NO. 20-394

IN THE

Supreme Court of the United States

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

A. Respondent effectively concedes that fraud on the court was committed.

Respondent concedes that Bernard National Loan Investors, Ltd. ("BLNI") was the only lender for the Renaissance Radio, Inc. ("RRI") Financing Agreement (Br. in Opp. 6). Respondent does not dispute any of Petitioner's points of fraud as stated in the petition (Pet.16) regarding BNLI was a foreign company, the BNLI domicile was purposely never disclosed by Respondent and use of a foreign lender was specifically prohibited by Schum. Respondents do not dispute that Judge Houser was deceived into thinking Highbridge/Zwirn Special Opportunities Fund, L.P. ("DBZ" or "Zwirn"), domiciled in Delaware, was the lender (Pet. 1) as reflected in her Finding of Facts and Conclusions of Law (Pet. 8).

Respondent's argument that "The Omission of the Lender's Domicile Was Not Fraud (Br. in Opp. 19-21) fails in that it ignores the fact that Schum specifically prohibited use of a foreign lender under the contract. Respondent makes arguments that it doesn't matter that Schum's terms of the contract were violated based upon FCC rules and statutes which have no bearing on the loan contract. Contract terms apply to all parties to a contract.

Respondent also argues that Schum knew that BNLI was the lender when the Exit Financing Facility was executed (Br. in Opp. 21) but they concede they purposely did not disclose the domicile of the lender to the court or to Schum. As the record reflects, Judge Houser, Schum and the attorneys relied on sworn testimony on behalf of Zwirn and documentation provided by Respondent which included a clause that required disclosure of the use of a foreign lender (Pet. 8-9). Respondent purposely did not make the required contractual disclosure of the use of a foreign lender. The Financing Agreement contract was a result of fraud on the court.

B. Respondent lists unrelated "Prior Related Litigation."

Schum and others were suspicious of Zwirn's ownership during the Watch bankruptcy proceeding and they refused to disclose the ownership to the FCC when required. They were hiding relevant information from Schum, the Bankruptcy Court and the attorneys and it turned out to be incriminating. Respondent observes (Br. in Opp. 6-9), Schum and others involved with his companies who were all wiped out by the fraud, sought to force Zwirn to abide by the terms of the bankruptcy sale where Zwirn took control of the assets of The Watch, Ltd. via a bankruptcy auction.

Respondent concedes Zwirn, not BNLI, fraudulently represented itself to be the lender and won the auction (Br. in Opp. 6). The terms of the auction included the necessity to be an eligible FCC licensee in order to participate. Zwirn fraudulently won the auction and then refused to disclose their ownership to the FCC. Schum and the others attempted to force the disclosure but they were denied standing as the respondent disclosed (Br. in Opp. 8).

All of the actions respondent refers to were initiated and decided prior to Schum finding out the original lender, BNLI was a foreign company, Zwirn was never a lender and Zwirn was in violation of the foreign ownership rules as a result of Jeffrey Epstein's ownership involvement (Pet. 14). Zwirn's attorneys were contractually and ethically required to disclose the use of an illegal lender, BNLI, in every proceeding but they purposely did not. Schum had and still has a fiduciary responsibility to everyone that lost their investment to get the frauds resolved. All of the legal actions that Respondent argues are relevant to the contract fraud that is before the court were initiated and/or decided before the discovery of the use of an illegal lender and that Epstein was laundering money through Zwirn.

C. Respondent Claims No Circuit Conflict Exists.

Respondent claims no circuit conflict exists (Br. in Opp. 10-13) but they do not site any cases involving Federal Rule of Civil Procedure 60(d)(3) that found that fraud on the court was time-barred as the Fifth Circuit upheld in this case. Petitioner disagrees. As pointed out in the petition (Pet. 1):

> "A final judgment can also be overturned by a motion, pursuant to Federal Rule of Civil Procedure 60(d)(3), which is incorporated into the Bankruptcy Rules by Rule 9024, to vacate a judgment based upon fraud on the court."
> "Fraud on the court" is a claim that exists to protect the integrity of the judicial process, and therefore a claim for fraud on the court cannot be time-barred. See 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.21[4][g] & n. 52 (3d ed.2009) (citing Lockwood v. Bowles, 46 F.R.D. 625, 634 (D.D.C.1969)). Bowie v. Maddox, 677 F. Supp. 2d 276, 278 (D.D.C. 2010).

