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

RESPONSE TO DONALD S. KAPLAN'S MOTION TO DISMISS AND COMBINED REPLY BRIEF SUPPORTING THE RECEIVER'S MOTION FOR SHOW CAUSE HEARING AND EXPEDITED CONSIDERATION

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

Michael J. Quilling, as Receiver for ABC Viaticals, Inc., ("Receiver") files this response to Donald S. Kaplan's Motion to Dismiss [Dkt. Nos. 59-60] and combines it with his reply brief in support of the Receiver's Show Cause Motion [Dkt. No. 44]. The Receiver seeks to have Donald S. Kaplan, individually and as principal officer for Kaplan Investment Properties and Services International Corp., (collectively, "Kaplan") appear in the proceedings and show cause why he should not disgorge $1,200,890.92 that he received for recruiting investors into a fraudulent investment scheme. In support, the Receiver would respectfully show the Court as follows:

A. THIS COURT HAS STATUTORY PERSONAL JURISDICTION OVER KAPLAN UNDER 28 U.S.C. § 754.

This is the first issue that the Court must decide in these show cause proceedings against Kaplan. The case law in this district is well-settled that courts overseeing federal equitable receiverships acquire nationwide personal jurisdiction through 28 U.S.C. § 754 and § 1692 instead of through the traditional minimum contacts analysis.[1] *S.E.C. v. Vision Comm., Inc.*, 74 F.3d 287, 290 (D.C. Cir. 1996); *American Freedom Train Foundation v. Spurney*, 747 F.2d 1069, 1073 (1st Cir. 1984); *Haile v. Henderson Nat'l. Bank*, 657 F.2d 816, 823-24 (6th Cir. 1981); *S.E.C. v. Cook*, 2001 WL 803791, *2-3 (N.D. Tex. July 11, 2001). Rule 4 of the Federal Rules of Civil Procedure contemplates that a district court's personal jurisdiction may extend beyond its territorial limits when permitted by statute. FED. R. CIV. P. 4(k)(1)(D); *see also Haile*, 657 F.2d at 824. In receivership proceedings, 28 U.S.C. § 754 and § 1692 provide for such extraterritorial jurisdiction.

Section 754 extends a district court's jurisdiction to any territory where property claimed by the receivership estate is present. In relevant part, § 754 provides as follows:

> A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.
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> * * *
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> Such receiver shall, within ten days after the entry of the his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located.

1 In his Motion to Dismiss, Kaplan spends a great deal of time addressing the traditional minimum contacts analysis set forth in *International Shoe v. State of Washington*, 326 U.S. 310 (1945). *See Brief in Support of Kaplan's Motion to Dismiss* [Dkt. No. 60] at 8-14. In the context of federal equity receiverships, however, "the analysis of *International Shoe* and its progeny is inapplicable." *Haile v. Henderson Nat'l. Bank*, 657 F.2d 816, 822 (6th Cir. 1981).

Section 1692 allows for service of process in any district where § 754 filings are properly made. In relevant part, § 1692 provides as follows:

> 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, but orders affecting the property shall be entered of record in each such district.

Through the interaction of § 754 and § 1692, this Court acquires both personal jurisdiction and *in rem* jurisdiction in all districts where § 754 filings are timely made. *Vision Comm., Inc.*, 74 F.3d at 290; *Haile*, 657 F.2d at 823-24; *Quilling v. Stark*, Case No. 3:05-CV-1976, 2006 WL 1683442, *3 (N.D. Tex. Jun. 19 2006). Courts have recognized that these statutes "facilitate judicial efficiency by permitting courts to manage claims regarding receivership property in a single forum." *Stark*, 2006 WL 1683442 at *3; *Quilling v. Grand Street Trust*, Case No. 3:04-CV-251, 2005 WL 1983879 (W.D.N.C. Aug. 12, 2005); *Terry v. June*, Case No. 3:03-CV-52, 2003 WL 22125300, *5 (W.D. Va. Sept. 12, 2003).

