

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of January, two thousand eighteen,

United States Securities and Exchange Commission,

Plaintiff,

Fractal Fund Management, Ltd., Fractal P Holding, Ltd.,
Rowberrow Trading Corp.,

ORDER

Docket No: 17-53

Intervenor - Plaintiffs,

v.

Michael Kenwood Capital Management, LLC, Michael
Kenwood Asset Management, LLC, MK Energy and
Infrastructure, LLC, MKEI Solar, LP, Highview Point
Partners, LLC, Highview Point LP, Highview Point
Offshore, LTD., Highview Point Master Fund, LTD.,

Defendant - Appellees,

John J. Carney, Esq.,

Reciever - Appellee,

v.

Francisco Illarramendi,

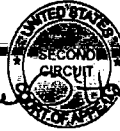
Defendant - Appellant.

Appellant Francisco Illarramendi filed a petition for panel rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



Catherine O'Hagan Wolfe

17-53-cv
SEC v. Warman

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of November, two thousand seventeen.

PRESENT:

PIERRE N. LEVAL,
DEBRA ANN LIVINGSTON,
DENNY CHIN,
Circuit Judges.

UNITED STATES SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

FRACTAL FUND MANAGEMENT, LTD., FRACTAL P
HOLDING, LTD., ROWBERROW TRADING CORP.,

Intervenor-Plaintiffs,

v.

MICHAEL KENWOOD CAPITAL MANAGEMENT, LLC,
MICHAEL KENWOOD ASSET MANAGEMENT, LLC,
MK ENERGY AND INFRASTRUCTURE, LLC, MKEI
SOLAR, LP, HIGHVIEW POINT PARTNERS, LLC,
HIGHVIEW POINT LP, HIGHVIEW POINT OFFSHORE,
LTD., HIGHVIEW POINT MASTER FUND, LTD.,

Defendants-Appellees,

17-53-cv

MANDATE ISSUED ON 01/23/2018

JOHN J. CARNEY, ESQ.,

Receiver-Appellee,

v.

FRANCISCO ILLARRAMENDI,

Defendant-Appellant.

For Defendant-Appellant:

FRANCISCO ILLARRAMENDI, proceeding *pro se*,
Fairton, New Jersey.

For Defendants-Appellees and
Receiver-Appellee:

JONATHAN B. NEW (Amy E. Vanderwal, *on the
brief*), Baker & Hostetler LLP, New York, New
York.

Appeal from an order of the United States District Court for the District of Connecticut
(Arterton, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
AND DECREED** that the order of the district court is **AFFIRMED**.

Defendant-Appellant Francisco Illarramendi, proceeding *pro se*, appeals from the district court's December 9, 2016 order (the "Fourth Distribution Order") authorizing a court-appointed receiver, Receiver-Appellee John J. Carney, Esq. (the "Receiver"), to distribute \$5,800,000 of assets recovered from receivership entities to holders of allowed claims, and overruling Illarramendi's objection to the distribution based on his lack of standing. A receivership was established to manage Illarramendi's and his companies' assets during the United States Securities and Exchange Commission's ("SEC") action against them for violations of Sections 206(1), (2), and (4) of the Investment Advisers Act of 1940 and Rule

206(4)-8 thereunder. The district court approved the Receiver's distribution plan, and three distributions pursuant to the distribution plan have already occurred, all without objection from Illarramendi. The district court has since entered judgment in favor of the SEC in the underlying civil action. In a parallel criminal action, Illarramendi pleaded guilty to five felony offenses in connection with his involvement in a five-year-long Ponzi scheme that resulted in hundreds of millions of dollars of losses. See *United States v. Illarramendi*, 677 F. App'x 30 (2d Cir. 2017) (summary order); *United States v. Illarramendi*, 642 F. App'x 64 (2d Cir. 2016) (summary order); see also *S.E.C. v. Michael Kenwood Capital Mgmt., LLC*, 630 F. App'x 89, 90 (2d Cir. 2015) (summary order). We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

