

No. 20-394

IN THE

Supreme Court of the United States

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DAVID ALAN SCHUM,

Petitioner,

—v.—

FORTRESS VALUE RECOVERY FUND I, L.L.C.; SCHULTE ROTH & ZABEL, L.L.P.; LAWRENCE S. GOLDBERG; DANIEL BERNARD ZWIRN, PERRY GRUSS; HIGHBRIDGE/ZWIRN SPECIAL OPPORTUNITIES FUND, L.P.; BERNARD NATIONAL LOAN INVESTORS, LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL L. COOK

Counsel of Record

ADAM C. HARRIS

SCHULTE ROTH & ZABEL LLP

919 Third Avenue

New York, New York 10022

(212) 756-2000

michael.cook@srz.com

*Attorneys for Lawrence S.
Goldberg and Pro Se*

QUESTION PRESENTED

A party asking a bankruptcy court to revoke an order confirming a Chapter 11 reorganization plan for asserted fraud under Bankruptcy Code (“Code”) §1144 must move within “180 days after the date of the entry of the order” See also Fed. R. Bankr. P. 9024 (“[C]omplaint ... may be filed only within the time allowed by §1144”). Federal Rule of Civil Procedure 60(c), made applicable by Federal Rule of Bankruptcy Procedure 9024, also requires that a motion to reconsider an order be made “within a reasonable time.”

The question presented is as follows: Whether a bankruptcy court may, in the exercise of its discretion, deny a party’s motion to re-open a 16-year-old reorganization case and reconsider previously allowed claims when (a) the motion was statutorily time-barred; (b) the movant delayed in seeking such relief; (c) the movant could not be granted effective relief; (d) the movant offered no evidence of fraud; and (d) courts had previously rejected the movant’s claims.

CORPORATE DISCLOSURE STATEMENT

No corporate parent or publicly held company owns 10% or more of any corporate entity's stock.

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INTRODUCTION

This case presents a narrow, splitless question that the petitioner, David A. Schum (“Schum”), has unsuccessfully litigated in the courts for years. Schum ignores his prior losses and the warnings from many courts. He claims to have discovered “new evidence” in 2012, arguing again, after two appellate losses, that the bankruptcy court abused its discretion in denying his motions to revoke a Chapter 11 reorganization plan, reopen a closed case, and to reject previously allowed claims. According to that court, affirmed by the district court and Fifth Circuit, Schum’s motions were baseless, untimely and equitably moot.

First, Code § 1144 contains an explicit deadline of “180 days” for seeking revocation of a confirmed reorganization plan, but Schum failed to move for 14 years after confirmation of the reorganization plan here and almost seven years after purportedly discovering any alleged “fraud.” Not only did Schum fail to show any evidence of fraud during the underlying bankruptcy case, but he also tried to relitigate previously rejected arguments. Because Schum admittedly waited for years to attack the long-confirmed reorganization plan, no court could provide effective relief, making Schum’s motion equitably moot.

This Court should deny review for at least four reasons. First, the circuits are not split and the question does not warrant review.

Second, the purported issues raised by Schum are narrow. Courts have easily disposed of these issues, and can continue to do so.

Third, the facts of this case render it a poor vehicle for review. Courts have consistently rejected Schum’s

claims over the past fourteen years. Allowing even more such litigation would set a bad precedent, encouraging endless, repetitive litigation.

Finally, although it should not matter in deciding whether to grant certiorari, the Fifth Circuit, like every other court, got it right in disposing of Schum's baseless claims.

STATEMENT

Schum is the asserted equity owner in businesses that held certain radio station assets (the "Assets"). He has repeatedly failed in many courts to undo the transfer of the Assets from Renaissance Radio Inc. ("RRI"), the debtor, to third parties over the past 14 years in the bankruptcy court, the district court, the Fifth Circuit, the Federal Communications Commission, the D.C. Circuit, and this Court. Despite his complete lack of success in all of these courts, Schum has persisted. The bankruptcy court instructed Schum to stop filing pleadings in these bankruptcy cases. ROA.20-10016.843¹. The Fifth Circuit held 12 years ago that Schum's "appeal is nothing but a repackaged attack on the Sale Approval Order by way of an appeal of the Reconsideration Order." In re Watch Ltd., 295 F. App'x 647, 650 (5th Cir. 2008). The D.C. Circuit also dismissed an appeal by Schum and others from rulings by the Federal Communications Commission ("FCC") in 2015. Schum v. F.C.C., 617 F. App'x 5 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 1672 (2016) (mem.). This petition is yet another baseless litigation tactic by Schum.

