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

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

BRIEF IN SUPPORT OF MOTION OF DONALD S. KAPLAN TO DISMISS MOTION FOR SHOW CAUSE HEARING AND REQUEST FOR EXPEDITED HEARING

DONALD S. KAPLAN, named in the Motion for Show Cause Hearing as a party allegedly in possession of assets of the receivership estate, has moved this court for an Order to Dismiss the Motion for Show Cause Hearing. The grounds of the motion are as follows:

1. There is a lack of minimum contacts between the forum, and the forum state, and Donald S. Kaplan such that the imposition of personal jurisdiction over him violates the Due Process Clause of the Fifth Amendment to the United States Constitution in that the exercise of personal jurisdiction over him is not fair and reasonable under the facts and circumstances of the case.

2. The service of the motion provided unreasonably insufficient information regarding the nature of the proceedings against him, the time within which he must respond, the place whereat he must respond, the consequences of his failure to respond, and that a judgment or other relief may be entered against him should he fail to respond. The deficiency of information is so unreasonable as to deprive Kaplan of constitutionally mandated notice of the proceedings against him, and is a violation of the due process clause of the Fifth Amendment to the United States Constitution.

The following is his Brief in Support of that Motion to Dismiss.

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INTRODUCTION

Donald S. Kaplan ("Kaplan") is a resident of California. In his individual capacity, he had no dealings with ABC Viaticals. In no capacity did he ever have residency in the State of Texas, do business in the State of Texas, or submit to the jurisdiction of the laws of the State of Texas. He is not charged with a violation of the Securities Laws of the United States in an action filed in the State of Texas, nor is he charged with a violation of the Securities Laws of the United States in connection with ABC Viaticals. He has undertaken no act which provides constitutionally sufficient minimum contacts with the State of Texas to justify the exercise of personal jurisdiction over him by a court within the State of Texas.

The nationwide service of process which Congress provided in the Securities Act and the Securities and Exchange Act does not provide for the exercise of jurisdiction over him in a supplemental proceeding not having any basis in a claim against Kaplan under either of the Securities Acts. The mere presence, in the Central District of California wherein he is resident, of property of the receivership estate in which he never claimed an interest does not provide a constitutionally permissible basis of the exercise of personal jurisdiction over him since there is no contact between him and the property.

Even if minimum contacts may exist in some form, the assertion of personal jurisdiction over him offends traditional notions of fair play and substantial justice.

In addition, the service of the Motion of Show Cause Hearing upon him does not meet the constitutionally mandated minimum standards of reasonable notice under the circumstances as enunciated in Mullane v Central Hanover Trust, and its progeny.

Specifically, the Motion does not provide Kaplan with sufficient notice of when to respond, to where to respond, and what the consequences may be of failing to respond. It is not specified that a judgment may be entered against him, nor are any other potential consequences of failing to respond delineated (which, according to the Receiver's counsel, may include civil contempt imprisonment for not tendering disgorgement of the allegedly fraudulent transfers). Federal Rules of Civil Procedure Rule 4(a) sets forth the standards for content of a summons commanding a person to appear and respond to a lawsuit; nothing less should be presented by the Receiver's motion.

FACTS

Background of the Viatical Industry. (Kaplan Decl ¶ 12, Attached as Exhibit A to the Appendix in Support of Motion to Dismiss, at pages 10-11)

ABC Viaticals, Inc. featured a variety of programs offering viatical and life settlement investment opportunities. In the viatical industry, under both types of life insurance transactions, an insured under a life insurance policy sells the policy to an investor for cash, who then owns the right to collect the death benefit when the insured passes away. The investor must also pay the premiums to the insurer until the policy matures. The investment grew as a response to the AIDS crisis in the 1980's when young policyholders where given short death sentences by the progress of a disease for which there was neither cure nor effective treatment. Unable to tap the insurance policies either for medical treatment or that last fling before the claws of death take them, the viatical investment arose to provide a way of getting cash into the hands of an insured with a need for the money. Today, a viatical transaction typically relates to an insured who is sick, while a life

settlement transaction involves an insured who is old and has a limited life expectancy.

