UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Michael J. Quilling, Receiver for Frederick J. Gilliland, Plaintiff, v. Grand Street Trust, Heartland Control Trust, Future Control Trust, Marie Margarite Gueco Mercado Paquette, Rein Evans Sestanovich, L.L.P. f/k/a Dressler Rein Evans & Sestanovich, L.L.P., Melrose Escrow, Inc., and Paul J. Cohen, Defendants.	**Case No. 3:04-CV-251** **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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Defendant Rein Evans Sestanovich, L.L.P. f/k/a Dressler Rein Evans & Sestanovich, L.L.P. ("Rein Evans"), by its undersigned counsel, respectfully submits this memorandum of law in support of its motion pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the pending complaint, filed on or about May 20, 2004. For the reasons set forth below, defendant's motion to dismiss should be granted.

PRELIMINARY STATEMENT

The Complaint must be dismissed as to Rein Evans because it is fatally deficient in several respects. First, Rein Evans is not subject to suit in North Carolina because this Court lacks in personam jurisdiction over Rein Evans. Second, Michael J. Quilling (the "Receiver") lacks standing to bring suit for the causes of action alleged in the Complaint, which divests this Court of subject matter jurisdiction.

Third, although any of the previous reasons would be sufficient by themselves for this Court to dismiss the Complaint, the Complaint fails to state a claim upon which relief can be granted and must therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for two reasons. As a matter of law, this action is time barred by the statute of limitations of either jurisdiction's laws under which the Receiver could be

bringing suit. In addition, as a matter of law, Rein Evans could not exercise the requisite dominion and control over the funds at issue, such that the "Fraudulent Transfer" claim must be dismissed.

For the foregoing reasons and as set forth more fully below, plaintiff's complaint should be dismissed in its entirety.

FACTUAL ALLEGATIONS[1]

Five years and seven months after the alleged transfers complained of in this matter, the Receiver filed the present action in his capacity as the receiver appointed for Frederick J. Gilliland ("Gilliland"), on behalf of the investors that Gilliland purportedly defrauded in a Ponzi scheme. In the Complaint, the Receiver named Rein Evans, a law firm located in Los Angeles, California, as one of the defendants. Compl. ¶¶ 6, 13.

The Complaint alleges that approximately $150,000 of legal fees paid to Rein Evans were diverted from investors on October 2, 1998, in a failed Ponzi scheme orchestrated by Gilliland. Compl. ¶¶ 12, 13. These diverted funds, the Complaint alleges, were laundered through a series of accounts held by various trusts. Compl. ¶ 13. The Complaint also alleges that funds

[1] For purposes of this motion, defendants "accept as true all of the plaintiff's factual allegations" in the complaint. Mylan Lab., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993).

from these trusts were then transferred to Rein Evans's law firm trust account and then transferred to Melrose Escrow, Inc. and Paul J. Cohen. Id. The Complaint 1) does not identify the investors whose funds are at issue, 2) does nothing to sketch out the facts that support money laundering, 3) does not indicate that any of the money purportedly transferred to Rein Evans is still in the possession of Rein Evans, and 4) it does not explain that Rein Evans transferred funds to Melrose Escrow and Mr. Cohen's law firm for the settlement of two lawsuits, solely in Rein Evans's capacity as an agent for a client.[2]

Apparently, on behalf of the allegedly wronged investors, the Receiver proceeds to claim that because the investment programs operated by Gilliland were fraudulent Ponzi schemes, all funds received by Rein Evans constitute fraudulent transfers. Compl. ¶ 16. The Receiver also seeks to impose a constructive trust on all of the funds received by Rein Evans that "are directly traceable to the funds of the investors defrauded by Gilliland, or in the alternative, a money judgment against Rein Evans in the amount of the funds received." Compl. ¶¶ 18, 19.

Regarding the jurisdictional prerequisites for filing suit, the Complaint states "this Court has jurisdiction over the

[2] Interestingly, the Receiver has not named the ultimate recipients of these settlement funds as parties in this matter.

subject matter of this action because the actions stated herein constitute Receivership Assets within the meaning of the Order Appointing Receiver.... In addition, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 754, 1692, 1331, 1332, and Fed. R. Civ. P. 4(k)(1)(D)." Compl. ¶ 9. Despite the Receiver's own admission that the gravamen of the claims is the recovery of ***investors' funds*** (¶¶ 13, 18), the Complaint does not reveal how this action could constitute a Receivership Asset. Moreover, the Complaint does not indicate that Rein Evans has ever had any contact with the State of North Carolina, nor does the Complaint allege that Rein Evans conducts, or has ever conducted, commercial business of any kind whatsoever in North Carolina.

