ponzi scheme  
12 and provided services to the Ponzi scheme, he may  
13 not be subject to being ordered to return what he  
14 was paid. And in the car dealer case, again, Your  
15 Honor, if we proceeded under fraudulent transfer  
16 theories where reasonably equivalent value was an  
17 issue, that might be different.

18           But we are dealing with one set of  
19 claimants here, every investor who has the identical  
20 claim; and what we are saying is they all need to

21 get in line. What we're trying to --

22                   JUDGE PRADO: How would you

23 trace this? I mean, what if they had taken their

24 money out and put it in another account in another

25 bank? I mean, how far down the road are you going

1 to trace this money that some of the victims got  
2 back?

3 MR. SADLER: Well, right now we  
4 are focused on the funds that are frozen in the  
5 accounts to which they were deposited. If you're  
6 talking about tracing, I mean, bank records can be  
7 followed. Now, what we are --

8 JUDGE GARWOOD: They went out  
9 and bought something in the car dealer with what  
10 they were paid, they don't have any money in that  
11 account. You going to get that back from that car  
12 dealer if they're bankrupt?

13 MR. SADLER: And Your Honor, you  
14 are, you're raising proper questions about equitable  
15 considerations which are not in front of you. The  
16 district court --

17 JUDGE GARWOOD: They're  
18 practical considerations.

19 MR. SADLER: Yes, sir. They are  
20 practical considerations, and the practical

21 consideration comes at the later part of this  
22 proceeding. Right now all we are here about is the  
23 legal question Judge Godbey faced and said he needed  
24 guidance on from this Court. He decided that he did  
25 not have the legal authority to allow us to go

1 forward to recover all of these funds. He said we  
2 should go forward but be limited to only what the  
3 Ponzi scheme designated as interest.

4           When we get into issues of whether  
5 people have dispensed these funds in ways that  
6 cannot be recovered, all of those are equitable  
7 considerations that would have to come to not only  
8 Judge Godbey, but later to you on a totally  
9 different record.

10           I mean, Judge Godbey crystallized it  
11 in this way: He said, "If I'm wrong on the law,  
12 then you, the receiver, should pursue these funds."  
13 But in particular cases if we come up -- for  
14 example, someone got \$10,000 paid preferentially but  
15 they've spent it and they've put it into a house or  
16 they've put it into a car or they've paid for their  
17 children's college education, under those  
18 circumstances would we pursue that person? That's  
19 based on equitable considerations that are not in  
20 front of you right now.

21 JUDGE GARWOOD: To what extent  
22 does the George case -- was this the SEC proceeding  
23 in that or was it a receiver, a separate receiver?

24 MR. SADLER: In the George case  
25 the SEC was the plaintiff, just like in the

1 Kimberlynn Creek Ranch case the Commodity Futures  
2 Trading Commission was the plaintiff.

3 JUDGE GARWOOD: Well, here the  
4 plaintiff is the SEC, and --

5 MR. SADLER: The plaintiff in  
6 the main case certainly is.

7 JUDGE GARWOOD: Is the SEC. And  
8 they don't want to do what you want to do here.  
9 They're not, they're not seeking to recover from  
10 these people. What --

11 MR. SADLER: I'd be happy to  
12 respond to that.

13 JUDGE GARWOOD: Yeah.

14 MR. SADLER: And that is an  
15 issue raised by all the appellees.

16 JUDGE GARWOOD: Yeah.

17 MR. SADLER: And I'm going to  
18 tell you this: Not only should you not defer to the  
19 SEC in this circumstance, there are very powerful  
20 reasons you should not defer. There is no

21 compelling reason to do it and compelling reason

22 against it, and let me tell you why.

23           The case that's given to you is the

24 Chevron case, which talks about deference to formal

25 agency action. We don't have any formal agency

1 action here. There is no formal policy rule that's  
2 ever been adopted by the SEC to deal with Ponzi  
3 schemes. Secondly, Your Honor, the position that's  
4 being offered by the SEC is fractured, and here  
5 what's I mean by that. In their amicus brief they  
6 say, We're not taking a position about whether the  
7 receiver should even pursue false profits or false  
8 interests. They simply back off and say, We're not  
9 taking a position. So there's nothing for you to  
10 defer to there.

11           JUDGE GARWOOD: But what George  
12 relied on, as I understand it, was the Sixth  
13 Circuit's broad view of the powers that the statute  
14 granted the SEC.

15           MR. SADLER: Sir, I believe if  
16 you read George and Kimberlynn Creek Ranch, it's  
17 actually a little different. What is being pursued  
18 here is an ancillary action for equitable relief,  
19 and the broad powers that are being referred to  
20 there are the broad powers of the district court to

21 grant equitable relief. That's a quote that comes  
22 out of Colello and Kimberlynn Creek Ranch and SEC  
23 versus George. And we as the equity receiver, we  
24 are the agent for the Court. The Court can't go out  
25 and gather evidence.

1           JUDGE GARWOOD: The SEC, though,  
2 has not elected to sue these investors. In George,  
3 as I understand your answer to me, in George the SEC  
4 did elect to sue.

5           MR. SADLER: That is absolutely  
6 correct, and what they --

7           JUDGE GARWOOD: What gives you  
8 the authority, the statutory authority to sue people  
9 that the SEC has not sued?

10          MR. SADLER: It is not statutory  
11 authority, Your Honor. It is equitable power that  
12 derives from the cases that say in this circumstance  
13 where there is an ancillary action where we are the  
14 plaintiff, we are the ones charged --

15          JUDGE GARWOOD: SEC versus  
16 George doesn't support that, if I'm understanding  
17 your answer correctly, because it's the SEC who  
18 sought to get the money from those so-called  
19 investors.

20          MR. SADLER: That is absolutely

21 right, and they were innocent investors, and in

22 this --

23                   JUDGE GARWOOD: So the SEC says,

24 Here, section such and such says I can do this. I

25 can do almost anything under section such and such;

1 which I can't remember what it is, but you don't

2 have any section such and such.

