No. 18-10514-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In re: SMF ENERGY CORPORATION, et al.

Debtors.

Bankr. Case No. 0:12-bk-19084-RBR
Adv. Proc. No. 0:14-ap-01162-RBR

SONEET R. KAPILA, LIQUIDATING TRUSTEE
OF SMF ENERGY LIQUIDATING TRUST,

Appellant,

v.

GRANT THORNTON LLP,

Appellee.

On Appeal from the United States District Court for
the Southern District of Florida, Case No. 0:14-cv-61194-RNS

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AND FLORIDA JUSTICE REFORM INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF GRANT THORNTON LLP AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1 to -3, *Amici Curiae*, American Tort Reform Association and Florida Justice Reform Institute, certify that the following persons or entities have an interest in the outcome of this appeal, indicating only those persons or entities not already identified in briefs previously filed in this case:

1. American Tort Reform Association, *Amicus Curiae*

2. Florida Justice Reform Institute, *Amicus Curiae*

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Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae*, American Tort Reform Association and Florida Justice Reform Institute, certify that they have no parent corporations and have issued no stock.

/s/ Cary Silverman
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STATEMENT OF THE ISSUE ADDRESSED BY *AMICI CURIAE*

Whether the district court properly ruled that the *in pari delicto* defense precludes a corporation that has acknowledged its fraudulent conduct to, through a bankruptcy trustee acting on the corporation's behalf, assert tort claims against third parties such as professional services companies alleging that they failed to detect or take sufficient action to prevent the company's own wrongdoing.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Tort Reform Association (ATRA), founded in 1986, is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance and predictability in civil litigation. For more than two decades, ATRA has filed *amicus curiae* briefs in cases that have addressed important civil justice issues.

The Florida Justice Reform Institute (the "Institute") is Florida's leading organization of concerned citizens, business owners, business leaders, and lawyers, who are working toward the common goal of promoting predictability and personal responsibility in Florida's civil justice system and promoting fair and equitable legal practices.

ATRA and the Institute are concerned that if this Court accepts the Liquidating Trustee's arguments and reverses the district court's ruling, its decision will be viewed as declaring open season for lawsuits against professional

service providers linked to businesses that file for bankruptcy as a result of allegations of fraud or other misconduct. Such an outcome may weaken the *in pari delicto* doctrine, which serves as a sound constraint on litigation, in other contexts.

STATEMENT OF AUTHORITY TO FILE

Amici have prepared this brief in support of the Appellee-Defendant Grant Thornton LLP and affirmance of the district court's decision. This brief accompanies a Motion for Leave to Participate as *Amici Curiae*, in which ATRA and the Institute seek this Court's permission to file the brief.

No party's counsel authored the brief in whole or in part. Nor did any party's counsel contribute money intended to fund preparing or submitting the brief. No person—other than the *amici curiae*, their members, or their counsel—contributed money intended to fund preparing or submitting the brief.

INTRODUCTION & SUMMARY OF ARGUMENT

The Liquidating Trustee's appeal invites this Court to authorize debtors, after filing for bankruptcy as a result of fraud or other improper conduct, to pursue lawsuits alleging that professional service providers failed to prevent the debtor's own wrongdoing. The district court properly ruled that the *in pari delicto* defense precludes this type of litigation. The alternative would encourage trustees, standing in the shoes of a debtor, to target third parties viewed as deep pockets—accounting firms, law firms, financial institutions and advisors, and others—after a bankruptcy

filing. The resulting lawsuits are likely to cast a broad net, alleging that third parties played a role in a bankrupt entity's misconduct because they failed to detect, report, prevent, or stop what occurred.

This type of blame-shifting by intentional wrongdoers onto potentially negligent secondary actors is precisely why the *in pari delicto* defense developed. It should apply here, where SMF Energy, which provided mobile fuel services to companies that had fleets of vehicles, charged customers for fuel that they did not actually receive. While the company has acknowledged systematically overbilling customers, its trustee is seeking damages from Grant Thornton LLP by claiming the accounting firm should have detected and disclosed to SMF Energy its own improper practices. When a plaintiff's responsibility for wrongdoing is at least equal or, as here, "far outweigh[s]" the person or business it has sued, (Slip Op., D. Ct., Feb. 9, 2018, at 6), the *in pari delicto* doctrine demands dismissal. This Court should affirm the district court's ruling.

