

No. 17-4059

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

CHARLES D. SCOVILLE,

Defendant-Appellant, and

TRAFFIC MONSOON, LLC,

Defendant.

On Appeal from the United States District Court for the District of Utah
Case No. 2:16-cv-00832, Honorable Jill N. Parrish, Presiding

BRIEF OF RECEIVER PEGGY HUNT AS AMICUS CURIAE
IN SUPPORT OF APPELLEE AND AFFIRMANCE

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I. STATEMENT OF IDENTITY

Peggy Hunt (the “Receiver”) was appointed by the District Court “for the purpose of marshaling and preserving all assets of Traffic Monsoon, LLC and all assets of Charles D. Scoville that were obtained directly or indirectly from Traffic Monsoon.” Appellants’ App. 2112. The Receiver has been in control of Traffic Monsoon since July 2016, and currently holds over \$49 million that cannot be equitably distributed to the many thousands of Traffic Monsoon investors who lost money in this fraudulent enterprise until after this appeal is resolved.

The Receiver has a duty to the Court, to the receivership estate, and to Traffic Monsoon’s defrauded investors to protect the assets of the receivership estate. *See SEC v. Wing*, 599 F.3d 1189, 1197 (10th Cir. 2010) (“[I]n a case involving a Ponzi scheme, the interests of the Receiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors.”). Given her position as a custodian of the assets of Traffic Monsoon, she files this brief. The District Court recognized below that the Receiver should be heard, and authorized her to file a *Post-Hearing Statement* in those proceedings. Appellants’ App. 6-7 (D. Docket Nos. 57, 58, and 68).

The Receiver contacted both parties to the appeal seeking their consent for her to file this amicus brief. The Securities and Exchange Commission consented to the Receiver filing this amicus brief. Mr. Scoville responded that he may not

object to the Receiver filing an amicus brief depending on the content. To the extent that Mr. Scoville does not consent, the Receiver requested leave of the Court to file this brief. The Receiver files this amicus brief by leave of the Court.

II. STATEMENT OF AUTHORSHIP

This brief was authored by the Receiver and her counsel on behalf of the receivership estate. No parties or parties' counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person—other than the Receiver on behalf of the receivership estate as amicus curiae—contributed money that was intended to fund preparing or submitting this brief.

III. ARGUMENT

A. Traffic Monsoon is not properly a party to this appeal.

The *Notice of Appeal* names Traffic Monsoon as an Appellant. Appellants' App. 2118. Yet, Traffic Monsoon is not properly a party to this appeal. Only the Receiver has the authority to bring an appeal on behalf of Traffic Monsoon and she has not done so and, importantly, Traffic Monsoon was not represented as a movant below.

The Receiver has:

[A]ll powers, authorities, rights and privileges heretofore possessed by the officers, directors, [and] managers . . . of Traffic Monsoon, and any affiliated entities owned or controlled by Traffic Monsoon or Scoville (Receivership Defendants) under applicable law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of

a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1692, and Fed.R.Civ.P. 66.

Appellants' App. 2112-2113; *see also id.* at 515. Furthermore, the Receiver is endowed with the authority to "pursue and preserve" Traffic Monsoon's claims, and Traffic Monsoon's "directors, officers, managers, . . . attorneys and other agents . . . have no authority with respect to Traffic Monsoon's operations or assets, except to the extent as may hereafter be expressly granted by the Receiver." *Id.* at 2113. The Receiver did not authorize the filing of the *Notice of Appeal* on behalf of Traffic Monsoon and, therefore, Traffic Monsoon is not a proper party to this appeal.

Additionally, Traffic Monsoon is not properly a party to this appeal because it did not appear as a movant in the District Court, and Mr. Scoville admitted below that he was not acting on behalf of Traffic Monsoon. At the hearing on the *Motion for Preliminary Injunction* and *Motion to Set Aside the Receivership*, Mr. Scoville's counsel stated that "we only represent Mr. Scoville, so the motion we filed to set aside the receivership was only on his behalf. Traffic Monsoon is a defendant, but it's in the receivership, so we don't represent Traffic Monsoon as a defendant." *Id.* at 567. The District Court then responded, "That makes sense. I appreciate that clarification." *Id.* Given these representations to the District Court, Mr. Scoville could not cause Traffic Monsoon to file the *Notice of Appeal*. Accordingly, Traffic Monsoon is not properly a party to this appeal.

B. The District Court's conclusion that Traffic Monsoon operated as a Ponzi scheme should be affirmed.

The District Court correctly concluded that Traffic Monsoon was a Ponzi scheme.