3 MR. SADLER: And Your Honor,

4 what I'm saying is under these cases that we have

5 cited to you is it the equitable power, not

6 anybody's statutory power, but it is the equitable

7 power of the Court to recover proceeds of the fraud

8 that we're proceeding under. And if you look at the

9 Kimberlynn Creek Ranch case, the exact wording in

10 that case says a plaintiff, paren, the Commission

11 here, but a plaintiff can invoke the equitable power

12 of the Court. And that's what we're doing in this

13 case.

14 JUDGE GARWOOD: The SEC is a

15 proper plaintiff. They're not, they're not relying

16 on any statute. It seems to me like the plaintiff

17 in a case ought to be the one or a defendant -- we

18 don't have -- I mean, frankly, in a sense you're

19 nobody. I mean, the plaintiff is the SEC, there's

20 some defendants; you're not either one.

21 MR. SADLER: No, sir. But we  
22 have a very specific court-ordered duty that none of  
23 these other people have, and in the order appointing  
24 the receiver we are directed to pursue litigation to  
25 recover assets traceable to the estate. And nobody

1 has appealed that order, nobody has said that order

2 is invalid or that the --

3 JUDGE DENNIS: Mr. Sadler, your

4 time has expired. Do you want to save it for

5 rebuttal?

6 MR. SADLER: I will save the

7 balance of my remarks for rebuttal. Thank you, Your

8 Honor.

9 JUDGE DENNIS: Mr. Little?

10 ORAL ARGUMENT

11 MR. LITTLE: May it please the

12 Court, my name is John Little. I was appointed by

13 the district court to serve as the examiner in this

14 receivership proceeding. I was charged by the

15 district court with the task of conveying to the

16 Court such information that I would find helpful to

17 the Court in considering the interests of the

18 investors in any Stanford product, account, vehicle,

19 or venture. Here I'm an intervenor. In the

20 district court I was one of the parties, together

21 with the SEC, that opposed the SEC's --

22 JUDGE GARWOOD: Speak up a

23 little bit, Counselor.

24 MR. LITTLE: Oh, I'm sorry.

25 Certainly. In the district court I was one of two

1 parties with the SEC to oppose the receiver's  
2 account freeze and to oppose these clawback claims.  
3 I'm here today with 11 groups of appellees, and they  
4 have permitted me to make the opening presentation  
5 for the appellees. I'm going to take 15 minutes, as  
6 you know, and then pass to Mr. Quilling. We have a  
7 plan on how we're dividing that, but either one of  
8 us is happy to answer whatever questions come up.

9           I want to start here today by  
10 responding to a couple of things the appellant has  
11 said. First, these 500 or so investors are not  
12 lucky. They're not lucky. They're not folks who  
13 got all their money out. There is a very, very  
14 small fraction of folks who really did get all their  
15 money out of Stanford. Some got it out in the year  
16 before the thing collapsed, some got it out four  
17 years before the thing collapsed.

18           These 500 people include people who  
19 got all their money out with interest, it includes  
20 people who got only interest and lost all of their

21 CD principal, it includes some folks who had

22 multiple CDs, redeemed some, didn't redeem others.

23 JUDGE PRADO: Does it include

24 any people who were part of the fraud?

25 MR. LITTLE: No.

1           JUDGE PRADO: Are all -- every  
2 one of these is an innocent investor?

3           MR. LITTLE: Your Honor, by  
4 definition the receiver acknowledges the absolute  
5 innocence of every one of these relief defendants.  
6 All 500-plus of them are pled to be innocent. No  
7 suggestion has been made that they have anything  
8 other than pure-as-the-driven-snow innocence with  
9 respect to this. These are folks who made  
10 investments. They bought CDs, they received  
11 interest, they redeemed them pursuant to the terms  
12 of the CDs. They have done nothing wrong, and the  
13 receiver acknowledges that.

14           Now, they're not the only folks who  
15 got CD proceeds. Over the many years that this  
16 scandal occurred there were tens of thousands of  
17 investors. Many of those investors could well have  
18 cashed out of the CDs years and years ago, taken  
19 their money and gone elsewhere. We don't know how  
20 many of those folks there are. There are thousands

21 and thousands of investors who took money out in the  
22 year prior to this receivership who have not been  
23 sued.

24           The receiver's own expert has found,  
25 forensic expert, has found that \$2 billion was taken

1 out of the bank in the 13 months prior to the  
2 receivership. These folks represent a tiny fraction  
3 of that amount, because the total that these folks  
4 are being sued for is about \$275 million, but that  
5 amount is not over a year. It reaches back a year,  
6 two, five, eight. Some of the folks who are the  
7 retirees here from Louisiana received interest for  
8 years and years and years on their CDs. That's what  
9 they lived on. That's what they're being sued for,  
10 is the CD interest they received over the years.

11           JUDGE PRADO: Can we distinguish  
12 between getting back the money you invested or the  
13 interest that I think the Court, the district court  
14 said that maybe they should return any interest that  
15 they made on their investment?

16           MR. LITTLE: Judge, there's,  
17 there's -- the case law under the Fraudulent  
18 Transfer Act is very clear that an investor who  
19 invests in a fraudulent scheme like this one is able  
20 to recover and retain an amount up to what his

21 investment is; the amounts above that are viewed as

22 false profits and can be disgorged.

23                   JUDGE DENNIS: We're acquainted

24 with that, but we aren't acquainted with the George

25 case and these cases that your client is relying on

1 that get away from all of those mainstream law

2 you're talking about right now.

3 MR. LITTLE: Well, and --

4 JUDGE DENNIS: Can you tell us

5 why we shouldn't follow the George case --

6 MR. LITTLE: Yes. I am --

7 JUDGE DENNIS: -- and the

8 Kimberlynn Ranch case?

9 MR. LITTLE: Yeah. I'd be happy

10 to. The cases that they primarily rely upon do not

11 involve innocent investors. Cavanaugh involves a

12 relief defendant who was in the middle of the fraud.

