

No. 24-1192

IN THE
Supreme Court of the United States

OVATION FUND MANAGEMENT II, LLC,

Petitioner,

v.

NOSSAMAN LLP, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Nossaman LLP has no parent corporation, nor is there any publicly held corporation that owns 10% or more of its stock.

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INTRODUCTION

Respondents Nossaman LLP and Marco Costales (collectively, “Nossaman”) join the brief in opposition filed by Respondents Chicago Title Company and Chicago Title Insurance Company (collectively, “Chicago Title”).

In addition, Nossaman separately submits two further reasons that any decision in this case would be unlikely to affect the ultimate result in any meaningful way, rendering this petition a poor vehicle for this Court’s review.

First, Petitioner Ovation Fund Management II, LLC (“Ovation”) cannot establish that it reasonably relied on Nossaman’s representations in light of its own admitted due diligence, and it is therefore unlikely to succeed in any litigation.

Second, Ovation’s core claims against Nossaman are further doomed to fail because they are time-barred.

For both of these reasons, even if this Court were to grant certiorari here, a reversal of the Ninth Circuit’s decision is highly unlikely to have any effect on the outcome of Ovation’s dispute with Nossaman.

Certiorari should therefore be denied.

STATEMENT

A. Ovation's Investment in the Ponzi Scheme

Gina Champion-Cain operated a Ponzi scheme in which she promised investors that they could make substantial returns loaning money through her company, ANI Development Inc. (“ANI”), to entities, such as wineries, stores, and bars, that were seeking approval from the California Alcohol Beverage Control Board (“ABC”) for liquor license transfer. Pet. App. 8a-9a. “Contrary to what Cain told her investors, however, there were no liquor license applicants needing loans.” Pet. App. 10a. Instead, Cain “used those funds to support her living expenses, fund her other business ventures, and repay earlier investors” in the scheme. *Id.*

One of the selling points Cain used to lure investors was her claim that the investments would “always remain safely in the escrow accounts” at Chicago Title. Pet. App. 9a. In truth, however, investor funds were pooled together in general-purpose Chicago Title accounts, from which Cain was allowed to withdraw funds for any reason. Pet. App. 10a. In support of her ruse, Cain allegedly bribed some Chicago Title employees to mislead investors by forging documents and giving them false information. *Id.*¹

To persuade more individuals and entities to join the illicit venture, Cain recruited Kim Peterson, a local land developer who was an early ANI investor himself, to solicit

1. Cain later pled guilty to securities fraud, while Chicago Title has not been found liable or responsible for the scheme. Pet App. 23a, 38a-39a.

investments. Pet. App. 10a-11a. Peterson formed multiple companies for the purpose of collecting funds for the ANI scheme. *Id.* at 11a.

In 2017, Peterson recruited Texas-based Ovation, a sophisticated institutional hedge fund, to invest in the ANI scheme. *See* Pet. 3-5; D.Ct. Dkt. 851-2 at ¶ 8. Ovation is the general partner and manager of a fund called Ovation Finance Holdings 2, LLC (the “Fund”). Pet. 3-4. As general partner and manager, Ovation earns income from management fees calculated on the value of assets held in the Fund. *See* Pet. 6.

As Ovation repeatedly represented in its state court complaints in the wake of the ANI scheme’s collapse, it conducted thorough due diligence before investing in ANI. Specifically:

Contact with Kim Peterson. Ovation requested that Peterson provide extensive additional documentation prior to investing. C.A. Dkt. 41 at 22-25.² Peterson obliged by providing Ovation emails purporting to be from Chicago Title to Cain containing details about the dedicated escrow accounts. *Id.* at 22. Peterson also provided Ovation with the form escrow agreements, apparently signed by ANI and Chicago Title. *Id.* at 24-25. Ovation remained in close contact with Peterson up to the time the SEC filed its complaint in August 2019, during which Peterson “assured Ovation” that all was well. D.Ct. Dkt. 851-2 at ¶ 61.

2. All citations to page numbers in documents from the court of appeals or district court dockets are to the page numbers assigned by the ECF system.

Contact with Cain and ANI. Ovation also requested to speak with ANI directly as part of its due diligence. C.A. Dkt. 41 at 25. In 2017, Ovation spoke directly with Cain during a conference call led by Cain. *Id.* at 25-26. In addition to contracting with Peterson, Ovation also negotiated and signed a “side agreement” with ANI directly, in a further exertion of diligence. *Id.* at 18; D.Ct. Dkt. 851-2 at ¶ 39.

Contact with Chicago Title employees. Ovation also spoke and corresponded with certain Chicago Title employees as part of its research prior to investing, making it one of the few investors to have such direct contact. A Chicago Title employee attended the 2017 conference call between Ovation and ANI. C.A. Dkt. 41 at 25. During that call, Ovation asked several questions of the Chicago Title employee and later explained that her confirmation was a necessary factor in Ovation’s decision to invest. *Id.* at 25-27. Throughout 2018 to 2019, Ovation’s outside auditors also exchanged letters which purported to confirm that Chicago Title’s records tracking Ovation’s investments were consistent with Ovation’s own records showing its funds held in the supposedly dedicated escrow accounts. *Id.* at 27-28.

