NO. 19-30705

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TROY LILLIE; LEAH FARR; KENNETH DOUGHTERY; CHARLES WHITE; MARTHA JEAN WITMER; ET AL.,
Plaintiffs-Appellants,

v.

OFFICE OF FINANCIAL INSTITUTIONS STATE OF LOUISIANA; SEI INVESTMENTS COMPANY; SEI PRIVATE TRUST COMPANY; CONTINENTAL CASUALTY COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON; INDIAN HARBOR INSURANCE COMPANY; NUTMEG INSURANCE COMPANY; ARCH INSURANCE COMPANY; ALLIED WORLD ASSURANCE COMPANY (U.S.), INCORPORATED,
Defendants-Appellees

On Appeal from the United States District Court
for the Middle District of Louisiana, Docket Nos. 3:13-CV-150-BAJ-EWD c/w
3:19-CV-138-BAJ-EWD

ORIGINAL REPLY BRIEF
BY APPELLANTS, TROY LILLIE, *ET AL.*

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Appellants, **TROY LILLIE, *ET AL.*** (collectively "Appellants", or "Plaintiffs"), present this Original Reply Brief to the Joint Appellees' Brief for SEI Investments Company, Inc., *et al*, filed on January 17, 2020.

I. SUMMARY JUDGMENT ON CONTROL PERSON LIABILITY

SEI attempts to transform this securities action to a breach of contract case, and argues the terms of the Contract[1] with the fraudster, Allen Stanford, inoculates it from securities liability. SEI attempts to have the Court disregard SEI's relationship with the Plaintiffs and SEI's regular interface with the Plaintiffs via reporting the SIB CD values to the IRS and Plaintiffs for ten years, which is the exact time period that the SIB CDs securities offering was occurring.

However, two sets of duties exist. First, contractual duties exist between SEI and Stanford Trust Company ("STC"). Second, duties are created under the securities law resulting from SEI's contractual obligations to communicate with the investors and IRS at the same time "the offer and sale of a security" was occurring which prevented SEI from disclosing "half-truths" to the Plaintiffs. SEI ignores the duties created by the securities law, which are independent of the Contract. Once SEI agreed to communicate with investors, SEI assumed a securities laws duty in favor of the Plaintiffs not to disclose material misleading information.

[1] The term "Contract" means the Service Agreement between SEI Investments Company, Inc. and Stanford Trust Company dated September 1, 1998. (ROA.34625-34656).

The district court set forth two separate elements to establish control person liability, namely (i) the "power to stop" the violation and (ii) the "power to direct the conduct constituting the violation," stating the following:

> "The argument [SEI's "monthly reporting of the values of the SIB[L] CDs"] is beside the point; the ***power to stop*** a securities-law violation is not the same as the ***power to direct the conduct constituting the violation***." (ROA.12622). (emphasis added).

SEI admits in its briefing that competent summary judgment evidence exists that it had the "power to halt" the violation.[2] As a result, SEI's brief focuses exclusively on the "conduct constituting the violation," arguing that, even though competent summary judgment evidence exists to show that it had the power to halt the transaction, no competent summary judgment evidence existed that SEI had the "power to direct the conduct constituting the violation."

SEI's arguments suffer from two fatal flaws in analyzing the "conduct constituting the violation." First, SEI ignores its role in communicating false information to the IRS and Plaintiffs for a ten year period as the "conduct constituting the violation" giving rise to control person liability. Second, SEI attempts to whitewash the district court's engrafting of the Second Circuit's "culpable participation" test into the ruling in this case in contradiction to this Court's well settled law that no culpable participation is required.

A. Power To Stop The Securities Violation

[2] "PL-p.___" refers to the original appellant brief of Plaintiffs. "SE-p._" refers to the original appellee brief of SEI.

The first issue in dispute is whether the "power to stop the securities violation" in this case creates control person liability when the alleged control person is responsible for and directly communicates with the investors. SEI concedes the point that the Plaintiffs have presented competent summary judgment evidence on the role SEI played in preparing STC's financial statements and reporting to the IRS and Plaintiffs from 1998 to 2009. Because SEI concedes that competent summary judgment evidence existed that this role with the Plaintiffs gave it the "power to halt" the violation, SEI repeatedly makes the argument that the power to "halt" the violation does in and of itself give rise to control person liability.

