No. 18-92

In The
Supreme Court of the United States

DAVID PERRY,

Petitioner,

v.

BRUCE P. KRIEGMAN, solely in his capacity as court appointed Chapter 11 Trustee for LLS America LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the United States Supreme Court grant certiorari under United States Supreme Court Rule 10?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

Bruce P. Kriegman, solely in his capacity as court appointed Chapter 11 Trustee for LLS America LLC (hereafter "Trustee").

Lazy M, LLC, Anthony Cilwa, Pacific Ventures Inc., Victoria Cilwa, Shelley Armstrong, Mark Trikowsky, David Wares, Lisa Wares, Frank Gyenizse, Beverly Gyenizse, Daljit Haer, Toby Coriell, Maria Coriell, Ronald Ponton, Tomika Ponton, David Perry and Othelia Spare.

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Perry v. Kriegman (*In re LLS America*), 707 Fed.Appx. 922 (Dec. 21, 2017). *See also* ER00001-00177.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider David V. Perry's ("Mr. Perry") Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED IN THE CASE

11 U.S.C. § 1106, 11 U.S.C. § 1141, 11 U.S.C. § 544, 11 U.S.C. § 547, 11 U.S.C. § 548, 11 U.S.C. § 550, and RCW 19.40.041.

No constitutional provisions, treaties, ordinances or regulations are involved in this case.

STATEMENT OF THE CASE

A. Statement of Facts.

This adversary proceeding involves recovery of fraudulent transfers made to Mr. Perry. Between August, 2006 and November, 2007 Mr. Perry loaned LLS America $149,975 and was issued promissory notes payable to him, and one promissory note that was payable to him and his daughter Othelia Spare (ER00026)

with annual interest rates of forty percent (ER00496-00505). Between September, 2006 and May, 2009 Mr. Perry received payments on the promissory notes totaling $220,000. ER00510-00558.[1]

There was no indication in the record that Mr. Perry performed any due diligence before or after investing. This lack of due diligence is particularly shocking due to the fact that Mr. Perry considered the investment opportunity in LLS America "too good to be true" and even questioned the legitimacy of the investment. ER00591. There is no indication in the record that financial statements of the Debtor were ever received by Mr. Perry. Rather, Mr. Perry states in his answers to interrogatories that he had "frequent conversations and correspondence especially with regard to possible fraud." ER00577. Mr. Perry received postdated checks for a guaranteed rate of return at the time of the investment. ER00020, ER00022-00026. Mr. Perry also received at least two non-sufficient funds check. ER00026.

LLS America defaulted on payments to Mr. Perry by failing to honor two checks. ER00026. Upon default, Mr. Perry obtained legal counsel, and settled with the Debtor. ER00615-00616. As a result of this settlement, a series of ten $15,000 payments were made to Mr. Perry through his attorney, Richard M. Layne between December 15, 2008 and May 1, 2009. ER00547-00556

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[1] ER___ refers to the Excepts of Record provided to the Court of Appeals, and which will be provided to the United States Supreme Court in the event certiorari is granted.

& 00604. LLS America then defaulted on the settlement causing Mr. Perry to initiate a lawsuit in Spokane County Superior Court in June of 2009.

Two payments, totaling $30,000, occurred within the 90 day look back period for preferential transfers under 11 U.S.C. § 547. ER00555-00556. Mr. Perry acknowledged that he is not entitled to offsets in correspondence and has expressed his desire to repay the victims of this Ponzi scheme. ER00610.

B. Procedural History.

This was one of approximately 225 adversary proceedings seeking recovery of fraudulent transfers initiated by Trustee. The reference of these adversary proceedings to the Bankruptcy Court authorized by 28 U.S.C. § 157(a) was withdrawn, and the adversary proceedings were referred back to the Bankruptcy Court to oversee discovery and dispositive motions. ER00145. The 225 adversary proceedings had two common issues that would determine the course of the mass litigation. The first common issue was whether LLS America engaged in a Ponzi scheme. The second common issue was when did LLS America become insolvent. ER00146-00147. The adversary proceedings were consolidated under FRCP 42 to determine these two common issues. ER00146-00147.