ARGUMENT

I. THE *IN PARI DELICTO* DOCTRINE PROTECTS COURTS AND THIRD PARTIES FROM LAWSUITS THAT STEM FROM A PLAINTIFF'S WRONGDOING

The *in pari delicto* doctrine is deeply rooted in public policy principles that constrain litigation of dubious social value. Weakening this longstanding defense

will encourage lawsuits in which the plaintiff has engaged in the very wrongdoing for which he or she seeks judicial relief.

The doctrine is grounded in the principle that courts should not aid a plaintiff who brings an action arising out of its own fraud. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 n.12, 105 S. Ct. 2622, 2626-27 (1985) (citing *Austin's Adm'x v. Winston's Ex'x*, 11 Va. 33, 47 (1806) ("He who comes here for relief must draw his justice from pure fountains.")). It traces back to English courts, which applied the doctrine "not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." *Id.* (quoting *Holman v. Johnson*, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K.B.1775)).

American courts have long applied the *in pari delicto* doctrine to deny relief to those who seek to recover for their own wrongdoing. *See* John W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. Pa. L. Rev. 261, 274 (1947). As the Florida Supreme Court recognized nearly a century ago, "Th[e] doctrine is an inevitable result from the universal rule of our law that one in a court of justice cannot complain of his own wrong, or of another's wrong whereof he was a partaker." *Hall v. Hall*, 112 So. 622 628 (Fla. 1927).

The doctrine continues to apply today to bar claims where the plaintiff's wrongdoing is equal or greater than the person or entity it has sued. *See Earth*

Trades, Inc. v. T&G Corp., 108 So.3d 580, 583 (Fla. 2013). As this Court has recognized:

> A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two—fraud and negligence—negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter.

Banco Nacional de la Vivienda v. Cooper, 680 F.2d 727, 730 (11th Cir. 1982) (quoting *Besett v. Basnett*, 389 So.2d 995, 998 (Fla. 1980)). For this reason, courts observe that "a participant in the fraud cannot also be a victim entitled to recover damages. . . ." *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 454 (7th Cir. 1982).

Courts apply the *in pari delicto* doctrine to dismiss lawsuits stemming from a wide range of plaintiff misconduct, protecting the judicial system from unworthy claims. For example, courts have relied on the doctrine to dismiss requests for relief stemming from plaintiffs who participated in submitting fictitious evidence to a court,[1] committed perjury,[2] and engaged in securities fraud.[3]

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[1] *See Hall*, 112 So. at 629 (denying plaintiff's request to set aside a divorce decree after she and her husband colluded to submit fictitious evidence to court).

[2] *See Turner v. Anderson*, 704 So.2d 748, 751 (Fla. 4th DCA 1998) (affirming summary judgment for defendants when plaintiff who committed perjury in a securities arbitration action brought a legal malpractice claim alleging his attorneys advised him to do so).

The history of *in pari delicto* demonstrates the doctrine's utility in sanctioning plaintiffs who commit fraud upon the courts and denying plaintiffs the ability to profit from their own misconduct. It is the latter principle that is under attack in the case before this Court – an attack that, if successful, would create a safety net for plaintiffs to engage in wrongdoing under an assurance that, if caught, they can seek recovery from companies that advised or provided services related to the conduct or transactions at issue.

II. BANKRUPTCY TRUSTEES SHOULD NOT BE PERMITTED TO SHIFT LOSSES RESULTING FROM THE DEBTOR'S OWN MISCONDUCT TO PROFESSIONAL SERVICE PROVIDERS

In the bankruptcy context, the *in pari delicto* doctrine does not permit a debtor to point the finger at third parties in an attempt to recover for its own misconduct, reserving such actions for creditors who are harmed. In doing so, the doctrine serves as an important check on speculative, unsound litigation that might otherwise follow a corporate bankruptcy.

The defense applies in cases in which a business that has engaged in misconduct files for bankruptcy protection after its actions are discovered, and then, through its bankruptcy trustee, files lawsuits against others alleging they failed to earlier detect, report, prevent, or stop its own misconduct. *See Official*

[3] *See Ross v. Bolton*, 904 F.2d 819, 824-25 (2d Cir. 1990) (dismissing claim against clearing agent brought by plaintiff who participated in fraudulent scheme).

