

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division
www.flsb.uscourts.gov

IN RE: CASE NO.: 09-34791-RBR
ROTHSTEIN ROSENFELDT ADLER, P.A., CHAPTER 11
Debtor.

**RAZORBACK CREDITORS' MOTION FOR ISSUANCE OF WRIT OF HABEAS
CORPUS AD TESTIFICANDUM TO DEPOSE SCOTT W. ROTHSTEIN IN STATE
COURT LITIGATION AND LIMITED JOINDER IN DEFENDANT GIBRALTAR
PRIVATE BANK & TRUST COMPANY'S MOTION FOR LEAVE TO DEPOSE SCOTT
W. ROTHSTEIN AND FOR CERTIFICATION TO DISTRICT COURT FOR ISSUANCE
OF A WRIT OF HABEAS CORPUS AD TESTIFICANDUM [D.E. 1660]**

The Razorback Creditors¹ move the Court for the issuance of a *Writ of Habeas Corpus Ad Testificandum* ordering the United States Attorney's Office for the Southern District of Florida, the United States Marshals Service, the United States Bureau of Prisons, and/or any other federal officer who has custody and control of Rothstein to present him at a suitable location and time so that he can be deposed in the state court case brought by the Razorback Creditors in accordance with the ruling of the Honorable Jeffrey Streitfeld granting leave to take Rothstein's deposition.

Further, the Razorback Creditors file this Limited Joinder in Defendant Gibraltar Private Bank & Trust Company's ("Gibraltar") Motion for Leave to Depose Scott W. Rothstein and for

¹ "Razorback Creditors", for purposes of this Motion and Limited Joinder, collectively refers to RAZORBACK FUNDING, LLC, D3 CAPITAL CLUB, LLC, BFMC INVESTMENT, LLC, LINDA VON ALLMEN as Trustee of the VON ALLMEN DYNASTY TRUST, D&L PARTNERS, LP, DAVID VON ALLMEN, as Trustee of the DAVID VON ALLMEN LIVING TRUST, ANN VON ALLMEN, as Trustee of the ANN VON ALLMEN LIVING TRUST, DEAN KRETSCHMAR, COOPER MANAGEMENT, ANTHONY DEGENNARO as Trustee of the EXTRA INNING DYNASTY TRUST, ADELE MUSSRY, JACK MUSSRY, NASSIM MUSSRY, MELINA EL-ANI, DANIELLE EL-ANI, H&N ASSOCIATES, ARETZ ASSOCIATES, PARK NATIONAL CAPITAL FUNDING, LLC, PARK NATIONAL MORTGAGE SERVICING, SCOTT MORGAN, VICEROY GLOBAL INVESTMENTS, INC., CONCORDE CAPITAL, INC., IRA SOCHET as Trustee of the IRA SOCHET REVOCABLE INTER VIVOS TRUST, SUSSCO, INC., EDWARD PALEY, FLORENCE PALEY, THE EDWARD AND FLORENCE PALEY FOUNDATION, STEVEN PALEY, LAURA PALEY, JANE ZARETSKY, STEVEN ZARETSKY, as Trustee of the JANE ZARETSKY DYNASTY TRUST, LAWRENCE E. DEKELBAUM, AND SHALOM STRICTLY KOSHER MEATS, INC.

Certification to District Court for Issuance of a *Writ of Habeas Corpus Ad Testificandum* [D.E. 1660]. The Razorback Creditors join in Gibraltar's request for issuance of the writ for the Trustee's adversary proceeding against Gibraltar but seek to have the writ broadened to also include the Razorback Creditors' state court litigation. Though this Court likely has jurisdiction to issue the writ, the Razorback Creditors understand that this is an unsettled issue and certification to the district court may be appropriate out of an abundance of caution.

I. INTRODUCTION AND GENERAL BACKGROUND

Scott W. Rothstein ("Rothstein") was, with the assistance of others, the principal perpetrator of the massive Ponzi scheme alleged in this case. The Ponzi scheme is the largest financial fraud in South Florida history. The Razorback Creditors, with more than \$150,000,000.00 in losses, represent the single largest victim group to have brought suit to recover their losses. That suit, pending in Broward County Circuit Court before the Honorable Jeffrey Streitfeld, was filed shortly after the collapse of the Ponzi scheme and is scheduled for trial in March 2012. This lawsuit represents the best opportunity for victims of the fraud to recover their losses.

