

**I.
STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. On November 17, 2006, the United States Securities and Exchange Commission (“SEC”) filed its complaint in *SEC v. ABC Viaticals, Inc., C. Keith LaMonda, and Jesse W. LaMonda, Jr., Defendants, and LaMonda Management Family Limited Partnership, Structured Life Settlements, Inc., Blue Water Trust, and Destiny Trust, Relief Defendants*, (“SEC Proceedings”). *Complaint* [Dkt. No. 1], Cause No. 3:06-CV-2136 (N.D. Tex.). In those proceedings, the Court appointed Michael J. Quilling as Receiver for the defendant entities and authorized him to prosecute all claims necessary to collect assets or proceeds thereof for the receivership estate. *Order Appointing Receiver* [Dkt. No. 8], Cause No. 3:06-CV-2136 (N.D. Tex.).

2. Accordingly, on March 7, 2007, the Receiver filed this lawsuit to recover investor funds that ABC Viaticals, Inc. (“ABC”) transferred to the Defendants and for other damages caused by the Defendants’ conduct. *Complaint* [Dkt. No. 1]. Among other things, the Receiver alleged that Defendants David A. Goldenberg and Mark Wolok operated a network of companies that marketed, sold, and guaranteed fraudulent bonds purchased by ABC. *Id.* The Receiver now seeks summary judgment against one of those companies—Defendant Surety Marketing Source, LLC.

ABC’S BUSINESS OPERATIONS

3. Before going into receivership, ABC was involved in the “viatical” or “life settlement” business. *Declaration of Michael J. Quilling* (“Receiver’s Declaration”), Exhibit A at ¶ 6 (App. at 5). ABC purchased insurance policies on the lives of third-party insureds and sold fractional interests in those policies to investors. *Id.* The principals of ABC represented that each investor’s contribution would purchase a fractional interest in a single insurance policy and

pay premiums on only that policy. *Id.* That, however, proved to be untrue. Account records show that ABC commingled all investor funds into a common account and used them to pay commissions, buy new policies, and make premium payments for the benefit of earlier investors. *Id.* ABC's principals eventually depleted the company's reserves by, among other things, transferring at least \$5 million to themselves. *Id.*

4. When the total funds raised by ABC are compared to the total expenses paid and the total obligations still owed to investors, it is obvious that the company suffered from a persistent deficit from which it could not recover. *Id.* at ¶ 7 (App. at 6).

5. Part of the problem lies in the way investor funds were handled. Receivership records show that an escrow agent was to manage accounts holding sufficient premium reserves for each policy. *Id.* at ¶ 8 (App. at 6). Those premium reserves, however, were not properly maintained and funded. *Id.*

6. To make up for this shortfall in premium reserves, bank records show that funds from new investors were simply commingled and used to pay premiums for policies benefiting earlier investors. *Id.* at ¶ 9 (App. at 6). Raiding these new investor funds effectively left ABC insolvent because it relied on money from new investors to pay its obligations owed to earlier investors. *Id.*

INVESTOR FUNDS USED TO PURCHASE IFS BONDS THROUGH SMS

7. To continue attracting new investor money, ABC marketed its product as a "bonded" life settlement policy. *Id.* at ¶ 10 (App. at 6). Investors were told that, even if the insureds outlived their life expectancy date, the bonding company would step in and pay the full death benefit on the policy after a certain amount of time. *Id.* The idea was to convince investors that ABC's offering was a sure thing. *Id.* The Receiver has interviewed investors who

insist that this representation was the single most important feature that convinced them to invest with ABC. *Id.* As a result, ABC raised approximately \$121 million from at least 3,300 investors worldwide. *Id.*

8. ABC initially purchased its bonds through Defendant International Fidelity & Surety Limited (“IFS”). *Id.* at ¶ 11 (App. at 6). IFS claimed to be a legitimate bonding company operating in conjunction with its holding company, International Consultants & Management Ltd. (“ICM”). *Id.*

