NO. 18-_____

In the Supreme Court of the United States

JOSEPH D. BRADLEY,

Petitioner,

v.

ALCO OIL & GAS CO., LLC, and RAILROAD COMMISSION OF THE STATE OF TEXAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State agency, with notice that certain defrauded investor funds on account at a bank are subject to 28 U.S.C. § 754's exclusive *in rem* jurisdiction, a Federal freeze order, and other orders, can divert such funds unbeknownst to the Federal equity receiver relying on the liquidation of those funds to close the receivership estate.

2. Whether 28 U.S.C. § 959(b) and the principles of Supreme Court's *Midlantic* decision apply to a liquidating Federal equity receiver, and, if they apply, can they be stretched to require the receiver's payment of the liabilities of a non-receivership operation whose liabilities arose prior-to the receivership.

3. Whether 28 U.S.C. § 959(b) and *Midlantic* should be used to catapult a State agency's regulatory expense "claim" to super-priority status, even though the expenses were never claimed or vetted in court, leaving the Receiver unable to pay the administrative expenses such as attorney fees.

4. Whether 28 U.S.C. § 959(b) and *Midlantic* supersede a District Court's orders to protect the Federal equity receiver from such expenses as well as the District Court's sales orders that eliminate the subject expenses with the transfer of estate properties.

5. Whether a Federal receiver is entitled to an opportunity to refute a State agency's defenses to contempt and whether all of a Federal receiver's causes of actions against a State agency, properly filed and contained in a "Summary Proceedings Application," can be dismissed without hearing or argument.

6. Whether a Federal receiver pursuing defrauded investor funds can claim the funds on deposit in support of letters of credit instead of claiming the letters of credit themselves.

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PETITION FOR WRIT OF CERTIORARI

Joseph D. Bradley, the Receiver of the estate amassed in *S.E.C. v. First Choice Mngmnt Servs., Inc.*, (N.D. IN 2000), respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's decision, a non-precedential disposition per F.R.A.P. 32.1 (App.1a-6a), was issued on November 20, 2018. The corresponding judgment was issued the same day. (App.7a). On January 24, 2018, the United States District Court for the Northern District of Indiana, issued its OPINION AND ORDER (App.9a-19a, [Distr. Ct. Doc. No. 1115]), denying "the receiver's motion for summary proceedings and civil contempt, disgorgement and other relief [Doc. No. 1097]."

JURISDICTION

The Seventh Circuit entered its judgment and opinion on November 20, 2018. The Petition for Writ of Certiorari was filed properly on the date listed herein, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

- 28 U.S.C. § 959(b)

  (b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in this possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

- 28 U.S.C. § 754

  A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

  He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.

  Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any

district shall divest the receiver of jurisdiction and control over all such property in that district.

INTRODUCTION AND STATEMENT OF THE CASE

Certiorari is warranted here not simply to provide precedent and resolve State-verses-Federal issues, conflicting Circuits, or the great injustice that was inflicted on the Receiver by the lower courts. Rather, the Supreme Court's pronouncements and resolutions regarding the relevant matters herein are needed to fill a significant void that only the supervisory nature of the Supreme Court can fill, and it is necessary in order for Federal equity receiverships to be a viable remedy.

With no Federal common law on the subject and no governing statutory framework for Federal equity receiverships, these equity constructs simply float within and around the codified Federal law constituting the "uniform Laws on the subject of Bankruptcies throughout the United States." (United States Constitution, Article 1, Section 8, Clause 4) But the treatment of Federal equity receivers is far from uniform, and the disparity in relevant legal concepts is particularly pointed when a State agency, 28 U.S.C. § 959(b), and the Supreme Court's precedent in *Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494 (1986), converge upon a receiver. This area of law is wildly expansive, conflicting and unpredictable. This broken system fails those who accept the appointment of receivership and may, as in the instant case, leave the

receiver—the only party with no responsibility for the mess the receiver is charged with cleaning-up—"holding the bag."

Certiorari is also warranted due to the glaring error by the lower courts in distorting the convergence of freeze orders with letter of credit law. The actual asset that is being frozen by the Receiver—the funds on deposit at the bank as opposed to the letters of credit or proceeds therefrom—was already physically segregated in an account at Bank of America, and, as long as freeze orders and 28 U.S.C. § 754 do what they say they do, there should not be an opportunity for an error of law.