¹ References to "ROA" are to the appellate record from the United States Court of Appeals for the Fifth Circuit

Schum started the current underlying litigation on December 28, 2018, by moving for the reopening of the RRI bankruptcy case and the reconsideration of certain allowed claims. ROA.20-10016.465. The bankruptcy court denied the requested relief on April 4, 2019, and entered an appropriate order on April 11, 2019. ROA.20-10016.62. Most important, the bankruptcy court found that Schum had offered no facts to support his asserted fraud claims. He had also attempted to attack prior orders collaterally; had inexcusably delayed in moving to reopen the bankruptcy case; and had “inexcusably tarried in pursuing relief after 2012.” ROA.20-10016.82; In re Renaissance Radio, Inc., No. 03-33479-BJH, 2019 WL 1503787, at *10 (Bankr. N.D. Tex. Apr. 4, 2019). The district court affirmed and enjoined Schum from further litigation in this case. Schum v. Fortress Value Recovery Fund I LLC, No. 3:19-cv-00978-M, 2019 WL 7856719, at *6 (N.D. Tex. Dec. 2, 2019). The Fifth Circuit affirmed the district court. In re Renaissance Radio, Inc., 805 F. App’x 319 (5th Cir. 2020), and denied Schum’s petition for rehearing on June 19, 2020. Pet. App. A.

A. Relevant Statutes

Schum failed to quote Bankruptcy Code § 1144, 11 U.S.C. § 1144, which reads as follows:

§ 1144. Revocation of an order of confirmation

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud.

An order under this section revoking an order of confirmation shall –

- (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and

- (2) revoke the discharge of the debtor.

The Bankruptcy Amendments and Federal Judgeship Act of 1984 amended section 1144 to stress that a plan confirmation order may be revoked “if and only” if procured by fraud. Pub. L. No. 98-353, § 515, 98 Stat. 333, 387. The 180 day deadline applies even if the fraud is not discovered until after the expiration of the 180 day period. In re Orange Tree Assocs., Ltd., 961 F.2d 1445 (9th Cir. 1992).

Bankruptcy Code § 350(b), 11 U.S.C. § 350(b), provides as follows:

A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

The decision to reopen a case is discretionary with the court. In re Chalasani, 92 F.3d 1300, 1308 (2d Cir. 1996); In re Thompson, 16 F.3d 576, 581-82 (4th Cir.), cert. denied, 512 U.S. 1221 (1994); In re Zurn, 290 F.3d 861 (7th Cir. 2002) (bankruptcy court had correctly refused to reopen Chapter 11 case to compel refund from creditor; reorganization plan had been fully consummated by payment of creditors; after bankruptcy had ended, state courts were appropriate forum to resolve parties’ dispute).

Schum also failed to quote Bankruptcy Code § 502(j), 11 U.S.C. § 502(j), which reads in relevant part as follows:

A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case.

In determining whether cause exists for reconsideration of a claim that was allowed prior to confirmation of the reorganization plan, the court looks to (1) the extent and reasonableness of the party's delay in seeking reconsideration post confirmation; (2) the prejudice to any party; (3) the effect of the delay upon court administration; and (4) the moving party's good faith. The Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(b) standards for determining whether allowance or disallowance of a claim should be reconsidered are applied only if the claim was previously litigated. In re Gomez, 250 B.R. 397 (Bankr. M.D. Fla. 1999).

A bankruptcy court's decision denying the reopening of a case under the Code is a matter of discretion. In re Faden, 96 F.3d 792, 796 (5th Cir. 1996). Similarly, a bankruptcy court's denial of a motion to reconsider allowed or disallowed claims under Code § 502(j) is also subject to an abuse of discretion standard. In re Colley, 814 F.2d 1008, 1010 (5th Cir. 1987).

B. Factual Background: RRI and The Watch Bankruptcy Cases

Creditors filed an involuntary chapter 7 petition against RRI on April 1, 2003. The bankruptcy court later converted the chapter 7 case to a chapter 11 case and confirmed RRI's *Second Amended Plan of Reorganization* ("RRI Plan") on January 8, 2004. ROA.20-10016.448. The RRI Plan required RRI to

transfer all of its Assets to a newly-formed entity called The Watch, Ltd. (“The Watch”). ROA.20-10016.216-226. Accordingly, The Watch purchased the Assets through an exit loan, in which Bernard National Loan Investors (“BLNI”) was the lender and Highbridge/Zwirn Special Opportunities Fund, L.P. (“Zwirn”) was the agent. ROA.20-10016.216-226. The Watch then transferred its radio station licenses to DFW Radio License LLC, a wholly owned subsidiary of The Watch. Letter to David A. Schum et al., 21 FCC Rcd. 14996, 14998 (MB 2006).