The district court erroneously held that the direct relationship between SEI and the Plaintiffs was "beside the point". Both *Friedman v. JP Morgan Chase & Co.*, 2016 WL 2903273, at *12 (S.D.N.Y. May 18, 2016) ("*JP Morgan*")[3], and *Solow v. Heard McElroy & Vestal, L.L.P.*, 44,042 (La.App. 2 Cir. 4/8/09, 20); 7 So.3d 1269, 1281 ("*Solow*"), hold that this relationship with the investors is not "beside the point." Control person liability is created by an alleged control person having a direct relationship with investors and "courts have looked to specific indicia of control over the securities violations such as …..participation in making false disclosures to investors." *JP Morgan* at *12. This same distinction was noted in

[3] SEI refers to the case of *Friedman v. JP Morgan Chase & Co.*, 2016 WL 2903273, at *12 (S.D.N.Y. May 18, 2016) as *Friedman* while Plaintiffs referred to it in the initial brief as *JP Morgan*.

Solow where the court held that no control person liability existed for the auditors because "HMV [the auditors] had no contact with Solow." *Solow v. Heard McElroy & Vestal, L.L.P.*, 44,042 (La.App. 2 Cir. 4/8/09, 20); 7 So.3d 1269, 1281.

B. <u>"Conduct Constituting The Violation"</u>

Because SEI concedes that Plaintiffs' competent summary judgment evidence shows that SEI had the power to stop the violation, it is forced to base its entire argument on the point that SEI must have the "power to direct the conduct constituting the violation." However, in doing so, SEI limits its definition of the conduct constituting the violation to the "offer, sale, or valuation of Stanford SIBs." (SE-p.2, p.29 ln.12; p.41 ln 5). SEI ignores the competent summary judgment evidence showing that the offering and sale to Plaintiffs of SIB CDs was ongoing for ten years while SEI sent monthly and quarterly reports to the Plaintiffs and IRS as required by the Contract. SEI's communication of valuations to the Plaintiffs was simultaneous with and continuous during the ten year SIB CDs offering. At a minimum, a question of fact exists as to whether SEI's simultaneous and continuous reporting of values to Plaintiffs and IRS at the time of the ongoing offering was participating in the sale and offer of the CDs. SEI ignores its continuous communication of inaccurate values of the SIB CDs to the Plaintiffs.

SEI and the district court claim that "conduct constituting the violation" is the preparation of the valuation reports. In contrast, the Plaintiffs have argued that the "conduct constituting the violation" would be the control of the communication process to the Plaintiffs that delivered false and misleading statements of value for the SIB CDs. Competent summary judgment evidence exists that SEI controlled the communications process with the IRS and Plaintiffs.

SEI specifically does not dispute in its brief the fact that it knew that an independent valuation on the pricing of the affiliate debt SIB CDs did not exist at any time for ten years while they were communicating with the unsophisticated IRA investors. SEI does not dispute the fact that it had significant expertise in valuation of non-marketable securities and understood the risk associated with valuations of affiliate debt where one affiliate owes money to another affiliate. SEI does not dispute the fact that STC was a small company and all of the trust's financial services, including reporting and financial operations, were performed by SEI.

SEI erroneously argues that because it had no duty to value the assets, it had the unconditional right to communicate false information to the Plaintiffs and IRS for ten years. SEI misreads the Contract, which provides that STC was to "obtain prices for the" SIB CDs securities and provide them to SEI Trust." (ROA.11668). It does not say that STC or Allen Stanford was allowed to perform the valuation. It does not say that no valuation was required to confirm the "price."

In other words, SEI argues that it is entitled to continue to report improper values on a quarterly basis to the Plaintiffs and IRS and deal in "untruths and half-truths" in furtherance of the Ponzi scheme. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 204, 66 S.Ct. 494, 503, 90 L.Ed. 614 (1946). The logic is flawed. There is a disconnect between no duty to value the assets, and SEI's having no duty to communicate accurate information to the investors and deal in "half-truths." The law is clear that "[E]ven absent a duty to speak, a party who discloses material facts in connection with securities transactions assumes a duty to speak fully and truthfully on those subjects." *In re K-tel Intern., Inc. Sec. Litig.*, 300 F.3d 881, 898 (8th Cir. 2002) (internal quotation marks and alteration omitted). In sum, "a defendant may not deal in half- truths." *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1317 (5th Cir. 1977) (emphasis added); *Rubinstein v. Collins*, 20 F.3d 160, 170 (5th Cir. 1994); *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 249 (5th Cir. 2009); *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1305 (11th Cir. 2011); *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239-40 (2d Cir. 2016); *Constr. Laborers Pension Tr. for S. California v. CBS Corp.*, 2020 WL 248729, at *10 (S.D.N.Y. Jan. 15, 2020).

