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** **REPLY IN SUPPORT OF DEFENDANT REIN EVANS SESTANOVICH, L.L.P.'S MOTION TO DISMISS**

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 reply in support of its Motion to Dismiss. [1] For the reasons set forth below and in the initial Memorandum in Support of Motion to Dismiss, defendant's motion to dismiss should be granted.

INTRODUCTION

The Receiver's Response fails to satisfy his burden to show that there is personal jurisdiction over Rein Evans in this matter, that he has standing to assert the claim for fraudulent

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in Rein Evans's Memorandum in Support of Motion to Dismiss.

transfer against Rein Evans, and that the statute of limitations is not an absolute legal defense to the Complaint. [2]

The Receiver baldly asserts, on five separate occasions in the Response, that the fraudulent transfer claim is actually an attempt to recover property belonging to Sterling Asset Management Services, Ltd, and thereby attempts to change the facts he has already plead in the Complaint. Moreover, the Order Appointing Receiver does not appoint Mr. Quilling as the receiver for Sterling Asset Services, Ltd. as a corporate entity, only its assets.

The Receiver similarly fails to meet his pleading requirement to allege that Rein Evans had dominion and control over the funds in question. Rather, he attempts to cure the pleading deficiencies by requesting that the parties proceed with discovery. But this can only lead to the Receiver pleading contradictory facts that would bar his case, as explained herein. The appropriate relief is for this court to dismiss the Complaint and allow the Receiver leave to re-file.

Regarding Rein Evans's statute of limitations defense, the Receiver's reliance upon equitable tolling and adverse domination is entirely misplaced, given that those equitable theories prevent the use of the statute of limitations as a

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[2] Although Rein Evans takes issue with each of the arguments put forth by the Receiver in the Response, pursuant to Local Rule 7.1(b), Rein Evans limits its Reply solely to matters newly raised in the Response.

shield by a wrongdoer, not an innocent third-party like Rein Evans. In addition, the Receiver's argument that payments of commissions and profits in a Ponzi scheme constitute transfers made with actual intent to defraud as a matter of law has been significantly undercut by other cases and is factually distinct from the present case, since Rein Evans is a subsequent, innocent third-party transferee, and there is no allegation that it was a broker or agent involved with the alleged Ponzi scheme.

ARGUMENT

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

1. 28 U.S.C. § 754 Does Not Provide for a Receiver's Reappointment

Despite the unambiguous language of 28 U.S.C. § 754, the Receiver urges this Court to follow opinions from courts in other circuits enlarging the terms of that statute by judicial fiat. (Resp. at 4-5). There is no authority that is binding upon this Court that mandates the result for which the Receiver argues. Despite the cases holding otherwise, 28 U.S.C. § 754 does not provide for the ***reappointment*** of a receiver. Cf. SEC v. Vision Comm., Inc., 74 F.3d 287 (D.C. Cir. 1996) and Terry v. June, No. Civ. A. 303CV00052, 2203 WL 22125300 (W.D. Va. Sept. 12, 2003). Instead, § 754 simply states:

> [s]uch receiver shall, ***within ten days*** after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is

> located. ***The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.***

(emphasis added). The receiver relies upon SEC v. Vision Comm., Inc. and Terry v. June. Both cases fail to explain why Congress would have mandated a short ten-day window for the filing of the receiver's order of appointment and the complaint related to his appointment and specified the consequence for failing to so file, if a receiver could simply end-run an unambiguous statute by moving the district court (himself) to "re-appoint" him.

In SEC v. Vision Comm., the United States District Court for the District of Columbia held that the receiver's failure to comply with § 754 was fatal to his being able to establish jurisdiction over the defendant. 74 F.3d 287, 290 (D.C. Cir. 1996). Then, the court remanded the case to the district court, and without citation to authority or explaining the rationale behind its conclusion, indicated in *dicta* that the district court could simply "re-appoint the receiver and start the ten-day clock of § 754 ticking once again." Id. at 291.

In Terry v. June, the United States District Court for the Western District of Virginia declined to accept the defendant's argument that a receiver should not be allowed to reassume jurisdiction under § 754 upon re-appointment, because the receiver failed to comply with the statute's requirements within the ten-day required timeframe. 2003 U.S. Dist. LEXIS 12873,

*7-8 (W.D. Va. 2003). Instead, the court held that if re-appointment were not allowed, it would result in the harsh consequence of forcing a receiver "to file the required documentation in all ninety-four federal districts to protect jurisdiction over any potential, but presently unknown, receivership assets." Id. at *8-9.