Less than two years later, on May 26, 2005, The Watch filed its own chapter 11 petition. ROA.20-10016.1174. Pursuant to Bankruptcy Code § 363, 11 U.S.C. § 363, The Watch and its affiliates auctioned off substantially all of the Assets on October 13, 2005. ROA.20-10016.1058, 1063. Zwirn’s bid was successful and the bankruptcy court entered an order approving the sale on December 28, 2005. (Order, In re Watch, Ltd., No. 05-35874 (Bankr. N.D. Tex. Dec. 28, 2005), Doc. No. 150). After acquiring the Assets, Zwirn assigned them to Bernard Dallas, LLC (“Bernard Dallas”), an entity created for this purpose. David A. Schum, 21 FCC Rcd. at 14998. In early 2006, the parties had sought and obtained the FCC’s consent to assign the FCC licenses to Bernard Dallas from DFW Radio. Id. Schum began repeatedly and frivolously disputing the approval at every chance, however.

C. Prior Related Litigation: Schum Unsuccessfully Disputes the Assignment of the Assets at the FCC, D.C. Circuit Court, and This Court

The FCC rejected Schum’s attempts to block the assignment of the Assets to Bernard Dallas five times.

First, Schum filed a petition at the FCC claiming that the assignment was invalid because Zwirn and Bernard Dallas did not comply with FCC ownership limitations set forth in 47 U.S.C. § 310. David A. Schum, 21 FCC Rcd. at 14996-98. The FCC rejected this argument twice — in response to both his original complaint and his motion for reconsideration. See Id. (rejecting Schum’s “speculative foreign ownership allegations” and granting the assignments to Bernard Dallas); Letter to Dennis J. Kelly, Esq. et al., 23 FCC Rcd. 2646 (MB 2008) (denying Schum’s petition for reconsideration).

Before the FCC rejected his claims, Schum asserted another violation under 47 U.S.C. § 310. While the first FCC decision was still pending, Bernard Dallas agreed to sell the Assets to Principle Broadcasting Network - Dallas, LLC (“Principle Broadcasting”) upon consummation of the sale between The Watch and Bernard Dallas. Consequently, Bernard Dallas applied for consent to assign the Radio Station Assets to Principle Broadcasting. Schum used this as another opportunity to object under § 310. See Letter to Richard R. Zaragoza, Esq. et al., 23 FCC Rcd. 2642, 2644 (MB 2008). Just as before, the FCC rejected his argument and denied his motion for reconsideration. Id. at 2645 (denying Schum’s motion and approving the assignment to Principle Broadcasting); Richard R. Zaragoza, 23 FCC Rcd. at 2643 n.7 (refusing to reconsider its prior ruling). In its rulings, the FCC noted Schum’s “meritless challenges.” Id. at 2644 n.12.

Schum again sought review of the FCC letter decisions declining to reconsider his objections to the assignments to Bernard Dallas and to Principle Broadcasting. The FCC again rejected Schum’s claims. In re Applications of DFW Radio License, LLC,

Memorandum Opinion and Order, 29 FCC Rcd. 804, 812 (2014) (holding that Schum’s foreign ownership claims “are speculative, inferential and, in any event, based on hearsay and unrelated proceedings”).

Schum unsuccessfully appealed his claim to the D.C. Circuit Court of Appeals. Schum v. F.C.C., 617 F. App’x 5, 5-7 (D.C. Cir. 2015) (mem.). When that failed, he sought review from this Court, which denied his petition for writ of certiorari and denied his petition for a rehearing. Schum v. F.C.C., 136 S. Ct. 1672 (2016) (mem.); Schum v. F.C.C., 136 S. Ct. 2481 (2016) (mem.).

D. Schum Appeals the Sale Approval Order to the District Court and the Fifth Circuit

Schum’s appeals were not only limited to his complaints to the FCC and his later appeals of those decisions. He also repeatedly brought claims to the district court and the Fifth Circuit. Specifically, while FCC approval of the license transfers was pending, Schum appealed the Sale Approval Order. Order, Schum v. D.B. Zwirn Special Opportunities Fund, L.P., No. 06-cv-00391-N (N.D. Tex. July 6, 2006), Doc. No. 19. The district court rejected his appeal for lack of standing. Subsequently, Schum appealed the Sale Approval Order to the Fifth Circuit, which dismissed the case as moot. In re Watch Ltd., 257 F. App’x 748, 750 (5th Cir. 2007).

When the courts denied his attempts, Schum refused to sign the FCC documents required to effectuate the license transfers. Zwirn had to file six motions to compel Schum to sign the documents, and the bankruptcy court entered six orders permitting a third party to sign the documents on Schum’s behalf. Schum appealed the bankruptcy court’s order to the

district court and the Fifth Circuit, both of which denied his appeal as moot. In re Watch Ltd., 295 F. App'x at 648.

