SUPREME COURT

DUPLICATE

STATE OF LOUISIANA

20 CC 643

NO. 5C040029 SEE ALSO 2020-CC-929

REGINA B. HEISLER, INDIVIDUALLY AND AS SUCCESSION REPRESENTATIVE/EXECUTRIX OF THE SUCCESSION OF FREDERICK P. HEISLER

Plaintiff-Relator

VERSUS

GIROD LOANCO, LLC

Defendant-Respondent

APPLICATION FOR WRIT TO REVIEW RULING OF THE FOURTH CIRCUIT COURT OF APPEAL, STATE OF LOUISIANA
CASE NO. 2020-CA-0074 D

CIVIL PROCEEDING

REQUEST FOR PRIORITY CONSIDERATION
BY REGINA B. HEISLER

JUN 03 2020
E-FILED B.
SUPREME COURT OF LOUISIANA
Filed
JUN 04 2020
Clerk
B.

Respectfully submitted,

Michael G. Bagneris (Bar #2658)
Bagneris, Pieksen & Associates, LLC
935 Gravier Street, Suite 2110
New Orleans, LA 70112
Phone (504) 493-7990 | Fax (504) 493-7991
Email: bagneris@bpajustice.com

SUPREME COURT OF LOUISIANA
A TRUE COPY OF DOCUMENT AS
SAME APPEARS IN OUR RECORDS
Theresa Ann McCarthy
Second Deputy Clerk of Court

WRIT BY: B.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Resolutions

STATEMENT OF THE CASE

This case did not attract mass media attention. There were no bold headlines announcing its fate. Yet, the Relator submits it is one of the most important legal questions to confront the Louisiana judiciary. This declaration is not hyperbole, at least, not according to the United Nations' Committee on Human Rights. That august body described Vulture Funds, like Girod LoanCo involved in this litigation, as the vilest of evils and ranked these funds ahead of human trafficking and the maltreatment of leprosy.[1]

The United States Congress, through Representative Maxine Waters, introduced the "STOP VULTURE FUNDS ACT" (House Resolution 2932).[2] This Act remains dormant (but not dead) in the House Judiciary and Financial Services Committee. If the Act is ever passed, it would prohibit Vulture Funds and their lawyers from using any court in the United States to seize assets, as follows:

> *(7) So-called "vulture" creditors acquire, either by purchase, assignment, or other form of transaction, the defaulted obligations of, and sometimes actual court judgments against, impoverished [debtors]. Vulture creditors usually acquire the debt for the payment of a sum far less that the face value of the defaulted obligation. They do so for the sole purpose of collecting through litigation, seizures of assets or other means, payment on the defaulted debt on terms and in amounts far in excess of the amount paid by the vulture creditor to acquire the debt.*

Relator understands that the Louisiana Supreme Court is not the world court. In fact, it may only be a speck on the worldwide judicial tapestry. But it is a speck with a voice. That voice should be heard on this extremely important global issue. To date, the Louisiana Judiciary has chosen to avoid rendering a decision on this matter. A decision emanating from this Court could literally impact the world. Instead, so far, Louisiana has chosen to have a muted voice. Relator respectfully request that: (1) the Louisiana Supreme Court accepts Writs of Certiorari and (2) let its voice be heard on this challenging global issue.

---

[1] United Nations General Assembly Resolution 68/304, 27th Session of U.N. Human Rights Council (HRC) held Sept. 2014, resolution adopted, condemning the activities of Vulture Funds.

[2] United States Congress, House Resolution 2932, through Representative Maxine Waters (introduced the "Stop Vulture Funds Act"), 111th Congress, 06/18/2009.

STATEMENT OF JURISDICTION

Relator maintains that **jurisdiction does not exist.** This contention is based on the fact that Respondent, Girod LoanCo, a vulture corporation, is transacting business in Louisiana without the mandatory certificate of authority.

SUMMARY OF PROCEEDINGS

The *Succession of Frederick P. Heisler*, Civil District Court No. 2007-3249, wherein several pleadings have been filed for Declaratory Judgment ruling that the notes purchased by Girod LoanCo from FDIC are unenforceable. The Trial Court granted an Exception of Lis Pendens and Plaintiff/Relator appealed.

The *Succession of Frederick P. Heisler* cited several reasons to support its writ to the Fourth Circuit Court of Appeals. All of the issues of law raised by the Relator except one were Denied. The Fourth Circuit failed to rule on the Relator's Exception of No Right of Action.

The Fourth Circuit pretermitted on Relator's Exception of No Right of Action, which presupposes that a ruling on this Exception would not affect the final outcome of the Court's decision. Relator focuses on a single issue in its writ before the Louisiana Supreme Court: a ruling on the Exception of No Right of Action and its affect on the Court's jurisdiction..

SUMMARY OF RELATED PROCEEDINGS

Charles Schwab & Co. v. Girod LoanCo and Regina Heisler, Civil District Court No. 2018-3694, invoked concursus as to $2,100,000 in the Registry of Civil District Court. (This case provoked the Declaratory Judgment sought in *Succession of Frederick P. Heisler*).

First NBA Bank v. Levy Gardens and Regina Heisler, United States District Court for the Eastern District of Louisiana No. 2017-6652. This case was removed from Civil District Court by the FDIC after April 28, 2017. Girod LoanCo's request for a foreclosure sale is still pending in this matter.

SUMMARY OF RELEVANT FACTS

The following facts are material to the issues raised:

- When the First NBC Bank was closed, Succession of Heisler attorney, Henry L. Klein (hereinafter "Klein"), immediately communicated with the Federal and State regulators in charge of the liquidation of bank assets.
- The Succession of Heisler and Levy Gardens Partners 2007 owed less than $600,000 to FNBC. (Note: Levy Gardens is owned 50/50 by the Succession and Klein. It is being foreclosed upon by Girod LoanCo. Girod claims that millions of dollars are owed to it. That foreclosure is in Federal Court by virtue of the FDIC's removal action sold to Girod).
- Klein met with FDIC regulators with sufficient funds to eliminate the approximately $600,000 debt.
- Klein was told that the Heisler debt exceeded $9 million.
- Klein requested proof of the $9 million plus indebtedness and the opportunity to see the loan files. This request was denied because the files had already been sent to Dallas, Texas to be bundled for sale to private investment funds.
- Klein offered to travel to Texas but was turned down and told to file a Freedom of Information Request.
- The Freedom of Information Agency took six (6) weeks to advise Klein that there were no files responsive to his request.
- Klein then filed pleadings in the Succession of Heisler to protect the Heisler's Rights of Litigious Redemption, knowing that the notes would be sold for pennies on the dollar.
- After Klein was notified that Girod was the winning bidder, he attempted to go to Boston to see the files. He was unsuccessful.
- When Kean Miller appeared as counsel for Girod, Klein sent over the emails asking for proof that Heisler interests received any of the money allegedly borrowed.

- Klein has not ever received any basic information, such as credit application, financial statement, income tax statement, bank officer approval form, etc. He has received nothing supporting a bank note or demonstrating how the alleged funds were applied on behalf of Regina Heisler.
- Regina Heisler is now a 77 years old widow with no business acumen, who never received any money.
- Klein maintains that Regina Heisler was defrauded by a land developer who used her name and assets (and many others) in a scheme to borrow $158 million with no real collateral.
- Klein estimates that the Succession of Heisler is on the path toward losing $15 to $20 million dollars to Girod LoanCo.
- In an effort to discover where the stolen FNBC money went, Klein retained the services of private investigators who reported that the funds, most likely, ended up in the Cayman Islands.

STATEMENT RE: HENRY L. KLEIN'S AFFIDAVIT

The Statement of Relevant Facts recited by undersigned counsel was obtained from Henry L. Klein, the attorney for the Succession of Frederick Heisler. Those facts are affirmed by his Affidavit.

Michael Bagneris

Michael G. Bagneris

AFFIDAVIT OF HENRY L. KLEIN

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned Notary, duly qualified and commissioned in and for the abovementioned Parish and State, personally came and appeared: **HENRY L. KLEIN**, a person of the full age of majority and a resident of New Orleans, Louisiana, who after first being duly sworn, did depose and state that:

When the First NBC Bank was closed, in my capacity as attorney for the Succession of Heisler, I immediately communicated with the Federal and State regulators in charge of the liquidation of bank assets. The Succession of Heisler and Levy Gardens Partners 2007 owed less than $600,000 to FNBC. Levy Gardens is owned 50/50 by the Succession and me. Levy Gardens is being foreclosed upon by Girod LoanCo. Girod claims it is owed millions of dollars. The foreclosure is in Federal Court by virtue of the FDIC's removal action sold to Girod.

I met with FDIC regulators with sufficient funds to eliminate the approximately $600,000 debt. I was told that the Heisler debt exceeded $9 million. I requested proof of the $9 million plus indebtedness and the opportunity to see the loan files. This request was denied because the files had already been sent to Dallas, Texas to be bundled for sale to private investment funds.

I offered to travel to Texas but was turned down and told to file a Freedom of Information Request. The Freedom of Information Agency took six (6) weeks to advise me that there were no files responsive to my request.

I then filed pleadings in the Succession of Heisler to protect the Heisler's Rights of Litigious Redemption, knowing that the notes would be sold for pennies on the dollar. After I was notified that Girod was the winning bidder, I attempted to go to Boston to see the files. I was unsuccessful.

When Kean Miller appeared as counsel for Girod, I sent over the emails asking for proof that the Heisler interests received any of the money allegedly borrowed. I have not ever received any basic information, such as credit application, financial statement, income tax statement, bank officer approval form, etc. I have received nothing supporting a bank note or demonstrating how the alleged funds were applied on behalf of Regina Heisler.

Regina Heisler is now a 77 years old widow with no business acumen, who never received any money. I maintain that Regina Heisler was defrauded by the land developer, Gary Gibbs, who used her name and assets (and many others) in a scheme to borrow $158 million with no real collateral.

It is estimated that the Succession of Heisler is on the path toward losing $15 to $20 million dollars to Girod Loanco. In an effort to discover where the stolen FNBC funds went, I retained the services of private investigators who reported that the funds, most likely, ended up in the Cayman Islands.

HENRY L. KLEIN

Sworn to and subscribed before me on this
1st day of June, 2020.

NOTARY PUBLIC

LAW AND ANALYSIS

There is one irrefutable fact in this case: that Girod Loanco, LLC, a limited liability company, does not possess the certificate of authority required by La. R.S. 12:1354 to transact business in the State of Louisiana.[3] This fact is irrefutable because Girod admits it does not have a certificate of authority to do business. However, Girod asserts that it does not need a certificate because it falls within an exception provided by Louisiana law. In fact, Louisiana law does provide an exception to a foreign business and allows it to transact business without a certificate if the business being transacted is for the collection of a lawful debt.[4] Girod claims it falls within the purview of this exception, and therefore, it has no need of a certificate.

But, when Girod's claim is examined another irrefutable fact is manifested. The second irrefutable fact: Girod purchased the bank notes involved in this litigation from the Federal Deposit Insurance Corporation (FDIC). This purchase made Girod the owner of the bank notes. Ownership of the bank notes is an absolutely crucial factor in this matter.

The U.S. Supreme Court in the landmark decision of *Henson v. Santander*, 137 S.Ct. 1718 (2017)[5], declared that there is a difference between a debt owner and a debt collector. Based upon the U.S. Supreme Court's decision, Girod, a debt owner, does not fall within Louisiana's statutory exception. Only a debt collector has the ability to avail itself of the statutory exception..

In light of the above, Relator maintains the following:

(1) Girod admits it is a foreign corporation transacting business in Louisiana without a certificate of authority.

(2) Girod acknowledges that it purchased the bank notes in question from the FDIC.

[3] La. R.S. 12:1354 – "Transacting business without authority: (A) No foreign limited liability company transacting business in this state shall be permitted to present any judicial demand before any court of this state unless it has been authorized to transact such business, if required by and as provided in, this Chapter.".

[4] La. R.S. 12:1343(7) – "Exceptions to use: Nothing in this Chapter shall be construed to prohibit or restrict by registration of other means calls made: (2) For the collection of a lawful debt.".

[5] *Ricky Henson v. Santander Consumer USA. Inc.*, 817 F.3d 131 (4th Cir. 2016), cert. granted, 137 S.Ct. 1718 (2017).

(3) The purchase of the bank notes from the FDIC constitutes ownership for Girod.

(4) Pursuant to the U.S. Supreme Court, an owner of a debt cannot avail itself of the statutory exception. This privilege is afforded to a debt collector, not owner.

Therefore, without a certificate of authority and unable to qualify under an exception, Girod should be prohibited from transacting business in Louisiana. This is the result this Court reached in *Proctor Trust Co. v. Pope*, 12 So.2d 724 (La. Ct. App. 1943) and *Milburn v. Proctor Trust Co*, 54 F.Supp. 989 (W.D. La. 1944).[6]

The *Proctor* Court recognized that the Louisiana Legislature mandated that "no foreign corporation doing business in this State shall be permitted to present any judicial demand before any court of this State unless and until it has complied with the laws of this State for doing business herein." (Emphasis added). Further, the *Proctor* Court found that the Exception of No Right of Action and the fundamental issue of jurisdiction were inextricably interrelated. The Court reasoned: "a lack of right or authority of plaintiff to sue in the court a qua and a lack of jurisdiction of the court to consider and entertain the suit because plaintiff is a foreign corporation doing local and intrastate business but has not complied with the laws of the State as a condition precedent to doing business therein and has not paid a corporation franchise tax as thereby required." (Emphasis added).

Proctor further declared that a foreign company transacting business without authority cannot retroactively remedy this failure to obtain the proper authority. To do so would only encourage foreign companies to transact business until they got caught.

The reasoning in the *Proctor* Court is unquestionably sound: a Louisiana court cannot assert jurisdiction over a party who is legislatively prohibited from invoking its jurisdiction.

[6] *Proctor Trust Co. v. Ethel Milburn Pope*, 12 So.2d 724 (La. Ct. App. 1943); *Ethel Milburn, et al v. Proctor Trust Co., et al*, 54 F.Supp. 989 (W.Dist. of La. 1944).

CONCLUSION

It is respectfully requested that this Court maintain the *Proctor* precedent which has existed for over 75 years. The foreign corporation in *Proctor* was denied the ability to further access any Louisiana court. This Court should find that Girod LoanCo is unauthorized to transact business in this State, and therefore, it is prohibited from invoking the jurisdiction of the Court. Consequently, its judicial demands should be dismissed.

Respectfully submitted,

Michael Bagneris

Michael G. Bagneris (Bar #2658)
Bagneris, Pieksen & Associates, LLC
935 Gravier Street, Suite 2110
New Orleans, LA 70112
Office (504) 493-7990 | Fax (504) 493-7991
Email: bagneris@bpajustice.com

VERIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned Notary, duly qualified and commissioned in and for the abovementioned Parish and State, personally came and appeared: **MICHAEL G. BAGNERIS**, a person of the full age of majority and a resident of New Orleans, Louisiana, who after first being duly sworn, declared:

- That he is the attorney for Henry L. Klein, in Civil Action No. 2020-CA-0074 pending before the Fourth Circuit Court of Appeal, State of Louisiana; and, co-counsel for Regina Heisler;
- That he has read the foregoing Application for Priority Consideration and that all of the allegations contained therein are true and correct to the best of his knowledge, information and belief; and
- That copies of this Application were duly served on: the Clerk of Court for the Fourth Circuit Court of Appeal by U.S. Mail on June 3, 2020, at 410 Royal Street, New Orleans, LA 70130; the Honorable Ethel S. Julien, Judge of Division "N" of the Civil District Court for the Parish of Orleans by U.S. Mail on June 3, 2020, at 421 Loyola Avenue, Suite 312, New Orleans, LA 70112, and counsel of record, James Eric Lockridge by electronic transmission on June 3, 2020, at email address eric.lockridge@keanmiller.com.

Michael Bagneris
Michael G. Bagneris

Sworn to and subscribed before me on this the 2nd day of June, 2020.

NOTARY PUBLIC
John O. Pieksen, Jr
21023

FOURTH CIRCUIT COURT OF APPEAL
NO. 2020-C-0074

JUDGMENT DATED
MARCH 9, 2020

NO. 2020-C-0074

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

THE SUCCESSION OF FREDERICK P. HEISLER AND REGINA B. HEISLER, INDIVIDUALLY AND AS THE EXECUTRIX OF THE SUCCESSION OF FREDERICK P. HEISLER

VERSUS

GIROD LOANCO, LLC

IN RE: THE SUCCESSION OF FREEDERICK P. HEISLER AND REGINA B. HEISLER, ET AL

APPLYING FOR: SUPERVISORY REVIEW

DIRECTED TO: HONORABLE ETHEL SIMMS JULIEN
CIVIL DISTRICT COURT, ORLEANS PARISH
DIVISION "N-8", 2007-03249, 2018-04698

WRIT DENIED

Relator, Regina B. Heisler, the Executrix of the Succession of Frederick P. Heisler, seeks review of the trial court's January 2, 2020 judgment, which granted respondent's, Girod LoanCo, LLC's declinatory exception of *lis pendens* and dismissed her Petition for Declaratory Judgment Regarding All Notes Allegedly Possessed by Girod LoanCo, LLC and for Injunctive Relief. As two other suits are pending regarding the same promissory notes/loans outlined in Ms. Heisler's Petition and involving the same parties in the same capacities, we do not find that the trial court erred by granting Girod LoanCo, LLC's exception of *lis pendens*. The writ is denied. Ms. Heisler's exception of no right of action is pretermitted.

New Orleans, Louisiana this 9th day of March 2020.

JUDGE TERRI F. LOVE

CHIEF JUDGE JAMES F. MCKAY III

JUDGE ROLAND L. BELSOME

ORLEANS CIVIL DISTRICT COURT
NO. 2007-3249 and 2018-4693

JUDGMENT DATED
JANUARY 9, 2020

Civil District Court for the Parish of Orleans
STATE OF LOUISIANA

No: 2007 - 03249
2018 - 04693

Division/Section: N-08

HEISLER, FREDERICK P. ET AL
versus
ET AL

Date Case Filed: 4/9/2007

NOTICE OF SIGNING OF JUDGMENT

TO:

James E Lockridge Esq 30159
II City Plaza
400 Convention St Ste 700
Baton Rouge, LA 70801

Henry L Klein Esq 07440
844 Baronne Street
New Orleans, LA 70113-1103

Michael G Bagneris Esq 02658
935 Gravier Street
1702
New Orleans, LA 70112

In accordance with Article 1913 C.C.P., you are hereby notified that Judgment in the above entitled and numbered cause was signed on January 2, 2020

New Orleans, Louisiana
January 2, 2020

1-6-2020
VERIFIED

Nolita Parker Wells
MINUTE CLERK
Norlita Parker Wells, Minute Clerk
Division "N"
BY ORDER OF THE COURT

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

SUCCESSION OF FREDERICK P. HEISLER

NUMBER 2007-3249

DIVISION N

JUDGMENT

There came for hearing on December 20, 2019, before Judge Ethel S. Julien, Girod LoanCo, LLC's Declinatory and Dilatory Exceptions.

Appearing at the hearing were J. Eric Lockridge on behalf of Girod LoanCo, LLC ("Girod") and Henry L. Klein and Michael G. Bagneris on behalf of the Regina B. Heisler, as Independent Executrix of the Succession of Frederick P. Heisler ("Heisler").

Girod filed its "Declinatory and Dilatory Exceptions" (the "Exceptions") to the "Petition for Declaratory Judgment Regarding All Notes Allegedly Possessed by Girod LoanCo, LLC and for Injunctive Relief" filed by Heisler. Girod's Exceptions included: Insufficiency of Citation, Insufficiency of Service of Process, *Lis Pendens*, Lack of Personal Jurisdiction, Unauthorized Use of Summary Proceedings, and Non-Conformity of the Petition with La. C.C.P. art. 891. Heisler filed an Opposition to the Exceptions, and Girod filed a Reply to the Opposition. At the hearing, Girod's Declinatory Exception of *Lis Pendens* was argued.

After considering Girod's Declinatory Exception of *Lis Pendens*, Heisler's Opposition, Girod's Reply, the applicable law, and argument of counsel, the Court is of the opinion that the law is in favor of Girod, and that the Declinatory Exception of *Lis Pendens* should be granted. Therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that Girod LoanCo, LLC's Declinatory Exception of *Lis Pendens* is hereby **GRANTED**.

IT IS FURTHER ORDER, ADJUDGED, AND DECREED that the Petition for Declaratory Judgment Regarding All Notes Allegedly Possessed by Girod LoanCo, LLC

Theodore B.
VERIFIED
12-27-19

20571098_2

NO. 07-3249 DIV "N"

SUCCESSION OF FREDERICK P. HEISLER

and for Injunctive Relief filed by Regina B. Heisler, as Independent Executrix of the Succession of Frederick P. Heisler is hereby **DISMISSED**.

JUDGMENT READ, RENDERED, AND SIGNED, at New Orleans, Louisiana this 2 day of January, 2020.

Ethel S. Julien, Judge
Civil District Court for the Parish of Orleans

Dated: December 27, 2019

Respectfully submitted:

J. Eric Lockridge (#30159)
eric.lockridge@keanmiller.com
Katilyn M. Hollowell (#37729)
katie.hollowell@keanmiller.com
KEAN MILLER LLP
400 Convention Street, Suite 700
P. O. Box 3513 (70821-3513)
Baton Rouge, LA 70802
Telephone: (225) 387-0999

Jill A. Gautreaux (#23750)
jill.gautreaux@keanmiller.com
Anthony M. Williams (#26750)
anthony.williams@keanmiller.com
KEAN MILLER LLP
First Bank and Trust Tower
909 Poydras St., Suite 3600
New Orleans, LA 70112
Telephone: (504) 585-3050

Attorneys for Girod LoanCo, LLC

1-6-2020
VERIFIED

PRIORITY
DUPLICATE

IN THE SUPREME COURT

FOR THE STATE OF LOUISIANA 20 CC 1130

Docket Number________

MATTER CONNECTED TO WRIT APPLICATION 2020-CC-643

GIROD LOANCO, LLC

Respondent

v.