Worse yet, this material error created a blind spot for the lower courts, enabling the State agency, the Railroad Commission of Texas ("RCT") to violate the freeze orders, the orders dismissing the regulatory liabilities, and the orders providing the protections for the Receiver of any such regulatory liabilities. Unfortunately, the Receiver took these District Court orders to mean what they said in plain English, and he relied on them to form his budget and strategy of liquidation.

It was not until the last asset was to be liquidated, to pay the attorneys and close the Receivership, that the RCT had clandestinely (unbeknownst to the Receiver or the District Court) removed the funds on deposit and was using them to pay the (excused) regulatory liabilities of a non-party. And even though the Receiver was protected from those liabilities, the lower courts provided the RCT with *de facto* immunity from any of the District Court's orders.

This case is the perfect case for clarifying precedent and guidance for Federal receivers because the relevant facts are either undisputed or established by the lower courts in this case. The precedential value of the Supreme Court's wisdom on these matters would aid all lower courts as well as those persons accepting Federal equity receivership appointments, and those persons and entities dealing with Federal equity receivers will benefit by the Supreme Court's wisdom on the matters raised herein.[1]

A. Exclusive *In Rem* Jurisdiction, Notice to All Parties, and Sequestering of the Funds.

This case arises out of a substantial Ponzi scheme full of a number of sham entities that were used by their puppeteers to create a financial mess that scattered defrauded investor funds nationwide. The SEC filed suit, pursuant to 28 U.S.C. § 1331 and 1337, to shut it all down. Federal questions arose out of the Securities Act of 1933 and the Securities Act of 1934, 15 U.S.C § 77(a) and 15 U.S.C. § 78aa, and specifically:

> Federal jurisdiction in this case is based, not on diversity of citizenship, but on a federal equity receivership arising out of violation of federal security regulation statutes. The receiver was appointed in this case to prevent further violations of the federal securities laws and to preserve the assets for the benefit of the investor-creditors of the companies.

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[1] The facts that follow are taken from the Appellant's Brief pp.6-16 and Short Appendix (May 30, 2018 [7th Cir. Doc. 15]) in addition to the Supplemental Appendix (May 30, 2018 [7th Cir. Doc. No. 16]).

Bryan v. Bartlett, 435 F.2d 28, 32 (8th Cir. 1970), reh'g *en banc* denied (1971) (federal law and not Arkansas law to be used for issues related to receivership assets).

The architects of the Ponzi dispersed the funds everywhere, and some of the funds were difficult to track, but sometimes birds of a feather flock together. The $250,000 in defrauded investor funds at issue in this case landed in the hands of convicted felon, Michael Wilson, d/b/a Alco Oil & Gas Co., LLC ("Alco"). Although neither Michael Wilson nor Alco were ever parties in this case, they were the Receiver's focus because Michael Wilson used his own "robotic tool" and "evil zombie" company, Alco, to launder the funds from his Ponzi-scheming acquaintances.

At the time, Alco was already a long time owner and operator of a number of oil and gas leases in Texas, under the authority of the RCT. Alco was already the RCT's approved "operator of record," for the oil and gas leases that later became assets of the estate, and Alco already had "financial assurance" with the RCT. The wells on the relevant leases were old—some dating to the 1930s and already subject to fines and penalties by the RCT.

So when Michael Wilson received the $250,000 from the fraudsters, he put it up as security to replace Alco's existing "financial assurance" with RCT that supported his status an "operator of record" for the RCT. He deposited those funds in a CD with Bank of America who in turn issued a letter of credit to RCT to serve as Alco's operating bond.

Thanks to the FBI and SEC, the Receiver was on the trail of these shenanigans and filed the requisite 28 U.S.C. § 754 documents in the District Courts of

Texas in order to secure exclusive *in rem* jurisdiction over the funds on deposit at Bank of America. Accordingly, immediately after the defrauded investor funds were deposited, they were "frozen in place," at "Bank of America" per the FREEZE AND TURNOVER ORDER [Distr. Ct. Doc. No. 178], and this was made known to all of relevant parties.