Committee of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1150-51 (11th Cir. 2006) (finding sister circuits have "unanimously concluded that *in pari delicto* applies with equal force to a trustee-in-bankruptcy as a debtor outside of bankruptcy).

Allowing a trustee to recover benefits the corporation's stockholders, which includes the corrupt corporate officers themselves. *Cenco*, 686 F.2d at 455. There are exceptions to this doctrine, but they do not apply where the acts involved were calculated to benefit the corporation.[4] *See Seidman & Seidman v. Gee*, 625 So.2d 1, 3 (Fla. 3d DCA 1992) ("Where it is shown, without dispute, that a corporate officer's fraud intended to and did benefit the corporation, to the detriment of outsiders, the fraud is imputed to the corporation and is an absolute defense to the corporation's action against its accounting firm for negligent failure to discover the fraud.").

[4] Courts have carved out from the defense, for example, instances in which a corporate insider's misconduct benefited only himself or a third party. This narrow "adverse interest" exception may apply in cases of theft, looting, or embezzlement. *See, e.g.*, *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 952 (N.Y. 2010). It includes actions where a corporate actor "totally abandoned" the interests of the corporation. *See id.*; *see also Cenco*, 686 F.2d at 456 ("Fraud on behalf of the corporation is not the same thing as fraud against it."). The exception does not apply where an action, such as overcharging customers, is calculated to benefit the business, and is therefore imputed to it, as the district court properly found. *See* Slip Op. at 4-5.

While some courts have allowed trustees to bring claims against professional service providers alleging a failure to prevent fraud or other misconduct despite the doctrine, these decisions are rooted in a fundamental misunderstanding of the role of a bankruptcy trustee. Federal law establishes this role by authorizing trustees to pursue the legal or equitable interests of the debtor on behalf of the debtor's estate. *See* 11 U.S.C § 541(a) ("Such estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case.").

A bankruptcy trustee acts as the debtor's representative, standing in the shoes of the corporation. *Edwards*, 437 F.3d at 1150. "[T]here is no suggestion in the text of the Bankruptcy Code that the trustee acquires rights and interests greater than those of the debtor." *Id*. (quoting *O'Halloran v. First Nat'l Bank of Fla*., 350 F.3d 1197, 1202 (11th Cir. 2003)). As this Court and others have recognized, "[i]f a claim of [the debtor] would have been subject to the defense of *in pari delicto* at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense." *Id*.[5]

A trustee does not sue third parties on behalf of innocent creditors or victims of fraud. *See id.* at 1150-51. The trustee is empowered "only to assert claims held

[5] *Accord Unsecured Creditors v. R.F. Lafferty & Co*., 267 F.3d 340, 356-58 (3d Cir. 2001); *In re Hedged-Investments Assocs*., 84 F.3d 1281, 1285 (10th Cir. 1996); *see also Baena v. KPMG*, 453 F.3d 1, 6-8 (1st Cir. 2006) (dismissing claim on basis that the wrongdoing of the corporation was imputed to trustee as a matter of state agency law).

by the bankrupt corporation itself." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 117 (2d Cir. 1991) (citing *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434, 92 S. Ct. 1678, 1688 (1972)). A "claim against a third party for defrauding a corporation with the cooperation of management accrues to the creditors, not to the guilty corporation." *Id.* at 120. It is unsound public policy to allow those who have unlawfully collected money to seek resources from others. *See Edwards*, 437 F.3d at 1155; *see also Cenco*, 686 F.2d at 455 (finding a judgment for the trustee benefits the corporation's stockholders and "would be perverse from the standpoint of compensating the victims of wrongdoing").

While bankruptcy trustees may argue that their lawsuits serve public policy by compensating the innocent and deterring professional negligence, the law already provides for compensation and deterrence independent of the trustee. The *in pari delicto* doctrine neither excuses auditors or other professional service providers from wrongdoing nor leaves creditors unprotected. *Peterson v. McGladrey LLP*, 792 F.3d 785, 788 (7th Cir. 2015). As the Seventh Circuit recognized, "The Trustee stepped into the shoes of the Funds, not the shoes of the investors. People who put up money have their own claims." *Id.*

Further, there is no guarantee that money recovered by the trustee will compensate innocent creditors in proportion to their losses. If creditors decide to bring claims independently of the trustee, they "would not risk dilution through

apportionment to senior creditors or unharmed creditors of equal priority." *Edwards*, 437 F.3d at 1151. The law should continue to allow creditors to "make their own assessment of the respective advantages and disadvantages, not only of litigation, but various theories of litigation." *Caplin*, 406 U.S. at 431, 92 S. Ct. at 1678.