REGINA B. HEISLER, INDIVIDUALLY AND AS
SUCCESSION REPRESENTATIVE/EXECUTRIX OF
THE SUCCESSION OF FREDERICK P. HEISLER

Applicant

DELIVERED BY HAND
SUPREME COURT
OF LOUISIANA
2020 SEP 23 PM 3:37
CLERK
OF COURT

****

APPLICATION FOR WRIT TO REVIEW THE RULINGS BY
THE FIFTH CIRCUIT COURT OF APPEALS IN CASE NO 20-C-236
ARISING FROM 24TH JUDICIAL DISTRICT COURT DOCKET NO. 793-014,
THE HONORABLE SCOTT U. SCHLEGEL PRESIDING

Respectfully Submitted,

Henry L. Klein
844 Baronne Street
New Orleans, LA 70113
(504) 301-3027
henryklein44@gmail.com

INPUT BY: DG

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

PRIORITY

NO.________________

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Girod Loanco LLC
VS.
Regina Heisler

Applicant: Regina Heisler
Have there been any other filings in this Court in this matter? ☒ Yes ☐ No

Are you seeking a Stay Order?_____
Priority Treatment? ✓
If so you MUST complete & attach a Priority Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

APPLICANT:
Name: Henry L. Klein
Address: 844 Baronne Street
New Orleans, La 70113
PhoneNo. 504-439-0488 Bar Roll No. 7440

RESPONDENT:
Name: Eric Lockridge
Address: 408 Poydras
New Orleans La 70130
PhoneNo.__________ Bar Roll No.__________

Pleading being filed: ☐ In proper person, ☐ In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☒ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court:__________ Docket No.__________
Judge/Commissioner/Hearing Officer:__________ Ruling Date:__________

DISTRICT COURT INFORMATION

Parish and Judicial District Court: 24th JDC Docket Number: 793-014
Judge and Section: Scott U. Schlegel Date of Ruling/Judgment: 6/3/20 ; 7/14/20

APPELLATE COURT INFORMATION

Circuit: 5th Docket No. 20-C-236 Action: Writ
Applicant in Appellate Court: Regina Heisler Filing Date:__________
Ruling Date: Aug 26 '20 Panel of Judges: JJM RAC MEJ En Banc: ☐

REHEARING INFORMATION

Applicant: N/A Date Filed:__________ Action on Rehearing:__________
Ruling Date:__________ Panel of Judges:__________ En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date:__________, ☐ Trial in Progress, ☐ Post Trial
Is there a stay now in effect?_____ Has this pleading been filed simultaneously in any other court?_____
If so, explain briefly This Writ is Connected to Writ 2020-CC-643

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

Sept 23 2020
DATE

SIGNATURE

C:\Documents and Settings\clemann\Local Settings\Temp\Filing Sheet.wpd

Revised 10-11-2002

TABLE OF CONTENTS

RULE X, § 3(1) Items Contained Within Application

RULE X, §3(4) Verification and Appendix of Key Pleadings

RULE X, §3(9) Compliance

CONCISE STATEMENT OF THE CASE

This case presents a travesty of justice. When the First NBC Bank was closed because of criminality, the door was opened to a repeat of the RTC days when debt was sold to vultures for pennies-on-the-dollar and innocents were under attack for money *never* owed. In the case at bar, the Heisler family owed less than $600,000 when April 28, 2017 arrived. Despite efforts to pay the entire debt on May 10, 2017, the Heisler interests were told the debt had ballooned to $9.8 million now known to have been a Gary Gibbs/Ashton Ryan Ponzi scheme of epic proportions. Against its own rules, the FDIC packaged the loans and sold the toxic paper to vulture funds such as Girod LoanCo, LLC, which plans to parlay its Cayman Island investment into a $15 million heist of the the Succession of Fred Heisler and his widow.

STATEMENT REGARDING JURISDICTION AND STATE "DOOR CLOSING STATUTES"

The issue of "...jurisdiction, *vel non*...", pending in Application 20-CC-643, is *fully* adopted herein ("Writ 643"). Girod LoanCo is a foreign LLC which had *not* qualified to do business in Louisiana in either of the underlying cases. Although Girod attempted to "cure" that infirmity on May 25, 2020, it can't. *Milburn v. Proctor Trust*[1] involved a bank which purchased and foreclosed on a slew of mortgage notes for ten years before "...getting caught...". When *Proctor Trust* attempted to post-qualify, the *Milburn* court said "no". All "door-closing" statutes have two purposes: (1) to protect the citizens from vile intruders and (2) to insure that foreign entities pay taxes and fees. In this case, the egregious violations of Regina Heisler's constitutional rights by Judge Schlegel cannot be sugarcoated. But if this Court enforces La. 12:1354(A), the issues raised by *Caperton*, *In re: Cooks*, *Liljeberg* and *Withrow* will not be reached and the travesty at bar can end *now*. R.S. 12:1354(A) deprives a court of *jurisdiction* to hear a claim by an *unauthorized* foreign entity making *billions* without having to pay taxes to the state. Per *Henson*, Girod is not a debt-collector but a DEBT-OWNER required to "...**Pay to Play**...", *viz:*

> "A. No foreign corporation transacting business in this state ***shall be permitted to present any judicial demand before any court in this state*** unless it has been authorized to transact such business, if required by and as provided in this Chapter."

---

1 For brevity, we omit full citations in the body and refer the Court to our list of authorities.

Vacatur must be *nunc pro tunc*. Girod's petition was as OWNER of Notes PURCHASED from the FDIC November 13, 2017, *Henson*. Also, R.S. 12:1354(A) has a *second* sentence which should have stopped the case at the intake desk:

> "The burden of proof ***shall*** rest upon the limited liability company to establish that it has been so authorized, and the ***only*** legal evidence thereof ***shall*** be the certificate of the Secretary of State or a duly authenticated copy thereof."

Girod's "...judicial demands..." for the $2.1 million in cash in the CDC Registry and for *all* Succession real estate are *absolute* nullities (i) for lack of jurisdiction and (ii) in violation of Louisiana Civil Code Article 7:

> **Article 7. Acts in derogation of the public interest**
>
> Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.

"Door-closing" statutes are made to protect the citizens of the state and the state's fisc. The following chronology exemplifies the "sharp practices" at play in the $15 million fleecing of Regina Heisler by the Ponzi scheme that closed FNBC:

10/09/19: Girod **LoanCo** proceeds with sheriff's sale.

10/09/19: Girod **REO** makes the winning (only) bid.

10/11/19: Case is removed to Federal Court.

10/25/19: In *violation* of 28 U.S.C. §1446(d), JPSO completes deed.

10/25/19: Deed to Girod **REO** is *backdated* to October 9 and filed.

11/25/19: Girod **REO** is created in Delaware.

11/26/19: Girod **REO** is created in Louisiana.

THE ESSENCE OF THESE ACTIONS IS THAT KEAN MILLER SENT AN ASSOCIATE FROM ITS NEW ORLEANS OFFICE TO BID FOR THIRD PARTY: GIROD REO. BUT GIROD REO DIDN'T EXIST BEFORE THE SHERIFF'S SALE. A FRAUD UPON THE COURT JUDGE SCHLEGEL DENIED TO CONSIDER WHILE HEISLER MONEY IS BEING SENT TO THE CAYMAN ISLANDS.

RULE X CONSIDERATIONS

Regina Heisler, a 77-year-old widow with no business acumen, *victimized* by criminality at FNBC, complies with Supreme Court Rule X as follows:

(A) Conflicting Decisions. Manifestly, the door to the 24th Judicial District Court was closed to Girod LoanCo, as the *Milburn v. Proctor Trust* court recognized and as established by Writ 643. Equally erroneous, the findings below that executory process has only two defenses, (suspensive appeal or injunctive relief), were *clearly wrong*, as evidenced by *Vance v. FNMA* (decided by a different 5th Circuit panel):

> "Our courts, however, have recognized an exception to this general rule....on certain limited grounds, provided that the property was adjudicated to and remains in the hands of the foreclosing creditor....The 'certain limited grounds' upon which an action may be maintained to annul the sale are where the defects are 'fundamental' defects. Other appellate decisions have characterized these grounds as **defects in the proceedings that are 'substantive in character and strike at the foundation of the executory proceeding.'**

The plan to create Girod REO was meant to circumvent *Vance* and diminish Regina Heisler's rights. Equally sinister was the *backdating* of the sheriff's deed to October 9, given that the case had been removed on October 11 and an October 25 deed would be an obvious nullity — all to defraud a widow already defrauded by the criminality at FNBC. Ruthlessness is a hallmark of vulture funding tactics.

(B-1) Failure to Apply United States Supreme Court Precedent. Rule X also mandates application of United States Supreme Court precedent in *Caperton*, a case directly applicable. Here, Judge Schlegel's campaign for this High Court accepted $47,500 in contributions from Kean Miller and Kean Miller-clients in the Texas Brine sinkhole litigation, clearly heading toward the Louisiana Supreme Court. Not surprisingly, in the heat of the campaign, insidious innuendos arose about Texas Brine's motives not necessary to repeat. But given the staccato DENIALS of everything Regina Heisler filed, fundamental precepts by the *Caperton* Court apply:

> It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." Murchison, supra, at 136....This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p. 59 (J. Madison); Disqualification of Judges, 56 Yale L. J. 605."

In due course, _Caperton_ made the statement that applies in the case at bar, where Judge Schlegel not only failed to recuse himself, as _In re: Cooks_ would strongly urge, but on August 10, he engaged in the prohibited process of "...Schlegel judging Schlegel..." and on August 11, refused to set a date for taking a writ from his failure to re-allot the case to another division. The _Caperton_ Court put it thus:

> "These are circumstances in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." citing _Withrow_, 421 U. S., at 47.

(B-2) Suspect campaign contributions. On September 6, 2019, Heisler filed a peremptory exception of no right of action, which goes to the heart of jurisdiction and La. R.S. 12:1354(A). On September 9, 2019, three (3) days later, Kean Miller paid $2,500 to Judge Schlegel's campaign, which was moribund by then. We lost the exception summarily, causing further investigation. As it eventuated, Kean Miller clients Texas Brine and its subsidiaries made multiple $5,000 payments while the Bayou Corne $100,000,000 Sinkhole litigation was ablaze in motions to move from the 1st Circuit to any other circuit, giving credence to venomous allegations we needn't repeat, _Between a Crime and a Dime: Bribery and Campaign Contributions_, joneswaker.com/images/content//1/2/v2/1221/1341.

(B-3) Texas Brine. After we discovered the Kean Miller contribution just after our _compelling_ dismissal motion was filed, we found more disturbance. In Texas Brine, with Kean Miller as lead counsel, these contributions were made:

- **$5,000.** On July 1, 2019, Texas Brine Sales and Distribution, LLC, 4800 San Felipe Street, Houston, TX 77056, paid $5,000 to Judge Schlegel's campaign.

- **$5,000.** On July 1, 2019, Texas Brine Company, LLC, 4800 San Felipe Street, Houston, TX 77056, paid $5,000 to Judge Schlegel's campaign.

- **$5,000.** On July 1, 2019, TBC Underground Services Markham, LLC, 4800 San Felipe Street, Houston, TX 77056, paid $5,000 to Judge Schlegel's campaign.

- **$5,000.** On July 1, 2019, Underground Storage, LLC, 4800 San Felipe Street, Houston, TX 77056, paid $5,000 to Judge Schlegel's campaign.

- **$5,000.** On July 1, 2019, United Brine Services, LLC, 4800 San Felipe Street, Houston, TX 77056, paid $5,000 to Judge Schlegel's campaign.

- **$5,000.** On July 23, 2019, Texas United Management Corporation, 4800 San Felipe Street, Houston, TX 77056, paid $5,000 to Judge Schlegel's campaign.

- **$5,000.** On July 23, 2019, United Brine Pipeline Company, 4800 San Felipe Street, Houston, TX 77056, paid $5,000 to Judge Schlegel's campaign.

- **$5,000.** On July 23, 2019, Louisiana Salt, LLC, 4800 San Felipe Street, Houston, TX 77056, paid $5,000 to Judge Schlegel's campaign.

- **$5,000.** On July 23, 2019, Pure Salt, LLC, 4800 San Felipe Street, Houston, TX 77056, paid $5,000 to Judge Schlegel's campaign.

Based on *Caperton* precepts and further misconduct described below, Judge Schlegel should have self-recused, as *Liljeberg* and *In re: Cooks* admonished:

> "If we focus on fairness to the particular litigants, a careful study of Judge Rubin's analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment in favor of Liljeberg than there is in allowing '...**a new judge to take a fresh look at the issues'**....The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact, Public Utilities Comm'n of D.C. v. Pollack, 343 U.S. 451, 466-467 (1952) (Frankfurter, J.)"

Canons 1, 2 and 3(c) of the ABA Code of Judicial Ethics supports Regina Heisler's claim as a victim without a remedy at Judge Schlegel's whim. See, Justice Stephen BREYER report to Chief Justice William REHNQUIST: *Implementation of the Judicial Conduct and Disability Act of 1980*, 28 U.S.C. 351 et seq. The most-enlightened test for recusation was articulated in *Liljeberg* which asks "...whether a reasonable person, knowing all of the facts known to the parties, would harbor doubts as to the court's impartiality...", a compelling guide when *constitutionally-protected rights* are at issue.

(B-4) "...Chilling effect..." of threats of contempt. Under the guise that asking his law clerk, Marla Hamilton, to suggest *sua sponte vacatur* of the writ of seizure was "threatening", Judge Schlegel commenced an attack upon Henry Klein that is explicable only when one considers the $47,500 in campaign contributions. In 52 years of practicing law across the United States, APPENDIX 1, nothing close to the abuse at issue has ever occurred. The specter of facing "...contempt..." for filing pleadings without Judge Schlegel's permission "...strik[es] at the foundation..." of due process and First Amendment liberties, *Wienman v. Updegraff*, 344 U.S. 183 (1952), *(The use of any law as a "chilling" mechanism has been outlawed by the Supreme Court for over 50 years.)* See, *Fear, Risk and the First Amendment: Unravelling the "Chillling Effect"*, 58 Boston University Law Review 685 (1978).

Over and again, Judge Schlegel made it *unconstitutionally* clear that Henry Klein did *not* have the right guaranteed by *Lamont v. Postmaster*, 381 U.S. 301 (1965) to represent Regina Heisler "...unfettered...". Threats of sanctions are the "...most lethal enemies of the First Amendment...", *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589 (1968). After October of 2019, Regina Heisler's lawyer was "...gagged..." by the first citation for contempt of court. At *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817 (1967), the 2nd Circuit Court of Appeals, citing *NAACP v. Button*, 371 U.S. 360 (1964), said this:

> "Since it is the mere threat of unconstitutional sanctions which precipitates the injury, **the courts must intervene at once to vindicate the threatened liberties.**"

Whether a judge should self-disqualify is not only a *constitutional* mandate, but can rise to a level of misconduct, as set forth by this Court at *In Re: Cooks.*

> "We hold that....where the circumstantial evidence of bias or prejudice is so overwhelming that no reasonable judge would hear the case, **failure of a judge to recuse [himself] is a violation of the Code of Judicial Conduct as well as the Louisiana Constitution.**"

(C-1) Gross Departure from proper legal proceedings. It's not possible to lose *all* motions filed before an impartial judge. The constitutional violations of fundamental due process and simple fairness in the case at bar were unprecedented[2]:

---

2 Exhibit A is the 5th Circuit Denial. All Exhibits were fruits of a campaign-poisoned tree.

Lest it be forgotten, Regina Heisler did *not* borrow the money which broke FNBC. She was a victim of a Ponzi scheme. Girod LoanCo, a vulture fund, has tied up $2.1 million left by Heisler's late husband and is seizing all Succession properties.

- On March 12 at 2:30 p.m., we sought an accounting to see how much money had made it to the Cayman Islands, Exhibit E. **Judge Schlegel summarily DENIED an accounting that afternoon without a hearing.**

- On March 24, we asked for Judicial Notice of the FDIC's Final Statement of Policy on Qualifications for Failed Bank Acquisitions (which should have disqualified Girod) and notice of *Henson v. Santander*. **Judge Schlegel summarily DENIED judicial notice that afternoon without a hearing.**

- On June 3, because Girod had used a *non-existent* entity, Girod **REO**, to purchase 4041 Williams Boulevard (the Succession's most valuable possession) and had defrauded the court in other ways and means, we filed a motion pursuant to the Supreme Court's ruling in *Chambers v. NASCO* and a motion to file sensitive documents under seal, Exhibit G. **Judge Schlegel summarily DENIED relief and entered the following order without a hearing:**

  IT IS FURTHER ORDERED that [Regina Heisler] is **PROHIBITED** from filing any further motions **without first seeking leave of Court and obtaining permission to make the filing.**

- On June 24, we asked *permission* to file a Motion for Reconsideration of the denial of an accounting. At this point, Regina Heisler — 77 and diagnosed with liver cancer — victimized by the FNBC Ponzi scheme, was down to Social Security and the threat that Girod was going to seize the Succession's entire $15 million estate, Exhibit H. **Judge Schlegel summarily DENIED relief without a hearing.**

- On July 2, because Regina Heisler is 77 and diagnosed with liver cancer, we sought expeditious relief pursuant to Louisiana Code of Civil Procedure Article 1573, Exhibit I. **Judge Schlegel summarily DENIED relief (as moot) without a hearing.**

- On July 2 (also), because Judge Schlegel has issued a rule to hold Henry Klein in contempt (scheduled for July 14), but didn't say which kind, we filed a Motion for Permission to File a Request for a More Definite Statement Regarding [the] Order to Show Cause Why Henry L. Klein Should Not be Held in Contempt of Court and Request for Vacatur, Exhibit J, which **Judge Schlegel summarily DENIED without a hearing.**

As it eventuated, on July 1, the United States Attorney filed a Bill of Information in the matter of *United States of America v. Gary R. Gibbs*, the Ponzi schemer who used Regina Heisler's name and property (and a multitude of others). In the agreed basis for the plea of guilty for bank fraud, Regina Heisler is clearly "...Nominal Borrower F...", corroborating what we had said all along to Judge Schlegel. On July 10, the United States Attorney Indicted FNBC President and CEO Ashton Ryan with 46 counts of bank fraud which included the trickery involved in duping Regina Heisler as a maker of shill loans as to which she received **ZERO DOLLARS.**

(C-2) Purging Public Records. In actions that would be deemed "...spoliation of evidence..." if committed by a litigant, on July 14, 2020, Judge Schlegel ordered someone (?) in the clerk's office or on his staff to *purge* or *remove* or *extinguish* or *erase* pleadings filed on behalf of Regina Heisler. In his order, Exhibit K, Judge Schlegel **DENIED permission to file the criminal indictments which supported Regina Heisler's arguments that she was defrauded.** Judge Schlegel then ordered that the filings be withdrawn from the record and returned to undersigned counsel. The July 14 purge of records at 793-014 was manifestly unconstitutional, *Iafrate Construction v. State*. The right of access to public records is fundamental, *Williams Law Firm* and access to public records has few exceptions, *First Commerce Title*.

(C-3) The Dismissal of the Motion to Recuse. On August 10, in violation of the maxim that "...no man should be allowed to be the judge of his own case...", Judge Schlegel DENIED the motion that he be recused, spending 5 pages exculpating himself and pointing an accusatory finger at Regina Heisler and her lawyer, Exhibit M. The next day, Judge Schlegel *paralyzed* Regina Heisler's legal rights by refusing to sign a Notice of Intention to Apply for a Writ of Mandamus, Exhibit O.

(C-4) *VACATUR* for lack of jurisdiction is the clearest path. Given the totality of circumstances, this Court should VACATE all infirm orders as did the High Court in *Liljeberg*. It is *impossible* for a judge to be impartial given his admission that he will not read our pleadings unless he gives advance permission! Even then, the pleadings were purged without being read. In the absence of expelling Girod LoanCo from Regina Heisler's life, if not the entire State of Louisiana, the issues raised by *Caperton* must be fully tried and tested. United States Supreme Court precedent pursuant to *Henson v. Santander* is also highly-likely to be tested as to the vulture-funding industry of vile entities.

ASSIGNMENT OF ERROR

The Court of Appeals simply avoided the difficult issue it faced with Judge Schlegel's misconduct, raising the same issues of "...judicial favoritism..." that Justice BREYER reported to Chief Justice RHENQUIST in his *Implementation of the Judicial Conduct and Disability Act* over 40 years ago. The Court of Appeals also failed to address the threshold issue of jurisdiction, which would end this egregious case as of March 12, 2019, *nunc pro tunc*. Absent a dismissal on the basis of La. 12:1354(A), the case is *Caperton v. Massey* all over again, money being the root of all evil.

SUMMARY OF THE ARGUMENT

There is a good reason why the United Nations Council on Human Rights ranks vulture funding at the top three of the vilest evils of the world, together with human trafficking and the maltreatment of leprosy (Writ 643). There is also good reason why the United States Congress is processing House Resolution 2832, titled "STOP VULTURE FUNDS ACT" through the Judiciary Committee, calling for the following provision to become the law of the land:

> *"§ 3. Vulture creditors usually acquire the debt for the payment of a sum far less than the face value of the defaulted obligation. They do so for the sole purpose of collecting through litigation, seizure of assets, political pressure, or other means, preferential payment of the defaulted debt on terms and in amounts far in excess of the amount paid by the vulture creditor to acquire the debt. The vulture creditors seek payments far in excess of the rates of payment made to other similarly situated creditors [such as banks]..."*

While the Congressional thinking is sound, this Court need not wait for the Legislative Branch to grind its wheels of justice at a Fabian pace. The following language in the H.R. version can (and should) be the ruling of this Court:

> *"§ 5(d) Legal Process Issued In Violation Of This Section Is Void. — A summons, subpoena, writ, judgment, attachment, or execution issued in violation of any provision of this section shall be void;*
>
> *"§ 5(e) Dismissal Of Actions Brought Or Maintained In Violation Of This Section. — If it appears to a court in or of the United States that an action brought in the court constitutes, or is in furtherance of, [] debt profiteering, the court shall, on its own initiative or at the request of any interested party, promptly dismiss the action."*

Girod LoanCo, Girod REO, Girod-whatever should be _expelled_ from the state and Regina Heisler and the Succession of Fred P. Heisler must be made whole. The American Bar Association passed ABA FORMAL OPINION 491 to carry the force of law. Immediate dismissal is appropriate and in the highest interests of justice.

ADOPTION OF AFFIDAVITS IN WRIT 643 AND VERIFICATION

PARISH OF ORLEANS

STATE OF LOUISIANA

BEFORE ME, the undersigned authority, personally came and appeared:

Henry L. Klein

who, after being duly sworn, did depose and say:

1. Affiant has read and adopts the factual statements and legal reasons set forth in Writ Application 2020-CC-643 as well as all affidavits referenced therein.
2. Affiant has read and adopts the factual statements and legal reasons set forth in this Writ Application and vouches for the truth thereof as a matter of his own personal knowledge.
3. Further affiant sayeth not.

Henry L. Klein

SWORN TO AND SUBSCRIBED
BEFORE ME, NOTARY, THIS 23RD
DAY OF SEPTEMBER, 2020.