The RCT was notified from the get-go and remained so throughout the duration of the case:

> Since the beginning of this case, the Railroad Commission has known of the court's oversight of the leases, the receiver's claim to the bond, and the governance of the freeze and turnover order concerning any resolution to issues concerning the leases and bond.

(2018 OPINION AND ORDER, at App.15a-16a).

Bank of America, of course, was also served with the same FREEZE AND TURNOVER ORDER ([Distr. Ct. Doc. No. 178] p. 6), and given that funds were sitting in CD, the Receiver rated this estate asset as one of his safest and so left it "frozen in place," per the terms of the FREEZE AND TURNOVER ORDER, and opted to leave it in place until the final liquidation. The Receiver anticipated that the final liquidation would happen in short order not over a decade later.

But first the convicted felon with a long fraud rap sheet had to be removed from the estate's assets. When the Receiver sought to remove Michael Wilson and Alco from the assets, the Receiver surprisingly encountered resistance from the RCT. Indeed, the RCT would not allow us to remove Alco as the operator of record, and for the most part would not give us stand-

ing. The specifics on this can be found in the Affidavits of Attorney J. Michael Katz [Dist. Ct. Doc. No. 1112-1] and Attorney T. DeBlasio [Dist. Ct. Doc. No. 1112-2]. (Suppl. Appx. [7th Cir. Doc. No. 16] pp. 65-68 and pp. 84-85)

Short of suing the RCT for its obstructive stance, which would have made all future transfers of leases more cumbersome because of the need for RCT's consent to operator transfers, the Receiver's only option was to remove Michael Wilson from the scene. The freeze had already stripped Alco of most of its assets, such as the $250,000 in funds on deposit at Bank of America, and the Receiver fought in Federal and state courts for a couple years until he was ousted. Eventually Michael Wilson went to jail, ousted from Alco, leaving Alco as a shell, but as the "operator of record."

That ends phase one of the funds on deposit at Bank of America. The prolonged and tortured duration between the readying of this prized asset to its attempted liquidation may have corrupted memories and permitted for incorrect inferences to be used against the Receiver, but no where and no way did the Receiver ever lose his position that it was the cash on deposit at Bank of America that was his frozen asset to be liquidated, not the letters of credit or some other claim. The cash itself. And once Michael Wilson was segregated from it and Alco, the path to the asset's liquidation was unhindered . . . so it seemed.

B. Pacifying the RCT in Order to Liquidate the Leases—by Keeping Alco as "the Operator of Record"—and Protecting the Estate from All Alco Liabilities, Past and Present.

The District Court, back when it was closer to the relevant facts and law, perfectly described this second phase related to the funds on deposit at Bank of America:

> Once Mr. Wilson was out of the picture, BET and ALCO came to an agreement and this court's order of September 5, 2006 [Doc. No. 487] determined that ALCO had assigned ownership to BET on July 25, 2002. The receiver designated ALCO to be the operator of the leases. The September 5, 2006 order lifted the freeze order as to ALCO so ALCO could operate the leases without violating the freeze order. The receiver's next task was to liquidate BET's assets (sell the leases) and give restitution to defrauded First Choice investors. But the receiver couldn't do this because certain other parties were known to claim interests in the property . . .

(January 20, 2010 OPINION AND ORDER, [Dist. Ct. Doc. No. 680]; Short Appx. [7th Cir. Doc. No. 15] p. 12).

The reference to that September 5, 2006 OPINION AND ORDER ([Dist. Ct. Doc. No. 487] p. 8. ¶ 4) is key because that order set forth Soam Oil and Gas Investments, the purchaser of Alco, as the "operator of record," but also explicitly recognized that such operatorship by Soam/Alco was "subject to its own direction, costs and discretion." A previous order also made clear exactly who was responsible for what. The

June 26, 2006 ORDER ([Dist. Ct. Doc. No. 471]; Short Appx. [7th Cir. Doc. No. 15] pp. 44-45) explained the scenario as follows:

> 1. The 9-17-03 freeze order shall continue to apply to the assets claimed by Branson Energy Texas, Inc., and Alco.
>
> * * * *
>
> 3. The 9-17-03 freeze order is lifted in favor of Alco, the receiver, and their designees, in-so-far as is necessary to maintain the value of the subject oil and gas assets, including repairs, operations, and improvements. All costs to repair, operate or improve the oil and gas assets shall be the responsibility of Alco at Alco's discretion.