SEI would have this Court endorse its argument that SEI can contract with a fraudster like Stanford, and, by agreement with the fraudster, limit its duties under the securities law to the Plaintiffs. If SEI's argument was accepted, it could continue, without penalty, to be complicit in the Ponzi scheme from 1998 to the closing date in 2009. It could for this ten year period make false statements to Plaintiffs on a monthly basis in the account statements it was communicating to investors, after preparing the statements based on SEI's accounting program, and have no duty to the Plaintiffs to present accurate information. However, the securities law does not allow SEI to be a joint violator with Stanford in providing false information to the investors and does not provide SEI the carte blanche right to distribute false information to Plaintiffs without obtaining an independent pricing report on the affiliate debt.

What is most insightful about SEI's brief is the fact that it requested the district court to use the wrong legal standard. Plaintiffs explain in detail in their brief that *JP Morgan* is based upon a "culpable participation" requirement. (PL-p.27-30). Further, Plaintiffs cite this Court's precedent that "culpable participation" is not an element of control person liability. After being confronted with this clear statement of the law after the district court, at SEI's suggestion, based their entire dismissal on this requirement, SEI is forced to retreat and state that it did not really promote such an argument. (SE-p.41). If so, SEI never told the district court that "culpable participation" is not required because the district court based its standard of conduct requirement solely on *JP Morgan*. SEI's halfhearted effort to convince this Court that the district court's reliance on *JP Morgan* is really not an application of the culpable participation standard is contrary to the express language in *JP Morgan*.

"The capacity to prevent the fraudulent conduct is, without more, insufficient to plead culpable participation in a scheme." *JP Morgan*, 2903273, at *12.

Despite SEI's attempt to explain and minimize its fatal error of not knowing the proper standard in the Fifth Circuit, the holding of *JP Morgan* could not be any more plain. The "capacity to prevent fraud" does not equal "culpable participation," which are the same arguments as made by SEI and adopted by the district court. In relying on the briefing of SEI, the district court held the same thing based upon *JP Morgan*, stating "The argument is beside the point; the power to stop a securities-law violation is not the same as the power to direct the conduct constituting the violation." (ROA.12622). SEI's argument that *JP Morgan* was not based upon the "culpable participation" requirement is contrary to the numerous references in the *JP Morgan* opinion. For example, the district court stated "To establish a prima facie case of control person liability, a plaintiff must show …*a culpable participant in the controlled person's fraud*." *Id.* at *10; "a plaintiff must allege some level of culpable participation at least approximating recklessness in the section 10(b) context." *Id.*;

" 'culpable participation' is an element of a Section 20(a) claim that must be pleaded with the same particularity as scienter" *Id.*; "[A] determination of [Section] 20(a) liability requires an individualized determination of …defendant's particular culpability." *Id.* at *11.

Because SEI now realizes its error in asking the district court to dismiss based upon the *JP Morgan* “culpable participation” standard, SEI attempts to resurrect its arguments by focusing on the Louisiana Second Circuit Court of Appeal opinion of *Solow* and two of the Madoff cases.[4]

SEI attempts to define the holding of *Solow* much broader than this Court did in *Heck*, where the Court stated the following:

> In *Solow*, the Louisiana Court of Appeals held that a CPA firm that served as a seller's auditor did not exercise control over the seller. The court found that the auditor’s power “to authorize the release of its [audit] opinion on [seller’s] financial statements” and “failure to ensure that its draft [audit] opinion was withdrawn from the ... 10–K filings” did not endow the CPA firm with the requisite “power to direct the management and policies” of the seller. *Id.* at 1281 (citing La. Rev. Stat. Ann. § 51:702(4)).