Additional Due Diligence. Ovation also consulted with multiple attorneys hired by Peterson (besides Nossaman) regarding the structure of the ANI loan program and its potential risks. *Id.* at 23; *see also id.* at 120; D.Ct. Dkt. 851-2 at ¶ 34. In addition, Ovation conducted further documentary due diligence, including comparing documents provided by Peterson to public information on the ABC’s official website. *See* D.Ct. Dkt.

851-2 at ¶¶ 58-59; D.Ct. Dkt. 833 at 13-14. In fact, as early as November 2018, Ovation was aware that documents it had received from Peterson and ANI were inconsistent with the information on the ABC website. D.Ct. Dkt. 851-2 at ¶ 58. Ovation nonetheless invested additional funds in the scheme as late as August 2019. *Id.* at ¶ 63.

In addition to its detailed contacts with Cain, Chicago Title employees, and Peterson; exchange of documents and letters with them; internal due diligence; and conversations with other attorneys, Ovation alleged that it spoke to an attorney at Nossaman on four occasions, *id.* at ¶¶ 35, 46-47, and received one email from him, *id.* at ¶ 53. Peterson also provided Ovation a memo that he and the Nossaman attorney had drafted. *Id.* at ¶¶ 48, 51. Nossaman has not been found liable or responsible in any way for the scheme. Pet. App. 38a-39a.

Based on its extensive admitted due diligence, Ovation ultimately authorized its Fund to invest in the ANI scheme multiple times from 2017 to 2019, totaling over \$50 million. *See* Pet. App. 28a-29a; C.A. Dkt. 41 at 27-28.

The ANI Ponzi scheme collapsed in late August 2019, when a grand jury indicted Cain and the SEC filed a civil complaint against Cain and ANI. Pet. App. 11a-12a; *see generally* D.Ct. Dkt. 1. The district court then appointed a receiver over ANI, froze Cain's and ANI's assets, and temporarily stayed any litigation against ANI in order to facilitate the Receiver's work to recover the ill-gotten gains for the Ponzi scheme's victims. Pet. App. 12a.

B. Ovation's State Court Litigation

Unable to sue ANI directly, Ovation sued Chicago Title and other defendants—but not Nossaman—in state court in 2020. *See* C.A. Dkt. 41 at 143 n.2. In Ovation's operative complaint, it alleged that Peterson recruited Ovation into the ANI scheme. *Id.* at 22; *see also* Pet. 5. It also detailed Ovation's due diligence process, including its communications with Chicago Title, ANI, Cain, Peterson, and multiple attorneys representing Peterson, as described above. C.A. Dkt. 41 at 22-41.

Ovation claimed that the Fund lost \$20 million in investments. *Id.* at 155. Ovation also alleged that its investment in the ANI Ponzi scheme caused clients to withdraw their funds from other investments Ovation was managing. *Id.* at 81. Specifically, Ovation claimed that those withdrawn investments caused it to lose an additional \$35 million in expected management fees. *Id.* at 155.

In February 2021, Ovation approached Nossaman to request an agreement tolling any claims it had against Nossaman until thirty days after the final resolution of Ovation's lawsuit against Chicago Title and a separate pending lawsuit between Peterson and Chicago Title. D.Ct. Dkt. 851-2 at Ex. A. Nossaman was nonetheless pulled into Ovation's state court litigation later that year, when Chicago Title filed a cross-complaint against Nossaman, among others. C.A. Dkt. 41 at 106-39.

In early 2022, Ovation and Chicago Title agreed to a settlement by which Chicago Title would pay Ovation a total of \$47 million. *Id.* at 152, 155. Ovation explained to the superior court that the \$47 million settlement payment amounted to "79.9% of the damages claimed by

both [Ovation] entities, including both [the Fund]’s out-of-pocket loss as well as [Ovation]’s consequential damages.” *Id.* at 155.

C. District Court Proceedings Leading to the Bar Orders

As Ovation and Chicago Title were finalizing their state court settlement, the Receiver, Chicago Title, and other parties were also engaged in settlement negotiations in the federal action. *See* D.Ct. Dkt. 860 at 14.

Chicago Title and the Receiver reached a settlement in which Chicago Title agreed to pay over \$24 million to the Receiver, and Nossaman agreed to pay \$4.75 million in contribution toward that global settlement. *See* D.Ct. Dkt. 795-1 at 13; *see generally* D.Ct. Dkt. 796-14. The parties released all claims, and the settlements were contingent on the district court’s entry of orders barring all future litigation against Nossaman and Chicago Title. *See generally* D.Ct. Dkt. 796-14. In the Receiver’s motion for approval of those settlements, she estimated that the global settlement would allow a recovery of “more than 90% and likely closer to 95%” of aggregate victim losses. D.Ct. Dkt. 795-1 at 5.