It is clear from the ORDER's language below that no assets were moving, the Receiver was not going to be involved, and the Receiver was not committing any obligations of the estate.

These orders are expressly clear concerning the limited nature of the lifting of the freeze. No funds are to be committed by the Receiver—most notably the funds on deposit at Bank of America[2]—and all costs are are Alco's/Soam's. There was never a question about who was taking on this liability—Soam was—and no Receivership assets were to be dedicated to

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[2] There would have been a great deal of discussion and sought-after court approval if the Receiver had the non-sensical idea of re-uniting the funds on account at Bank of America with Alco. It would have received much discussion in the court because a Receiver does not easily part with $250,000 just to pacify the RCT. Undoubtedly, another route would have been chosen.

this effort. (Short Appx. [7th Cir. Doc. No. 15] p. 44; Suppl. Appx. [7th Cir. Doc. No. 16])

And the Receiver's protection from any Alco liabilities went one step further—the District Court, in approving the sale of the leases operated by Alco extinguished all past and present liability associated with Alco's operations. (See, *e.g.*, 4/16/10 SALE ORDER [Dist. Ct. Doc. No. 686] p. 7, ¶ E; 9/22/10 SALE ORDER [Dist. Ct. Doc. No. 703] p. 6, ¶ G; 11/1/13 SALE ORDER [Dist. Ct. Doc. No. 861]). This was not boiler-plate or accidental. It is clear that the court was erasing all Alco liabilities associated with operation of the oil and gas operations, especially regulatory liabilities (which were the only known liabilities to exist). The exculpatory language used by the court recognizes the deplorable condition that the leases were in and that their prior management, at the hands of Michael Wilson, was not good.

What's more, the RCT was involved in these sales and knew of the transactions that were occurring because they are part of the transaction. The RCT has to sign-off on the transfer of operatorship, and they eventually did which has been made public in the filings in the District Court. The RCT was right every step of the way and never did object to any of the transfers, the SALE ORDERS or otherwise make a claim to the Receiver's right to the funds on deposit at Bank of America.

Furthermore, with Alco being a third party, a non-party, forced upon the Receiver by the RCT, and with the Receiver staying in liquidation mode, never seeking to actually operate, never seeking any revenue, and there were no benefits to the estate—simply the

passage of time. Moreover, those regulatory liabilities were extinguished in final sale orders, and, accordingly no party including Alco can be liable for them.

In sum, as for this phase surrounding the $250,000 on deposit at Bank of America, appeasing the RCT was successful by leaving Alco in there as the operator. There was no indication of any movement of the funds on deposit at Bank of America, and, why would there be if the orders at the time made clear that the Receiver was not going to incur any operational costs. The Receiver was expressly protected from any regulatory liabilities.

C. While Seeking Liquidation of the Funds on Account at Bank of America, the Discovery of RCT's Clandestine Activities Related to Those Funds.

This third phase in the life of the funds on deposit at Bank of America involves the attempts to liquidate the funds. The $250,000 on deposit was to serve as the last asset to liquidate—because of its liquidity—and whenever there was light at the end of the tunnel, the Receiver referenced the funds in his liquidation status reports.

The Receiver never lost sight of the funds on account at Bank of America, and he publicly referenced his eagerness to get to them. He referred to them in 2010 as "[t]he Receivership's interest in a Surety Bond held by Bank of America." (3/02/10 [Dist. Ct. Doc. No. 684] p. 1; *see also* 10/21/10 Receiver's Eighteenth Liquidation Report [Dist. Doc. No. 704] p. 4) With a little light at the end of the tunnel in 2011, the Receiver referred to liquidation of the funds as follows: "The Bank of America deposit of $250,000 . . . will either be

resolved through settlement or summary proceedings." (8/4/11 Receiver's Twentieth Consolidated Liquidation Report [Dist. Ct. Doc. No. 774] p. 2)

With the lease litigation and sales concerning the Texas oil and gas leases completed, it was time for the Receiver to finally liquidate the funds. It was with these efforts that the Receiver learned of the RCT's clandestine activities. It is important to note that the RCT never filed a claim or insinuated that it was making a claim to the funds on account at Bank of America. The Receiver had no idea what he was going to discover regarding the status of the funds on account at Bank of America. None of the details are known by the Receiver, but the funds made it over to the RCT, and the Receiver demanded their return. There were demand letters and discussions, but no progress.

