No. 19-759

In The
Supreme Court of the United States

IN RE PROVIDENT ROYALTIES, L.L.C.,
Debtor,

MILO H. SEGNER, JR.,
Petitioner,
V.
CIANNA RESOURCES INCORPORATED,
Respondent.

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

PETITIONER'S REPLY TO OPPOSITION

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REPLY BRIEF FOR PETITIONER

Cianna devotes its brief in opposition almost entirely to the doc-stamp issue, saying little about the jury question preventing differentiation among the 197 transfers.

Cianna's only real argument about the jury question is that courts often permit the aggregation of multiple transfers into one question on good faith. And that is true—but only because some cases don't require differentiation among transfers.

Where every challenged transfer involves the same knowledge by the transferee, there is no need to differentiate among transfers. But here, William Ball sent his letter—drawing back the curtain on the double-flip and double-markup—halfway through the scheme. Ball's letter was a game-changer on Cianna's need to inquire.

So how does Cianna respond to Ball's letter? Simple—it doesn't. Cianna's brief never even mentions it. Not once. Cianna's inability to mount any response to Ball's letter highlights the impropriety of preventing the jury from differentiating between (1) transfers Cianna received before the Ball letter, and (2) the $13 million in transfers it received after that letter.

By its own admission, Cianna pocketed $7 million in eight months. (BIO at 1). NBA stars and bestselling rappers make $200,000 a week; Oklahoma landmen don't—at least not legitimately. And Cianna's response lacks any explanation for the double-flip, double-markup nature of the acquisitions for Provident. Instead, Cianna says that its flips to

Ruthven are "false and unsupported by the record." (BIO at 5).

But Cianna bought the Myers' mineral rights for $64,000 and immediately sold them to Ruthven for $91,000. Record.28522 (Control No. 0045). Cianna bought Ball's rights for $16,000 and immediately sold them to Ruthven for $24,000. Record.26711. This method—a Cianna purchase and immediate sale to Ruthven with a massive markup—was repeated in transactions for all 197 properties. Record.28522.

Under these circumstances, the jury's inability to consider whether the Ball letter put Cianna on inquiry notice—thereby enabling Segner to claw back more than $13 million for Provident's elderly victims—renders the verdict so suspect that review is warranted.

A. The trial court's all-or-nothing question prevented the jury from considering good faith as to each transfer.

As Cianna notes, federal courts routinely permit the grouping of transfers in jury questions about good faith. (BIO at 3, 14). After all, where a transferee knows the same facts when receiving every transfer, no differentiation is required to decide good faith.

But that isn't the situation here—and Cianna does not argue otherwise. Here, Ball sent his letter laying out the entire scheme—including the flips with inflated prices and the doc-stamp fraud—in a letter halfway through the scheme. Even assuming Cianna had no cause to ask questions at the beginning of its involvement, it certainly had reason to inquire after the Ball letter.

Cianna never even mentions Ball's letter in its brief in opposition—literally not once. And there really is nothing Cianna can say.

The trial court swept Ball's letter aside by saying that Shutt's denials of wrongdoing applied "to all of the transactions." (App. 27a). But whether that testimony was ***true*** as to (1) all the transfers, (2) none of the transfers, or (3) only transfers preceding the Ball letter was the central issue the jury needed to decide. The trial court's lump-sum question precluded the jury from doing so by locking the jury into an all-or-nothing decision on all 197 transfers—with no ability to differentiate among them based on Ball's letter or other mounting red flags.

The trial court's question precluded Segner from attempting to persuade the jury to claw back the $13 million that Cianna received after the Ball letter. Record.28522–28524. In this situation, no reasonable person can have confidence in the jury's (ostensible) finding that Cianna acted in good faith after receiving the Ball letter. And that (ostensible) finding precluded recovery of $13 million for elderly retirees whose savings were stolen by Provident.

Cianna's final argument—that the jury would have been required to answer 197 questions—is silly. Only one question, with two subparts, was necessary:

> Do you find that Cianna acted in good faith for all 197 transfers?
>
> If not, what is the date on which Cianna ceased to act in good faith?

This Court should grant review to clarify that where a Ponzi-scheme recipient faces mounting red

flags over time, the jury must decide good faith as to each transfer—not just all the transfers as a whole.

B. The decisions by the Fourth and Fifth Circuits on illegal acts are inconsistent.

Contrary to Cianna's assertion, the decisions by the Fourth and Fifth Circuits concerning the role of illegal conduct in deciding good faith conflict with one another.

The Fifth Circuit called Cianna's doc-stamp violations "shady" but excused them as "acceptable business . . . practices" based on testimony that they are routine in the industry. (App. 3a). These acts found acceptable were violations of a criminal statute.

But in *In re Nieves*, the Fourth Circuit cited *Rudiger* for the proposition that a "reasonable commercial practice includes a 'custom or practice' unless in conflict with a statute." *Goldman* v. *Capital City Mortg. Corp. (In re Nieves)*, 648 F. 3d 232, 239 (4th Cir. 2011) (citing *Rudiger Charolais Ranches* v. *Van De Graff Ranches*, 994 F. 2d 670, 672–73 (9th Cir. 1993)) (emphasis supplied).

The Fifth Circuit held that Cianna proved its good faith by testimony that others in the same industry also violate the doc-stamp statute. And that holding is inconsistent with the rule followed by the Fourth Circuit.