Ovation objected to the proposed Nossaman bar order in the district court and filed a new state court complaint against Nossaman, seeking additional lost management fees. *See generally* D.Ct. Dkts. 851-1, 851-2. That is, Ovation sought recovery beyond the \$47 million settlement with Chicago Title, even though it had admittedly recouped all of its investment losses and attorneys’ fees, as well as consequential damages. D.Ct. Dkt. 851-2 at ¶ 7.

The district court overruled Ovation's objection and entered the bar order enjoining further litigation against Nossaman, as well as a bar order enjoining further litigation against Chicago Title. *See* D.Ct. Dkts. 926, 927, 928; *see generally* Chicago Title Br.

D. Appellate Proceedings

Ovation appealed the Nossaman bar order, while Peterson appealed the Chicago Title bar order. The court of appeals (Bade, Forrest, and Ebel (sitting by designation), JJ.) unanimously affirmed both bar orders. Pet. App. 4a, 8a; *see generally* Chicago Title Br. In so doing, the court of appeals explained that Ovation had already recovered all of its investors' losses, all of its attorneys' fees, and millions of dollars in additional damages. Pet. App. 29a.

Ovation petitioned for certiorari.

ARGUMENT

In addition to the reasons set forth in Chicago Title's brief, Ovation's petition presents a poor vehicle for this Court's review because any litigation Ovation might bring against Nossaman is likely to fail for multiple reasons. Ovation's petition should therefore be denied.

1. This petition is a poor vehicle because Ovation's admitted due diligence defeats its assertion that its reliance on Nossaman caused its losses. Ovation's state court complaint, which is the basis of its objection to the Nossaman bar order, charges Nossaman with fraud, deceit, and negligent misrepresentation based on the events described above. Ovation alleges that, because it relied

on Nossaman’s representations—via four emails, a phone call, and a memo co-authored by Peterson—Nossaman “duped” Ovation into investing in the ANI Ponzi scheme and, when its other investors learned that Ovation had been so duped, they withdrew their investments, leading Ovation to lose millions of dollars in management fees.

To succeed on its claims under California law, Ovation would need to prove, among other things, that it justifiably relied on Nossaman’s statements and that that reliance was the cause of its lost management fees. *See Moncada v. W. Coast Quartz Corp.*, 221 Cal. App. 4th 768, 781 (2013).

Ovation cannot meet that strict threshold, in light of the myriad other sources of “due diligence” it claims to have completed prior to investing in the ANI Ponzi scheme. By Ovation’s own account, its representatives consulted with Cain, Peterson, multiple attorneys referred by Peterson, and employees of Chicago Title as part of its careful research in advance of investing. It reviewed scores of documents provided by those entities, and in fact flagged inconsistencies between the documents it received and the ABC’s public records.

In the face of that mountain of carefully assembled diligence, it begs credulity that Ovation based its several decisions to invest on comments from a Nossaman attorney representing Peterson, contained in just four phone calls, a single email, and a co-authored memo. Common sense suggests that Ovation’s eventual loss of customers—and therefore its lost management fees—was caused by Ovation’s decision to invest millions of its investors’ funds in a Ponzi scheme, despite its reputation as a savvy professional hedge fund and the fact that

it had itself noted multiple red flags suggesting fraud. Ovation's customers did not flee because of Ovation's scant contacts with Nossaman, but because Ovation made bad investment decisions. As such, Ovation cannot prove that it both relied on Nossaman when choosing to invest in Cain's scheme and that such reliance was the cause of its alleged consequential damages.

Ovation's likelihood of succeeding in its state court litigation against Nossaman is speculative at best. Because Ovation's claims are likely to fail, any decision from this Court would not affect the ultimate result in this case.

2. Even if Ovation could prove that its reliance on Nossaman was justified and the cause of its alleged damages, it would still need to prove that Nossaman had engaged in "actual fraud"—a high bar—for its litigation to be successful. That is because its other claims are time-barred.

Under California law, the statute of limitations for non-fraud claims against attorneys "arising in the performance of professional services" is one year. Cal. Code Civ. Proc. § 340.6(a). Ovation was aware of its potential claims against Nossaman as of at least late August 2019, when the SEC filed its complaint against Cain and ANI. Yet Ovation did not obtain a tolling agreement from Nossaman until February 2021, over 17 months later.

In fact, the record below reveals that Ovation had reasons to suspect wrongdoing in the ANI investment scheme even before the SEC filed its complaint. Ovation was aware almost a year before the SEC's lawsuit that documents it had received from Peterson and ANI were

inconsistent with the information reported on the official ABC website. Those inconsistencies put Ovation—a highly sophisticated institutional hedge fund—on notice of its claims related to the ANI Ponzi scheme, even before the SEC initiated this action. *See* Cal. Code Civ. Proc. § 340.6(a) (statute runs from date “plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act”).

As a result, Ovation’s core negligence claims are time-barred and destined to fail in state court, even if this Court were to vacate the Nossaman bar order. A grant of certiorari is thus unwarranted.

CONCLUSION

For these reasons, and the reasons stated in Chicago Title’s brief, Ovation’s petition should be denied.

Respectfully submitted,

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