Hence, desperate to close the Receivership and be in position to pay his attorneys, on August 31, 2016, the Receiver submitted his "Verified Final Budget and Revised Plan for Closure of the Receivership" [Dist. Ct. Doc. No. 1093]. The District Court approved that budget [Dist. Ct. Doc. No. 1094] and authorized the receiver to make immediate demand of the RCT for turnover of the $250,000. The failure of the RCT to turn the funds over led to the July 26, 2017 "Verified Application for Summary Proceedings and Civil Contempt, Disgorgement, and Other Relief Against the Railroad Commission of Texas," which contained several different causes of action, including turnover (although only contempt gets heard and resolved).

D. Revelation of the RCT's Immunity to All of the Orders in the Case, the Dismissal of All of the Receiver's Claims Without a Hearing, and the Implosion of the Receiver's Budget and Final Plan for Closing the Receivership.

This fourth phase surrounding the funds on account at Bank of America concerns the litigation that leads this case to the Supreme Court. First of all, after the Receiver filed the Verified Application for Summary Proceedings and Civil Contempt Contempt, Disgorgement, and Other Relief Against the Railroad Commission of Texas [Dist. Ct. Doc. No. 1097], only the contempt claim received any analysis. Obviously contempt was the claim to lead with, but not at the expense of all other claims.

Even as to the contempt claim, the Receiver was not afforded an opportunity to refute the defenses of the RCT. The Receiver does not believe they are meritorious and strenuously objected to the District Court and 7th Circuit that the facts being alleged by RCT needed to be vetted. While giving the cause of action for turnover scant mention, the District Court simply dismissed the application against the Receiver in its entirety, without a hearing, accepting all of the RCT's "evidence" without any opportunity to challenge it, and giving the Receiver no avenue to pursue other causes of action against the RCT. (Appx. at p. 16a)

The Receiver appealed this final decision to the 7th Circuit Court of Appeals pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1294. The Court of Appeals affirmed the District Court.

REASONS FOR GRANTING THIS PETITION

The Court should take this case to examine the issues set forth below in order to resolve the problems that beset court-appointed receivers in Federal equity matters, wherein there is no statutory guidance or framework.

I. Federal Equity Receivers, Who Pay Their Expenses From Estate Assets, Need Rules Upon Which They Can Rely Such as the Exclusive *In Rem* Jurisdiction of 28 U.S.C. § 754, the Procedures of a Freeze Order, Protective Orders, and Final Sales Orders That Absolve Liabilities.

As set forth above in the Statement of the Case, the RCT never filed a claim in Receivership estate, never filed notice of any kind that it was taking an asset continually claimed by the Receiver, and never proved-up any costs or the relation of those costs to the Receiver.

A. If 28 U.S.C. § 754 Provides Exclusive, *In Rem* Jurisdiction, and a Freeze Order Specifically Lists the Account Holder of Where the Asset in Question Is Located, and a State Agency Has Notice of the Jurisdiction, the Freeze Order and the Receiver's Claim, the State Agency Should Be Required to Air Its Alleged Claim in Court.

Unless 28 U.S.C. § 754 is to be rendered useless and fail to serve the purpose Congress intended for it, and unless all rulings in Federal equity receiverships are subject to be trumped at the whim of a State agency,

a claim must be filed against an asset claimed by a Federal Receiver, pursuant to a freeze order with procedures for making such claims. This must be the case regardless of a mistaken understanding of the situation or alternative interpretations of the facts at hand. A Federal receivership cannot function unless this is a mandatory rule.

With the current dearth of rules in Federal equity receiverships, rules that always have been and will need to be fashioned by the Federal courts, a scenario similar to the instant case will be encouraged. A State agency conceal its motive and its plan, waiting for the proper time, or out waiting the receiver forever, while receiver plans his liquidation budget.