GINO J. RENDEIRO
NOTARY PUBLIC
ID No. 4770 / LA Bar No. 14348
State of Louisiana
My Commission is issued for life

8/26

REGINA B. HEISLER, INDIVIDUALLY AND AS SUCCESSION REPRESENTATIVE/EXECUTRIX OF THE SUCCESSION OF FREDERICK P. HEISLER

VERSUS

GIROD LOANCO, LLC

NO. 20-C-236

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

August 26, 2020

Susan Buchholz
First Deputy Clerk

IN RE REGINA B. HEISLER, INDIVIDUALLY AND AS SUCCESSION REPRESENTATIVE/EXECUTRIX OF THE SUCCESSION OF FREDERICK P. HEISLER

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE SCOTT U. SCHLEGEL, DIVISION "D", NUMBER 793-014

Panel composed of Judges Marc E. Johnson, Robert A. Chaisson, and John J. Molaison, Jr.

WRIT DENIED

As determined from another writ application filed in this matter, respondent, Girod LoanCo, LLC (hereinafter "Girod") filed a Verified Petition for Foreclosure by Executory Process in the 24th Judicial District Court against relator, Regina Heisler. See *Heisler v. Girod*, 20-56 (La. App. 5 Cir. 3/5/20)(unpublished writ).

In her most recent filing, relator appears to challenge an Order from the trial court dated June 3, 2020, in which the court denied relator's motion to set a hearing, refused to accept certain documents as part of the official record, and prohibited relator from filing any additional motions without first obtaining leave of court.[1]

The instant writ application is deficient in several respects. Specifically, relator has failed to comply with Uniform Rules, Courts of Appeal, Rule 4-5, in that the application does not include:

> (4) the issues and questions of law presented for determination by the court;
> (5) the assignments or specifications of errors and a memorandum in support of the application, under Rules 2-12.2 and 2-12.10, and a prayer for relief;

[1] Relator was advised in this Court's denial of her prior writ that the only defenses to a writ of sale and seizure are a request for an injunction or a suspensive appeal. La. C.C.P. art. 2642.

EXHIBIT A

(8) a copy of each pleading on which the judgment, order, or ruling was founded, including the petition(s) in civil cases …

(9) a copy of any opposition and any attachments thereto filed by a party in the trial court or a statement by the relator that no opposing written document was filed.

Without the inclusion of all necessary documents listed above, we are unable to complete a full review of the relator's claims. Accordingly, we deny the relator's application on the showing made.

Gretna, Louisiana, this 26th day of August, 2020.

JJM
MEJ
RAC

9/2

24[TH] JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

p7
713
Ce34

GIROD LOANCO, LLC

NUMBER 793-014

VERSUS

DIVISION D

REGINA B. HEISLER, INDIVIDUALLY AND AS SUCCESSION REPRESENTATIVE/EXECUTRIX OF THE SUCCESSION OF FREDERICK P. HEISLER

FILED
Sept 24th 2019
Kayla Palmer
DEPUTY CLERK

JUDGMENT

There came for hearing on September 20, 2019, before Judge Scott U. Schlegel, the Peremptory Exception of No Right of Action filed by defendant, Regina B. Heisler.

Appearing at the hearing was J. Eric Lockridge on behalf of Girod LoanCo, LLC. Oral argument was waived. Girod's Opposition and all exhibits thereto were admitted in evidence at the hearing.

Regina B. Heisler, Individually and as Succession Representative/Executrix of the Succession of Frederick P. Heisler ("Heisler"), filed a Peremptory Exception of No Right of Action to the Verified Petition for Foreclosure by Executory Process filed by Girod LoanCo, LLC (the "Exception"). Girod LoanCo, LLC subsequently filed an Opposition to the Exception (the "Opposition"), and Heisler filed a Reply to the Opposition.

After considering the Exception, the Opposition, the Reply, and the applicable law, oral argument having been waived, the Court is of the opinion that the law is in favor of Girod LoanCo, LLC, and that the Exception should be denied. Therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that Regina B. Heisler's Peremptory Exception of No Right of Action is hereby DENIED.

JUDGMENT READ, RENDERED, AND SIGNED, at Gretna, Louisiana this 24 day of September 2019

Scott U. Schlegel
Scott U. Schlegel, Judge
24[th] Judicial District Court

24th E-Filed: 09/23/2019 08:40:07 Case: 793014 Div:D Atty:030159 J ERIC LOCKRIDGE

D Lowes

19970656_1

A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE
Michelle Pire
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

SIGNED: HON. SCOTT U. SCHLEGEL - DIVISION: D - 09/24/2019 07:34:47 - CASE:793-014

EXHIBIT
B

Submitted On: 8/10/2020 2:56:23 PM
Accepted On: 8/10/2020 2:58:32 PM

9/1/19
650

FILED FOR RECORD 09/27/2019 15:02:47
Maggie A. Robichaux, DY CLERK
JEFFERSON PARISH, LA

D 1

24[th] JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 793-014 DIVISION "D"

GIROD LOANCO, LLC

VERSUS

REGINA B. HEISLER

FILED: ______________________ ______________________

DEPUTY CLERK

REASONS FOR JUDGMENT

This case came on for hearing on September 20, 2019, on the Peremptory Exception of No Right of Action filed by defendant, Regina B. Heisler. The Court denied the exception for reasons orally assigned. The judgment was signed on September 24, 2019. Ms. Heisler timely filed a Request for Written Reasons on September 25, 2019. Accordingly, the oral reasons are supplemented as follows.

Background

This case commenced on March 12, 2019, as a foreclosure of mortgages by executory process filed by plaintiff, Girod LoanCo, LLC ("Girod"), through its servicer, Capital Crossing Service Company, LLC. Ms. Heisler removed the case to the United States District Court for the Eastern District of Louisiana on March 14, 2019. On June 5, 2019, the Eastern District of Louisiana issued an Order and Reasons remanding the case to this Court on the grounds that federal jurisdiction did not exist because the parties did not have diversity of citizenship.

On June 21, 2019, the Court granted the petition for foreclosure by executory process and ordered the issuance of a writ of seizure and sale on the properties.

Also on June 21, 2019, Ms. Heisler filed an exception of *Lis Pendens*. This exception was denied at the hearing on August 13, 2019, with the signed written judgment following on August 20, 2019.

The pending exception of no right of action was filed on September 5, 2019.

SEAL OF THE CLERK OF COURT PARISH OF JEFFERSON LOUISIANA
JON A. GEGENHEIMER

EXHIBIT C

Reasons

As stated by the Louisiana Fifth Circuit Court of Appeal in *Everhome Mortg. Co. v. Lewis*, 16-323 (La. App. 5 Cir. 12/7/16), 207 So. 3d 646, 651,

> The Louisiana Code of Civil Procedure recognizes two methods by which a mortgagor defendant may assert defenses and procedural objections to an executory proceeding: the filing of an injunction to arrest the seizure and sale, or a suspensive appeal from the order directing the issuance of the writ of seizure and sale. La. C.C.P. arts. 2642; *Deutsche Bank Nat'l Trust Co. ex rel. Morgan Stanley ABS Capital I, Inc. v. Carter*, 10–663 (La.App. 5 Cir. 1/25/11), 59 So.3d 1282, 1286; *American Thrift & Finance Plan Inc. v. Richardson*, 07–640 (La.App. 5 Cir. 1/22/08), 977 So.2d 105, 108.

Thus, an exception of no right of action is not a proper defense to an executory process suit. According to *Everhome Mortg. Co. v. Lewis*, and the authorities cited therein, the proper defense is to file an injunction to arrest the seizure and sale or file a suspensive appeal from the order directing the issuance of the writ of the seizure and sale.

For these reasons, the Court denied the exception of no right of action filed by Ms. Heisler.

Gretna, Louisiana, this 30 of September, 2019.

Scott U. Schlegel
JUDGE SCOTT U. SCHLEGEL

Submitted On: 8/10/2020 2:56:23 PM
Accepted On: 8/10/2020 2:58:32 PM

1/6

FILED FOR RECORD 01/06/2020 15:49:44
Kayla M. Palmer, DY CLERK
JEFFERSON PARISH, LA

D1
865

24th JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 793-014 DIVISION "D"

GIROD LOANCO, LLC

VERSUS

REGINA B. HEISLER

FILED: ______________________ ______________________
DEPUTY CLERK

ORDER

Before the Court is the "Motion To Vacate Order of Executory Process, Peremptory Exception of Right of Action, Request for Expedited Hearing and Motion to Dismiss" filed by defendant, Regina B. Heisler, on January 2, 2020.

Defendant has already requested and has been denied the relief requested in the pending motion. At a hearing on August 13, 2019, the Court denied the defendant's Exception of *Lis Pendens*. *See* Judgment signed on August 20, 2019. At a hearing on September 20, 2019, the Court denied the defendant's Peremptory Exception of No Right of Action. *See* Judgment signed on September 24, 2019. In response to the defendant's Request for Written Reasons filed on September 25, 2019, the Court entered written Reasons for Judgment on September 30, 2019, which supplemented the oral reasons from the hearing.

The relief requested in the pending motion is duplicative of the relief previously requested and previously denied. Accordingly,

IT IS ORDERED that the "Motion To Vacate Order of Executory Process, Peremptory Exception of Right of Action, Request for Expedited Hearing and Motion to Dismiss" filed by defendant, Regina B. Heisler, on January 2, 2020 is **DENIED.**

Gretna, Louisiana, this 6 day of January, 2020.

____
JUDGE SCOTT U. SCHLEGEL

EXHIBIT

DI 7/15
634

FILED
July 15th 2020
Kayla Palmer
DEPUTY CLERK

24th JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 793-014 DIVISION "D"

GIROD LOANCO, LLC

VERSUS

REGINA B. HEISLER, INDIVIDUALLY AND AS SUCCESSION REPRESENTATIVE/EXECUTRIX OF THE SUCCESSION OF FREDERICK P. HEISLER

FILED: ______________________ ______________________
DEPUTY CLERK

JUDGMENT

This case came on for hearing on July 14, 2020 on (1) the defendant's *Motion for an Accounting by Court-Appointed Keeper*, filed on March 10, 2020, and (2) the Court's *Order to Show Cause Why Attorney Should Not be Held in Contempt*, filed on October 7, 2019.

Present: J. Eric Lockridge, Esq., counsel for plaintiff

Henry L. Klein, Esq., counsel for defendant

After hearing the arguments of counsel and considering the record and applicable law, and for the reasons orally assigned, accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's *Motion for an Accounting by Court-Appointed Keeper*, filed on March 10, 2020 is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court's *Order to Show Cause Why Attorney Should Not be Held in Contempt*, filed on October 7, 2019 is MOOT.

Gretna, Louisiana, this 15 day of July, 2020.

____
JUDGE SCOTT U. SCHLEGEL

SEAL OF THE CLERK OF COURT PARISH OF JEFFERSON LOUISIANA

EXHIBIT

FILED FOR RECORD 08/10/2020 11:07:45
Kayla M. Palmer, DY CLERK
JEFFERSON PARISH, LA

8/10

D1
865

24[th] JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 793-014

DIVISION "D"

GIROD LOANCO, LLC

VERSUS

REGINA B. HEISLER, INDIVIDUALLY AND AS SUCCESSION REPRESENTATIVE/EXECUTRIX OF THE SUCCESSION OF FREDERICK P. HEISLER

FILED: ______________________.

____
DEPUTY CLERK

ORDER

For the reasons assigned in the foregoing Reasons for Order, accordingly,

IT IS ORDERED "*Motion to Recuse Judge Scott U. Schlegel and to Disqualify Kean Miller, LP*" filed by the defendant, Regina B. Heisler, on August 3, 2020 is **DENIED.**

Gretna, Louisiana, this 10 day of August, 2020.

____
JUDGE SCOTT U. SCHLEGEL

EXHIBIT

8/10

FILED FOR RECORD 08/10/2020 12:06:19
Kayla M. Palmer, DY CLERK
JEFFERSON PARISH, LA

D1
650

24th JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER: 793-014 DIVISION "D"

GIROD LOANCO, LLC

VERSUS

REGINA B. HEISLER, INDIVIDUALLY AND AS SUCCESSION REPRESENTATIVE/EXECUTRIX OF THE SUCCESSION OF FREDERICK P. HEISLER

FILED: ______________________ ______________________
DEPUTY CLERK

REASONS FOR ORDER

Before the Court is the "*Motion to Recuse Judge Scott U. Schlegel and to Disqualify Kean Miller, LP*" filed by the defendant, Regina B. Heisler, on August 3, 2020 (hereinafter "*Motion to Recuse").* The motion is DENIED.

This proceeding for executory process is a type of summary proceeding. The case has an extensive history that began on March 12, 2019 when the plaintiff, Girod LoanCo, LLC, filed a Verified Petition for Foreclosure by Executory Process against the defendant, Ms. Heisler. The defendant immediately removed the case to the United States District Court for the Eastern District of Louisiana on March 14, 2019. But the Eastern District of Louisiana remanded the case back to this Court by Order and Reasons of June 5, 2019.

Soon thereafter, this Court entered the Order for Writ of Seizure and Sale in favor of the plaintiff and signed the judgment on June 21, 2019. Instead of seeking an injunction or taking a suspensive appeal in accordance with Article 2642 of the Louisiana Code of Civil Procedure, the defendant began a pattern of filing other types of motions (a number of them were repetitive) as chronicled below:

> **On June 21, 2019,** the Defendant filed an exception of *lis pendens. The* Court denied this exception during a hearing on August 13, 2019, reasoning that this exception is not a proper defense to a proceeding for executory process. *See* Judgment of Aug. 20, 2020. The defendant did not file an application for a supervisory writ.
>
> **On August 19, 2019**, the defendant filed an exception of no right of action, and filed another exception of no right of action on **September 5, 2019.** These exceptions were denied at the hearing on September 20, 2019. *See* Judgment of Sept. 24, 2019. The Court rendered Reasons for Judgment on September 30, 2019, which stated:

EXHIBIT
20

Thus, an exception of no right of action is not a proper defense to an executory process suit. According to *Everhome Mortg. Co. v. Lewis*, (La. App. 5 Cir. 12/7/16), 207 So. 3d 646, 651, and the authorities cited therein, the proper defense is to file an injunction to arrest the seizure and sale or file a suspensive appeal from the order directing the issuance of the writ of the seizure and sale.

The defendant did not file an application for a supervisory writ.

On October 7, 2019, the Court issued *sua sponte* an "Order to Show Cause Why Attorney Should Not Be Held in Contempt" because of threatening and disrespectful correspondence sent to the Court by defense counsel, Henry Klein. The hearing was scheduled for October 29, 2019. But before the hearing could be held, the defendant again removed the case to the United States District Court for the Eastern District of Louisiana. On December 23, 2019, the Eastern District of Louisiana again remanded the case to this Court, finding that the defendant did not have an "objectively reasonable basis" for seeking removal, and sought to remove only to delay this Court's show cause hearing on contempt. *See Girod Loanco, LLC v. Regina B. Heisler*, No. 19-13150("G") (E.D.La. 12/23/19) (Order and Reasons at 10). The Eastern District of Louisiana awarded attorneys' fees and costs in favor of the plaintiff due to the improper removal.

On October 8, 2019, the defendant filed an application for a stay of this Court's Order to Show Cause directly to the Louisiana Supreme Court. On October 9, 2019, the Louisiana Supreme Court denied the stay. *Girod Loanco, LLC v. Regina B. Heisler*, No. 2019-CD-1582 (La. 10/9/19) (unpublished writ disposition).

On October 15, 2019, the defendant filed an application for a supervisory writ directly to the Louisiana Supreme Court regarding the issuance of the order to show cause why attorney should not be held in contempt. The Louisiana Supreme Court denied the writ application. *Girod Loanco, LLC v. Regina B. Heisler*, No. 2019-CD-1633 (La. 10/16/19) (unpublished writ disposition).

On January 2, 2020, the defendant filed a *Motion to Vacate Order of Executory Process, Peremptory Exception of Right of Action [sic], Request for Expedited Hearing and Motion to Dismiss*. The Court entered an order on January 6, 2020, setting forth that the relief sought was duplicative and had already been denied. The defendant filed an application for a supervisory writ of this order to the Louisiana Fifth Circuit Court of Appeal on February 4, 2020. On March 5, 2020, the Louisiana Fifth Circuit Court of Appeal denied the defendant's application to vacate order of executory process and peremptory exception of [no] right of action. The Fifth Circuit's denial of the writ application reasoned:

> First, the trial court was correct in its finding that Heisler's current Exception/Motion pleading was duplicative, and on that basis we find that the trial court did not err in denying the current Exception/Motion.
>
> Furthermore, as the trial court correctly stated in its September 30, 2019 reasons for judgment, Heisler is not entitled to the relief requested. **The only defenses to a writ of sale and seizure are a request for an injunction or a suspensive appeal. La.C.C.P. art. 2642. Heisler filed neither of these proceedings.** [Emphasis added].

Regina B. Heisler, et al. v. Girod Loanco, LLC, No. 20-C-56 (La. App. 5 Cir. 03/05/20)(unpublished writ disposition) at 2.

On March 10, 2020, the defendant filed a *Motion for an Accounting by Court-Appointed Keeper*, which was originally set for April 21, 2020, but continued due to the closure of the Court resulting from COVID-19.

On March 12, 2020, the defendant filed a *Motion for Reconsideration of Disclosure Date*, which the Court summarily denied on the same date. The defendant did not file an application for a supervisory writ.

On March 23, 2020, the defendant filed a *Request for Judicial Notice Pursuant to Code of Evidence Article 202*, which asked that the Court take judicial notice of the Federal Deposit Insurance Corporation's "Final Statement of Policy on Qualifications for Failed Bank Acquisitions", and a decision of the United States Supreme Court in 2017. The Court summarily denied the request on March 24, 2020. The defendant did not file an application for a supervisory writ.

On May 27, 2020, Heisler filed a "*Motion to Set a Hearing Pursuant to Precedent Set in Nasco v. Calcasieu and Chambers v. NASCO, 501 U.S. 32 (1991)*.

On May 28, 2020, Heisler filed a document entitled *Opposed Motion to File Documents Under Seal*. The Court denied this motion and the motion filed on May 27, 2020, and provided Reasons on June 3, 2020. The Court also prohibited defendant from filing further motions in this case without first seeking leave of Court.

On June 10, 2020, Heisler filed with the Louisiana Fifth Circuit Court of Appeal a *Motion for Reconsideration Limited to Milburn v. Proctor Trust Co. and Henson v. Santander Consumer, U.S.A. As ". . . Controlling . . . "*. This request sought a partial rehearing as to the Louisiana Fifth Circuit's March 5, 2020 denial of Relator's application for supervisory review of this Court's order of January 6, 2020. The Fifth Circuit denied the application on June 17, 2020, finding that Heisler was not entitled to a rehearing. *Regina B. Heisler, et al. v. Girod Loanco, LLC*, No. 20-C-56 (La. App. 5 Cir. 06/17/20)(unpublished writ disposition).

On June 20, 2020, defendant filed an *Opposed Motion For Leave to File Motion for Consideration (or Partial Reconsideration) of Request for Accounting and Complete Report From Sterling Properties*. The Court denied this "*Opposed Motion*" on June 24, 2020, finding that the relief requested was duplicative and thus moot. The Court again noted that the case was over with the exception of Heisler's *Motion for an Accounting by Court-Appointed Keeper* and the Court's "Order to Show Cause Why Attorney Should Not be Held In Contempt". Order of June 24, 2020. It does not appear that the defendant filed an application for a supervisory writ.

On June 24, 2020, the Court set a hearing for July 14, 2020 on the defendant's *Motion for an Accounting by Court-Appointed Keeper* and the Court's "Order to Show Cause Why Attorney Should Not be Held In Contempt". Order Setting Hearing of June 24, 2020.

On June 26, 2020, the defendant filed a "Notice of Intention to File Writs" with the Fifth Circuit Court of Appeal on the Court's June 3 order. The Court granted the defendant until July 24, 2020 to file the writ. *See* Order of June 26, 2020. According to the Louisiana Fifth Circuit Clerk of Court's office, a writ application was filed on July 29, 2020 by the defendant. The defendant did not provide a copy of the writ to this Court, however. The writ application is currently pending.

On July 2, 2020, the defendant filed an (1) *Opposed Motion to Treat Pleadings Filed by Regina Heisler Expeditiously Pursuant to LA CCP Article 1573*; and (2) *Opposed Motion for Permission to File Request for a More Definite Statement Regarding Order to Show Cause Why Henry L. Klein Should Not be Held in Contempt of Court and Request for Vacatur*. The Court summarily denied these motions on July 2, 2020. It does not appear that the defendant filed an application for a supervisory writ.

On July 6, 2020, the defendant filed an *Opposed Motion For Permission to File Bill of Information Against Gary R. Gibbs and to Take Judicial Notice Of Same Pursuant to Louisiana Code of Evidence Article 201 and 202.*

On July 12, 2020, the defendant filed a document entitled *Post "...Ashton Ryan Indictment..." Submission.* The Court denied the filing of this document and the *Opposed Motion* of July 6, 2020 by Order of July 14, 2020, and ordered that the filings be withdrawn from the record and returned to the defendant. Order of July 14, 2020. The writ application is currently pending.

On July 14, 2020, the Court held a hearing on the defendant's *Motion for an Accounting by Court-Appointed Keeper* and the Court's "Order to Show Cause Why Attorney Should Not Be Held In Contempt". The Court denied the defendant's *Motion for an Accounting by Court-Appointed Keeper*, and mooted the Court's Order to Show Cause after defense counsel, Henry Klein, apologized to the Court. *See* Judgment entered on July 15, 2020. It does not appear that the defendant filed an application for a supervisory writ.

On July 22, 2020, the Louisiana Supreme Court entered an order denying the defendant's writ application as untimely filed. This denial was from the Fifth Circuit's Order of June 17, 2020, which denied rehearing of the Fifth Circuit's Order of March 5, 2020.

On August 3, 2020, defendant filed the pending *Motion to Recuse.*

<u>Analysis</u>

Article 154 of the Louisiana Code of Civil Procedure provides the procedure for filing a motion to recuse a judge, and states:

> A party desiring to recuse a judge of a district court shall file a written motion therefor assigning the ground for recusation. This motion shall be filed prior to trial or hearing unless the party discovers the facts constituting the ground for recusation thereafter, in which event it shall be filed immediately after these facts are discovered, **but prior to judgment.** If a valid ground for recusation is set forth in the motion, the judge shall either recuse himself, or refer the motion to another judge or a judge ad hoc, as provided in Articles 155 and 156, for a hearing.