9. IFS and ICM listed offices in Connecticut as well as on a South Pacific island in the Republic of Vanuatu. *Id.* at ¶ 12 (App. at 6-7). However, neither of those companies maintained actual offices at either location. *Id.* The Receiver’s investigation revealed they only had a mail drop box in Connecticut without any known employees, facilities, or assets. *Id.* Bank records also confirm that IFS and ICM existed only on paper as the alter egos of Defendants David A. Goldenberg and Mark Wolok. *Id.*

10. Goldenberg and Wolok also operated Defendant Surety Marketing Source, LLC (“SMS”), a Michigan company claiming to be IFS’s exclusive marketing agent. *Id.* at ¶ 13 (App. at 7). In numerous correspondence with ABC, Defendants SMS, Goldenberg, and Wolok all represented that IFS and ICM were legitimate entities, financially sound, and that they could honor the bonds issued to purchasers. *Id.*

11. As a result of those representations, ABC’s principals decided to purchase bonds from IFS that would guarantee payment on numerous insurance policies. *Id.* at ¶ 14 (App. at 7). Over time, ABC purchased 18 separate bonds from IFS with a total coverage amount of \$134,311,500.00. *Id.*

12. ABC, using investor money, paid at least \$3,267,037.50 in premiums for those bonds, all of which went directly to SMS. *Id.* at ¶ 15 (App. at 7). Defendants Goldenberg and Wolok represented that they would deduct their commission from the premiums and forward the balance to IFS. *Id.* That representation was false and known to be false by Goldenberg and Wolok. *Id.* Instead of forwarding the balance to IFS, they simply spent it or divided it between themselves without purchasing a bond of any sort. *Id.* Meanwhile, in each instance ABC was given a bond certificate indicating that IFS had received the funds and issued the bond accordingly. *Id.*

13. In short, ABC transferred \$3,267,037.50 to SMS in exchange for fake bonds that it used to perpetuate a fraudulent investment scheme. *Id.* at ¶ 16 (App. at 7).

PROCEDURAL BACKGROUND WITH RESPECT TO SMS

14. SMS filed an Answer to the Receiver's Complaint on May 1, 2007. *Answer* [Dkt. No. 37]. At the time, it was represented by Riney Palter PLLC. *Id.* David Goldenberg directed the course of that representation as manager of SMS. *See Motion to Withdraw as Counsel* [Dkt. No. 65] at 2.

15. David Goldenberg then committed suicide on or about October 14, 2007. Following his death, Riney Palter PLLC filed a motion to withdraw as counsel for Goldenberg, SMS, and other corporate defendants. *Id.* The Court granted that motion, directing all future correspondence with SMS to:

Estate of David Goldenberg
3036 West Ridge Court
Bloomfield Hills, Michigan 48302

Order on Motion to Withdraw [Dkt. No. 76] at 2.

16. Goldenberg's wife, Lisa Portney-Goldenberg, is handling the affairs of his estate. She and the Receiver have entered into a settlement agreement where she expressly disavows any interest in SMS and, in fact, transferred to the Receiver whatever interest she may have acquired through Goldenberg's death. *Settlement Agreement* [Dkt. No. 73-2] at ¶ 4.

17. Similarly, Mark Wolok has not asserted any ownership interest in SMS within these proceedings or advanced a defense on the company's behalf. Instead, he permitted the Receiver to take final default judgment against him in the principal amount of \$48,811,500.00. *Order of Final Default Judgment* [Dkt. No. 52] at 2.

II. ARGUMENTS AND ANALYSIS

A. Standard For Granting Summary Judgment.

A party may obtain summary judgment when there is no genuine issue as to any material fact. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is "material" only if it relates to the substantive law of the parties' claims for relief. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("the substantive law will identify which facts are material"); *Rogers v. Monumental Life Ins. Co.*, 289 F.3d 442, 448 (6th Cir. 2002). An issue is "genuine" only if a reasonable jury could return a verdict for the non-movant on the evidence. *MacDonald*, 94 F.3d at 1440; *Poulis-Minot*, 388 F.3d at 363. Stated another way, the Court should award summary judgment where the record, taken as a whole, could not lead a rational jury to find for the respondent. *See Logan v. Commercial Un. Ins. Co.*, 96 F.3d 971 978 (7th Cir. 1996).