The Bankruptcy Court heard the Plaintiff's Motion for Partial Summary Judgment on the "common issues." ER00144-00177. The Bankruptcy Court determined that LLS America was engaged in a Ponzi

scheme, and explained that the result of that finding was that actual fraud under 11 U.S.C. § 548(a)(1)(A) had been determined. ER00154-00170. Also, the Bankruptcy Court found that LLS America had been insolvent since its inception in 1997. ER00170-00177. These proposed findings and recommendations were approved by the District Court. ER00135-00143.

As a result of the resolution of the common issues, the remaining issues for trial were: (i) that the Trustee had to prove up the amount of transfers to and amount of deposits from the defendants in each adversary proceeding showing reasonably equivalent value (or lack thereof) for purposes of Section 548(a)(1)(B); and (ii) whether the defendants could carry their burden of proving the affirmative defense of good faith. ER00177. The record lacks any indication that Mr. Perry objected to the Motion for Partial Summary Judgment or participated in any way at the hearing on the Motion for Partial Summary Judgment. As the Bankruptcy Court explained, if a defendant were able to prove the affirmative defense of good faith the Trustee's recovery would be limited to the "profit" the defendant received. ER00176. The Bankruptcy Court quoted *Donell v. Kowell*, 533 F.3d 762, 771 (9th Cir. 2008), to explain the accounting that would be necessary during the trial:

> In the context of a Ponzi scheme, whether the receiver seeks to recover from winning investors under the actual fraud or constructive fraud theories generally does not impact the amount of recovery from innocent investors. Under the actual fraud theory, the receiver

> may recover the entire amount paid to the winning investor, *including* amounts which could be considered "return of principal." However, there is a "good faith" defense that permits an innocent winning investor to retain funds up to the amount of the initial outlay. *See* CAL. CIV. CODE § 3439.08(a); *Scholes*, 56 F.3d at 759; *Agritech*, 916 F.2d at 535. Under the constructive fraud theory, the receiver may only recover "profits" above the initial outlay, unless the receiver can prove a lack of good faith, in which case the receiver may *also* recover the amounts that could be considered return of principal. CAL. CIV. CODE § 3439.08(d); *Scholes*, 56 F.3d at 757.

ER00176.

Pretrial matters and the trial were conducted before the United States District Court. ER00060-00095. A two-day trial occurred on January 20 and 21, 2015. ER00041-00059. Mr. Perry appeared by phone. ER00041-00059. The District Court determined that Mr. Perry carried his burden of showing good faith. ER00026. As a result, the Trustee's recovery was limited to Mr. Perry's profit. ER00029 & ER00038. The District Court awarded the Trustee judgment in the amount of $70,025. ER00013-00015.

Following the trial, Mr. Perry filed a document that the District Court deemed a Motion for a New Trial and/or to Amend Judgment. ER00006-00008. As noted by the District Court, this motion sought to:

> re-litigate issues that have already been determined at trial by presenting evidence that was previously before this Court and has already been considered. Defendant's different interpretations of evidence that have already been considered by this Court are not proper grounds for granting a new trial. He fails to provide this Court with evidence of any error of fact or law or any newly discovered evidence. His claims regarding "manifest injustice" are unpersuasive and this Court finds no good cause to grant a new trial.

ER00007-00008.

