

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION, §

Plaintiff, §

vs. §

Civil Action No.: 3:06-CV-2136-P

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. §

**MOTION FOR SHOW CAUSE HEARING REGARDING COMMISSIONS
PAID TO DONALD S. KAPLAN ALONG WITH REQUEST FOR
EXPEDITED CONSIDERATION AND BRIEF IN SUPPORT**

TO THE HONORABLE JORGE A. SOLIS, UNITED STATES DISTRICT JUDGE:

Michael J. Quilling, as Receiver for ABC Viaticals, Inc., (“Receiver”) files this Motion for Show Cause Hearing Regarding Commissions paid to Donald S. Kaplan and requests that the Court expedite its consideration of this motion. The Receiver submits that Kaplan must disgorge at least \$1,200,890.92 of commissions that he received for recruiting investors into a *Ponzi* scheme. In support of this motion, the Receiver would respectfully show the Court as follows:

I. INTRODUCTION

It is the settled law of this District that commissions paid from a *Ponzi* scheme should be disgorged and returned to the Receivership Estate. Receivership Records in this case clearly show that ABC Viaticals, Inc. was operated as a *Ponzi* scheme and that Donald S. Kaplan received at least \$1,200,890.92 in commissions for recruiting investors to ABC. Therefore, as explained more fully below, the Receiver requests that Kaplan appear in this case and show cause why those funds should not be disgorged to the Receivership Estate.

II. BACKGROUND FACTS

1. On November 17, 2006, the United States Securities and Exchange Commission (“SEC”) filed suit against the Defendants and Relief Defendants in this case alleging, among other things, that ABC Viaticals, Inc. (“ABC”) fraudulently sold life settlement policies and made numerous misrepresentations to investors. *Complaint* [Dkt. No. 1].

2. By Order of November 17, 2006, this Court appointed Michael J. Quilling as Receiver for ABC and other entities named as Defendants and Relief Defendants in this case. *Order Appointing Receiver* [Dkt. No. 8].

3. Before going into receivership, ABC operated a life settlement investment program under the direction and control of C. Keith LaMonda and Jesse W. LaMonda, Jr. *Declaration of Michael J. Quilling* (“Receiver’s Declaration”), Exhibit “A” at ¶ 2. ABC purchased insurance policies on the lives of third-party insureds and then sold fractional interests in those policies to investors. *Id.* The investors expected to realize a return of 30% to 150% from benefits paid when the insured died. *Id.*

4. ABC represented to investors that their contributions were tied to a particular insurance policy and would only be used to cover that policy's purchase price, premium payments, and other related expenses. *Id.* at ¶ 3. Each policy was to have a separate escrow account that covered all premiums on that policy for the life of the investment. *Id.* ABC, however, never managed investor funds consistent with these representations. *Id.*

5. From the beginning, ABC commingled each investor's contribution and used it to pay premiums and expenses on numerous policies not assigned to that particular investor. *Id.* at ¶ 4. The commingled escrow accounts were also underfunded, meaning ABC had to solicit funds from later investors to cover its obligations to earlier investors. *Id.* Therefore, the Receiver submits that ABC was insolvent from its inception and operated as a *Ponzi* scheme.

6. Among those who benefited from the ABC investment program was Respondent Donald S. Kaplan ("Kaplan" or "Respondent"). Between July 2002 and March 2006, ABC paid at least \$1,200,890.92 in commissions to Respondent, both individually and d/b/a Services International Corp. and Kaplan Investment Properties, LP. *Id.* at ¶ 7. Those commissions compensated Respondent for recruiting investors as well as other marketing agents to ABC. *Kaplan Deposition*, Jul. 17, 2006, Exhibit "B" at 107, 112-114. The Receiver submits that those commissions were fraudulently transferred from a *Ponzi* scheme and, therefore, constitute assets of the Receivership Estate.

7. The Court's Order Appointing Receiver expressly directs that all Receivership Assets be surrendered to the Receivership Estate:

All persons, including Defendant and Relief Defendants and their officers, agents . . . brokers, facilitators . . . and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise . . . shall promptly deliver to the Receiver all Receivership Assets in the possession or under the control of any one or more of them . . .