The RCT knew for 15 years what was going-on in the case in terms of the Receiver's plans for the leases and the bond. Unfortunately, it took that long to clean up the mess they helped construct with the fraudsters. But, by not having to file a claim, and thereafter not having to justify or otherwise prove-up any of its alleged expenses somehow attributable to the Receivership, the RCT watched the Receiver freeze this asset (the funds at Bank of America), protect against the very liabilities on which RCT's expenses are based, absolve those liabilities through the sale of leases, and then rip the rug right out from under the Receiver's feet when the Receiver tries to liquidate the funds to close the estate.

B. If a Federal Receiver Cannot Rely on the Appointing Court's Orders That Explicitly Prevent the Receiver from Being Saddled with Certain Expenses, and Yet, a State Agency Can Inflict Those Certain Expenses on the Estate, at the 11th Hour, Administering a Federal Estate Will Be Near Impossible and the Slippery Slope with Such a Ruling Will Disable Federal Equity Receiverships as a Remedy.

As explained above in the Statement of the Case, and in more detail in the proceedings before the 7th Circuit Court of Appeals, once Michael Wilson, the convicted felon, was ousted from Alco, and a new party bought Alco's business, the Receiver was willing to appease the RCT by recognizing Alco as the operator (since the RCT was unwilling to depose Alco as the operator). But, in so appeasing, the District Court provided protections to the Receiver so that none of the regulatory expenses nor liabilities that might arise from Alco's new operations would fall on the Receiver.

These protections are without ambiguity. For instance, the September 5, 2006 OPINON AND ORDER ([Dist. Ct. Doc. No. 487] p. 8. ¶ 4) is key because the order sets forth Soam Oil and Gas Investments, as the purchaser of Alco and the "operator of record," but also explicitly recognizes that such operatorship by Soam/Alco was "subject to its own direction, costs and discretion." A previous order was even more succinct regarding where expenses and liabilities would fall:

> 1. The 9-17-03 freeze order shall continue to apply to the assets claimed by Branson Energy Texas, Inc., and Alco.
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> * * * *

3. The 9-17-03 freeze order is lifted in favor of Alco, the receiver, and their designees, in-so-far as is necessary to maintain the value of the subject oil and gas assets, including repairs, operations, and improvements. All costs to repair, operate or improve the oil and gas assets shall be the responsibility of Alco at Alco's discretion.

(June 26, 2006 ORDER [Dist. Ct. Doc. No. 471]; Short Appx. [7th Cir. Doc. No. 15] pp. 44-45)

The meaning of the District Court's terms here are without genuine question. The question is what happened to that clear meaning when the RCT revealed at the 11th hour that it had acquired the funds on deposit at Bank of America. Something turned the State agency into a clandestine super-creditor with the highest priority status, which makes it near impossible to operate as a Federal equity receiver.

C. Liabilities That Are Expunged as Part of Final Sale Orders Need to Be Honored in Order to Attract Third Parties to Those Sales and to Enable the Receiver to Appropriate Expenses.

It is common for the courts to extinguish liabilities associated with property interests in order to move them out of the estate and to provide them with a "fresh start." Such use of equity in the case at hand, when the Receiver has inherited an estate previously managed by fraudsters. The release of such liabilities is rendered even more appropriate here, as to the RCT, because the RCT was the party that approved of Michael Wilson, d/b/a Alco, as the operator that ran the leases into the ground and switched his final

assurance literally months before the Receiver was knocking at the RCT's door.[3]

The Receiver was relying on the fact that the erasure of Alco's liabilities was authentic and valid. Surely Alco was relying on such a fact. The buyers were relying on such a fact. What does that do to the buyers and Alco when the claim of the RCT is that those liabilities are still being collected upon and the RCT is not done. Obviously for the Receiver, it creates substantial problems because the Receiver cannot now pay for the expenses incurred the last couple years of the administration of the estate. Instead those administrative expenses are trumped by the expenses of a non-party, incurred (whether latent or manifest) prior to the existence of the Receivership, despite the fact that those expenses were expressly eliminated nine years ago.

Moreover, all relevant parties believed such expenses and liabilities to be extinct because there has never been an attempt to collect them in the District Court and there was never a mention that such expenses existed until 2017 when the Receiver demanded turnover of the funds.

It bears hearkening back to the District Court's finding that the RCT always knew what was going on, and yet, stayed conveniently silent amidst all these orders being issued in favor of the Receiver's reliance on liquidating the funds on account at Bank of America:

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[3] The point here is that the RCT could have required new financial assurance from Michael Wilson, when the Receiver showed up claiming the bond funds and the leases.

> Since the beginning of this case, the Railroad Commission has known of the court's oversight of the leases, the receiver's claim to the bond, and the governance of the freeze and turnover order concerning any resolution to issues concerning the leases and bond.

(2018 OPINION AND ORDER, at App.15a-16a).

And thus, this Court should grant the writ for certiorari to address these issues and formulate rules of law that will provide the proper guidance and not allow for great injustices to fall upon the court-appointed receivers who are administering the Federal estate.

II. In a Split from Circuits That Do Not Apply 28 U.S.C. § 959(b) to Liquidating Estates, the 7th Circuit Erroneously Applied 28 U.S.C. § 959(b) and the Rationale of *Midlantic* to the Receiver's Liquidation Efforts, Demonstrating the Need for Supreme Court Guidance.

Although noting that *In re Wall Tube & Metal Products Co.*, 831 F.2d 118 (6th Cir. 1987) finds liquidation verses operation inconsequential, the Northern District of Indiana court correctly maintained that "t]he overwhelming authority established by federal courts is that § 959(b) does not apply to the trustee in a Chapter 7 case unless the trustee continues to operate the debtor's business." *Minn. Pollution Control Agency v. Gouveia*, 345 B.R. 619, 637 (Bankr. N.D. IN 2006) (string citing a host of bankruptcy decisions). That the Northern District of Indiana is in the 7th Circuit is intriguing because the 7th Circuit appears to have

a rule of thumb that if a receiver is in existence, the receiver is operating.

When the words of the Supreme Court and Congress no longer have meaning, and can be ignored, the Supreme Court needs to reset the standard, especially in the context of Federal equity receivers where there is no general common law or statutory framework.

A. In the Absence of Federal Common Law or a Governing Statutory Framework, Federal Equity Receiverships Inheriting Shams and Scams Need Their Own Standard for Application of 28 U.S.C. § 959(b) and the *Midlantic* Principle.

Obviously, most of the 28 U.S.C. § 959(b) and *Midlantic* caselaw arises out of the Bankruptcy Code. Yet every bankruptcy filing under the Code, even involuntary bankruptcies, involve voluntary participants. They may have made some wrong turns and they may have even made some illegal turns, but in virtually all cases they are not a sham for the purposes of operating a scam. The same can be said of most receiverships.

That said, the Federal equity receiver inheriting a Ponzi scheme has no intention of operating, in the normal sense of the word, and is going to be charged, by the appointing court, to liquidate as soon as possible. The sole goal for a Federal equity receiver, as was the case here, is to collect all the defrauded investor funds that are collectible and return them to investors. And so, if that is the sole goal, the Federal equity receiver needs to know what limits exist that he or she must work around when budgeting and strategizing.

The case can be made, despite some variation amongst the Circuits, that a liquidating trustee or a receiver is outside the mandate of 28 U.S.C. § 959(b) and *Midlantic* principals. And there is an even stronger case that Federal equity receivers, particularly when cleaning up shams and scams, should fall outside the parameters of 959 and *Midlantic*. The Supreme Court needs to put parameters on the intersection of 959 and *Midlantic* so that Federal equity receivers, such as the case here, are not treated in the same manner as bankruptcy trustees and receivers inheriting normal (and legal) business situations.

B. The Intersection of 28 U.S.C. § 959(b) and *Midlantic* Have Been Expanded to Require a Receiver to Pay the Liabilities of a Non-Receivership Entity, Even Though the Liabilities Arose Prior-to the Receivership, the Liabilities Were Extinguished by Previous Court Orders, and the Receiver Was Protected by Court Order Against Those Liabilities.

Without limits on the intersection of 28 U.S.C. § 959(b) and *Midlantic* principals, unjust results like the instant case will arise, and Federal equity receivers will have a difficult time fulfilling budgeting and planning.

This case presents a challenging set of facts that should have made the application of 28 U.S.C. § 959(b) and *Midlantic* principals improbable. But, when the 7th Circuit applies 959(b) to a receiver charged only to liquidate, with only liquidation reports and public expressions referring to liquidation, merely because the receiver recognizes the pre-existing operator that

the RCT will not allow to be removed, there are few situations, if any, where 959(b) would not apply.

The 7th Circuit goes so far as to say that Alco as the operator preserved the estate. Say what? Alco's existence cost the estate hundreds of thousands in losses and expenses, and that was before the loss of the funds on account at Bank of America. The presence of Alco, that the RCT would not allow us to removed, spawned a great deal of litigation and led to much delay. The Receiver would have liquidated the leases and the funds on account at Bank of America as early as 2003-04, at the time the Receiver first gave notice to the RCT. But RCT would not allow the Receiver to separate Alco from the scene, and it took several years to do so, and over five more years dealing with the related litigation, and then another two years getting the RCT to sign off on the transfer of operatorship for the new buyers.

Again, facts such as these markedly make the point that Supreme Court intervention and guidance in this area is a necessity.

III. Without an Opportunity to Be Heard, the Receiver Had All of His Causes of Action Against RCT (in the Application for Summary Proceedings) Dismissed by the 7th Circuit, and Even the Contempt Claim Was Dismissed Without a Hearing and an Opportunity for the Receiver to Rebut the RCT's Defenses.

When the District Court denied the Receiver's motion for contempt, the court apparently denied all claims against RCT: "the court DENIES the Receiver's motion for summary proceeding and civil contempt,

disgorgement and other relief [Doc. No. 1097]." (App. 19a) The 7th Circuit followed suit in affirming the District Court. The 7th Circuit's analysis focused primarily on the contempt claim and affirmed on that basis.

This is problematic for two reasons. First, as is apparent on the face of the Application for Summary Proceedings for Civil Contempt, Disgorgement, and Other Relief" contains a host of other claims, as all of the Receiver's summary proceeding complaints have. It did lead with contempt, and for obvious reasons that was to resolved first. But the Receiver never had an opportunity to be heard on the rest of its claims against RCT, and the consequences are significant for the Receiver.

Second, the 7th Circuit's blind focus on just contempt also changed the standard of review from *de novo* to abuse of discretion. To eliminate all of the Receiver's claims against the RCT, both legal and equitable, the Receiver should have had the chance to be heard on them. A *de novo* standard of review would have required the 7th Circuit to delve into the facts.

But the 7th Circuit did not even permit the Receiver to have a hearing or otherwise rebut the defenses of the RCT. All of the RCT's defenses to the contempt motion were newly alleged despite the fact that they were years old. The Receiver doubts the factual integrity and merit of any of them and stressed this in briefing to the 7th Circuit. The RCT made off with $250,000 of defrauded investor funds without undergoing any scrutiny as to the validity of its claim.

IV. The 7th Circuit Erroneously Focused on the Letters of Credit Instead of the Funds on Deposit at Bank of America (Which Is What the Receiver Was Pursuing), Thus Demonstrating the Need for Guidance in This Area, Especially When a Federal Equity Receiver and Freeze Orders Are Involved.

The 7th Circuit's statement proves the Receiver's case, and with this argument, we have gone full circle. The 7th Circuit said: "When the [FREEZE] order was issued, the bond was in the hands of Bank of America, and the Railroad Commission had an independent letter of credit from the bank." Precisely. The Receiver froze the bonds funds—cash on deposit—in the hands of Bank of America, and Bank of America is specifically listed in the FREEZE ORDER (9-17-03 [Dist. Doc. No. 178] p. 6) along with Alco, and Michael Wilson.

If a freeze order in this context does its job, the fraudulent intent of the depositing of funds evaporates and the Receiver's intent for the funds controls. This should especially be true in a situation where all the relevant parties have notice. Caselaw supports that the funds that support the letter of credit are estate assets: "where the claim centers around the collateral is a red herring.'" *Int'l Finance Corp. v. Kaiser Group Int'l Inc.*, 399 F.3d 558, 566 (quoting from *Redback Networks, Inc. v. Mayan Networks Corp.* 306 B.R. 295, 299 (9th Cir. BAP 2004)).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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