The United States Supreme Court, however, has mandated that a clearly worded statute is not to be re-interpreted by the courts despite what could otherwise be considered a "harsh" result. In Lamie v. United States Trustee, the Court held that where a statute's language is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms. 124 S. Ct. 1023, 1030, 157 L. Ed. 2d 1024, 1033 (2004) (citing cases). The Court reasoned that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Id. at 1032, 157 L. Ed. 2d at 1036 (citing Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)). Moreover, the Court's "unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." 124 S. Ct. at 1032, 157 L. Ed.

2d at 1036 (citing cases). The Supreme Court concluded that it was beyond the province of the courts to rescue Congress from its drafting errors, and that Congress could amend the statute to conform to its intent if it saw fit to do so. Id. at 1034, 157 L. Ed. 2d at 1038-39.

Similarly, this Court should not "rewrit[e] rules that Congress has affirmatively and specifically enacted" in an attempt to rescue the Receiver from the harsh result that the Receiver encounters by virtue of not filing a copy of his order of appointment in the Central District of California within ten days of his appointment. Id. at 1032, 157 L. Ed. 2d at 1036. Section 754 is unambiguous and does not provide for "re-appointment" of a receiver, despite how convenient that alternative might be for receivers in federal courts.

2. In re Alpha Telcom, Inc., is Cited by the Receiver and Actually Supports Rein Evans's Argument that This Court Does Not Have Personal Jurisdiction Over it.

The Receiver's argument concerning the "interplay" of 28 U.S.C. §§ 754 and 1692 is unconvincing. One of the numerous unreported opinions that the Receiver cites, In re Alpha Telcom, Inc., actually supports Rein Evans's argument that there is no personal jurisdiction. Alpha Telcom was a company engaged in the sale, installation, and maintenance of payphones. SEC v. Alpha Telcom, Inc., 187 F. Supp. 2d 1250 (D. Or. 2002). The SEC commenced an action against Alpha Telcom's owner alleging that

he violated the securities registration provisions and antifraud provisions of the Securities Acts of 1933 and 1934. Alpha Telcom filed for bankruptcy shortly after securities regulators decreed that the particular payphone program at issue constituted the sale of securities. Id. at 1258. In the Response, the Receiver cites to the unreported decision in the ancillary receivership proceeding, holding that even though a receiver's recovery may ultimately benefit the debtor's investors, this does not divest the receiver of standing. (Resp. at 11 and n. 5 (citing In re Alpha Telcom, CV 01-1283-PA slip op. at 20 (D. Or. Aug. 18, 2004))). In re Alpha Telcom actually bolsters Rein Evans's point that this Court lacks personal jurisdiction over Rein Evans.[3]

In In re Alpha Telcom, the court undertook the same minimum contacts analysis suggested in Rein Evans's original Memorandum in Support of its Motion to Dismiss. Id. at 2. The Oregon district court took special note that the debtor's bankruptcy case was pending in Oregon, the debtor was based in Oregon, the agent's sales contracts were with a company headquartered in Oregon and contemplated ***an ongoing relationship in Oregon***, and

[3] The receiver in In re Alpha Telcom filed a motion (not a complaint, as in the present case) for disgorgement of commissions paid to sales agents of the debtor. In re Alpha Telcom merely stands for the proposition that funds paid to the agents that assisted in the sale of unregistered securities are subject to disgorgement. Slip op. at 9. There was no dispute over the receiver's authority to act on behalf of Alpha Telcom as a corporate entity. The Receiver's Complaint in the present case does not indicate that he is doing anything other than attempting to seek restitution for the investors.

the contracts specified that Oregon law would govern any dispute. Id. at 2.[4] Furthermore, the court noted that nationwide service of process is actually authorized in the securities law cases filed by the SEC. Id.[5]

The Receiver's assertion that there should be personal jurisdiction over Rein Evans is also unconvincing in another respect. The Response argues that Rein Evans will not be prejudiced by having to defend this matter in North Carolina, because it has already retained local counsel to assist in this endeavor. (Resp. at 8). This is precisely the point - had the case been brought in California, Rein Evans could obviously represent itself in the courts of that State.

