No. 15-3472

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee

v.

KEVIN TRUDEAU,
Defendant,

and

HOGAN MARREN BABBO & ROSE, LTD.,
FARUKI IRELAND & COX, P.L.L.,
Objectors-Appellants

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 1:03-cv-03904
Hon. Robert W. Gettleman, District Judge

SUPPLEMENTAL MEMORANDUM OF THE FEDERAL TRADE COMMISSION

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At oral argument in this matter, the panel asked counsel for both parties questions concerning two recent Supreme Court decisions. One, *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015), pertains to whether an order is final for purposes of appellate jurisdiction. The other, *Luis v. United States*, 136 S.Ct. 1083 (2016), concerns attorney's fees, which this case also involves. The Court subsequently entered an order on September 14, 2016, directing the parties to file supplemental memoranda addressing appellate jurisdiction (including whether the "order resolving the [receivership] fund is the one under appeal") and *Luis*. As set forth herein: (1) the Federal Trade Commission (FTC) continues to believe that the Court has jurisdiction, although the order on review was not the last order entered below; and (2) nothing in *Luis* alters the district court's discretion to give priority to redress of fraud victims over payment of the wrongdoer's legal fees from those funds.

DISCUSSION

1. Jurisdiction and *Bullard*

a. Post-judgment Orders in this Case. The panel asked counsel to provide information about what orders the district court entered and when it entered them, and whether any funds remain in the receivership. Here is the history:

In July 2015, the FTC asked the district court to approve a victim redress plan for all the Trudeau-controlled assets the Receiver had recovered. D.892-1 at

1.[1] Shortly thereafter, the Receiver sought permission to notify interested parties that it proposed to turn over all net receivership assets to the FTC. D.898. The Receiver anticipated those assets would be worth a little more than $8 million. *Id.* at 5. The Receiver anticipated that after any objections were resolved, it would provide a final accounting and a request to close the receivership. *Id.* at 1-2. Several parties, including appellants (D.912), objected to the distribution. In the October 7, 2015, order on appeal, the district court denied the objections and granted the FTC's motion. A1 (D.917).

The district court subsequently issued three more orders. Under the plan approved by the court in October, the Receiver was not slated to turn over any funds to the FTC until the final accounting had been completed. Later in October, however, the Receiver asked the court to approve an interim distribution of $4 million to accommodate the FTC's desire to expedite consumer redress. D.919. The court approved that request on November 4, 2015. D.925. Then, in late December 2015, the Receiver moved to close the receivership estate, including: (1) approval of a final accounting; (2) distribution of the remaining assets (about $4 million) to the FTC; (3) assignment to the FTC of any future royalty payments from Trudeau-related products and services; and (4) discharging the Receiver. D.936. In January 2016, Trudeau opposed the request to assign future royalty payments to the FTC. D.946. That month, the court approved an interim payment of fees and expenses to

[1] "D.xxx" refers to entries in the district court's docket; A[#] refers to pages in the Appellants' Short Appendix; "SA[#] refers to pages in the FTC's Supplemental Appendix filed pursuant to Circuit Rule 30(e).

the Receiver. D.941. In February 2016, in the last order issued below, the court granted the Receiver's December 2015 motion, closed the receivership, and discharged the Receiver. D.951, D.952. The Receiver then distributed to the FTC all the remaining money in the fund totaling a little more than $4 million.[2]

b. Appellate Jurisdiction. As explained at pages 3-4 of our Brief, 28 U.S.C. § 1291 grants this Court jurisdiction over the October 7 order.

First, an order that addresses all issues raised in a motion that initiates post-judgment proceedings is deemed final for purposes of Section 1291. *Solis v. Current Dev. Corp.*, 557 F.3d 772, 776 (7th Cir. 2009). The FTC's July 2015 motion and the Receiver's related motion were post-judgment motions, and the October 7 order resolved all issues raised in them. Subsequent orders entered by the district court do not alter the finality of the October 7 order because that order effectively "resolv[ed] the fund." At that point, only ministerial matters remained.

The recent decision in *Bullard v. Blue Hills Bank*, 135 S.Ct. 1686 (2015), does not dictate otherwise. There, the Supreme Court held (under special rules that apply in bankruptcy proceedings) that (1) the *denial* of a bankruptcy confirmation plan is not a final order because it does not fix legal obligations among the parties; and (2) the *confirmation* of a plan that disposes of objections is a final order because it alters the legal relationships among the parties. *Id.* at 1692-1693. Here, in the post-judgment context, the October 7 order is analogous to confirmation of a plan: it

[2] The Receiver subsequently received and is holding *de minimis* payments of royalty income (now worth approximately $1000). It will send to the FTC this income and any additional receipts of such income.

overruled the objections to the redress distribution plan, fixed the right of the FTC to receive all the net receivership assets, and denied other parties (such as the law firms here) the right to any of those assets. In the post-judgment context, that constitutes a final order.

Moreover, the October 7 order can be deemed a final appealable decision under section 1291 because it ended the Receiver's collection proceeding over Trudeau's assets and required the Receiver to transfer those assets to the FTC pursuant to the receivership order. On that theory, this Court held in *United States v. Antiques Ltd. P'ship,* 760 F.3d 668 (7th Cir. 2014), that a judgment concluding a receiver's collection proceeding is an appealable final judgment. *Id.* at 671. *Bullard* has no apparent bearing on that issue.

