

STATEMENT OF THE CASE

A "ponzi scheme" investment fraud based on "prime bank instruments" was named as the scheme to defraud for mail fraud and money laundering allegations in the 12/5/03 Criminal Complaint filed by FBI Special Agent, Samuel Moore (R.2), that was used to obtain the 39 count mail fraud and one count of conspiracy to commit mail fraud indictment from the grand jury on 7/29/04 (R.24) after Janet Marcusse's (hereinafter "Marcusse") arrest on 7/1/04.

An 83 count superseding indictment on 10/27/04 added 39 money laundering counts, 2 more conspiracy charges, including defrauding the IRS, and a \$10 million money judgment based on the same mail fraud investment scheme (R.108, R.323).

At trial, the government's initial theory of the case was that investors had been promised their funds would be invested only in "prime bank" programs as evidenced by Government Exhibit 1 (GX-1), but that no investor funds were placed into any "prime bank" programs (Gezon at TR 747, Kaczor at TR 3487). \$12.1 million was instead "spent" by the accused "on themselves and others" as testified by IRS Special Agent James Flink using summary exhibits (GX-170 at TR 1725; TR 171 at TR 1735-36; GX-172 at TR 1927-28). This allegedly constituted a "classic" ponzi scheme investment fraud (R.6; Gov. Trial Brief, R.297, p.4; Gezon at TR 3515).

AUSA Schipper's opening statement at trial on 5/16/05 was, "Ponzi scheme. You've heard the word already. Ponzi scheme.

That's what this case is about." (Schipper at TR 41).

The first morning of trial, the judge limits the defense:

"This matter is not whether you invested money wisely. That's not the issue that the government has put before us. So whether or not the money that you allegedly may have had to invest was run off with by a third party or a fourth party or someone else is really not the issue here, so that's why I want you to focus clearly on this. The allegation is that you and others--listen carefully to me. The allegation is that you and others fraudulently and deceitfully deceived other people, not that other people deceived you, which may be the case. I imagine the government might concede that if you ask them. The question is whether you and others deceitfully deceived other people. And as I began to look at some of your motions, it became clear to me that you are not focusing upon the issue that's in front of us. An interesting issue though it might be that you're focusing on, it's not really what we're here for." (Court at TR 8-9).

The defense was thereby limited to evidence and witnesses relevant only to the government's theory of a "prime bank" fraud.

At the beginning stages of trial, the judge further rules Marcusse is to be denied the right to proceed pro se, make objections, or cross examine witnesses (Court at TR 18, 26-27, 31-32). An Opinion during trial rules that Marcusse is denied 13 defense witnesses primarily because their testimony to "alleged investments" is "wholly unrelated and irrelevant" to the charges

(R.401). The witnesses requested were to testify to non-prime bank investments, such as the SSBT Bahamas program in stocks. Also as the result, virtually all of her "reams" of evidence, including even that of "stipulated" bank records (TR 629-30), are withheld by defense counsel acting as an "officer of the court" (Kaczor at TR 3049). She refuses to close the evidence issue (Marcusse at TR 3348), appealing counsel's decision, only to again be denied its use by the court, because it was "not relevant", there was "no custodian", and the judge did not want a "confusion of the issues" with the jury (Court at TR 3679-80).

AUSA Reed Pixler, Phoenix, testifies that the accused were defrauded as the "innocent victim" of a "prime bank" fraud for \$400,000 in May, 1999 (Pixler at TR 769-71). This event was prior to the first mail fraud count in the indictment of 10/21/99 (R.323, p.6). Nevertheless, AUSA Gezon asserts that this "prime bank" booklet (GX-1) was the only product that was ever promised to investors through 3/23/01, the date of the last mail fraud count (Gezon at TR 3714-15; R.323, Items 11-13, pgs. 3-4, 6-7). He has 6 investors testify that they had recognized GX-1. This is out of the 36 investors who testified at trial and the alleged total of 577. All 6 investors can be demonstrated to have "seen" a form of GX-1 prior to 10/21/99 from the evidence the government submitted at trial, however, cross-examination was limited for the pro se accused (See Exh. A). Therefore, there was no evidence presented at trial to establish GX-1 was the only type of investment shown to investors.

All investors signed contracts agreeing to diversification,

arbitration, "best efforts", no guarantees on returns, and discretion over the investment choices (Kaczor at TR 3592-95; GX-63b, GX-63c; Def. Exh. M-L).

Marcusse testified to over \$12.1 million in stocks or other non-prime-bank investments, but her credibility was at issue by the prohibition of evidence and witnesses to prove it. Through witness Robert W. Plaster, a good friend of John Ashcroft, however, the government was forced to concede that not only had funds been invested into MLC Development, but that some of these funds had been obtained and kept by this individual (Plaster at TR 2256-57; Gezon at TR 3721-22). Agent Flink conceded that if an investment was not that of a "prime bank" vehicle, he did not count it in his summary exhibits (Flink at TR 2052-54, 2058, 2070-76).