B. The Receiver Has Failed to Establish this Court's Jurisdiction Over the Subject Matter of this Case

1. The Complaint Contains No Allegation that the Claim and the Funds Belong to Sterling Asset

In the Response, the Receiver asserts on ***five*** separate occasions that the investors' funds and fraudulent transfer

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[4] The Alpha Telcom court also refused to give any credence to the fraudulent transfer claim in that case because the receiver did not charge the agents with any wrongdoing or prove scienter. Id. at 8-9. Fraudulent transfer is the Receiver's only cause of action in the present case.

[5] The distinction between statutes that allow for nationwide service of process, such as the securities statutes at issue in In re Alpha Telcom, and the receivership statute at issue here, was discussed at length in Rein Evans's original Memorandum in Support of Motion to Dismiss. For the sake of efficiency, Rein Evans respectfully refers to pages 12 and 13 therein, where it is explained that the receivership statute does not grant personal jurisdiction.

claim actually belong to Sterling Asset. (Resp. at 9, 10, 14).[6] There are several pervasive errors in the Receiver's new argument. First, this is the first such assertion in this case. The Receiver apparently hopes that simple repetition of facts nowhere appearing in the Complaint or in the Order Appointing Receiver will allow him to survive the Motion to Dismiss. Second, the Receiver does not reference any allegation of fact in the Complaint or otherwise that would lead this Court to believe that the funds (or the claim) actually do belong to Sterling Asset as compared to the investors. This is because the Receiver makes no such allegation or averment to that effect in the Complaint. Third, these assertions contradict the Receiver's own admissions in the Complaint *and in the Response*.

In the Complaint, not only does the Receiver fail to allege that the funds (or the claim) belong to Sterling Asset, the Receiver is unequivocal that the investors own the funds and that he is pursuing the funds on their behalf. (Compl. ¶¶ 13, 18; and see Mem. Supp. Mot. to Dismiss at 17-18). These are not simply alternative legal theories permissible under Fed. R. Civ. Pro. 8(e). Rather, they are mutually exclusive factual

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[6] "By this lawsuit, the Receiver is asserting fraudulent transfer claims that belong to Sterling Asset Services, Ltd....", "[w]hile the funds were in the NationsBank Account, Sterling Asset Services, Ltd. retained ownership and control of the funds.", "the fraudulently transferred funds were owned by Sterling Asset Services Ltd...", "the transferred funds were owned by Sterling Asset Services, Ltd.", and "Rein Evans came into possession of funds that belonged to Sterling Asset Services, Ltd.").

averments that cannot be used to withstand Rein Evans's Motion to Dismiss. A party is ordinarily bound by his pleadings, which does not include a memorandum submitted to the court. Lockert v. Faulkner, 574 F. Supp. 606, 609 and n. 3 (N.D. Ind. 1983). In fact, the Receiver continues to admit this point in the Response. (See Resp. at 2) ("the Receiver seeks to recover in excess of $1,500,000 ***of investor funds***..." (emphasis added)).

Although the Response implicitly acknowledges that it is an important point, the Receiver does not, and cannot, reference any allegation of fact in the Complaint or otherwise that would lead this Court to believe that the funds (or the claim) actually do belong to Sterling Asset as compared to the investors.[7] This is because, as a matter of law, the funds and the claim do not belong to Sterling Asset - they belong to the investors. See, e.g., Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1093-94 (2d Cir. 1995); E.F. Hutton & Co., Inc. v. Hadley, Inc., 901 F.2d 979, 986-87 (11th Cir. 1990); Boston Trading Group, Inc. v. 1st Pullen Commodity Servs., Inc., 1983 U.S. Dist LEXIS 11398 (D. Mass. 1983). Although the Receiver's effort to recast his capacity as established by the Order Appointing Receiver is understandable, it is unsupportable both as a matter of fact and law. Even if he could do so, he would simply be

[7] The Receiver's reliance upon Scholes v. Lehmann is misplaced. (Resp. at 11). The Receiver in Scholes was appointed the receiver for the corporate entity itself. 56 F.3d 750 (7th Cir. 1995). This is not the situation in the present case.

contradicting his own prior pleading, since it is already judicially admitted he is pursuing assets not of the Receivership Estate, but of investors over whom he is not a receiver.

