

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF NORTH CAROLINA
 CHARLOTTE DIVISION

Michael J. Quilling, Receiver)	Case No. 3:04-CV-251
for Frederick J. Gilliland,)	
)	
Plaintiff,)	
)	
v.)	MEMORANDUM IN SUPPORT OF
)	MOTION TO AMEND ORDER TO
Grand Street Trust, Grand)	INCLUDE CERTIFICATION FOR
Street Trust, Heartland)	INTERLOCUTORY APPEAL AND TO
Control Trust, Future Control)	STAY PROCEEDING PENDING APPEAL
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.)	

Defendant Rein Evans Sestanovich, L.L.P. f/k/a Dressler Rein Evans & Sestanovich, L.L.P. ("Rein Evans") respectfully submits this memorandum in support of its motion to amend the Court's Order entered August 12, 2005 denying Defendant Rein Evans's motion to dismiss. Rein Evans moves the Court to amend the Order to include certification for interlocutory appeal.

FACTUAL BACKGROUND

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 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 an allegation of 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.

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 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, as Rein Evans argued in connection with its Rule 12 motion, 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.

PROCEDURAL POSTURE

The Receiver filed its Complaint on May 20, 2004. Rein Evans filed its Motion to Dismiss on August 17, 2004. By order dated August 12, 2005, this Court denied Rein Evans's Motion to Dismiss and the Motion to Dismiss filed by Defendants Marie Paquette, Grand Street Trust, Future Control Trust, and Heartland Control Trust. The status of Defendants Melrose Escrow, Inc. and Paul J. Cohen is unclear. They have not responded to the Complaint and Plaintiff has not filed a proof of service or had their defaults entered. The Motion to Amend Order to Include Certification for Interlocutory Appeal and to Stay Pending Appeal filed contemporaneously herewith requests certification of the Order to permit Rein Evans to file a petition for permission to appeal with the circuit court.

ARGUMENT

A. Legal Standard

A district court may certify an interlocutory order as appropriate for immediate appeal by stating "that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" 28 U.S.C. § 1292(b) (2005). If a district court order does not initially include the certification, the district court may amend the order at anytime to include the required statement for

certification. Fed. R. App. P. 5(a)(3); Sanders v. Humphrey, 1986 U.S. Dist. LEXIS 23066, at *28 (N.D. Ga. July 8, 1986).

District courts are conferred with "first line discretion to allow interlocutory appeals." Swint v. Chambers County Comm'n, 514 U.S. 35, 47 (1995). In the absence of this Court's certification, the Fourth Circuit Court of Appeals lacks jurisdiction to hear an appeal of this type of interlocutory order. In re Wallace & Gale Co., 72 F.3d 21, 24 (4th Cir. 1995).

B. The Court's Order Meets the Requirements for Certification

Rein Evans moved to dismiss on the grounds that: (1) the Receiver's Complaint was time-barred by the statute of limitations; (2) this court lacked personal jurisdiction over Defendant Rein Evans; and (3) the Receiver lacked standing to assert claims on behalf of allegedly defrauded investors instead of the Receivership estate itself. All three grounds meet the requirements for certification as they each involve a controlling question of law as to which there is substantial ground for a difference of opinion, and an immediate appeal from the Order may materially advance the ultimate termination of the litigation. See 28 U.S.C. § 1292(b).

1. This Court Should Certify the Issue of Standing for Immediate Interlocutory Appeal

In its motion to dismiss, Rein Evans argued that the

Receiver lacked standing to assert claims on behalf of allegedly defrauded investors, which is how the Complaint is pled.

"Standing is a controlling question of law, so it meets the first requirement of § 1292(b)." Forest Guardians v. Bureau of Land Mgmt., 188 F.R.D. 389, 396 (D. N.M. 1999) (citing Moore's Fed. Prac., Vol. 19, § 203.31[2] (3d ed. 1999)) . Furthermore, though this Court obviously has a clear view on the subject, a substantial ground for difference of opinion exists based on the lack of a controlling case decided by the Fourth Circuit, especially in light of conflicting authority based on the First Circuit's opinion in Fleming v. Lind-Waldock Co., 922 F.2d 20 (1st Cir. 1990). As noted by the United States District Court for the District of New Mexico, uncertain precedent and paucity of case law on the issue creates substantial ground for difference of opinion. Forest Guardians 188 F.R.D. at 397.