E. Procedural History Related to the Present Petition

Schum moved in the bankruptcy court on December 28, 2018, seeking to reopen the RRI bankruptcy case and to have the court reconsider and deny certain claims. ROA.20-10016.465. On April 11, 2019, the bankruptcy court denied Schum's motion, rejecting his baseless fraud claims as "conclusory" and finding his admitted delay in moving to reopen the case (Pet. 17-18) "inexcusable." Schum then appealed to the district court, which affirmed, holding that (a) the bankruptcy court had not abused its discretion in denying Schum's motion to reopen the RRI case and to reconsider claims, (b) Fortress's counsel and the bankruptcy judge had no conflicts of interest or bias, and enjoining (c) Schum as "a vexatious litigant" from filing further papers in the RRI and Watch cases without prior court approval. Fortress Value Recovery Fund I LLC, 2019 WL 7856719, at *6. Schum then appealed to the Fifth Circuit.

The Fifth Circuit affirmed on May 18, 2020. In re Renaissance Radio, Inc., 805 F. App'x at 322. It denied Schum's petition for rehearing on June 19, 2020. Pet. ii. According to the Fifth Circuit, Schum's motion sought "a revocation of the RRI confirmation order" and was statutorily "time-barred" under Code § 1144, as well as under Bankruptcy Rule 9024 and Civil Rule 60(b) and (d). 805 F. App'x at 321. Schum had also shown no "cause to reopen the bankruptcy [case] over a decade after its conclusion under [Code] §§ 350(b) or 502(j)." Id. at 321-22. Finally, held the court, the

district court properly enjoined “Schum from further filings relating to the Watch or RRI bankruptcies” because of his “long history of repetitive and frivolous filings pertaining to this matter in this and other federal courts.” Id. at 322.

REASONS FOR DENYING THE PETITION

I. NO CIRCUIT CONFLICT EXISTS

Schum wrongly argues that the “Fifth Circuit’s holding [here] is contrary to the view of a majority circuits....” Pet. 18. In Schum’s view, “other circuits” held that a claim of “fraud on the court” is not time-barred. Id. Schum thus argues that the Fifth Circuit mistakenly held that his fraud-on-the court was time-barred. In fact, no court hearing Schum’s claims was defrauded. More important, fraud on the court claims are not time-barred in the Fifth Circuit.

Schum ignores settled Fifth Circuit law to manufacture an imaginary circuit split. The Fifth Circuit’s position on extraordinary “fraud on the court” claims is as follows, consistent with that of other circuits:

Rule 60(b)(6) provides that a court may “relieve a party ... from a final judgment ... for ... any other reason justifying relief from the operation of the judgment.” Rule 60(b) sets out five specific bases for granting relief from a final judgment, followed by clause (b)(6). We have held that this clause’s “any other reason” language refers to any other reason than those contained in the five enumerated grounds on which a court may grant a Rule 60(b) motion.” Government Fin. Servs. One Ltd Partnership v. Peyton Place, Inc., 62 F.3d

767, 773 (5th Cir. 1995) (citing cases). Although we frequently have recognized that “Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses,” e.g., *id.* (quoting Harrell v. DCS Equip. Leasing Corp., 951 F.2d 1453 (5th Cir. 1992)), we have also narrowly circumscribed its availability, holding that Rule 60(b)(6) relief “will be granted only if extraordinary circumstances are present.” Bailey v. Ryan Stevedoring Co., 894 F.2d 157, 160 (5th Cir.) (affirming order denying Rule 60(b)(6) motion based on change in federal law) (citing Ackermann v. United States, 340 U.S. 193, 71 S. Ct. 209, 95 L. Ed. 207 (1950)), cert. denied, 498 U.S. 829, 111 S. Ct. 89, 112 L. Ed. 2d 61 (1990); Government Fin. Servs., 62 F.3d at 774; American Totalisator Co. v. Fair Grounds Corp., 3 F.3d 810, 815-16 (5th Cir. 1993).

Batts v. Tow-Motor Forklift Co., 66 F.3d 743, 747 (5th Cir. 1995) (alterations in original); Riley v. Wells Fargo Bank, N.A., 815 F. App’x 808, 809 (5th Cir. 2020) (per curiam) (pro se litigants moved to vacate judgment, asserting “fraud on the court”; “[r]ather than establishing proof of fraud on the court, the [plaintiffs] are rehashing their substantive claims regarding the ... foreclosure proceeding, which this court has already held did not constitute fraud on the court.”); Tu Nguyen v. Bank of America, N.A., 516 F. App’x 332, 335 (5th Cir. 2013) (“A court may ... provide relief from a judgment if it is the result of a ‘fraud on the court.’ Fed. R. Civ. P. 60(d). . . . Fraud is ‘never presumed’ and ‘must always be proven by clear and convincing evidence.’”) (citation omitted) (pro se