[Emphasis added]. In the case of *Schexnayder v. St. Charles Par.*, 202 So. 3d 576, 584 (La. App. 5th Cir. 2016), *writ denied,* 214 So. 3d 866 (La. 2017), the Louisiana Fifth Circuit Court of Appeal made clear that a motion to recuse must be filed prior to the judgment.

In this case, the Court entered the Order for Writ of Seizure and Sale in favor of the plaintiff and signed the judgment on June 21, 2019, over a year ago. Additionally, the Court denied (1) the defendant's exception of *lis pendens* at the hearing on August 13, 2019; and (2) the defendant's exception of no right of action on September 20, 2019. *See* Reasons for Judgment on September 30, 2019. These decisions were affirmed on appeal.

After the filing of the motion to recuse, the Court contacted the Clerk's Office of the Louisiana Fifth Circuit Court of Appeal and learned that the defendant filed a writ application on July 29, 2020, although a copy of this writ application was not provided to this Court. The writ application seeks review of:

(1) the Order of June 3, 2020, and

(2) the Order of July 14, 2020, which denied the filing of the *Opposed Motion For Permission to File Bill of Information Against Gary R. Gibbs and to Take Judicial Notice Of Same Pursuant to Louisiana Code of Evidence Article 201 and 202,* and the *Post "...Ashton Ryan Indictment..." Submission.*

This writ is still outstanding.

For these reasons, the Court will enter an order denying the "Motion to Recuse Judge Scott U. Schlegel and to Disqualify Kean Miller, LP" as untimely filed by the defendant, Regina B. Heisler, on August 3, 2020.

Gretna, Louisiana, this 10 day of August, 2020.

JUDGE SCOTT U. SCHLEGEL

DUPLICATE

SUPREME COURT

STATE OF LOUISIANA 20 C 1324

NO.________________ Scanned 11/17/20 KO Date Initials

Linked 11/17/20 KO Date Initials

REGINA B. HEISLER, INDIVIDUALLY AND AS SUCCESSION REPRESENTATIVE/EXECUTRIX OF THE SUCCESSION OF FREDERICK P. HEISLER

Plaintiff-Relator

SUPREME COURT OF LOUISIANA Filed NOV 1 3 2020 Clerk

E-Filed 11/12/20 KO

VERSUS

GIROD LOANCO, LLC

Defendant-Respondent

APPLICATION FOR WRIT TO REVIEW RULING OF THE FOURTH CIRCUIT COURT OF APPEAL, STATE OF LOUISIANA
CASE NO. 2020-C-0461
RELATED TO CASE NO. 2020-CC-0643
(SUPRRME COURT FILING NO. SC040029)

CIVIL PROCEEDING

Respectfully submitted,

Michael G. Bagneris (Bar #2658)
Bagneris, Pieksen & Associates, LLC
935 Gravier Street, Suite 2110
New Orleans, LA 70112
Office (504) 493-7990 | Fax (504) 493-7991
Email: bagneris@bpajustice.com

SUPREME COURT OF LOUISIANA
A TRUE COPY OF DOCUMENT AS
SAME APPEARS IN OUR RECORDS
Theresa Ann McCarthy
Second Deputy Clerk of Court

INPUT BY: KO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Resolutions

STATEMENT OF JURISDICTION

Regarding jurisdiction, Relator, Regina B. Heisler, individually and as Representative/Executrix of the Succession of Frederick P. Heisler, must direct this Court's attention to the first Writ it filed concerning Respondent's case in chief. This initial Writ basically asserts that Respondent does not have a right to file a judicial demand to any court in the State of Louisiana due to its failure to comply with R.S. 12:1354(A). This argument will be more fully addressed in the Procedural component of this Brief.

In the interim, since there has not been a ruling on the first Writ, it was incumbent upon Relator to file this second Writ challenging the Denial of its Motion for a New Trial.

Relator reasserts its arguments articulated in the first Writ. If, however, this Court rejects that argument, Relator contends that jurisdiction exists pursuant to the Louisiana Code of Civil Procedure Article 2201 and Rule 4 of the Uniform Rules – Courts of Appeal.

STANDARD OF REVIEW

The applicable standard of review on ruling on a Motion for a New Trial is whether the Trial Court abused its discretion. *Perkins v. Allstate Ins. Co.*, 950 So.2d 850 (La. App. 1st Cir. 2006).

ASSIGNMENT OF ERRORS

1) After Relator satisfied the requirements of Article 1972(2), did the Trial Judge abuse her discretion by failing to grant a new trial?

2) Since Article 1972 uses the mandatory language of "shall", did the Trial Judge abuse her discretion by failing to grant a new trial?

3) Did the Trial Judge err by failing to grant a new trial?

STATEMENT OF THE CASE

This case has all the elements of an academy award winning movie – suspense, intrigue, a sympathetic victim and an unscrupulous villain. Unfortunately, the facts of this case are real not fictional. The Respondent, a Vulture loan company, is openly and shamelessly fleecing the Relator. This Court represents her last chance for justice.

The Relator, Mrs. Regina Heisler, is a 77 year old widow with no business acumen, who was defrauded into signing millions of dollars in shill loans by Mississippi developer, Gary Gibbs. The fraud was necessary to enable Mr. Gibbs to conceal his shill loans of over $158,000,000 which he had with First National Bank of Commerce (FNBC). Mr. Gibbs was utilizing a Ponzi like scheme designed to use collateral pledged by innocents like Mrs. Heisler. The aforementioned statements are not simple allegations. Gary Gibbs has confessed to this crime and is awaiting sentencing.

For various reasons including the millions of dollars lost because of the actions of Gary Gibbs, the FNBC closed its doors on April 28, 2017. This date marked the end of FNBC and the beginning of Mrs. Heisler's tortuous journey to bankruptcy.

When FNBC closed, it sold a bundle of notes to the Vulture fund, Girod LoanCo, LLC ("Girod" or "Girod LoanCo") for pennies on the dollar. Relator's notes were in that bundle. Days after the bank failed, Attorney Henry Klein, who was counsel for Regina Heisler and the Frederick Heisler Succession, attempted to pay the FNBC debt. Of course, at this time, Attorney Klein was totally unaware of the scam perpetrated by Gary Gibbs. Attorney Klein's record demonstrated that the accurate Heisler Succession debt with FNBC was $600,000. He was told by the FDIC officials that the debt was $9.8 million. Klein was flummoxed by this revelation. How could Mrs. Heisler owe $9.8 million in money she never borrowed or received on notes never funded? Klein requested proof of the $9.8 million indebtedness and the opportunity to see the loan files. This request was denied. He was told that the files had been shipped to Dallas. Klein offered to travel to the Dallas office, but was turned down and advised to file a Freedom of Information Request. After six (6) weeks, the Freedom of Information Agency informed Mr. Klein that there were no files responsive to his request. Later, Klein was notified that Girod was the winning bidder of the FNBC notes. He attempted to go to Boston to see the files. He was unsuccessful. When Kean Miller appeared as counsel for Girod LoanCo, Mr. Kelin sent multiple emails asking for proof that Heisler received any of the money she allegedly borrowed.

No one -- not the bank, not FDIC, not Kean Miller – has ever provided any basic information, such as credit application, financial statement, income tax statement, bank officer approval forms, etc., supporting the claim that Mrs. Heisler received millions of dollars. In short, there has never been one scintilla of proof supporting the indebtedness represented by the FNBC note. Relator has constantly argued that the FNBC notes were unenforceable since they were obtained through fraud.

It does not matter to a Vulture fund like Girod LoanCo that the notes it purchased and seeks to enforce are the result of fraud. Girod LoanCo has relentlessly begun to seize every asset Regina Heisler possesses. Klein estimates that the Succession of Heisler is on the path toward losing \$15-\$20 million. In an effort to discover where the stolen FNBC money went, Klein retained the services of private investigators, who reported that the funds, most likely, ended up in the Cayman Islands. Undersigned counsel is trying to prevent the last liquid asset of Mrs. Heisler from heading to the Caymans.

In an effort to stop the bleeding of assets flowing from Mrs. Heisler, multiple pleadings have been filed. This case focuses only on the asset of \$2.1 million in the registry of Civil District Court. Mrs. Heisler is dying of liver cancer and may not be around when this Court rules. However, like any parent, she would like to leave something to her children other than the awful memory of her being hoodwinked out of their inheritance.

RELEVANT PROCEDURAL HISTORY

The case of Regina Heisler, individually and as Succession Representative/ Executrix of the Succession of Frederick P. Heisler, has had a long and tortious history. This Writ will only address the dispute regarding the $2.1 million held in the registry of Civil District Court. A brief history is necessary to explain how the funds got to the Court's registry and the origin of the dispute.

When the First National Bank of Commerce (FNBC) closed its doors, the Federal Deposit Insurance Corporation (FDIC) managed the debts and revenues for the bank. This management was the genesis of the problem. The FDIC disregarded its own policy and sold, at remarkable discounts, a bundle of notes to a Vulture corporation, Girod LoanCo, LLC. This bundle of notes contained ones signed by Regina Heisler. To make matters worse, the Regina Heisler notes were unaccompanied by any supporting data. There was no loan application from Regina Heisler. There was no financial statement. There was no tax return. There was no bank officer approval. There was absolutely nothing that generally accompanies a multi-million dollar loan.

The Vulture, Girod LoanCo, LLC, attempted to seize funds of Mrs. Heisler invested with Charles Schwab Company ("Schwab") to partially pay the debt on the notes. As Executrix of the Succession, Regina Heisler, through Attorney Klein, alerted Schwab that the Girod LoanCo note was unenforceable. She also filed a Petition for Declaratory Judgment in the Frederick Heisler Succession. Mrs. Heisler sought to have the Court declare that the notes purchased by Girod LoanCo were unenforceable.

Schwab filed a Concursus naming Girod LoanCo, LLC and Regina Heisler and the Succession of Frederick Heisler as claimants. Further, Schwab placed the Heisler funds in the registry of the Court asking the Court to decide who should get the money.

The Concursus Petition was consolidated with the Petition for Declaratory Judgment. On January 2, 2020, a Judgment was rendered for Girod LoanCo, LLC.

Relator filed a Motion to Stay the Judgment followed by a Motion for a New Trial. Both Motions were granted. The Motion for a New Trial was supplemented with various affidavits and documents. A Zoom hearing was held on August 13, 2020. The New Trial was Denied and this Writ ensued.

RELATOR'S REPLY TO RESPONDENT'S ANTICIPATED PROCEDURAL OBJECTIONS

Respondent raises three procedural objections to Relator's Writ. First, Respondent asserts that this Court found that the Trial Court properly granted its Exception of Lis Pendens. Therefore, the present action is inappropriate. Relator directs the Court' attention to a matter pending before it bearing docket No. 2020-CC-0643. This matter basically demonstrates that the Vulture fund, Girod LoanCo, did not have a right to file a judicial demand in the State of Louisiana. This right was forfeited when Girod LoanCo failed to comply with La. R.S. 12:1354(A). If Respondent cannot file a judicial demand, then the Courts have no jurisdiction. *Proctor Trust Co. v. Ethel Milburn Pope*, 12 So.2d 724 (La. Ct. App. 1943); *Ethel M. Milburn, et al v. Proctor Trust Co., et al*, 54 F.Supp 989 (W.Dist of La. 1944).

Unfortunately, the threshold question of jurisdiction was never answered. The Trial Court failed to rule on the Exception of No Right of Action which raises the jurisdiction question and the Fourth Circuit pretermitted on this all important issue. The Exception of No Right of Action/Jurisdiction is fully discussed in Relator's first Writ. Those arguments are adopted herein as if copied in *extenso*. Until the essential issue of jurisdiction is addressed by ruling on the Exception of No Right of Action, it is respectfully asserted that this second Writ is properly before this Court. Clearly, the Court cannot rule on Lis Pendens or any other matter until jurisdiction is determined.

Second, Respondent emphasizes that at a point in time the Succession matter and the Concursus were consolidated; it was later de-consolidated. Respondent goes on to indicate that pleadings which should have been filed in the Succession matter had the docket number of the Concursus. This clerical error did exist on two occasions. However, it should be noted that even after the de-consolidation of these matters, the trial Court continued to place both docket numbers on the pleadings. Moreover, the Trial Court was never confused about what was before it or what it was ruling upon.

LAW AND ANALYSIS

The purpose of a trial in any given matter is to seek the truth.[1] However, the redactors of the Civil Code realized that there were those rare occasions when truth could sometimes be eluded by time and circumstances. It is for this reason that Article 1972 of the Louisiana Code of Civil Procedure was established. As the Article states, its goal is to ensure impartial justice is done. Article 1972 Subsection (2) reads in appropriate part:

> "Art. 1972. Peremptory grounds[2]
>
> A new trial shall be granted, upon contradictory motion of any party, in the following cases:
>
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial."

The case before the Bench is a classic example of the circumstances described in La. C.C.P. Art. 1972(2).

Relator filed its request for a new trial primarily based upon the Federal indictment of Ashton Ryan and the Bill of Information of Gary Gibbs. Importantly, subsequent to the hearing for a New Trial, Gary Gibbs pled Guilty to bank fraud. This Court is asked to take judicial notice of this fact.[3] (See attached Plea).

There are three criteria that must be satisfied for Article 1972(2) to apply. The first two criteria are articulated in the statute: 1) the evidence must be important to the cause; 2) the evidence could not, with due diligence, have been obtained before or during the trial. The third criterion is required by La. C.C.P. Article 1975; 3) applicant must verify by affidavit the allegations of fact.

I. Threefold Test

Criterion 1 – Evidence Important to the Cause

In the beginning of this litigation, Mrs. Regina Heisler always maintained that she did not receive a penny of the money represented by the notes in this matter. Her only

---

[1] *Perkins v. Allstate Insurance Co.*, 950 So.2d 850 (La. App. 1st Cir. 2006).
[2] Louisiana Code of Civil Procedure Article 1972(2)
[3] Gary Gibbs Plea

counsel at the time, Attorney Henry Klein, argued that she was the victim of a Ponzi scheme. He alleged that FNBC and developer, Gary Gibbs, had hoodwinked Mrs. Heisler. Unfortunately, at the time these statements were made they were mere factual allegations.

Relator's argument of fraud rang hollow with the Courts. After all, Relator admitted that she had in fact signed the notes in question. No Court looked beyond this fact. When one peeks behind the curtain, a cornucopia of facts are presented. When the factual allegations are viewed in the light of the newly discovery evidence, it becomes unquestionably clear that a fraud was perpetrated upon Relator.

- It is a fact that there are no documents demonstrating that Regina Heisler initiated a loan request for millions of dollars.

- It is a fact that Relator's counsel has never been provided with a bank application reflecting that Relator requested the loan represented by the notes or tax returns supporting her ability to borrow millions or a board resolution affirming the loan or anything evidencing Relator received the funds represented by the notes.

- It is a fact that Regina Heisler has always maintained that she did not receive a copper cent from the notes in question.

- It is a fact that Relator is a high school graduate with no business acumen.

All of the above facts were argued by Attorney Klein but the Court believed that those facts were insufficient to overcome the Relator's signature on the notes. The Court reasoned that the above facts, standing alone, are not indicative of any Ponzi scheme or fraud or anything that proves Mrs. Heisler had been bamboozled.

However, after the trial of January 2, 2020 was held, salient facts of fraud were uncovered by the Federal Government. The Bill of Information of Gary Gibbs demonstrates the Ponzi-like scheme that was employed to deceive customers of FNBC. Additionally, at the hearing for a New Trial, Relator asserted that "Borrower F", described in the Gary Gibbs Bill of Information as one of the defrauded customers of FNBC, was, in fact, Mrs. Regina Heisler.

As stated, Attorney Klein named developer, Gary Gibbs, as the culprit who stole widow Heisler's funds. The fact that Mr. Gibbs was running a Ponzi scheme on customers

II. <u>FNBC Notes Lack Support</u>

In seeking a New Trial, another argument raised by the Appellant, was a lack of financial data supporting the notes in this matter.

There are no less than seventy-eight (78) emails from Attorney Klein begging for this information. These emails were addressed to the FDIC, various federal agencies, and to opposing counsel. Attorney Klein wanted to be provided with supporting documentation evidencing Mrs. Heisler had requested and received the funds. <u>Absolutely nothing was forthcoming</u>. LSU Professor Brian Andrews submitted a report declaring that there were multiple violations of the alleged banking transactions between FNBC and Mrs. Heisler. Prof. Andrews believed that these violations should have raised a red flag with bank officials. Andrews' report and the statements made in the Bill of Information should raise a gigantic red curtain of doubt about the enforceability of the FNBC notes.

Obviously, the financial documents Relator seeks, do not exist, so they cannot be produced. Mr. Gibbs' Guilty plea makes him a self-proclaimed criminal. He defrauded Mrs. Regina Heisler. He did not complete the requisite paperwork of the bank in committing this fraud. He is a criminal. Criminals do not like to leave a paper trail of their crimes.

III. <u>The Trial Court Abused its Discretion</u>

<u>Abused Discretion</u>

Relator vehemently maintains that when all of the above facts and information are viewed in *pari materia*, the conclusion that a new trial was warranted is inescapable. The facts are so overwhelming that it must be concluded that the trial Judge abused her discretion in denying the Motion for New Trial.

CONCLUSION

Relator has satisfied the criteria mandated by La. C.C.P. Art. 1972(2). The peremptory grounds articulated by Article 1972 once satisfied, compels the granting of a New Trial. It declares that a New Trial shall be granted when the party has discovered important evidence which was unavailable at the time of trial.

For three years, Mrs. Regina Heisler has been screaming that she was a victim of fraud. She knew it but initially could not prove it. Now, with the indictment of Ashton Ryan, the Guilty plea and Bill of Information of Gary Gibbs, she can. A new trial will afford Mrs. Heisler the opportunity to prove she was a victim and the law clearly provides that she is entitled to one.

Respectfully submitted,

Michael Bagneris

Michael G. Bagneris (Bar #2658)
Bagneris, Pieksen & Associates, LLC
935 Gravier Street, Suite 2110
New Orleans, LA 70112
Office (504) 493-7990 | Fax (504) 493-7991
Email: bagneris@bpajustice.com

Henry L. Klein
844 Baronne Street
New Orleans, LA 70113
Phone (504) 301-3027
Email: henryklein44@gmail.com

VERIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned Notary, duly qualified and commissioned in and for the abovementioned Parish and State, personally came and appeared: **MICHAEL G. BAGNERIS**, a person of the full age of majority and a resident of New Orleans, Louisiana, who after first being duly sworn, declared:

- That he is the attorney for Henry L. Klein, in Civil Action No. 2020-CA-0074 pending before the Fourth Circuit Court of Appeal, State of Louisiana; and, co-counsel for Regina Heisler;
- That he has read the foregoing Writ Application and that all of the allegations contained therein are true and correct to the best of his knowledge, information and belief; and
- That copies of this Application were duly served on: the Clerk of Court for the Fourth Circuit Court of Appeal by U.S. Mail on November 12, 2020, at 410 Royal Street, New Orleans, LA 70130; the Honorable Ethel S. Julien, Judge of Division "N" of the Civil District Court for the Parish of Orleans by U.S. Mail on November 12, 2020, at 421 Loyola Avenue, Suite 312, New Orleans, LA 70112, and counsel of record, James Eric Lockridge by electronic transmission on November 12, 2020, at email address eric.lockridge@keanmiller.com.

Michael Bagneris

Michael G. Bagneris

Sworn to and subscribed before me on
this 12th day of November, 2020.

John O. Pieksen, Jr., Notary Public
LSBA #21023

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 491 **April 29, 2020**

Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in conduct the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness to or conscious avoidance of facts. Accordingly, where facts known to the lawyer establish a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require the lawyer to inquire further in order to help the client avoid crime or fraud, to avoid professional misconduct, and to advance the client's legitimate interests. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after inquiry and based on information reasonably available at the time does not violate the rules. This opinion does not address the application of these rules in the representation of a client or prospective client who requests legal services in connection with litigation.[1]

I. Introduction

In the wake of media reports,[2] disciplinary proceedings,[3] criminal prosecutions,[4] and reports on international counter-terrorism enforcement and efforts to combat money-laundering, the legal profession has become increasingly alert to the risk that a client or prospective client[5] might try to retain a lawyer for a transaction or other non-litigation matter that could be

---

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *See* Debra Cassens Weiss, *Group Goes Undercover at 13 Law Firms to Show How U.S. Laws Facilitate Anonymous Investment,* A.B.A. J. (Feb. 1, 2016), https://www.abajournal.com/news/article/group_goes_undercover_at_13_law_firms_to_show_how_us_laws_facilitate; *see also* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate,* N.Y. TIMES (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html.

[3] *In re* Albrecht, 42 P.3d 887, 898–900 (Or. 2002) (disbarment for assisting client in money laundering).

[4] *See, e.g.*, United States v. Farrell, 921 F.3d 116 (4th Cir. 2019) (affirming conviction for money laundering); United States v. Blair, 661 F.3d 755 (4th Cir. 2011) (same); Laura Ende, *Escrow, Money Laundering Cases Draw Attention to the Perils of Handling Client Money*, STATE BAR OF CAL. (Feb. 2017), http://www.calbarjournal.com/February2017/TopHeadlines/TH1.aspx (lawyer sentenced "to five years in prison after being convicted of felonies related to a money laundering scheme").

[5] "Client" refers hereinafter to "client and prospective client" unless otherwise indicated.

legitimate but which further inquiry would reveal to be criminal or fraudulent.[6] For example, a client might seek legal assistance for a series of purchases and sales of properties that will be used to launder money. Or a client might propose an all-cash deal in large amounts and ask that the proceeds be deposited in a bank located in a jurisdiction where transactions of this kind are commonly used to conceal terrorist financing or other illegal activities.[7] On the other hand, further inquiry may dispel the lawyer's concerns.

This opinion addresses a lawyer's obligation to inquire when faced with a client who may be seeking to use the lawyer's services in a transaction to commit a crime or fraud. Ascertaining whether a client seeks to use the lawyer's services for prohibited ends can be delicate. Clients are generally entitled to be believed rather than doubted, and in some contexts investigations can be both costly and time-consuming. At the same time, clients benefit greatly from having informed assistance of counsel. A lawyer's obligation to inquire when faced with circumstances addressed in this opinion is well-grounded in authority interpreting Rule 1.2(d) and in the rules on competence, diligence, communication, honesty, and withdrawal.