Accordingly, the District Court denied the motion. ER00006-00008. On December 21, 2017, the Court of Appeals affirmed the District Court. Perry App. 3a.[2] In doing so, the Court of Appeals held the District Court properly concluded that the law of the case doctrine applied to its earlier ruling that LLS America was engaged in a Ponzi scheme and Mr. Perry failed to establish any basis for departing from the doctrine. Perry App. 2a. The Court of Appeals held that the District Court did not abuse its discretion in denying Mr. Perry's post-trial motion under FRCP 59(a) because Mr. Perry failed to set forth any basis for relief. Perry App. 2a. Mr. Perry's contention that service was faulty was rejected as unsupported by the record. Perry App. 3a. The Court of Appeals refused to consider

[2] Perry App. [page number] refers to the appendix attached to the Petition.

documents and facts not presented to the District Court. Perry App. 3a.

On April 19, 2018, the Court of Appeals denied Mr. Perry's petition for rehearing en banc. Perry App. 92a. Mr. Perry filed his Petition for Writ of Certiorari (the "Petition") on July 16, 2018, and the Petition was placed on the docket on July 20, 2018.

SUMMARY OF ARGUMENT

Mr. Perry's Petition should be denied based on the standards for certiorari set forth in United States Supreme Court Rule 10. Simply stated, Mr. Perry has failed to set forth any reason, let alone a compelling reason, why certiorari should be granted. Further, the Court should deny certiorari because Mr. Perry has failed to "present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration. . . ." Rule 14.4. Instead, Mr. Perry has submitted a rambling and verbose narrative in which he airs his grievances with the Trustee, the Trustee's counsel, the District Court and the Court of Appeals and perhaps even the Department of Justice. It is difficult to ascertain why Mr. Perry believes certiorari would be proper, or what at error(s) Mr. Perry believes were made, other than the obvious fact that he is displeased with the results reached by the District Court.

The Court of Appeals decisions affirming the District Court and refusing to review en banc do not

conflict with any decision of another Court of Appeals decision. The Court of Appeals decisions did not decide an important federal question in a way that conflicts with a state court of last resort. The Court of Appeals did not so depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Nor did the Court of Appeals decide an important issue of federal law that has not been, but should be, settled by this Court. Lastly, the Court of Appeals decisions did not conflict with any decision of this Court. Rather, the decisions of the Court of Appeals were warranted based on the lack of any error committed by the District Court.

This case involves a garden variety avoidance action in which the Trustee was awarded judgment for fraudulent transfers and preferential transfers received by Mr. Perry. He is not shielded from liability by the United States Constitution, his personal notions of "due process" or any aspect of "human rights." The evidence overwhelmingly proved Mr. Perry's liability. Mr. Perry is simply a disgruntled litigant who refuses to accept that the Court properly awarded the Trustee $70,025 after trial.

ARGUMENT

A. Mr. Perry's Petition Raises No Grounds for Review by This Court.

As stated above, the Petition should be denied because Mr. Perry has failed to carry his burden under

Rule 10. The Petition does not identify any split of authority amongst circuits of the Court of Appeals. In fact, Mr. Perry does not identify any federal Court of Appeals decision at odds with the District Court and/or Court Appeals for the Ninth Circuit. Nor does the Petition identify any decision by the Court of Appeals involving an *important federal question* that conflicts with a state court of last resort. No state court decision was made in this case. Nor has the Court of Appeals decided any matter that conflicts with a decision of this Court.

As best as the Trustee can discern from the Petition, Mr. Perry argues that the District Court's decisions relating to the Ponzi scheme conflict with the Minnesota Supreme Court's decision in *Finn v. Alliance Bank*, 860 N.W.2d 638, 646-47 (2015). This does not support certiorari. First, the order(s) that Mr. Perry repeatedly complains of were entered by the District Court, not the Court of Appeals. The Court of Appeals simply affirmed that the District Court did not error.