If the Court disagrees that the October 7 was a final order and determines that the February 23, 2016 order closing the receivership and discharging the Receiver was the final order, then this Court lacks jurisdiction over this appeal. The law firms did not appeal that final order, and the time to do so has long passed. The notice of appeal of the October 7 order cannot ripen into a timely appeal of a subsequent final order. *See Feldman v. Olin Corp.*, 692 F.3d 748, 758-59 (7th Cir. 2012).

Finally, 28 U.S.C. § 1292(a)(2) does not provide appellate jurisdiction. That section provides jurisdiction over interlocutory: "[1] orders appointing a receiver, [2] orders refusing to wind up a receivership, and [3] orders refusing to take steps to

accomplish the purposes for winding up a receivership." *Antiques Ltd. P'ship*, 760 F.3d at 672. The October 7 order plainly falls within none of these categories.

2. *Luis* Does Not Alter The District Court's Broad Equitable Discretion

It is established law in this Court that a district court sitting in equity has broad discretion to dispose of receivership assets. *See*, *e.g.*, *Duff v. Central Sleep Diag., LLC*, 801 F.3d 833, 841 (7th Cir. 2015) (citing *SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 332 (7th Cir. 2010)). At argument, the Court asked whether the Supreme Court's decision last term in *Luis v. United States*, 136 S.Ct. 1083 (2016), limited that discretion when it comes to requests that attorney's fees be paid from the receivership. *Luis* places no limits on the court's discretion here.

Luis involved a criminal defendant charged with health care fraud. Before trial, the government asked the district court to freeze the defendant's assets, some of which were the products of her alleged fraud and others of which were untainted by illegal derivation. *Id.* at 1087-88. The district court granted the request and barred the defendant from using her untainted assets to hire counsel of her choice. *Id*. at 1088.

The Supreme Court held that the freeze violated the defendant's Sixth Amendment right to counsel in a criminal trial. Under Supreme Court precedent, tainted assets that are traceable to a crime are effectively forfeited to the government at the time they are generated. *Id.* at 1090-92. But prior to a conviction, the government has no equivalent interest in assets that are not connected to a

crime. *Id*. at 1092-94. In that situation, the Court determined, the Sixth Amendment prohibits interference with a defendant's right to retain counsel.

Luis has no bearing here and does not constrain the district court's discretion for multiple reasons. Most obviously, as the Court acknowledged at argument, *Luis* was a criminal proceeding implicating a constitutional right to counsel. This civil case does not involve any such right; "the Sixth Amendment does not govern civil cases." *Turner v. Rogers,* 564 U.S. 431, 441-43 (2011). To the degree *Luis* discusses common law principles, it does so only in the criminal context, noting that the common law only allowed forfeiture of a defendant's property at the time of a criminal conviction. *Id.*, 136 S.Ct. at 1094.

Even apart from Sixth Amendment considerations absent here, *Luis* involved the *pretrial* use of untainted funds that the defendant lawfully possessed. In sharp contrast, this case involves post-trial funds that the district court had already found Trudeau controlled and had no right to possess. Eight years before its October 2015 order declining to pay Trudeau's company's lawyers out of funds intended for his victims, the district court had found Trudeau in contempt for violating the 2004 injunction, D.92, D.93; five years before the 2015 Order it had imposed a $37.6 million compensatory sanction for that contempt in 2010, D.372; and two years before the Order it had found Trudeau in contempt again for failing to pay those sanctions by hiding his assets through a complex web of corporate affiliates he controlled, including Website Solutions. D.728; SA116-125 (D.729, adopting D.713). By the time of the October 2015 Order, all of Trudeau's assets, up to the amount of

the contempt judgment, therefore were "tainted" at least in a civil sense, *i.e.*, money to which Trudeau had no right.

This is true regardless of the source of the net proceeds in the receivership fund turned over to the FTC. Trudeau (or lawyers representing his companies) should not be rewarded by his practice of hiding his significant wealth through myriad domestic and offshore entities (as the court found in its July 2013 contempt order) that rightfully belonged all along since 2007 to consumers injured by his violation of the 2004 injunction. Unlike the criminal defendant before trial and conviction, the law firms sought payment solely from funds that the district court found Trudeau controlled and owed his victims.

To put it differently, under the rubric of *Luis*, the money never belonged to Website Solutions (or Trudeau) as "innocent" funds. *See* 136 S.Ct at 1093. Rather, once the 2007 contempt judgment had been entered, Trudeau's money belonged to the FTC on behalf of consumers who had been injured by Trudeau's contemptuous conduct and were owed compensation. As the Supreme Court put it, this case involves "[t]he robber's loot [that] belongs to the victim, not the defendant." *See id.* at 1090*; see also FTC v. Liberty Supply Co.*, No. 4:15-CV-829, 2016 WL 4182726, at *3 n.2 (E.D. Texas Aug. 8, 2016) (distinguishing *Luis* to deny defendants' pretrial access to frozen funds to pay attorney fees in civil case, because *Luis* involved a criminal defendant's right to representation, defendants sought payment from receivership funds, and defendants had access to exempt funds).

Nothing in *Luis* suggests that it limits a district court's broad authority overseeing an equitable receivership in civil proceedings. There's no reason why a criminal case involving pretrial, untainted funds should have that effect.

CONCLUSION

For the reasons stated above and in the FTC's Brief, the order of the district court should be affirmed.

Respectfully submitted,

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September 28, 2016

CERTIFICATE OF COMPLIANCE

I certify the foregoing supplemental memorandum contains 1,970 words, excluding the parts of the memorandum listed in Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the Microsoft Word 2010 word processing program. I also certify that the foregoing memorandum 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) and Circuit Rule 32(b), because the memorandum has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Century Schoolbook type style.

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