2. The Order Appointing Receiver Merely Appoints Mr. Quilling as the Receiver for Sterling Asset Services, Ltd.'s Assets, Not the Corporate Entity Itself

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...***

(Order Appointing Receiver (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. The Receiver argues in the Response that this Court should allow him to exercise authority much broader than that granted to him in the Order Appointing Receiver. The Receiver argues that he:

> has standing to assert the fraudulent transfer claim at issue in this lawsuit because he was appointed receiver not only for Gilliland, but also for the ***'Receivership Estate' which is defined as including all assets of Sterling Assets Services,*** Ltd. and Sterling Management Services, Inc... ***Thus, the Receiver is the receiver for*** Gilliland and ***all corporate entities*** that were owned and/or controlled by him...

(Resp. at 9) (emphasis added). The Order Appointing Receiver is not as broad as argued by the Receiver. Although the Order Appointing Receiver includes the assets of Sterling Asset in the Receivership Estate, it stops short of appointing Mr. Quilling as the Receiver for the corporate entity itself or the investors.[8] Corporate entities and investors might initiate lawsuits on their own behalf, but assets cannot. The Receiver has judicially admitted that he is pursuing the claims of investors and the Order Appointing Receiver does not appoint him the receiver over the investors or Sterling Asset itself. Thus, the Receiver cannot survive the Motion to Dismiss and he cannot amend the Complaint to fix this problem.

C. The Cases Cited by the Receiver Concerning the Statute of Limitations are Inapposite

The Receiver admits that the lawsuit was not filed against Rein Evans within the standard statute of limitations time period, but he insists that principles of equitable tolling and adverse domination operate to extend the limitations period one year after the day of his appointment. (See Resp. at 13-14). The Receiver fails to prove that the theory of equitable tolling has any applicability in this case whatsoever. "[A] plaintiff who seeks to obtain equitable tolling of a limitations period

[8] "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)).

must show that the misrepresentations he reasonably relied upon were made by the party raising the defense." Town of Pineville v. Atkinson/Dyer/Watson Architects, P.A., 114 N.C. App. 497, 500, 442 S.E.2d 73, 74-75 (1995). Where the defendant does not make any representations to the plaintiff, as a matter of law, the equitable tolling doctrine is unavailable. Id. The Receiver has never alleged that Rein Evans made any misrepresentations that prevented him from filing suit. In addition, "the Fourth Circuit has rarely found equitable tolling of the filing period to be appropriate, noting that such relief is only available where ***the defendant*** misled or deceived the plaintiff in order to prevent timely filing." Peterson v. West, 122 F. Supp. 2d 649, 651 (W.D.N.C. 2000) (emphasis added).

The Receiver cites Martin Marietta Corp. v. Gould, Inc., F.D.I.C. v. Gonzalez-Gorrondona, and In re Blackburn in support of his argument that the statute of limitations should be tolled in this case. Each of these cases permitted equitable tolling or allowed the adverse domination theory to resurrect a time barred claim because the claim was brought against the very person or entity that had some degree of culpability for the untimely filing. Those same defendants then sought to shield themselves with the statute of limitations. This is simply not the situation alleged in the Complaint regarding Rein Evans. The Receiver does not even allege in the Complaint or claim in

the Response that Rein Evans engaged in any wrongdoing or that Rein Evans was complicit in Gilliland's scheme. In fact, the Complaint does not allege that Rein Evans represented Gilliland or any Receivership Entity.

Specifically, in Martin Marietta Corp. v. Gould, Inc., Defendant Gould's attempt to raise a statute of limitations defense at summary judgment was denied because defendant Gould and its former employees made misrepresentations and breached warranties to the plaintiff. 70 F.3d 768 (4th Cir. 1995). Martin Marietta involved an acquisition by Martin Marietta of a subsidiary of the defendant defense contractor for $117.5 million in which employees of the defendant continued to work for the plaintiff after the acquisition. Id. at 770. Gould moved for dismissal of the plaintiff's case, arguing that its former employees who made the misrepresentations about which the plaintiff complained, now worked for the plaintiff. Id. Therefore, Gould argued, the former employees' knowledge regarding the possible cause of action against Gould should be imputed to the plaintiff as of the date of the acquisition. Id. at 771. The Fourth Circuit declined, under Maryland law, to enforce the legal fiction of imputing an agent's knowledge to its principal when the agents should not be expected to disclose their roles in the wrongdoings complained of by the plaintiff. Id. at 772-73. Stated simply, the court would not allow

defendant Gould the advantage of using the imputed knowledge of its former employees as a shield where defendant Gould itself was a wrongdoer.