A viatical investment depends upon a number of factors, among them: the amount of the death benefit, the amount of the premiums required to be paid, the life expectancy of the insured, and the quality of the insurer. In the somewhat ghoulish hope that the insured dies sooner rather than later, investors find the potential of a very substantial return. A miraculous recovery and a long life, by contrast, can spell ruin for the investor. As is typical in any industry, spreading the risk becomes a high priority. Rather than one investor owning one policy, viatical providers pooled many investors together to own a number of policies. The risk could be hedged by purchase of a bond which pays the investor pool at the life expectancy date in exchange for the policy.

In 1995, the United States Court of Appeal for the District of Columbia held that a life settlement transaction did not involve the sale of a security within the meaning of the Securities Act of 1933, Securities and Exchange Commission v Life Partners, Incorporated, 87 Fed 3d 536 (DC Cir, 1996). This decision provided a measure of shelter for participants in the viatical industry as its methods became more sophisticated. When, and indeed if, a program morphed into a security transaction subject to state and federal securities law was probably not a question within the ken of those outside the immediate circle of the viatical program provider. The question of whether the program offered by ABC Viaticals is a securities transaction is an ultimate question under the SEC's complaint in this case. It is far less relevant in this proceeding, however. Ultimately at issue in the Receiver's motion is whether ABC Viaticals had a *bona fide* investment program.

Don Kaplan, Services International Corporation and ABC Viaticals.

Services International Corporation ("Services") is a Nevada corporation based in Agoura Hills, California in Los Angeles County (Kaplan Decl at ¶ 7, App 7). Donald Kaplan is its president (Id. at ¶ 7, App 7). It maintained a website which matched potential investors with viatical program providers. It undertook no duties of a broker; it was a finder only (Id. at ¶ 7, App 7). It entered into a written representation agreement with ABC Viaticals which provided for the payment of finder's fees for any investor or investor representative referred to ABC by Services (Id at ¶ 7, App 7). Services, and only Services, had an agreement with ABC Viaticals, and only Services had the right to receive any finder's fees from ABC Viaticals. Kaplan did not participate as an individual in any activity related to ABC Viaticals; everything Kaplan did was as a representative of Services (Id at ¶ 5, App 6).

Except as stated above regarding Services, neither Kaplan nor any entity in which he had an interest ever resided in or conducted business in the State of Texas (Id at ¶ 3, App 5). None owned any real property or personal property located in Texas (Id at ¶ 3). Kaplan was in Texas on only two occasions and solely to visit friends. No business was done (Id at ¶ 4, App 5-6). They never had agents, representatives or employees in Texas, and neither maintained an office nor telephone number nor had a bank account in Texas, or even with a Texas bank (Id at ¶ 6, App 6). They never advertised nor litigated in Texas (Id at ¶ 6, App 6).

Neither Kaplan nor Services were aware that ABC Viaticals was running a Ponzi scheme (Id at ¶ 11, App 9-10). In fact, they believe that it was a legitimate business enterprise with a business plan designed to make profits for investors. Those profits would

not be dependent upon new investors joining the investment pool, but rather upon the risks and rewards of the viatical program. Services received payment of commissions from ABC Viaticals which were intended (as understood by Services) as payment free and clear of any claims, and were to be treated as Services' property upon receipt. Services paid its bills from that money, commingling it with all other moneys which it had. ABC Viaticals sent IRS Form 1099s to Services for years 2002 - 2006 (Id at ¶ 9, App 8-9)

The Receivership Estate.

The Receiver found that Erwin & Johnson, lawyers located in Orange County, California, was the trustee of substantial funds traceable to ABC Viaticals and its investors (Baum Declaration ¶3, Attached as Exhibit B to the Appendix in Support of Motion to Dismiss at pp 19-20). Five days after his appointment, the Receiver filed his Order of Appointment in the United States District Court for the Central District of California (Id at ¶ 2, App 19). Kaplan and Services never had any connection, directly or indirectly with the trust funds, or with Erwin & Johnson (Kaplan Decl at ¶ 13, App 11-22).