Heck v. Triche, 775 F.3d 265, 284–85 (5th Cir. 2014). *Heck* then goes on to distinguish the facts in *Solow* from the facts in the *Heck* case, stating:

> ***While this*** *[that a CPA firm that served as a seller's auditor did not exercise control over the seller]* ***is surely a correct interpretation*** of the control person statute, plaintiffs did not allege that Triche controlled Buhler in his capacity as the CPA for AIG. *Solow* has no bearing on the factual scenario presented at trial. Under any interpretation of the evidence, Triche's relationship with Buhler and involvement with AIG went far beyond the auditing services at issue in *Solow*.

[4] *Dusek v. JPMorgan Chase & Co.*, 132 F.Supp.3d 1330, 1351 (M.D. Fla. 2015); *In re Bernard L. Madoff Inv. Sec. LLC*, 739 Fed. Appx. 679, 686 (2d Cir. 2018).

Heck, 775 F.3d at 285. (emphasis added).

The *Heck* Court recognized that the holding of *Solow* is limited to the role the CPA firm played as auditor in a one-time offering based upon the one-time issuance of financial statements. To avoid this holding, SEI misinterprets *Heck* at page 45 of its brief and states that *Heck*'s "surely a correct interpretation" language confirms its suggested holding in that case that "power to halt the primary violation does not satisfy the requirement of control." (SE-p.45).

However, *Heck* does not say that and SEI's argument is another of its legal extrapolations and paraphrasing that is required to achieve an illogical result. SEI is not an auditor and SEI's bookkeeping, administrative functions, reporting to Plaintiffs and and reporting to the IRS went far beyond the auditing services at issue in *Solow*. In fact, *Heck* confirms that the services performed by independent non-issuers, based upon their relationship to the investors, may make the person a control person.

In addition, the court stated in *Solow*, "HMV [the auditors] had no contact with Solow". *Solow*, 7 So.3d at 1281. That is precisely the opposite set of facts that exists in this case where SEI was regularly reporting the fair market value of the SIB CDs to the Plaintiffs and the IRS. *Solow* and *JP Morgan* both recognize that the roles of communicating with investors is a role that creates control person liability. (*see* pg. 3 of this brief).

SEI also relies on several Madoff cases where commercial banks, who had knowledge of the fraud, were not required to "blow the whistle" and inform the investors. However, the facts of this case differ radically from the Madoff cases based upon the relationship that SEI continuously had with the Plaintiffs over a ten year period.

At multiple places in its brief (SE-p.3, 4, 29, 36), SEI argues that no control person liability exists because SEI was not a director or officer of STC nor did SEI own any shares of stock in STC. SEI ignores the specific provisions of the Louisiana Securities Act applicable to this case that factually give rise to control person liability. The Louisiana Securities Act does not limit a control person to a director, officer or shareholder. Rather, it also states that "[E]very person occupying a similar status or performing similar functions" as a general partner, executive officer, or director is a control person. La. R.S. 51:714(B). Further, the Act defines control as "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, ...***by contract, or otherwise***." La.R.S. 51:702(4). (emphasis added).

SEI's analysis is devoid of whether Plaintiffs presented competent summary judgment evidence that SEI was controlling the operation "by contract, or otherwise" or "occupying a similar status or performing similar functions" as a general partner, executive officer, or director. La.R.S. 51:714(B).

SEI never contests that competent summary judgment evidence existed to show SEI was the *de facto* trustee as shown by the SEI's sophistication in valuation of private equities, SEI's knowledge and understanding of the affiliate valuation risk, and SEI's performance of all of the financial and administrative operations for STC from 1998 to its closing in February 2009. This is shown by the district court's recently decided summary judgment in favor of SEI in the companion case of *Robert Ahders, et al. v. SEI Private Trust Co., et al.*, 2020 WL 411694, at *4 (M.D. La. Jan. 24, 2020), dismissing the claims of the persons who opted out of the *Lillie* class action. In this case, the district court confirmed further evidence that SEI was really the *de facto* trustee of STC. The district court acknowledged that STC was a small company that entirely outsourced its operations, that Messrs. Perry and Layfield were the only other trust officers at STC and that STC outsourced operations to a large trust company like SEI with a well-developed operations system and relied on SEI's expertise and sophistication to perform all operational responsibilities. This is precisely the reason questions of fact exist whether SEI was the *de facto* trustee of the IRAs that was controlling STC "by contract, or otherwise" or "occupying a similar status or performing similar functions" as a general partner, executive officer, or director. La.R.S. 51:714(B).