We review *de novo* a district court's determination that a party lacks standing. See *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79, 84-85 (2d Cir. 2014). To have Article III standing, a party must show (1) that he "ha[s] suffered or [is] imminently threatened with a concrete and particularized 'injury in fact'" (2) that is "fairly traceable to the challenged action of the defendant" and (3) that is "likely to be redressed by a favorable judicial decision." See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Illarramendi, despite not objecting to the Receiver's distribution plan or the first three distributions pursuant to the distribution plan, belatedly raises a series of unmeritorious arguments that he now has standing to object to the Fourth Distribution Order. First, to show an "actual injury," Illarramendi contends that his term of imprisonment was based on the Receiver's loss calculation (which was equivalent to the allowed claims). However, the

Not True.
Did object to Plan & later due to immaturity we will not object further.

sentencing court did not enhance Illarramendi's term of imprisonment based on the Receiver's evidence of victims' losses, but rather on Illarramendi's fraudulent gains from the Ponzi scheme. *See Illarramendi*, 642 F. App'x at 64-65. And Illarramendi's term of imprisonment is not traceable to the Fourth Distribution Order because there is no nexus between the distribution and his term of imprisonment. *See Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013). Accordingly, Illarramendi's invocation of the Receiver's loss calculation at sentencing fails to confer standing to challenge the Fourth Distribution Order.

This is wrong.
Describe
Directly
Traceable

Illarramendi also asserts that the restitution order in his criminal case is an actual injury conferring standing. Although the restitution order is arguably traceable to the Receiver's distribution plan because the sentencing court relied on the Receiver's loss estimates to determine the amount of restitution, denying the Fourth Distribution Order would not affect the amount of restitution. Thus, this injury fails to satisfy Article III's redressability requirement. *See Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 96 (2d Cir. 2017). The proper vehicle for Illarramendi to challenge the restitution order in the criminal case was to appeal; he did, and we affirmed. *See Illarramendi*, 677 F. App'x at 30-31. We thus reject Illarramendi's claim involving the restitution order in his criminal case.

Yes it was
b/c I am
the
first
to do it



Illarramendi also contends that the Fourth Distribution Order should be denied so that certain funds could be used to pay other claimants who were paid only 92 percent of their allowed claims. But this argument also cannot succeed because Illarramendi lacks standing to assert claims on behalf of other claimants. *See Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 358 (2d Cir. 2016); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167 (1965).

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We have considered all of Illarramendi's remaining arguments and find them to be without merit. We need not reach a conclusion whether Illarramendi in fact lacks Article III standing. It suffices to affirm the district court's dismissal of his claims to rule that he has not shown facts that would entitle him to the relief he seeks. Accordingly, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit




UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

S.E.C.,

Plaintiff,

v.

Civil No. 3:11cv78 (JBA)

Francisco Illarramendi,

Defendant.

Rulings on Receiver's Motion for Approval of Subsequent Distribution and Establishment of Third Subsequent Distribution Date [Doc. ## 1012, 1013] and Defendant Illarramendi's Motion Requesting the Court's Denial of the Receiver's Proposed Third Subsequent Distribution [Doc. ## 1015, 1016]

The Court-appointed Receiver John J. Carney [Doc. # 666] seeks authorization to distribute \$5,800,000.00 of assets recovered from the Receivership Entities to holders of Allowed Claims, determined pursuant to the Claims Administration Order #800, and a date by which he shall do so. There have been three prior Court-approved distributions: December 12, 2014 \$264,343,551, June 29, 2015 \$51,123,613.71, and December 31, 2015 \$8,737,679.57. The Claims Schedule for the instant proposed distribution appears as Schedule A to the Receiver's Motion. The Receiver's Distribution Notice containing the deadline for objections and proposed treatment of claims appears consistent with the Receiver's Distribution Plan [Doc. # 905-1].