plaintiff merely disagreed with district court's judgment, which was "insufficient" to undo judgment; also "claim preclusion" mandated dismissal of suit); Yesh Music v. Lakewood Church, 727 F.3d 356, 363 (5th Cir. 2013) (affirmed district court's vacating of dismissal under Rule 60(b)(6); "Rule 60(b)(6) requires a showing of 'manifest injustice' and will not be used to relieve a party from the 'free, calculated, and deliberate choices he has made.' Edward H. Bohlin Co., Inc. v. Banning Co., Inc., 6 F.3d 350 (5th Cir. 1993). . . . [I]t is an abuse of discretion to use Rule 60(b)(6) to allow [party] to avoid the consequences of its actions and reactivate its claim."); Rozier v. Ford Motor Co., 573 F.2d 1332, 1337-38, 1346 (5th Cir. 1978) (held that defendant's "misconduct . . . completely sabotaged the federal trial machinery The policy protecting the finality of judgments is not so broad as to require protection of judgments obtained in this manner"; because motion made timely, court did not have "to review [defendant's] conduct in light of the more exacting 'fraud upon the court' standard also provided for by Rule 60(b), but not subject to any time limitation."); Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 872 (5th Cir. 1989) ("[M]ere nondisclosure to an adverse party and to the court of facts pertinent to a controversy . . . does not add up to 'fraud upon the court' for purposes of vacating a judgment under Rule 60(b).") (citing Kerwit Med. Prods., Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 837 (5th Cir. 1980)). Accord United States v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002) ("Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court."), quoting Rozier, 573 F.2d at 1338 and Weese v. Shukman, 98 F.3d 542, 553 (10th Cir. 1996) ("Fraud

on the court' is tightly construed because the consequences are severe. It may permit a party to overturn a judgment long after it has become final.") (citing 7 Moore's Federal Practice ¶ 60.33 at 60-357, 358, 360-61); United States v. Sierra Pac. Indus., Inc., 862 F.3d 1157, 1168-69 (9th Cir. 2017) (no fraud on court when movant able to challenge alleged fraud at trial; evidence lacking); Brown v. U.S. Dep't of Labor, 812 F. App'x 940, 943 (11th Cir. 2020) (rejected fraud on court claim; conclusory allegations insufficient; factual error not fraud; movant knew of alleged fraud at the time). See generally 12 James Wm. Moore et al., Moore's Federal Practice § 60.21 (3d ed. 2020). Even if Schum could somehow avoid the hurdles of Rule 60, his fraud claim is wholly baseless, as every court in this litigation has found over the past fourteen years.

Schum's assertion of a nonexistent circuit split is one mere attempt to relitigate his baseless fraud claims that courts have rejected. He can label his tactic as one based upon a fraud on the court to evade the time limits of Federal Rule 60(c)(1) (within a reasonable time – and ... no more than a year after the entry of the judgment), but he cannot use Rule 60(d)(3) to relitigate judicially rejected claims. Riley, 815 F. App'x at 809; Yesh Music, 727 F.3d at 363.

II. THE ISSUE PRESENTED IS NARROW, WITH NO PROSPECTIVE IMPORTANCE

Schum had effectively asked the bankruptcy court to revoke parts of the RRI Confirmation Order entered more than sixteen years ago on January 8, 2004. He sought to unwind the allowance of claims approved by the Confirmation Order and satisfied through an exit financing facility under the terms of the confirmed RRI

Plan. As shown below, Schum’s meritless fraud-on-the-court claims are time-barred.

A. The Code Barred Schum’s Motions

Code § 1144 gave Schum 180 days after the January 8, 2004 RRI confirmation order to seek revocation of the Plan. 11 U.S.C. § 1144 (“before 180 days after the date of the entry of the order of confirmation ...”); In re Skyport Glob. Commc’n, Inc., 642 F. App’x 301, 302 n.1 (5th Cir. 2016) (holding that a Chapter 11 plan “became irrevocable 180 days after entry.”) See also Fed. R. Bankr. P. 9024(3) (“a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144”); First Nat’l Bank of Oneida, N.A. v. Brandt, 887 F.3d 1255, 1260 (11th Cir. 2018) (holding that a Chapter 11 plan “cannot be revoked unless, within 180 days after confirmation, it is shown that the plan was procured by fraud.”). Schum brought this claim more than 14 years after the entry of the RRI Plan confirmation order. Thus, Schum’s requested relief is time-barred under the terms of the Code.

Schum also failed to show “cause” for the reconsideration of the claims allowed by the terms of the RRI Plan, as required by Code § 502(j) (permitting reconsideration “for cause” of a claim that has been allowed or disallowed). Schum cannot avoid “the usual rules for finality of contested matters” in bankruptcy cases. In re Colley, 814 F.2d at 1010. Schum’s fraud argument turned on FCC regulations that were inapplicable here. Moreover, Schum’s claims under Federal Rule of Civil Procedure 60(b) failed because Schum showed no diligence, as required by Rule 60(b)(2); because Schum failed to move “within a reasonable time” as required by Rule 60(c)(1); and because Schum never proved fraud, as required by

Rule 60(b)(3). Because the bankruptcy court confirmed the RRI Plan 16 years ago, Schum's attempt to revoke parts of that plan is meritless.