C. Other Arguments

1. SEI also argues that it has no liability because the Receiver, Ralph Janvey, never filed an adversary proceeding against it. SEI misrepresents the position of the Receiver in the Plaintiffs' claims against SEI. First, this is the only class action that has been certified in the MDL proceeding. Both the Receiver and the examiner filed an amicus brief in *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012) at the Fifth Circuit supporting the Plaintiffs' claims to bring a lawsuit against SEI under the Louisiana Securities Law. Second, this class is composed of approximately 900 investors who did business with STC. The Receiver makes distributions to 24,000 investors. Because of the difference in the potential claimants, a receivership claim against SEI was not suitable, because the benefits did not accrue to all of the 24,000 claimants, most of whom did not do business with STC and with whom SEI had no relationship.

2. Plaintiffs discuss in detail the reporting of asset values to the IRS and the preparation of the forms on behalf of the Plaintiffs. (PL-p.34). The form sent to the IRS by SEI is on behalf of the investor and any agreement as to its accuracy is controlled based upon its relationship with the investor and not Stanford. To state it another way, the investor is responsible for any misstatement to the IRS. Second, no agreement exists with anyone that SEI had no responsibility for the accuracy of the information filed on behalf of the investors with the IRS. SEI attempts to bury the

analysis by addressing it in one short paragraph in hopes this Court will not focus on the misrepresentation of values being made to the IRS by SEI on behalf of each Plaintiff. SEI's cavalier treatment of this issue is indicative of the fact that it has no response.

3. SEI filed a pleading in the MDL proceeding attaching the Contract and requested that Judge Godbey review the Contract and to dismiss the case based upon the terms of the Contract. (PL-p.48). He refused to rule this document solely defined the duty to the Plaintiffs under the securities law. SEI is not candid with the Court on the fact that it submitted the Contract to Judge Godbey in its motion to dismiss (*see* SE-p.15).

4. SEI argues that a disclosure was placed on the statement to the investors that exonerates SEI from liability. (SE-p.10). What SEI does not tell the Court is that the disclaimer was not included until the credit debacle had started in 2008. More importantly, language had existed on the statement that indicated the statement computed the fair market value of the SIB CD. Each account statement communicated by SEI had a section that reconciled the market value of the investor's account with a "Beginning Fair Market Value", "Changes in Fair Market Value" and "Ending Fair Market Value". (ROA.7472, 11772). Further, the account statement given to each investor defines "Market Value" as "the value of an asset as of the end of the period". (ROA.7476). SEI fails to inform the Court that the language it

discusses at page 10 of its brief was only inserted on the statement when the discovery of the Ponzi scheme was inevitable in a futile attempt to reduce its liability. It is more an admission of liability than a waiver of liability as suggested by SEI.[5]

II. RULE 56(d) MOTION FOR CONTINUANCE

The district court held that Plaintiffs' Rule 56(d) continuance request did not (i) identify subjects of their documents requests and depositions; (ii) identify the time frame that the documents could be obtained and reviewed and the depositions held; and (iii) show the required discovery would change the likely outcome. Essentially, the district court required that Plaintiffs put in place a full scheduling order, including the scheduling of depositions, for a complex $250 million case when no federal court had put such a scheduling order in place pursuant to Rule 16 and no discovery had yet occurred in the federal proceeding as a condition to the granting of the Rule 56(d) motion.

Unlike other cases where Rule 56(d) is an issue, no discovery had occurred in this case in federal court as of the date of the Rule 56(d) motion (other than the attempt to hold a 30(b)(6) deposition to obtain the name of the document custodians) and that is what makes the ruling of the district court in this case an abuse of discretion. Further, the subjects for document production and future depositions to

[5] When the 30(b)(6) witness was asked about this very question, he stated that he had made no inquiry. Entry 596 (ROA.14992).

establish the SEI/Investor relationship are set forth in detail in the Custodian Interrogatories. (ROA.12254; *see also* ROA.12460-12473).

The district court concluded that no discovery would change the outcome of its ruling. Given that the court essentially concluded that any evidence regarding the SEI/Investor relationship requested in the Plaintiffs' discovery request and depositions was "beside the point", and the only evidence of the scope of SEI's securities duty was the Contract between SEI and STC, it is not hard to see why the court concluded that the evidence of the SEI/Investor relationship would not change the results. The court essentially determined that subjects designated by the Plaintiffs for discovery to be irrelevant to the outcome of the case.