13 Colello involves a relief defendant who's in the

14 middle of the fraud. Kimberlynn Creek, the opinion

15 says expressly the relief defendants were holding

16 funds on behalf of the defendants. That's a classic

17 relief defendant, someone who is holding funds for

18 the bad guys.

19 JUDGE DENNIS: Who doesn't claim

20 an interest in it?

21 MR. LITTLE: Excuse me?

22 JUDGE DENNIS: Who does not

23 claim an interest?

24 MR. LITTLE: Who does not have a

25 legitimate interest in those funds. George is the,

1 is the one case that they hang their hat on  
2 consistently, and George involves four relief  
3 defendants. One really doesn't play into this.  
4 She's the girlfriend/fiancee/wife of the bad guy,  
5 and she's ordered to disgorge a car and a diamond  
6 ring and some money. The other three, as the SEC  
7 explains in its briefing, were all folks who were  
8 somehow not innocent.

9           Now, if you read the opinion, the  
10 opinion speaks in terms of innocence, but you see  
11 that in all the relief defendant cases. The fiancee  
12 or wife who is ordered to disgorge dollars is not  
13 guilty of the fraud, but she's tied into the fraud  
14 because of the husband who is depositing money into  
15 her account. And so --

16           JUDGE GARWOOD: In other words,  
17 she did not invest money, the wife certainly didn't.

18           MR. LITTLE: The Lehmann case,  
19 for example, involves a wife whose husband was  
20 involved in the fraud, gets \$500,000, sticks it in

21 her account. She hasn't done anything wrong, but  
22 she has money that the husband took out of the  
23 fraud. He's involved, she's a relief defendant.  
24 She has no legitimate claim on that money. She  
25 didn't even know it was in the account.

1           These folks are different, and if I  
2 may, these folks simply are not relief defendants,  
3 and the receiver acknowledges three things that make  
4 that so. First, these folks have done nothing  
5 wrong. We've talked about that. Second, the  
6 receiver acknowledges that the assets in these  
7 frozen accounts belong to these investors. These  
8 are not assets that belong to Stanford, these are  
9 not assets that belong to his cohorts. These are  
10 assets that belong to these individual investors,  
11 and they sit in accounts titled in the investors'  
12 names. And the receiver acknowledged that back in  
13 April in his status report to the Court.

14           The third thing, Mr. Sadler just told  
15 you that each of these relief defendants will have a  
16 claim against the estate. How does one get a claim  
17 against the estate? You have a legitimate ownership  
18 interest in the instrument that gives you that  
19 claim. If these folks have a -- if these folks have  
20 done nothing wrong on the assets in their frozen

21 accounts and will have a claim against the estate

22 for anything that they're ordered to disgorge, then

23 they have an ownership interest and cannot be relief

24 defendants.

25           And the relief defendant cases are

1 very clear. I think it's one of the few things we  
2 agree on. If you have an ownership interest, if you  
3 have a legitimate claim, you are not, cannot be a  
4 relief defendant. All of these folks on the face of  
5 the pleadings have an ownership interest; therefore,  
6 they cannot be relief defendants.

7           That has two implications for this  
8 Court. That either means that the claims fail at  
9 sort of a motion-to-dismiss level, because on the  
10 face of the pleadings you have pled facts which make  
11 your claim fail. Alternatively, it deprives the  
12 Court of subject matter jurisdiction. Relief  
13 defendants can be joined without additional subject  
14 matter jurisdiction being alleged as to them. If  
15 these folks are not relief defendants, there is no  
16 subject matter jurisdiction as to the claims against  
17 them and the action against them would be dismissed  
18 and the freeze would go away.

19           JUDGE DENNIS: Why is that? Why  
20 is there no subject matter jurisdiction?

21 MR. LITTLE: Because in order to  
22 have subject matter jurisdiction, they must be  
23 relief defendants. If they are not relief  
24 defendants, then there is no subject matter  
25 jurisdiction. They are not ancillary -- they cannot

1 be brought in in an ancillary action. The receiver  
2 would have to bring an honest-to-god lawsuit and  
3 state a cause of action for fraudulent transfer or  
4 whatever other claim he can come up with, and he  
5 would then have to assert that claim and assert  
6 subject matter jurisdiction as to these folks.

7           The way the Court gets these people  
8 is because there is no need for subject matter  
9 jurisdiction if they are, in fact, relief  
10 defendants. If they are not, there is no subject  
11 matter jurisdiction.

12           JUDGE DENNIS: The lead  
13 defendant is another word for nominal --

14           MR. LITTLE: Yes.

15           JUDGE DENNIS: -- defendant who  
16 has no really real interest?

17           MR. LITTLE: Right. And the  
18 genesis of that concept, of course --

19           JUDGE GARWOOD: [Indiscernible]  
20 or something of that [indiscernible] --

21 MR. LITTLE: Judge, you know,  
22 the genesis of that concept comes out of banks,  
23 trust accounts, depository institutions that hold  
24 things in a custodial sense. It was expanded over  
25 the years from those very traditional relief

1 defendants to folks who are related to the bad  
2 guys -- the wife, the brother, the parents, the  
3 affiliated company, the partnership -- but they're  
4 all things that are -- these are all relief  
5 defendants tied in. They're holding assets --  
6           Kimberlynn, the Kimberlynn Creek case  
7 says holding assets on behalf of the defendants, the  
8 bad guys. These relief defendants aren't holding  
9 assets on behalf of any of the Stanford folks.  
10 These are their assets. They own them. They're not  
11 relief defendants for that reason.

