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COMMISSION AUTHORIZED

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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| MERRICK S. RAYLE, as Receiver for HANNES TULVING RARE COIN INVESTMENTS, INC., ELLENE N. MAYER, on her own behalf and on behalf of all those similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>FIRST NATIONAL BANK OF CUT BANK, INDUSTRY COUNCIL FOR TANGIBLE ASSETS, INC., GREGORY N. ROBERTS, LAURA D. GASPARELLI, STEVEN O'DAY, ALAN TULVING, DWIGHT N. MANLEY, ROBERT N. MANLEY, VALENCIA NATIONAL BANK, RESOLUTION TRUST CORPORATION, as Receiver for VALLEY FEDERAL BANK, DAVID INGALLS, CHRISTOPHER OWEN, HTRCI SPECULATIVE RARE COIN FUND I, DELOITTE & TOUCHE, CADWALADER WICKERSHAM & TAFT, and DOES 1-100,<br><br>Defendants. | CASE NUMBER:<br>92 4925 KN (GHKx)<br><br>MEMORANDUM OF POINTS AND AUTHORITIES OF AMICUS CURIAE FEDERAL TRADE COMMISSION<br><br>Date: Jan. 25, 1993<br>Time: 9:30 a.m.<br>Courtroom: "3" Before the Honorable David V. Kenyon |

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**MEMORANDUM OF POINTS AND AUTHORITIES OF**

**AMICUS CURIAE FEDERAL TRADE COMMISSION**

The Federal Trade Commission ("FTC" or "Commission") files this Memorandum as amicus curiae for plaintiff Merrick S. Rayle, receiver for Hannes Tulving Rare Coin Investments, Inc. ("HTRCI"). The Commission supports the Receiver's standing to bring the captioned lawsuit on behalf of defrauded customers of HTRCI. This standing has been challenged by defendant Deloitte & Touche in Part I.A. of the Argument in its Memorandum of Points and Authorities in Support of its Motion to Dismiss ("Mem.").

**ISSUE PRESENTED**

Whether a district court sitting in equity may empower an equity receiver to bring suit on behalf of defrauded customers of the receivership entity.

**INTEREST OF AMICUS FEDERAL TRADE COMMISSION**

The Federal Trade Commission often seeks the appointment of equity receivers in suits brought under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). These suits are brought to prevent and redress "unfair or deceptive acts or practices" prohibited by Section 5 of the FTC Act, 15 U.S.C. § 45, or violations of other laws enforced by the Commission. See, e.g., FTC v. World Wide Factors, Ltd., 882 F.2d 344 (9th Cir. 1989); FTC v. American National Cellular, Inc., 810 F.2d 1511 (9th Cir. 1987); FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431 (11th Cir. 1984).

An equity receivership sometimes presents the only practical means of recovering funds to redress victims of fraud. Where, as in this case, the primary perpetrator of a fraudulent scheme is

undercapitalized or insolvent, a suit of the sort involved here may be essential to provide significant redress to consumers.[1] Also, in many instances, it is practically impossible for defrauded investors to pursue recovery on their own, or for the Commission to pursue the farflung web of conspirators who may have assisted the primary perpetrator of the deceptive practices.

Adoption of the position taken in Part I.A. of the Deloitte-Touche Memorandum, that the Receiver lacks standing to bring this suit, would deprive the Commission of an essential tool in its efforts to redress victims of fraud. For that reason, and because it believes defendant's position is incorrect, the Commission appears here. The Commission takes no position in this Memorandum as to any other issue raised in defendant's Motion to Dismiss.