ARGUMENT

A. Legal Standard

1. Subject Matter Jurisdiction

A party must have standing to file suit because standing is an essential element of establishing subject matter jurisdiction. See Burke v. City of Charleston, 139 F.3d 401, 404-05 (4th Cir. 1998). Standing must exist at the time of filing suit. Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 228 (4th Cir. 1997). Pursuant to Article III of the U.S. Constitution, federal courts may only adjudicate actual cases and controversies. Id. As stated in Burke:

> the irreducible constitutional minimum of standing requires: (1) that the plaintiff personally has suffered actual or threatened injury that is concrete and particularized, not conjectural or hypothetical; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision from the court.

Id. (citing cases) (plaintiff could not claim an injury allegedly suffered by third party). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the required elements of standing." Retired Chicago Police Assoc. v. City of Chicago, 76 F.3d 856, 862 (7th Cir. 1996) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). "If standing is challenged as a factual matter, the plaintiff must come forward with 'competent proof' -- that is a showing by a preponderance of the evidence -- that standing exists." Lee v. City of Chicago, 330 F.3d 456, 468 (7th Cir. 2003) (quoting Retired Chicago Police Assoc., 76 F.3d at 862).

2. Personal Jurisdiction

Pursuant to Fed. R. Civ. P. 12(b)(2), the resolution of a question of personal jurisdiction over a non-resident defendant involves a two-part analysis: (1) whether a statutory basis exists to permit the Court to exercise jurisdiction over the person of the defendant; and (2) whether the exercise of such jurisdiction over the defendant violates due process of law.

Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062, 1064 (4th Cir. 1982).

Plaintiff has the burden of showing that this Court has in personam jurisdiction over Rein Evans. Young v. New Haven Advocate, 315 F.3d 256, 261 (4th Cir. 2002). This threshold requirement was aptly stated in Weller v. Cromwell Oil Co., 504 F.2d 927, 929-30 (6th Cir. 1974):

> Where a motion to quash and dismiss is filed, supported by affidavits, the non-moving party may not rest upon allegations or denials in his pleadings but his response by affidavit or otherwise must set forth specific facts showing that the court has jurisdiction.

3. Failure to State a Claim upon which Relief Can Be Granted

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant's motion to dismiss should be granted if, in viewing the allegations in the complaint as true and in the light most favorable to the plaintiff, "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In re First Union Corp. Sec. Litig., 128 F. Supp. 2d 871, 883 (W.D.N.C. 2001) (citation omitted). In considering the sufficiency of plaintiff's claims, the Court need not accept conclusory allegations, legal conclusions or characterizations presented as allegations of fact. See Papasan v. Allain, 478 U.S. 265, 286 (1986). Nor is it proper "to assume that the plaintiff can prove facts that he has not alleged or that the

defendants have violated the law in ways that have not been alleged." Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 221 (4th Cir. 1994) (internal quotations and citations omitted).

In addition, defendant's motion to dismiss should also be granted where, as here, "the face of the complaint clearly reveals the existence of a meritorious affirmative defense." Brooks v. City of Winston-Salem, N.C., 85 F.3d 178, 181 (4th Cir. 1996). Indeed, a court in this jurisdiction recently acknowledged its willingness "to dismiss claims which are time-barred on the face of the complaint." Byrd v. Hopson, 265 F. Supp. 2d 594, 598 (W.D.N.C. 2003). Analyzed under the foregoing principles, plaintiff's complaint fails to state a claim and should be dismissed.

B. This Court Lacks In Personam Jurisdiction over Defendant Rein Evans

1. Exercise of In Personam Jurisdiction Violates the Due Process Clause of the Fifth Amendment

The Receiver's only purported basis offered to this Court to establish personal jurisdiction over Rein Evans is via 28 U.S.C. §§ 754 and 1692. As discussed below, these statutes do not permit nationwide ***service*** of a summons. Since no other basis exists for personal jurisdiction over Rein Evans, including long-arm jurisdiction, the Complaint must be dismissed.