As Cianna notes, the Fourth Circuit later rejected any notion that a party asserting a good-faith defense must prove "his every action concerning the relevant transfers was objectively reasonable in light of industry standards." *Gold* v. *First Tennessee Bank Nat. Assn. (In re Taneja)*, 743 F. 3d 423, 431 (4th Cir.

2014). But that has nothing to do with the issue presented by this petition.

Here, Cianna's doc-stamp violations went to the heart of the Ponzi scheme by concealing the double-flip and hiding the siphoning of cash from the deals. The SEC receiver testified that the doc-stamp inflation concealed a portion of the inflated prices and helped to hide the entire scheme. Record.26281, 26282. Segner confirmed the critical role the doc-stamp fraud played in concealing the scheme. Record.25944. Their testimony was uncontroverted.

This isn't a situation where—to borrow the trial court's analogy—Cianna broke the law by running a red light on the way to one of the closings. (App. 14a). Instead, the criminal violations here are part and parcel of what Cianna "knew or should have known" about the legitimacy of the transactions. *See Gold*, *supra*, at 431.

As a general matter of public policy, custom and practice simply cannot excuse criminal conduct.

The Court should grant review to resolve the conflict among lower courts and hold that a transferee who breaks the law in connection with every transfer it receives—and those illegal acts advance the fraud scheme at issue—should not be permitted to carry its burden on a good-faith defense and overcome the trustee's avoidance powers.

C. Cianna's lack of criminal adjudication and purported overpayment of the tax are irrelevant.

Cianna's half-hearted defense that it hasn't been "adjudicated" guilty of breaking any law doesn't

make much sense given Shutt's admission of these violations. Shutt admitted that Cianna lied on every doc-stamp associated with Provident:

> Q. In other words, you lied.
>
> A. If you want to call it that, yes.
>
> Q. I would, sir. You lied to the government of Oklahoma as to how much money you were actually paying the mineral owners for these properties, right?
>
> A. Yes.

Record.25465–25466. Shutt admitted rolling Cianna's commissions into the mineral cost—and admitted this broke the law:

> Q. Which is in direct violation of Oklahoma law, true?
>
> A. True.

Record.25513. So while Cianna was not adjudicated guilty of breaking the law, it freely admitted doing so. In any event, many factors—including law-enforcement and prosecutorial resources—affect whether crimes are prosecuted. And "[a] complex society in which individuals obeyed the law only because they feared prosecution could not thrive." Melvin A. Eisenberg, *The Duty of Good Faith in American Corporate Law*, 31 Del. J. Corp. Law 1, 31 (2006).

Cianna's other argument—that it overpaid the tax—isn't true and wouldn't matter anyway.

It isn't true because Cianna claimed an improper exemption and avoided paying *any* tax on

its sales to Ruthven. The net effect of the "double-flip" transactions was to underpay the tax.

It wouldn't matter because overpayment still is a crime. The stamps cannot be purchased in an amount greater than necessary; the "exact amount" is required. Okla. Stat., Tit. 68, § 3206(A) (West 2018); *see also* Documentary Stamp Tax Quick Reference Guide, Oklahoma Tax Commission Compliance Division (September 2011), at Documentary Stamp Tax Questions and Answers No. 21 p. 19.[1]

Contrary to Cianna's suggestion, overstating the price corrupts the records—and land marketplace—just as much as understating it. In any event, what legitimate business "overpays" its taxes?

As one state attorney general has explained, overstating the doc-stamp "give[s] the appearance that the value of the property interest transferred is greater than the amount paid . . . inflating property values of adjoining lots in excess of their true value, resulting in innocent consumers paying inflated prices for such property . . . ." Op. Att'y Gen. Fla. AGO 95-80 (1995).[2] It also impugns the integrity of the public records by using them to deceive. *See id.*[3]

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[1] *Available at* https://www.ok.gov/tax/documents/Documentary%20Stamps%20Quick%20Reference%20Guide.pdf.

[2] *Available at* http://www.myfloridalegal.com/ago.nsf/Opinions/2FAFEC*707E761E9C8525629E005BE2E2*.

[3] Cianna says it falsified doc-stamps for a previous customer. But when confronted with the recorded instrument from one of those deals, Shutt reversed course and admitted it properly reflected

D. This case presents an ideal vehicle to resolve both questions.

Cianna's "poor-vehicle" argument addresses only the issue concerning the role of criminal acts in deciding good faith. Not even Cianna disputes that this case presents the jury-question issue cleanly and without complicating facts. The Ball letter provides a clear point of demarcation establishing the need to permit the jury to differentiate among the transfers. Cianna does not argue otherwise.

Likewise, Cianna does not dispute the importance of this question in light of the billions of dollars in Ponzi-scheme money being bandied about the nation's bankruptcy courts. The need for juries to decide good faith separately for each transfer (when the evidence provides a basis for doing so) is critical to trustees' attempts to claw back stolen money.

With regard to the doc-stamp issue, Cianna's waiver argument is incorrect. Segner did not seek a jury instruction on the role of the doc-stamps because it is a matter of law—not of fact-finding for the jury.

The issues presented by this petition have real-world, practical implications for trustees seeking recovery of Ponzi-scheme proceeds. These issues merit review by this Court given their potential to affect the recovery of hundreds of millions of dollars stolen from elderly retirees across the country.

CONCLUSION

Based on these two important issues concerning the pursuit of Ponzi-scheme proceeds in

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the documentary tax as required by law. Record.25574–25575, 25579; *see also* Record.28655.

bankruptcy proceedings, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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