B. Summary Judgment Is Appropriate In This Case Because The Undisputed Material Facts Establish That SMS Received Fraudulent Transfers Under The UFTA.

There is no genuine issue as to the material facts supporting the Receiver's fraudulent transfer claim. In relevant part, the Uniform Fraudulent Transfer Act ("UFTA") provides that:

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation:
- (1) with actual intent to hinder, delay, or defraud any creditor of the debtor . . .

TEX. BUS. & COM. CODE § 24.005.¹ Therefore, the only material facts at issue in this case are (1) whether SMS received funds from ABC and (2) whether ABC made transfers or incurred obligations with the intent to hinder, delay, or defraud any of its creditors.

In this case, it is undisputed that ABC paid \$3,267,037.50 to SMS for fraudulent and non-existent bonds. *Receiver's Declaration*, Ex. A at ¶¶ 15-16 (App. at 7). It is also undisputed that ABC used those bonds to perpetuate an investment scheme against its largest group of creditors—the investors themselves.² *Id.* at ¶¶ 10, 16 (App. at 6, 7). Those non-existent bonds gave ABC the marketing tool it needed to promote its “bonded” life settlement policies. *Id.* ABC used the non-existent bonds to convince investors that their investment was guaranteed to pay off by a certain date, even if the insured outlived their life expectancy. *Id.* at ¶ 10 (App. at 6). Some investors insist that this representation was the single most important feature that convinced them to invest with ABC. *Id.* Unfortunately, ABC’s investment product did not really exist. There were no “bonded” life settlement policies and all premiums paid to SMS were just an extension of ABC’s efforts to defraud its own investors. *Id.* at ¶ 16 (App. at 7).

The intent of ABC’s principals to “hinder, delay, or defraud” is also established as a matter of law by the existence of a Ponzi scheme. *Quilling v. Gilliland*, 2002 WL 373560, *2 (N.D. Tex. Mar. 6, 2002); *SEC v. Cook*, 2001 WL 256172, *3 (N.D. Tex. Mar. 8, 2001); *see*

¹ The Michigan Uniform Fraudulent Transfer Act contains the same provisions. See MICH. COMP. LAWS § 566.34.

² Under the UFTA, “creditor” is broadly defined to include an “individual . . . estate, trust, or any other legal or commercial entity” that has a “right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” See TEX. BUS. & COM. CODE § 24.002(3), (4), (9).

also, *In re Ramirez Rodriguez*, 209 B.R. 424, 434 (Bankr. S.D. Tex.1997); *In re Independent Clearing House Co.*, 77 B.R. 843 (Bankr. D. Utah 1987). This presumption is necessarily true because a Ponzi scheme is insolvent from its inception. *Warfield v. Byron*, 2006 WL 118250, *5 (5th Cir. Jan. 17, 2006) (*Cunningham v. Brown*, 265 U.S. 1, 7-8 (1924)). Accordingly, all transfers from a Ponzi scheme are intended to hinder, delay, and defraud creditors. *See Cook*, 2001 WL 256172 at *3, 4 (granting Receiver's motion for summary judgment to recover transfers from a Ponzi scheme); *see also Warfield*, 2006 WL 118250 at *6-7 (disgorging compensation from a Ponzi scheme); *In re Alpha Telecom, Inc.*, 2004 WL 3142555, *4 (D. Or. Aug. 18, 2004) (disgorging transfers made from a Ponzi scheme).