Rothstein has been convicted of several federal offenses and is incarcerated and in federal custody at a location unknown to the Razorback Creditors. Given Rothstein's central role in the Ponzi scheme and his extensive contact with the events and circumstances at issue, he is a critical witness in the state court litigation and will have substantial knowledge of the material allegations in the Razorback Creditors' Third Amended Complaint.

The Razorback Creditors seek this Court's assistance in issuing a *writ of habeas corpus ad testificandum* to compel the federal authorities with custody and control of Rothstein to produce him to testify for a deposition in the state court litigation in order to preserve and use

that testimony at trial. Judge Streitfeld has already ruled that the Razorback Creditors can take this deposition in the state court case, but this Court's assistance is needed to give effect to Judge Streitfeld's ruling since Rothstein is in federal custody.

Given that Gibraltar has already filed a motion to take Rothstein's deposition in the Trustee's adversary proceeding against it, the Court could simply expand that writ to also include the Razorback Creditors' state court litigation. Gibraltar is a defendant in both the Razorback Creditors' state court litigation as well as the Trustee's adversary proceeding against it. Gibraltar has asserted in the adversary case that a number of the Trustee's allegations against it are essentially the same as the allegations in the Razorback Creditors' state court litigation. In addition, both the Razorback Creditors' allegations against Gibraltar and the Trustee's allegations against Gibraltar arise from the underlying Ponzi scheme. As a result, a significant portion of Rothstein's testimony regarding Gibraltar issues will relate to claims and defenses in both the Razorback Creditors' state court litigation and the Trustee's adversary proceeding against Gibraltar.

II. PROCEDURAL BACKGROUND

1. On November 10, 2009, a group of petitioning creditors filed an involuntary petition for reorganization under Chapter 11 of Bankruptcy Code against the Debtor, Rothstein Rosenfeldt Adler, P.A. On November 25, 2009, the Debtor consented to the entry of an Order for Relief under Chapter 11 of the Bankruptcy Code, and on November 30, 2009, such order was entered.

2. On November 20, 2009, the Razorback Creditors initiated their state court action as Plaintiffs in the case styled: *Razorback Funding, LLC, et. al, v. Scott W. Rothstein, et. al.*, Broward County Circuit Court Case No.: 09-062943(19) (the "State Court Action" or "State

Court Case”). The Third Amended Complaint in the State Court Action was filed on July 26, 2010. The Third Amended Complaint seeks extensive relief from Rothstein and twenty-seven co-conspirator Defendants, including TD Bank, Frank Spinosa, Gibraltar, Platinum Partners Value Arbitrage Fund (USA), L.P., and Centurion Structured Growth, LLC. As to the various co-conspirator/financial institution Defendants, the Third Amended Complaint asserts various causes of action, including but not limited to, aiding and abetting fraud and civil conspiracy.

3. On December 6, 2010, Herbert Stettin as Chapter 11 Trustee of the Debtor filed the Adversary Complaint to Avoid and to Recover Preferential and Fraudulent Transfers, for Turnover, for an Accounting, Unjust Enrichment, for Damages and for Other Relief in the adversary case styled *Stettin v. Gibraltar Private Bank & Trust Company*, Adversary Case No.: 10-03767-RBR-BKC-A (the “Gibraltar Adversary”). Gibraltar has asserted that the Trustee’s non-bankruptcy claims in the Gibraltar Adversary are essentially seeking to recover on the claims of investors by alleging that the proofs of claims filed by investors represent damages to RRA.