Whether the Receiver has standing to assert the claims against Rein Evans is an issue that warrants interlocutory appeal. "If the plaintiffs have no standing, the litigation will be terminated, and such questions are particularly well suited for an interlocutory appeal." Klapper v. Commonwealth Realty Trust, 662 F. Supp. 235, 236 (D. Del. 1987). Here, "[s]tanding is a threshold issue . . . [t]hus, an immediate appeal on the standing question may materially advance the ultimate termination of the litigation." State Farm Mutual

Auto. Ins. Co. v. Abrams, 2000 U.S. Dist. LEXIS 1524, at *14 (N.D. Ill. Feb. 3, 2000). Rein Evans believes this issue is governed by the Supreme Court's decision in Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972), and that the Receiver has no standing to pursue the claims as he has pled them. This is especially true given two very recent decisions on the standing issue.

First, approximately six weeks ago the Fourth Circuit held in In re Bogdan that a trustee only had standing to pursue the claims belonging to certain creditors because the trustee had received written "unconditional assignments" from the injured creditors. In re Bogdan, 414 F.3d 507, 2005 U.S. App. LEXIS 13385 at * 9-10 (4th Cir. July 6, 2005). In analyzing the issue of a trustee's standing to pursue claims held by creditors, the Fourth Circuit discussed the very argument raised by Rein Evans based upon Caplin v. Marine Midland Grace Trust Co. In re Bogdan, 414 F.3d 507, 2005 U.S. App. LEXIS at * 8-10 (citing Caplin, 439 F.2d 118 (2d Cir. 1971) (trustee lacked standing to assert claims on behalf of debenture holders)). Unlike the trustee in In re Bogdan, the Receiver here received no such assignments from the allegedly defrauded investors.

The second recent case, In re Parmalat, interpreted North Carolina's Uniform Fraudulent Transfer law and held that only creditors can pursue fraudulent transfers made by a debtor.

2005 WL 1923839 at * 9 (S.D.N.Y. Aug. 5, 2005). Neither the debtor, its estate nor the estate's representative, such as a bankruptcy trustee or receiver, can do so. For the foregoing reasons, an interlocutory appeal is warranted on the issue of the Receiver's standing to pursue the claims as alleged in the Complaint.

2. This Court Should Certify the Personal Jurisdiction Issue for Immediate Interlocutory Appeal

Rein Evans also moved to dismiss the Complaint on the ground that this Court lacks personal jurisdiction as Rein Evans does not have contacts with North Carolina. The issue of personal jurisdiction is a controlling question of law as to which there is substantial ground for a difference of opinion. See Army Times Publ'g Co. v. Watts, 730 F.2d 1398, 1398-99 (11th Cir. 1984). An immediate appeal from the Order denying the motion to dismiss would materially advance the ultimate termination of the litigation because if this Court does not have jurisdiction over Rein Evans, then the matter would be terminated as to Rein Evans, at least in this Court. See Koehler v. Bank of Bermuda, Ltd., 1995 U.S. Dist. LEXIS 18223, at *11 (S.D.N.Y. Dec. 8, 1995)(if circuit court finds district court lacks personal jurisdiction, matter then terminated). "[B]ecause the Court should not speak to any matter over which it lacks jurisdiction, the issue is controlling." APCC

Services, Inc. v. Sprint Communications Co., 297 F. Supp. 2d 101, 106 (D.C. 2003).

There is substantial ground for difference of opinion on the issue of personal jurisdiction over Rein Evans. The Complaint fails to show that Rein Evans has ever had any contact with the State of North Carolina. Furthermore, the Complaint fails to allege that Rein Evans conducts, or has ever conducted, commercial business of any kind whatsoever in North Carolina. "[A] court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute." Id. at 107. Failure to allege contacts with North Carolina along with the supposed interaction between 28 U.S.C. §§ 754 and 1692 leaves substantial grounds for dispute as to the Court's jurisdiction.

In its Order, the Court notes this very difference of opinion on jurisdiction in this case based upon Sections 754 and 1692. The Court specifically states that two cases "fly squarely in the face of" other authority. See August 12, 2005 Order, at p. 7 (comparing Stenger v. Leadenhall Bank & Trust Co., Ltd., 2004 WL 609795 (N.D. Ill. Mar. 19, 2004) and Stenger v. World Harvest Church, Inc., 2003 WL 22048047 (N.D. Ill. Aug. 29, 2003) with S.E.C. v. Bilzerian, 378 F.3d 1100 (D.C. Cir. 2004)). Furthermore, the Court states, "the issue has never

been expressly ruled on by the Fourth Circuit." See Order, at p. 8. As the Court makes clear, there is substantial ground for difference of opinion on the issue of personal jurisdiction.