The Receiver's Complaint lacks any substantive allegation as a basis to exercise long-arm jurisdiction over Rein Evans. The Complaint is devoid of allegations showing any significant contact between Rein Evans and the State of North Carolina. Absent such provable allegations, the Complaint must be dismissed. In fact, the Receiver cannot meet his burden because Rein Evans has no significant contacts with the State of North Carolina.

The Due Process Clause prevents a court from exercising jurisdiction over a nonresident individual unless that individual has certain "minimum contacts" with the forum and the exercise of jurisdiction will not offend notions of "fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Thus, the Due Process inquiry has two prongs: the "contacts" prong and the "fairness" prong.

Rein Evans would not be subject to in personam jurisdiction under the North Carolina long-arm statute, N.C. Gen. Stat. § 1-75.4. Rein Evans has no local presence or status in North Carolina and is not engaged in any sufficiently substantial activities here.

Simply put, the North Carolina long-arm statute could not vest this Court with jurisdiction over the person of defendant Rein Evans. The North Carolina Supreme Court and the Fourth Circuit Court of Appeals have both declared that by enacting the

long-arm statute, the General Assembly intended to give the North Carolina courts "the full jurisdictional powers permissible under federal due process." Dillon v. Numismatic Funding Corp., 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977); Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062, 1065 (4th Cir. 1982). Since Rein Evans is not amenable to jurisdiction under the North Carolina long-arm statute, it necessarily follows that Rein Evans does not have the minimum contacts with North Carolina required by the Due Process Clause of the United States Constitution.

Nor does Rein Evans have contacts with the State of North Carolina to support jurisdiction in North Carolina under the principle of general jurisdiction. Under this theory, a defendant's activities within the state must be of a "continuous and systematic" nature. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 (1984). Mere "minimum" contacts are not enough; there must be an ongoing, pervasive relationship between the defendant and the forum state. See id.

Rein Evans is not subject to general jurisdiction in the State of North Carolina. As the Affidavit of Peter A. Davidson makes abundantly clear, it has not interjected itself into this forum in any manner.

Of course, even where a non-resident defendant's contacts with a forum state are not "continuous and systematic" enough to

support general jurisdiction, that defendant may still be subject to specific jurisdiction for claims arising from or related to its activities within the State. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)(specific jurisdiction exists when "the defendant has 'purposefully directed' his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities")(quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984) and Helicopteros Nacionales, 466 U.S. at 414).

The plaintiff must establish that specific jurisdiction exists by showing that the defendant has purposefully established significant (not "random, fortuitous or attenuated") contacts with the forum state and the plaintiff's cause of action arises or relates to those contacts. Burger King, 471 U.S. at 475.

If the plaintiff can make that showing, as has not happened here, only then will the defendant have the burden of showing, from the balance of interest factors, that the state's exercise of specific jurisdiction would be unfair. Burger King, 471 U.S. at 483.

In Burger King, the Court took an additional step toward clarifying the contacts-fairness test by enunciating the step-by-step analysis process and employing a burden-shifting

reformulation of the International Shoe test. 471 U.S. 462. In clarifying the test, the Court stated:

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether they comport with 'fair play and substantial justice.' Thus courts in 'appropriate case[s]' may evaluate the 'burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social polices.'

Id. at 476-77 (citing International Shoe, 326 U.S. at 320 and World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).

Even if this Court determines that it requires neither specific nor general jurisdiction over Rein Evans to exercise personal jurisdiction in view of 28 U.S.C. §§ 754, 1692 and Fed. R. Civ. P. 4(k)(1)(D),[3] this Court should hold that exercising jurisdiction over Rein Evans in this matter will constitute an extreme inconvenience and unfairness that puts Rein Evans at a severe disadvantage.

First, the burden on Rein Evans to defend this case could hardly be more pronounced. Rein Evans would be forced to defend this matter from all the way across the continental United States. Second, North Carolina does not have a greater interest in resolving this dispute than several other jurisdictions that

[3] Please see Section B.2, below.

are more logical choices. None of the defendants reside in North Carolina[4] (Compl. ¶¶ 2-8), the Receiver is a resident of Texas, and the Complaint seeks to address purported money laundering conducted via trusts in California (Compl. ¶¶ 2-4, 13). Finally, it is difficult to imagine how the efficient resolution of this controversy can be achieved in light of the time and expense the litigants will incur while engaging in litigation from such distances in a forum that has no connection whatsoever to the underlying matters alleged in this complaint.