In the absence of the *in pari delicto* doctrine, the law would "permit corporations to shift responsibility for their own agent's misconduct to third parties." *Kirschner*, 938 N.E.2d at 958. In rejecting this invitation, the New York Court of Appeals questioned, "why should the interests of innocent stakeholders of corporate fraudsters trump those of innocent stakeholders of the outside professionals who are defendants in these cases?" *Id*. at 958-59.

Weakening the *in pari delicto* defense is not supported by fairness or deterrence. Rather, the approach urged by Plaintiffs seeks to make professional firms the insurers of investors who lose money because of management wrongdoing. *See* Andrew Morris, Expert Analysis, *Why Continuing Attacks on In Pari Delicto Will Fail*, Law360, Sept. 11, 2013, https://www.law360.com/articles/471836/. Some characterize this as a new form of discredited "enterprise liability," which disregards core principles of law in an attempt to spread shareholder losses to solvent third parties—professional firms that are viewed as having deep pockets. *See id.*

III. A WEAKENED DOCTRINE WILL LEAD TO A PROLIFERATION OF LAWSUITS FOLLOWING BANKRUPTCIES AGAINST ACCOUNTANTS, FINANCIAL CONSULTANTS, LAWYERS, AND OTHERS VIEWED AS DEEP POCKETS

The *in pari delicto* defense is not limited to claims brought by bankruptcy trustees against accounting firms alleging negligence in their auditing responsibilities. The doctrine's far broader application and the Trustee's proposed reformulation of the defense may spark a wider range of lawsuits targeting professional service firms and others viewed as deep pockets. This Court should preserve the doctrine as a vital check on litigation.

Practitioners have observed "a flurry of litigation commenced by equity receivers appointed by the federal courts and trustees in bankruptcy proceedings against professionals, such as attorneys, accountants and brokers, or financial institutions" making such claims. Jerome Selvers, *The In Pari Delicto Defense*, 297 N.J. Law. 60 (Dec. 2015); *see, e.g.*, *Kirschner*, 938 N.E.2d at 946 (indicating trustee alleged that investment banks, law firm, accounting firms, and several customers either participated in brokerage and clearing service's financial fraud or neglected to discover it). These third parties "are appealing targets because they tend to have more resources than the now-bankrupt corporation and therefore more likely able to pay damage awards." Samuel C. Wasserman, Note, *Can the Trustee Recover? Imputation of Fraud to Bankruptcy Trustees in Suits Against Third-Party Service Providers*, 77 Fordham L. Rev. 365, 367 (2008).

While, as in the case before this Court, accounting firms that audited the bankrupt company are a prime target, financial institutions are also frequently subject to claims alleging that since they maintained the funds of the wrongdoer, they knew or should have suspected that it was engaged in improper or illegal activity. *See, e.g.*, *Edwards*, 437 F.3d at 1148 (holders of individual retirement accounts); *O'Halloran*, 350 F.3d at 1204-05 (bank). A "primary culprit" of a fraud, through its trustee, however, cannot sue anyone to recover for a scheme it perpetrated. *O'Halloran*, 350 F.3d at 1203-04 (finding the claim "fruitless").

For example, after the greatest Ponzi scheme in history, the trustee for Bernard Madoff's brokerage firm took a shotgun approach, filing claims against numerous financial firms and individuals affiliated with those firms. *See In re Bernard L. Madoff Investment Securities LLC*, 721 F.3d 54, 57-58 (2d Cir. 2013). The lawsuits sought to require financial institutions that provided services to Madoff's firm to pay billions of dollars Madoff had stolen following his firm's bankruptcy by alleging they were complicit, ignoring warning signs and failing to put an end to the fraud. *See id.* at 62. The Second Circuit ruled that the *in pari delicto* doctrine barred such claims. *See id.* at 63-65.