B. Schum's Massive Delay

The bankruptcy court confirmed the RRI Plan on January 8, 2004, and closed the case on December 29, 2006. ROA.20-10016.448, 770. But Schum never showed any "cause" for his delay in moving to reopen the case, as required by Code § 350(b) ("[C]ase may be reopened ... to administer assets, to accord relief to the debtor, or for other cause.").

The bankruptcy court properly held that Schum showed no "cause" under either § 350(b) or § 502(j) to reopen a RRI case or to reconsider any claims. In fact, Schum prematurely asked the bankruptcy court to reconsider claims allowed 16 years ago even before the court had reopened the case. No reason whatsoever existed for reopening the RRI case after more than 16 years. In re Case, 937 F.2d 1014, 1018 (5th Cir. 1991) (movant must show "compelling" reason for reopening case after a lengthy period of time).

Schum's claim to have purportedly discovered "new" evidence eight years ago also failed under any standard. Rule 60(b)(2) of the Federal Rules of Civil Procedure requires a movant to show "reasonable diligence" when discovering material new evidence. Nat'l City Golf Fin. v. Scott, 899 F.3d 412, 417 (5th Cir. 2018). According to Schum, he first learned that the lender here, Zwirn, "used a foreign company" to fund the exit loan in 2012. ROA.20-10016.521. He made a similar frivolous argument in an unsuccessful appeal to the FCC. DFW Radio License, LLC, 29 FCC Rcd. at 818 (Bernard National Loan Investors, Ltd., an exit lender, was "a specialized investment group based in the Cayman Islands.").

The bankruptcy court properly rejected Schum's lame explanation, noting his seven-year delay between discovering the new "evidence" and his belated motion to reopen the bankruptcy case (i.e., Schum's asserted need for more time to investigate and gather evidence). In re Renaissance Radio, Inc., 2019 WL 1503787, at *3-4. Randomly searching the internet, as Schum claimed, hardly constituted "reasonable diligence" required by Federal Rule 60(b)(2). Although Schum claims that his fraud-on-the-court claim cannot be time barred, the bankruptcy court also found Schum's fraud claim to be substantively meritless, as will be shown below.

C. Schum's Motions and Appeals Were Equitably Moot

An appellate court looks to three questions to determine whether it can grant relief "(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." In re Manges, 29 F.3d 1034, 1039 (5th Cir. 1994) (citation omitted). In balancing the criteria, substantial consummation of a plan can override all other factors. In re Pac. Lumber Co., 584 F.3d 229, 240 (5th Cir. 2009). Accord In re Allied Nev. Gold Corp., 725 F. App'x 144, 148 (3d Cir. 2018) (holding an appeal of a confirmation order equitably moot because the appellant sought to unscramble a complex reorganization when appellants should have acted before the plan became difficult to retract); In re City of Detroit, 838 F.3d 792, 799 (6th Cir. 2016) (affirming the dismissal of appeals from a Chapter 9 plan as equitably moot because it would require unraveling of a vast number of complex settlement agreements).

The bankruptcy court rightly held that Schum's attempt to reopen the RRI case met all three factors for equitable mootness. See In re Renaissance Radio, Inc., 2019 WL 1503787, at *8. First, Schum admittedly never obtained a stay of the bankruptcy court's order confirming the RRI Plan. Second, the plan had been "substantially consummated," consistent with Code § 1101(2) ("substantial consummation" means – (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan."). Creditors received all the payments due under the RRI Plan years ago. Third, Schum's belated claim for fees paid under the 2004 confirmed RRI Plan would only undo the plan on which third parties and transferees have relied. In re Pac. Lumber Co., 584 F.3d at 242 (after transfer of debtor's assets to new entities, reversing confirmation order would improperly affect third parties); In re CTLI, LLC, 534 B.R. 895, 910 (Bankr. S.D. Tex. 2015) (denied motion to revoke plan confirmation on basis of non-existent fraud; case equitably moot; refused to "unravel the Plan, significantly harming third parties.")

Equitable mootness is "a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." In re Manges, 29 F.3d at 1039. That "point" passed here long ago. Schum asserts that the Financing Agreement was "a major element of the contract" underlying the RRI Plan ("integral part of the ... plan"), but he seeks the denial of claims due to Schulte and Zwirn under the same Financing

Agreement. Pet. 5, 7. Returning fees due under the Financing Agreement, as Schum sought, would unwind critical parts of the confirmed plan more than a decade after the parties consummated it. Schum's appeal was moot as well as frivolous.

D. Schum Failed To Show Fraud By Any Party Or Its Counsel

According to Schum, counsel defrauded the court by not disclosing the actual lender and the foreign domicile of the lender. Pet. 5-6. Schum first relied on Federal Rule of Civil Procedure 60 in the bankruptcy court. Pet. 15; In re Renaissance Radio, Inc., 2019 WL1503787, at *1. That Rule provides relief for fraud under three sections: (b)(2), (b)(3), or (d). Schum now relies on Federal Rule 60(d)(3), however, which enables a court to "set aside a judgment for fraud on the court" and is not governed by the time limits in Federal Rule 60(c)(1) applicable to motions under Rule 60(b). Regardless of Schum's theory, however, his fraud allegations are baseless.

