NO.14-4024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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.

PETITION FOR PANEL REHEARING AND REQUEST FOR REHEARING EN BANC OF APPELLANTS WILLIAM T. CORNELIUS and CORNELIUS & SALHAB

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PETITION FOR PANEL REHEARING AND REQUEST FOR REHEARING EN BANC OF APPELLANTS WILLIAM T. CORNELIUS and CORNELIUS & SALHAB

A. The panel decision conflicts with a decision of the United States Supreme Court in *Omni Capital International v. Rudolf Wolff Co. LTD.,* 484 U.S. 97, 106 (1987) and consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions. The proceeding also involves one or more questions of exceptional importance. This question is an important jurisdictional question, and the conclusion that, by these statutes, 28 U.S.C §§ 754 and 1692, Congress has intended and provided for nationwide service of process in all *in personam* actions brought by any federal receiver and that such intent and provision has stripped away virtually protection against suit anywhere in the United States is drastic and far reaching. The panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue. *American Freedom Train Foundation v. Spurney,* 747 F. 2.d 1069 (1st Cir., 1984)*; Gilchrist v. General Electric Capital Corp.,* 262 F. 3d 295 (4th Cir., 2001)

Where is 28 U.S.C § 1692's "express" congressional grant of personal jurisdiction? Opinion, pg. 16.

The statute, in its entirety, reads as follows:

> In proceedings in a district court where a receiver is appointed for property, real , personal or mixed , situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district , but orders affecting the property shall be entered of record in each of such districts.

The United States Supreme Court has written, "It would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it." *Omni Capital International v. Rudolf Wolff Co. LTD.,* 484 U.S. 97, 106 (1987). Is it really true that the text of 28 U.S.C § 1692 is an expression of such an intent? Why is it then that no other Congressional authorization of nationwide service of process bears the slightest resemblance to the text of 28 U.S.C § 1692?

This is important. The conclusion that 28 U.S.C § 1692 expresses a congressional grant of nationwide service of process and personal jurisdiction for any personal action brought by any receiver appointed by a federal district court in any context for any purpose has enormous and unprecedented consequences. This statute has been on the books since 1948 and has never been so construed.

For the panel to conclude that 28 U.S.C. § 1692 is "an express congressional grant of personal jurisdiction" is simply beyond comprehension absent explication because the entire statue reads as follows:

§ 1692 Process and orders affecting property in different districts:

> In proceedings in a district court where a receiver is appointed for property, real , personal or mixed , situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district , but orders affecting the property shall be entered of record in each of such districts.

(June 25, 1948, c. 646 , 62 Stat. 945.)

In its heading and in the sole sentence of its content, the statute uses the word "property" four times; yet, it neither uses the words "personal" or "jurisdiction" nor any terms which could be read to effectively encompass such concepts. Surely, in such circumstances, if construction of the statute to effect an express grant of nationwide service of process is possible, the basis for that conclusion should be laid out.

Likewise, *American Freedom Train* must be quoted again. There can be no dispute here; the First Circuit is holding that 28 U.S. §§ 754 and 1692 are inapposite *in personam* actions:

> 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.
>
> 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. III. 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. 2.d 1069 (C.A. 1. (Mass.). 1984)

The *American Freedom Train* Court actually concluded that 28 U.S.C. §§ 754 and 1692 refer to jurisdiction *over property* and that the jurisdictional limits of these statutes have no application to an in *in personam* action and that in such actions the district court's jurisdiction over the defendant must comport with the "minimum contacts" standard. That is why the American *Freedom Train* Court proceeded to discuss the Massachusetts long arm statute. This cannot be read any other way. This should be reconsidered.

The authoritative decisions of the First and Fourth Circuits should not be so easily cast aside. Does the Court not feel moved to address the teaching of the United States Supreme Court in *Rudolf Wolff* that Congress knows how to authorize nationwide service of process ? Is there no obligation to articulate how 28 U.S.C § 1692 does just that?

B. An express trust executed in Texas has no standing; the theory about an association of persons under Utah law was raised for the first time on appeal,

and was waived. At the very least, justice requires remand.

To quote that great, and largely forgotten, American hero, Vannevar Bush, speaking in 1954 to a senate committee in defense of his colleague, Robert Oppenheimer, "Excuse me, gentlemen, if I am stirred, but I am."

Unless rehearing be had, summary judgment is to be affirmed, based not on the case Plaintiff brought *by sworn declaration with attached documentary evidence,* but on some hodgepodge of concepts cobbled together for the first time in the appellate Court. Appellant is chided for not having addressed *Peay* earlier in the course of the proceedings and is deemed to have waived an argument. Is nothing waived by Mr. Klein having failed either to claim or offer evidence that Winsome Trust was "two or more individuals conducting business under a common name under Utah law "? Who are these persons? Were we never entitled to know?

We repeat, but now in a simple plea that we be accorded a fair adjudication:

Once again, and for emphasis, the outcome determinative fact in this case is the fundamental sworn factual allegation on which the Receiver 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".*

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

Instead of this result obtaining as justice requires, the panel makes the following

statements of fact:

1. "Winsome Investment Trust, [is] a business entity" (01019436270, 5/27/2015, "Opinion" p.2).
2. "Winsome was a trading pool….." (Id.)
3. "[The Receiver] Klein is not acting directly on behalf of Winsome's investors. He is suing on Winsome's *own* behalf. (Opinion p. 7) (Emphasis in original).
4. Under Utah law, Winsome is an association of investors who pooled their resources together and transacted business under the common name of Winsome Investment Trust. It had joint venture contracts with the investors on behalf of the Trust, including bank accounts and other indicia of independence and separateness. (Opinion pp. 10-11)
5. "Winsome is an independent entity under Utah law" (Opinion p. 11)

None of this was raised in the district court. Existence and capacity are not the same thing. The bank account produced by Mr. Klein on the strength of his driver's license alone as documentation.

If "Winsome Trust" is more than the fraudulent creation of Andres, if it is

"an association of two or more persons," then who are those persons? We must be allowed to confront our accusers. If the receiver is to be suffered to raise this entire theory for the first time on appeal, then the justice requires the case be remanded so that we be given a fair opportunity to meet these new allegations.

How receivership would work, whether Andres is one of the two or more persons conducting business, and whether and when knowledge can be imputed to an association of persons when any one person has knowledge, are questions raised by the cavalier conclusion that Winsome is an association of persons conducting business in that common name with capacity to sue in that name and thus an entity. Again, capacity does not an entity make. But, more importantly, what happened to the express trust agreement relied on and made of record by Mr. Klein? It has named beneficiaries. Are these the persons we are seeking? There was no evidence of any of this adduced in the district court. In *Weber v. the Ogden Trece,* the findings of (1) two or more persons, (2) conducting business, (3) in a common name, were all supported by ample evidence adduced at an evidentiary hearing in the trial court. Here the "association of persons under Utah law" theory and the *Ogden Trece* make their first appearance in this Court.

Not only no waiver, but no evidence necessary and no opportunity to reply accorded. Having clearly defeated the case brought in the district court, we must be given the opportunity to meet these new allegations or else summary

judgment truly has, in this case, become a mere catchpenny contrivance.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Rehearing En Banc 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 17th day of June, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Date: June 17, 2015

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