The District Court cited the controlling legal standard in this Circuit for establishing a Ponzi scheme, and this standard is not contested by the parties. *See* Appellants' App. 2096-97, 2102; Appellants' Opening Br. 46-47; Appellee's Br. 24-25. On the whole, Mr. Scoville does not contest the District Court's extensive factual findings at Appellants' App. 2065-75, and summarized at Appellants' App. 2097-2102, in support of its conclusion that Traffic Monsoon operated as a Ponzi scheme. *See* Appellants' Opening Br. 14-20, 46-53. Indeed, Mr. Scoville does not point to any single material finding of fact made by the District Court in support of its Ponzi conclusion as being "clearly erroneous." *See id.* Mr. Scoville instead makes arguments which are without merit based on the law and the evidentiary record in this case. *See* Appellee's Br. at 8-18, 24-28.

The District Court certified this appeal in part because it perceived the "issue of whether Traffic Monsoon's particular business model constitutes a Ponzi scheme in light of the contingent nature of the promised returns appears to be an issue of first impression in this circuit." Appellants' App. 2107. The Receiver respectfully submits that the contingent nature of the return is irrelevant in this case because the District Court's uncontested factual findings show that Traffic

Monsoon had little or no “revenue-producing activity other than the continual raising of new funds.” *Mosier v. Callister, Nebeker & McCullough, P.C.*, 546 F.3d 1271, 1273 n.2 (10th Cir. 2008).

Traffic Monsoon paid those holding older AdPacks who sought returns with funds raised from the sale of newer AdPacks. The District Court expressly found that 98% of Traffic Monsoon’s revenue came from the sale of AdPack investments and that “over 98% of the revenue sharing distributed to qualified AdPack owners came from the sale of AdPacks.” Appellants’ App. 2071 at ¶ 21. Based on the fact that almost all of the revenue Traffic Monsoon shared was “generated by the sale of new AdPacks,” Traffic Monsoon is a Ponzi scheme under the agreed-upon and controlling definition. *Id.*

Mr. Scoville suggests that Traffic Monsoon “fully disclosed everything to its members” and it should not be viewed through the lens of a Ponzi scheme. Appellants’ Opening Br. 52. This argument is factually incorrect inasmuch as the District Court expressly found that Traffic Monsoon had not disclosed “everything” to its members, Appellants’ App. 2071 at ¶ 21, and in fact concluded that “[t]he deception at the heart of the Traffic Monsoon Ponzi scheme is that it concealed the fact that almost all of the returns from the AdPacks were derived from subsequent AdPack purchases.” *Id.* at 2100. Indeed, Traffic Monsoon’s representations to its members “falsely claim[ed] that the sale of AdPacks did not

constitute a Ponzi scheme [and] suggested that the returns were generated by business revenue rather than by other investments in AdPacks.” *Id.* The overwhelming evidence as summarized by the District Court—and not contested by Mr. Scoville—establishes Traffic Monsoon as a Ponzi scheme. Accordingly, the District Court’s Order should be affirmed.

IV. CONCLUSION

The Receiver has been in control of Traffic Monsoon since July 2016 and currently holds over \$49 million for the benefit of thousands of people who lost money by purchasing AdPacks from Traffic Monsoon. Based on her ongoing investigation, and consistent with her testimony in November 2016, the Receiver believes that Traffic Monsoon operated as a Ponzi scheme primarily because it paid returns to investors on matured AdPacks with money obtained from investors purchasing new AdPacks. Affirming the District Court’s Order is important in protecting the receivership estate and allowing the Receiver to propose a plan to the District Court providing for an equitable distribution of the funds held to those harmed by this fraudulent enterprise. For the foregoing reasons, the Order of the District Court should be affirmed.

Dated this 23rd day of October, 2017.

DORSEY & WHITNEY LLP

/s/ Peggy Hunt

Peggy Hunt

Michael F. Thomson

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Attorneys for Receiver Peggy Hunt

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type Style Requirements

I hereby certify under Fed. R. App. P. 32(g)(1) that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), this brief contains 1,416 words.

I hereby certify that 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 this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font.

Date: October 23, 2017

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify with respect to the foregoing:

- 1) All required privacy redactions have been made per 10th Cir. R. 25.5.
- 2) The paper copies submitted to the Court are exact copies of the ECF filing.
- 3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, McAfee Agent, Version 5.0.4.470, last updated October 23, 2017, and according to the program are free of viruses.

Date: October 23, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2017, I electronically filed the foregoing **BRIEF OF RECEIVER PEGGY HUNT AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE** with the Clerk of the Court of the United States Court of Appeals for the Tenth Circuit using the court's CM/ECF system that will send a notice of electronic filing to the CM/ECF participants listed immediately below:

- Amy J. Oliver
- William K. Shirey
- Daniel J. Wadley
- D. Loren Washburn
- Micah S. Echols
- John E. Durkin
- Michael F. Thomson
- Peggy Hunt

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Peggy Hunt