Order Appointing Receiver [Dkt. No. 8] at ¶ 4. On March 8, 2007, the Receiver sent Respondent a copy of the Order Appointing Receiver and demanded that he return all commissions received from ABC. *Receiver's Demand Letter*, Mar. 8, 2007, Exhibit "A-2". To date, Respondent has not tendered that amount to the Receiver. *Receiver's Declaration*, Exhibit "A" at ¶ 8.

8. As explained more fully below, the law in this District views commissions paid from a *Ponzi* scheme as assets to be disgorged and surrendered to the Receivership Estate. This Court should, therefore, order Respondent to appear at a show cause hearing to determine whether the \$1,200,890.92 ought to be disgorged under the Order Appointing Receiver.

9. Federal case law recognizes that a District Court may use summary procedures to determine whether assets should be disgorged for the benefit of a Receivership Estate. As explained more fully below, the Receiver submits that summary procedures and expedited consideration are appropriate in this case to help the Receivership Estate recover funds in a timely manner and cover its life insurance premiums that currently exceed \$10 million a year.

III. BRIEF IN SUPPORT

A. KAPLAN OUGHT TO DISGORGE ALL COMMISSIONS EARNED FROM ABC.

1. Commissions from a *Ponzi* Scheme are Receivership Assets.

All of ABC's transfers to Respondent are voidable under the Texas Uniform Fraudulent Transfer Act ("UFTA") or the supplemental provisions of common law. In relevant part, that statute provides:

(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 . . .

Tex. Bus. & Com. C. § 24.005. While a plaintiff must ordinarily prove fraudulent intent to recover under this provision of the UFTA, that element is automatically established for transfers out of a *Ponzi* scheme. *Quilling v. Gilliland*, Civil Cause No. 3:01-CV-1617 (N.D. Tex. Mar. 6, 2002); *S.E.C. v. Cook*, 2001 WL 256172, *3 (N.D. Tex. Mar. 8, 2001); *see 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 inception. *Warfield v. Byron*, 2006 WL 118250, *5 (5th Cir. Jan. 17, 2006), *citing Cunningham v. Brown*, 265 U.S. 1, 7-8 (1924). Accordingly, all payments from a *Ponzi* scheme—including commissions—are presumed fraudulent and must be disgorged and returned to the Receivership Estate. *See Cook*, 2001 WL 256172 at *3, 4 (disgorging commissions paid from a *Ponzi* scheme); *see also Warfield*, 2006 WL 118250 at *6-7 (disgorging commissions paid from a *Ponzi* scheme); *In re Alpha Telecom, Inc.*, 2004 WL 3142555, *4 (D. Or. Aug. 18, 2004) (disgorging commissions for selling securities on behalf of a *Ponzi* scheme). Therefore, to the extent that ABC was a *Ponzi* scheme, Respondent has no legal basis to retain investor funds that he received as commissions.

2. Receivership Estate Records Show that ABC was a *Ponzi* Scheme.

At the show cause hearing, the Receiver intends to show that ABC was operated as a *Ponzi* scheme. A *Ponzi* scheme exists where an insolvent company raises money from new investors to satisfy obligations promised to earlier investors. *See Warfield*, 2006 WL 118250 at *5. ABC represented that each investor's contribution would purchase a fractional interest in a particular insurance policy and pay premiums on only that policy. *Receiver's Declaration*, Exhibit "A" at ¶ 3. However, the Receiver has obtained account records showing that ABC commingled all investor funds into a single account and used those funds to pay commissions,

buy new policies, and make premium payments on numerous policies as they became due. *Id.* at ¶ 5. ABC's principals eventually depleted the company's reserves by, among other things, transferring millions of dollars to themselves. *Id.* at ¶ 6. Therefore, to keep policies from lapsing, funds from new investors were used to pay the premiums on policies benefiting earlier investors. *Id.* In reality, ABC was at all times insolvent and relied on the contributions of new investors to sustain itself. *Id.* ABC was, therefore, insolvent and a *Ponzi* scheme under the settled law of this District.

