



Richard Roper, in his capacity as the court-appointed Receiver for Millennium Bank, United Trust of Switzerland S.A., UT of S, LLC, Millennium Financial Group, William J. Wise d/b/a Sterling Administration, William J. Wise d/b/a/ Sterling Investment Services, and William J. Wise d/b/a Millennium Aviation, (the “Receiver”) files this Complaint against Millennium Bank Brokers David Jones, Robert Kelty, and Scott Christopher (the “Brokers”), and states:

## I. INTRODUCTION

1. This case arises out of, and is ancillary to, a lawsuit brought by the Securities and Exchange Commission (“SEC”) against Millennium Bank, United Trust of Switzerland S.A., UT of S, LLC, Millennium Financial Group, William J. Wise d/b/a Sterling Administration, William J. Wise d/b/a/ Sterling Investment Services, and William J. Wise d/b/a Millennium Aviation and others named above (collectively, the “SEC Defendants”) for claims related to a fraudulent investment scheme created, organized, and operated by William J. Wise and others. That lawsuit is styled *SEC v. Millennium Bank et al.*, No. 7:09-CV-050-0, and is pending in the United States District Court for the Northern District of Texas, Wichita Falls Division (“*SEC v. Millennium Bank, et al.*”). In *SEC v. Millennium Bank, et al.*, the SEC alleges, *inter alia*, that the SEC Defendants engaged in a Ponzi scheme that raised millions of dollars from unwitting investors through the sale of Certificates of Deposit that purported to offer guaranteed interest rates significantly higher than those being offered by domestic, insured financial institutions (the “Ponzi scheme”). The SEC’s complaint in *SEC v. Millennium Bank, et al.* describing the Ponzi scheme is in this Court’s record and is incorporated herein by reference. The Receiver’s investigation has established that at least \$100 million was raised from defrauded investors during the course of the scheme.

2. David Jones, Robert Kelty, and Scott Christopher, identified herein as the Ancillary Defendants or the “Brokers,” sold fraudulent certificates of deposit on behalf of the

SEC Defendants, and received “commissions” for the CDs they sold. The payment of commissions on fraudulent CDs amount to fraudulent transfers (“the Transfers”) because the Brokers exchanged no reasonably equivalent consideration for what they received. The Receiver brings this Complaint to rescind these Transfers because the funds used were those of innocent, unwitting investors in Millennium Bank’s fraudulent Ponzi scheme.

## II. PARTIES

3. Plaintiff Richard Roper was appointed as Receiver for the SEC Defendants by order of this Court signed March 25, 2009, and superseded by the Amended Orders Appointing Receiver entered on June 22, 2009, and December 2, 2010 (the “Receivership Orders”), which are in the Court’s record and incorporated herein by reference. The Receivership Order authorizes the Receiver to, *inter alia*:

institute such actions or proceedings to impose a constructive trust, obtain possession, and/or recover judgment with respect to persons or entities who received assets or records traceable to the Receivership Estate. All such actions shall be filed in this Court.

¶ 5(c), p. 4.

4. Defendant David Jones is an individual residing at 185 Threadneedle Drive, Madisonville, KY 42431. He may be served with process at that address.

5. Defendant Robert Kelty is an individual residing at 352 Milford Court, Newtown, PA 18940. He may be served with process at that address.

6. Defendant Scott Christopher is an individual residing at 33 Lighthouse Court, Napa, CA 94558. He may be served with process at that address.

## III. JURISDICTION AND VENUE

7. This Court has subject-matter jurisdiction over the matters raised by this lawsuit pursuant to 28 U.S.C. § 1367 because this action is ancillary to *SEC v. Millennium Bank, et al.*

*See Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 822 (6<sup>th</sup> Cir. 1981). Moreover, the money transferred to the Brokers as described herein constitutes a Receivership Asset, defined in the Receivership Order as “assets, monies, securities, properties, real and personal, tangible and intangible, of whatever kind and description, wherever located, and the legally recognized privileges (with regard to the entities) of the Defendants and Relief Defendants and all entities they own or control.” Receivership Order, ¶ 1, p. 2. This Court assumed exclusive jurisdiction through the Receivership Order, which expressly states that all actions or proceedings instituted by the Receiver related to Receivership Assets *shall* be filed in this Court. Receivership Order, at ¶ 5(c), p. 4.

8. Venue is proper in this Court because this action is ancillary to *SEC v. Millennium Bank, et al.*, and pursuant to 28 U.S.C §§ 754 and 1692, the Receiver may sue in the district in which he was appointed to enforce claims anywhere in the country. The Receivership Order also states that all actions or proceedings instituted by the Receiver related to Receivership Assets shall be filed in this Court. *See* Receivership Order at ¶ 5(c), p. 4.