The district court held that the terms of Contract solely defined SEI's duties under the securities law even though the facts were uncontested that the alleged control person was communicating fair market values to the Plaintiffs during the ongoing offerings from 1998 to February 2009. The district court created reversible error when it determined that SEI's relationship with the Plaintiffs was "beside the point." The mistaken view that the Contract solely defined the duty under the securities law is the only rational explanation for why the court would ignore the discovery rights (seven items at pages PL-p.37-38) and determine that the detailed subjects in the discovery requests relating to the SEI/Investor relationship were not "germane" to any duty SEI would have under the securities law. *Int'l Shortstop, Inc* *v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) (see PL-p.39); *Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 868 (7th Cir. 2019).

Plaintiffs set forth in detail the testimony of the 30(b)(6) witness that was unbashfully not responsive to the questions of Plaintiffs. (ROA.14982-15003).[6] (See also a detailed narrative of what was not responded to at ROA.12265-12276). The court refused to make any analysis why the subjects of the 30(b)(6) deposition were not "germane" to the issue of control person or why SEI was not held accountable for this charade of a 30(b)(6) deposition. For example, there was no attempt by the 30(b)(6) witness to determine (i) the various Stanford relationships with SEI (Entry 634) (ROA.14997); or (ii) who at the executive or board level had knowledge of the Stanford relationship. (Entry 530) (ROA.14982); (Entry 536) (ROA.14983); (Entry 577, 581) (ROA.14989); (Entry 623) (ROA.14995). The witness made no inquiry as to the scope of documents included in the 2009 Documents or who were the SEI employees that were the custodians of those 2009 Documents prior to their collection by SEI. (Entry 529-534) (ROA.14982); (Entry 537) (ROA.14983). These deposition excerpts show that the state of discovery in this case was not the fault of the Plaintiffs. Rather, it was an active effort by SEI to stymie any meaningful discovery.

[6] ROA.14982-15003 details the numerous examples taken from the full deposition of the 30(b)(6) witness which show that SEI refused to provide a witness made appropriate inquiries as required by Rule 30. For complete deposition transcript see ROA.14769-14976.

The district court did not even address the uncontested fact that no discovery had occurred in the case since the time of the state class action certification prior to the filing of the Rule 56(d) motion or the fact that the same unresolved issues had existed since 2015 since the filing of the Initial Rule 26(f) Report. (ROA.28068-28101). The district court also did not address the fact that no Rule 16(b) Scheduling Order had ever been implemented despite repeated requests by Plaintiffs. Further, SEI offered no explanation as to why it did not produce the 2009 Documents despite repeated requests prior to the Rule 56(d) motion or the error created by the court when it ruled that Plaintiffs, and not SEI, had the burden to object to the lack of responses in the 30(b)(6) deposition prior to filing the Rule 56(d) motion and bring it to the attention of the court. Their silence is an admission of the error.

SEI has attempted to make this a breach of contract case and limit the facts considered by the court to the written terms of the Contract between it and STC. At every turn, SEI has refused to allow discovery “germane” to SEI/Investor relationships and the duties created by the securities law based upon the reporting function that SEI had to the Plaintiffs and IRS. However, that is contrary to the ruling of Judge Godbey which specifically rejected this argument by SEI, when it attached the Contract to the pleadings.

In its brief at page 15, SEI argues with a play on words that Judge Godbey made no ruling on whether the Contract was the only evidence that should be considered. SEI misleads this Court by not telling the "rest of the story," that SEI made the decision to file the Contract along with its motion to dismiss, in a desire to have it treated as a summary judgment and have Judge Godbey rule on it. It now desires to disown its pleadings that it filed with Judge Godbey. (PL-p.48). If Judge Godbey had thought the Contract was the only evidence, he would have dismissed the case.