12           I wanted to also talk a minute about  
13 the notion of timing. In the receiver's plead -- in  
14 the receiver's briefing you get the sense that there  
15 is no sense of time here. Judge Prado, you asked  
16 the question about how far back they're reaching.  
17 They've never actually answered that question. We  
18 know from the relief defendants who have, who have  
19 lawyers and who have responded to some of the claims  
20 that the reach-back is one, two, five, eight years.

21 JUDGE GARWOOD: Is what?

22 MR. LITTLE: It goes back one,

23 two, five, eight, many, many years back. There

24 doesn't appear to be any limitations period to this

25 clawback claim that's being pursued. Essentially,

1 the receiver's position is that equity wipes out all  
2 of the timing requirements of any of this sort  
3 of -- any of these causes of action.

4           But it's important to remember that  
5 time, timing does matter. It does matter. The  
6 cases are pretty clear. If an investor deposits  
7 money with a fraud scheme but that money's deposited  
8 the day after the accounts are frozen, the investor  
9 gets that back. If he invests two days before the  
10 accounts are frozen, he doesn't get that back.  
11 Timing matters. Timing matters with respect to  
12 limitations under the Fraudulent Transfer Act.  
13 The --

14           JUDGE DENNIS: Is it your  
15 position that these investors are entitled to  
16 recover or hold onto their principal investment?

17           MR. LITTLE: Yes.

18           JUDGE DENNIS: Regardless of  
19 whether it's called interest or what, whatnot?

20           MR. LITTLE: The case law, the

21 case law that I know the Court is familiar with

22 under the Fraudulent --

23                   JUDGE DENNIS: Once they recover

24 up to that, then they're not entitled to any more?

25                   MR. LITTLE: Under the

1 Fraudulent Transfer Act the case law is very clear  
2 that up to the amount of the initial invest -- of  
3 their investment, they're entitled to retain any  
4 proceeds they've received. In the case --

5           JUDGE GARWOOD: It doesn't  
6 matter what they --

7           MR. LITTLE: It doesn't matter  
8 what you call it. You know, the Shoals case and a  
9 lot of the other cases in that area make it clear  
10 that what's --

11           JUDGE DENNIS: But Mr. Sadler  
12 says he's not proceeding under that -- under those  
13 statutes.

14           MR. LITTLE: I understand that,  
15 and that's one of the things that's very troubling  
16 about what he is proceeding under, because there  
17 don't appear to be any rules that Mr. Sadler is  
18 following. It's all just equity. The Court in  
19 equity can do anything it wants. The Court can  
20 ignore limitations, the Court could ignore the

21 ownership interest.

22                   JUDGE DENNIS: It's your

23 position, I suppose, it would be inequitable for us

24 to depart from the principles that are in most of

25 the cases regarding fraudulent conveyances,

1 constructive fraud and all of that?

2           MR. LITTLE: I think we have, I  
3 think we have a body of case law that speaks in  
4 great detail to how receivers are to go about  
5 bringing back proceeds from a fraud scheme. And  
6 that's the Fraudulent Transfer Act. It's been  
7 adopted in all 50 states. It's -- that body of law  
8 is very clear. False profits can be recovered.

9           JUDGE DENNIS: What about by  
10 analogy to the bankruptcy section?

11           MR. LITTLE: Well, and the  
12 Fraudulent Transfer Act provisions are mirrored in  
13 the Bankruptcy Code. Those same sorts of claims  
14 could be made in the bank -- under the Bankruptcy  
15 Code. The Uniform Fraudulent Transfer Act and the  
16 Bankruptcy Code have essentially identical  
17 provisions for those sorts of claims, and that is  
18 the rubric under which receivers proceed.

19           Judge Garwood, I think you raised the  
20 question of the difference between the SEC and a

21 receiver, and that's an important and critical  
22 difference. The SEC is charged with enforcing the  
23 securities laws, and it filed this lawsuit, the  
24 primary action, and decided who to sue.

25           Now, in virtually all of the cases

1 cited by the receiver the SEC is the plaintiff  
2 and the SEC is deciding who to sue. The  
3 receive -- there is not a receiver bringing those  
4 lawsuits. They're brought by the SEC.

5           Also, the asset freeze in place here  
6 was originally obtained by the SEC. The SEC has a  
7 far lower bar for getting an injunction asset  
8 freeze. The receiver is trying to coattail the  
9 SEC's asset freeze that it got via its special  
10 statutory ability to do that, but the problem is the  
11 SEC is sitting over here with me. It opposes the  
12 asset freeze and has done so since May. So the  
13 receiver has never made a showing to get the  
14 injunctive relief he's gotten, and he can't coattail  
15 the SEC's asset freeze.

16           JUDGE GARWOOD: Which does seem  
17 to me odd, somehow, that the receiver isn't  
18 representing or whatever, acting on behalf of any  
19 party to the lawsuit, either a defendant or the  
20 plaintiff, which is the SEC. Now, since he's acting

21 under the authority of the Court's appointment, it  
22 seems to me we can't or shouldn't be expanding that  
23 appointment to make the receiver in effect a trustee  
24 in bankruptcy, because we've got a bunch of statutes  
25 that say how you do that. And it's all right to

1 expand it a little bit if the people that are being  
2 reached are just nominal custodians, but to reach it  
3 all out you wonder where the, where the jurisdiction  
4 comes from.

5 JUDGE DENNIS: Mr. Quilling  
6 [sic], your time expired during that question. If  
7 you need to give a short answer, go ahead.

8 MR. LITTLE: I'll give Judge  
9 Garwood --

10 JUDGE GARWOOD: [Indiscernible.]

11 MR. LITTLE: I'll give Judge  
12 Garwood a quick answer, and then Mr. Quilling will  
13 come up and say his piece. I think you're exactly  
14 right, Judge. The issue here is that this receiver  
15 is moving far beyond the pale of what his order  
16 really charges him to do. He's not seeking -- he's  
17 not going after Stanford's assets. He's going after  
18 these relief defendants' assets.

19 JUDGE DENNIS: Thank you,  
20 Mr. Little. That was a [indiscernible] of the

21 question, so you don't need to belabor it.