#### **IV. FACTS AND PROCEDURAL BACKGROUND**

9. The Receiver relies on, and hereby incorporates by reference, the specific factual allegations made by the SEC in its complaint against the SEC Defendants.

10. From at least 2004, the SEC Defendants engaged in the Ponzi scheme, which included the sale of purported self-styled “certificates of deposit” and raised at least \$100 million from investors located primarily in the United States (the “Defrauded Investors”). The Court made a finding that the SEC Defendants were engaged in a Ponzi scheme in an evidentiary hearing which took place on July 9, 2009. Based on the work of his forensic accountants, the Receiver currently estimates that more than \$100 million was actually taken in from Defrauded Investors.

11. Millennium Bank was not a “bank” in the traditional sense. It conducted no ordinary banking operations. It did not regularly make loans. It did not make investments.

12. Upon information and belief, Kelty and Jones were paid commissions of 1% upon “investment” in a CD, and received another ½ % upon renewal. Christopher was compensated under a different model, which is detailed at length below. Each Broker received portions of investor funds for the sale of CDs from the Millennium Ponzi scheme.

13. The SEC Defendants did not keep financial records, and the Receiver has had to rely on bank records received by subpoena in order to reconstruct the transactions of the Defendant entities and determine how and where money was spent. However, these records are limited in that the recipients of certain transactions cannot be identified, whether due to illegibility or the fact that many payments out of the accounts were evidently made in cash or by cashier’s checks. Therefore, while the bank accounts provide a minimum amount which is known to have been paid directly by check to the Brokers, it is possible that they actually received more money that is not identifiable from the accounts.

14. The Receiver, during his investigation, seized three Millennium databases, which contained information on each purported investment in three different entities labeled in the databases as Sterling, UT of S, and Millennium Bank. While the Receiver believes (and has reported) that the databases significantly inflate the amount of unique cash actually placed with the SEC Defendants, it does not appear that this overstatement would affect the calculation of commissions detailed below. Even though the same money may have been re-invested and therefore counted twice within the databases, the Brokers would have received commissions on each investment, even if the same principal was used for each one.

15. David Jones worked as a broker for Millennium Bank and/or its sister entities, Sterling and United Trust of Switzerland. Upon information and belief, he sold the SEC Defendants' certificates of deposit to 347 investors beginning in 2004, and according to bank records subpoenaed by the Receiver, received at least \$624,153.79 in compensation for these sales.

16. Upon information and belief, Jones may have received additional monies not verifiable or evident from the bank records of the SEC Defendants at this time. The Millennium investor databases seized by the Receiver suggest that Jones was responsible for \$80,113,830.66 in investments, on which he would have received approximately \$801,138.31 in commissions.

17. Robert Kelty also worked as a broker for Millennium Bank and/or its sister entities, Sterling and United Trust of Switzerland. Upon information and belief, he sold the SEC Defendants' certificates of deposit to 389 investors since 2000, and according to bank records subpoenaed by the Receiver, received at least \$750,866.50 in compensation for these sales.

18. Upon information and belief, Jones may have received additional monies not verifiable or evident from the bank records of the SEC Defendants at this time. The Millennium investor databases seized by the Receiver suggest that Kelty was responsible for \$76,745,582.69 in investments, and would have received approximately \$767,455.83. in commission payments.

19. Scott Christopher also worked as a broker for Millennium Bank and/or its sister entities, Sterling and United Trust of Switzerland. He is the ex-husband of defendant Kristi Hoegel (f/k/a Kristi Christopher). Christopher sold the SEC Defendants' certificates of deposit to numerous investors, but dealt extensively with one investor in Texas, Robert Thomas. Bank records show that Christopher received \$6,322.50 from the SEC Defendants' accounts, but the Receiver believes that Christopher actually received far greater proceeds from the scheme.

20. Christopher worked directly and primarily with William Wise himself from 1999 until 2001, and Wise determined the formula by which Christopher received commissions. For a five-year CD, the Receiver understands that Scott received 2% of the amount invested on the date of deposit, 1.5% of the amount invested at the end of the first year, 1% of the amount invested at the end of the second year, .75% of the amount invested at the end of the third year, .5% of the amount invested at the end of the fourth year, and .25% of the amount invested at the end of the fifth year. Upon information and belief, Christopher received commissions on the investments of 95 investors. Using the formula devised by Wise and the investment information present in the SEC Defendants' investor databases, Christopher would have received at least \$500,000 in commission payments. While bank records do not substantiate amounts beyond \$6,322.50 paid directly to Christopher by check, it is likely that he received additional monies in cash and/or cashier's checks from Wise and/or other SEC Defendants.