**STATEMENT**

The captioned case is a suit brought by Merrick Rayle, in his capacity as the permanent equity receiver for HTRCI. On August 22, 1990, Mr. Rayle was appointed permanent receiver by the district court at the request of the Commission, as part of its suit for injunctive and monetary equitable relief against

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[1] The receiver's action in this case is patterned after In re U.S. Oil & Gas Litigation, No. 83-1702-A1 (S.D. Fla.), a suit brought by the equity receiver appointed in FTC v. U.S. Oil & Gas Corp., No. 83-1702 (S.D. Fla.), against various professional firms that had allegedly aided and abetted the defendants in the FTC case to perpetrate their fraud. The receiver's suit ultimately resulted in a settlement that, when combined with money recovered by the Commission from defendants, realized nearly $47 million in restitution for victims of the U.S. Oil & Gas scheme. See generally In Re U.S. Oil & Gas Litigation, 967 F.2d 489 (11th Cir. 1992).

HTRCI, FTC v. Hannes Tulving Rare Coins, Inc., No. 90-4387KN (GHKx) (C.D. Cal.) (complaint filed 8/16/90). In its complaint, the Commission alleged that HTRCI and its owner Hannes Tulving, Jr., had operated a rare coin investment Ponzi scheme that had bilked investors of millions of dollars. The Commission's case was resolved with a settlement, filed on June 17, 1992, that provided for conduct relief and redress of $10 million. Owing to defendant HTRCI's weak financial condition, however, the settlement defers payment of all but $260,000 of this amount to a later date, and it is uncertain whether any or all of the balance will be collected.

The August 22, 1990, order appointing the receiver invested him with the "full power of an equity receiver." In August, 1992, the receiver filed an application seeking appointment of a Special Counsel to assist the receiver to:

> (1) investigat[e] any and all potential claims arising from defendants' operations; (2) advis[e] the Permanent Receiver with respect to the institution of litigation or the negotiation of settlements with any potential claim defendants; and (3) institut[e], prosecut[e], defend[] and/or compromis[e] such actions or proceedings in state or federal courts as the Permanent Receiver may deem necessary to carry out the terms of this Court's order appointing him, including but not limited to actions on behalf of injured investors.

(Emphasis added.)

This Court granted the receiver's motion, without limitation, on August 6, 1992, in its Order for Appointment of Special Counsel. Pursuant to this grant of authority, on August 12, 1992, the Special Counsel filed the present case against third parties that allegedly acted with HTRCI in various ways to defraud consumers.[2]

On October 16, 1992, defendant Deloitte & Touche, an accounting firm, filed a motion to dismiss the complaint as to itself. Defendant argues, in Part I.A. of its Memorandum, that the receiver lacks standing to pursue claims on behalf of defrauded investors of HTRCI.

**ARGUMENT**

The question presented by defendant's "standing" argument is whether a district court, sitting in equity, may empower an equity receiver to bring suit against third parties on behalf of defrauded customers of the receivership entity. The answer to that question is "yes." Although courts have differed on the scope of an equity receiver's powers absent specific authorization, they have repeatedly stated that an equity court may authorize a receiver to sue on behalf of victims of the receivership entity's misconduct. Indeed, many state courts, have held that authority to bring such suits is part of an equity receiver's ordinary power, even absent express authorization by the appointing court. (Part I, infra.)

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[2] This lawsuit was filed on behalf of both the Receiver and Ellene Mayer, class representative of certain Hannes Tulving customers.

Cases cited by defendant that interpret the power of bankruptcy trustees under provisions of the Bankruptcy Act are not apposite. Those cases turn on judicial construction of the Bankruptcy Act, which does not apply here. Further, those cases recognize no constitutional limitation on the power of Congress, by statute, to authorize trustee suits, nor on the power of a court, exercising the broad, traditional powers of equity, to vest an equity receiver with authority to pursue claims on behalf of victims of the receivership entity. (Part II, infra.)