2. 28 U.S.C. § 754 Does Not Confer Personal Jurisdiction over Defendant Rein Evans

The "Fraudulent Transfer" claim requires this Court to exercise personal jurisdiction over Rein Evans, distinct from the jurisdiction that the Court would have in an in rem action.[5] Stenger v. World Harvest Church, Inc., 2003 U.S. Dist. LEXIS 15108 (N.D. Ill. 2003). In Stenger, the court held that 28 U.S.C. § 1692 does not actually allow for ***service*** of process, only for the "issuance and execution" of process in an in rem

[4] The undersigned only represents Rein Evans but is unaware of any connection that any of the other defendants have with this forum.

[5] Out of an abundance of caution, for Fed. R. Civ. P. 11 purposes, the undersigned identifies ESAB Group, Inc. v. Centricut, Inc., in which the court held that Fed. R. Civ. P. 4(k)(1)(D) effectively enabled service of process to establish personal jurisdiction because 18 U.S.C. § 1965(d) authorized service of process. 126 F.3d 617, 626 (4th Cir. 1997). This case, however, is easily distinguished from one involving § 1692 because other statutes that have been construed to permit nationwide service of process, such as the RICO statute, Securities Exchange Act of 1934, or the Clayton Act have specifically used the words "may be served," while § 1692 has not done so. Stenger v. World Harvest Church, 2003 U.S. Dist. LEXIS 15108, *9-10 (N.D. Ill. 2003).

action.[6] Id. at *9-10. The Stenger court reasoned, "the issuance of process is the Clerk's ministerial act of issuing a summons to a plaintiff so that he or she can serve it on the defendant. The execution of process involves the act, in an in rem action, of attaching property." Id. at *8. Accordingly, the court dismissed the fraudulent transfer claim for lack of personal jurisdiction. Id. at *10-11.

In American Freedom Train Foundation v. Spurney, the receiver alleged a claim for breach of fiduciary duty. 747 F.2d 1069 (1st Cir. 1984). The district court dismissed the receiver's complaint on the ground that the court lacked personal jurisdiction over the defendants. Affirming the district court's decision, the First Circuit Court of Appeals held that 28 U.S.C. § 754 only governed property claims made in a receivership and did not apply at all to a claim that required in personam jurisdiction. Id. at 1073-74. The court held that it had ancillary subject matter jurisdiction, and the court proceeded with a typical minimum contacts/long arm statute analysis before concluding that the court could not exercise personal jurisdiction over the defendant. Id. at 1075-76.

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[6] 28 U.S.C. § 1692 states:

> 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.

Research does not reveal the existence of any authority that is controlling precedent on this Court which holds that § 1692 can be used by the Receiver to establish in personam jurisdiction over Rein Evans for the Complaint's "Fraudulent Transfer" claim. In fact, the Fourth Circuit Court of Appeals recently held that even when a receiver has in rem jurisdiction over property in other districts, this does not confer personal jurisdiction over persons in other districts absent an express congressional grant of personal jurisdiction.[7] Gilchrist v. General Electric Capital Corp., 262 F.3d 295, 301 (4th Cir. 2001). Rein Evans urges this Court to follow the well-reasoned and fundamentally sound holdings of the courts in American Freedom Train and Stenger.

C. The Court Lacks Subject Matter Jurisdiction over this Matter

A challenge to a receiver's standing raises a subject matter jurisdiction issue under Rule 12(b)(1). Scholes v. Schroeder, 744 F. Supp. 1419, 1421, (N.D. Ill. 1990). The Receiver lacks standing to bring suit to recover the investors' funds because he was not authorized to do so by the Order Appointing Receiver in Civil Action No. 3:02CV128-McK (W.D.N.C.

[7] Rein Evans does not concede that in rem jurisdiction can be exercised over funds that do not exist in any identifiable state, as in the present case.

May 21, 2003) (the "Order Appointing Receiver") and he lacks standing to sue in light of overwhelming case law.

1. The Order Appointing Receiver Does Not Confer Standing on the Receiver to Recover Investors' Funds in this Matter

In pertinent part, this Court's order authorized and empowered the Receiver to act:

> for the estate of Frederick J. Gilliland... [including] the assets of Sterling Assets Services, Ltd. ("Sterling Asset") and Sterling Management Services, Inc. ("Sterling Management") and the assets any other entity owned or controlled by Gilliland, Sterling Asset or Sterling Management, but shall not include those assets belonging to the Receivership Estate in Rollar v. United States of America, Civil Action No. 3-02CV205-McK (W.D.N.C.) except for such distributions as may be made from such estate to the Receivership Estate in this matter.