As set forth in Section II of this opinion, a lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d). Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule. Whether the facts known to the lawyer require further inquiry will depend on the circumstances. As discussed in Section III, even where Rule 1.2(d) does not require further inquiry, other Rules may. These Rules include the duty of competence under Rule 1.1, the duty of diligence under Rule 1.3, the duty of communication under Rule 1.4, the duty to protect the best interests of an organizational client under Rule 1.13, the duties of honesty and integrity under Rules 8.4(b) and (c), and the duty to withdraw under Rule 1.16(a). Further inquiry under these Rules serves important ends. It ensures that the lawyer is in a position to provide the informed advice and assistance to which the client is entitled, that the representation will not result in professional misconduct, and that the representation will not involve counseling or assisting a crime or fraud. Section IV addresses a lawyer's obligations in responding to a client who either agrees or does not agree to provide information necessary to satisfy the duty to inquire. Finally, Section V examines hypothetical scenarios in which the duty to inquire would be triggered, as well as instances in which it would not.

---

[6] Hereinafter, "transaction" refers both to transactions and other non-litigation matters unless otherwise indicated. This opinion does not address the application of rules triggering a duty to inquire where a client requests legal services in connection with litigation. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981), discusses how a lawyer *not* involved in the past misconduct of a client should handle the circumstance of a proposed transaction arising from or relating to the past misconduct.

[7] *See* AM. BAR ASS'N TASK FORCE ON GATEKEEPER REGULATION AND THE PROFESSION, VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING 15–16 (2010) [hereinafter GOOD PRACTICES GUIDANCE] (describing institutions, such as the United Nations, the World Bank, the International Monetary Fund, and the U.S. Department of State, believed to be "credible sources" for information regarding risks in different jurisdictions); *id.* at 24 (noting the "higher risk situation" when a client offers to pay in cash).

II. The Duty to Inquire Under Rule 1.2(d)

Rule 1.2(d) states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." A duty to inquire to avoid knowingly counseling or assisting a crime or fraud may arise under this Rule in two ways. First, Rule 1.0(f) states that to "know[]" means to have "actual knowledge of the fact in question." When facts already known to the lawyer are so strong as to constitute "actual knowledge" of criminal or fraudulent activity, the lawyer must "consult with the client regarding the limitations on the lawyer's conduct."[8] This consultation will ordinarily include inquiry into whether there is some misapprehension regarding the relevant facts. If there is no misunderstanding and the client persists, the lawyer must withdraw.[9]

In *In re Blatt*,[10] for example, the New Jersey Supreme Court disciplined a lawyer for participation in a real estate transaction where "*[o]n their face* the [transaction] documents suggest[ed] impropriety if not outright illegality."[11] Addressing the lawyer's duties, the court wrote:

> A lawyer may not follow the directions of a client without first satisfying himself that the latter is seeking a legitimate and proper goal and intends to employ legal means to attain it. . . . The propriety of any proposed course of action must be initially considered by the attorney, and it may be thereafter pursued only if the lawyer is completely satisfied that it involves no ethical compromise. . . . [The lawyer's] duty, upon being requested to draft the aforementioned agreements, was to learn all the details of the proposed transaction. Only then, upon being satisfied that he had indeed learned all the facts, and that his client's proposed course of conduct was proper, would he have been at liberty to pursue the matter further.[12]

Additionally, if facts before the lawyer indicate a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, a lawyer's conscious, deliberate failure to inquire amounts to knowing assistance of criminal or fraudulent conduct. Rule 1.0(f) refers to "actual knowledge" and provides that "[a] person's knowledge may be inferred

---

[8] MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. [13] [hereinafter MODEL RULES].
[9] *See* MODEL RULES R. 1.16(a)(1); Section IV, *infra*. Rule 1.2(d) nevertheless permits a lawyer to "discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."
[10] 324 A.2d 15 (N.J. 1974).
[11] *Id.* at 18 (emphasis added).
[12] *Id.* at 18–19; *see also In re* Evans, 759 N.E.2d 1064 (Ind. 2001) (mem.) (three-year suspension for filing fraudulent federal tax returns knowingly misrepresenting sale proceeds from real estate transaction); *In re* Harlow, 2004 WL 5215045, at *2 (Mass. State Bar Disciplinary Bd. 2004) (suspending lawyer for violation of 1.2(d) for assisting client in knowing manipulation of state licensing agency's escrow account requirements); State *ex rel.* Counsel for Discipline of Nebraska Supreme Court v. Mills, 671 N.W.2d 765 (Neb. 2003) (two-year suspension for participating in illegal scheme to avoid estate taxes by knowingly backdating and preparing false documents); *accord* N.C. State Bar, Formal Op. 12, 2001 WL 1949450 (2001).

from circumstances." Substantial authority confirms that a lawyer may not ignore the obvious.[13]

The obligation to inquire is well established in ethics opinions. Nearly forty years ago, prior to the adoption of the Model Rules, ABA Informal Opinion 1470 (1981) declared that "a lawyer should not undertake representation in disregard of facts *suggesting* that the representation might aid the client in perpetrating a fraud or otherwise committing a crime . . . . A lawyer cannot escape responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct . . . ."[14]

Relying on ABA Informal Opinion 1470, the Legal Ethics Committee of the Indiana State Bar Association concluded in 2001 that "[a] lawyer should not undertake representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."[15] The opinion reasoned that an attorney asked to create a "new" sole power of attorney for a prospective client on behalf of her wealthy grandfather in matters concerning his estate has a duty to inquire further. The opinion emphasized the possibility that the granddaughter could fraudulently use the power of attorney to benefit herself rather than serve the interests of her grandfather, whom the attorney had not consulted, the possibility that the grandfather would not wish to grant sole power of attorney to his granddaughter, and the possibility that the grandfather might lack the capacity to consent to such an arrangement (made likely by the fact that the lawyer's paralegal observed the grandfather's deteriorated condition). Thus, although it is possible that the granddaughter's representation of the facts was accurate and therefore consistent with Rule 1.2(d), "the fact that a proposed client in drafting a power of attorney was the agent and not a frail principal should have suggested to [the lawyer] the possibility that the client's real objective might be fraud. [The lawyer] then *had an ethical responsibility to find out whether the proposal was above-board* before performing the services. By failing to make further inquiry, [the lawyer] violated Rule 1.2."[16]

Similarly, New York City Ethics Opinion 2018-4 concluded that lawyers must inquire when "retained to assist an individual client in a transaction that appears to the lawyer to be suspicious."[17] The opinion explains that "[i]n general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained

---

[13] In the words of Charles Wolfram, "as in the criminal law, a lawyer's studied ignorance of a readily ascertainable fact by consciously avoiding it is the functional equivalent of knowledge of the fact. . . . As a lawyer, one may not avoid the bright light of a clear fact by averting one's eyes or turning one's back." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 696 (1986); *see also* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 47 (9th ed. 2019) ("[a] lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives"); *id.* (gathering cases).

[14] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981) (emphasis added) (interpreting the analogous ABA Model Code provision 7-102(A)(7), which provides that a lawyer must not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent").

[15] Ind. State Bar Ass'n Comm. on Legal Ethics, Op. 2, at 4 (2001).

[16] *Id.* at 4 (emphasis added). The Opinion reaches the same conclusion if the grandfather is considered to be the true client. *Id.* at 6–7. *Accord* N.C. State Bar Ass'n, Formal Op. 7 (2003).

[17] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4, at 2 (2018); *see also* Conn. Bar Ass'n Standing Comm. on Prof'l Ethics, Informal Op. 91-22 (1991).

from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance. . . . What constitutes a suspicion sufficient to trigger inquiry will depend on the circumstances."[18] Failure to inquire may constitute "conscious avoidance" when, for example, "the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction."[19]

Courts imposing discipline are generally in accord. When a lawyer deliberately or consciously avoids knowledge that a client is or may be using the lawyer's services to further a crime or fraud, discipline is imposed.[20] Some courts have applied the even broader standard set out in Comment [13] to Rule 1.2, which requires a lawyer to consult with the client when the lawyer "comes to know or *reasonably should know* that [the] client expects assistance not permitted by the Rules of Professional Conduct . . . ." (Emphasis added.) For example, in *In re Dobson*,[21] the South Carolina Supreme Court identified facts showing that the lawyer "knew" or *"should have known"* that he was furthering a client's illegal scheme, and added, "[w]e also find that respondent *deliberately evaded* knowledge of facts which tended to implicate him in a fraudulent scheme. This Court will not countenance the conscious avoidance of one's ethical duties as an attorney."[22]

---

[18] N.Y.C Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4, at 3 (2018).

[19] *Id.* Hypotheticals in Section V of this opinion, *infra*, identify circumstances that should prompt further inquiry.

[20] *See In re* Bloom, 745 P.2d 61 (Cal. 1987) (affirming disbarment of lawyer who assisted client in sale and transport of explosives to Libya; categorically rejecting lawyer's defense that he believed in good faith that transaction was authorized by national security officials); *In re* Albrecht, 42 P.3d 887, 898–99 (Or. 2002) ("suspicious nature" of transactions, combined with other facts, support inference that lawyer must have known his participation in scheme constituted money laundering; upholding disbarment for knowingly assisting crime or fraud and rejecting defense that lawyer was "an unwitting dupe to a talented con man"); *see also* ELLEN BENNETT & HELEN GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 47 (9th ed.) ("[a] lawyer's assistance in unlawful conduct is not excused by a failure to inquire into the client's objectives"). *But see* Iowa Supreme Court Att'y Disciplinary Bd. v. Ouderkirk, 845 N.W. 2d 31, 45–48 (Iowa 2014) (declining to infer knowledge of client's fraud despite what disciplinary counsel argued were "highly suspicious" circumstances where sophisticated, longstanding client who typically relied on the lawyer exclusively to prepare final paperwork deceived the lawyer about a fraudulent transfer to avoid creditors).

[21] 427 S.E.2d 166 (S.C. 1993).

[22] *Id.* at 427 (emphasis added); *see also* Florida Bar v. Brown, 790 So.2d 1081, 1088 (Fla. 2001) (suspension for soliciting illegal campaign contributions from employees and others for political candidates viewed as favorable to business interests of major client of firm; lawyer "should have known" conduct was criminal or fraudulent under Florida version of Rule 1.2(d) which expressly incorporates this standard); *In re* Siegel, 471 N.Y.S. 2d 591, 592 (N.Y. App. Div. 1984) (attorney "knew *or should have known* that at the very least, his conduct was a breach of trust, if not illegal") (emphasis added). Other jurisdictions have rejected a negligence standard for Rule 1.2(d). *See In re* Tocco, 984 P.2d 539, 543 (Ariz. 1999) (en banc) (declining to read a should have known standard into Arizona Rule 1.2(d); "While actual knowledge can be proven by circumstantial evidence, a mere showing that the attorney reasonably *should have known* her conduct was in violation of the rules, without more, is insufficient."); *accord* Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Jones, 606 N.W.2d 5, 7–8 (Iowa 2000).

The Committee acknowledges the tension between the "actual knowledge" standard of Model Rule 1.2(d), on the one hand, and those authorities applying a reasonably should know standard. This opinion concludes only that the standard of actual knowledge set out in the text of Model Rules 1.2(d) and 1.0(f) is met by appropriate evidence of willful blindness. When the Model Rules intend a lower threshold of scienter, such as "reasonably should know," the text generally makes this explicit. *See, e.g.*, MODEL RULES R. 2.3(b), 2.4(b), 4.3.

Criminal cases treat deliberate ignorance or willful blindness as equivalent to actual knowledge.[23] As the Supreme Court recently summarized:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. . . . [The Model Penal Code defines] "knowledge of the existence of a particular fact" to include a situation in which "a person is aware of a *high probability* of [the fact's] existence, unless he actually believes that it does not exist." Our Court has used the Code's definition as a guide . . . [a]nd every Court of Appeals—with the possible exception of the District of Columbia Circuit—has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.[24]

A lawyer may accordingly face criminal charges or civil liability, in addition to bar discipline, for deliberately or consciously avoiding knowledge that a client is or may be using the lawyer's services to further a crime or fraud.[25] To prevent these outcomes, a lawyer must inquire further when the facts before the lawyer create a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity.[26]

---

[23] United States v. Ramsey, 785 F.2d 184, 189 (7th Cir. 1986) ("[A]ctual knowledge and deliberate avoidance of knowledge are the same thing.").

[24] Global-Tech Appliances, Inc. v. SEB USA, 563 U.S. 754, 767 (2011) (emphasis added) (citations omitted) (applying willful blindness standard to statute prohibiting knowing inducement of patent infringement).

[25] *See* United States v. Cavin, 39 F.3d 1299, 1310 (5th Cir. 1994) (upholding deliberate ignorance jury instruction in prosecution of a lawyer); United States v. Scott, 37 F.3d 1564, 1578 (10th Cir. 1994) (affirming use of deliberate ignorance instruction against an attorney convicted of conspiracy to defraud the IRS); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 590 (9th Cir. 1983) (upholding deliberate ignorance finding against law firm in antitrust suit because firm was aware of high probability that client made illegal payments and failed to investigate); United States v. Benjamin, 328 F.2d 854, 862 (2d Cir. 1964) (a lawyer may be held liable in a securities fraud suit if the lawyer has "deliberately closed his eyes to the facts he had a duty to see"); Harrell v. Crystal, 611 N.E. 2d 908, 914 (Ohio Ct. App. 1992) (affirming finding of liability in malpractice action for lawyer's failure to investigate sham tax shelters); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2003-104 (2003) (where facts suggested property transfer to client from relative was to conceal assets from creditors, lawyer handling sale of property to a third party "must evaluate whether the transfer of realty to your client was 'fraudulent'" under state law); *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94, Reporter's Note, cmt. g. at 17 (AM. LAW INST. 2000) ("the preferable rule is that proof of a lawyer's conscious disregard of facts is relevant evidence which, together with other evidence bearing on the question, may warrant a finding of actual knowledge").

[26] As the authorities and analysis in this Section make clear, the duty to inquire under Model Rule 1.2(d) is tied to the circumstances and the lawyer's state of knowledge. It is *not* a freestanding, blanket obligation to scrutinize every client for illicit ends irrespective of the nature of the specific matter and the attorney-client relationship. *See* United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972) ("Construing 'knowingly' in a criminal statute to include willful blindness . . . is no radical concept in the law," but the standard does not mean that an attorney has a general duty to "investigate 'the truth of his client's assertions' or risk going to jail"; upholding criminal conviction of lawyer who actively aided in immigration related marriage fraud); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 2001-26 ("*Generally*, a lawyer has no obligation to inquire or otherwise uncover facts that are not necessary to enable the lawyer to fulfill his or her obligations with respect to the representation"; warning nevertheless that Rule 1.2(d) applies to filing of worker's compensation claims and leaving attorney to determine relevance of client's fatal condition to client's specific claim) (emphasis added). However, the

III. The Duty To Inquire Under Other Rules

Rule 1.2(d) is not the only source of a lawyer's duty to inquire. A lawyer may be obliged to inquire further in order to meet duties of competence, diligence, communication, honesty, and withdrawal under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. The kinds of facts and circumstances that would trigger a duty to inquire under these rules include, for example, (i) the identity of the client, (ii) the lawyer's familiarity with the client, (iii) the nature of the matter (particularly whether such matters are frequently associated with criminal or fraudulent activity), (iv) the relevant jurisdictions (especially whether any jurisdiction is classified as high risk by credible sources), (v) the likelihood and gravity of harm associated with the proposed activity, (vi) the nature and depth of the lawyer's expertise in the relevant field of practice, (vii) other facts going to the reasonableness of reposing trust in the client,[27] and (viii) any other factors traditionally associated with providing competent representation in the field.

First, Rule 8.4(b) makes it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule 8.4(c) makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Providing legal services could violate Rules 8.4(b) and (c) where the relevant law on criminal or fraudulent conduct defines the lawyer's state of mind as culpable even without proof of actual knowledge.[28] In such a situation, the lawyer must conduct further investigation to protect the client, advance the client's legitimate interests, and prevent the crime or fraud.

Second, and more broadly, the lawyer's duty of competence, diligence, and communication under Rules 1.1, 1.3, and 1.4 may require the lawyer, prior to advising or assisting in a course of action, to develop sufficient knowledge of the facts and the law to understand the client's objectives, identify means to meet the client's lawful interests, to probe further, and, if necessary, persuade the client not to pursue conduct that could lead to criminal liability or liability for fraud. Comment [5] of Rule 1.1 states that "[c]ompetent handling of a particular matter requires inquiry into and analysis of the factual and legal elements of the problem."[29]

Committee rejects the view that the actual knowledge standard of Rule 1.2(d) relieves the lawyer of a duty to inquire further where the lawyer is aware of facts creating a high probability that the representation would further a crime or fraud. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. g. at 11 ("Under the actual knowledge standard . . . a lawyer is not required to make a particular kind of investigation in order to ascertain more clearly what the facts are, although it will often be prudent for the lawyer to do so."); *id.* § 51 cmt. h., ill. 6 at 366; George M. Cohen, *The State of Lawyer Knowledge Under the Model Rules of Professional Conduct*, 3 AM. U. BUS. L. REV. 115, 116 (2014) (discussing association of willful blindness with recklessness, without citing to *Global-Tech Appliances*, and analyzing assumption that "the actual knowledge standard aims to exclude a duty to inquire").

[27] For facts that can undermine the reasonableness of reposing trust, see the discussion of "risk categories" provided by the GOOD PRACTICES GUIDANCE, *supra* note 7, at 15–36.

[28] *See In re* Berman, 769 P.2d 984, 989 (Cal. 1989) (en banc) (holding, in disciplinary proceeding for aiding a money laundering scheme, that attorney's "*belief* that the financial statements contained false information reflects sufficient indicia of fraudulent intent to constitute moral turpitude"). The same conduct would require the lawyer's withdrawal under Rule 1.16(a)(1).

[29] *See also* Iowa Supreme Court Att'y Disciplinary Bd. v. Wright, 840 N.W.2d 295, 301 (Iowa 2013) (failure to conduct even preliminary research on overseas internet scam violates Rule 1.1); *In re* Winkel, 577 N.W.2d 9 (Wis. 1998) (failure to obtain information on trust funds of clients' business prior to surrendering clients' assets to bank). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. c at 377 ("[A] lawyer must perform tasks reasonably appropriate to the representation, including, where appropriate, inquiry into the facts.").

The duty of diligence under Rule 1.3 requires that a lawyer ascertain the relevant facts and law in a timely and appropriately thorough manner.[30] Rule 1.4(a)(5), which requires consultation with the client regarding "any relevant limitation on the lawyer's conduct" arising from the client's expectation of assistance that is not permitted by the Rules of Professional Conduct or other law, may require investigation of the relevant facts and law. Rule 1.4(b) requires the lawyer to give the client explanations sufficient to enable the client to make informed decisions about the representation.

Rule 1.13 imposes a duty to inquire in entity representations. Rule 1.13(a) provides that a lawyer "employed or retained by the organization represents the organization acting through its duly authorized constituents." Determining the interests of the organization will often require further inquiry to clarify any ambiguity about who has authority and what the organization's priorities are. Under Rule 1.13(b), once the lawyer learns of action, omission, or planned activity on the part of an "officer, employee, or other person associated with the organization . . . that is a violation of a legal obligation to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interests of the organization." Even if the underlying facts regarding the violation or potential violation are already well established and require no additional inquiry, determining what is "reasonably necessary" and in the "best interest of the organization" will commonly involve additional communication and investigation.[31]

Recent ABA guidance and opinions support this approach. Concern that individuals might use the services of U.S. lawyers for money-laundering and terrorist financing prompted the ABA House of Delegates to adopt in 2010 the *ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing* ("Good Practices Guidance"). The Good Practices Guidance advocates a "risk-based approach" to avoid assisting in money laundering or terrorist financing, according to guidelines developed by the Financial Action Task Force on Money Laundering ("FATF").[32] Recommended measures

---

[30] *See In re* Konnor, 694 N.W. 2d 376 (Wis. 2005) (failure to investigate concern that rents owed to estate were being misappropriated).

[31] *See* MODEL RULES R. 1.13 cmts. [3] & [4]. Rule 1.13(b) was added after a series of high profile financial accounting scandals in the early 2000s. AM. BAR ASS'N TASK FORCE ON CORPORATE RESPONSIBILITY (2003), *reprinted in* 59 BUS. LAW. 145, 166–70 (2003). Other law may also create a duty to inquire. The Sarbanes-Oxley Act of 2002 creates a duty for the "chief legal officer" to conduct an "appropriate" investigation in response to another lawyer's report of "evidence of a material violation" by the company. 17 C.F.R. § 205.3(b)(2) (2012); *see also In re* Kern, 816 S.E. 2d 574 (S.C. 2018) (discussing obligations of securities lawyers); U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS § 9-28.720 (quality of internal investigation can affect eligibility for "cooperation credit"); Cohen, *supra* note 26, at 129–30 (discussing obligations of securities lawyers).

[32] *See* GOOD PRACTICES GUIDANCE, *supra* note 7, at 2. A "risk-based approach" is generally "intended to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified . . . [H]igher risk areas should be subject to enhanced procedures, such as enhanced client due diligence ("CDD") . . . ." *Id.* at 8. The report continues: "This paper [identifies] the risk categories and offer[s] voluntary good practices designed to assist lawyers in detecting money laundering while satisfying their professional obligations." *Id.*

include "examining the nature of the legal work involved, and where the [client's] business is taking place."[33]

ABA Formal Opinion 463 addresses efforts to require U.S. lawyers to perform "gatekeeping" duties to protect the international financing system from criminal activity arising out of worldwide money-laundering and terrorist financing activities. Observing that "the Rules do not mandate that a lawyer perform a 'gatekeeper' role," especially in regards to "mandatory reporting" to public authorities "of suspicion about a client," Opinion 463 nevertheless identifies the Good Practices Guidance as a resource "consistent with the Model Rules" and with Informal Opinion 1470.[34] It also reinforces the duty to investigate in appropriate circumstances. Specifically, Opinion 463 states that "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . *[P]ursuant to a lawyer's ethical obligation to act competently, a duty to inquire further may also arise*. An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are *essential prerequisites* for accepting a new matter or continuing a representation as new facts unfold."[35]

A lawyer's reasonable judgment under the circumstances presented, especially the information known and reasonably available to the lawyer at the time, does not violate the rules. Nor should a lawyer be subject to discipline because a course of action, objectively reasonable at the time it was chosen, turned out to be wrong with hindsight.[36]

IV. Other Obligations Incident to the Duty to Inquire

If the client refuses to provide information or asks the lawyer not to evaluate the legality of a transaction the lawyer should explain to the client that the lawyer cannot undertake the representation unless an appropriate inquiry is made. If the client does not agree to provide

---

[33] ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 463, at 2 (2013) (summarizing GOOD PRACTICES GUIDANCE).