Case law further illustrates the extent of this Court's personal jurisdiction under 28 U.S.C. § 754. In *Quilling v. Grand Street Trust*, the Court appointed a receiver for an individual and several entities that had engaged in a Ponzi scheme. *Grand Street Trust*, 2005 WL 1983879 at *1. After filing notice of his appointment in all of California's U.S. district courts, the receiver filed an ancillary action to recover receivership estate assets fraudulently transferred to parties located there. *Id.* The defendants filed a motion to dismiss, claiming that the North Carolina district court lacked personal jurisdiction over them as California residents without any contacts in that forum. *Id.* The Court noted that the receiver's § 754 filings in California were "effective to extend the jurisdiction of this Court to any Defendants who have minimum contacts with California." *Id.* at *3 (emphasis added), *citing Vision Comm., Inc.*, 74 F.3d at 291; *Terry*, 2003 WL 22125300 at * 3. This "extraterritorial jurisdiction" prevails in all ancillary actions except those of "extreme"

inconvenience or unfairness. *Id.* at *4. Although a California resident might encounter some inconvenience by defending a suit in North Carolina, the Court held that this did not rise to the level of "extreme" inconvenience so as to implicate due process concerns.[2] *Id.* Accordingly, the receivership court found that it did have personal jurisdiction over the defendants in California. *Id.*

In this case, the Receiver filed timely notice of his appointment in the Central District of California. *See Brief in Support of Kaplan's Motion to Dismiss* [Dkt. No. 60] at 7. Under 28 U.S.C. § 754, that filing effectively extends the jurisdiction of this Court to any parties who have minimum contacts with that district. *See Vision Comm., Inc.*, 74 F.3d at 291; *Terry*, 2003 WL 22125300 at *3. Without question, Kaplan currently resides in the Central District of California and did so while recruiting investors into the ABC investment scheme. *See Appendix in Support of Kaplan's Motion to Dismiss* [Dkt. No. 61], Exhibit "A" at ¶ 2. Therefore, this Court has both personal jurisdiction over Kaplan and *in rem* jurisdiction over $1,200,890.92 of investor funds (or their proceeds) that he received as commissions from ABC.

B. A SHOW CAUSE PROCEEDING IS THE PROPER WAY TO ADDRESS THE $1,200,890.92 OF INVESTOR FUNDS THAT KAPLAN RECEIVED FROM ABC.

1. Kaplan Has Violated the Order Appointing Receiver by Continuing to Possess $1,200,890.92 in Commissions Traced to Investor Funds.

To prevail on his Show Cause Motion, the Receiver must show that (1) a court order is in effect, (2) the order requires certain conduct by Kaplan, and (3) Kaplan has failed to comply with the order. *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 581 (5th Cir. 2000); *Lelsz v. Kavanaugh*, 673 F.Supp. 828, 839 (N.D. Tex. 1987). The alleged conduct need not be willful so

2 In this case, Kaplan suggests that a heart condition could make it inconvenient to defend this action in the U.S. District Court for the Northern District of Texas. *See Appendix in Support of Motion to Dismiss* [Dkt. No. 61], Exhibit "A" at ¶ 15. If Kaplan's physicians provide sworn statements that he truly cannot fly under any circumstances, then his testimony could be developed through depositions, affidavits, or by telephone in connection with the Show Cause Hearing. The Receiver believes that these are fair accommodations under the Order Appointing Receiver, which requires that all claims by or against the Receivership Estate be litigated exclusively in the U.S. District Court for the Northern District of Texas. *Order Appointing Receiver* [Dkt. No. 8] at ¶¶ 10, 14.

long as Kaplan is actually violating the order. *Am. Airlines, Inc.*, 228 F.3d at 581. In this case, the Order Appointing Receiver clearly directs ABC's agents and brokers to surrender all receivership assets at issue in this case:

> All persons, including Defendant and Relief Defendants, and their . . . agents, servants, employees, brokers . . . 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. By his own admission, Kaplan acted as a "finder" for ABC who received "payment of a finder's fee for any investor or investor representative referred to ABC." *Brief in Support of Kaplan's Motion to Dismiss* [Dkt. No. 60] at 6. As discussed below, those fees constitute receivership assets that should be surrendered to the Receiver in this case.

2. Kaplan Received Commissions Fraudulently Transferred out of a Ponzi Scheme.

Receivership estate records show that at least $1,200,890.92 of investor funds can be traced directly to Kaplan, individually and d/b/a Kaplan Investment Properties or Services International Corp. ABC's bank records reveal at least 95 separate commission payments to Kaplan and his entities in the following aggregate amounts:

Named Recipient	**Amount**
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**

See Receiver's Show Cause Motion [Dkt. No. 44-2], Exhibit "A-1".[3] In his responsive pleadings,

3 The Receiver recognizes that ABC paid at least some of those commissions to Services International Corp. The Receiver has, therefore, asked that Kaplan appear as the principal officer of that entity to explain why Services International Corp. has not surrendered all investor funds purportedly earned as a "finder's fee" from ABC. *See Show Cause Motion* [Dkt. No. 44] at 10.