Second, *Finn* does not involve any question of federal law. *Finn* involved the Minnesota Supreme Court's interpretation of the Minnesota Uniform Fraudulent Transfer Act, Minn. Stat. §§ 513.41-.51. 860 N.W.2d at 641. While *Finn* discussed a number of federal cases, *Finn* did not decide any federal question. And certainly, no *important* federal question was decided in *Finn*. Rather, the Minnesota Supreme Court held that the plain text of the Minnesota Uniform Fraudulent Transfer Act ("MUFTA") did not include a provision allowing an evidentiary presumption that statutory elements were

met in the event a Ponzi scheme was being operated, MUFTA did not include the term "Ponzi", MUFTA did not address "schemes" and therefore elements of the state statute could not be presumed from the undisputed existence of a Ponzi scheme. *Id*. at 646-48. *Finn* did not involve any question of federal law and presents no reason for certiorari.

In any event, *Finn* is factually distinguishable from this case. In this case, the Trustee proved at summary judgment that LLS America had been insolvent from its inception in 1997. ER00170-00177.[3] No such finding was made in *Finn*. Rather, the Minnesota Supreme Court appears to have found the exact opposite – that First United Funding, LLC was solvent at some point in time, and that not all transfers occurred while First United Funding, LLC was insolvent. *Id*. at 648-49.

Further, the Minnesota Supreme Court repeatedly stated the Respondent Banks and Alliance Bank purchased *real and legitimate* participation interests or loans from First United Funding, LLC (the operator of the Ponzi scheme), and *not the oversold or fictitious interests* sold to victims of the fraud. *See, e.g.*, 860 N.W.2d at 642. The Respondent Banks and Alliance Bank were not relying on the operator of the Ponzi scheme for repayment. Rather, the Respondent Banks and Alliance Bank were looking to the borrower on the loans (and not First United Funding, LLC) for repayment.

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[3] Again, Mr. Perry did not participate in the summary judgment proceedings.

Further, *Finn* is silent regarding any unusual aspects of the transaction, such as artificially high rates of return for the interests acquired by the defendants, use of false or misleading financial statements, misappropriation of investor funds, lack of due diligence by the Respondent Banks or Alliance Bank or other indicia of a Ponzi scheme. The loans which the Respondent Banks participated in, and the loan acquired by Alliance Bank were all paid in full. *Id*. at 643. These facts clearly drove the Minnesota Supreme Court's holding that the plain text of the Minnesota Uniform Fraudulent Transfer Act does not contain a Ponzi scheme presumption.

The facts before the District Court were much different. Mr. Perry loaned money to and was issued a promissory note by and received payments from LLS America, which was operating the Ponzi scheme. Mr. Perry did not conduct due diligence before lending nearly $150,000 to LLS America. He himself questioned the legitimacy of his investment. ER00591. In addition, he was contractually guaranteed forty percent annual interest, which was an exorbitant rate of return. ER00496-00505. After his investment, LLS America defaulted on payments to Mr. Perry. ER00026. Upon default, Mr. Perry obtained legal counsel, and settled with LLS America. ER00615-00616. As a result of this settlement, a series of ten $15,000 payments were made to Mr. Perry through his attorney, Richard M. Layne between December 15, 2008 and May 1, 2009. ER00547-00556 & 00604. LLS America then defaulted on the settlement causing Mr. Perry to initiate a

lawsuit in Spokane County Superior Court in June of 2009. Mr. Perry even received $30,000 of payments during the 90 day look back period for recovery of preferential transfers under 11 U.S.C. § 547. Such facts were *not* present in *Finn*.

Mr. Perry's citation to *Rohrer v. Snyder*, 29 Wn. 199 (1902) is equally misplaced. *Rohrer* involved a quiet title action under Washington law, and did not involve any question of federal law. In addition, *Rohrer* was decided before any of the statutes authorizing the relief against Mr. Perry were enacted. *Rohrer* does not in any way show a conflict between a decision of the Court of Appeals and the Supreme Court of Washington on any important federal question.

Mr. Perry has failed to show any basis for certiorari. As a result, the Petition should be denied.