[34] *Id.*

[35] *Id.* at 2–3 (emphasis added); *see also id.* at 2 n.10 ("The Good Practices Guidance encourages all lawyers to perform basic CDD by (1) identifying and verifying the identity of each client; (2) identifying and verifying the identity of any 'beneficial owner' of the client, defined as the natural person(s) with ultimate control of a client, when such an analysis is warranted from a risk-based standpoint; and (3) obtaining enough information to understand a client's circumstances, business, and objectives.").

[36] In numerous contexts of evaluating attorney conduct, courts and regulators have warned against hindsight bias. *See* Woodruff v. Tomlin, 616 F.2d 924, 930 (6th Cir. 1980) ("[E]very losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight."); *In re* Claussen, 14 P.3d 586, 593–94 (Or. 2000) (en banc) (declining to discipline lawyer who aided client in converting insurance policy to cash while client's bankruptcy petition was pending; lawyer did not know client would abscond with money and cannot be judged by a standard of "clairvoyance" that reflects the knowledge of "hindsight"); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 (2018) ("Under the knowledge standard of Rule 1.2(d), a lawyer is not deemed to 'know' facts, or the significance of facts, that become evident only with the benefit of hindsight."); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2005-05 (2005) (in handling of "'thrust upon' concurrent client conflicts a lawyer who does balance the relevant considerations in good faith should not be subject to discipline for getting it wrong in hindsight"); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2001-100 (2001) (the propriety of accepting stock as payment of legal fees for a start-up "should be made based on the information available at the time of the transaction and not with the benefit of hindsight").

information, then the lawyer must decline the representation or withdraw.[37] If the client agrees, but then temporizes and fails to provide the requested information, or provides incomplete information, the lawyer must remonstrate with the client. If that fails to rectify the information deficit, the lawyer must withdraw. Indeed, proceeding in a transaction without the requested information may, depending on the circumstances, be evidence of the lawyer's willful blindness under Rule 1.2(d).[38] If the client agrees, provides additional information, and the lawyer concludes that the requested services would amount to assisting in a crime or fraud, the lawyer must either discuss the matter further with the client, decline the representation, or seek to withdraw under Rule 1.16(a).[39]

In general, a lawyer should not assume that a client will be unresponsive to remonstration. However, if the client insists on proceeding with the proposed course of action despite the lawyer's remonstration, the lawyer must decline the representation or withdraw.[40] The lawyer may have discretion to disclose information relating to the representation under Model Rule 1.6(b)(1)-(3).[41]

If the lawyer needs information from sources other than the prospective client and can obtain that information without disclosing information protected by Rules 1.6 and 1.18, the information should be sought. If the lawyer needs to disclose protected information in order to analyze the transaction, the lawyer must seek the client's informed consent in advance.[42] If the client will not consent or the lawyer believes that seeking consent will lead to criminal or fraudulent activity, the lawyer must decline the representation or withdraw.[43]

If an inquiry would result in expenses that the client refuses to pay, the lawyer may choose to conduct the inquiry without payment or to decline or discontinue the representation.

Overall, as long as the lawyer conducts a reasonable inquiry, it is ordinarily proper to credit an otherwise trustworthy client where information gathered from other sources fails to resolve the issue, even if some doubt remains.[44] This conclusion may be reasonable in a variety of

---

[37] As discussed below, under Rule 1.2(c) a lawyer cannot assent to an unreasonable limitation on the representation even if the client seeks or insists upon such a limitation and offers consent.

[38] *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 5 ("[A] client's refusal to authorize and assist in an inquiry into the lawfulness of the client's proposed conduct will ordinarily constitute an additional, and very significant, 'red flag.'").

[39] MODEL RULES R. 1.2 cmt. [13] ("If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law . . . the lawyer must consult with the client regarding the limitations on the lawyer's conduct.").

[40] *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 6 ("If it becomes clear during a lawyer's representation that the client has failed to take necessary corrective action, and the lawyer's continued representation would assist client conduct that is illegal or fraudulent, Rule 1.16(b)(1) mandates that the lawyer withdraw from representation."). For a discussion of the obligation to withdraw upon learning that a lawyer's services have been used to further a fraud, see ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-366 (1992).

[41] N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 6.

[42] MODEL RULES R. 1.0(e) ("'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.").

[43] MODEL RULES R. 1.16(c)(2).

[44] *See* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2018-4 at 5.

circumstances. For example, the lawyer may have represented the client in many other matters. The lawyer may know the client personally, professionally, or socially. The business arrangements and other individuals or parties involved in the transaction may be familiar to the lawyer.

Finally, Rule 1.2(c) permits a lawyer to "limit the scope of [a] representation if the limitation is reasonable under the circumstances and the client gives informed consent." Permitted scope limitations include, for example, that the client has limited but lawful objectives for the representation, or that certain available means to accomplish the client's objectives are too costly for the client or repugnant to the lawyer.[45] Any limitation, however, must "accord with the Rules of Professional Conduct and other law," including the lawyer's duty to provide competent representation.[46] In the circumstances addressed by this opinion, a lawyer may not agree to exclude inquiry into the legality of the transaction.

V. Hypotheticals

The following hypotheticals are intended to clarify when circumstances might require further inquiry because of risk factors known to the lawyer. Some are drawn from the Good Practices Guidance, an important resource for transactional lawyers detailing how to conduct proper due diligence as well as how to identify and address risk factors in the most common scenarios in which a lawyer's assistance might be sought in criminal or fraudulent transactions.[47]

Further inquiry would be required in the first two examples because the combination of risk factors known to the lawyer creates a high probability that the client is engaged in criminal or fraudulent activity.

#1: A prospective client has significant business connections and interests abroad. The client has received substantial payments from sources other than his employer. The client holds these funds outside the US and wants to bring them into the US through a transaction that minimizes US tax liability. The client says: (i) he is "employed" outside the US but will not say how; (ii) the money is in a "foreign bank" in the name of a foreign corporation but the client will not identify the bank or the corporation; (iii) he has not disclosed the payments to

---

[45] *See* MODEL RULES R. 1.2 cmt. [6] ("A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.")

[46] *See id.* cmt. [7] ("an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation"); *id.* cmt. [8] ("All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law.").

[47] The analysis of the hypotheticals that follows draws on the GOOD PRACTICES GUIDANCE but should not be read to support the conclusion that any isolated risk factor identified in the GOOD PRACTICES GUIDANCE necessarily creates a duty to inquire in all matters in which it may be present. The question is whether a reasonable lawyer under the specific circumstances would be obliged to conduct further inquiry. The Committee further cautions that circumstances that render a specific jurisdiction or other factor "high risk" can change. On the one hand, if new circumstances presenting a greater risk arise the lawyer should take appropriate action, and may need to seek advice on what, if any, action is required. On the other hand, new circumstances may support acceptance or continuation of the representation by showing that, upon inquiry, the high-risk designation is inaccurate or inapplicable to the matter.

his employer or any governmental authority or to anyone else; and (iv) he has not included the amounts in his US income tax returns.[48]

#2: A prospective client tells a lawyer he is an agent for a minister or other government official from a "high risk" jurisdiction[49] who wishes to remain anonymous and would like to purchase an expensive property in the United States. The property would be owned through corporations that have undisclosed beneficial owners. The prospective client says that large amounts of money will be involved in the purchase but is vague about the source of the funds, or the funds appear to come from "questionable" sources.[50]

If, on the same facts as #2, the client assures the lawyer that information will be provided but does not follow through, the lawyer must either withdraw or again discuss with the client the need for the information to continue in the representation, seek an explanation for the delay, and withdraw if the explanation the client offers is unsatisfactory. If the information provided is incomplete — e.g., information that leaves the identity of the actual funding sources opaque — the lawyer must follow the same course: withdraw or again discuss with the client the need for the information to continue in the representation, seek an explanation for the delay, and withdraw if the explanation offered is unsatisfactory.[51]

In examples #3 through #5 below, the duty to inquire depends on contextual factors, most significantly, the lawyer's familiarity with the client and the jurisdiction.

#3: A general practitioner in rural North Dakota receives a call from a long-term client asking her to form a limited liability company for the purpose of buying a ranch.[52]

#4: The general practitioner in rural North Dakota receives a call from a new and unknown prospective client saying that the client just won several million dollars in Las Vegas and needs the lawyer to form a limited liability company to buy a ranch.[53]

#5: A prospective client in New York City asks a general practitioner in a mid-size town in rural Georgia to provide legal services for the acquisition of several farms in rural Georgia. The prospective client tells the lawyer that he has made a lot of money in hedge funds and now wants to diversify his investments by purchasing these farms but says he doesn't want his purchases to cause a wave of land speculation and artificially inflate local prices. He wants

---

[48] This hypothetical is drawn from ABA Comm. on Ethics & Prof'l Responsibility, Informal Opinion 1470, which concludes that a lawyer must conduct further inquiry.
[49] For information about "high risk" jurisdictions, see GOOD PRACTICES GUIDANCE, *supra* note 7, at 15–16.
[50] This hypothetical is based on *In re* Jankoff, 81 N.Y.S.3d 733, 734 (N.Y. App. Div. 2018) (public censure imposed on stipulated facts), and *In re* Koplik, 90 N.Y.S.3d 187 (N.Y. App. Div. 2019) (same).
[51] *See supra*, Section IV.
[52] This hypothetical is drawn from GOOD PRACTICES GUIDANCE, *supra* note 7, at 8, and should not require further inquiry regarding the legitimacy of the transaction assuming prior matters have not involved abuse of the attorney-client relationship on the part of the client. It is likely, of course, that some inquiry into other details will be necessary to handle the transaction competently.
[53] This hypothetical is drawn from GOOD PRACTICES GUIDANCE, *supra* note 7, at 8, and requires further inquiry.

to wire money into the law firm's trust account over time for the purchases. He asks the lawyer to create a series of LLCs to make strategic (and apparently unrelated) acquisitions.[54]

VI. Conclusion

Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in a transaction or other non-litigation matter the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness or conscious disregard of available facts. Accordingly, where there is a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer must inquire further to avoid advising or assisting such activity. Even if information learned in the course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require further inquiry to help the client avoid crime or fraud, to advance the client's legitimate interests, and to avoid professional misconduct. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after that inquiry based on information reasonably available at the time does not violate the rules.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

CENTER FOR PROFESSIONAL RESPONSIBILITY

[54] This hypothetical is drawn from AMERICAN LAW INSTITUTE, ANTI-MONEY LAUNDERING RULES AND OTHER ETHICS ISSUES 450-51 (2017) and requires further inquiry.

Dated: August 20, 2009.

Andrew M. Gaydosh,

Acting Regional Administrator, Region 8.

[FR Doc. E9–20801 Filed 9–1–09; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

Date and Time: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on September 10, 2009, from 9 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Roland E. Smith, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

A. Approval of Minutes

• August 13, 2009.

B. New Business

• Fall 2009 Abstract of the Unified Agenda of Federal Regulatory and Deregulatory Actions and Fall 2009 Regulatory Performance Plan.

Closed Session*

A. Reports

• Office of Secondary Market Oversight Quarterly Report.

B. New Business

• Supervisory Actions.

Dated: August 28, 2009.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

*Session Closed—Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

[FR Doc. E9–21291 Filed 8–31–09; 4:15 pm]

BILLING CODE 6705–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

RIN 3064–AD47

Final Statement of Policy on Qualifications for Failed Bank Acquisitions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final statement of policy.

SUMMARY: The FDIC is issuing a Final Statement of Policy on Qualifications for Failed Bank Acquisitions (Final Statement). This Final Statement provides guidance to private capital investors interested in acquiring or investing in failed insured depository institutions regarding the terms and conditions for such investments or acquisitions.

DATES: *Effective Date:* August 26, 2009.

FOR FURTHER INFORMATION CONTACT: Catherine Topping, Counsel, Legal Division, (202) 898–3975 or *ctopping@fdic.gov*, Charles A. Fulton, Counsel, Legal Division, (703) 562–2424 or *chfulton@fdic.gov*, Lisa Arquette, Associate Director, (202) 898–8633 or *larquette@fdic.gov*, or Mindy West, Chief, Policy and Program Development, Division of Supervision and Consumer Protection, (202) 898–7221 or *miwest@fdic.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On July 9, 2009, the FDIC published for comment a Proposed Statement of Policy on Qualifications for Failed Bank Acquisitions (Proposed Policy Statement) with a 30-day comment period to provide guidance to private capital investors interested in acquiring the deposit liabilities, or both such liabilities and assets, of failed insured depository institutions regarding the terms and conditions for such investments or acquisitions.[1] After carefully reviewing and considering all comments, the FDIC has adopted certain revisions and clarifications to the Proposed Policy Statement (as discussed in Part III) in the Final Statement.

The FDIC is aware of the need for additional capital in the banking system and the contribution that private equity capital could make to meeting this need provided this contribution is consistent with basic concepts applicable to the ownership of insured depository institutions that are contained in the established banking laws and regulations. The preamble to the Proposed Policy Statement explained that in view of the increased number of bank and thrift failures and the increase in interest by private capital investors in acquiring insured depository institutions in receivership, the FDIC determined to issue, in proposed form, guidance to potential acquirers. In developing the Proposed Policy Statement, the FDIC sought to establish the proper balance in a number of important areas including the level of capital required for these de novo institutions and whether these owners would be a source of strength to the banks and thrifts in which they have invested. The FDIC also considered the important policy issues raised by the structure of investments in insured depository institutions, particularly with respect to their compliance with the requirements applied by the FDIC in its decision on the granting of deposit insurance and with the statutes and regulations aimed at assuring the safety and soundness of insured depository institutions and protecting the Deposit Insurance Fund ("DIF").

In the Introduction to the Proposed Policy Statement, the FDIC set forth its reasons for adopting a policy on private capital participating in the acquisition of or investment in failed insured depository institutions. In part, the Introduction stated:

> Capital investments by individuals and limited liability companies acting through holding companies operating within a well developed prudential framework has long been the dominant form of ownership of insured depository institutions. From the perspective of the FDIC's interest as insurer and supervisor of insured depository institutions, this framework has included, in particular, measures aimed at maintaining well capitalized bank and thrift institutions, support for these banks when they face difficulties, and protections against insider transactions. The ability of the owners to provide financial support to depository institutions with adequate capital and management expertise are essential safeguards. These safeguards are particularly appropriate for owners of insured depository institutions given the important benefits conferred on depository institutions by deposit insurance.
>
> * * * The FDIC is also aware that new banks, regardless of their investor composition, pose an elevated risk to the deposit insurance fund since they generally lack a core base of business, a proven track record in the banking industry, and are vulnerable to significant losses in the early years of incorporation.
>
> The FDIC is of the view that private capital participation in the acquisition of the deposit liabilities, or both such liabilities and assets, from a failed depository institution in receivership should be consistent with the foregoing basic elements of insured depository institution

[1] 74 FR 32931 (Jul. 9, 2009)

EXHIBIT C

-48- 170a

* * * The FDIC is particularly concerned that owners of banks and thrifts, whether they are individuals, partnerships, limited liability companies, or corporations, accept the responsibility to serve as responsible custodians of the public interest that is inherent in insured depository institutions and will devote the efforts to assuring that banks or thrifts acquired with assistance from the deposit insurance fund do not return to the category of troubled institutions.

These same reasons underlie the need to adopt the Final Statement described below.

The Proposed Policy Statement described the terms and conditions that private capital investors would be expected to satisfy to obtain bidding eligibility for a proposed acquisition structure. These standards would apply to (1) private capital investors in certain companies that sought to assume deposit liabilities or both such deposit liabilities and assets from a failed insured depository institution and (2) private capital investors involved in applications for deposit insurance in conjunction with de novo charters issued in connection with the resolution of failed insured depository institutions (hereinafter "Investors"). As more fully summarized below, the Proposed Policy Statement provided, among other measures, standards for capital support of an acquired depository institution; an agreement to a cross guarantee over substantially commonly-owned depository institutions; limits on transactions with affiliates; maintenance of continuity of ownership; and avoidance of secrecy law jurisdictions as investment channels, absent consolidated home country supervision.

Capital Commitment

The Proposed Policy Statement required private investors to agree to cause an insured depository institution acquiring a failed bank's deposit liabilities, or both such deposit liabilities and assets, to have a Tier 1 leverage ratio of 15 percent for the first three years of operation, subject to further extensions by the FDIC. Thereafter, such investors would be required to cause the insured depository institution's capital to remain at "well capitalized" levels for the duration of their ownership. The FDIC explained that failing to meet those standards could cause the insured depository institution to be considered "undercapitalized" for purposes of Prompt Corrective Action and other supervisory measures.

Source of Strength

The FDIC would require Investors covered by its Proposed Policy Statement to agree to serve as a source of strength for subsidiary depository institutions. As necessary, the Proposed Policy Statement required depository institution holding companies in which such Investors held interests to sell equity or to engage in capital qualifying borrowing.

Cross Guarantees

If Investors had an individual or collective investment that constituted a majority interest in more than one insured depository institution, the Proposed Policy Statement required them to pledge to the FDIC their interest in each institution to cover losses to the Deposit Insurance Fund caused by the failure of such insured depository institution(s) or by the FDIC's provision of assistance to such institutions.

Transactions With Affiliates

The Proposed Policy Statement prohibited extensions of credit to an Investor by an insured depository institution acquired or controlled by the Investor. According to the Proposed Policy Statement, this prohibition also applied to related investment funds, any affiliates (that is, any company in which an Investor owns 10 percent or more), and to any companies in which the Investor or its affiliates invested.

Secrecy Law Jurisdictions

The Proposed Policy Statement prohibited investors in entities domiciled in bank secrecy jurisdictions from making a direct or indirect investment in an insured depository institution unless the investors are subsidiaries of companies subject to comprehensive consolidated supervision, as recognized by the Board of Governors of the Federal Reserve System. Among other things, such investors also would be required to agree to provide information to their primary Federal regulator, abide by statutes and regulations administered by U.S. banking agencies, consent to U.S. jurisdiction, and cooperate with the FDIC.

Continuity of Ownership

Absent the FDIC's prior approval, the Proposed Policy Statement would prohibit covered Investors from selling or transferring securities of their holding company or insured depository institution for three years following acquisition. The FDIC indicated that it did not expect to approve such transfers within the initial three-year period unless the buyer agreed to be bound by the same conditions of the Proposed Policy Statement that were applicable to the Investor.

Disclosures

The Proposed Policy Statement provided for disclosures of certain specified information (and other non specified information deemed necessary by the FDIC) from Investors and other entities in their ownership chains.

II. Overview of the Comments

The FDIC requested public comment on all aspects of the Proposed Policy Statement and set forth nine specific questions for consideration by commenters. The issues presented by the specific questions included the definition of the "investors" to whom the policies would apply; the bidding eligibility of so-called "silo" structures; the appropriate capital levels for failed insured depository institutions acquired by private capital investors; whether source of strength commitments should be required and the scope of such commitments; whether cross guarantee commitments should be required and the scope of such commitments; the bidding eligibility of entities established in bank secrecy jurisdictions; whether a three-year continuity of ownership rule is the appropriate period of time; the bidding eligibility of investors that directly or indirectly hold 10 percent or more of the equity of a bank or thrift in receivership; and whether the proposed limitations should be lifted after a certain number of years of successful operation of a bank or thrift holding company.

The FDIC received 61 individual comment letters.[2] The comment letters were sent by private investment firms, investment advisory firms, law firms, insured depository institutions, advocacy organizations, financial services trade associations, 4 United States Senators, a labor union, research organizations, academics, and 6 individuals. Most of the commenters were private capital firms or their representatives that would be affected by the Proposed Policy Statement. The FDIC also received 3,190 form letter comments in support of the Proposed Policy Statement.

Many commenters expressed the general view that limitations and restrictions contained in the Proposed Policy Statement would deter many private capital investors and inhibit the flow of capital into failed banks, resulting in greater costs to the DIF. On the other hand, some commenters stated that they did not have confidence in the motives of private equity investors because of their short-term investment objectives and limited regulatory

[2] *See http://www.fdic.gov/regulations/laws/federal/2009/09comAD47.html.*

oversight. These commenters argued that private capital firms should be subject to strict regulation or excluded altogether from participating in the ownership of insured depository institutions. The form letter comments strongly supported the FDIC's Proposed Policy Statement on grounds that private equity firms engage in inherently risky behavior in order to extract large profits in short periods of time.

Three specific areas of the Proposed Policy Statement—the 15 percent Tier 1 leverage ratio, the source of strength commitment, and the cross guarantee provision—generated considerable comment. Commenters opposed to the 15 percent Tier 1 leverage ratio argued that setting the required initial capitalization level at such a high level would place private capital investors at a competitive disadvantage relative to strategic acquirers, make it difficult for private capital investors to realize a reasonable return on investment, and encourage risky post-acquisition investments and business strategies. These commenters noted that the 15 percent Tier 1 leverage level was three times the high-end range for "well-capitalized" depository institutions and double the industry average. With respect to source of strength commitments and cross guarantees, these commenters were opposed to any direct financial commitment or support obligations beyond an investor's initial contribution. The commenters argued that the imposition of source of strength commitments would introduce substantial uncertainty for investors and potentially expose them to unlimited liability. Commenters also stated that the cross guarantee requirement would deter private capital investment in failed insured depository institutions because private capital investors in unrelated banks would not agree to a cross guarantee commitment that places their legally separate investments at risk. Lastly, the commenters contended that source of strength and cross guarantee commitments were generally prohibited by private equity fund agreements. A summary of the comments by issue follows.

Summary of the Comments by Issue

1. Bidding Eligibility of "Silo" Structures

In the Proposed Policy Statement, the FDIC noted that, because of their often complex and opaque organizational arrangements, so-called "silo" ownership structures would be considered inappropriate vehicles for acquiring insured depository institutions. Some commenters, including a few private equity firms, endorsed the proposed prohibition of "silo" structures, citing the FDIC's need to ascertain beneficial ownership, clearly identify the parties responsible for making management decisions, and ensure that ownership and control are not separated.

Other commenters stated that they recognized the FDIC's need for transparency, but opposed a blanket prohibition of "silo" structures as acquisition vehicles. These commenters believe that the FDIC would eliminate many otherwise suitable investors who would be willing to provide full disclosures with respect to beneficial ownership, decision making responsibility, and ownership and control issues, and to provide additional disclosures as necessary—even submitting to regulation as a bank holding company under the Bank Holding Company Act—in order to be eligible to bid on failed insured depository institutions. They did not view an absolute prohibition of "silo" structures as necessary for the advancement of the FDIC's important interest in transparency. Some private investors involved in "silo" organizations indicated that they had been part of acquisitions approved pursuant to existing legal standards through the application processes of the Office of Thrift Supervision and the Board of Governors of the Federal Reserve System.

