UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO.14-4024

WILLIAM T. CORNELIUS and CORNELIUS & SALHAB,

Appellants,

v.

R. WAYNE KLEIN, the COURT-APPOINTED RECEIVER of U.S. VENTURES LC, WINSOME INVESTMENT TRUST, and the ASSETS of ROBERT J. ANDRES, and ROBERT L. HOLLOWAY,

Appellee.

On Appeal From No. 2:11-cv-01159-DAK,
In the United States District Court
For The District of Utah, Central Division,
the Honorable Dale A. Kimball.

REPLY BRIEF OF APPELLANTS WILLIAM T. CORNELIUS and CORNELIUS & SALHAB

ORAL ARGUMENT REQUESTED

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Appellants reply to the briefs of Appellee and the Amicus Curae.

I. Rule 17, Fed R. Civ. P., does not provide the means to transmogrify an express trust agreement into an "unincorporated association" with a legal existence.

The Receiver premised his action on the sworn assertion that:

> "Winsome operated as an unincorporated trust based in Houston, Texas which came into existence upon the signing of a June 1, 2002 "Declaration of Trust". A true and correct copy of that document is attached hero as Exhibit A.

Aplt. App. at 232.

The dispositive issue is whether or not this is the case.

For the first time, on appeal, Mr. Klein raises an argument, almost in the nature of confession and avoidance, arguing that Utah law, ie. the law of the forum, applies by virtue of Rule 17, Fed. R. Civ. P, and that the express trust agreement is now not an express trust agreement but rather an "unincorporated association which may sue in its common name" under Utah law.

In moving for summary judgment, the Receiver made no effort to establish "Winsome Trust" as an unincorporated association under either Texas or Utah law. Rather, the Receiver relied on the sworn statement set out above. Utah's version of Rule 17, which, like the federal rule, provides that an unincorporated association may sue or be sued under its common name, says nothing about the facts which must be

established to determine whether an unincorporated association exists, and what law applies to the making of that determination.

It would appear to be a novel concept that Rule 17 provides a choice of law rule in all federal actions mandating that the law of the forum applies to determine whether an unincorporated association *exists* regardless of where its alleged managers, members, offices or property may be located. To the contrary, this Court has held that the existence of an unincorporated association is determined as a matter of the law of the state where it was organized and exists. *Arbuthnot v. State Automobile Ins. Ass'n,* 264 F.2d 260 (10th Cir. 1959).

The Receiver reveals what would be necessary to create an unincorporated association under Utah law, citing authority from the Utah Supreme Court requiring that two or more persons must be proved to be transacting business together as a joint stock company, partnership, or other association not a corporation, under a common name, before they may sue or be sued under that common name. *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389, 1342 (1996). In the more recent *Ogden Trece* opinion, the evidence of the association of many persons into an organized, criminal gang, the "Ogden Trece", which could be sued in that common name, was amply proved in the trial court. Of course, the evidence which the Receiver brought forward in the district court makes no attempt to satisfy the Utah Supreme Court's standards of what Utah's Rule 17 requires. No testimony from any involved person with any

personal knowledge of anything was brought forward, let alone any evidence that there were two persons transacting business together under a common name.

II. Recovery of investor losses is beyond the "parameters" of the remedies of restitution and disgorgement available in a CFTC enforcement action.

Cornelius doesn't advance any argument or even any suggestion that 7 U.S.C. § 13a-l carries with it some limitation on the scope of equitable remedies available to a receiver appointed under authority of that statute. Nor does Cornelius argue or suggest that there are limitations on the power of receivers appointed in a CFTC 7 U.S.C. § 13a-l enforcement actions to pursue the remedies of disgorgement and restitution against the Defendants in that action.

The question presented is completely different and presents the issue of whether a receiver appointed in an enforcement action has the power to bring personal actions against third parties on behalf of some alleged informal group of defrauded investors. The validity of Cornelius's argument is revealed by the CFTC's attempt to distinguish *American Metals*, claiming that Cornelius has quoted out of context and misled the Court on the meaning of the word "parameters" in that opinion. In fact, *American Metals* is directly on point and demonstrates that Cornelius attacks neither the general nor specific powers of a Receiver appointed in a CFTC enforcement action. *American Metals* is clear and unequivocal in holding that recovery of investors losses is a remedy outside the parameters of the remedies available in a CFTC enforcement action. The First Circuit's statement of the

dispositive point could not be more clear:

> "If investors wish to seek recovery of these losses as a remedy, they are free to do so in an independent civil action against defendants."
>
> *American Metals, 991 F.2d at 78.*