## I. A COURT SITTING IN EQUITY MAY PROPERLY AUTHORIZE AN EQUITY RECEIVER TO BRING SUIT ON BEHALF OF DEFRAUDED VICTIMS OF THE RECEIVERSHIP ENTITY

This Court's Order for Appointment of Special Counsel of August 6, 1992, specifically authorizes the receiver to bring "actions on behalf of injured investors." Order at 2.[3] The August 17, 1992, complaint initiates exactly the sort of action contemplated by the August 6 order -- it seeks relief from those who allegedly participated in, or benefited from, the fraudulent scheme perpetrated by HTRCI. Also consistent with the August 6

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[3] Defendant offers no support for its argument (Mem. at 13) that this Court's grant of authority to the receiver was limited to its August 22, 1990, order appointing the receiver, and could not be subsequently modified. This Court's August 22, 1990, order specifically retains jurisdiction over the receiver, and this retention is reaffirmed in the June 1992 settlement in FTC v. HTRCI. It necessarily follows that to the extent the August 22, 1990, order did not provide authority for the commencement of this action, the Court, in the exercise of its continuing jurisdiction, remained free to enlarge the receiver's responsibilities in the August 6, 1992, order. See Fleming v. Bank of Boston Corp., 127 F.R.D. 30, 31 (D. Mass. 1989), aff'd, 922 F.2d 20 (1st Cir. 1990) (receiver permitted to seek enlargement of authority from appointing court).

order, any relief obtained by the receiver would inure to the benefit of investors injured by HTRCI's fraudulent scheme. The only question presented by defendant's challenge to the receiver's standing, therefore, is whether this Court acted within its authority in empowering the receiver to bring the present case. We believe that it did.

In a suit for permanent injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the district court enjoys the broad, traditional, inherent powers of a court of equity to "accomplish complete justice." FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982); see Porter v. Warner Holding Co., 328 U.S. 395, 397-98, 66 S.Ct. 1086, 1089, 90 L.Ed. 1332, 1336-37 (1946). These powers include the authority to appoint an equity receiver. FTC v. U.S. Oil & Gas Corp., 748 F.2d at 1434.

This Court's specific grant of authority to the receiver to liquidate claims of customers of the receivership entity by suing jointly liable third parties is consistent with numerous decisions of this and other courts addressing the power of equity receivers. In the decision most directly on point, the district court in In re U.S. Oil and Gas Litigation, No. 83-1702-A1 (S.D. Fla., slip op. 2/8/88) (Hoeveler, J.), held that a receiver appointed in an FTC suit for permanent injunction under Section 13(b) of the FTC Act "has standing to pursue claims on behalf of the allegedly defrauded investors in the defunct companies," based upon the court's order authorizing the receiver to

"'determine, adjust and protect the interest of the clients of these companies'" (id. at 1).[4]

Federal courts that have denied receivers authority to sue on behalf of investors have made clear that their decisions turned on the limited scope of authority granted by the appointing court, not on any limit on the court's equitable powers to grant broader authority. For example, in a decision from this district, Canut v. Lyons, 450 F. Supp. 26 (C.D. Cal. 1977), a corporate conservator seeking to sue third parties on behalf of investors defrauded by the conservatorship entities lacked specific authorization to do so. In granting a motion to dismiss the conservator's actions, the court stated that:

> It is axiomatic that the conservator's power is derived from and limited by the order of the court appointing him; he may assert only claims which arise in favor of his estate. The order of appointment in this case empowered the conservator to take control of and manage the assets under the control of [the corporate defendants]. * * * The order does not grant the conservator power with respect to the individual investors * * *.

450 F. Supp. at 28-29. Only because of this limitation on the conservator's authority did the court hold that the conservator lacked standing to sue on behalf of injured investors. 450 F. Supp. at 30. Defendant's apparent effort to read Canut to hold

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[4] The relevant pages of the court's opinion, pages 1-2, and the signature page (page 68) are attached hereto as Attachment 1.

that a court could not authorize such a suit (Mem. at 12) is misplaced.