One group of private equity investors noted that separation of ownership and control is characteristic of many categories of institutional investors, including mutual funds, pension plans, and endowments, and argued that bifurcated ownership and control is not a reason to disqualify a potential bidder for a failed bank or thrift. Other commenters, including several law firms, argued against the categorical prohibition in part because "there is no agreed-upon definition in the private equity industry or elsewhere on what constitutes a 'silo' structure."

2. Definition of "Investors"/ Applicability of Standards

The limitations and restrictions contained in the Proposed Policy Statement would apply to more than *de minimis* investments by: "(a) private capital investors in a company (other than a bank or thrift holding company that has come into existence or has been acquired by an Investor at least 3 years prior to the date of this policy statement), that is proposing to directly or indirectly assume deposit liabilities, or such liabilities and assets, from a failed insured depository institution in receivership, and to (b) applicants for insurance in the case of de novo charters issued in connection with the resolution of failed insured depository institutions." The FDIC asked commenters whether some other definition of applicability was more appropriate.

Many of the comments received from representatives of private investment firms indicated that the limitations and restrictions contained in the Proposed Policy Statement should be imposed only when an investor or group of investors would exercise control over the failed institution. Some proposed that investors owning 9.9 percent or less of a failed institution should not be subject to the limitations contained in the Proposed Policy Statement. Other private equity firms argued that private investment funds should not be treated differently from other passive investors.

Some commenters argued that the proposed definition of "investor" is ambiguous and that a clearer definition of applicability is needed. These commenters, which include both law firms and representatives of private equity firms, believed that the scope of the definition was unclear because the term "private capital investor" does not have any generally understood meaning and the Proposed Policy Statement fails to define it. They noted that if the Proposed Policy Statement primarily is concerned with private equity funds, the FDIC should clarify that fact.

Several private investment firm commenters disagreed with that part of the definition that would make the Proposed Policy Statement applicable to private investors in bank or thrift holding companies that came into existence or were acquired by the investor within the three years prior to the date of the Proposed Policy Statement. Some of these commenters proposed that the three-year period be measured prior to the date of the bid for a failed depository institution rather than from the date of issuance of the Proposed Policy Statement. A number of commenters mistakenly asserted that this provision is retroactive in nature and viewed it as arbitrary.

One commenter looked to the definition of control contained in the Bank Holding Company Act and Regulation Y to determine to whom the Proposed Policy Statement might apply. Using that definition, the commenter suggested that the Proposed Policy Statement should apply to private capital investors and applicants for insurance in cases of de novo charters who seek to act as a controlling company or influence over a failed insured depository institution in receivership.

3. Capital Commitment

Several commenters supported a Tier 1 leverage ratio requirement of at least 15 percent (as provided in the Proposed Policy Statement) because of the higher risk profile of the failed institutions investors would be buying, the higher risk appetite of private equity investors, and the financial challenges facing banking institutions today. Another commenter encouraged the FDIC to maintain a Tier 1 leverage ratio requirement of at least 12 percent.

A majority of the commenters objected to the proposed capital requirements, arguing that such requirements would; disadvantage private capital firms relative to other bidders and publicly-owned institutions; discourage private capital investment in failed institutions; result in less competitive bids for failing institutions from private equity investors; and create a separate Prompt Corrective Action framework for institutions acquired by private capital investors.

Several commenters in opposition to the proposal expressed concern that the capital requirement would result in excessive risk-taking to realize a sufficient return on the investment, with one commenter noting that the proposed capital requirement also could hinder an institution's ability to lend. A number of commenters opposed the proposed capital requirement because they believe it disregards other factors that are determinative of an institution's financial condition, such as the proposed business plan, the risk of on-balance sheet assets, and the qualifications of the management team.

Comments varied with respect to recommendations on an appropriate capital requirement. One commenter was of the view that a 7.5 percent Tier 1 leverage ratio is appropriate because the assets of a resolved bank are marked-to-market and the riskiest assets are subject to loss-sharing agreements with the FDIC. Another commenter supported an 8 percent Tier 1 leverage ratio requirement, as well as a 15 percent total risk-based capital ratio or a lower capital requirement for assets covered in loss-sharing agreements. Another commenter proposed a 10 percent Tier 1 leverage ratio or, alternatively, an incremental reduction in the 15 percent requirement to between 7 and 8 percent over the first three years following the acquisition, while other commenters suggested various ranges between 5 and 10 percent, with 8 percent being the most frequently suggested level. Several other commenters supported a case-by-case approach based on the risk profile of the institution.

One commenter took the position that the capital requirement should be based on the Tier 1 risk-based capital ratio rather than the Tier 1 leverage ratio to avoid penalizing institutions holding low-risk, highly-liquid assets. Under this proposal, private investment firms would have to meet a "common" Tier 1 risk-based capital ratio requirement of 8 percent. Two commenters recommended moving to a tangible common equity measure, with a minimum requirement of 6 percent.

4. Source of Strength

Four commenters generally supported the proposed source of strength requirement, with one supporting an enhanced source of strength requirement that explicitly requires individual private capital investors or beneficial fund managers to ensure the financial strength of the depository institution through direct capital injections. Another commenter expressed limited support for the source of strength requirement to the extent that it would require investors to serve as a source of managerial strength for the institution.

Many commenters expressed general opposition to the proposed source of strength requirement. Specifically, seven commenters criticized the proposal as potentially creating unlimited liability for private capital investors. Although the Proposed Policy Statement limited the source of strength requirement to raising new capital by selling new shares or engaging in capital qualifying borrowing by the bank's or thrift's holding company, several commenters indicated that the proposed source of strength requirement is not feasible because, as a practical matter, many private capital investors are limited by the terms of their fund documents from providing capital support or making follow-on investments in their portfolio companies. Several other commenters indicated that the proposed source of strength requirement would likely discourage investments by private capital investors in failing institutions, with a number of them viewing the requirement as unnecessary given the FRB and OTS holding company requirements. Two commenters viewed the source of strength requirement as altogether unnecessary because the interests of private capital investors are aligned with those of the insured depository institutions in their investment portfolios, and that sufficient financial incentives exist for investors to protect such investments. Other commenters noted that the source of strength requirement for bank and savings and loan holding companies was not effective in preventing bank failures, and another commenter objected to making individual investors responsible for the actions of the institution, absent the ability to influence policies or decision-making.

At least ten commenters supported the imposition of a "control" threshold for purposes of the source of strength requirement, and another commenter suggested that parties with "substantial ownership stakes" and board representation should either be required to provide capital under source of strength commitments or not use their limited corporate governance rights to block capital from other sources. One commenter expressed concern that the imposition of a source of strength requirement on a non-controlling investor could be perceived by the FRB and OTS as an indication of control, potentially making the investor subject to holding company supervision.

A number of these commenters presented alternatives to the source of strength requirement. These commenters suggested that a more appropriate alternative would be for regulators to obtain commitments from investors that, under certain circumstances, they will not use whatever limited corporate governance rights they have to block capital raising efforts. One commenter suggested an alternative under which the investor is required to hold as a reserve at the partnership level a percentage of the transaction value for future capital investment in the bank. Still another commenter proposed making private equity investors capitalize failed insured depository institutions with all common stock equity, leaving available the option of issuing hybrid securities and thereby providing financial flexibility. One more commenter supported applying the source of strength requirement selectively, and only to the banking silo of a private fund.

5. Cross Guarantees

Ten commenters supported the cross guarantee provision as a means of limiting risk to the DIF, noting that, without it, private capital investors would have no exposure beyond their initial investment in the failed bank or thrift if the institution later experienced difficulties and the investors owned another bank or thrift.

In contrast, a majority of the commenters opposed the proposed cross guarantee provision in that it would deter private capital investment in failed insured depository institutions; place the other investments of private capital investors at risk; result in less competitive bids for failing institutions; and inhibit a private equity manager from investing in two different depository institutions through two different funds with two distinct groups of private capital investors.

Other commenters objected to imposing a cross guarantee requirement on non-controlling investors. Specifically, a number of law firms argued that the Federal Deposit Insurance Act does not authorize the FDIC to impose cross-guarantee liability on institutions that are not commonly controlled, as their owners are not in a position to control the management or policies of both institutions and should not be held responsible, directly or indirectly, if a non-controlled depository institution fails. Other commenters expressed similar concerns that the proposal goes beyond long-standing principles of corporate law and existing federal statutes by imposing obligations on a class of shareholder, without regard to whether they actually control the underlying institution. Two commenters requested clarification that a non-controlling investor would not be subject to the cross guarantee requirement.

Several commenters contended that the cross guarantee requirement is inconsistent with the realities of private equity investments, which are generally passive in nature, and will only complicate club investments in failed institutions. Other commenters noted that this provision would limit diversification of private equity portfolios and questioned the FDIC's intentions with respect to its pledged ownership interest in the event it acquired a majority interest in an institution, and what effect this would have on minority investors. Other commenters took the position that an investor would not make an investment where they have all the risks that come with accountability but neither the ability to affect nor control those risks.

A number of commenters suggested providing an 80 percent ownership threshold for purposes of the cross guarantee provision. To encourage capital investments in failed institutions, one commenter proposed a "special dispensation" approach for private capital investors holding only one bank investment in which the ownership limit would be increased from 24.9 percent to a level of controlling interest, encouraging the investor to strengthen the bank for future growth. For investors holding multiple bank investments, however, the commenter proposed adhering to existing regulations.

6. Transactions With Affiliates

The Proposed Policy Statement proposed a prohibition of certain extensions of credit by an insured depository institution to certain related parties. Several private investment firms, a few law professors, some legislators, and a banking trade association supported the proposed prohibition on all extensions of credit to affiliates. The professors suggested that the FDIC strengthen its stance by prohibiting an insured depository institution from engaging with an affiliate in any "covered transaction" as defined in the Federal Reserve Act and its implementing regulations.

Most of the commenters who registered opinions about this section offered alternatives for dealing with transactions with affiliates. Some commenters noted that the absolute prohibition went farther than the limitations contained in Sections 23A and 23B of the Federal Reserve Act and their implementing regulations. Rather than proposing a new standard, many of the commenters recommended that the Proposed Policy Statement instead rely on the current restrictions on transactions with affiliates contained in sections 23A and 23B of the Federal Reserve Act and the FRB's Regulation W.

Some suggested other alternatives. For example, one group of private investors suggested that all extensions of credit by an insured depository institution to related parties be subject to regulatory approval for a period of three years concurrent with that of the capital requirement under the Proposed Policy Statement. After that period, the investor group suggested, the restrictions in sections 23A and 23B of the Federal Reserve Act would apply.

One commenter suggested that the FDIC implement a de minimis exception for an ownership threshold of at least 10 percent before an investor's affiliates would be covered by the prohibition and that the prohibition on transactions with affiliates should exclude existing extensions of credit. One commenter requested guidance as to how the new test would apply to the lower tier holdings of a 10 percent owned portfolio company. Finally, one commenter urged the FDIC to prohibit or strictly limit the ability of private capital investors to effect dividend recapitalizations—that is, transactions in which a private capital investor borrows money on behalf of a company under its management and uses the proceeds to pay dividends to investors and investment managers.

7. Secrecy Law Jurisdictions

The FDIC received 15 comments addressing secrecy law jurisdictions. A majority of those comments opposed the ban on offshore investment vehicles in secrecy law jurisdictions in the Proposed Policy Statement. A number of comments expressed the belief that the FDIC's concerns in the area of secrecy law jurisdictions can be addressed through the information requests and other aspects of the "Disclosure" provisions of the Proposed Policy Statement. Similarly, one commenter expressed the belief that verifiable regulatory standards could be developed to assure compliance of offshore entities with basic anti-money laundering policies and practices and to ensure jurisdictional certainty with regard to U.S. enforcement interests. A small number of commenters suggested that the FDIC adopt a review of secrecy law jurisdiction cases on a case-by-case approach.

Other commenters expressed concerns that the Proposed Policy Statement will result in a practical bar on investment by many fund organizations with non-U.S. investors. These commenters suggested that the Proposed Policy Statement would restrict private capital investors bidding on depository institutions from using traditional funding structures that provide tax and other efficiencies.

A number of commenters noted that by prohibiting offshore vehicles from making investments, the Proposed Policy Statement would unintentionally prohibit a parallel domestic vehicle from investing. Commenters also pointed out that the comprehensive consolidated supervision exception would likely not be applicable to fund investors because that concept applies only to regulated banking organizations in other countries. Additionally, the FDIC also received a number of comments requesting clarification of the Proposed Policy Statement on what is meant by "bank secrecy jurisdiction" and what types of specific situations are covered by the Proposed Policy Statement. One comment recommended that offshore funds established prior to the date of the Proposed Policy Statement be exempt from the restrictions.

The FDIC also received comments, including one from 3 Senators, supporting the treatment of secrecy jurisdictions in the Proposed Policy Statement. The Senators' comments urged the FDIC to eliminate the ability of investors domiciled in secrecy jurisdictions to invest in failed U.S. banks and thrifts based on the history of association offshore structures have with financial fraud, money laundering, tax evasion, and other misconduct.

8. Continuity of Ownership

The FDIC received a number of comments supporting the proposed three-year continuity of ownership rule. One commenter pointed out that it would take management at least three years to resolve problem assets and restore the failed insured depository institution to health. Commenters also expressed the belief that a three-year continuity of ownership rule was necessary to prevent speculative investors from "flipping" banks for short-term profits. One commenter opined that the holding period should be longer than three years to protect against private investors focused on short term profits at the expense of long term financial stability.

In contrast, the FDIC also received comments expressing concern that a three-year period is too long. A number of these commenters proposed an 18-month period as an alternative. Commenters opposing the required holding period also pointed out that such a requirement could chill the interest of private equity investors in failed institutions. One commenter expressed concern that the three-year holding period might prevent a private equity investor from conducting a public offering of the stock of a depository institution. Two commenters noted that a three-year time period overstates the time required to stabilize the operations of a failed institution. Another commenter argued that the sale or transfer of ownership can, in some instances, enhance the overall safety and soundness of an insured depository institution. One commenter recommended that the holding period requirement only pertain to the first acquisition of a failed institution.

Other commenters suggested that the continuity of ownership requirement is not necessary because most private capital investors considering a failed bank acquisition have a long-term investment horizon. One such commenter suggested a de minimis exception to the holding period requirement. Two commenters recommended eliminating the holding period requirement and imposing, in its place, a requirement that investors obtain prior approval of acquisitions from the Federal Reserve Board. Another commenter recommended applying the holding period requirement to only "controlling" private equity investors.

The FDIC also received comments expressing concern about the justification of the holding period requirement. Two commenters argued that the three-year continuity period could be viewed as arbitrary and/or ambiguous. Another commenter added that new regulatory burdens and requirements for bank acquisitions were being imposed through the holding period requirement without formal or informal processing timeframes. A number of commenters noted that the required holding period could chill the interest of private equity investors in failed institutions.

Many commenters stated that precluding an initial public offering during the holding period, even where the proceeds of the offering go the bank itself, is counter to the objective of increasing capital of banks. Other commenters suggested that holding companies in which investors invest, or their subsidiaries, should be able to conduct initial public offerings and follow-on offerings of their own securities without FDIC approval.

9. Special Owner Bid Limitation

The FDIC received a number of comments expressing the opinion that investors that owned 10 percent or more of a failed insured depository institution should not be eligible to bid on the liabilities, or both such liabilities and assets, of that failed institution in receivership. One commenter urged the FDIC to go farther, suggesting that any private capital investor that held a 10 percent or greater equity interest in three or more failed depository institutions be permanently banned from bidding on the deposits, or both such deposits and liabilities, of any failed insured depository institution.

One private equity firm expressed concern about the general ban and instead proposed that such investors be evaluated on a case-by-case basis. A national industry advocacy organization agreed with the case-by-case approach, and suggested that a blanket limitation on 10 percent investors may deprive the FDIC of the ability to effect a least-cost resolution. Similarly, another commenter suggested that investors owning 10 percent or more of a failed insured depository institution should be eligible to bid "in exceptional circumstances."

10. Disclosure

The FDIC received 4 comments addressing the Proposed Policy Statement's disclosure requirements. One comment supporting the disclosure requirement stated that transparency is essential to ensure effective and prudent oversight and regulation by U.S. regulators. Another commenter requested clarification of whether information submitted by private capital investors to the agency as part of a bidding process would be kept confidential. Two law firms commented that the disclosure requirement is overly broad. These commenters noted that any entity formed for the purpose of acquiring control of a bank or savings association would be required to submit detailed information to the FRB or the OTS. They also sought clarification on whether this requirement would apply to all private capital investors without regard to their percentage ownership.

11. Lifting of Restrictions After a Certain Time Period of Successful Operation of a Bank

The FDIC received 10 comments addressing this issue. Commenters generally suggested a three-year period as an appropriate time frame. One commenter noted that the limitations should be removed after three years of successful operation, similar to the practice for de novo institutions. Another commenter recommended that the limitations in the Proposed Policy Statement should be lifted "as the FDIC and the primary regulator increasingly gain comfort with a bank's risks and business plan." Two commenters requested that the FDIC abandon the initiative entirely, but recommended that such a time period not extend beyond three years if adopted. Another commenter defined the term "successful operation" as involving the same criteria as those that are applied to qualification for and maintenance of financial holding company status under 12 CFR Section 225.81. One law firm recommended lifting the restrictions after 18 months, noting that a shorter holding period would prevent a situation where private equity investors in a failed depository institution are operating at a competitive disadvantage.

One individual commenter suggested that the effective period of the Proposed Policy Statement should be the earlier of either the completion of two examinations that result in satisfactory ratings or three years. Similarly, an insured depository institution suggested that a two-year period would provide the FDIC with the opportunity to evaluate the competency of the management team in place at the acquired institution. One private equity firm supported the notion that an institution, once it has been recapitalized with new management installed, should not be distinguished from any other institution with respect to risk management.

One comment the FDIC received recommended extending the restrictions of the Policy Statement to a four-or-five-year period, with the source of strength, cross guarantee, and bank secrecy restrictions continuing for perpetuity.

III. Final Statement

After consideration of the comments described above the FDIC has made various amendments in the text of the Final Statement. These changes are summarized below with the explanation organized around each of the basic elements of the Final Statement.

Definition of "Investors"/Applicability of Standards

Many investors asked for greater precision in the definition of the types of firms to be covered by this policy statement. The FDIC notes that the policy statement is just that—a policy statement and not a statutory provision imposing civil or criminal penalties and that the requirements it imposes on investors only apply to investors that agree to its terms. Moreover, the FDIC finds it exceedingly difficult to use precisely defined terms to deal with the relatively new phenomenon of private capital funds joining together to purchase the assets and liabilities of failed banks and thrifts where the investors all are less than 24.9 percent owners but supply almost all of the capital to capitalize the new depository institution. The FDIC, in only a short period of time, has seen multiple variations in the structures that have been employed by private capital firms to own banks and thrifts. The FDIC also notes that under some structures the investors are not subject to the Bank Holding Company Act, are not subject to the Change in Bank Control Act, not subject to Prompt Corrective Action, are not institution affiliated parties, are not subject to cross guarantees, and are not subject to Section 23A or Section 23B of the Federal Reserve Act. The FDIC Board will review the operation and impact of this Final Statement within 6 months of its approval date and shall make adjustments as it deems necessary.

In the Final Statement, the exclusion for private capital investors in bank or thrift holding companies that were created or acquired by the investor at least three years prior to the date of the Policy Statement has been deleted. In response to comments that the Policy Statement should specify a date after which it would no longer apply, the FDIC has added a provision that that upon application and approval by the FDIC's Board of Directors the Final Statement will no longer apply to an Investor in a bank or thrift, or bank or thrift holding company of an insured institution that was covered by the Final Statement if the bank or thrift has maintained a CAMELS 1 or 2 rating continuously for seven years. The Final Statement also makes clear that the Final Statement would not apply to Investors in partnerships or similar ventures with depository institution holding companies (excluding shell holding companies) where the latter have a strong majority interest in the acquired bank or thrift and an established record for successful operation of insured banks or thrifts. Such partnerships are strongly encouraged by the FDIC. In response to comments that the Policy Statement should define "*de minimis* investments", a provision has been added that provides that the Final Statement shall not apply to Investors with 5 percent or less of the total voting power of an acquired depository institution or its bank or thrift holding company provided there is no evidence of concerted action by these Investors. Finally, a provision has been added to make clear that the FDIC Board of Directors may waive one or more provisions of the Final Statement if such exemption is in the best interests of the Deposit Insurance Fund and the goals and objectives of the Final Statement can be accomplished by other means.

Capital

After consideration of the comments presented, the Final Statement revises the capital commitment to provide for a level of initial capitalization sufficient to establish a ratio of Tier 1 common equity to total assets of at least 10 percent throughout the first 3 years. Some commenters suggested that capital requirements should be adjusted based on the facts of individual cases. The FDIC adopted this suggestion in so far as it provides that capital requirements may be increased above 10 percent Tier 1 common equity to total assets ratio if warranted. The specific language in the proposed text authorizing an extension of the 3-year period has been eliminated. After 3 years, as in the proposed text, the depository institution must remain "well capitalized", as that term is defined in Section 325.103(b)(1) of the FDIC Rules and Regulations, as long as the Investors' ownership continues. In response to comments that a source of strength provision would be difficult for private investors to apply as a practical matter, the FDIC decided to delete the provision. Further, as in the proposed text, if at any time the depository institution fails to meet this standard, immediate action would have to be taken to restore the institution to the at least 10 percent Tier 1 common equity ratio or the "well capitalized" standard, as applicable.

The FDIC believes that heightened capital levels are necessary in view of the higher risk profile of what are de novo institutions being acquired and for the protection of the DIF from losses. Depository institutions insured less than 7 years are overrepresented in the list of institutions that have failed in 2008 and 2009 with most of the failures occurring between the fourth and seventh years of operation, particularly where they have pursued early changes in business plans and inadequate controls and risk management practices.

Regarding the appropriate method for measuring capital in the Final Statement, staff considered the strong concerns that have been raised about the quality of bank capital (for example, whether banks have sufficient common equity as compared to debt-like or other instruments that qualify as regulatory capital), and the adequacy of the risk-based capital rules. Therefore, in the Final Statement, the FDIC has adopted Tier 1 common equity in the capital ratio because it provides a stronger measure of the capital available to absorb losses than alternative measures.