21. When the commissions were paid, the assets of Millennium Bank were insufficient to fully reimburse all of the Defrauded Investors for the money each invested in the Ponzi scheme. Millennium Bank, through the other SEC Defendants, knew or should have known at the time of the Transfers that by making the Transfers, Millennium would be unable to fully reimburse the Defrauded Investors who had invested in the Ponzi scheme.

22. Millennium Bank made the Transfers in an attempt to prevent the Ponzi scheme from being discovered. Thus, Millennium Bank made the Transfers with actual intent to defraud the Defrauded Investors in the Ponzi scheme.

23. Whether any or all of the Brokers knew that Millennium Bank was a Ponzi scheme is not known. However, their knowledge of the fraud is immaterial to the claims herein,

as each Ancillary Defendant received funds supposedly in payment of commissions for what was ultimately a fraudulent investment product.

24. The Brokers' "services" in furtherance of the Ponzi scheme do not constitute reasonably equivalent value for the monies they received from the SEC Defendants because their efforts only served to extend the fraud and did not increase the net worth of Millennium Bank.

25. Upon information and belief, the Brokers made no serious inquiries as to the legitimacy of the product they were selling.

26. The SEC filed its complaint in the *SEC v. Millennium Bank, et al.* case on March 26, 2009, alleging that the SEC Defendants engaged in the Ponzi scheme.

27. The Court entered an agreed order on March 26, 2009, appointing Richard B. Roper as Receiver for the SEC Defendants, charging him with specific receivership powers and duties.

28. This Court found that the SEC Defendants engaged in a Ponzi scheme in a July 9, 2009 hearing.

29. Despite attempts by the SEC and the Receiver to collect Receivership Assets, there are currently insufficient funds to fully reimburse the Defrauded Investors.

30. As the Texas Supreme Court has provided, Section 145 of the Restatement (Second) Conflict of Laws governs choice-of-law disputes in tort actions. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex.1984). Under § 145, the local law of the state that has the "most significant relationship to the occurrence and the parties" will govern the claim. *Id.*; Restatement (Second) Conflict of Laws § 145(1) (1971). Because the conduct of the Ponzi scheme occurred across state borders, it may be difficult to pinpoint which state has the most significant relationship to the scheme. In this case, each of the defendants resided in different

states, and the investors they solicited and sold CDs to reside in states across the county. However, the operations of the SEC Defendants were based primarily in California, and that is the state with the most significant relationship to the Ponzi scheme as a whole. Therefore, California law should apply.

## V. CLAIMS

### COUNT ONE

#### ACTUAL FRAUDULENT TRANSFER CAL. CIV. CODE § 3439.04(a)(1)

31. The preceding paragraphs are hereby incorporated as if set forth fully herein.

32. A Ponzi scheme is, by its nature, a fraudulent enterprise. *See In re International Management Associates, LLC*, No. 09-MP-601, 2009 Bankr. Lexis 4240, \*8-9 (Bankr. N.D. Ga. Dec. 1, 2009). Transfers made in furtherance of such an enterprise are presumptively fraudulent. *Id; In re Christou*, No. 08-6405, 2009 WL 6498175, \*1 (Bankr. N.D. Ga. Sept. 29, 2009).

33. Millennium Bank transferred numerous commission payments to each of the Brokers. These Transfers were fraudulent as to Millennium Bank's creditors, including the other investors, pursuant to the Uniform Fraudulent Transfer Act, Cal. Civ. Code § 3439 *et seq.*

34. The claims of Millennium Bank's creditors, including the Defrauded Investors in the Ponzi scheme, arose before or within a reasonable time after the Transfers.

35. Millennium Bank made the Transfers with the actual intent to hinder, delay, or defraud its creditors, including the Defrauded Investors.<sup>1</sup>

36. Because the Brokers provided no reasonably equivalent value in exchange for the commission payments, they are not entitled to retain the funds. The "services" provided by the

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<sup>1</sup> Millennium Bank engaged in all relevant actions herein through its managers, members, and control persons; specifically the other SEC Defendants.

Brokers were no more than efforts that expanded the fraud, and they did not increase the net worth of Millennium Bank or any other entity. The services were premised on illegal contracts, and cannot serve as a basis for the Brokers to keep money that really belongs to the Defrauded Investors. *See Warfield v. Byron*, 436 F.3d 551, 560 (5<sup>th</sup> Cir. 2006); *Butler Aviation Int'l v. Whyte*, 6 F.3d 1119, 1127 (5<sup>th</sup> Cir. 1993); *Ramirez Rodriguez v. Dunson (In re Ramirez Rodriguez)*, 209 B.R. 424, 434 (Bankr. S.D.Tex. 1997); *Randy v. Edison Worldwide Capital (In re Randy)*, 189 B.R. 425, 438-39 (Bankr. N.D.Ill. 1995); *Dicello v. Jenkins (In re Int'l Loan Network, Inc.)*, 160 B.R. 1, 16 (Bankr. D.D.C. 1993)

37. Therefore, the Transfers should be avoided pursuant to Cal. Civ. Code § 3439.07(a)(1). Further, a judgment should be entered in favor of the Receiver and against each Broker for the amount of all commission payments he received pursuant to Cal. Civ. Code § 3439.08(b). These proceeds are directly traceable to the funds of Defrauded Investors.