The First Circuit applied a similar rationale in Boston Trading Group, Inc. v. Burnazos, 835 F.2d 1504 (1st Cir. 1987), in which a receiver for several commodity investment firms attempted to sue the transferee of money taken from investors by the firms. After concluding that the suit was brought on behalf of the defrauded investors, the court held that the receiver lacked the authority to bring such a suit only because

> [t]he Receiver draws his authority to sue from a court order that gives him 'full power to prosecute all claims . . . on behalf of [the commodity investment corporations]. It does not give him authority to prosecute claims on behalf of [the commodity investment corporations'] creditors."

835 F.2d at 1514 (emphasis in original). See also Fleming v. Bank of Boston Corp., 127 F.R.D. at 31 (action on motion to dismiss stayed to permit receiver to seek expansion of its authority to act on behalf of defrauded investors); Lank v. New York Stock Exchange, 548 F.2d 61, 67 (2d Cir. 1977) ("where [the receiver] represents the creditors as well as the estate, he may sometimes sue in that right where the estate could not * * *"); Dirks v. Clayton Brokerage Co. of St. Louis, Inc., 105 F.R.D. 125, 135 (D. Minn. 1985) ("[w]here a receiver represents creditors as well as the corporation, though, the receiver can sue on behalf of the former as well" (citing Lank)); Baker v. Heller, 571 F. Supp. 419 (S.D. Fla. 1983). In none of the above

cases did the receiver's grant of authority include the power to bring suit on behalf of injured investors of the corporation in receivership. However, the clear implication in each case is that had the receiver been granted such authority (as he was here), the court would not have dismissed the receiver's suit for lack of standing.

Even where express authorization has not been provided, numerous state courts have held that an equity receiver has standing to sue on behalf of injured investors.[5] For example, in Talbot v. Jensen, 294 Ark. 537, 744 S.W.2d 723, 725 (1988), the court described the receiver as "a fiduciary representing the court and all parties in interest" with "power to do acts that a mere agent of the defunct company could not do," including "bringing suit on behalf of creditors."

In Butcher v. Howard, 715 S.W.2d 601, 603 (Tenn. Ct. App. 1986), the court stated that:

> [w]hile a receiver stands in the shoes of the debtor, and may not himself enjoy the status of a creditor, the representation of all creditors is among his functions. As noted in 75 C.J.S., Receivers, § 143, 'in asserting his right to collect or hold assets as those of the insolvent, [the receiver] may be said to claim under the

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[5] Although the authority of a federal court exercising federal question jurisdiction to appoint a receiver is a question of federal law, United States v. View Crest Garden Apartments, Inc., 268 F.2d 380 (9th Cir.), cert. denied, 361 U.S. 884 (1959), federal courts may look to state law in fashioning federal common law, United States v. Best, 573 F.2d 1095 (9th Cir. 1978).

> latter's right and so to represent his interest; but, in a sense, or for some purposes, he represents the creditors as well . . ..'"

(Citations omitted.)

Similarly, in Camerer v. California Savings & Commercial Bank of San Diego, 4 Cal.2d 159, 48 P.2d 39 (Cal. 1935), the court noted that while, as a general rule, the receiver has no greater rights than those of the debtor, nevertheless

> there are certain situations where the receiver is permitted to assert rights and defenses not available to the insolvent. Thus, it is held that although the insolvent debtor cannot set aside a transfer in fraud of his creditors, as he is in pari delicto, the receiver acting for the creditors may attack it. * * * It is also held that although an unrecorded conveyance or mortgage is valid as against the grantor or mortgagor, his receiver prevails over the holder under the unrecorded instrument under statutes which provide that unrecorded transfers are void as to creditors. * * * The justice and equity of such exceptions to the general rule that the receiver has only the rights of the insolvent debtor are apparent.

48 P.2d at 44-45. See also Bonhiver v. Graff, 311 Minn. 111, 248 N.W.2d 291, 296 (1976) (corporate receiver seeking to sue accountant for failing to discover fraud "represents the rights

of creditors and is not bound by the fraudulent acts of a former officer of the corporation"); Magnuson v. American Allied Insurance Co., 290 Minn. 465, 189 N.W.2d 28, 33 (1971)).