B. Mr. Perry's Argument Regarding the Look Back Period is Moot.

Mr. Perry's argument that the District Court lacked jurisdiction apply a fourteen year lookback period, and could not avoid transfers as far back as the year 2000. Petition, p. i, & p. 30-33. The evidence clearly and unequivocally showed that Mr. Perry received transfers totaling $220,000 between September, 2006 and May, 2009. No fourteen year look back period applied to him. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). There is no "live"

dispute over any fourteen year look back period. There are no facts to support Mr. Perry's argument that the judgment entered against him was somehow improper based on the look back period for fraudulent transfers. In fact, $30,000 of transfers to him occurred within the 90 day look back period for preferential transfers under 11 U.S.C. § 547. Recovery for this preferential transfer did not require any findings or conclusions regarding fraud, good faith or the existence of a Ponzi scheme.

The Petition should be denied because it does not raise any issue proper for review by the United States Supreme Court. No split between the Courts of Appeals is identified. No split between a state supreme court and the Court of Appeals on an *important federal question* is identified. The Court of Appeals certainly did not depart so far from the accepted and usual course of judicial proceedings as to call for review by this Court. Certainly, the Court of Appeals did not make any decision involving an important matter of federal law that conflicts with a decision of this Court. Simply stated, this was a garden variety fraudulent transfer case that was decided against Mr. Perry.

C. Preservation of Issues for Appeal.

The Trustee is mindful of the admonition set forth in Rule 15.2. However, identifying every misstatement made in the Petition would be an overwhelming task, not capable of being done within the page and word limitations for responding to the Petition, or any

reasonable extension of those limits. Almost everything Mr. Perry has cited is incomplete, out of context, inaccurate or simply wrong. Mr. Perry continues to rely on arguments and evidence that was never before the District Court. Further, Mr. Perry failed to properly raise arguments below, and has generally failed to follow rules and procedures in this litigation. Therefore, the Trustee reserves the right to oppose any and all matters in the event certiorari is granted. The Trustee expressly identifies the following issues to avoid any potential wavier.

1. The Evidence Clearly Supported Judgment Against Mr. Perry.

The District Court determined Mr. Perry satisfied his burden of proving good faith. ER00026. The Trustee has not appealed the District Court's finding that Mr. Perry invested in good faith, meaning that any argument Mr. Perry puts forth regarding good faith or bad faith is moot. The Trustee is entitled to recovery of Mr. Perry's profit from his loans to LLS America. *Donell v. Kowell*, 533 F.3d at 771. There is no dispute that Mr. Perry invested $149,975. ER00029 & ER00509-00511. Likewise, the evidence clearly showed that Mr. Perry received $220,000 in transfers. ER00029-00030, ER00022, ER00509-00558. Mr. Perry received $150,000 that was transferred to his attorney on his behalf. ER00022-00026, ER00547-00556, ER00604, ER00495-00508. As the District Court found, Section 550(a) allows the Trustee to recover from the initial transferee of an avoidable transfer, or the entity for whose benefit

the transfer was made. ER00022-00024. The funds transferred to Richard Layne were under the dominion of Mr. Perry within the meaning of *In re Incomnet*, 463 F.3d 1064, 1071 (9th Cir. 2006). Specifically, Mr. Perry admitted that such funds were used to pay his debts and attorney's fees. ER00022-00023. Because LLS America was a Ponzi scheme, the Trustee was entitled to recover Mr. Perry's profit as a fraudulent transfer. *Barclay v. Mackenzie* (*In re AFI Holding, Inc.*), 525 F.3d 700 (9th Cir. 2008); *In re Agricultural Research and Technology Group, Inc.*, 916 F.2d 528, 536 (9th Cir. 1990); *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008); *In re Ramirez Rodriguez*, 209 B.R. 424 (Bankr. S.D. Tex. 1997). The $70,025 judgment against Mr. Perry should be upheld.