The only objection received by the Court is from Defendant Francisco Illarramendi, who continues to maintain that the claim submitted to the Receiver by PDVSA is over-valued due to exchange rates used and PDVSA's corrupt activities in Venezuela, and its basis has never been

subjected to "effective evidentiary scrutiny." Def.'s Mot. Requesting Denial [Doc. # 1015] at 11. However Defendant offers no evidentiary basis for his belief of the impropriety of the PDVSA claim, only conclusory assertions claiming that the Receiver wrongly corroborated PDVSA's claim and thus presented an erroneous claim valuation to the Court for Plan approval and to Judge Underhill for his sentencing and restitution determinations.¹ See, e.g., *SEC v Michael Kenwood Cap. Mgmt*, 630 F.App'x. 89 (2d Cir. 2015). This PDVSA claim was approved October 27, 2014 as part of the Plan Approval Order to which Ramon Illarramendi, but not Defendant, objected. After the hearing, Ramon Illarramendi was found to lack standing for his challenges to PDVSA's and Fractal's claims "in the absence of any record basis for his conclusory claims" [Doc. # 941, Order granting Receiver's Motion for Approval of Distribution Plan and Initial Distribution.]

At its core, Defendant's objection is based on his view that this civil enforcement action and his criminal prosecution, *United States v. Illarramendi*, No. 11-cr-41 (SRU), are "inextricably intertwined cases" such that the amount of the PDVSA claim improperly drove up the loss amount calculation at his sentencing, resulting in a longer term of imprisonment and a

¹ The previous denials of defendant's motions challenging PDVSA's claim also were based on his view that the valuation was based on lack of proper information or misleading information provided by the Receiver. His claim that he was previously prevented from introducing evidence because of the confidentiality agreement he "was forced to sign in order to obtain evidence to defend myself in the Criminal Matter" is of no continuing force as he acknowledges that the evidence is now public and he "can now properly present it to the Court" but has not proffered any. Def's. Rebuttal [Doc. # 1023] at 8.

“crippling” Restitution Order totaling \$370,482,716.54. Def.’s Rebuttal [Doc. # 1023] at 9-10. See also, *United States v. Illarramendi*, No. 11-cr-41 (SRU) [Doc. # 198]. In fact, the Second Circuit observed that Judge Underhill had determined that investor loss was difficult to determine and instead “relied on Illarramendi’s gains from his fraudulent scheme, which totaled over \$20 million, to calculate a guideline range of 188-234 months’ imprisonment and imposed “what was effectively a below Guideline sentence of 156 months’ imprisonment.” *United States of America v. Illarramendi*, 642 F.App’x 64, 65 (2d Cir. 2015). Although his conviction and sentence were affirmed by the Second Circuit’s Mandate issued May 14, 2016, his challenge to the Restitution Order [Doc. # 198, No. 11-cr-41 (SRU)] remains pending before the Second Circuit. *United States of America v. Illarramendi*, No. 15-4160. Further, he recently filed a § 2255 motion claiming ineffective assistance of counsel at all stages. See *Illarramendi v. United States of America*, No. 16-cv-1853 (SRU).

The relationship between the amount of PDVSA’s claimed loss and Defendant’s sentence he claims shows his ‘concrete injury,’ and thus his standing to object to the Receiver’s Motion for Approval of Subsequent Distribution. The Receiver represents that Defendant is not a Claimant for any funds proposed to be distributed nor a creditor of any Receivership Entity, and thus has no interest in how defrauded creditors are reimbursed for the losses he caused. The Receiver further notes that because Defendant’s own funds are separately held in escrow, they will not be affected by the proposed distribution. Thus, the Receiver maintains that Defendant lacks

standing to object to the Receiver's Distribution Plan, as well as the valuation or the timing of claims under the Plan. The Court agrees that Defendant lacks standing to oppose the Receiver's proposed distribution as he would be unaffected in any way even if his Objection were sustained.