Clearly, then, a long and continuing case law tradition supports the power of an equity court to appoint a receiver with authority to sue on behalf of injured investors.[6]

## II. CASES CONSTRUING THE STATUTORY AUTHORITY OF BANKRUPTCY TRUSTEES DO NOT CONSTRAIN THE AUTHORITY OF EQUITY COURTS TO EMPOWER EQUITY RECEIVERS

With one exception,[7] the cases cited by defendant to argue against the receiver's standing here fall into two categories. The first are cases in which the court rejected a receiver's authority to represent defrauded customers because such representation was not authorized by the appointing court. As discussed above, these cases affirmatively support the receiver's position, not defendant's.

The second category of cases involves statutory trustees appointed pursuant to specific provisions of the Bankruptcy Act, not pursuant to a court's equitable authority. See Caplin v. Marine Midland Grace Trust Company of New York, 406 U.S. 416, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972); Williams v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988); Rochelle v. Marine Midland

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[6] In any event, even lacking the express authority he was granted, the receiver, if sued by injured investors, could assert many of the claims he raised here as third party claims, pursuant to Fed. R. Civ. P. 14.

[7] Scholes v. Schroeder, 744 F. Supp. 1419 (N.D. Ill. 1990), discussed at pp. 13 - 15, infra.

Grace Trust Company of New York, 535 F.2d 523 (9th Cir. 1976). Nothing in these decisions is inconsistent with this Court's grant of authority to the receiver here.

The sole issue in Caplin (and in Williams and Rochelle) was whether a bankruptcy trustee, acting pursuant to authority of the Bankruptcy Act, had standing to sue third parties on behalf of the bankrupt's bondholders. The Supreme Court held that the trustee lacked standing, based solely on its construction of the bankruptcy code (406 U.S. at 428):

> Congress has established an elaborate system of controls with respect to * * * reorganization proceedings, and nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of [bond] holders.

The Court recognized that Congress could amend the bankruptcy code, if it wished, to broaden the trustee's authority. Indeed, in Williams, 859 F.2d at 666, the court noted that "[w]hen Congress rewrote the bankruptcy laws in 1978, it considered and rejected a provision which would have expressly overruled Caplin." As a result of this congressional rejection, the Williams court reaffirmed the statutory interpretation reached in Caplin. Although a statutory trustee under the Bankruptcy Act is thus plainly not authorized to commence action

on behalf of third parties,[8] nothing in any of the bankruptcy cases suggests that any constitutional barrier precludes a court in equity from authorizing a receiver to sue on behalf of injured investors.[9] Because the action here was brought by an equity receiver, not a bankruptcy trustee, cases such as Caplin, Williams, and Rochelle are not relevant.

The same overreading of Caplin v. Marine Midland that underlies defendant's position also underlies Scholes v. Schroeder, 744 F. Supp. 1419 (N.D. Ill. 1990) ("Scholes"), the sole decision involving an equity receiver that actually holds that a court may not authorize the receiver to sue on behalf of defrauded investors.[10] The court in Scholes read Caplin v. Marine Midland to announce a categorical restriction on the standing of any "receiver or like surrogate" to pursue claims of those "who may have an ultimate derivative interest in the

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[8] But see In re Weisbrod, 138 B.R. 869 (Bankr. S.D. Ohio 1992); In re Tenth Avenue Record Distributors, Inc., 97 B.R. 163 (S.D.N.Y. 1989); Lumbard v. Maglia, 621 F.Supp. 1529 (S.D.N.Y. 1985), all of which hold that the 1978 enactment of Section 544 of the Bankruptcy Code, 11 U.S.C. § 544, authorizes Chapter 7 trustees to sue on behalf of creditors. These decisions, thus, limit the holding of Caplin to Chapter 10 trustees.