In F.D.I.C. v. Gonzalez-Gorrondona, the Defendants, former officers and directors of a failed savings and loan association, filed a motion to dismiss the plaintiff's claims for negligence, breach of fiduciary duty, breach of contract, and restitution arguing that these causes of action began to accrue while the insolvent corporation was still under their control. Gonzalez-Gorrondona, 833 F. Supp. 1545, 1556-57 (S.D. Fla. 1993). The court's explanation of the "adverse domination" theory upon which the Receiver now attempts to rely shows exactly why this exception is inappropriate under the present circumstances:

> [t]he 'adverse domination theory' reasons that as long as a bank is dominated by the same wrongdoers against whom a cause of action exists, the statute of limitations is tolled. The rationale of the theory is as follows: (1) wrongdoers cannot be expected to bring an action against themselves; (2) the wrongdoer's control puts the corporation in the position of a cestui of a trust and unable to make an adverse claim; and (3) the wrongdoer's control results in the concealment of causes of action from those who otherwise might be able to protect the corporation.

Id. at 1557 (citations omitted). The purpose of the adverse domination theory is to prohibit a wrongdoer from benefiting from his own misdeeds, ***when the action is brought against the wrongdoer.*** The theory does not apply when the action is brought against an innocent outsider like Rein Evans.

One anticipates that the Receiver will argue that Rein Evans's status as an innocent outsider is a question of fact, but it is not. In fact, there is no question of fact at all. The Receiver has created no such factual issue and has not alleged Rein Evans's complicity in this matter.

The same is true in the third case cited by the Receiver on this point, In re Blackburn, 209 B.R. 4 (Bankr. M.D. Fla. 1997). In that case, the State of Florida Department of Insurance filed an action against the defendant-debtor for breach of his fiduciary duties, usurpation of an insurance company's corporate opportunities while he was an officer and director, and illegal transfers. Id. The defendant-debtor filed a motion for summary judgment on the grounds that his knowledge that he acquired while engaged in the wrongful acts should be imputed to the same entity from which he was stealing. Id. at 10-11. The court denied the defendant's motion for summary judgment related to the statute of limitations defense. The court explained that all of the theories offered by the plaintiff were grounded in the equitable notion that:

> the receiver should not be time barred from pursuing the management of an insurer in liquidation to recover for alleged wrongdoing ***that management*** committed while in control of the insurer and that lead to the liquidation - all before the receiver was even appointed. In other words, the plaintiff's position is that the defendant may not use the statute of limitations to insulate himself from liability...

Id. at 10. This is not the case here. Application of the statute of limitations would not result in insulation of the wrongdoer (Gilliland, whose shoes the Receiver is in). Rather, application of the statute of limitations would result in insulation of an innocent third-party, Rein Evans, which is not even alleged to have had any part in the scheme, to have ever represented Gilliland or any Receivership Entity, or to have done anything other than render legal services to a subsequent transferee.

In addition, the Receiver's statute of limitations argument is misplaced in another respect. The Receiver's argument that payments of commissions and profits in a Ponzi scheme constitute transfers made with actual intent to defraud as a matter of law (Resp. at 13) has been significantly undercut and is factually distinct from the present case. For example, the Receiver cites to In re Ramirez for the proposition that a Ponzi scheme's payments of commissions to one of its investors as a reward for referring new investors to the Ponzi scheme were subject to being set aside by the bankruptcy court as a fraudulent transfer. In re Ramirez, 209 B.R. 424, 429, 434 (Bankr. S.D. Tex. 1997) (citing In re Randy, 189 B.R. 425, 440 (Bankr. N.D. Ill. 1995)).

However, the present case is factually distinct. Rein Evans is neither an investor in the alleged Ponzi scheme, nor

did it receive any commission from the Ponzi scheme. Taking the allegations in the Complaint as true, at most Rein Evans is an innocent third-party transferee in the ordinary course of business. In fact, the ordinary course defense in a Ponzi scheme case is available to ordinary trade creditors and non-investor transferees like Rein Evans. In re Ramirez at 432 (citing Sender v. Heggland Family Trust (In re Hedged Investments Assoc., Inc.), 48 F.3d 470 (10th Cir. 1995)).