## COUNT TWO

### CONSTRUCTIVE FRAUDULENT TRANSFER CAL. CIV. CODE § 3439.04(a)(2)

38. The preceding paragraphs are hereby incorporated as if set forth fully herein.

39. Without receiving reasonably equivalent value in exchange for the commission payments to the Brokers, Millennium Bank engaged in a transaction for which the remaining assets of Millennium Bank were unreasonably small in relation to its business.

40. Without receiving reasonably equivalent value in exchange for the commission payments, Millennium Bank intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due, including the claims of the Defrauded Investors.

41. Therefore, the Transfers to the Brokers described herein should be avoided pursuant to Cal. Civ. Code § 3439.07(a)(1). Further, judgments for these amounts should be entered in favor of the Receiver and against the Brokers, pursuant to Cal. Civ. Code § 3439.08(b).

### **COUNT THREE**

#### **UNJUST ENRICHMENT**

42. The preceding paragraphs are hereby incorporated as if set forth fully herein.

43. The Brokers were unjustly enriched by the commission payments they received, based on principles of justice, equity, and good conscience. The Transfers caused the Brokers to receive money that belonged to Defrauded Investors for no reasonably equivalent exchange. Because of the nature of the Ponzi scheme and the fact that Millennium Bank's assets are insufficient to fully repay all of its creditors, the Defrauded Investors will only receive a fraction of the amount of their investments back from Millennium. It would be fundamentally unfair to allow the Brokers to retain funds truly belonging to the Defrauded Investors while the Defrauded Investors stand to recover little to none of their original investments.

44. Moreover, the Ponzi scheme involved actual fraud and was the source of the commission payments made to the Brokers. The Transfers also involved actual fraud on the part of the SEC Defendants. As third-party beneficiaries who, combined, likely received millions of dollars through the SEC Defendants' fraud, the Brokers were unjustly enriched and are not entitled to retain that money.

45. The funds used for the commission payments are directly traceable to funds of the Defrauded Investors in the Ponzi scheme. As such, they constitute Receivership Assets and are impressed with a constructive trust and should be disgorged and paid to the Receiver for ultimate distribution equitably among all Defrauded Investors.

## COUNT FOUR

### CONSTRUCTIVE TRUST

46. The preceding paragraphs are hereby incorporated as if set forth fully herein.

47. Because the Transfers constitute fraudulent transfers under California law, and/or because the Brokers have been unjustly enriched by those Transfers, the funds used for the Transfers are impressed with a constructive trust and should be disgorged. *See* Cal. Civ. Code § 2224 (“One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”).

48. The Receiver has a superior equitable interest to recover the investor funds used to pay commissions and other amounts to the Brokers. Once the funds are recovered, it is anticipated that they will be distributed on a pro rata basis to the Defrauded Investors who lost money and to appropriate Millennium creditors. The Receiver alone is in a position to redistribute the limited funds available to the Receivership Estate, including those the Receiver should be awarded based on the transfer of commissions.

49. Pursuant to the principles of equity, the Receiver seeks the imposition of a constructive trust on the profits received by the Brokers as described herein, and the immediate turnover of such funds to the Receiver.

50. To the extent that the Brokers are unable to return the funds received, the Receiver seeks a money judgment against each of them in an amount equal to the payments they received from the SEC Defendants.

**VI. RELIEF REQUESTED**

THEREFORE, the Receiver requests that the Brokers be ordered to return the funds they received from the SEC Defendants to the Receivership Estate, and that judgment be entered against each Broker and in favor of the Receiver for the total amount transferred to each Broker. In the case that the funds were spent to acquire any real or personal property, the Receiver requests that a constructive trust be imposed upon the property, and an order that it must immediately be turned over to the Receiver. Further, the Receiver requests that it be granted any other relief, both special and general, to which it may be justly entitled.

Dated this 1st day of March, 2011.

Respectfully submitted,

**THOMPSON & KNIGHT, LLP**

/s/ Jennifer Ecklund

William L. Banowsky  
State Bar No. 01697125

Jennifer Ecklund  
State Bar No. 24045626

1722 Routh Street  
One Arts Plaza, Suite 1500  
Dallas, Texas 75201  
Tel. (214) 969-1700  
Fax (214) 969-1751

**COUNSEL TO THE RECEIVER, RICHARD B. ROPER**