4. On December 20, 2010, Herbert Stettin, Chapter 11 Trustee, filed the Adversary Complaint to avoid and to recover fraudulent and preferential transfers, for turnover of property of the estate, for constructive trust, for an equitable lien, and for an accounting against Defendants, Centurion Structured Growth, LLC, Platinum Partners Value Arbitrage Fund, LP and Level 3 Capital Fund, LP, bearing case style: *Stettin v. Centurion Structured Growth, LLC, Platinum Partners Value Arbitrage Fund, LP and Level 3 Capital Fund, LP*, Adversary Case No.: 10-03802-BKC-RBR-A.

5. On March 30, 2011, the Razorback Creditors filed in the State Court Action Plaintiffs’ Motion for Leave to Depose Incarcerated Defendant (“State Court Motion for Leave”)

in which leave was sought to depose Rothstein pursuant to Florida Rule of Civil Procedure 1.310(a).

6. On April 1, 2011, the Razorback Creditors filed a parallel motion with this Court entitled Motion for Leave of Court to Depose and Take Rule 2004 Examination of Incarcerated Individual, Scott W. Rothstein (the “Bankruptcy Motion for Leave”) [D.E. 1589].

7. On April 15, 2011, pursuant to a ruling made from the bench, Judge Streitfeld granted the State Court Motion for Leave and authorized the Razorback Creditors to take Rothstein’s deposition in the State Court Action. Judge Streitfeld is awaiting this Court’s ruling before entering his written order so that his order can parallel the language of this Court’s order. *See, Hearing Transcript* filed in this case pursuant to a Notice of Filing [D.E. 1645] *at page 4, lines 19-25 and page 5, lines 1-2.*

8. On April 26, 2011, this Court entered the Order Denying Razorback’s Motion to Depose Scott Rothstein (the “Order”) [D.E. 1649] without prejudice “... to the parties bringing a new Motion for *Writ of Habeas Corpus Ad Testificandum* to the said deposition pursuant to Bankruptcy Rule 7030 with appropriate joinder by interested parties.” At the hearing on the Bankruptcy Motion for Leave, this Court envisioned that Rothstein’s deposition would be taken for the various pending adversary proceedings as well as the other federal and state court litigation arising from the Ponzi scheme.

III. AUTHORITY FOR ISSUANCE OF WRIT

Federal district courts may issue *writs of habeas corpus ad testificandum* where “[i]t is necessary to bring him [the prisoner] into court to testify or for trial.” *See*, 28 U.S.C. § 2241. The court in *Gordon v. Woodring*, 2005 WL 464636 (N.D.Cal. 2005) granted the writ to compel

a federal prisoner's attendance to testify in a state civil matter. The court found that it had the authority to issue the writ despite the existence of procedures in which the petitioner could have obtained a writ from the state court requesting permission to release him to the custody of state authorities pursuant to 28 C.F.R. §§ 527.30-.31. The court noted that nothing in the text of the statute required a party to first exhaust available procedures for issuance of a state writ before requesting issuance of a federal writ.

Likewise, the court in *U.S. v. Mandel*, 857 F.Supp. 253 (E.D.N.Y. 1994), found that it had authority to issue a *writ of habeas corpus ad testificandum* to order the federal authorities to produce a federal prisoner to testify at his state court civil trial. The court rejected the argument that the petitioner must follow the procedures for issuance of the writ by the state court under 28 C.F.R. § 527.30. Though not stated by the *Mandel* court, the regulations regarding a writ issued by a state court make clear that compliance with the writ is not mandatory. By contrast, compliance with a federal writ is mandatory and does not depend on the exercise of discretion by the authorities with custody of the prisoner.

The court in *Mandel* also found that there was a sufficient nexus with the court's jurisdiction to issue the writ under the All Writs Act, 28 U.S.C. §1651. The All Writs Act "... empowers the court to issue such commands ... as may be necessary or appropriate to effectuate and prevent frustration of orders it has previously issued in its exercise of jurisdiction." *Mandel*, 857 F.Supp. 253 at p. 254. (quoting from *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 42 (1985)). Specifically, the writ was requested for purposes a state court civil action where the proceeds from that action were ordered to be placed in a restitution fund as a condition of the sentence. Accordingly, the court found that issuance of the writ would be appropriate to effectuate the court's prior order.