2. Mr. Perry Improperly Raises Issues for the First Time on Appeal.

Issues raised for the first time on appeal are not considered by the appellate court. *Wood v. Milyard*, 566 U.S. 463, 473 (2012). Evidence not considered by the trial court cannot be presented to the appellate court. *Draper v. State of Washington*, 372 U.S. 487, 506 (1963). Matters such as an email exchange with Mrs. Nelson's criminal attorney ten months after Mr. Perry's trial were clearly not before the District Court. If Mr. Perry believes that court-appointed counsel for a court-appointed Chapter 11 trustee conspired with a court-appointed examiner, he should have taken action during the three years of litigation between the parties. Mr. Perry's belated argument regarding "Operation Choke

Point" was never brought before the District Court and cannot be raised now. Likewise, Mr. Perry cannot rely on the "Brubaker Report" described in *Perkins v. Lehman Bros., Inc.* (*In re International Management Associates, LLC*), 563 B.R. 393 (N.D. Ga. 2017) because that report was not presented to the District Court.

3. Mr. Perry Must Follow the Rules of Procedure.

"Pro se litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1986). "[P]ro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record." *Jacobsen v. Filer*, 790 F.2d 1362, 1364 (9th Cir. 1986). Mr. Perry's briefing generally lacks citations to the record, or if citation to the record is made it is difficult or impossible to decipher what exactly is being cited, or why. Likewise, very few citations to statutes or cases are provided to support any legal proposition.

4. The Chapter 11 Plan is Binding on Mr. Perry.

A considerable part of the Petition revolves around Mr. Perry's disagreement with the liquidation of LLS America. At the outset, this argument is improper because the confirmation of the Chapter 11 Plan has not been appealed. In the absence of a timely notice of appeal, this Court lacks jurisdiction to hear arguments seeking to review the Chapter 11 Plan. *Bowles*

v. Russell, 551 U.S. 205, 214 (2007). There is nothing in the record to indicate that Mr. Perry opposed confirmation of the Chapter 11 Plan, or that he filed a timely notice of appeal. Moreover, a confirmed Chapter 11 Plan is binding. 11 U.S.C. § 1141(a). In addition, 11 U.S.C. § 1106(a)(3) vests the Trustee with the authority to determine whether or not a business should continue. Had Mr. Perry wanted to oppose confirmation of the plan, which provides for the liquidation of LLS America, he should have done so many years ago.

5. The Bankruptcy Code, Revised Code of Washington, and Precedent from the Court of Appeals Are Not Vague.

Mr. Perry argues at length that the applicable law is vague, posing some kind of constitutional violation. The law is quite clear. 11 U.S.C. § 548, as well as 11 U.S.C. § 544 and RCW 19.40 allow the Trustee to recover fraudulent transfers. If a plaintiff can establish the existence of a Ponzi scheme, actual intent to defraud has been determined as a matter of law for purposes of 11 U.S.C. § 548 and RCW 19.40.041. *Barclay v. Mackenzie* (*In re AFI Holding, Inc.*), 525 F.3d 700 (9th Cir. 2008); *In re Agricultural Research and Technology Group, Inc.*, 916 F.2d 528, 536 (9th Cir. 1990); *Donell v. Kowell*, 533 F.3d 762, 771 (9th Cir. 2008); *In re Ramirez Rodriguez*, 209 B.R. 424 (Bankr. S.D. Tex. 1997).

No error was made by the District Court in interpreting the evidence or applying the law. Likewise, no error was made by the Court of Appeals in affirming

the District Court. Rather, Mr. Perry simply disagrees that the Trustee should be able to recover the transfers made to him.

6. The Declarations of Lenore Romney and Marie Rice were Stricken.

Mr. Perry yet again attempts to rely on the declarations of Lenore Romney and Marie Rice. *See, e.g.*, Petition, p. 23. At trial, the District Court struck both of these declarations following a motion in limine from the Trustee. ER00079-00081. In connection with the Trustee's Motion for Partial Summary Judgment, the declaration of Ms. Romney was withdrawn and never even considered by the lower courts. ER00119-00120. The Bankruptcy Court also struck the declaration of Marie Rice for failure to comply with FRE 702. ER00122-00134. Mr. Perry did not argue that those decisions were incorrect before the Court of Appeals. As a result, he waived any issue regarding the courts' evidentiary rulings. *Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco*, 979 F.2d 721, 726 (9th Cir. 1992). Furthermore, because these declarations were never considered by the lower courts, they cannot be considered on appeal. *Draper v. State of Washington*, 372 U.S. at 506.