3. It is Undisputed that Kaplan Received \$1,200,890.92 as Commissions from ABC.

Without question, Respondent received at least \$1,200,890.92 as commissions from ABC. In fact, his own deposition testimony shows that Respondent acted as ABC's marketing agent, both individually and as Services International Corporation. *Kaplan Deposition*, July 17, 2006, Exhibit "B" at 21-22. Respondent states that ABC sent his commissions either as a check to Services International or a wire to Kaplan Investment Properties, LP. *Id.* at 42-43. The Receiver has reviewed ABC's account records, which confirm the amount of those commissions. Between July 2002 and March 2006, ABC paid the following amounts to Respondent for recruiting investors:

<u>Commissions Paid</u>	<u>Recipient</u>
Don Kaplan dba Kaplan Investment Properties	\$636,952.77
Don S. Kaplan dba Kaplan Investment Properties	\$39,768.40
Donald S. Kaplan	\$379,988.52
Services International Corp.	\$144,181.23
Total:	\$1,200,890.92

Summary of ABC Transfers, Exhibit "A-1".

In short, the Receiver intends to establish (1) that ABC operated a *Ponzi* scheme by diverting funds from new investors to pay the premiums on policies benefiting earlier investors

and (2) that Respondent received at least \$1,200,890.92 as commissions for recruiting new investors. Therefore, under the settled law of this District and the UFTA, the Receiver is entitled to recover those commissions on behalf of the Receivership Estate.

B. EXPEDITED CONSIDERATION IS APPROPRIATE IN THIS CASE.

This Court may order Respondent to disgorge commissions following an expedited show cause hearing. Federal receivership law recognizes the use of such summary proceedings to resolve disputes to property claimed by a Receivership Estate. *SEC v. Basic Energy & Affiliated Resources*, 273 F.3d 657, 668 (6th Cir. 2001); *see also Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 2000); *SEC v. Wencke*, 783 F.2d 829, 837-38 (9th Cir. 1986). It is well settled that Federal Courts have “broad powers and wide discretion” to fashion such relief in equitable receivership proceedings. *Basic Energy & Affiliated Resources*, 273 F.3d at 668. This discretion, which derives from the Court’s inherent equitable powers, makes abbreviated and summary proceedings possible without violating the interests of due process. *See id.* (allowing summary proceedings so long as they “permit parties to present evidence when the facts are in dispute and to make arguments regarding those facts”); *SEC v. Elliott*, 953 F.2d 1560, 1571 (9th Cir. 1992). Therefore, as long as this Court gives him a meaningful opportunity to present his factual and legal contentions, summary proceedings are proper to determine whether Respondent must disgorge the commissions that he received from ABC.

Furthermore, summary proceedings are favored in the context of federal receivership actions because they embrace the long-recognized policy of preserving and protecting assets for claimants of the Receivership Estate. *See Elliott*, 453 F.2d at 1566; *Wencke*, 783 F.2d at 837-38. Abbreviated procedures—including the use of a single receivership proceeding to resolve all

claims—advance the government’s interest in judicial efficiency by “reducing the time needed to resolve disputes, decreasing the costs of litigation, and preventing the dissipation of the receiver’s assets.” *Basic Energy & Affiliated Resources*, 273 F.3d at 668; *Elliott*, 453 F.2d at 1566; *Wencke*, 783 F.2d at 837-38. Summary proceedings allow the Receiver to consolidate litigation before a single District Judge and “avoid formalities that would slow down the resolution of disputes.” *Wencke*, 783 F.2d at 837 n.9. This both promotes judicial efficiency and reduces litigation costs to the receivership. *Id.*, citing *Smith v. Am. Industrial Research Corp.*, 665 F.2d 397, 399 (1st Cir.1981).