The court in *Mandel* ultimately did not issue the writ on the basis that the prisoner's deposition could be taken and that this would be a less burdensome alternative. In this case, taking Rothstein's deposition where he is incarcerated is not a practical or less burdensome alternative. First, it is widely believed that Rothstein is in witness protection and his whereabouts are unknown. Therefore, the Razorback Creditors cannot make arrangements to travel to where Rothstein is incarcerated to take his deposition. Moreover, this Court has indicated that it will be issuing the writ in connection with various adversaries and contested matters relating to the Rothstein matter. As a result, the burden of transporting Rothstein and providing for his security will have to be borne without regard to the taking of his deposition in the State Court Action. Finally, given the number of parties who will be examining Rothstein, it is doubtful that the facilities in a prison would be adequate for the taking of his deposition under such circumstances.

IV. WHETHER A BANKRUPTCY COURT MAY ISSUE THE WRIT

The Razorback Creditors have filed this partial joinder in Gibraltar's motion seeking issuance of the writ. Gibraltar argues that this Court does not have the authority to issue the writ and believes that the matter should be certified to the district court for issuance of the writ to avoid any question in that regard. The Razorback Creditors, after analyzing the issue, believe that this Court likely has the authority to issue the writ. However, since there does not appear to be any definitive precedent on this issue, the Court may want to consider certification to the district court as an alternative out of an abundance of caution.

V. ROTHSTEIN TESTIMONY

As noted above, there is a critical need for Rothstein's testimony in this matter given his wealth of personal knowledge of so many of the facts and circumstances at issue in the

Razorback Creditors' claims set forth in the Third Amended Complaint and various of Gibraltar's defenses to those claims. Reid Cocalis, a partner in the undersigned law firm with significant involvement in the State Court Action, has prepared the affidavit attached as Exhibit "A" setting forth a proffer that Rothstein has knowledge regarding many of the material allegations set forth in the Third Amended Complaint.

VI. TIMING ISSUES

It is imperative that Mr. Rothstein's deposition be arranged as soon as possible so that the Razorback Creditors can depose him for purposes of the State Court Action. His deposition has already been authorized by Judge Streitfeld and the trial in the State Court Action is scheduled for March of 2012. December 23, 2011 is the deadline for conducting and concluding fact discovery in the State Court Action. Given the potential hurdles that may still exist regarding the taking of Rothstein's deposition, it is important that the process commence as soon as possible.

VII. OTHER FACTORS

Gibraltar analyzed the factors that courts generally consider in determining whether to issue a *writ of habeas corpus ad testificandum* at pages 4 through 6 of the Gibraltar Motion. The Razorback Creditors have already discussed the third factor and are in general agreement with the discussion of the other factors set forth in the Gibraltar Motion except factor (4) involving the need for an early determination, which is specific to the Trustee's litigation against Gibraltar. In terms of factor (4) as it relates to the State Court Action, The Razorback Creditors comprise a significant portion of the losses sustained by victims of the Ponzi scheme at issue here. The State Court Action provides a significant opportunity to recover these losses in an expeditious fashion. Issuance of the writ providing for Rothstein's deposition will substantially assist in this regard.

WHEREFORE, the Razorback Creditors respectfully request that this Court grant this Motion and issue the *Writ of Habeas Corpus Ad Testificandum* in the form attached hereto, or in the alternative, certify this matter to the District Court for the issuance of the Writ, and for such further relief related to the deposition of Scott Rothstein as the Court deems just and proper.

Dated: May 6, 2011

Respectfully submitted,

/s/James D. Silver
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I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 6th day of May, 2011 via the Court's CM/ECF electronic noticing system to all electronic filing participants with respect to this proceeding and via mail and/or e-mail to all those additional persons and entities listed on the attached service list.

/s/James D. Silver
James D. Silver

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(FORT LAUDERDALE DIVISION)

In Re:

CASE NO. 09-34791- BKC-RBR
CHAPTER 11

ROTHSTEIN ROSENFELDT
ADLER, P.A.,

Debtor.