The Order Appointing Receiver also enumerated several powers and rights that the Receiver would possess, including: to take custody, control, and possession of all property ***under the direct or indirect control of the Receivership Estate***, and "to pursue... all suits, actions, claims and demands... which may be ***brought by the Receivership Estate.***" (Emphasis added).

The Order Appointing Receiver only authorizes the Receiver to file suit to recover property that belongs to the Receivership Estate, not the investors. B.E.L.T., Inc. v. Lacrad Int'l Corp., 2002 U.S. Dist. LEXIS 15267, *7-8 (N.D. Ill. 2002) ("the receiver has not been appointed to represent [the receivership entity's] creditors, and he therefore cannot bring

claims that only they have standing to bring"). "It is axiomatic that [a receiver's] power is derived from and limited by the order of the court appointing him..." Fleming v. Lind-Waldock & Co., 922 F.2d 20, 25 (1st Cir. 1990) (quoting Canut v. Lyons, 450 F. Supp. 26, 28 (C.D. Cal. 1977)). Moreover, even if the Order Appointing Receiver had in fact authorized the Receiver to file suit to recover the investors' funds, this would be legally unenforceable. Scholes v. Tomlinson, 1991 U.S. Dist. LEXIS 10486, *7-8 (N.D. Ill. 1991) (holding that language in an order purporting to give the receiver the authority to bring actions belonging to the receivership entities' "investors or clients" exceeded the authority permitted by law).

2. The Receiver Does Not Have Standing on his Own Behalf or on Behalf of the Entity in Receivership to Assert the Claim

In Fleming v. Lind Waldock & Co., the First Circuit Court of Appeals held that the claims brought by an equity receiver appointed in connection with a Commodity Futures Trading Commission action were properly dismissed pursuant to Rule 12(b)(6) because "the pleadings acknowledge that the [commodities accounts in question] were comprised solely of investor funds. [The receiver], however, merely avers, without offering facts demonstrating the relationship between the accounts and the corporation, that [the corporation] suffered

injury as a result of losses to these accounts." Fleming, 922 F.2d at 24.

In Fleming, the court reasoned, "without injury to [the corporation for which the receiver was appointed] supported in the pleadings, the six conclusory counts alleging Lind-Waldock's wrongdoing all lack an essential element." Id. at 24. The court concluded that the receiver failed to satisfy his preliminary pleading burden and affirmed the district court's dismissal of the complaint. Id.

The Receiver's Complaint avers that the "actions alleged" and the funds that he seeks to recover "constitute Receivership Assets within the meaning of the Order Appointing Receiver". Compl. ¶¶ 9, 10, 18. This is a conclusionary allegation. Indeed, the conclusionary pleading conflicts with the more specific factual allegations contained in the Complaint that shows the Receiver seeks to recover ***investor*** funds. Compl. ¶ 13. Specifically, the Complaint alleges:

> After ***investor funds*** were initially placed in the NationsBank Account..., on October 2, 1998 Gilliland caused $2.5 million of ***investor funds*** to be wire transferred from the NationsBank account... ***The funds*** were then laundered... From such accounts, Rein Evans was paid an aggregate of at least $1,500,000.00... No consideration of any value to the ***investors whose funds were diverted*** was given by Rein Evans, Melrose Escrow or Cohen. The remainder of the ***investor funds*** were stolen or otherwise wrongfully diverted by Paquette for no consideration whatsoever.

Compl. ¶ 13 (emphasis added); see also Compl. ¶ 18 ("The funds directed to each of the Defendants constitute and are directly traceable to the ***funds of the investors*** defrauded by Gilliland") (emphasis added). As in Fleming, the Receiver's Complaint lacks the essential element of alleging harm to the Receivership Estate. Therefore, the Receiver failed to satisfy his preliminary pleading burden under Fed. R. Civ. P. 12(b)(6) and the Complaint must be dismissed.

3. The Receiver Lacks Standing to Sue for the Recovery of Investors' Funds and the Complaint Must Be Dismissed Pursuant to Rule 12(b)(1)

In Fleming, the court also considered a receiver's standing to sue on behalf of third parties, and the court's reasoning is worth quoting at length:

> Since 1935 it has been well settled that 'the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have.' McCandless v. Furland, 296 U.S. 140, 148 (1935). In McCandless, Justice Cardozo 'clearly emphasized that the receiver in that case was suing on behalf of the corporation, not third parties...' In other words, the receiver can only make a claim which the corporation could have made. Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 429 (1972) (citing McCandless, 296 U.S. 140).