The Fifth Circuit ruling that Petitioner's motion was time-barred is in conflict with other Circuit rulings as well as Supreme Court ruling in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 251, 64 S. Ct. 997, 88 L. Ed. 1250 (1944).

D. Respondent claims The Code Barred Schum's Motion.

Respondent claims Petitioner was time-barred under various sections of the code (Br. in Opp. 14-15). Petitioner claims and asks this Court to verify that fraud on the court has to be treated as the egregious violation of the legal process that it is and 60(d)(3) takes precedent over any time limits imposed under other sections of the code.

Congress was resolute about imposing time limits for Bankruptcy Code ("Code") §1144, Code § 502(j), Rule 60(b)(2), etc. Congress purposely did not impose a time limit on fraud on the court claims brought under 60(d)(3) due to the serious nature of the fraud involving sworn officers of the court and the Circuit Court's and the Supreme Court have held time limits do not

apply (Pet. 2-5). The Texas Disciplinary Rules of Professional Conduct exist because honest, ethical attorneys felt the need to protect the integrity of the legal profession.

> "Attorneys are forbidden to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" (see Texas Disciplinary Rules of Professional Conduct rule 8.04 (a)(3)) and they are obligated to disclose any fraud "until remedial legal measures are no longer reasonably possible" (see Texas Disciplinary Rules of Professional Conduct rule 3.03 (c))" (Pet. 4-5).

The rules of conduct for attorneys dovetails with 60(d)(3) in that there is no time limit for the attorneys to come clean.

Respondent is bothered by "Schum's Massive Delay" in bringing the motion to reopen the bankruptcy case stating:

> "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)." (Br. in Opp. 16).

Petitioner shows this Court addressed the time and effort defense in Hazel-Atlas:

> "The Circuit Court did not hold that Hartford's fraud fell short of that which prompts equitable intervention, but thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone." Hazel-Atlas Glass Co. v Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997 (1944). (Pet. 20-21).

E. Respondent claims Petitioner is trying to unwind the confirmation plan.

Petitioner states "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 denies trying to unwind the plan and only seeks to deny the parties that profited from the fraud the fruit from their fraud in keeping with the Eleventh Circuit's Global Energies ruling. As set out in the Petition (Pet. 5):

"Schum's motion did not seek to have the reorganization plan revoked. Schum's motion was supported with a sworn affidavit and record evidence. The Eleventh Circuit Court recognized the need to not allow those that intentionally and maliciously commit fraud and fraud on the court to benefit or profit from fraudulent contracts or actions. In Global Energies,LLC the Eleventh Circuit Court did not take the attorney's (Pugatch) unprofessional conduct lightly when the court ruled:
"The bankruptcy court then shall conduct any hearings necessary in the exercise of all its powers at law or in equity and issue appropriate orders or writs, including without limitation orders requiring an accounting and disgorgement, orders imposing sanctions, writs of garnishment and attachment, and the entry of judgments to ensure that Chrispus, Juranitch, Tarrant, and Pugatch do not profit from their misconduct and abuse of the bankruptcy process." In re Global Energies, LLC (Published), No. 0:12-cv-61483-KMW, Justia 1411129135,ca11, August 15, 2014.

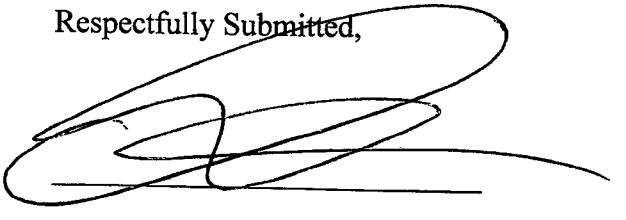
F. **The Decision Below Is Incorrect and Petitioner's Questions Warrant Review.**

The decision by the Fifth Circuit to uphold the time bar for a motion brought under Federal Rule of Civil Procedure 60(d)(3) for fraud on the court cannot be allowed to stand as it in direct conflict with other Circuit Courts' as well as the Supreme Court's well established rulings. Allowing the time-bar ruling renders 60(d)(3) toothless, The Texas Disciplinary Rules of Professional Conduct window dressing and the Supreme Court Hazel decision meaningless.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully Submitted,



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