An immediate appeal from the Court's Order would materially advance the ultimate termination of the litigation. As to immediate appeal of a court's order ruling on personal jurisdiction, one district court stated:

An immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed . . . Moreover, although plaintiffs argue correctly that they will be prejudiced by further delays, in the event that it is ultimately found that this Court lacks jurisdiction to litigate these cases, it would be far better for all concerned, including plaintiffs, to have these matters resolved now, as opposed to sometime in the distant future.

APCC Services, Inc., 297 F. Supp. 2d at 109 (citations omitted).

Here, a ruling that the Court lacks personal jurisdiction eliminates Rein Evans from this lawsuit, which would materially advance the ultimate termination of the litigation.

The Fourth Circuit Court of Appeals has held that interlocutory appeal may be taken on the issue of personal jurisdiction. ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 622 (4th Cir. 1997)(accepting on interlocutory appeal district court's denial of motion to dismiss on personal jurisdiction grounds). Moreover, circuit courts generally agree to hear appeals of motions concerning personal jurisdiction.

See Alexander & Alexander Services, Inc. v. Lloyd's Syndicate 317, 925 F.2d 44, 45 (2d Cir. 1991); Wilson v. Humphreys Ltd., 916 F.2d 1239, 1241 (7th Cir. 1990); Go-Video, Inc. v. Akai Electric Co., Ltd., 885 F.2d 1406, 1408 (9th Cir. 1989); Army Times Publ'g Co. v. Watts, 730 F.2d 1398, 1398-99 (11th Cir. 1984); DeMelo v. Woolsey Marine Indus., Inc., 677 F.2d 1030, 1031 (5th Cir. 1982). For all the reasons stated, the issue of personal jurisdiction in this case merits certification for immediate interlocutory appeal.

3. This Court Should Certify the Statute of Limitations Issue for Immediate Interlocutory Appeal

Rein Evans asserts that the statute of limitations in this case bars the Receiver's claims. Although the Order makes it clear that this Court disagrees with that assertion, whether the Receiver's claims are time-barred is a controlling question of law. See Williams v. Gen. Motors Corp., 393 F. Supp. 387, 396 (M.D.N.C. 1975). This Court recently held that the issue of whether a claim is time-barred is "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." United States ex rel. Wilson v. Graham Count Soil & Water Conservation Dist., 224 F. Supp. 2d 1042, 1051 (W.D.N.C. 2002) (certifying for interlocutory appeal whether proper statute of

limitations for retaliatory discharge claim under False Claims Act is three years or six years). Moreover, "[r]esolving this issue at this point in the litigation will potentially prevent duplicative litigation at a later date." Wilson, 224 F. Supp. 2d at 1051. An immediate appeal from the Order (denying Rein Evans's motion to dismiss Receiver's claim on time bar grounds) would materially advance the ultimate termination of the litigation. Accordingly, the motion for certification should be granted.

C. The Action in this Court Should be Stayed Pending Appeal

28 U.S.C. § 1292(b) provides in part: "...application for appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." Rein Evans moves this Court to stay the proceedings herein until such time as the Fourth Circuit Court of Appeals decides the request for an interlocutory appeal, and if granted, until such time as that court issues its mandate following the appeal. Staying the action in this Court while the interlocutory appeal is proceeding will conserve the time and resources of the parties and of the Court, in the event that the Fourth Circuit determines any of the issues on appeal in favor of Rein Evans.

CONCLUSION

For the reasons stated above, defendant Rein Evans respectfully requests that the Court amend the Court's Order entered August 12, 2005 denying Defendant Rein Evans's motion to dismiss. Rein Evans moves the Court to amend the Order to include certification for interlocutory appeal.

This the 29th day of August, 2005.

RAYBURN COOPER & DURHAM, P.A.

By: S/ David S. Melin
James B. Gatehouse
N.C. State Bar No. 22811
David S. Melin
N.C. State Bar No. 29350
Suite 1200, The Carillon
227 West Trade Street
Charlotte, NC 28202
(704) 334-0891

*Attorneys for Defendant Rein Evans
Sestanovich, L.L.P.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO AMEND ORDER TO INCLUDE CERTIFICATION FOR INTERLOCUTORY APPEAL AND TO STAY PROCEEDING PENDING APPEAL was served on this date upon the parties who have appeared in this action, postage prepaid, as follows:

Michael J. Quilling, Esq.
Quilling Selander Cumiskey Lownds
Bryan Tower
2001 Bryan Street, Suite 1800
Dallas, TX 75201

Marie Margarite Gueco Mercado Paquette
Grand Street Trust, Heartland Control Trust
and Future Control Trust
2701 Cartier Street
Calgary, Alberta, Canada T2T 3J5

This the 29th day of August, 2005.

S/ David S. Melin
David S. Melin