Fleming v. Lind Waldock & Co., 922 F.2d at 29.

In Caplin, the district court had expressly authorized the bankruptcy trustee to bring an independent action on behalf of the creditors of the debtor. The trustee in Caplin tried to sue an indenture trustee for "breach of duty" on behalf of the

bondholders. 406 U.S. at 420. When the issue of standing was expressly raised, however, the district court dismissed for lack of standing. On appeal, the Supreme Court affirmed the dismissal of bankruptcy trustee's action and held that the trustee lacked standing to sue on behalf of the debtor's bond holders. Id.

The Supreme Court reasoned that 1) the trustee was only statutorily empowered to "collect and reduce to money the property of ***the estate***" for which he was trustee and not those that had invested in the entity; 2) the bondholders could bring their own class action; and 3) permitting the trustee to bring the bondholders' claims threatened to complicate the litigation because serious questions as to whether the trustee adequately could represent the bondholders' interests and whether he could bind them to a settlement existed. Caplin, 406 U.S. at 428-33 (emphasis in original).

A long line of cases supports the proposition that a corporation's receiver may only assert those claims that the corporation in receivership could have asserted and therefore lacks any standing to sue on behalf of any investors. See, e.g., Boston Trading Group, Inc. v. Burnazos, 835 F.2d 1504, 1514-15 (1st Cir. 1987) (receiver lacked authority to sue on behalf of investors in commodity pools when receiver did not have authority from order of appointment to sue on behalf of

creditors); Commodity Futures Trading Comm'n v. Chilcott Portfolio Management, Inc., 713 F.2d 1477, 1481 (10th Cir. 1983) (warning that receiver can assert claims only for corporate fund, not "damages on the claims for the investors"); Lank v. New York Stock Exchange, 548 F.2d 61, 67 (2d Cir. 1977) (insisting receiver "stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted"); Johnson v. Chilcott, 590 F. Supp. 204, 208 (D. Colo. 1984) (disallowing receiver's standing to assert investors' claims when corporate interests not congruent with investors' interests); In re Investors Funding Corp. Secur. Litigation, 523 F. Supp. 533, 540-44 (S.D.N.Y. 1980) (emphasizing need for "proximate causal connection" or "but for chain" between misrepresentations to investors and losses to corporate entity in order for trustee to assert investors' claims).

The principle that investors' claims are logically distinct from the receivership's assets was aptly stated in Scholes v. Schroeder:

> Fraud on ***investors*** that damages those ***investors*** is for those ***investors*** to pursue - not the receiver. By contrast, fraud on the ***receivership entity*** that operates to ***its*** damage is for the ***receiver*** to pursue (and to the extent that investors as the holders of equity interest in the entity may ultimately benefit from such pursuit, that does not alter the proposition that the receiver is the proper party to enforce the claim).

744 F. Supp. 1419, 1422-23 (N.D. Ill. 1990) (emphasis in original)).

In the instant case, as in Caplin, Fleming, and the other authorities discussed above, the funds allegedly mismanaged by Gilliland's corporations in accounts established by Gilliland belonged entirely to investors, not to the corporate entities. Similarly, the Receiver is not a member of the class of investors and would not have standing to assert a class action. Fleming, 922 F.2d at 25. In the role that Quilling proposes to undertake as both Receiver for the estate and as a representative of the investors with claims against the corporation, his receivership duties inherently conflict with his pursuit of claims on behalf of those that he has not been appointed to represent. Moreover, the Receiver's Complaint even falls short of the complaint in Fleming, because it does not allege that the corporation suffered injury as a result of losses to the investors' accounts. The Complaint merely alleges that "the actions stated herein constitute Receivership Assets" and "the funds... are directly traceable to the funds of the investors... and constitute Receivership Assets." Compl. ¶¶ 9, 18. Accordingly, the Complaint should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

D. Plaintiff's Fraudulent Transfer Claim Is Barred by the Applicable Statute of Limitations

Although it is not apparent from the Complaint under which state's law the claims are alleged, the applicable statutes of limitation for both North Carolina and California operate as an absolute bar to the "Fraudulent Transfer" claim. Accordingly, the Complaint should be dismissed pursuant to Rule 12(b)(6).