For purposes of summary judgment, a Ponzi scheme may be proven by the Receiver's uncontroverted testimony. *See Cook*, 2001 WL 256172 at *3. In his declaration, the Receiver clearly explains how the undisputed material facts show that ABC's principals used the company to operate a Ponzi scheme. *Receiver's Declaration*, Exhibit "A" at ¶¶ 6-9, 17 (App. at 5-6, 7-8). A Ponzi scheme exists where money from new investors constitutes the sole source of funds used to pay obligations owed to earlier investors. BLACK'S LAW DICTIONARY (8th ed. 2007); *see also Receiver's Declaration*, Exhibit "A" at ¶ 17 (App. at 7-8). Using funds in this manner gives the Ponzi scheme an "illusion of profitability" that helps recruit more investors and keeps the investment scheme going. *Warfield v. Carnie*, 2007 WL 1112591, *4, 10 (N.D. Tex. Apr. 13, 2007). Although Ponzi schemes continue to evolve and become more sophisticated, at their heart they still operate on the "rob-Peter-to-pay-Paul" principle.³

The Receiver has taken possession of the account records held by ABC and its escrow agents. *Receiver's Declaration*, Exhibit "A" at ¶ 17 (App. at 7-8). Those records conclusively

³ See SEC. & EXCH. COMM'N "Ponzi" Schemes (2001), available at <http://www.sec.gov/answersponzi.htm>.

show that (1) investor funds constituted virtually all of ABC's revenue and (2) new investor funds were commingled in a common account and used to pay premium obligations solely benefiting earlier investors. *Id.* The Receiver submits that this arrangement illustrates a Ponzi scheme sufficient to raise the presumption that ABC's transfers were fraudulent under the UFTA and common law.

C. Summary Judgment Is Also Appropriate In This Case Because The Undisputed Material Facts Show That SMS Received Funds Impressed With A Constructive Trust.

It is a long-standing principle of equity that assets acquired by fraud are held subject to a constructive trust for the benefit of the defrauded parties. RESTATEMENT (FIRST) OF RESTITUTION § 166 (1937). A constructive trust is an equitable remedy for situations where a person holding title to property would be unjustly enriched if he were allowed to retain it. *See, e.g., Dyll v. Adams*, 167 F.3d 945, 948 (5th Cir.1999), *citing Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401, 405 (1960); *United States v. Durham*, 86 F.3d 70, 72 (5th Cir.1996) (District Court has discretion to impose a constructive trust pursuant to its inherent equitable powers). While there is no strict formula dictating when a District Court sitting in equity is bound to impose a constructive trust, this remedy is appropriate to protect investor funds paid into a fraudulent investment scheme. *See SEC v. Paige*, 1985 WL 2335 (D.D.C. July 30, 1985), *aff'd* 810 F.2d 307 ("federal legal precedent [is] clear that a thief obtains no title to the stolen property and holds such property and the proceeds thereof in trust for the victim"); *United States v. Fontana*, 528 F. Supp. 137, 146 (S.D.N.Y. 1981) ("Where the title to property is acquired by one person under such circumstances that he is under a duty to surrender it, a constructive trust immediately arises"), quoting 5 A. SCOTT, LAW OF TRUSTS § 462.4 (3d ed. 1967).

The Court overseeing these Receivership Proceedings clearly anticipated that the funds of ABC's investors were imposed with a constructive trust. In the Order Appointing Receiver, the

Court expressly directed that: “[t]he Receiver is hereby authorized to institute such actions or proceedings to impose a constructive trust . . . with respect to persons or entities who received assets or funds or proceeds traceable to investor monies.” *Order Appointing Receiver* [Dkt. No. 8] at ¶ 14, Cause No. 3:06-CV-2136 (N.D. Tex.). The Receiver, therefore, submits that all transfers or proceeds SMS received are held in constructive trust and ought to be disgorged for the benefit of ABC’s investors.

III. CONCLUSION

The undisputed material facts show that SMS received funds fraudulently transferred from a Ponzi scheme or otherwise impressed with a constructive trust for the benefit of ABC’s investors. Therefore, under the UFTA and the settled law of this district, the Receiver has satisfied his burden for proving his fraudulent transfer and constructive trust and disgorgement claims against SMS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of this pleading will be served upon all interested parties through the Court's electronic filing system.

In addition, a copy of this Brief has been sent by U.S. Mail, first class postage pre-paid, to:

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This pleading will also be posted on the Receiver's website, www.secreceiver.com after filing.