Kaplan does not dispute the amount of these transfers or the fact that they can be traced to investor funds. Nevertheless, without citing any case law or other authorities, Kaplan denies that those payments constitute receivership assets. *See Brief in Support of Kaplan's Show Cause Motion* [Dkt. No. 60] at 20. [4]

The Receiver, on the other hand, has provided citations to numerous cases showing that commissions paid from a Ponzi scheme may be recovered as assets of the receivership estate. *See, e.g., S.E.C. v. Cook*, 2001 WL 256172, *3, 4 (N.D. Tex. Mar. 8, 2001); *see also Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006); *In re Alpha Telecom, Inc.*, 2004 WL 3142555, *4 (D. Or. Aug. 18, 2004). ABC's bank records stand on their own in showing that the company was insolvent and operated as a Ponzi scheme. Those records show that (1) investor funds constituted virtually all of ABC's income, (2) those funds were commingled, and (3) the contributions of later investors were used to cover premium obligations owed to earlier investors. Kaplan does not dispute these facts but, instead, argues that ABC does not fit the traditional definition of a Ponzi scheme.

In a classic Ponzi scheme, "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." *Quilling v. Humphries*, Case No. 3:06-CV-0299, 2006 WL 2934276 at n.2 (N.D. Tex. Oct. 13, 2006). For purposes of recovering under the UFTA, the key trait of a Ponzi scheme is that it is necessarily insolvent so that later investors are guaranteed to lose money. *In re Independent Clearing House Co.*, 77 B.R. 843, 860 (Bankr. D. Utah 1987); *see also Cook*, 2001 WL 256172 at *3. Although ABC did purchase a portfolio of life

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4. Kaplan also mistakenly claims that the Receiver failed to bring his fraudulent transfer claim within the UFTA's statute of limitations. *See Kaplan's Response Brief* [Dkt. No. 58] at 5. The UFTA permits claims "within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." TEX. BUS. & COM. C. § 24.010(a)(1). The Receiver could not possibly have discovered the fraudulent transfers to ABC's sales agents until his appointment on November 17, 2006. Therefore, the Receiver timely initiated this action against Kaplan on April 6, 2007—well within one year of his appointment.

settlement policies, they never amounted to an "actual revenue-producing business." Instead, ABC used commingled funds of later investors to purchase those policies for the benefit of earlier investors. After paying exorbitant fees to its officers and agents, ABC lacked the reserves needed to pay policy premiums as they became due. To keep policies from lapsing, ABC relied solely on income from new investors to cover existing premium obligations for its earlier investors. In this manner

, ABC was necessarily insolvent and operated as a Ponzi scheme for purposes of the UFTA.

As a Ponzi scheme, ABC paid Kaplan for bringing in new investors to "keep the scheme going." *Cook*, 2001 WL 256172 at *3. Such transfers are voidable under the UFTA whether or not Kaplan knew that the ABC investment scheme was fraudulent. *Warfield*, 436 F.3d at 559 ("the transferees' knowing participation is irrelevant"). Kaplan, therefore, must disgorge all funds earned for unlawfully marketing the investments offered by ABC. *In re Alpha Telecom*, 2004 WL 3142555, *4 (D. Or. Aug. 18, 2004) ("The law cannot permit [those receiving commissions] to benefit from the sale of unregistered securities").

3. The Receiver's Constructive Trust Claim Applies to All Proceeds Traced to the $1,200,890.92 that Kaplan Accepted from ABC.

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). Under Texas law, 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 Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex.1974) (no strict formula for creating constructive trust under Texas law); *see also 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).

In *Quilling v. Trade Partners, Inc.*, Case No. 1:03-CV-0236 (W.D. Mich. Dec. 1, 2006), the district court appointed a receiver for a fraudulent investment scheme that marketed and sold interests in viatical policies. It acknowledged that the equitable doctrine of constructive trust gave defrauded investors a "priority of right" over all other claimants. *Report & Recommendation* [Dkt. No. 1501] at 4 (citing III CLARK ON RECEIVERS § 662.1 at 1174), as adopted Jan. 9, 2007 [Dkt. No. 1523] (1:03-CV-0236 W.D. Mich.). The court explained that the constructive trust arose by operation of law at the moment investors contributed their money to the fraudulent investment scheme:

> 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 . . . It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when the duty is subsequently enforced.

Id. at 5 (quoting 5 A. Scott, LAW OF TRUSTS § 462.4 (3d ed. 1967)) (emphasis added); *see also Fontanta*, 528 F. Supp. at 146.

As in *Trade Partners*, the Court in this case clearly anticipated that ABC held funds in constructive trust for the benefit of its investors and unlawfully transferred those funds to third parties. In fact, the Order Appointing Receiver expressly provides 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. In this case, the Receiver has traced an identifiable *res* of investor funds totaling $1,200,890.02 to Kaplan. Kaplan now holds those funds (or their proceeds) as constructive trustee for the defrauded investors and should disgorge that amount to the receivership estate.

C. EXPEDITED CONSIDERATION IS APPROPRIATE IN THIS CASE.

The Receiver's Show Cause Motion [Dkt. No. 44] cites numerous cases where a district court determined receivership claims through expedited, summary procedures. *See, e.g., SEC v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6th Cir. 2001); *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 2000); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. Wencke*, 783 F.2d 829, 837-38 (9th Cir. 1986). Those cases make it clear that, in the context of receivership proceedings, this Court can employ summary procedures as long as it gives Kaplan notice and a meaningful opportunity to present his factual and legal contentions. Although he does not claim he suffered any prejudice, Kaplan believes that the Court has denied him due process in both respects.[5] *Brief in Support of Kaplan's Motion to Dismiss* [Dkt. No. 60] at 23-24.

Kaplan clearly had ample notice and an opportunity to respond to the Receiver's claim for the $1,200,890.92 at issue in this action. On March 8, 2007, the Receiver sent Kaplan a copy of the Order Appointing Receiver along with a letter demanding that he surrender those funds as proceeds from a Ponzi scheme. *See Receiver's Show Cause Motion* [Dkt. No. 44-2], Exhibit "A-2". When

5 Kaplan also mistakenly claims that he is entitled to a jury trial because the Receiver's requested relief is legal, as opposed to equitable in nature. *See Kaplan's Response Brief* [Dkt. No. 58] at 8. In his Show Cause Motion, however, the Receiver clearly seeks an order directing equitable disgorgement of the $1,200,890.92 in investor funds that Kaplan received as commissions from ABC. *See Receiver's Show Cause Motion* [Dkt. No. 44] at 10. Such relief is clearly equitable in nature and permitted under the both common law and the UFTA. *See Pierce v. Vision Invs., Inc.*, 779 F.2d 302, 307 (5th Cir. 1986) (suits seeking disgorgement are "equitable in nature"); TEX. BUS. & COM. C. § 24.008(a)(3).

Kaplan failed to do so, the Receiver filed a Show Cause Motion and delivered it to three different addresses used by Kaplan, Kaplan Investment Properties, and Services International Corp. *See Receiver's Show Cause Motion* [Dkt. No. 44 at 11]. On April 30, 2007, the Court entered its Order directing Kaplan to respond in these proceedings by May 10, 2007. *Order* [Dkt. No. 47]. Kaplan then obtained counsel and twice negotiated extensions of time to respond in this case. *See Motion to Approve Stipulation Extending Donald S. Kaplan's Time to Respond* [Dkt. No. 49]; *Motion to Approve Second Stipulation Extending Donald S. Kaplan's Time to Respond* [Dkt. No. 53]. On June 14, 2007, Kaplan appeared in these proceedings and filed 86 pages of responsive pleadings and evidence. *See Kaplan's Response Brief* [Dkt. No. 57-58]; *Kaplan's Motion to Dismiss* [Dkt. Nos. 59-61]. Clearly Kaplan received notice of the action against him and took full advantage of his opportunity to respond. The Receiver now asks that the Court set a show cause hearing to determine the receivership estate's right to recover $1,200,890.92 that Kaplan accepted as commissions from a fraudulent investment scheme.

Pending that hearing, the Receiver would not oppose entry of a scheduling order if the Court believes it would satisfy the requirements of due process. Such an order would allow both parties to conduct discovery, file briefs, and promptly bring this matter before the Court.

Dated: June 27, 2007

Respectfully submitted,

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ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June, 2007, a true and correct copy of this document was served to the following by U.S. mail with first-class postage pre-paid:

Richard T. Baum
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Wilson E. Wray Jr.
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A copy will also be posted on the Receiver's website at www.secreceiver.com.

/s/ Brent J. Rodine