22 Mr. Quilling?

23 ORAL ARGUMENT

24 MR. QUILLING: May it please the

25 Court, I'm Mike Quilling. I speak on behalf of all

1 of the appellees; the investors is the way I'll  
2 refer to them. Judge Garwood, you've asked the  
3 question directly of the appellants, which they  
4 either did not answer or would not answer, and  
5 that's because they don't want to -- they don't want  
6 to give you that answer, I believe.

7 I urge the Court to look at In Re:  
8 Independent Clearinghouse. It's a bankruptcy case  
9 where the very same thing that this receiver is  
10 trying to do in a court of equity was discussed in  
11 that court of equity, the bankruptcy court. And I'm  
12 not going to recite very much, but two sentences is  
13 incredibly instructive, and this is at page 855.

14 "In theory, the most equitable  
15 resolution of cases may well be for each undertaker  
16 to return all the money he received from the debtors  
17 so that the money can be redistributed pro rata."  
18 This is what the Court said after that. "The  
19 equitable powers of the bankruptcy court are limited  
20 by the express terms of the code. A court of

21 equity," which this is, "may not create totally new  
22 substantive rights under the guise of doing equity.  
23 In the absence of any statutory or judicial  
24 precedent, the Court may not invoke its equitable  
25 powers to substantially enlarge the trustee's

1 avoiding powers as urged."

2           Their position has been considered  
3 and rejected even by the courts of law. Now, as a  
4 court of equity in this order that they champion  
5 that they're acting under, it doesn't say go destroy  
6 the world. It says go collect assets like all  
7 receivers do. Go do what normal receivers do. Go  
8 file your causes of action, state your cause of  
9 action, get your judgment, and then collect it.

10           It is time for this Court to call, as  
11 the Eleventh Circuit did in the Mitsubishi case, a  
12 duck a duck. This freeze started off in February of  
13 this year, and it was something that SEC acting  
14 under its powers could do. It was a normal type of  
15 freeze. This receiver interpreted it to give him  
16 carte blanche authority to go take the accounts of  
17 innocent investors who had no clue Stanford was a  
18 fraud.

19           It was turned into an agreed  
20 injunction on March 2nd, eight months ago to this

21 day, and that agreed injunction was between the  
22 receiver and Allen Stanford and his cohorts who are  
23 in jail. Not one investor was consulted, not one  
24 investor was allowed to speak. Indeed, until today,  
25 Your Honors, not one single investor has been able

1 to speak at the district court level to be heard.

2           Now, if somebody walked into my  
3 office and said, Hey, I bought this company and I've  
4 been looking at some old records, and I think  
5 somebody owes me some money. Well, how far back?  
6 Eight years. Where do you -- where's the money now?  
7 Well, it's in his IRA account. Well, do you know  
8 how much he owes you? No. But I've got an  
9 estimate, so I want to go down and get a freeze of  
10 his account. And oh, by the way I don't want to  
11 offer any evidence. I don't want to have a hearing.  
12 I don't want the in -- that person who owes me the  
13 money to ever have a hearing. I just want to go  
14 take it because I think that he owes it.

15           That's exactly what is occurring  
16 here. This is the duck. This is a prejudgment  
17 attachment. You can't get around it. It is a  
18 prejudgment attachment. In some instances -- and  
19 this receiver can't tell you how much interest these  
20 folks got, they can't tell you how much principal

21 they have. All they can say is, They have accounts

22 and we know some money went there, and we don't care

23 what time frame it was, and it doesn't even matter

24 if it's not the same amount.

25           Let's say you had an account at Chase

1 Bank and went into Comerica and the bad guy sent the  
2 money to Comerica, and you've got an account at  
3 Chase and he happens to have the account frozen at  
4 Chase. He say's that's all his money. That is an  
5 attachment. I don't care how you phrase it -- as a  
6 freeze, an injunction -- it's an attachment. That  
7 is a duck.

8           And they say under the equity field  
9 they get to do anything they want. You don't get  
10 counsel, you're going to have a summary proceeding  
11 on some day never to be set and apparently sometime  
12 off in the years from now when these retirees who  
13 are sitting in this room may well be dead. They  
14 need their money now. This has been nine months.  
15 This money is in their IRS accounts, many of them.

16           And Judge Prado, I know the issue of  
17 are these people real victims or did they get some  
18 sort of preferential treatment is on, is on  
19 everybody's mind. These are net losers. Many of  
20 these people are net losers. The retirees that have

21 been sitting here for eight years getting their  
22 interest check, they still have their principal tied  
23 up there. They're going to lose that money.  
24           One of my clients, the Mississippi  
25 Polymers Pension Fund that gives benefits to 300

1 retirees in Mississippi, steelworkers, they have  
2 \$3 million of the pension fund's assets sitting in  
3 that bank in Antigua. They got \$300,000 of interest  
4 over a period of five years. That interest went to  
5 partially fund distributions to retirees. Now, they  
6 are not a winner. They are not unlucky [sic]. They  
7 are very unlucky. They are a victim and they should  
8 not be penalized further. They got a \$3 million  
9 loss. That's going to hurt the pension. But they  
10 shouldn't have to go give -- find a way to get  
11 \$300,000 to put back into this receiver's pocket.

12 No. That's not how the law works. There is --

13           JUDGE PRADO: But do they fit  
14 the definition of relief defendants?

15           MR. QUILLING: Absolutely not.  
16 There's not a single one of these people who fits  
17 the definition of a relief defendant, and Mr. Little  
18 addressed the three points. First of all, they have  
19 an ownership interest. That's the end of the  
20 discussion. You don't even get to the second point.

21 And he says, Well, this is stolen money. It's not  
22 stolen. It was a fraud. They didn't steal it from  
23 anybody. They miss -- they diverted money.

