

IN THE SUPREME COURT OF THE UNITED STATES

No. A-_____

LISA ANNE HENRY, DONALD F. BURESH,
AND SHARON J. PHILLIPS, APPLICANTS

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS
OF WALLDESIGN, INC.

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for Lisa Anne Henry, Donald F. Buresh, and Sharon J. Phillips respectfully requests a 21-day extension of time, to and including February 28, 2018, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The United States Court of Appeals for the Ninth Circuit entered its judgment on October 2, 2017. App., infra, 1a-39a. It denied petitions for rehearing on November 9, 2017. Id. at 40a-41a. Unless extended, the time for filing a petition for a writ of certiorari will expire on February 7, 2018. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. Applicants face an action to recover funds they received from Michael Bello in arm's-length transactions for fair value because, unbeknownst to them, Mr. Bello was perpetrating a fraud

on his company. Mr. Bello served as the sole shareholder, director, and president of debtor Walldesign, Inc. Walldesign maintained a legitimate bank account from which it paid its expenses; that account was disclosed in Walldesign's books and records. App., infra, 6a-8a.

In 2002, Mr. Bello opened a secret account at a different bank in Walldesign's name. Mr. Bello used his home as the account's address; he later named his wife, who was not a Walldesign employee, as a signatory. That account, unlike Walldesign's legitimate account, was not used to pay Walldesign's expenses, and it was not disclosed in Walldesign's books and records. App., infra, 6a.

Over several years, Mr. Bello deposited millions of dollars in rebate checks written to Walldesign into the secret account instead of into Walldesign's legitimate account. He used these funds to support a lavish lifestyle, including paying for a horseracing stable, family vineyards, Las Vegas casino bills, and fees for private golf courses. App., infra, 7a.

Applicants Donald Buresh and Sharon Phillips are a married couple who sold a piece of real property to Mr. Bello to fund their retirement. Applicant Lisa Anne Henry is a small business owner who provided interior-design services for Mr. Bello and his wife. Mr. Bello paid applicants approximately \$220,000 and \$230,000, respectively, from the secret account; all the transactions were undisputedly at arm's length and for fair value. Apart from these transactions, applicants had no relationship with Mr. Bello, his family, or his businesses. App., infra, 7a-8a.

In 2012, Walldesign petitioned for bankruptcy; it did not disclose the secret account in its petition. Respondent, Walldesign's committee of unsecured creditors, learned of the secret account and brought actions against applicants to recover the payments Mr. Bello made from that account. Respondent also sought to recover those amounts directly from Mr. Bello and related individuals in a separate action. App., infra, 7a-9a.

2. Section 550(b)(1) of the Bankruptcy Code provides a safe harbor from recovery for subsequent transferees (but not initial transferees) who accepted the transferred property in good faith and without knowledge of the voidability of the transfer. 11 U.S.C. 550(b)(1). In the actions against them, applicants argued that Mr. Bello was the initial transferee of the funds he deposited in the secret account; that applicants were therefore subsequent transferees; and, as a result, that applicants qualified for the safe harbor in Section 550(b)(1). The bankruptcy court agreed and granted summary judgment to applicants. See App., infra, 9a.

3. The district court reversed, holding that the applicants were initial rather than subsequent transferees of the fraudulent payments. App., infra, 42a-60a. It identified "two distinct tests" courts have developed to determine whether a party is an initial transferee under Section 550(a)(1): the "dominion test" and the "control test." Id. at 50a. The dominion test focuses on the recipient's "legal authority over the money," whereas the control test "takes a more gestalt view" to determine "who, in reality, controlled the funds in question." Id. at 51a (citation omitted). The district court determined that the Ninth Circuit

followed the dominion test. Id. at 50a. Applying that test, the district court then concluded that Mr. Bello was not the initial transferee because he lacked legal authority over the funds, which, as a formal matter, remained in Walldesign's name. Id. at 54a. Accordingly, the district court deemed applicants the initial transferees. Ibid.

4. A divided panel of the court of appeals affirmed. App., infra, 1a-32a.

a. The court of appeals recognized the "critical" distinction between initial and subsequent transferees. App., infra, 10a (citation omitted). In assessing whether Mr. Bello, rather than applicants, qualified as the initial transferee of Walldesign's rebate funds, the court rejected applicants' reliance on an "oversimplistic syllogism from the meaning of 'transfer'" in the Bankruptcy Code. Id. at 12a. The court of appeals observed that courts construing the term "initial transferee" are divided on whether to apply the dominion test, the control test, or some combination of those tests. Id. at 13a-14a. Following the Seventh Circuit and its own circuit precedent, the court of appeals applied the dominion test, "reject[ing]" the "more lenient" standard applied by the Eleventh Circuit and several other courts. Id. at 13a, 24a-25a (citing In re Incomnet, Inc., 463 F.3d 1064, 1069-1071 (9th Cir. 2006)).

The court of appeals embraced the dominion test despite concern that doing so could lead courts to "lose track of the original question proposed by the statute -- namely, whether a party is a transferee." App., infra, 12a (citation omitted). In light of

that approach, the court of appeals deemed "misplaced" any "reliance on the meaning of 'transfer' in [Section] 101(54)(D)." Ibid.

Applying the dominion test, the court of appeals explained that the test "strongly correlates with legal title, and is akin to legal control." App., infra, 25a (internal quotation marks and emphasis omitted). It determined that, regardless of Mr. Bello's "de facto control" over the funds transferred into the secret account, he was not the initial transferee because he lacked "legal title" to, and thus "legal control" of, the funds, which formally belonged to Walldesign. Id. at 20a-21a.

The court of appeals acknowledged that, as an equitable matter, the result in this case "seem[ed] harsh," and that its approach "may elevate form over substance." App., infra, 5a, 22a (internal quotation marks and alteration omitted). Nonetheless, it deemed the dominion test conclusive and held that applicants "are strictly liable to the Committee as initial transferees." Id. at 32a.

b. Judge Nguyen dissented. App., infra, 32a-39a. She began by observing that, while bankruptcy courts are courts of equity, "[t]here [was] nothing equitable" about the decision in this case, which imposed potentially "ruinous" liability on applicants even though they knew nothing of Mr. Bello's fraud. App., infra, 32a-33a.

Judge Nguyen urged the court of appeals to "ditch[] the dominion test" and adopt the control test "used successfully by other circuits," or to return to its prior "hybrid approach" that allowed it "to step back and evaluate a transaction in its entirety."

App., infra, 33a-34a (citation omitted). She explained that "the pragmatic control test used in other circuits * * * would have produced the correct result here without fuss and held [Mr.] Bello personally liable for his fraudulent acts as the initial transferee." Id. at 33a (internal quotation marks omitted).

In the alternative, Judge Nguyen would have determined that Mr. Bello was an initial transferee even under the dominion test, on the ground that the sham account legally belonged to him, rather than to Walldesign, under state law. App., infra, 34a-38a.

5. The court of appeals subsequently denied petitions for rehearing. App., infra, 40a-41a.

6. Counsel for applicants respectfully requests a 21-day extension of time, to and including February 28, 2018, within which to file a petition for a writ of certiorari. The court of appeals' decision in this case presents complex issues concerning the proper interpretation of the Bankruptcy Code. The undersigned counsel did not represent applicants below and needs additional time to review the record and decisions below. In addition, the undersigned counsel is currently preparing to present argument in this Court in Dahda v. United States, No. 17-43, on February 21. Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted.

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