A movant, under Rule 60(b)(2), must show "(1) that it exercised due diligence in obtaining the information; and (2) that the evidence is material and controlling and clearly would have produced a different result if present before the original judgment." Nat'l City Golf Fin., 899 F.3d at 418 (citation omitted). Rule 60(b)(3) requires "clear and convincing evidence (1) 'that the adverse party engaged in fraud or other misconduct' and (2) 'that this misconduct prevented the moving party from fully and fairly presenting his case.'" Id. at 418-19 (citation omitted)

"[O]nly the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney

is implicated, will constitute a fraud on the court" under Federal Rule 60(d)(3). Rozier, 573 F.2d at 1338. The bankruptcy court properly exercised its discretion in finding that Schum failed to satisfy any of these standards here:

The elements of a claim for fraud are (1) that the debtor or proponent made a materially false representation or omission to the court; (2) that the representation was made with knowledge of its falsity or reckless disregard for the truth; (3) that the representation was made to induce the court's reliance; (4) that the court actually relied upon the representation; and (5) the court entered the confirmation order in reliance on the representation. A claim for fraud in an adversary proceeding must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). Under Rule 9(b) "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

In re Sherwin Alumina Co., 952 F.3d 229, 235 (5th Cir. 2020) (alteration in original) (citing Fed. R. Bankr. P. 7009); In re Fornesa, No. 12-37238-H3-13, 2016 WL 2930459, at *3 (Bankr. S.D. Tex. May 13, 2016); Fed. R. Civ. P 9(b); United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997) ("Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud.") (citation omitted).

1. The Omission of the Lender's Domicile Was Not Fraud

Schum falsely alleges that Zwirn defrauded the court when it purportedly concealed the foreign

domicile of BNLI, the ultimate lender under the Exit Financing Facility. Pet. 5-6. As shown below, Schum had all the facts in early 2004 and there was no concealment. In any event, the relevant statute here, 47 U.S.C. §310(b), restricts foreign owners of FCC licenses, not lenders:

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by – (1) any alien or the representative of any alien; (2) any corporation organized under the laws of any foreign government; (3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country; (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the [FCC] finds that the public interest [would] be served by the refusal or revocation of such license.

As the bankruptcy court explained, “the statute addresses only the nationality of the entity that held the FCC licenses (DFW Radio License) and not the Lender (BNLI).” In re Renaissance Radio, Inc., 2019 WL 1503787, at *5. Accord Letter to Una Vez Mas Tex. Holdings, LLC et al., 25 FCC Rcd. 13409, 13414 (MB 2010) (“There is no prohibition on relying on debt financing for all or part of a station acquisition and

there is no prohibition on that financing being provided from a non-U.S. bank.”). Section 310(b), therefore, never applied here because the transferee entity, DFW Radio License, was a Texas entity.

The FCC also confirmed that § 310(b) did not apply to foreign lenders such as BNLI. It rejected Schum’s foreign ownership argument, noting that “Section 310(b) does not proscribe debt interests held by foreign entities.” DFW Radio License, LLC, 29 FCC Rcd. at 822 n.129. That holding wholly undermines Schum’s fraud claim. Nor do Schum’s baseless allegations of BNLI’s hidden domicile constitute evidence that Zwirn or anybody else engaged in fraud under Federal Rule 60. Schum admitted that he and his then counsel received the key financing Agreement, that he signed it, and that he guaranteed the borrower’s obligations on February 5, 2004. Pet. 9. In sum, there was no fraud.

2. Schum Knew The Facts

Further undermining his fraud claim, Schum knew that BNLI was the “Lender.” He signed the execution version of the Exit Financing Facility, the signature page of which named BNLI as “Lender”. ROA.20-10016.533. Schum also never inquired further about the Lender’s identity. It was not important to him at the time, never was, and is still immaterial. Sherwin Alumina Co., 952 F.3d at 235-36 (no misrepresentation; sale terms known before confirmation hearing).

Earlier drafts of the Exit Financing Facility identified Zwirn as “Agent” and stated that “Lenders” would be “financial institutions from time to time.” ROA.20-10016.631. By signing the relevant documents in February 2004, Schum knew that a lending institution other than Zwirn would be a

lender. A copy of the Exit Financing Facility attached to the RRI plan named Zwirn as the lender on its signature page, stating that it was “[s]ubject to further modifications and drafting of ancillary documents.” ROA.20-10016.228 No party or counsel deceived Schum when BNLI became a lender. In fact, the February 5, 2004 Exit Financing Facility showed that BNLI was the lender. ROA.20-10016.533.