24                   JUDGE DENNIS: Mr. Quilling,

25 what judgment do you and Mr. Little seek --

1 MR. QUILLING: What judgment --

2 JUDGE DENNIS: -- from this

3 Court?

4 MR. QUILLING: What judgments we

5 seek? I seek the one that eliminates all of this,

6 both as to principal and interest. If you find that

7 there aren't -- that these are not proper relief

8 defendants, this injunction, this freeze, this duck

9 is dead and all money gets released, principal --

10 JUDGE DENNIS: Do we have

11 jurisdiction?

12 MR. QUILLING: -- and interest.

13 JUDGE DENNIS: Do we have

14 jurisdiction to give you the clarity of relief or

15 anything like that?

16 MR. QUILLING: Well, I think

17 that that depends on how you want to fashion it,

18 Your Honor. There's several ways to get there. If

19 you're not a relief defendant, this is dissolved.

20 If you want to also say, We believe that in this

21 district or this circuit there will be no ability  
22 to pursue principal or any amount above what  
23 their -- up until you get your investment back.

24           If you made false profits, that's the  
25 law in this circuit, and frankly, that is the law

1 and probably out to be the law. But the problem  
2 that is not really being followed here -- and this  
3 is a court of equity, and they champion that. They  
4 carry this banner of, This is what we want done.

5 Well, the problem is, it's not  
6 equitable to pursue 500 victims to get their money,  
7 part of it back in and make their loss bigger, i.e.,  
8 the Mississippi Polymers, or pick out one of the  
9 retirees in this room today. They are victims, and  
10 you're going to take even more money from them and  
11 make them a bigger victim.

12 JUDGE GARWOOD: Well, how you  
13 going to know -- in other words, suppose the  
14 district court said that you can't freeze anybody  
15 who hasn't got his money -- you can't freeze anybody  
16 who's a net loser, in other words?

17 MR. QUILLING: We wouldn't be  
18 here today, Your Honor, if that --

19 JUDGE GARWOOD: I understand  
20 that, but how's anybody going to know who's a net

21 loser?

22 MR. QUILLING: Well, I can tell

23 you each of the victims --

24 JUDGE GARWOOD: These people are

25 all named, is what I'm saying.

1           MR. QUILLING: Right. Each of  
2 the victims know whether they're a net loser, and  
3 we've been offering since day one to provide that  
4 information to the receiver. He simply says, I've  
5 got the cards, you're not getting to look at them  
6 and I don't want to know what the real cards say.  
7 We know who the victims are, and we know -- if there  
8 would just be a procedure that the district judge,  
9 if you submit your evidence --

10           JUDGE GARWOOD: Some sort of  
11 summary proceeding? Is that what you would do? I  
12 don't quite understand what you --

13           MR. QUILLING: Yes, Your Honor.  
14 Let me go to court on behalf of my clients and say,  
15 Here's the evidence, this is how much we got, this  
16 is the time frame; we're a net loser, all your money  
17 gets released. That could happen.

18           I know my time's about to run out. I  
19 just want to repeat this: These are net losers.  
20 This is a duck. It is time for this Court to shoot

21 this duck and let this money go. It's been nine

22 months. Thank you.

23 JUDGE DENNIS: Thank you,

24 Mr. Quilling. Mr. Post?

25

1 ORAL ARGUMENT

2 MR. POST: Thank you, Your  
3 Honor. May it please the Court, Michael Post on  
4 behalf of the Securities and Exchange Commission.  
5 The freeze that has been on these innocent fraud  
6 victims' accounts since February of this year should  
7 finally be lifted. The receiver's claims lack  
8 statutory and case law support, and they are  
9 inequitable. It bears emphasizing that the standard  
10 before the Court here that governs its decision is a  
11 likelihood --

12 JUDGE GARWOOD: Lift the mic a  
13 little bit there.

14 MR. POST: I'm sorry. The  
15 element for the injunctive relief that bears  
16 emphasizing here is the receiver has the ultimate  
17 burden of showing a likelihood of success on the  
18 merits. He, however, has failed to cite a single  
19 case even involving what he's attempting here, a  
20 claim by a receiver for -- against an innocent

21 investor named as a relief defendant. And it's  
22 difficult to understand how he could have carried  
23 his burden to show a likelihood of success on the  
24 merits in this situation.

25           The most logically applicable body of

1 law is that of Fraudulent Transfer Acts, and that's  
2 the law under which receivers and trustees and  
3 bankruptcy have proceeded in these factual  
4 scenarios. It's undisputed that his claims would  
5 fail under fraudulent transfer provisions, because  
6 these investors took in good faith and gave  
7 reasonably equivalent value.

8           So the receiver is attempting to make  
9 an end run around the most logically applicable body  
10 of law and invoking the Court's generic equity  
11 powers. He hasn't asserted a recognized cause of  
12 action in equity. He seeks a constructive trust of  
13 the investors' assets; but a constructive trust is a  
14 remedy, not a cause of action.

15           If he had asserted a cause of action  
16 for unjust enrichment, it would also certainly fail  
17 because it wouldn't be inequitable for the receiver,  
18 for the investors to keep the benefit that they  
19 received up to the amount of their initial  
20 investment.

21           The cases the receiver cites,  
22 including from this circuit, sanctioning a pro rata  
23 distribution, are off point. What we're talking  
24 about here is a plaintiff seeking a judgment,  
25 disgorgement of monies from the investors that the

1 receiver has acknowledged the investors own. The  
2 pro rata distribution cases are simply approving a  
3 principle that once you've already amassed monies  
4 into the receivership estate, that it's equitable to  
5 distribute it on a pro rata basis, and it's within  
6 the district court's discretion to do that.

7           Entirely different equities and legal  
8 principles are implicated when, as in this instance,  
9 the receiver has already been -- has -- the  
10 receiver -- the investors already have an ownership  
11 interest in the funds.