7. LLS America Was Engaged in a Ponzi Scheme.

Mr. Perry did not object to the Trustee's Motion for Partial Summary Judgment seeking a determination

that LLS America engaged in a Ponzi scheme and that LLS America was insolvent. Nonetheless, he now apparently wants to litigate these matters even though he did not participate in the summary judgment proceedings. He is barred from doing so under *Wood v. Milyard*, 566 U.S. at 473.

Again, the Court should take note that declaration of Lenore Romney was withdrawn, and the declaration of Marie Rice was stricken. After consideration of the Court appointed examiner's final report, and the reports of two accounting experts, the Bankruptcy Court determined that the hallmark of a Ponzi scheme – that earlier lenders were repaid with funds from later lenders – was clearly present. The examiner concluded that as early as 1998, the debtor's operations did not generate sufficient profits or cash flow to repay lenders. He concluded that the source of payments made to lenders were the receipts from later lenders. The report concludes that the debtor's operations "exhibit the financial characteristics of a Ponzi scheme. . . ." ER00154-00159. Accounting expert Michael Quackenbush concluded that new lender funds were used to repay old lenders, and that 89 percent of lender funds were used to repay earlier lenders. ER00157-00158. Finally, accounting expert Dan Harper concluded that LLS America was a Ponzi scheme from the inception. ER00158. In addition, other characteristics of a Ponzi scheme were clearly present, including artificially high rates of return, commingling of investor funds, the criminal indictment of Doris Nelson (who later pled guilty to wire fraud, mail fraud and international

money laundering), insiders using investor funds for personal use, rolling over promissory notes (to avoid repayment of principal), numerous related entities with confusing and unjustifiable intercompany transfers, a purported legitimate business that produces little or no profit[4], providing false or misleading financial statements to lenders, and paying bonuses or commissions to those that bring in new lenders. ER00159-00166.

Importantly, there was no evidence at all indicating any other conclusion. As stated by the Bankruptcy Court, "The only conclusion possible is that this debtor engaged in a Ponzi scheme. Not only was the essential nature demonstrated by the expert testimony, i.e., the only significant source of repayment to earlier lenders were the funds received from later lenders, but many of the common characteristics of Ponzi schemes are present." ER00166. No error was made by the lower courts regarding the finding that LLS America was a Ponzi scheme. Mr. Perry's disagreement with that finding, even if verbose, does not show any error.

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[4] Mr. Perry appears confused regarding why LLS America was able to generate a profit **during bankruptcy**. While in bankruptcy, LLS America had the advantage of the bankruptcy stay (11 U.S.C. § 362) and was **not paying** its lenders principal or interest even though such amounts were contractually due under promissory notes. The bankruptcy stay allowed LLS America to ignore the principal and interest payments that were due on over $100,000,000 of debt. Annual interest obligations alone were approximately $40,000,000. Also, Mr. Perry appears to forget that LLS America defaulted on the settlement agreement with him.

8. LLS America Was Insolvent from Its Inception.

Likewise, there was no genuine issue of material fact that LLS America was insolvent from its inception in 1997. ER00170-00177. The Bankruptcy Court relied on the expert testimony of Mr. Quackenbush to determine that LLS America was insolvent on balance sheet basis since 1997, and insolvent on a cash flow basis since 1997. These determinations were made following approximately 650 hours of work and the reconstruction of LLS America's business records. ER00170-00173. Again, there was no evidence before the Bankruptcy Court to the contrary. ER00144-00177. The finding that LLS America was insolvent since inception was not clearly erroneous. Again, Mr. Perry's disagreements with findings of fact do not provide a basis for certiorari.