Claims under the North Carolina version of the Uniform Fraudulent Transfer Act are governed by various statutes of limitations, determined by the subsection under which the suit was brought. N.C. Gen. Stat. § 39-23.9. The statutes of limitations range from one to four years. Id.

Similarly, four years is also the longest applicable statute of limitations for a fraudulent transfer claim brought pursuant to California law:

> An action for the fraudulent transfer of the debtor's property with the intent to 'hinder, delay, or defraud any creditor of the debtor' (Civ. Code, § 3439.04, subd. (a)) must be brought 'within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." (Civ. Code, § 3439.09, subd. (a); Monastra v. Konica Business Machines, U.S.A., Inc. (1996) 43 Cal. App. 4th 1628, 1645 [51 Cal. Rptr. 2d 528].)

Snapp & Assocs. Ins. Servs., Inc. v. Robertson, 117 Cal. Rptr. 2d 331, 335 (Cal. Ct. App. 2002).

Here, by the Receiver's own admission, Gilliland made the alleged fraudulent transfer on October 2, 1998 (five years and seven months prior to the filing of the Complaint) (Compl. ¶ 13), and the United States government seized all of the funds in Gilliland's NationsBank account in December 1998 (five years and five months prior to the filing of the Complaint) (Compl. ¶ 12). At the latest, the statute began to run in December 1998 and expired in December 2002, which is a year and five months before the Receiver filed the Complaint. As such, the claim for "fraudulent transfer" must be dismissed.[8]

In the instant case, the Receiver attempted to file the Complaint under the second part of the limitations statute, apparently believing that he filed the action "within one year after the transfer or obligation was or reasonably could have been discovered by the claimant." However, ***Gilliland*** clearly knew of the transfer and the one year as to him ran the year after he made the transfer (as of October 2, 1999). With the four-year statute having run more than a year prior to Quilling's appointment and at least a year and five months

[8] The "Constructive Trust and Disgorgement" Claim must be dismissed as well because it cannot stand by itself without some type of predicate claim. It is merely a remedy. See, e.g., Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970)("[A] constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of ***some duty or other wrongdoing.***") (emphasis added) (superceded by statute on other grounds, as stated in Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985); and Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

before he filed this action, it is properly barred by the statute of limitations.

A receiver is subject to the same defenses as the entity for which he is the receiver. "Any claim brought by a receiver is subject to the same defenses that could have been raised in a suit by the corporation. Thus, for example, a receiver's claim may be barred by the statute of limitations." 16 William Meade Fletcher et al., Fletcher Cyc. Corp. § 7852.10 (perm. ed. rev. vol. 1998). In addition, "any defense available against a company is good against its receiver." Id. at § 7840. This has long been the law, both in state and federal court. Seminole Phosphate Co. v. Johnson, 188 N.C. 419, 429, 124 S.E. 859, 864 (1924) (appointment of receiver "does not affect the rights of defendant in this action"); Rankin v. City National Bank of Kansas City, 208 U.S. 541, 546 (1908) (receiver "stands no better" than the entity for which he is appointed; see also, James L. High, Treatise on the Law of Receivers § 205 (1876).

In a similar case, the California Commissioner of Corporations sued Cole's Check Service, Inc. for violating the Check Sellers and Cashier's Law. A receiver was appointed fourteen months later. The receiver sued the defendant Ramsay for fraud. The fraud action was subject to a three-year statute of limitations. The three-year statute ran prior to the receiver's appointment but after the Commissioner of

Corporations sued Cole's. The Court held the receiver's action was barred by the statute of limitations. The Court noted:

> A receiver occupies no better position than that which was occupied by the person or party for whom he acts and the receiver takes the property and the rights of one for whom he was appointed in the same condition and subject to the same equities as existed before his appointment and any defense good against the original party is good against the receiver.

Allen v. Ramsay, 4 Cal. Rptr. 575, 583 (1960)(citations omitted). The court reasoned:

> [T]he time when the receiver made the discovery himself is not particularly important in this case. The time when the party or parties for whose benefit he brought the action first made the discovery is the important date and it is the only date which is proper in the establishment or nonestablishment of a cause of action. There is nothing in the complaint as to why the plaintiff's principals failed to discover the claimed fraud.

Id. at 582.