In sum, and for emphasis, there is no question that a receiver appointed in an CFTC enforcement action can invoke the full panoply of equitable remedies in aid of pursuit of the available remedies of restitution and disgorgement. The sole question is whether an action seeking to recover investor losses in some broad fraudulent scheme is outside the parameters of the remedies available in a CFTC enforcement action; whether the receiver has impermissibly expanded the scope of the CFTC's main action into a general effort to grant relief to all persons injured by Andres's Ponzi scheme. Aside from the fact that such relief would only be authorized under the commodities laws in an action under 7 U.S.C. § 13a-2 or 7 U.S.C. § 25, the receiver cannot ignore the limits of personal jurisdiction applicable to those types of proceedings. Of course, Appellants would have been subject to jurisdiction in an action brought by the State of Texas through its attorney general under 7 U.S.C. § 13a-2. But as to an action brought by injured investors under 7 U.S.C. § 25, the Supreme Court held in *Omni Capital International v. Rudolf Wolff Co Ltd.,* 484 U.S. 97, 106 (1987):

> Neither the majority nor the dissent in the Court of Appeals found that the CEA contained an implied provision for nationwide service of process in a private cause of action. We, too, decline to draw that

> inference. After the Curran decision, while the present litigation was still pending in the District Court, Congress enacted the Futures Trading Act of 1982, 96 Stat.2294. That Act amended the CEA by adding § 22, 96 Stat. 2322, 7 U.S.C.§ 25, which authorizes explicitly a private right of action for a violation of the CEA. Section 22, however, is silent as to service of process. Thiscontrasts sharply with the other enforcement provisions of the CEA, on which Omni asks us to rely. We find it significant that Congress expressly provided for nationwide service of process in those sections, but did notdo so in the new § 22. *See Russello v. United States*, 464 U. S. 16, 464 U.S. 23 (1983). It would appear that Congress knows how to authorizenationwide service of process when it wants to provide for it. ThatCongress failed to do so here argues forcefully that such authorization was not its intention. *Cf. INS v. Hector*, 479 U. S. 85, 479 U. S. 88-91 (1986).

It would be a clear perversion of justice to permit the *ex parte* establishment of a receivership in a CFTC enforcement action to authorize the receiver to pursue for the benefit of a class or group of unnamed private investors, and, in so doing, to achieve the avoidance of basic constitutional protections of due process otherwise available to mere third parties like Cornelius, when, in a direct action brought by such private investors, the directly culpable defendant, Mr. Andres, would himself retain such due process protections by specific act of Congress and the Receiver of the United States Supreme Court.

Thus the objection to jurisdiction over the person comes dovetails into this objection to subject matter jurisdiction. The bottom line in the case at bar is that only a receivership established as an ancillary equitable remedy in actions brought pursuant to 7 U.S.C. § 13a-2 or 7 U.S.C. § 25 could provide the occasion for a receiver to have power

to bring a multitude of ancillary actions to benefit investors defrauded by Robert Andres. This action brought in a receivership ancillary to an CFTC enforcement action is simply way out of bounds both in substance and in the asserted reach of process in actions seeking a personal judgment, and it must be dismissed for want of jurisdiction.

III. Cornelius stands on his argument that 28 U.S.C. § 754 and 1692 deal only with jurisdiction over property and *in rem* actions and do not authorize nationwide service of process in *in personam* actions.

This Court's Opinion in *Peay* reads:

> Like the Eleventh Circuit, we discern no reason why the Fourteenth Amendment's fairness and reasonableness requirements "should be discarded completely when jurisdiction is asserted under a federal statute." Republic of Panama, 119 F.3d at 945. The Due Process Clauses of the Fourteenth and Fifth Amendments are virtually identical,[5] and both "were designed to protect individual liberties from the same types of government infringement." Id. (citing Mathews v. Eldridge, 424 U.S. 319, 331-32 (1976)). Accordingly, we hold that *in a federal question case* where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant. In other words, the Fifth Amendment "protects individual litigants against the burdens of litigation in an unduly inconvenient forum." Id.

Peay v. BellSouth Medical Assitance Plan, 205 F.3d 1206, 112 (10th Cir. 2000) (emphasis added).

Peay was an ERISA action. There is no federal question in this case. And, in *Peay*, this Court at least required *some* nexus between Defendant and the forum. Here there is no nexus whatsoever of any nature between Cornelius and Utah.