12           JUDGE GARWOOD: If one concedes  
13 or concludes that these defendant investors are not  
14 relief defendants, that is to say, that they have  
15 some legitimate claim, some right to a portion of  
16 these assets at least, if one concludes that they're  
17 not historic relief defendants, what -- how does the  
18 receiver have the right to bring this as opposed to  
19 the SEC?

20           In other words, the receiver is not a

21 party to the case, and I guess the courts have  
22 recognized some expansion of what a receiver can do  
23 to handle these so-called relief defendants who are  
24 not -- don't really have any actual substantive  
25 claim at all to the assets in question. But why

1 shouldn't it be the SEC that seeks to recover from  
2 these people?

3           MR. POST: It should be the SEC,  
4 Your Honor. The SEC is the primary agency entrusted  
5 by Congress with the enforcement of the federal  
6 securities laws and the protection of the investing  
7 public. The Commission is the agency that filed the  
8 underlying enforcement action here. The receiver  
9 was appointed at the SEC's request. The Commission  
10 has authority to ask courts to set up fair funds  
11 under the Sarbanes-Oxley act in order to distribute  
12 disgorgement funds into victim investors.

13           If, as Your Honor's question  
14 supposes, if the investors are not proper relief  
15 defendants, the receiver could assert claims against  
16 investors such as these in this case under the  
17 Fraudulent Transfer Act. Those claims, however,  
18 would be dead on arrival and the receiver could not  
19 show a likelihood of success on the merits and this  
20 freeze should be lifted.

21 JUDGE DENNIS: Mr. Post, your

22 time is expired.

23 MR. POST: Thank you, Your

24 Honor.

25 JUDGE DENNIS: Thank you.

1 Mr. Sadler, you have 10 minutes on rebuttal.

2 REBUTTAL

3 MR. SADLER: Thank you, Your

4 Honor. Let me pick up -- there are a number of

5 points to cover in a limited time. But let me pick

6 up on what was just said, the idea that if the

7 receiver were restricted by this Court's ruling to

8 pursue only statutory fraudulent transfer claims.

9 Let's focus on that for a minute.

10 First, look at the Shoals case and

11 the Donnell case and what is boilerplate,

12 black-letter, fraudulent transfer law. In a Ponzi

13 scheme you have actual fraud, and what that means is

14 a receiver can recover the entire payment unless an

15 investor can prove his affirmative defense. That

16 is fraudulent transfer law. So this idea that

17 our -- if we brought this as a fraudulent transfer

18 claim it'd be dead on arrival is dead wrong.

19 Now, why did we not bring fraudulent

20 transfer claims? And if that's where this Court is

21 headed, an opinion that says we are restricted to  
22 state law fraudulent transfer claims, here's what  
23 happens. We have hundreds of trials under different  
24 states' fraudulent transfer laws on the investors'  
25 affirmative defense of objective good faith. We

1 will spend millions of dollars wasted in litigation  
2 pursuing that kind of process when we have a claim,  
3 an equitable claim and remedy that was designed to  
4 take care of the Ponzi scheme problem.

5           Fraudulent transfer statutes do  
6 differ. For example, here in Louisiana there is not  
7 even a fraudulent transfer statute. They have  
8 something called a revocatory action with a one-year  
9 prescriptive period. Why, why does that matter?  
10 Because, Your Honor, we're here trying to establish  
11 a uniform rule for dealing with this horrendous  
12 problem where we have a few investors who did get  
13 some money out and we have thousands of others who  
14 have nothing, and we have cases like --

15           JUDGE GARWOOD: Why should you  
16 have greater powers than a bankruptcy trustee?

17           MR. SADLER: Your Honor, you  
18 said, and I understand the context of what you said,  
19 you said we're nobody, and I have to differ with  
20 you. We are a federally appointed statutory

21 receiver under 28 USC, Section 754. We're the only  
22 party standing before you whose job it is, whose  
23 core job it is to recover assets. That is our  
24 specific directive under the Court's order and under  
25 the statute.

1           And why does that matter? Because  
2 the SEC has admitted, and we heard other arguments,  
3 the SEC's core job is enforcement of the securities  
4 laws; and they've come in for a substantial amount  
5 of scrutiny on how they've handled that job in both  
6 the Madoff case and the Stanford case. The only  
7 party before you whose core function it is to  
8 recover assets is the receiver.

9           And so what's being asked of you  
10 right now is to write an opinion that says an equity  
11 receiver appointed ancillary to a federal securities  
12 law cannot invoke an equitable remedy to provide  
13 equitable relief to thousands of victims, and that  
14 is wrong.

15           JUDGE GARWOOD: See, the  
16 receiver is an agent of the Court, I think is what  
17 you're saying. It's appointed by the Court. It's  
18 not appointed by any party to the case.

19           MR. SADLER: Well, that's  
20 absolutely right, but we have standing to sue for

21 the benefit of the victims. Look at the Shoals  
22 case, look at the Donnell case, those fraudulent  
23 transfer cases they talk about. That's exactly what  
24 they say. The receiver steps in once the people  
25 running the fraud are removed, and he files lawsuits

1 to recover assets for the benefit of who? Not for  
2 the benefit of the receiver, but for the benefit of  
3 all the fraud victims. And members of the panel,  
4 this is what's getting missed here.

5           JUDGE GARWOOD: But what I still  
6 don't understand, why would the law want to give  
7 such a receiver powers in excess of a bankruptcy  
8 trustee which the Congress passed all these  
9 complicated bankruptcy laws and they set up the  
10 person who's to collect all this stuff and they've  
11 got United States trustees, and all this very  
12 sophisticated system with the whole centuries of law  
13 behind it? Why should we invent kind of a new  
14 system?

15           MR. SADLER: Oh, Your Honor,  
16 we're not inventing anything new. Equity receivers,  
17 especially equity receivers in Ponzi schemes, have  
18 been a feature of federal law for decades. This  
19 isn't the first time an equity receiver has been  
20 appointed after a Ponzi scheme failed.