THE RECEIVER BEARS THE BURDEN OF PROVING THAT THE COURT HAS PERSONAL JURISDICTION OVER KAPLAN

This is a motion to dismiss under FRCP Rule 12(b)(2). "When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." Wilson v. Belin, 20 F 3d 644, 648 (5th Cir 1994) (citing Stuart v. Spademan, 772 F 2d 1185, 1192 (5th Cir 1985)). The Receiver's motion says nothing about personal jurisdiction over

Kaplan. The Receiver must not only show admissible facts that Kaplan had minimum contacts with the State of Texas, or that there are statutes which provide for jurisdiction, but must also show that it is fair to bring Kaplan to this jurisdiction. In all factual issues, the Receiver will be unable to sustain his burden. As shall be developed further, he will not be able to sustain the legal burden either.

The Receiver does not allege that Kaplan is a resident of Texas; he does not state the basis upon which he brings Kaplan to this court. The Motion makes no reference to any facts supporting the issue of jurisdiction, and we are left to wonder whether Kaplan is in this court because of 1) jurisdiction under the Texas Long Arm statute, 2) the nationwide service of process provisions of the Securities Acts, or 3) some other statute of the United States. The analysis below shows that the Receiver cannot establish personal jurisdiction over Kaplan on any of the three bases, and that his motion should be dismissed.

JURISDICTION UNDER THE TEXAS LONG-ARM STATUTE:

KAPLAN DOES NOT HAVE MINIMUM CONTACTS

WITH THE STATE OF TEXAS

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution require that the exercise by a court of personal jurisdiction over a defendant be predicated upon that defendant's contacts with the jurisdiction. "The test for personal jurisdiction requires that 'the maintenance of the suit ... not offend 'traditional notions of fair play and substantial justice.' " International Shoe Co. v Washington, 326 US 310, 316, 66 S Ct 154, 158, 90 L Ed 95 (1945), quoting Milliken v. Meyer, 311 US 457,

463, 61 S Ct 339, 342, 85 L Ed 278 (1940). International Shoe, and its progeny, required that a defendant's conduct vis-a-vis the forum jurisdiction be evaluated to determine whether there was a purposeful availment of the protections of the law of the forum state, and if that availment was sufficient to be considered a minimum contact for the purposes of the exercise of personal jurisdiction. Burger King Corp. v Rudzewicz, 471 US 462, 472, 105 S Ct 2174, 2182. Even if a minimum contact exists, the exercise of personal jurisdiction must comport with those "traditional notions of fair play and substantial justice." Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F3d 935, 946 (11th Cir 1997)[1].

Limitations on personal jurisdiction protect liberty interests of the people. The Supreme Court explained in Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 US 694, 702, 102 S Ct 2099, 2104, 72 L Ed 2d 492,

> "The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."

The protections of the Due Process Clause of the Fourteenth Amendment, the Court said, ensure two constitutionally mandated goals: that an individual not be unfairly required to

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[1] The Fifth Circuit's decisions in Bellaire Gen. Hosp. v Blue Cross Blue Shield, 97 F 3d 822, 825 (5th Cir.1996) and Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F 3d 1255 (5th Cir 1994) are not on point since these cases proceeded upon the nationwide service of process provisions of ERISA and the Securities Acts, neither of which are applicable herein, see *infra*.

litigate far from home in an inconvenient forum, and that states be discouraged from expanding their power over non-residents at the expense of their co-equal sovereigns, Bauxites, Id, fn 10 quoting World-Wide Volkswagen Corp. v. Woodson, 444 US 286, 291-292, 100 S Ct 559, 564, 62 L Ed 2d 490 (1980). Since this analysis depends upon the use of the Texas Long Arm statute to establish jurisdiction, the liberty concerns of the 14th Amendment act through the Fifth Amendment to preclude the exercise of jurisdiction by the Federal Courts.

Unless the defendant is brought to court by the nationwide service of process provisions of the act under which he is charged, the federal court operates in many respects as an extension of the courts of the state wherein it sits. It uses the forum state's long-arm statute in order to acquire extra-territorial jurisdiction, FRCP Rule 4(k)(1) (A). Its ability to take personal jurisdiction over the defendant is entirely based upon the International Shoe standards of minimum contacts with the forum state. The structure of Federal Rules of Civil Procedure Rule 4 is premised upon resort to state law where appropriate. Rule 4(k)(1)(A) specifically adopts the long-arm statute of the forum state. In Texas, the grant of jurisdictional power over a defendant is as broad as the limits of constitutional power, Tex. Civ. Prac. & Rem. Code §17.042, Panda Brandywine Corp. v Potomac Electric Power Co., 253 F 3d 865, 867 (5th Cir 2001).

Kaplan Is Not Subject to Non-Minimum Contacts Bases of Personal Jurisdiction.

There are a number of bases upon which personal jurisdiction over a non-resident may be acquired by a court. The defendant may be served while within the jurisdiction, or he may agree to the exercise of jurisdiction over him in advance, National Equipment

Rental, Ltd. v. Szukhent, 375 US 311, 316, 84 S Ct 411, 414, 11 L Ed 2d 354 (1964), or he may generally appear and waive his right to this aspect of due process (see, e.g., FRCP Rule 12(h), "[a] defense of lack of jurisdiction over the person ... is waived" if not timely raised in the answer or a responsive pleading.) In this instance, none of these bases apply to Kaplan. He was served by mail at his home in California. He is not a party to any agreements with ABC Viaticals nor any of the other defendants nor with the Securities and Exchange Commission nor with the Receiver, and nor did he agree to Texas jurisdiction in advance. He brings this motion to immediately contest the assertion of personal jurisdiction over him, and therefore has not waived the issue.

Kaplan Is Not Subject to Texas' General Jurisdiction.

When it comes to out-of-state defendants, their activities in the forum state may be so extensive that any claim may be litigated against them, see Alpine View Co. v Atlas Copco AB, 205 F 3d 208 (5th Cir 2000). This general jurisdiction typically involves out of state corporations selling and advertising their products in the forum, establishing branch offices, and the like. Here, Kaplan has done none of these things. He has had no business or personal dealings within the State of Texas at all.

Kaplan Is Not Subject to Texas' Specific Jurisdiction.

If that general jurisdiction does not exist, specific jurisdiction may be established if Kaplan "purposefully availed himself of the benefits and protections of the forum state by establishing minimum contact with that forum state." Wilson v Belin, 20 F 3d 644, 647 (5th Cir 1994). Three elements go into determining whether minimum contacts exist: (1) the extent to which the defendant has purposefully availed himself or herself of the privilege of conducting activities in the State; (2) whether the plaintiff's claims arise out of those

activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable. Burger King Corp. v Rudzewicz, *supra*, 471 US 462, 472, 105 S Ct 2174, 2182, 85 L Ed 2d 528, 540-41 (1985).

The question becomes the extent of the contacts Kaplan had with ABC Viaticals. His declaration makes it clear that all agreements were between ABC Viaticals and Services. He personally was not a party to any agreements. All bases for payments were activities of Services, a corporation separate and distinct from its owners and operators. The fiduciary shield doctrine holds that an individual's transaction of business within the state solely as a corporate officer does not create personal jurisdiction, Stuart v Spademan, 772 F 2d 1185, 1197 (5th Cir 1985)[2]

The Receiver will point to the summary of payments attached to his declaration in an attempt to show that Kaplan was the direct beneficiary of payments, and therefore minimum contacts are established. However, there is no authentication that the list contains a record of ABC Viaticals, as opposed to the Receiver's own recapitulation based upon ABC Viatical's records. If the latter, there is no foundation upon which it can be shown that the characterization of the party to whom paid is supported by the underlying documents. As Kaplan's declaration makes clear, the designation of payee was done by ABC; the funds went to Services at the account it specified. Services earned the income. Services booked the income for accounting and tax purposes. ABC Viaticals sent IRS

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[2] Some courts have found an exception to this doctrine where the corporation is the alter ego of the individual. In this case, however, there is no allegation that Kaplan is the alter ego of Services, nor any admissible evidence to support such a finding. Therefore, any dealing which Kaplan had with ABC Viaticals occurred while a corporate officer and are not included in the analysis of personal jurisdiction.

Form 1099s to Services with Services' taxpayer identification number.

Finally, the mere receipt of payment made from the forum jurisdiction is not enough to establish a minimum contact, particularly where the place of receipt is outside the forum state. Helicopteros Nacionales de Colombia v Hall, 466 US 408, 417, 104 S Ct 1868, 1873-74, 80 L Ed 2d 404 (1984) (holding that the unilateral activity of another entity can never serve as the basis for personal jurisdiction over a defendant).

Imposition of Jurisdiction is Not Consistent with Fair Play and Substantial Justice.

Even if the Receiver were to demonstrate sufficient minimum contacts between Kaplan and Texas (which he cannot), the Court must then determine whether the "fairness" prong of the jurisdictional inquiry is satisfied. See Wilson v Belin, 20 F 3d 644, 649-652 (5th Cir 1994). To ascertain whether the exercise of jurisdiction is fair and reasonable, the Court must balance the following factors: 1) the burden on the non-resident defendant of having to defend himself in the forum; 2) the interest of the forum state in the case; 3) the plaintiff's interest in obtaining convenient and effective relief; 4) the interstate judicial system's interest in the most effective resolution of controversies; and 5) the shared interests of the states in further fundamental social policies. Central Freight Lines v APA Transport Corp., 322 F 3d 376, 384 (5th Cir 2003); see Asahi Metal Industry Co. v Superior Court, 480 US 102, 113-115 (1987). Under these factors, forcing Kaplan to come to Texas would be manifestly unfair.

Undue Burden.

Forcing Kaplan to come to Texas is an undue burden. First, there is no evidence to suggest that he was anything but the corporate officer of Services in acting in connection with Texas. The issue whether he was Services' alter ego will require resort to corporate

documents and to witnesses all of whom are in California. He is under the care of physicians who have strongly recommended that he limit his travel to no more than four-hour car trips, and that he completely avoid air travel (See Appendix, Decl of Donald S. Kaplan, ¶12, App page 12).

No Particular Texas Interest.

Texas has no particular interest in the case since the claims against ABC arise under Federal Securities law. The claims against Kaplan arise under the Uniform Fraudulent Transfer Act, the provisions of which are virtually identical from state to state.

Convenience to the Receiver.

The Receiver has an interest in making claims against Kaplan in Texas simply because he was appointed in Texas and has his offices there. However, with the filing in the Central District of California of the Order Appointing Receiver, the Receiver is fully able to sue in California, 28 USC §754.

California's Protection of Its Resident.

California has an interest in seeing that one of its residents is not unfairly dragged half-way across the country to respond to claims which are, at best, ancillary to a federal securities action. Its resident's liability can equally and fairly be adjudicated in its state courts and in the Federal Courts which sit within it. Texas has an interest in seeing that its investors recover their losses, but there is nothing in the record which suggests that Texas investors were any more likely to become involved with ABC Viaticals than anyone else. Hence, Texas' interest is no different that any other states.

Shared Policies.

If fraudulent transfers occurred, both Texas and California have similar interests in

promoting their social policies of restoring to the estate that which was unfairly alienated. Since they share the same objectives, and since both enacted the Uniform Fraudulent Transfer Act, there is no preference of Texas over California. In short, it is unreasonable to exercise extraterritorial jurisdiction over Kaplan and bring him to Texas.

THE NATIONWIDE SERVICE OF PROCESS PROVISIONS WITHIN THE SECURITIES ACTS DO NOT PROVIDE A BASIS FOR PERSONAL JURISDICTION OVER KAPLAN

While service of process under FRCP Rule 4 generally follows state long-arm procedures, FRCP Rule 4(k)(1)(D) provides that the service of a summons anywhere is effective to establish jurisdiction over the person of a defendant "when authorized by a statute of the United States." The complaint by the Securities and Exchange Commission alleges violations of both the 1933 Securities Act and the 1934 Securities and Exchange Act, as they are amended. Both acts provide for nationwide service of process, and the statutory language is identical. 15 USC §77v of the Securities Act, and 15 USC §78aa of the Securities and Exchange Act provide in part as follows:

"... process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

Statutory Construction Excludes a Non-Defendant from Nationwide Process Provisions.

Statutory construction starts with the evaluation of the precise words utilized by Congress, I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446, 107 S Ct 1207, 1221 (1987). There is one key word used: "defendant". If a party is not a defendant, the statute does not apply. Here, Kaplan is not sued by the SEC, or by anyone else, alleging a violation of

either of the Securities Acts, and is not a "defendant" in any proceeding brought under the Acts. Furthermore, it is unclear that Kaplan is even a "defendant" in the proceeding brought by the receiver. By construction of the words used by Congress, the two nationwide service of process provisions do not apply to Kaplan.

There is nothing in the either statute to suggest that a receivership established to safeguard an estate of an entity subject to either act becomes the beneficiary of the nationwide service of process provision. The provisions of both sections are limited to actions charging a defendant with violation of the acts. The 1934 Act states, "The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." (Emphasis added.) Unless it is shown that a defendant committed a violation of the act, the tie between the basis of subject matter jurisdiction and the nationwide service of process is not established. The provisions of the 1933 Act are similar, but jurisdiction is not exclusive with the district courts. Nonetheless, there must be a violation of the act(s) by the party to be charged and nationwide service of process. Leroy v Great W. United Corp., 443 U S 173, 181-82 & n 5, 99 S Ct 2710, 61 L Ed 2d 464 (1979) (finding that the reference to the "liabilit[ies] and dut[ies] created by this chapter" in § 78aa "clearly corresponds to the various provisions in the 1934 Act that explicitly establish duties for certain participants in the securities market or *that subject such persons* to possible actions brought the Government, the Securities and Exchange Commission, or private litigants.")

Subject Matter Jurisdiction Does Not Equate with Personal Jurisdiction; Supplemental Jurisdiction over the Receiver's Claims Does Not Subject Defendants to Nationwide Process.

From the standpoint of subject matter jurisdiction, this court may hear and resolve the claims of the Receiver since they are supplemental (*nee* ancillary) to the Securities Acts violations. However, one cannot conflate subject matter jurisdiction with personal jurisdiction. The supplemental jurisdiction which the court possesses creates subject matter jurisdiction, but it does not import nationwide service of process nor elimination of minimum contacts in absence of the defendant being charged with violation of the act(s). In Warfield v Arpe, 2007 WL 549467 (ND Tex 2007) (unpublished opinion), a judge of this court held that the reach of ancillary jurisdiction over the subject matter of the dispute does not import the nationwide reach of process under the Securities Acts, since the parties to be served were not defendants in the underlying securities case, nor charged with Securities Acts violations in the supplemental case.

In Lasch v. Antkies, 161 F Supp 851 (DC Pa 1958), the court held that nationwide service of process provisions of the Securities Act did not apply to claims for relief not based on Securities Act violations. "The provision cannot be carried beyond what Congress intended. Service of Count 3 of the amended complaint [alleging common law rescission based upon mutual mistake] is not authorized by 15 U.S.C.A. § 17v and, therefore, the service requirements of the Federal Rules of Civil Procedure must control." The court then reasoned that the doctrine of ancillary jurisdiction applies to questions of subject matter jurisdiction, but not to matters of service of process.

As shown by Bauxites, the two types of jurisdiction are premised upon different

bases. Subject matter jurisdiction is the most direct expression of sovereignty, that is, the power of the state to exercise supreme authority over all things and persons within its territory. 1 Oppenheim, International Law, Peace (8th Ed., H Lauterpacht, Editor) §123. The limitations on personal jurisdiction flow from due process, the freedom to be left alone. Thus, even if the court may exercise supplemental jurisdiction over a defendant, it does not import the nationwide service of process provisions unless the third party defendant is charged under the provisions of the act authorizing it.

THE FILING OF THE ORDER APPOINTING RECEIVER IN CALIFORNIA IS NOT SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION OVER KAPLAN BECAUSE THERE IS NO NEXUS BETWEEN RECEIVERSHIP PROPERTY IN CALIFORNIA AND KAPLAN

Several courts have taken the position that the interplay of two statutes peculiar to receiverships, 28 USC §754 and 28 USC §1692, permit the court which appointed the receiver to exercise personal jurisdiction over anyone having minimum contacts with the district where receivership property is located, see, e.g., Securities and Exchange Commission v Bilzarian, 378 F 3d 1100 (DC Cir 2004). There, the court reasoned that FRCP Rule 4(k)(1)(D) permits the exercise of jurisdiction over a person when authorized by a statute of the United States. Under Section 754, the court may take possession and administer receivership property located in another district by filing his order appointing receiver in that district within ten days of appointment. Section 1692 provides:

> "In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may

> issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

The Bilzarian court points to the authorization that "process may issue and be executed" as the basis for subjecting anyone within the non-forum district to the personal jurisdiction of the forum. "Process" includes a summons. "Executed" refers not only to the procedures of enforcing a judgment, but to the completion of any act involving "process", including service of the summons.

When put together, the statutes provide that a receiver who filed his order may bring to the forum which appointed him anyone having contacts with the district in which he filed his order. Minimum contacts, says the court in Bilzarian is established by contact with the United States as a whole, Bilzarian, *supra* at 1106.

A Key Factor in Bilzarian was Defendant's Connection with Property in the Non-Forum District.

In Bilzarian, the receiver filed a complaint against Haire in the district which appointed her against Haire seeking to collect a promissory note secured by pledge of stock. Haire moved to dismiss for lack of jurisdiction, a contention the court rejected based on the foregoing rationale. The receivership's property was the note and stock pledge, a specific *res* located in Haire's district. Thus, there was a connection between the receivership property which was located in the non-forum district and the defendant. Seen in the light of the lessons of Bauxites that minimum contacts is a liberty interest, the link between specific receivership property in a non-forum district and the defendant provides constitutional protection. But where there is no link between property in a district and a

defendant, the exercise of personal jurisdiction cannot comport with minimum contact and with traditional notions of fair play and substantial justice.

In this case, Kaplan does not have possession of or an interest in any "property, real, personal or mixed" of the receivership estate. At best, the receiver holds a claim for relief under the Texas or California Uniform Fraudulent Transfer Acts. But, as shown below, Kaplan does not have possession of a thing having a situs. There is receivership property located in the Central District of California: clients' trust bank accounts maintained by entirely third parties. But there is no nexus between that property and Kaplan.

In Order for These Statutes to Impose Personal Jurisdiction of the Forum Court, There Must be a Contact between the Receivership Property and the Defendant.

To permit the exercise of jurisdiction over persons not connected with the property which gives the receiver authority in the non-forum district has the potential of limitless jurisdiction. Any claim could be brought against any person in a district with which he had no contact – the potential for abuse is substantial. Not requiring a link between property in the non-forum district and the defendant places millions in a distant district subject to whatever claims the receiver could think up. Entirely local transactions giving rise to an account payable to the receivership can be sued upon in a court far, far away. If it was Congress' intent to provide a receiver with plenary power to bring anyone within the district whereat the property was located to the forum district, why does 28 USC §754 provide that a receiver "...shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in Section 959 of this title."?

Congress explicitly gave the power to sue in non-forum districts because it recognized that it would impair constitutional limitations to force every possible defendant

to the forum. The receiver can sue and be sued in the non-appointing state. Both sections were enacted in 1948 and are unchanged. They clearly sought to remedy the problem faced by receivers when property was located across a state line. Instead of filing a new suit in the property locus, qualifying as a receiver and following differing state requirements, Congress simply allowed its Federal Courts to take possession of property in other states simply by filing the receiver's order of appointment. The filing requires a ties to the receivership assets. There is nothing in the congressional record, and nothing in the first forty years of their history to suggest that Congress wanted to expand receivership power far beyond the situs of assets. Equity receiverships often pursued assets in the districts where they were located, and it was fair to require the Receiver to come to the asset in order to administer it. It is fair to require a non-resident to come to the forum jurisdiction if he has purposefully availed himself of the protections and laws of the forum. But is not fair to require him to come to the forum where his only contact with the case is his contact with a district wherein the receivership happens to have property.

Here, Kaplan[3] received payments of commissions which could be considered fraudulent only with the application of hindsight. At the time of the transfers, ABC Viaticals intended to pay a debt owed to him, and Kaplan intended to apply the payment to the debt. The money has long ceased to be an ascertainable fund, and commingling will make tracing impossible. As such, there is little more than a claim for relief against Kaplan; being inchoate, it does not have a situs.

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[3] Kaplan denies that he received anything, contending that his corporation was the recipient. For analysis purposes only, Kaplan refers to Kaplan, Service, or Kaplan Investment Properties, LP.

There is no Receivership Property in Kaplan's Possession because the Receiver Cannot Impose a Constructive Trust.

The only theory which supports a claim that Kaplan has property of the receivership estate is that the funds paid to Kaplan are subject to a constructive trust. To obtain a constructive trust, the proponent must prove: (1) breach of a special trust, fiduciary relationship, or actual fraud; (2) unjust enrichment of the wrongdoer; and (3) tracing to an identifiable res. Hubbard v Shankle, 138 SW 3d 474, 485 (2004), Troxel v Bishop, 201 SW 3d 290, 297 (2006). The Receiver has not identified, in his motion or in his letter of demand, any identifiable property which Kaplan supposedly holds as a constructive trustee. The proponent of a constructive trust must strictly prove the elements necessary for the imposition of the trust. Hubbard, 138 SW 3d at 485, Troxel, at 298, Mowbray v. Avery, 76 SW 3d 663, 681 n. 27. Without an identifiable *res*, the Receiver's filing of his order in the Central District of California does not reach Kaplan, and jurisdiction is not established.

Unlike many cases seeking constructive trusts, the recipient here is not the party with fraudulent intent. The disposition of the proceeds was not promised to be safeguarded, used in any particular, stashed awaiting further instructions, or in any manner limited. The funds were paid unconditionally, and were treated, commingled, and used accordingly.

THE MOTION DOES NOT PROVIDE SUFFICIENT NOTICE

TO ACCORD DUE PROCESS

Due process requires that defendants be afforded notice of proceedings involving their interests and an opportunity to be heard. This requires "... notice reasonably calculated, under all the circumstances, to appraise interested parties of pendency of the action and to afford them opportunity to present their objections." Mullane v Central Hanover Bank & Trust Co., (1950) 339 US 306, 314, 70 S Ct 652, 657. The notice required must be likely to result in providing actual notice of the proceedings and sufficient information on how to preserve one's rights.

The Federal Rules of Civil Procedure provide a clear guide as to what kind of information is required to provide sufficient notice of a proceeding. FRCP Rule 4(a) provides the form of a summons. "The summons shall ... identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, the plaintiff. It shall also state the time within which the defendant must appear and notice the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint."

Comparison of the information afforded by a summons and that afforded by the motion served upon Kaplan shows the latter's clear deficiencies. Notice is not separately given, only the motion itself. Nowhere is the address of the court stated. The Motion is not strictly addressed to Kaplan. The counsel for the Receiver's name and address are stated only on the last page. It does not provide any time frame whatsoever as to when a response may be due. It does not say that a failure to respond could lead to a summary

procedure by default and ultimately a judgment by default. It does not state that the failure to comply with an order of disgorgement could, at least in the opinion of the receiver's attorney, lead to imprisonment as a contempt.

A summons requires the date by which the defendant must appear. The motion leaves it to counsel (or a very smart layman) to wade through the FRCP and the Local Rules to determine what the procedure is on motions, and what the individual judge requires. Byzantine paths to truly simple information does not make for notice reasonably calculated to appraise the defendants of the nature of the proceedings against him.

Receivership proceedings are, in many ways, like bankruptcy proceedings. Like a bankruptcy trustee, the receiver may enforce the rights of the estate against third parties by resort to legal proceedings based upon state law claims. In bankruptcy, a summons is issued in order to commence an adversary proceeding (see Federal Rules of Bankruptcy Procedure Rule 7004). FRCP Rule 4(a) is explicitly incorporated into bankruptcy practice by FRBP Rule 7004. Should anything less be expected of a receivership proceeding?

CONCLUSION

The Motion of the Receiver at issue herein seeks to deprive Kaplan of due process. It seeks to force him to a forum in which he had no contact. The imposition of jurisdiction against him offends fairness and substantial justice. The motion improperly seeks to utilize nationwide service of process provisions from the two Securities Acts when, in fact, Kaplan is not charged with a violation of either act. The filing of the Order Appointing Receiver in the Central District of California creates sufficient minimum contacts with the appointing court's forum only where there is a contact between the receiver's property and the party to be charged. Finally, the lack of sufficient information in the Receiver's Motion deprives Kaplan of his due process right to know that his interests may be impaired and that he must timely do something about it.

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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