The establishment of legitimate investments and the investor contracts were used as the basis for a renewed motion for acquittal regarding the "ponzi scheme investment fraud" allegation, but was denied by the court (TR 3486-92).

Defense counsel in closing arguments listed the "legitimate" investments that had been made, including this prima facie evidence of the MLC investment, emphasizing that, as the result, there could not be a "ponzi scheme" (Kaczor at TR 3584, 3591, 3614).

On 6/14/05, in his rebuttal closing argument, AUSA Gezon responds by disavowing his "ponzi scheme" allegation,

"Let me just say about that that I don't think if you look at the indictment you will see the words Ponzi scheme anywhere in that indictment. I suspect that you will not

hear the words Ponzi scheme coming from the Judge's instructions, and I know you will not see the words Ponzi scheme in any of the elements that you have to consider in these crimes." (Gezon at TR 3713).

A secondary interwoven scheme grafted into the indictment through the use of duplicitous mail fraud counts was that of a "failure to file and pay tax" conspiracy (Gezon at TR 3455). This permits AUSA Gezon to conclude his rebuttal closing arguments by asking the jury to find the accused "guilty" for "not paying their taxes" (Gezon at TR 3744).

Allegations of unreported "income" of \$943,370 against Marcusse and \$1,022,642 against George Besser, were made by Agent Flink at trial (Flink at TR 1736), but no unreported income allegations are charged in the indictment against these two "lead defendants" unlike the others (Count 40, Items 3-17). Agent Flink admits that he added \$600,000 to Marcusse's "income" for 2001 after his first grand jury testimony (Flink at TR 2098). These amounts consisted of "pass through" funds, which the use of bank and business records at trial could have demonstrated went into investments. IRS Special Agent Steve Corcoran concedes that "related" investment accounts were not included in their summary exhibits (Corcoran at TR 2292-93).

On 6/13/05, both defense counsel insist during closing arguments that while "failure to file" was not one of the charges (Kaczor at TR 3589; Dunn at TR 3642-43), if it had been, their client would be "guilty". This contradicts the IRS's own evidence (GX-148 - withheld bank & bus. records) and Marcusse's testimony

in order to admit to some of the unreported "income" Agent Flink alleges at trial (Dunn at TR 3642-43; Kaczor at TR 3607). An exhibit prepared by the IRS, GX-148, established that Marcusse's 1998 income of \$6,744 had been below the filing requirement threshold. At the jury instruction conference on 6/10/05 the prosecution had clarified that "failure to file" was not only now going to be charged, but was the "nature" of the "conspiracy" (TR 3453-55). AUSA Gezon had conceded that the accused may have first been "misreading" the tax code (Gezon at TR 3452).

The trial judge "alters" the standard jury instructions (Court at TR 3445-46) at this conference to remove virtually all references to the indictment (R.296), to accommodate the specific "failure to file" offense, changing the nature of Count 42, conspiracy against the IRS, from that of primarily a 26 U.S.C §7202 offense to that of a 26 U.S.C §7203, tying it to the amounts listed in the indictment (Court at TR 3771-72; Count 40, Items 3-17, conspiracy to commit mail fraud, R.323), as well as tying Count 42 to the money laundering charges (Court at 3762).

After counsel's closing argument, Besser places it on the record that Mr. Dunn had no right to speak for him (Besser at TR 3680). Marcusse had previously objected to Mr. Kaczor as a "prosecutorial tool" (R.200).

The jury returned guilty verdicts on all counts, in effect, based upon a "failure to file" mail fraud scheme, an abuse of charging authority in place at the time of the alleged offense. Under these instructions, the jury could not have found the accused guilty of a "ponzi scheme", however, later that same day,

this allegation is resurrected by the prosecutor in the media (See Exh. A-3). The trial judge uses a "ponzi scheme" as his reason to deny motions for acquittal (R.492) and at sentencing (TR 31, 10/13/05; TR 59, 10/14/05). The Office of U.S. Attorney uses it in official Press Releases targeted to investors (See Exh. FF, p.5). The Appellee Brief now seeks to again promote a "ponzi scheme" as the result of "overwhelming evidence", exactly as was done prior to trial in the Grand Rapids Press (Exh. A-3, 8/5/04).

Motions to dismiss charges under Fed. Rules of Crim. Proc. Rule 12(b) were filed prior to trial (R.312, R.315) for numerous reasons, including that of duplicitous counts, but were denied by the court (R.325).

Sentencing "guidelines" initially recommended 14,520 months for each of the five, Category 1 accused, that took the case all the way through trial. They were "reduced" from "life" to 25 years for Marcusse at the sentencing hearing by the prosecutor (Schipper at TR 39, 10/28/05, R.639). The court stated the reasons for the sentence were due to the "seriousness of the offense", and because it "promotes the respect for the law" and "protects the public" (Court at TR 47, 10/28/05, R.639).