The Bankruptcy Court's report and recommendation was adopted by the District Court. ER00135-00143. Again, there is no indication in the record that Mr. Perry objected to the Bankruptcy Court's report and recommendation as authorized by FRBP 9033(b). All that remained for trial was a determination of the amount Mr. Perry loaned to LLS America, the amount of payments he received from LLS America, and whether he could carry his affirmative defense of showing that he invested in good faith.

9. Mr. Perry is not Entitled to Offsets.

Mr. Perry has previously argued that he should receive an offset for funds used to satisfy his attorney's fees or perhaps loans that he took out in order to invest in LLS America. Offsets are not allowed. *Donell v. Kowell*, 533 F.3d 762, 779 (9th Cir. 2008).

10. Mr. Perry is Subject to the District Court's Jurisdiction and was Properly Served.

Mr. Perry has argued the District Court lacked jurisdiction over him and that he was not properly served. Both contentions are wrong. Mr. Perry submitted a proof of claim in the bankruptcy case. ER00495-00508. By doing so he submitted to the jurisdiction of the lower courts. *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990); *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947); *In re P&P Holdings Corp.*, 99 F.3d 910 (9th Cir. 1996); *In re Nees*, 12 B.R. 968, 971 (Bankr. W.D. Va. 1981). He was not entitled to a jury trial. *Langenkamp v. Culp*, 498 U.S. at 44-45.

Mr. Perry was served with process. Even if he had not been, he waived any service of process argument by failing to raise the issue in his answer or in a timely motion to dismiss. ER00026 & ER00096-00101. Furthermore, Mr. Perry has never identified as error the District Court's order concluding he waived any defense regarding any alleged failure of service of process, and has therefore waived this issue on appeal. *Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco*, 979 F.2d at 726.

11. Mr. Perry Has Not Disputed the Findings that He Received $30,000 in Preferential Transfers Recoverable Under Section 547.

The District Court found that Mr. Perry had received $30,000 in transfers that were recoverable under 11 U.S.C. § 547. ER00035-00036 & 00038. Mr. Perry did not brief this issue before the Court of Appeals, and therefore waived it. *Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco*, 979 F.2d at 726. Even if certiorari were granted, and the Court were to overturn numerous cases such as *Donell v. Kowell*, the Trustee is entitled to a recovery of $30,000 against Mr. Perry.

12. The District Court Properly Denied the Motion for New Trial.

As the District Court stated, the Motion for New Trial sought to:

> re-litigate issues that have already been determined at trial by presenting evidence that was previously before this Court and has already been considered. Defendant's different interpretations of evidence that have already been considered by this Court are not proper grounds for granting a new trial. He fails to provide this Court with evidence of any error of fact or law or any newly discovered evidence. His claims regarding "manifest injustice" are unpersuasive and this Court finds no good cause to grant a new trial.

ER00007-00008.

In light of the ruling that Mr. Perry was simply relitigating the same issues previously decided, there was no abuse of the discretion by the District Court. No error of fact or law was committed. There is no manifest injustice simply because the District Court disagreed with Mr. Perry's interpretations of the evidence. Little if any of Mr. Perry's brief before the Court of Appeals actually addresses Rule 59, the standards for consideration a motion under Rule 59, or why the District Court erred in denying the motion. As a result, issues relating to his Motion for New Trial were waived. *Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco*, 979 F.2d at 726.

CONCLUSION

For the reasons stated above, certiorari should be denied. Mr. Perry has not met the burden of showing certiorari is proper. Mr. Perry is not a victim. He is the exact opposite. He profited by $70,025 from fraud. The judgment obtained against him provides a vehicle for recovery of money for the true victims of the LLS America Ponzi scheme in accordance with LLS America's Chapter 11 Plan.

Dated this 20th day of August, 2018.

Respectfully submitted,

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