E. Schum Relitigates a Lost Cause

Claim preclusion, held the bankruptcy court, affirmed twice on appeal, prevents the “relitigation of a claim or cause of action that has finally been adjudicated,” and issue preclusion “prevents relitigation of specific issues already resolved in a prior action.” In re Renaissance Radio, Inc., 2019 WL 1503787, at *6.

Both claim preclusion and issue preclusion applied here. “Each of Schum’s appeals and challenges repeated the same arguments that were already denied or dismissed on a final basis.” Id. Schum repeatedly raised his foreign ownership fraud-on-the-court argument against all of the parties here. See, e.g., DFW Radio License, LLC, 29 FCC Rcd. at 819 & n.115; David A. Schum, 21 FCC Rcd. at 15003; Dennis J. Kelly, 23 FCC Rcd. at 2648. Federal courts and the FCC had already rejected Schum’s claims based on the same facts. The time has come for this Court to stop Schum’s imposition on the judicial system and the parties.

III. THIS CASE IS A POOR VEHICLE FOR FURTHER REVIEW

Schum has ignored warnings from courts over the years in response to his baseless filings. Schum’s

conduct confirmed his intent “to harass or to cause unnecessary delay or needless increase in the cost of litigation[,]” in violation of Federal Rule of Bankruptcy Procedure 9011(b)(1).

The Fifth Circuit properly affirmed the district court’s enjoining Schum, a vexatious litigant, from continuing this misconduct pursuant to the All Writs Act, 28 U.S.C. § 1651. In re Carroll, 850 F.3d 811, 815 (5th Cir. 2017); Newby v. Enron Corp., 302 F.3d 295, 301-02 (5th Cir. 2002); Estate of Hester v. NationsBank, 59 F.3d 1242, 1995 WL 413030, at *1, *2 (5th Cir. 1995) (affirmed sanctions for litigant’s “relentless judicial campaign” and “continued pursuit of vexatious litigation against anyone and everyone remotely connected with her bankruptcy [case]”). In no way did Schum’s status as a pro se litigant impede the Court’s authority to enjoin his vexatious pattern of actions. Harrelson v. United States, 613 F.2d 114, 116 (5th Cir. 1980).

The district court here found that Schum had “engaged in an extensive and unsuccessful history of vexatious and duplicative litigations over the last 16 years to challenge the RRI and Watch bankruptcy proceedings.” Fortress Value Recovery Fund I LLC, 2019 WL 7856719, at *5. Because of Schum’s “consistent course of conduct,” reasoned the district court, “[anything] short of this injunction would be insufficient to deter his future actions.” Id. Agreeing, the Fifth Circuit noted “Schum’s long history of repetitive and frivolous filings ... [in] this matter in this and other federal courts.” In re Renaissance Radio, Inc., 805 F. App’x at 322. See also In re Coppedge, Nos. 17-12341-BLS, 19-12-MN, 19-13-MN, 19-713-MN, 2020 WL 1332993, at *2-6 (D. Del. Mar. 23, 2020) (district court affirmed bankruptcy court’s orders denying reconsideration of orders lifting stay of

foreclosure, denying avoidance of lender's lien, striking counterclaim, sanctioning debtor for "vexatious and duplicitous filings," striking "notice of default," striking "notice of discharge"; accepted magistrate's recommendation withdrawing appeal from mandatory mediation; appellant-debtor failed to satisfy requirements of Federal Rule of Civil Procedure 60, applicable by Federal Rule of Bankruptcy Procedure 9024 – no challenge of bankruptcy court's fact finding; no support for appellant's arguments; no showing of "mistake, inadvertence, surprise, or newly discovered evidence"; debtor merely disagreed with bankruptcy court's legal conclusions, relying on previously rejected arguments, many of which "are barred by the doctrine of res judicata"; debtor "failed to present any new evidence, argument, or circumstance justifying reconsideration"; "appeal is vague, repetitive, and nonsensical"; court refused to "countenance serial and baseless appeals ... clearly filed for the purpose of further delaying the decade-long efforts of" lender enforcing legal remedies.).

Federal courts have "inherent power" to impose sanctions against vexatious litigants who have repeatedly engaged in bad-faith conduct. Chambers v. NASCO, Inc., 501 U.S. 32, 35 (1991). Given Schum's 16-year refusal to heed warnings from the courts, his behavior can only be described as harassment, at the very least. The Fifth Circuit's sensible, fair decision does not merit this Court's review.

CONCLUSION

The Court should deny the Petition for certiorari.

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Michael L. Cook
Counsel of Record
Adam C. Harris
SCHULTE ROTH & ZABEL LLP
Attorneys for Lawrence S.
Goldberg and Pro Se
Michael.Cook@srz.com
919 Third Avenue
New York, New York 10022
(212) 756-2000
(212) 593-5955 (Facsimile)