[9] Indeed, the rules of this Court contemplate that an equity receiver may receive authority in excess of that provided by statute to bankruptcy trustees. See Central District Rule 25.8 ("Except as otherwise ordered by the Court, a receiver shall administer the estate as nearly as possible in accordance with the practice in the administration of estates in bankruptcy." Emphasis added.)

[10] Scholes v. Tomlinson, No. 90 C 1350, et al., 1991 U.S. Dist. Lexis 10486 (N.D. Ill. July 29, 1991), cited by defendant as a separate authority (Mem. at 11, 12), is part of the same case as Scholes v. Schroeder, and merely restates and implements the earlier decision.

estate," and concluded that it would be unconstitutional for a court to vest the receiver with such authority, although Congress could do so by statute. 744 F. Supp. at 1421-22.[11]

The logic of Scholes is dubious and, to our knowledge, no cases follow it.[12] If it were true that only an express act of Congress could constitutionally vest an equity receiver with standing to sue, then such receivers would lack even authority to

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[11] The Scholes court may have based its conclusion on the Supreme Court's observation in Caplin that the bankruptcy trustee's authority under 11 U.S.C. § 567(3) is supplemented by 11 U.S.C. § 587. As the Court noted, § 587 gives the trustee the rights that a "receiver in equity would have if appointed by a court of the United States for the property of the debtor." 406 U.S. at 429. Although the Court held that even this additional authority would not suffice to empower a trustee to sue on behalf of a third party, the Court nowhere suggested that an equity court could not expressly empower such a receiver to sue on behalf of injured investors. Indeed, the Court's analysis of the powers of an equity receiver appears consistent with the federal cases discussed in Part I, supra, that hold generally that an equity receiver may not sue on behalf of injured customers of the receivership estate unless expressly authorized by the appointing court.

[12] Defendant mistakenly implies that Southmark Corp. v. Cagan, No. 89 C 4647, 1992 U.S. Dist. LEXIS 2626 (N.D. Ill. March 6, 1992), follows Scholes. Mem. at 11. It does not. Although Southmark was decided in the same district as Scholes and, like Scholes, addressed the standing of a corporate receiver to sue on behalf of investors, the court in Southmark avoided adopting the Scholes rationale. Unlike the situation in Scholes (and here), the injured investors in Southmark had dealt with an intermediary, not directly with the corporate defendant. Thus, the logic of Scholes should have applied even more strongly. However, the court merely quoted, but did not adopt, that portion of Scholes concerning the constitutional limitations on the receiver's standing. Instead, the court held that the receiver lacked standing solely because of the remote relationship between the receivership corporation and the investors on whose behalf he sought to sue. The clear implication of the decision is not, as defendant suggests, that the court's authority to create equity receiverships is constitutionally limited, but rather that the receiver may well have had standing to sue on behalf of the investors had they dealt directly with the corporate defendant. This result, of course, would directly contradict Scholes.

sue on behalf of the corporations they represent. Receiverships in FTC cases (as in SEC cases) are created, not pursuant to statute, but pursuant to the court's inherent equitable authority, and the court defines the scope of the receiver's powers. SEC v. Wencke, 783 F.2d 829, 837 n.9 (9th Cir.), cert. denied, 479 U.S. 818 (1986). Yet no court, including the Scholes court, has ever questioned the standing of the receiver to sue on behalf of the corporations it controls, although such standing flows solely from an order of the court.

A court order that also gives a receiver authority to represent injured investors, for the limited purpose of bringing suit on their behalf against those who have joined with the receivership entity in the fraudulent scheme, is constitutionally indistinguishable from an order authorizing the receiver to sue on behalf of the corporation itself. See Boston Trading Group, Inc. v. Burnazos, 835 F.2d at 1515 (holding that there is no distinction between a receiver's authority derived from a statute and authority derived from a court order). Once granted this authority, there is little doubt that the receiver enjoys a sufficient stake in the outcome to assure an adequate presentation of issues before the court, thus fulfilling the requirements for constitutional standing. Linda R.S. v. Richard D., 410 U.S. 614, 616, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536, 540 (1973). Accordingly, there is no constitutional barrier to this Court's Order for Appointment of Special Counsel.