The *Lillie* action representing 900 IRA account holder investors has been a ten year odyssey through state court, two federal courts, the Fifth Circuit, and the U.S. Supreme Court. This history of this case falls into four separate periods. Period One spans August 20, 2009, (ROA.391-437), when the Petition was filed in state court, through March 11, 2013 (ROA.81-90), the date SEI and the insurer transferred the state court class action to federal court that started a five year delay. Period Two is the time period triggered by the review by the Supreme Court of the United States of *Chadbourne & Parke LLP v. Troice,* 571 U.S. 377, 134 S.Ct. 1058, 188 L.Ed.2d. 88 (2014) on appeal from the March 19, 2012 decision of this Court, and rendering an opinion on February 26, 2014. Period Two also includes the addressing of multiple briefs filed by SEI at the federal court in the MDL as to why the case should not be certified as a class action and why the state court was wrong in granting the Class Action (ROA.12101), and the filing of multiple motions to dismiss the securities law claims at the MDL. (ROA.12119).

Period Three is triggered by the District Court's order recertifying the class action on May 2, 2016 (ROA.12101) to December 7, 2016 concluding the notice period made to the potential class members. Finally, Period Four commenced eight years after the original filing of the class action in August of 2009. No reasonable person could conclude that eight year delay was caused by anything other than the well-funded delay tactics of SEI and the insurers. Therefore, the focus is now on the time during Period Four which started January 1, 2017.

At page 37-38 of their brief, Plaintiffs list out the key factors as to why the Rule 56(d) motion should have been granted. They are largely uncontested and acquiesced to by SEI.

1. ***No depositions have been held since the state court class certification hearing that concluded on September 21, 2012, other than the 30(b)(6) deposition to determine document custodians.***

SEI does not contest this fact and the lower court does not address it in its ruling.

2. ***No discovery was made on the issue of control person liability in the state court proceeding because SEI objected to the subjects of the discovery.***

Plaintiffs set forth the specific ruling of the state court judge that establishes SEI stonewalled discovery and that no discovery was allowed on the duty created by control. (PL-p.12-13).

3. ***No scheduling order or discovery order under Rule 16(b) has ever been issued in the federal proceedings due to the case load in the MDL Proceeding.***

SEI does not contest this fact. Further, SEI never addresses what effect if any this should have on the Rule 56(d) motion. (PL-p.49).

4. ***No opportunity has existed since the state court proceeding to take any of the ten allowed depositions concerning the merits of the case because SEI refused to respond to the interrogatories to provide the names of the Custodians so the documents could be located and analyzed, and then used to determine appropriate deponents on the substantive issue of the SEI and STC relationship.***

SEI does not contest the fact that it refused to answer interrogatories and respond under oath through a verification as to who had personal knowledge of the relationship issues for purpose of determining the custodians for purpose of electronic searches. (ROA.12266-12277). (ROA.14982-15003).

5. ***SEI refused to describe or provide Plaintiffs access to the 2009 Documents that SEI had segregated in response to the SEC and DOJ prior to the summary judgment despite repeated requests and the requirements of the Rule 26 Initial Disclosures.***

At pages 15 to 16 of their brief, Plaintiffs set forth a chronology of their attempts to get an agreement with SEI to produce the 2009 Documents. Most interesting, SEI does not mention in its brief the non-production of the 2009 Documents, and by its silence, concedes in its response that Plaintiffs' version of the events concerning the 2009 Documents is correct.

6. ***Despite being a part of the MDL in Texas and working with the Receiver's counsel to discuss document review protocol and an order regarding same, the Receiver never granted the Parties access to Stanford's document that were in possession of the Receiver.***

SEI does not contest the fact. In fact, SEI objected to the transfer from the MDL to the Middle District of Louisiana because of the need of the MDL court to get it access to the Receiver Documents as a part of the required discovery in the case. (ROA.31700-31703). Now, SEI has taken the opposite position that the documents in the Receiver's possession were not required.

7. ***The 30(b)(6) witness designated by SEI failed to respond to who had personal knowledge of the facts surrounding the subjects precisely set forth in the Custodian Interrogatories and the Notice of 30(b)(6) deposition did not inquire about most subjects that were the subjects noticed for the deposition.***

The method of designating document custodians for purposes of electronic searches has never been reviewed by any appeals court and the status of this case offers a unique opportunity for this issue to be reviewed by a circuit court. SEI contends the custodians for electronic searches are designated by their choice of persons based upon the subjects they, in their sole discretion, deem relevant without being required to sign verifications required in discovery requests or tendering a knowledgeable 30(b)(6) witness. (Entry 534, 536) (ROA.14982).