Writ of Habeas Corpus Ad Testificandum

_____/

TO: Any United States Marshal
United States Bureau of Prisons
United States Attorney's Office for the Southern District of Florida
Any federal officer having custody or control of Scott W. Rothstein

Comes now the undersigned Judge, and it appearing that the presence of Scott W. Rothstein is necessary to the parties in Bankruptcy Case No. 09-34791-BKC-RBR, the adversary cases related thereto, and in the case styled: *Razorback Funding, LLC, et. al, v. Scott W. Rothstein, et. al.*, Broward County Circuit Court Case No.: 09-062943(19), for purposes of discovery, for use at trial, or both of the foregoing or for such other purposes as are permitted under the applicable rules of procedure, and it further appearing that Scott W. Rothstein is now confined in the custody of the United States government at an undisclosed location and that his presence for these proceedings cannot be secured under the ordinary process or subpoena of the United States Bankruptcy Court for the Southern District of Florida or process or subpoena of the Broward County Circuit Court.

The Court orders as follows: The United States Marshal, United States Bureau of Prisons, United States Attorney's Office for the Southern District of Florida and/or any federal officer who has the custody and control of Scott W. Rothstein is required to present Rothstein appear before the United States Bankruptcy Court for the Southern

District of Florida, Fort Lauderdale Division and the Broward County Circuit Court at such time and location as the United States government and the parties seeking Rothstein's deposition mutually agree upon, for a deposition pursuant to Federal Rule of Bankruptcy Procedure 7030 and in accordance with Florida Rules of Civil Procedure. The deposition of Rothstein shall commence on the agreed-upon date and continue thereafter from day to day until completed. The time limitations in Fed.R.Civ.P. 30(d)(1) or other applicable time limitations shall not apply.

Date: _____

Raymond B. Ray, Judge
United States Bankruptcy Court

EXHIBIT “A”

**AFFIDAVIT OF REID A. COCALIS, ESQ, IN SUPPORT OF
RAZORBACK'S MOTION TO ISSUE WRIT OF HABEAS
CORPUS AD TESTIFICANDUM**

BEFORE ME, the undersigned authority, duly authorized to administer oaths and take acknowledgments, personally appeared REID A. COCALIS, who, being first duly sworn upon oath, deposes and says

1. I, Reid A. Cocalis, am a partner in the law firm of Conrad & Scherer, LLP and have personal knowledge of the matters set forth herein except where indicated otherwise.
2. Conrad & Scherer, LLP is counsel of record for the Razorback plaintiffs in the case styled RAZORBACK FUNDING, LLC, et. al., v. SCOTT W. ROTHSTEIN, et. al., CASE NO.: 09-062943 (07) IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA
3. Scott Rothstein is a named defendant and critical witness in the aforementioned case among others.
4. It is believed that: (i) Scott Rothstein will validate many of the allegations of the Razorback plaintiffs as set forth in their third amended complaint; (ii) Rothstein will testify that a number of the named defendants in the Razorback litigation were co-conspirators or had knowledge of the Ponzi scheme yet remained silent and/or encouraged others to invest in order to recoup their losses; (iii) Rothstein will testify that certain bank officers accepted bribes. For the sake of brevity and saving trees, a copy of the 2200 page third amended complaint is not attached hereto but is available upon request.
5. Based upon proffers from counsel for Rothstein there exists a good faith belief that Rothstein will testify in accordance with the assertions set forth in paragraph 4 above.
6. The Rothstein testimony is essential as many of the alleged co-conspirators have asserted their 5th amendment privilege and refuse to answer questions under oath. Scott Rothstein is the only person who can offer affirmative testimony that bank officers accepted bribes. Scott Rothstein is the only person who has knowledge as to the identity of all co-conspirators and their actions and inactions.

FURTHER AFFIANT SAYETH NAUGHT.


REID A. COCALIS

STATE OF FLORIDA)

)ss:

COUNTY OF BROWARD)

The foregoing instrument was subscribed and sworn to before me this 6th day of May, 2011 by REID A. COCALIS, who is personally known to me or has produced a Florida driver's license number _____ as identification.

Notary Public



Printed Name

printed, typed or stamped]



My Commission Expires: