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

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| SECURITIES AND EXCHANGE COMMISSION,<br><br>Plaintiff,<br><br>vs.<br><br>ABC VIATICALS, INC.<br>C. KEITH LA MONDA<br>JESSE W. LA MONDA, JR.<br><br>Defendants,<br><br>and<br><br>LAMONDA MANAGEMENT FAMILY LIMITED PARTNERSHIP,<br>STRUCTURED LIFE SETTLEMENTS, INC.<br>BLUE WATER TRUST, and<br>DESTINY TRUST,<br><br>Relief Defendants. | Civil Action No.<br><br>3-06-CV-2136-P |

**BRIEF IN RESPONSE TO MOTION FOR SHOW CAUSE HEARING REGARDING COMMISSIONS PAID TO DONALD S. KAPLAN; REQUEST FOR INTERIM HEARING SETTING PROCEDURES**

Comes Now DONALD S. KAPLAN ("Kaplan"), and provides the following brief in Response to the Motion of Receiver Michael J. Quilling for Show Cause Hearing Regarding Commissions Paid to Donald S. Kaplan, and Request for Expedited Hearing. Nothing herein is intended to be a waiver of the right of Kaplan to object to the personal jurisdiction of the court over him, which jurisdiction is denied. Kaplan requests that the Court set a

hearing at which the processes and procedures to be utilized in this proceeding, which is far from ordinary, can be discussed and ordered by the Court.

## RESPONSE TO MOTION TO SHOW CAUSE

A. This Court Does Not Have Personal Jurisdiction over Kaplan.

1. A separate motion will be made to dismiss this proceeding due to lack of personal jurisdiction over Kaplan. Suffice it to say here, there is a lack of minimum contacts between Kaplan and the State of Texas, and that the imposition of personal jurisdiction over him is not consistent with traditional notions of justice and fairness.

2. The Receiver is not entitled to rely upon the nationwide service of process provisions of the Securities Acts since Kaplan is not a defendant in any of those actions.

3. The Receiver is not entitled to rely upon the provisions of 28 USC §754 and §1692 since Kaplan is not in possession of assets belonging to the receivership estate.

B. This Motion Served upon Kaplan Does Not Comport with Due Process.

1. Under Mullane v Central Hanover Bank & Trust Co., (1950) 339 US 306, 70 S Ct 652, process must be calculated to actually apprise the responding party of the nature of the proceedings, the deadlines for response, and the consequences of failure to respond. The Motion fails to provide information to Kaplan that a judgment could be entered against him, that he could be found in contempt of the Order Appointing Receiver and that such contempt could lead to a period of civil imprisonment, or any other relief.

The Motion does not state when Kaplan must respond, or even that he should respond. The Motion does not state the address of the court so that Kaplan knows to where to respond.

2. The Motion is not in conformance with FRCP Rule 4(a) governing the content of a summons in a civil action. In view of the potential relief which the Receiver has verbally said he may seek, the court should dismiss the Motion as not providing sufficient notice to comply with the requirements of due process.

3. This too will be the subject of a separate Motion to Dismiss.

C. Kaplan Did Not Violate Any Provision of the Order Appointing Receiver.

1. Paragraph 1 of the Order Appointing Receiver describes the receivership estate. It comprises "the assets, monies, securities, choses in action, and properties, real and personal, tangible and intangible, of whatever kind and description, whereever situated, of Defendant and of Relief Defendants that are attributable to funds provided to the Defendant or the Relief Defendants by an investor and/or any entities they own or control (hereinafter "Receivership Assets")..."

2. The Receiver alleges that commissions were paid to Kaplan (Kaplan maintains that all payments were to Services International Corporation). The Receiver's claim, if any, rests upon his supposition that such payments of money were fraudulent transfers under the Uniform Fraudulent Transfer Act as enacted in Texas. These payments of money are not Receivership Assets; rather they are the basis of a claim under the UFTA, which is a chose in action perhaps, or an intangible personal property. The money paid to Kaplan /

Services International Corporation is not an identifiable, segregated sum. The money became Services', and the Receiver has a claim to recover damages in that sum.

D. ABC Viaticals Was Not a Ponzi Scheme.

1. The Receiver comes to the conclusion, without supporting evidence, that ABC Viaticals was a Ponzi scheme operation. A Ponzi scheme is "a fraudulent investment scheme where money from new investors is used to pay 'profits' on the money contributed by earlier investors, without the operation of an actual revenue-producing business other than the raising of new funds by finding more investors", See Quilling v. Humphries, No. 3-06-CV-0299-L, 2006 WL 2934276 at n .2 (ND Tex Oct. 13, 2006) (Kaplan, J.), *citing* BLACK'S LAW DICTIONARY 1180 (7th ed.1999), Quilling v Stark, 2007 WL 415351 (ND Tex 2007).

2. As shown by the Receiver's Motion for Authority to Borrow (Docket Entry 16), ABC Viaticals purchased life insurance policies of sick or elderly insureds, just like it said that it would do. The maturity of those policies produces, or will produce sufficient benefits in order to return profits to investors. New investors moneys are not required.

3. The nature of this investment plan is the central factual issue at the heart of this motion. If the operation is not a Ponzi scheme, then the Receiver will be required to prove for each payment that there was either actual fraudulent intent to hinder, delay or defraud creditors, or constructive fraudulent intent (inadequate consideration at a time ABC Viaticals was insolvent or was thereby rendered insolvent). These are highly fact intensive matters, and the full rights of discovery are required.

E. Kaplan has a Separate Existence from Services International Corporation.

1. ABC Viaticals did business with Services International Corporation, which is a Nevada corporation with its principal place of business in Agoura Hills, California. No business which ABC Viaticals did was with Donald Kaplan as an individual. The agreement is with Services. The referrals came from Services. The business came from Services.

2. There are no grounds stated nor available to pierce the corporate veil of Services. It is adequately capitalized, maintains corporate formalities, is separate from its officers and directors, and has an independent existence. Thus, Kaplan has no liability on the transfers made herein.

F. The Statute of Limitations Bars Recovery of Transfers Made More than Four Years from the Date of Filing of the Motion.

1. Generally, proceedings for the recovery of Fraudulent Transfers under the UFTA must be commence within four years of the date of the transfer. Tex. Bus. & Com.Code Ann. § 24.010 provides:

> "(a) Except as provided by Subsection (b) of this section, a cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:
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> "(1) under Section 24.005(a)(1) of this code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been

discovered by the claimant;

"(2) under Section 24.005(a)(2) or 24.006(a) of this code, within four years after the transfer was made or the obligation was incurred; or

"(3) under Section 24.006(b) of this code, within one year after the transfer was made."

2. The Receiver's Motion seeks to recover transfers made as far back as July 17, 2002. Kaplan contends that no transfer is recoverable if made before April 5, 2003 which is four years prior to the date of the filing of the Receiver's Motion.

G. Expedited Hearing Without Full Rights of Discovery, Jury Trial, Judgment and Appeal Denies Due Process.

1 Assuming that the Court is inclined to grant relief upon the motion, it should order sufficient safeguards to ensure that a fair and full hearing will be provided. "Due process requires notice and an opportunity to be heard. Cleveland Bd. of Education v Loudermill, 470 US 532, 542, 105 S Ct 1487, 1493, 84 L Ed 2d 494, 503 (1985); Greene v Lindsey, 456 US 444, 102 S Ct 1874, 72 L Ed 2d 249 (1982). Due process essentially requires that the procedures be fair. In re Murchison, 349 U S 133, 136, 75 S Ct 623, 625, 99 L Ed 942 (1955). The process that is due varies according to the nature of the right and to the type of proceedings. Mathews v. Eldridge, 424 US 319, 334, 96 S Ct 893, 902, 47 L Ed 2d 18 (1976).

In Eldridge, the Supreme Court applied a balancing test to determine what type of procedure was required. The Court looked at the strength of the private interest, the risk

of erroneous deprivation, the probable value of additional or substitute safeguards, and the government interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail." 424 U S at 335, 96 S Ct at 903. Generally, if government action will deprive an individual of a significant property interest, that individual is entitled to an opportunity to be heard. Boddie v Connecticut, 401 US 371, 379, 91 S Ct 780, 786, 28 L Ed 2d 113 (1971).

2. Here, the Receiver seeks $1.2-million from Kaplan based upon state law claims arising under the Uniform Fraudulent Transfer Act. This is not an insubstantial amount. It is based upon the highly fact-intensive allegation that ABC Viaticals was a Ponzi Scheme. The proof of this, or disproof, lies buried deep within the bowels of ABC Viatical's papers and records. Full discovery under FRCP Rules 26 - 37 is wholly appropriate in light the centrality of the issue to the claims made. This is a key consideration for Kaplan. The alternative is to deny him that right, leaving five years of business conducted by ABC Viaticals reduced to two paragraphs in Mr Quilling's declaration which state, in essence, "I looked at the books of ABC Viaticals. It was a Ponzi scheme." Without discovery, there is no way to counter Mr Quilling's bald assertion.

3. At a minimum, even in the unlikely event that the Court concludes that Kaplan is not entitled to a full trial on the merits and that an expedited hearing is appropriate, as the cases cited in the Receiver's Motion make clear, Kaplan is entitled to an opportunity to seek discovery and to present an evidentiary and legal response to the Receiver's motion following such discovery. See 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 (9th Cir.

1986); see also Receiver's Motion at 7-10.

H. Kaplan is Entitled to a Jury Trial.

1. The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...." The Supreme Court has "consistently interpreted the phrase 'Suits at common law' to refer to "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. Parsons v Bedford, 3 Pet 433, 447, 7 L Ed 732 (1830)." Granfinanciera, S.A. v. Nordberg, 492 US 33, 41, 109 S Ct 2782, 2790 (1989).

2. At common law, an action for the recovery of damages resulting from a fraudulent transfer was a legal matter, not equitable, and, as such, the right of a jury trial was preserved, Granfinanciera, S.A. v. Nordberg, 492 US 33, 109 S Ct 2782 (1989). In Granfinanciera, dealing with the question of the entitlement to jury trials in bankruptcy proceedings, the Supreme Court found no doubt of the entitlement to jury trial in fraudulent transfer cases. It stated:

> "Schoenthal v Irving Trust Co., 287 US 92, 53 S Ct 50, 77 L Ed 185 (1932), removes all doubt that respondent's cause of action should be characterized as legal rather than as equitable. In Schoenthal, the trustee in bankruptcy sued in equity to recover alleged preferential payments, claiming that he had no adequate remedy at law. As in this case, the recipients of the payments apparently did not file claims against the bankruptcy estate. The Court held that the suit had to proceed at law instead, because the long-settled rule that suits in equity will not be sustained where a complete remedy exists at law, then codified at 28 U.S.C. § 384, "serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed." 287 U.S., at 94, 53 S.Ct., at 51. The Court found that the trustee's suit-indistinguishable from respondent's suit in all

> relevant respects-could not go forward in equity because an adequate remedy *49 was available at law. There, as here, "[t]he preferences sued for were money payments of ascertained and definite amounts," and "[t]he bill discloses no facts that call for an accounting or other equitable relief." Id., at 95, 53 S.Ct., at 51. Respondent's fraudulent conveyance action plainly seeks relief traditionally provided by law courts or on the law side of courts having both legal and equitable dockets. Unless Congress may and has permissibly withdrawn jurisdiction over that action by courts of law and assigned it exclusively to non- Article III tribunals sitting without juries, the Seventh Amendment guarantees petitioners a jury trial upon request." Gianfinanciera, *supra*, 492 US at 48-49, 109 S Ct 2794.

3. There is no ascertainable *res* from the payments alleged, and thus equitable remedies related to constructive trust will not be present. At best, the proceeding will entitle the Receiver to a money judgment, which is relief at law for which the right to jury trial is preserved.

4. In addition, the Receiver's motion prays for "such other and further relief, general or special, at law or in equity, to which he might show himself otherwise entitled."

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LAW OFFICES OF RICHARD T. BAUM
2215 Colby Avenue
Los Angeles, California 90064
310.277.2040 Tel
310.286.9525 Fax

By /s/ *Richard T. Baum*
RICHARD T. BAUM
California State Bar No. 80889

Attorneys for DONALD S. KAPLAN

Of Counsel:
JIM FLEGLE
Texas Bar No. 07118600
WILSON E. WRAY, JR.
Texas Bar No. 00797700
Loewinsohn Flegle Deary, L.L.P.
12377 Merit Drive, Suite 900
Dallas, Texas 75251
214.572.1700 Tel
214.572.1717 Fax

**CERTIFICATE OF SERVICE**

I hereby certify that a true of the above instrument has this day been sent by electronic means upon its filing to all parties pursuant to the Federal Rules of Civil Procedure and Local Rule CV-5(a)(3)(A).

SIGNED on June 14, 2007.

*/s/ Richard T. Baum*
RICHARD T. BAUM