The Allen court also questioned why no action was filed in the intervening period between the time the Department of Corporations sued Cole's Check Service, Inc. and the receiver was appointed, because the Commissioner "must have been familiar with the affairs of Cole's; otherwise an action would not have been instituted against that firm." Id.

The four-year statute of limitations ran before the Receiver was appointed and Gilliland obviously knew of the transfer. Compl. ¶¶ 12-13. Accordingly, both the four-year limitation and one year "discovery" limitation ran prior to the

Receiver's appointment. Simply put, the act of appointing a receiver should not result in the resurrection of claims that no longer exist and that the entity for which the Receiver was appointed is barred from bringing.

E. Plaintiff's Claim Must Be Dismissed Because Rein Evans Could Not Exercise Dominion and Control Over the Funds as a Matter of Law

In order to be considered an initial transferee of a fraudulent transfer, one must exercise dominion and control over the received funds. The test for dominion and control requires control over the funds and the right to put those funds to one's own purpose. Bowers v. Atlanta Motor Speedway, Inc., 99 F.3d 151, 156 (4th Cir. 1996) (adopting this test from Bonded Fin. Servs. V. European Am. Bank, 838 F.2d 890, 893 (7th Cir. 1988)). Courts have consistently held that an agent is not an initial transferee when the agent or principal is acting in his or her representative capacity, even if the agent has physical dominion or control over the funds. See, e.g., Bowers v. Atlanta Motor Speedway, 99 F.3d at 156; Bowers v. Kuse Enterprises, Inc., 1998 U.S. App. LEXIS 23540, *9-10 (4th Cir. 1998); Rupp v. Markgraf, 95 F.3d 936, 938-39 (10th Cir. 1996) (principal is a "conduit", not an initial transferee where principal caused debtor to make fraudulent transfer); Security First Nat'l Bank v. Bruson (In re Coutee), 984 F.2d 138, 141 (5th Cir. 1993) (law firm not initial transferee where acting as clients' agent); In re Lifecare

Technologies, Inc. v. Berman Law Firm, P.A., 305 B.R. 88, 92 (M.D. Fla. 2003) (same); In re Medical Cost Management, Inc., 115 B.R. 406, 408 (D. Conn. 1990) (same); Gropper v. Unitrac, S.A. (In re Fabric Buys of Jericho, Inc.), 33 B.R. 334, 337 (S.D.N.Y. 1983) (same).

The facts in both In re Lifecare Technologies and In re Medical Cost Management, Inc. are strikingly similar to those of the case at bar. In these cases, a law firm's client obtained a money judgment against a defendant, the funds from which the law firm deposited into its trust account. The law firm then deducted the fee for its services from the law firm's trust account and transferred the balance to its client. When the defendant filed for bankruptcy, the debtor/trustee sought to recover the amount paid to the plaintiff's attorney as a voidable fraudulent transfer. See, e.g., In re Lifecare Technologies, 305 B.R. at 92; In re Medical Cost Management, Inc., 115 B.R. at 408. In both cases, the courts held that, as a mere conduit for the client, the attorney was not an initial transferee and did not have the right to control the funds under the Bonded test for dominion and control. Both courts also held "that the retention of his legal fees was only an 'accounting device' that did not transform the attorney into an initial transferee." In re Lifecare Technologies, 305 B.R. at 92 (citing In re Medical Cost Management, 115 B.R. at 408). As

such, the debtor/trustee in both cases was not entitled to recover from the law firm.

Rein Evans is similarly situated to the law firms in both In re Lifecare Technologies and In re Medical Cost Management. Rein Evans never exercised dominion and control over the funds at issue. Rein Evans did not have the right to use those funds for its own purposes. Rein Evans simply held the funds in trust, in its trust account, then transferred the funds to Mr. Cohen's trust account for distribution to his client in the settlement of litigation against Rein Evans's client. Rein Evans was then paid by its client from those funds. Compl. ¶ 13. As such, Rein Evans is not an initial transferee as a matter of law, and the Complaint must be dismissed pursuant to Rule 12(b)(6).

CONCLUSION

For the reasons stated above, defendant Rein Evans respectfully requests that the Court dismiss plaintiff's complaint in its entirety pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure.

This the 16th day of August, 2004.

RAYBURN COOPER & DURHAM, P.A.

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS was served on this date upon the parties who have appeared in this action, postage prepaid, as follows:

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This the 16th day of August, 2004.

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