Of course, the better view remains that 28 U.S.C. § 754 and 1692 deal only with property and *in rem* jurisdiction and do not implicate *in personam* jurisdiction. So

held the First Circuit, relying in part on this Court's opinion, in the following passage, which bears quotation at length:

> Section 754 is ancillary to the main suit in which the receiver is appointed, and the purpose of the statute is to give the appointing court jurisdiction over property in the actual or constructive possession and control of the debtor, wherever such property may be located. Inland Empire Insurance Co. v. Freed, 239 F.2d 289, 292 (10th Cir.1956). We are therefore in agreement with the Sixth Circuit's holding that pursuant to sections 754 and 1692,[t]he appointment court's process extends to any judicial district where receivership property is found. As such, the minimum contacts analysis, as a limitation on state extra-territorial power, is simply inapposite.
>
> Haile v. Henderson National Bank, 657 F.2d 816, 826 (6th Cir.1981) (Emphasis added).
>
> In that case, which is distinguishable on its facts, a receiver appointed in the District of Tennessee, sued Alabama residents and an Alabama bank in the appointing court to recover the debtors' property located in Alabama. The receiver filed a copy of the complaint and the order of appointment in the District of Alabama.
>
> We think the district court erred when it concluded, based largely on dicta in the Haile case, that jurisdiction in an in personam receivership action, such as the case at bar, is governed exclusively by section 754.
>
> It is well established that a federal district court has subject matter jurisdiction in ancillary actions brought in the court where the receiver is appointed "to accomplish the ends sought and directed by the suit in which the appointment was made." Pope v. Louisville, New Albany & Chicago Ry. Co., 173 U.S. 573, 577, 19 S.Ct. 500, 501, 43 L.Ed. 814 (1899); Tcherepnin v. Franz, 485 F.2d 1251 (7th Cir.1973). As stated above, the receiver in this case requested and was granted authority by the appointing court to commence an action against the defendants for breach of their fiduciary duties which caused the AFTF to violate the antitrust laws and to incur the adverse judgment in the district court in Washington.

> We find nothing in the language of section 754 or in the decisional law which precludes the district court from exercising its in personam equitable jurisdiction in ancillary actions brought by the receiver. If there is in personam jurisdiction, it need not be shown that the court has jurisdiction over property under section 754. Tcherepnin v. Franz, 439 F.Supp. 1340, 1344, 1345 (N.D.Ill.1977). Instead, the limits of the district court's jurisdiction should comport with the general standards applicable to suits brought under that court's in personam equity jurisdiction, barring any special statutory exceptions. *Since we have concluded that the jurisdictional limitations of section 754 are inapplicable in plaintiff's in personam action, we find it necessary* to consider the district court's alternative holding and *to determine whether the court had jurisdiction over defendants under the Massachusetts long-arm statute and the "minimum contacts" standard of International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).*

American Freedom Train Foundation v. Spurney, 747 F.2d 1069, 1073-74 (1st Cir. 1984) (emphasis added)

Cornelius simply submits that, as held in *Gilchrist* and *American Freedom Train*, 28 U.S.C. § 754 and 1692 have no application to *in personam* actions. And, even if they do, due process still prohibits the exercise of *in personam* jurisdiction in this case where Cornelius had absolutely no contact with the forum.

CONCLUSION

Once again, and for emphasis, the outcome determinative fact in this case is the fundamental sworn factual allegation on which the Receiver's premised his action and his standing:

"Winsome operated as an unincorporated trust based in Houston, TX, *which came into existence upon the signing of a* June 1, 2002 "Declaration of Trust". *A true*

and correct copy of that document is attached hereto as Exhibit A".

Is this fundamental allegation just to be ignored? The argument on Rule 17, Fed.R.Civ.P. raised for the first time on appeal, urges the Court to ignore the facts sworn to by the Receiver as the facts creating Winsome's legal existence. But this procedural rule has no application in fact or law.

Justice requires that this case be adjudicated on the basis of facts sworn to by the Plaintiff at the outset. There is no arduous inquiry to be had. The June 1, 2002, Declaration of Trust simply does not create a legal person under Texas law, under Utah law, or under any law. The receiver had no standing, and the district court had no subject matter jurisdiction.

For the foregoing reasons, Appellants William T. Cornelius and Cornelius and Salhab respectfully request and pray that this Court dismiss this action for want of jurisdiction or, alternatively, that this Court reverse the judgment of the district Court with direction to enter judgment for Appellants.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellant has been filed in the office of the Clerk for the United States Court of Appeals for the Tenth Circuit, and a true and correct copy of the same has been provided to counsel listed below in the manner indicated on this 19th day of September, 2014.

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