See S.E.C. v. Michael Kenwood Capital Mgmt., L.L.C., 630 F. App'x. 89, 91 (2nd Cir. 2015). As

well, his allegations of PDVSA's and the Receiver's misdeeds have not been shown to have any evidentiary basis and have been previously considered and rejected by the Court, e.g. Doc. # 1005.

Accordingly, it is hereby ordered:

1. That the Receiver's Motion for Approval of Subsequent Distribution is GRANTED and the Receiver's proposed classification of and payments with respect to the Allowed Claims set forth in the Claims Schedule is APPROVED.
2. Subject to the requirement that the Receiver establish an adequate Reserve Fund with respect to Disputed Claims pursuant to Sections 3.1.2 and 4.3.2 of the Plan, and further subject to the authorization granted pursuant to paragraph 3 of this Order, the Third Subsequent Distribution to Claimants in an amount of five million eight hundred thousand dollars and zero cents (\$5,800,000.00) (the "Subsequent Distribution Amount") is AUTHORIZED.
3. The Receiver is authorized to augment the Subsequent Distribution Amount and decrease the Reserve Fund upon filing a notice with this Court and an amended Claims Schedule (to include an updated estimate of the value of Disputed Claims) at least seven (7) days prior to

the Third Subsequent Distribution Date, provided that (i) the sum of the Subsequent Distribution Amount and any additional funds distributed pursuant to this paragraph 3 (collectively, the "Distribution Amount") must be distributed in accordance with the Plan, and (ii) the Reserve Fund applicable to such Distribution Amount is sufficient to satisfy Section 3.1.2 of the Plan.

4. Without limiting the generality of paragraph 3 above and pursuant to Sections 2.2.4.2 and 4.3.2 of the Plan, the Distribution Amount shall be apportioned among Claimants on a pro rata basis as set forth in the Claims Schedule and in accordance with the Plan.

5. The Receiver shall initiate this Third Subsequent Distribution by January 26, 2017.

6. The Third Subsequent Distribution shall be made from Available Cash held by the Receivership Entities. In making such payments, pursuant to Section 4.1 of the Plan, the Receiver may satisfy his obligation to make distributions under the Plan by either (i) sending via first-class mail a check payable in Cash to each Claimant at the address indicated on such Claimant's Proof of Claim or the last address designated by such Claimant in a Writing to the Disbursing Agent at the Disbursing Agent Address; or (ii) wiring the Cash payment according to wiring instructions provided by the Claimant to the Disbursing Agent, provided, however, that any wire transfer fees that may arise by operation of this clause (ii) shall be borne by the Claimant. All funds represented by void checks not timely reissued shall be forfeited by the Claimant, revert to the Receivership Entities and be treated in accordance with the Plan.

7. Except as otherwise set forth in the Plan, if a Holder has filed a timely objection to the Distribution Motion or to a notice of claim determination or has appealed a final order of this Court approving the Distribution Motion or approving the Plan, the Holder is disqualified from participating in the Third Subsequent Distribution until such objection or appeal is resolved.

8. Nothing in this Order shall restrict the Receiver's authority to compromise and settle any claim, or resolve any objection to a notice of claim determination, at any time, as appropriate, without further order of this Court.

9. Any Claimant who receives a payment pursuant to this Order shall be deemed to have released that portion of the Claim(s) for which payment was made in accordance with the Plan.

10. Nothing in this Order shall supersede this Court's Claims Administration Order [Doc. # 800] or Amended and Restated Order Appointing the Receiver [Doc. # 666] and functional predecessors of same. ¶ 11.

11. The Court retains jurisdiction over the matters set forth in the Plan and enforcement of the Plan's provisions.

12. Defendant's objection to Third Subsequent Distribution is overruled.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 9th day of December 2016.

**Additional material
from this filing is
available in the
Clerk's Office.**