## CONCLUSION

For the reasons set forth above, this Court should deny defendant Deloitte & Touche's challenge to the receiver's standing to bring the present case on behalf of defrauded customers of Hannes Tulving Rare Coins, Inc.

Respectfully submitted,

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# United States District Court

SOUTHERN DISTRICT OF FLORIDA

NO: 83-1702-Al-CIV-HOEVELER

ALL CASES

IN RE:
U. S. OIL AND GAS LITIGATION

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THIS CAUSE having come before the Court upon Defendants' Motions to Dismiss the Amended Complaints, and the Court having twice heard argument on the motions and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED as follows:

## I. STANDING

The Court finds that Receiver Wald has standing to pursue claims on behalf of the allegedly defrauded investors in the defunct companies. The Receiver's standing, as a federal equity receiver, to pursue such claims derives from this Court's Order of Appointment of January 7, 1984, in which the Court appointed Wald with directions to "determine, adjust and protect the interest of the clients of these companies." The Receiver's Ancillary Complaint, on behalf of the Companies, investors and creditors is a proper exercise of the powers granted him by this Court's appointment. See Schacht v. Brown, 711 F.2d 1343, 1348 (7th Cir. 1983), cert. denied, 464 U.S. 1002 (1983); Meyers v. Moody, 693 F.2d 1196, 1206 (5th Cir. 1982), cert. denied, 464 U.S. 920 (1983); Lank v. New York Stock Exchange, 548 F.2d 61, 67 (2d Cir. 1977); Hooper v. Mountain State Sec. Corp., 282 F.2d 195 206-07 (5th Cir. 1960); Dirks v. Clayton Brokerage Co. of St. Louis, Inc., 105 F.R.D. 125, 135 (S. Minn. 1985); Glusband v. Fittin Cunningham Lanzer, Inc., 582 F.Supp. 145, 148 (S.D.N.Y.

1984); McDermott v. Russell, 523 F.Supp. 347, 352 (E.D. Pa. 1981); Fletcher Cyc. Corp. (Perm. Ed.) §7847 at 458-64.

The Dirks, Schacht, and Lank cases are useful law for the proposition that the Receiver is not bound by the former officers' frauds because he represents creditors who were injured, rather than benefited, as a result of the fraud. 711 F.2d at 1348; 548 F.2d at 67; 105 F.R.D. at 135.

Further, the Receiver here has standing to represent the Companies because the Companies were injured and ultimately wasted through the fraudulent schemes of the officers. See Schacht, 711 F.2d at 1348-49; Hooper, 282 F.2d at 206-07.

## II. RULE 9(b) DEFENSES AS TO ALL COUNTS INVOLVING FRAUD

Certain Defendants have moved to dismiss those counts of the Plaintiffs' and the Receiver's Amended Complaints involving fraud for failure to plead such fraud with particularity as required by Fed.R.Civ.P. 9(b). Plaintiffs' Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss at 15-46 effectively counters Defendants' rule 9(b) assertions.

". . . [A] Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle them to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L.Ed. 2d 80, 84 (1957). A motion to dismiss on the basis of the pleadings alone should rarely be granted; the practice of dismissing claims on the basis of the barebone pleadings is a precarious one with a high mortality rate. See

Wolfson, Diamond and defendant, Morgenstern, these will be heard at 4:30 p.m., on Monday, February 29, 1988 at 301 North Miami Avenue, 9th Floor, Miami, Florida.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of February, 1988.

U. S. DISTRICT JUDGE

Copies furnished to
all counsel of record
and defendants pro se