So is it really reasonable for a district court to deny a Rule 56(d) motion when no depositions have been held because no document production has occurred or the electronic searches could not be initiated because the procedures for agreeing to the custodian of documents for the electronic search cannot be agreed upon? The answer to this is apparent. Plaintiffs are only entitled to ten depositions. Fed.R.Civ.P.

30(a)(2)(A)(i). Prudent management of the case by counsel dictates that no depositions be held (when the parties are limited to ten depositions) until document production is substantially complete so that the documents can be used in the depositions of the key persons with knowledge of the issues.

The district court erred in holding Plaintiffs responsible for not objecting to the failure of SEI to respond to the subjects in the 30(b)(6) notice. (ROA.14982-15003). However, applicable law dictates that SEI, and not the Plaintiffs, had the duty to object to the scope of the 30(b)(6) deposition that it desired not to answer, and SEI, and not Plaintiffs, should bear the consequences of not producing a witness that was prepared to answer. "When a Rule 30(b)(6) deposition notice references multiple topics, the party named in the deposition notice must either move for a protective order regarding each topic or designate a person to testify regarding each topic." *Talon Transaction Techs., Inc. v. Stoneeagle Servs., Inc.*, 2014 WL 6819846, at *2 (N.D. Tex. Dec. 4, 2014). (PL-p.43-44). This point of law is not contested by SEI. Further, SEI does not contest in its response that its witness did not make a search of who had personal knowledge of the issues raised in the notice of deposition. A review of the opposition and excerpts from the deposition, establish that SEI did not contest the fact that their 30(b)(6) witness was unprepared to answer the questions posed in the deposition as to who had personal knowledge of certain events set forth in the Custodian Interrogatories. (ROA.12266-12277). (ROA.14982-15003).

The Plaintiffs insisted that SEI respond to interrogatories under oath as to who had personal knowledge of the key issues of the relationship other than the persons designated in the suggested list by SEI. SEI refused to sign a verification, as required by the discovery rules, as to who on the executive board and board of directors had knowledge of the discovery issues. In fact, the person that verified the responses to these Interrogatories was not tendered as the 30(b)(6) witness. In addition, the 30(b)(6) witness tendered by SEI never talked to the person that verified the Custodian Interrogatories about her scope of inquiry. (Entry 613) (ROA.14994). Further, SEI filed its Summary Judgment the day after its 30(b)(6) witness refused to answer questions—nothing more than a planned scheme to avoid having to disclose personal knowledge of the key issues in the discovery requests and 30(b)(6) deposition.

SEI now argues that it cured the flaw that existed as of the filing date of the Rule 56(d) motion by dumping 700,000 documents on Plaintiffs in February of 2019---six months after the filing of the Rule 56(d) motion. This “dump” was made with no explanation as to what type of documents had been provided and what documents had been held back. Further, it was made on a rolling basis and the production was never completed. How can a motion to compel production be made as suggested by SEI, when the production is not completed because it is on a rolling basis, and SEI fails to state what it has not produced. The lack of diligence argument by not filing a motion to compel is without merit. The first question that would be asked by the court, before allowing the motion to compel, is whether the production has been completed. The production SEI made in the first quarter of 2019 is irrelevant to this case because it had not occurred as of the date of the Rule 56(d) motion and was not a part of the record in this case. In any event, SEI never completed the production, disclosed the number of documents that had not been produced or disclosed what the documents were responsive to and what documents were withheld, resulting in zero accountability for the scope of the production in which it decided what it would produce. Despite the argument of SEI, the number of documents produced has no correlation to the fact of whether it produced the key documents that would establish liability. No one knows except SEI and that is the problem.

CONCLUSION

SEI and its insurers have delayed this proceeding with all of the resources they can muster in hopes that the claims will disappear due to the demise of the elderly Plaintiffs. SEI and its insurers have completed a well-funded plan of filing extensive motions at every turn in three different courts and stonewalling discovery at each of these levels for ten years. The unfairness of the ruling of the district court in terminating this proceeding is apparent and Plaintiffs submit that it should be reversed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief has been served upon all counsel of record, who are CM/ECF participants electronically by filing in the Court's CM/ECF system on this 4th day of February, 2020 and by providing them a copy via electronic mail. I hereby further certify that on this 4th day of February, 2020, I have emailed the foregoing pleading, and notice of electronic filing to any non-CM/ECF participants.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6415 words as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 pt. Times New Roman.

Respectfully submitted by:

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