Second, the Court's reasoning in In re Randy (relied upon by the Ramirez court), has been significantly questioned. In re Churchill, 256 B.R. 664, 682, 684 (Bankr. S.D.N.Y. 2000). The court in Churchill declined to follow the Randy court's holding because of what the Churchill court described as the:

> fatal legal flaw [that any transfers made by the Ponzi scheme were actually or constructively fraudulent] is that it focuses not on a comparison of the values of the mutual consideration actually exchanged in the transaction between the Broker and the Debtor, but on the value, or more accurately stated, the supposed significance or consequence of the Broker-Debtor transaction in the context of the Debtor's whole Ponzi scheme... [Rather], the statutes require an evaluation of the specific consideration exchanged by the debtor and the transferee in the specific transaction which the trustee seeks to avoid, and if the transfer is equivalent in value, it is not subject to avoidance under the law.

Id. at 680. Furthermore, in a striking similarity to the instant case, the complaint filed by the trustee in Churchill alleged that the "Defendant gave the Debtors no value or fair consideration in exchange for the Commission Payments which

Defendant received", and the court explained the trustee's real position was that any such transfers were "constructively fraudulent simply because the commissions were paid by an entity engaged in a Ponzi scheme." Id. at 673-674; and see Compl. ¶¶ 13, 16. In granting the defendants' motion to dismiss, the Churchill court concluded that the defendant-brokers "earned what they were paid fairly and without wrongdoing" and accordingly dismissed the trustee's fraudulent conveyance claim to recover commissions. Id. at 680.

Randy was strongly criticized in In re Financial Federated Title & Trust, Inc. as well. 309 F.3d 1325, 1331-32 (11th Cir. 2002). The Financial Federated court reasoned that, if the Randy court's holding were taken to its logical conclusion, any transfers to "the debtor's landlord, salaried employees, accountants and attorneys, and utility companies that provided services to the debtors" would be subject to avoidance. Id. This result would be at odds with the fraudulent transfer statute because the goods and services that these persons and entities provided were not without value. Id.

D. Rein Evans Lacked Dominion and Control Over the Funds

The Receiver seeks to proceed to the discovery phase of this lawsuit arguing that the extent of Rein Evans's dominion and control over the funds in question is a factual issue that must be examined by the Court. (Resp. at 15). This request

must be denied for two interconnected reasons. First, the Complaint does not allege that Rein Evans ever had dominion and control over the funds. Second, the allegations in the Complaint affirmatively show that, as a matter of law, Rein Evans could not exercise dominion and control over the funds.

The Complaint falls well short of alleging that Rein Evans had dominion and control over the funds in question. The Receiver's vague argument that Rein Evans actually makes unsupported factual allegations regarding its lack of dominion and control over the funds in question is rather surprising, given that it is a required element of the Receiver's pleading.[9] "[T]he minimum requirement of status as a 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes." Bonded Fin. Servs. v. European Am. Bank, 838 F.2d 890, 893 (7th Cir. 1988). In In re Circuit Alliance, Inc., the court held that a lawyer who received and disbursed funds on behalf of a client "was acting solely as an intermediary, without a legal interest in the funds and certainly without authority to direct them to her own uses." In re Circuit Alliance, Inc., 228 B.R. 225, 233 (Bankr. D. Minn. 1998). The court stated:

[9] Rein Evans cannot respond to the Receiver's vague argument, "[b]y making this ***and other statements***, Rein Evans implicitly acknowledges that the issue of dominion and control is a fact question…"

> It is not the simple possession of funds, coupled with a one-time act of directing them on to a further transferee, that makes out the 'dominion and control' of Bonded Financial Services. Rather, it is an unfettered legal right to use the funds for the possessor's own purposes and benefit. Thus, an entity that is in possession of transferred funds as a 'mere conduit' between other parties in a transactional chain is not a 'transferee' . . . .

Id. at 232-33. The court elaborated that "[g]enerally, 'mere conduits' hold transferred funds via escrow, trust, or deposit, and do so only in the status of commercial or professional intermediaries for the parties that actually hold or receive a legal right, title, or interest." Id. at 233. As an example of a "mere conduit," the court listed "attorneys holding funds in trust in connection with settlements of disputes." Id. Because the Complaint fails to allege that Rein Evans is more than a mere conduit, it must be dismissed.

The Receiver does not state in the Complaint that the funds were in Rein Evans's trust account, but neither does he plead that Rein Evans had dominion and control over the funds. Indeed, the vague allegations of the Complaint show that Rein Evans did not exercise control over the funds and was simply an intermediary. (Compl. at ¶ 13).

CONCLUSION

For the reasons stated above and in the Memorandum in Support of Motion to Dismiss, 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 14th day of September, 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 14th day of September, 2004.

James B. Gatehouse