Numerous other reported cases have held that a District Court may use summary proceedings to order that a third-party, who is not a party to the lawsuit, turn over property to the Receiver. For example, in *Commodity Futures Trading Comm’n v. Topworth Int’l, Ltd.*, 205 F.3d 1107 (9th Cir. 2000), a shareholder of the company in receivership claimed \$300,000.00 held in an attorney’s trust account. The Receiver countered that those funds rightfully belonged to the Receivership Estate. The District Court held a hearing using summary proceedings and determined that the Receiver should take possession of those funds. On appeal, the shareholder argued that the summary proceedings violated its due process rights. The Ninth Circuit disagreed, reasoning that “for the claims of non-parties to property claimed by receivers, summary proceedings satisfy due process as long as there is adequate notice and opportunity to be heard.” *Id.* at 1113. In that case, summary proceedings did not violate the shareholder’s due process rights because “[t]here was ample opportunity for the appellants in this case to file papers, and two hearings were held in the district court.” *Id.*

Similarly, in *SEC v. Wencke*, 783 F.2d 829 (9th Cir. 1986), cert. denied, 479 U.S. 818 (1986), the Receiver filed an application for disgorgement seeking to have non-parties turn over

certain shares of stock and the profits they derived from those shares. *Id.* at 832. The District Court employed summary proceedings to determine that the non-parties must turn over the assets. On appeal, the Ninth Circuit affirmed and found that the District Court's procedural safeguards—including notice to the respondents of proceedings affecting their property, the opportunity to file a response, the opportunity to seek discovery, and the substantive benefits of the Federal Rules of Evidence and Civil Procedure—sufficiently protected the respondents' due process rights. *Id.* at 836-37. Summary proceedings were appropriate in that case despite the lack of "a formal complaint, answer and summonses." *Id.*

It is important to note that in each of these cases the disputed property was not in the Receiver's possession at the time of the hearing. In fact, in *Wencke*, the property remained in the non-party's possession until the Court entered its disgorgement order. *Id.* at 832-34. The Receiver anticipates using a similar procedure in this case.

The Receiver submits that such summary procedures are not just appropriate in this case, but necessary to help cover premium payments on the portfolio of insurance policies benefiting the Receivership Estate. The Receivership Estate's largest single asset is a portfolio of 55 life insurance policies with a combined face value of benefits exceeding \$236 million. These policies, however, carry premium obligations approaching \$10 million a year and failure to pay those premiums will cause some of the life insurance policies to lapse. The Receiver intends to continue paying premiums on these policies since they present the largest, most promising source of funds to pay the investor claims that eventually may number more than 3,000. If successful, the Receiver could recover enough funds to pay all premiums for two months without any policies lapsing, without borrowing money, and without selling any Receivership Assets to cover

premium payments. He, therefore, respectfully requests that the Court consider this motion on an expedited basis.

**IV.
PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, the Receiver respectfully requests as follows: (1) that this Court set a show cause hearing; (2) that it order the Respondent Donald S. Kaplan, individually and d/b/a Services International Corp. and Kaplan Investment Properties, LP, to appear and respond to this motion; and (3) that, following a hearing on this motion, the Court order Respondent to disgorge all commissions received from ABC. The Receiver also requests that the Court expedite its consideration of this motion, adopt summary procedures, and grant the Receiver such other and further relief, general or special, at law or in equity, to which he might show himself otherwise entitled.

Dated: April 6, 2007

Respectfully submitted,

**QUILLING, SELANDER, CUMMISKEY
& LOWNDS, P.C.**

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By: /s/ Michael J. Quilling .
Michael J. Quilling
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Brent Rodine
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ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2007, a true and correct copy of this document was served to the following by U.S. mail with first-class postage pre-paid:

Donald S. Kaplan
3906 Fairbreeze Circle
Westlake Village, California 91361

Services International Corp.
c/o Far West Legal Service Inc.
861 Coronado Center Drive
Suite 222-FW
Henderson, Nevada 89052

Kaplan Investment Properties,
a California Limited Partnership
c/o Donald S. Kaplan
5699 Kanan Road, Suite 234
Agoura Hills, California 91301

A copy will also be posted on the Receiver's website at www.secreceiver.com.

/s/ Michael J. Quilling
Michael J. Quilling