21           And Your Honor, what is being  
22 overlooked here, what is being overlooked here is  
23 the only person who is standing before you  
24 attempting to get relief, not for this minority, but  
25 for the thousands of people who have nothing, who

1 literally have one piece of paper that is a phony  
2 CD -- they don't have any frozen assets, they don't  
3 have assets of any kind, and the only person in this  
4 case whose job it is to marshal assets to compensate  
5 those victims is this receiver.

6           And it is the most difficult, the  
7 most thankless job that anyone can have and what  
8 it -- if you tell us we cannot invoke federal  
9 equitable principles but instead we have to invoke  
10 the fraudulent transfer statutes of 46 states, you  
11 have made a job that is already difficult almost  
12 impossible.

13           JUDGE GARWOOD: Well, as we told  
14 you yesterday, invoke the fraudulent provisions of  
15 the Bankruptcy Code.

16           MR. SADLER: But the case is not  
17 in bankruptcy, Your Honor. It is following --

18           JUDGE GARWOOD: Well, it  
19 would -- I mean, it's got to be eventually for sure.  
20 Because, I mean, the whole premise of this thing is

21 that this defendant or these defendants, other than  
22 the innocent transferees, but that these defendants  
23 don't have enough money. That's the whole principle  
24 of this thing.

25                   MR. SADLER: Absolutely it's the

1 whole principle, and --

2           JUDGE GARWOOD: And therefore,  
3 they're bankrupt.

4           MR. SADLER: And Your Honor,  
5 Ponzi schemes have been wound up by equity receivers  
6 time and time and time again, and we submitted  
7 extensive briefing on this in the district court.

8 But if you're going to follow the principle from the  
9 Cunningham case, from the original Ponzi scheme  
10 case, it says people who are quick enough or lucky  
11 enough to get money out from a Ponzi scheme have no  
12 preferential right to keep it.

13           And we cited examples in the district  
14 court of a baseball player who got \$3.6 million out  
15 of this Ponzi scheme in the few short weeks before  
16 it collapsed at the same time millions of dollars  
17 were still pouring into this Ponzi scheme. And the  
18 only evidence, the only evidence in this record is  
19 our 22-page declaration from our accounting expert  
20 who traced the money, just like the money was traced

21 in SEC versus George.

22           And that affidavit shows that all of

23 these investors were paid with other people's money.

24 There was no real return, there was no interest,

25 there was no return of principal. That's what

1 happens in a Ponzi scheme. Their money was spent  
2 years ago. What they received is someone else's  
3 money, and that someone else stands to receive  
4 pennies, if anything, from the receiver if the funds  
5 that were not -- that were preferentially paid are  
6 not returned to the estate.

7           And that is the result we're trying  
8 to get to here: All of these assets assembled in a  
9 fund where everyone can submit a claim and be  
10 treated ratably and equitably, just like was done in  
11 the Durham case and in the Forex Asset Management  
12 case. And what this does, if you write an opinion  
13 that says you're relegated to state fraudulent  
14 transfer law, go do that, the money will disappear.  
15 These people will be allowed to keep preferential  
16 payments when it is undisputed on this record that  
17 the money they got was not a real return of  
18 principal, it was not a real payment of interest.  
19 It came from somebody else who is standing here with  
20 nothing, hoping the receiver can collect enough to

21 make some kind of payment. And if you follow the  
22 SEC versus George case, and if you disagree with --  
23 JUDGE GARWOOD: [Indiscernible]  
24 the SEC seeking that relief and relying on a broad  
25 statute concerning the powers of the SEC.

1           MR. SADLER: I differ with you,  
2 and here's why: They invoked the equitable power of  
3 the Court for that remedy just like the CFTC invoked  
4 the equitable power of the Court --

5           JUDGE GARWOOD: They're invoking  
6 that equitable power on behalf of and at the request  
7 of a party whom the Congress has said has very broad  
8 powers.

9           MR. SADLER: Understood, Your  
10 Honor, and the problem in this case --

11          JUDGE GARWOOD: And then you're  
12 not doing that --

13          MR. SADLER: We're doing it,  
14 Your Honor, because the SEC has abandoned, has  
15 abandoned its duty and responsibility. They have  
16 absolutely abandoned it. They have no policy on  
17 these clawback claims. They came to this Court with  
18 an amicus brief and said, You know, we don't even  
19 have an opinion about whether false profits should  
20 be recovered.

21           You would think in 60 years the SEC  
22 should have come up with a formal policy that this  
23 Court could look to and defer to. But what do they  
24 have? They have a litigation position that is one  
25 thing in this case, it's different in SEC versus

1 George.

2           And this may have missed your notice,  
3 but what did they just do in one of the biggest  
4 hedge fund fraud cases in New York? They went to  
5 a federal district judge and they asked that  
6 federal district judge, the Reserve Fund Management  
7 case -- and it's cited in our reply brief -- and  
8 they asked the federal district judge to appoint an  
9 equity receiver to do what? To pursue clawback  
10 claims against investors who cashed out early.

11           That is exactly what we're doing  
12 here. We ask that the judgment of the district  
13 court insofar as letting us pursue our equitable  
14 claim be affirmed, that it be reversed as to any  
15 limits on that and we be allowed to bring all of  
16 these assets back into the estate. Thank you very  
17 much.

18           JUDGE DENNIS: Now that  
19 concludes this case and we will have a...

20 [End of recording.]

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1           REPORTER'S CERTIFICATION  
2           OF ONLINE RECORDING OF ORAL ARGUMENTS  
3           BEFORE THE FIFTH CIRCUIT COURT OF APPEALS

4       I, Sandra S. Givens, Certified Shorthand  
5 Reporter in and for the State of Texas, hereby  
6 certify to the following:

7       That this transcript of the aforementioned  
8 online recording is a true record of the recorded  
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10      That the transcript was submitted on November  
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12      I further certify that I am neither counsel  
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18      Certified to by me this 4th day of November,  
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