As noted, law firms are among the types of professional services sued following a bankruptcy. *See* Anthony Lin, *Bankruptcy Trustee Suits Cause Increasing Concern*, N.Y.L.J., Nov. 26, 2007, at 1, https://www.law.com/

newyorklawjournal/almID/900005496598/ (reporting "bankruptcy trustee suits have largely replaced shareholder class actions in the nightmares of law firm managing partners"). For example, the Second Circuit recently affirmed a district court decision that applied the *in pari delicto* doctrine to dismiss claims brought by liquidators of investment funds against DLA Piper. These claims even failed to allege sufficient facts to show the law firm knew of a fund manager's fraudulent transfer of assets. *See In re: ICP Strategic Credit Income Fund, Ltd. v. DLA Piper L.L.P.*, -- Fed. Appx. --, 2018 WL 1902400, at *3 (2d Cir. Apr. 23, 2018) (summary order). Likewise, the doctrine precluded a trustee for an auto loan company that engaged in "duplicitous bookkeeping" and failed to register its promissory notes as securities despite legal advice to do so from asserting that Holland & Knight failed to keep the firm from violating securities laws. *See In re Inofin Inc.*, 219 F. Supp. 3d 265, 272-74 (D. Mass. 2016)*; see also Uecker v. Zentil*, 198 Cal. Rptr. 3d 620, 623-26 (Cal. Ct. App. 2016), as modified (Feb. 5, 2016) (affirming dismissal of claim by trustee alleging former attorney of bankrupt real estate investment company knew of managers' fraud).

In these cases, the professional service provider may be an innocent victim of the client's deception, may have negligently failed to detect the fraud or other misconduct, or may have had some knowledge of the misconduct. What is clear, however, is that the service provider was far less culpable than the company

behind the fraud. In such instances, applying the *in pari delicto* defense to preclude the trustee for that corporation from targeting third parties for its own misconduct is sound policy.

Finally, the outcome of this appeal may have ramifications for application of the *in pari delicto* doctrine beyond the bankruptcy context. The Trustee seeks to limit application of the doctrine to instances in which a wrongdoer and the person or entity sued engaged in precisely the same course of conduct. Appellant's Initial Br. at 46-49. The district court properly rejected this invitation to narrow the defense from its traditional application. *See* Order on Motion for Reconsideration, Aug. 23, 2017, at 2 (ECF No. 41).

Under the Trustee's reasoning, a law firm, accounting firm, or bank cannot raise the defense because that entity provided auditing, legal, or financial services—it did not itself engage in fraud. The doctrine, however, applies where the parties "participate in the same wrongdoing," which the Florida Supreme Court has explained as applying when the primary wrongdoer alleges another party played a role in the illegal act. *See Earth Trades*, 108 So. 3d at 583 (finding doctrine applies when two parties are "concurring in an illegal act" and the plaintiff "bore at least substantially equivalent responsibility"). As a district court in this Circuit recently recognized, the *in pari delicto* doctrine "focuse[s] on wrongful acts that resulted in the same eventual harm, not requiring that those wrongful acts be

identical in nature or coordinated toward that harm." *In re Palm Beach Fin. Partners, L.P.*, No. 09-36379-EPK, 2018 WL 1916177, at *8 (Bankr. S.D. Fla. Apr. 20, 2018) (adopting Seventh Circuit's "well reasoned" analysis in *Peterson*, 792 F.3d at 787-88).

If accepted, the Trustee's reformulation of the doctrine would eviscerate it, as many individuals and businesses will be unable to invoke the defense when targeted by wrongdoers who seek recovery for their own misconduct.

CONCLUSION

For these reasons, the Court should affirm the district court's decision.

Respectfully submitted,

/s/ Cary Silverman

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Dated: July 30, 2018

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P.29(a)(5) because, excluding parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,459 words.

2. 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 proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amici Curiae* Brief of the American Tort Reform Association and Florida Justice Reform Institute with the Clerk of the Court by using the Court's CM/ECF system on July 30, 2018. Seven paper copies have been sent to the Clerk of the Court via First Class Mail, postage prepaid. Pursuant to 11th Cir. R. 25-3, the notice generated and e-mailed by the ECF system constitutes service of the brief on all registered ECF attorneys.

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Dated: July 30, 2018