The FDIC also asked in the Proposed Policy Statement whether there should be a further requirement that if capital declines below the required capital level, the institution would be treated as "undercapitalized" for purposes of Prompt Corrective Action. Commenters argued that depository institutions in which private capital investors have invested should not be subject to the higher capital standards of the Proposed Policy Statement but to the same Prompt Corrective Action standards as other institutions. They argue that a separate and unequal Prompt Corrective Action regime for a bank that is backed directly or indirectly by private capital investors provides no supervisory benefits. As noted above, de novo depository institutions are subject to a considerably higher rate of failure. Accordingly, the FDIC is of the view that the higher capital standards applicable under the Proposed Policy Statement are extremely important in order to preserve the safety and soundness of these de novo institutions and to protect the Deposit Insurance Fund. Therefore, the special prompt corrective action requirements have been retained in the Final Statement.

Cross Support

The Proposed Policy Statement provided that Investors that owned two or more depository institutions, including one covered by this policy statement, would have an obligation to commit their bank or thrift investments to support one or more of these institutions if they failed, provided there was sufficient common ownership as provided in the Proposed Policy Statement. Commenters stated that the cross guarantee requirement would deter private capital investment in failed insured depository institutions because private capital investors in unrelated banks would not agree to a cross guarantee commitment that places their legally separate investments at risk.

The Final Statement scales back the circumstances in which what is now referred to as "cross support" would be required. A cross support obligation would apply if two or more depository institutions are owned by a group of Investors covered by the Final Statement if both depository institutions are at least 80 percent owned by common investors. Further, the FDIC may waive the cross support obligation if enforcing the obligation would not reduce the cost of the bank or thrift failure to the DIF.

Transactions With Affiliates

A number of commenters argued that the restrictions under sections 23A and 23B of the Federal Reserve Act and the Federal Reserve's Regulation W and Regulation O are sufficient to prevent inappropriate affiliate and insider transactions. Under some common private capital investment structures for investments in banks and thrifts, the investors would not meet the standards that trigger the applicability of sections 23A and 23B. The FDIC is of the view that a special situation is presented with respect to transactions with affiliates by private capital investors who are not subject to the activities restrictions of the Bank Holding Company Act with a resultant temptation to cause the de novo bank they have purchased to lend to companies in which they have invested. Moreover, the FDIC notes that the prohibitions on insider lending are among the most crucial requirements for maintaining a safe and sound banking system and for protecting the Deposit Insurance Fund. Accordingly, limited changes were made to the scope of this provision in the Final Statement.

The Final Statement modifies the definition of the term "affiliate" to mean "any company in which the Investor owns, directly or indirectly, at least 10 percent of the equity of such company and has maintained such ownership for at least 30 days." This change is designed to make compliance easier and is based on the assumption that very short term investments do not provide a reason for extensions of credit. Also added is an expectation that Investors will provide regular reports to the insured depository institution identifying all affiliates. Lastly, a provision has been added that exempts from the prohibition existing extensions of credit.

Bidding Eligibility of "Silo" Structures

Commenters acknowledged the FDIC's need to ascertain beneficial ownership, clearly identify the parties responsible for making management decisions, and ensure that ownership and control are not separated but objected to the blanket prohibition on "silo" structures, arguing that such a prohibition would eliminate many investors who would be willing to meet the FDIC's disclosure and transparency requirements. In the Final Statement, the FDIC has clarified that it would not approve ownership structures that typically involve a private equity firm (or its sponsor) that create multiple investment vehicles funded and apparently controlled by the private equity firm (or its sponsor) to acquire ownership of an insured depository institution. The FDIC is concerned that the purpose of these structures is to artificially separate the non-financial activities of the firm from its banking activities so that the private equity firm is not required to become a bank or savings and loan holding company. This type of structure also raises serious concerns about the sufficiency of the financial and managerial support to the acquired institution, even in those instances where the investing fund(s) agrees to be regulated as a bank or savings and loan holding company.

Secrecy Law Jurisdictions

Many commenters stated that a prohibition on having any offshore entities in an ownership structure could restrict private capital investors from using traditional funding structures that provide tax and other efficiencies, thereby hampering their ability to bid for failed depository institutions.

In evaluating a proposal involving an investment in an insured depository institution, it is important that the FDIC have adequate assurances that it will have access to reliable information on the operations or activities of the investor and its affiliates. Entities organized in secrecy law jurisdictions can make it difficult for the FDIC as a regulator to obtain information about a company's owners and its affiliates. Therefore, the FDIC believes that the Final Statement's provisions requiring transparent ownership and full disclosure are reasonable and prudent and that investors can organize efficient and functional ownership structures in the U.S.

In response to commenters' request that the FDIC clarify the meaning of "bank secrecy jurisdiction" in the Final Statement, the FDIC provides a definition of bank secrecy jurisdiction as "a country that applies a bank secrecy law that limits U.S. bank regulators from determining compliance with U.S. laws or prevents them from obtaining information on the competence, experience and financial condition of applicants and related parties, lacks authorization for exchange of information with U.S. regulatory authorities, does not provide for a minimum standard of transparency for financial activities, or permits off shore companies to operate shell companies without substantial activities within the host country."

Continuity of Ownership

The FDIC received comments questioning the justification for the proposed three-year holding period. The FDIC also received comments that indicated the three-year period was an appropriate amount of time required to stabilize the operations of a failed bank or thrift. The FDIC continues to take the position that it is important to encourage long term investment to promote the stability of a de novo previously failed bank or thrift. In particular, the FDIC has a direct interest in stability of management on which it depends for appropriate management of any agreements it may have with a bank or thrift concerning losses at that bank or thrift. Therefore, the Final Statement has largely left unchanged this prohibition absent prior FDIC approval, but has added a statement that in the case of transfers to affiliates FDIC approval shall not be unreasonably withheld provided the affiliate agrees to be subject to the same requirements that are applicable under this policy statement to the transferring Investor. In the Final Statement, the three-year holding period does not apply to mutual funds defined as an open-ended investment company registered under the Investment Company Act of 1940 that issues redeemable securities that allow investors to redeem on demand.

Disclosures

The FDIC believes that this feature could likely be implemented without significantly deterring private capital investments. In an effort to address commenters' concerns about confidentiality, in the Final Statement the FDIC provides that confidential business information will be treated as such and not disclosed except in accordance with applicable law.

V. Regulatory Analysis and Procedure

Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. Ch. 3501 *et seq.*, the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Final Policy contains reporting and recordkeeping requirements that constitute a collection of information as contemplated by the PRA. Specifically, the Final Policy sets forth the expectation that investors subject to the policy will provide regular reports that identify all affiliates (as that term is defined in the Final Policy) of the investor; that investors that own an interest in an insured depository institution and that employ ownership structures utilizing entities that are domiciled in bank secrecy jurisdictions (as that term is defined in the Final Policy) will maintain business books and records (or duplicates thereof) in the U.S.; and that investor will submit information to the FDIC regarding the investors and all entities in the ownership chain, including information on the size of capital funds, diversification, return profile, marketing documents, the management team, business model, and such other information required by the FDIC. The FDIC has submitted to OMB a request for approval, by August 28, 2009, of the information collection under emergency clearance procedures. The estimated burden is as follows:

Title: Qualifications for Failed Bank Acquisitions.

OMB Number: 3064–[new].

Estimated Number of Respondents:
Investor Reports on Affiliates: 20.
Maintenance of Business Records: 5.
Disclosures Regarding Investors and Entities in Ownership Chain: 20.

Frequency of Response:
Investor Reports on Affiliates: 12.
Maintenance of Business Records: 4.
Disclosures Regarding Investors and Entities in Ownership Chain: 4.

Average hours per response:
Investor Reports on Affiliates: 2.
Maintenance of Business Records: 2.
Disclosures Regarding Investors and Entities in Ownership Chain: 4.

Total annual burden—840 hours

If approved by OMB under emergency authority, the FDIC will proceed with a request for approval under normal clearance procedures, including an initial 60-day request, and subsequent 30-day request, for comments on: (1) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (2) the accuracy of the estimates of the burden of the information collection, including the validity of the methodologies and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Pending publication of the initial 60-day notice, interested parties are invited to submit written comments on the estimated burden herein by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- *E-mail: comments@fdic.gov.*
- *Mail:* Leneta Gregorie (202–898–3719), Counsel, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

A copy of the comment may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503. All comments should refer to the name of the collection.

The text of the Final Statement of Policy on Qualifications for Failed Bank Acquisitions follows:

Final Statement of Policy on Qualifications for Failed Bank Acquisitions

In order to provide guidance about the standards for more than *de minimis* investments in acquirers of deposit liabilities and the operations of failed insured depository institutions, the FDIC has adopted this Statement of Policy ("SOP"). It is the intent of the FDIC Board of Directors that this Statement of Policy applies to investors and is not intended to interfere with or supplant the preexisting regulation of holding companies. The Board of Directors will review the operation and impact of this SOP within 6 months of its approval date and shall make adjustments, as it deems necessary.

Applicability. Except as provided below, this SOP will apply prospectively to:

(a) private investors in a company, including any company acquired to facilitate bidding on failed banks or thrifts that is proposing to, directly or indirectly, (including through a shelf charter) assume deposit liabilities, or such liabilities and assets, from the resolution of a failed insured depository institution; and

(b) applicants for insurance in the case of de novo charters issued in connection with the resolution of failed insured depository institutions (hereinafter "Investors").

This SOP shall not apply to acquisitions of failed depository institutions completed prior to its approval date.

Following application to and approval by the FDIC Board of Directors, taking into consideration whether the ownership structure of such bank, thrift or holding company is consistent with the objectives of this SOP, this SOP shall not apply to an Investor in a bank or thrift, or bank or thrift holding company where the bank or thrift has maintained a composite CAMELS 1 or 2 rating continuously for seven (7) years.

This SOP shall not apply to:

(a) investors in partnerships or similar ventures with bank or thrift holding companies or in such holding companies (excluding shell holding companies) where the holding company has a strong majority interest in the resulting bank or thrift and an established record for successful operation of insured banks or thrifts. Such partnerships are strongly encouraged; or

(b) investors with 5 percent or less of the total voting power of an acquired depository institution or its bank or thrift holding company provided there is no evidence of concerted action by these Investors.

Under expedited procedures established by the Chairman, the FDIC Board of Directors may waive one or more provisions of this SOP if such exemption is in the best interests of the Deposit Insurance Fund and the goals and objectives of this SOP can be accomplished by other means.

B. *Capital Commitment:* The resulting depository institution shall maintain a ratio of Tier 1 common equity to total assets of at least 10 percent for a period of 3 years from the time of acquisition. Thereafter, the depository institution shall maintain no lower level of capital adequacy than "well capitalized" during the remaining period of ownership of the Investors.

If at any time the depository institution fails to meet this standard, the institution would have to immediately take action to restore capital to the 10 percent Tier 1 common equity ratio or the "well capitalized" standards, as applicable. Failure to maintain the required capital level will result in the institution being treated as "undercapitalized" for purposes of Prompt Corrective Action triggering all of the measures that would be available to the institution's regulator in such a situation.

Tier 1 common equity is defined as Tier 1 capital minus non-common equity elements. Non-common equity elements are defined as qualifying perpetual preferred stock, plus minority interests and restricted core capital elements not already included.

C. *Cross Support:* If one or more Investors own 80 percent or more of two or more banks or thrifts, the stock of the banks or thrifts commonly owned by these Investors shall be pledged to the FDIC, and if any one of those owned depository institutions fails, the FDIC may exercise such pledges to the extent necessary to recoup any losses incurred by the FDIC as a result of the bank or thrift failure. The FDIC may waive this pledge requirement where the exercise of the pledge would not result in a decrease in the cost of the bank or thrift failure to the Deposit Insurance Fund.

D. *Transactions With Affiliates:* All extensions of credit to Investors, their investment funds if any, and any affiliates of either, by an insured depository institution acquired by such Investors under this SOP would be prohibited. Existing extensions of credit by an insured depository institution acquired by such Investors would not be covered by the foregoing prohibitions.

For purposes of this SOP the terms (a) "extension of credit" is as defined in 12 CFR 223.3(o) and (b) "affiliate" is any company in which the Investor owns, directly or indirectly, at least 10 percent of the equity of such company and has maintained such ownership for at least 30 days. Investor(s) are to provide regular reports to the insured depository institution identifying all affiliates of such Investor(s).

E. *Secrecy Law Jurisdictions:* Investors employing ownership structures utilizing entities that are domiciled in bank secrecy jurisdictions would not be eligible to own a direct or indirect interest in an insured depository institution unless the Investors are subsidiaries of companies that are subject to comprehensive consolidated supervision ("CCS") as recognized by the Federal Reserve Board and they execute agreements on the provision of information to the primary federal regulator about the non-domestic Investors' operations and activities; maintain their business books and records (or a duplicate) in the U.S.; consent to the disclosure of information that might be covered by confidentiality or privacy laws and agree to cooperate with the FDIC, if necessary, in obtaining information maintained by foreign government entities; consent to jurisdiction and designation of an agent for service of process; and consent to be bound by the statutes and regulations administered by the appropriate U.S. federal banking agencies.

For the purposes of this paragraph E, a "Secrecy Law Jurisdiction" is defined as a country that applies a bank secrecy law that limits U.S. bank regulators from determining compliance with U.S. laws or prevents them from obtaining information on the competence, experience and financial condition of applicants and related parties, lacks authorization for exchange of information with U.S. regulatory authorities, does not provide for a minimum standard of transparency for financial activities, or permits off shore companies to operate shell companies without substantial activities within the host country.

F. *Continuity of Ownership:* Investors subject to this policy statement are prohibited from selling or otherwise transferring their securities for a 3 year period of time following the acquisition absent the FDIC's prior approval. Such approval shall not be unreasonably withheld for transfers to affiliates provided the affiliate agrees to be subject to the conditions applicable under this policy statement to the transferring Investor. These provisions shall not apply to mutual funds defined as an open-ended investment company registered under the Investment Company Act of 1940 that issues redeemable securities that allow investors to redeem on demand.

G. *Prohibited Structures:* Complex and functionally opaque ownership structures in which the beneficial ownership is difficult to ascertain with certainty, the responsible parties for making decisions are not clearly identified, and ownership and control are separated, would be so substantially inconsistent with the principles outlined above as not to be considered as appropriate for approval for ownership of insured depository institutions. Structures of this type that have been proposed for approval have been typified by organizational arrangements involving a single private equity fund that seeks to acquire ownership of a depository institution through creation of multiple investment vehicles, funded and apparently controlled by the parent fund.

H. *Special Owner Bid Limitation:* Investors that directly or indirectly hold 10 percent or more of the equity of a bank or thrift in receivership will not under any circumstances be considered eligible to be a bidder to become an investor in the deposit liabilities, or both such liabilities and assets, of that failed depository institution.

I. *Disclosure:* Investors subject to this policy statement would be expected to submit to the FDIC information about the Investors and all entities in the ownership chain including such information as the size of the capital fund or funds, its diversification, the return profile, the marketing documents, the management team and the business model. In addition, Investors and all entities in the ownership chain will be required to provide to the FDIC such other information as is determined to be necessary to assure compliance with this policy statement. Confidential business information submitted by Investors to the FDIC in compliance with this paragraph I shall be treated as confidential business information and shall not be disclosed except in accordance with law.

J. *Limitations:* Nothing in this policy statement is intended to replace or substitute for any determination required by a relevant depository institution's primary federal regulator or a federal bank or thrift holding company regulator under any applicable regulation or statute, including, in particular, bank or thrift holding company statutes, or with respect to determinations made and requirements that may be imposed in connection with the general character, fitness and expertise of the management being proposed by the Investors, the need for a thorough and reasonable business plan that addresses business lines and strategic initiatives and includes appropriate contingency planning elements, satisfactory corporate governance structure and representation, and any other supervisory matter.

By order of the Board of Directors.

Dated at Washington, DC, this 26th day of August 2009.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E9–21146 Filed 9–1–09; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

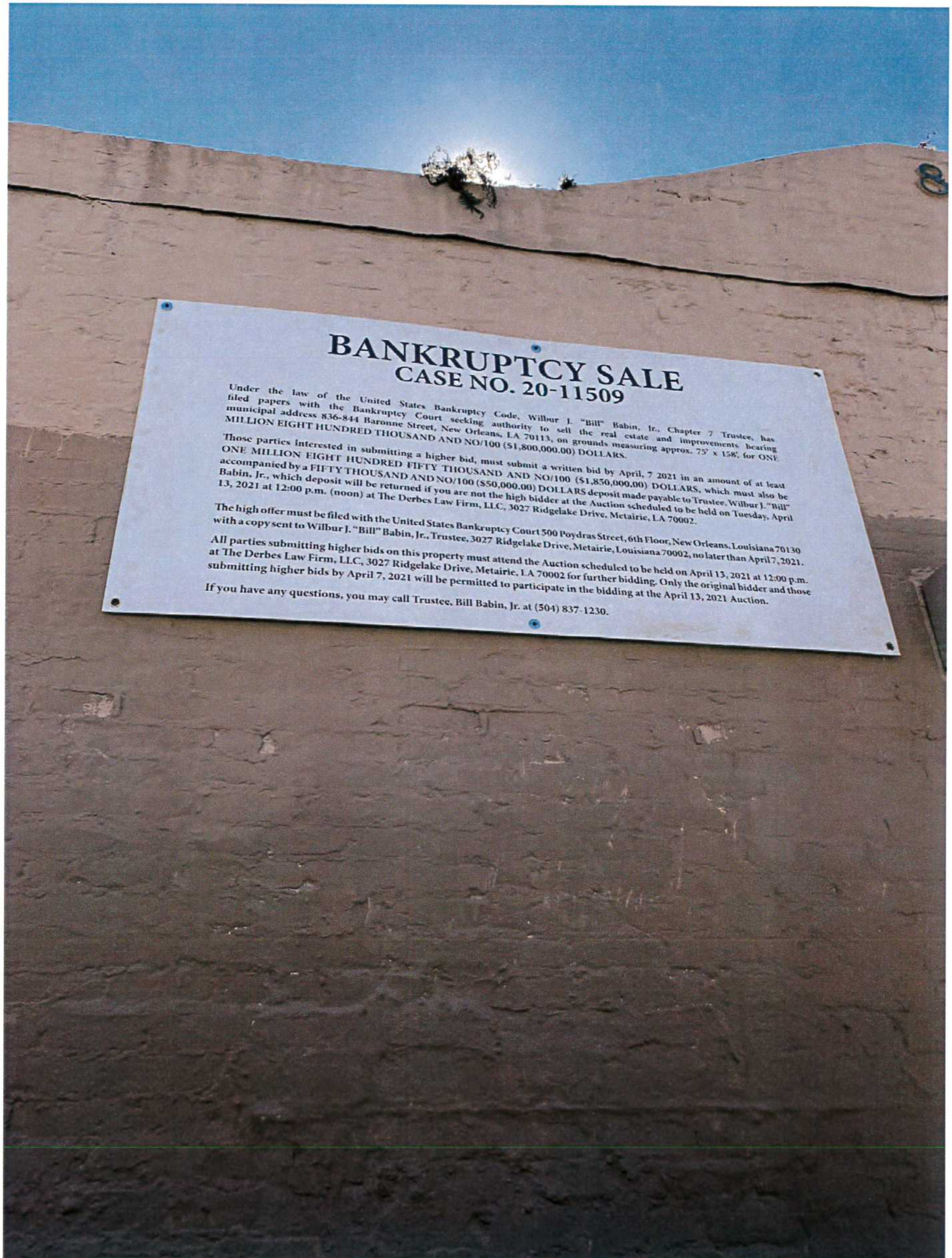
Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices acquire control of 21.51 percent of Community FirstBancshares, Inc., Union City, Tennessee ("Bancshares"), and the Kirkland family control group will acquire controlof 25.82 percent of Bancshares.of the Board of Governors. Comments must be received not later than September 15, 2009.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *Gary Shiffman, West Bloomfield, Michigan; Arthur Weiss, Farmington Hills, Michigan; Ronald Klein, Bloomfield Hills, Michigan; Paul Hodges, Orchard Lake, Michigan; Roman Ferber, West Bloomfield, Michigan; David Freidman, West Bloomfield, Michigan; Steven Freidman, West Bloomfield, Michigan; Brian Wenzel, Howell, Michigan; Sheldon Yellen, Bloomfield Hills, Michigan; Gary Torgow, Oak Park, Michigan; Dov Loketch, Oak Park, Michigan; Joseph Nusbaum, Oak Park, Michigan; David Provost, Birmingham, Michigan; Max Berlin, Southfield, Michigan; Donald Coleman, Bonita Springs, Florida; Albert Papa, Birmingham, Michigan; Robert Naftaly, West Bloomfield, Michigan; Thomas Schellenberg, Cross Village, Michigan; Thomas Brown, Farmington Hills, Michigan; Christine Otto, Oxford, Michigan; James Dunn, Livonia, Michigan; Gary Sakwa, Bloomfield Hills, Michigan; Frank Hennessey, Ocala, Florida; Christine Provost, Birmingham, Michigan; Scott*


BANKRUPTCY SALE
CASE NO. 20-11509
Under the law of the United States Bankruptcy Code, Wilbur J. "Bill" Babin, Jr., Chapter 7 Trustee, has filed papers with the Bankruptcy Court seeking authority to sell the real estate and improvements bearing municipal address 836-844 Baronne Street, New Orleans, LA 70113, on grounds measuring approx. 75' x 158', for ONE MILLION EIGHT HUNDRED THOUSAND AND NO/100 ($1,800,000.00) DOLLARS.
Those parties interested in submitting a higher bid, must submit a written bid by April, 7 2021 in an amount of at least ONE MILLION EIGHT HUNDRED FIFTY THOUSAND AND NO/100 ($1,850,000.00) DOLLARS, which must also be accompanied by a FIFTY THOUSAND AND NO/100 ($50,000.00) DOLLARS deposit made payable to Trustee, Wilbur J. "Bill" Babin, Jr., which deposit will be returned if you are not the high bidder at the Auction scheduled to be held on Tuesday, April 13, 2021 at 12:00 p.m. (noon) at The Derbes Law Firm, LLC, 3027 Ridgelake Drive, Metairie, LA 70002.
The high offer must be filed with the United States Bankruptcy Court 500 Poydras Street, 6th Floor, New Orleans, Louisiana 70130 with a copy sent to Wilbur J. "Bill" Babin, Jr., Trustee, 3027 Ridgelake Drive, Metairie, Louisiana 70002, no later than April 7, 2021.
All parties submitting higher bids on this property must attend the Auction scheduled to be held on April 13, 2021 at 12:00 p.m. at The Derbes Law Firm, LLC, 3027 Ridgelake Drive, Metairie, LA 70002 for further bidding. Only the original bidder and those submitting higher bids by April 7, 2021 will be permitted to participate in the bidding at the April 13, 2021 Auction.
If you have any questions, you may call Trustee, Bill Babin, Jr. at (504) 837-1230.