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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	Civil Action No.
	§	
vs.	§	3-06-CV-2136-P
	§	
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.	§	
	§	

REPLY RE MOTION OF DONALD S. KAPLAN TO DISMISS MOTION FOR SHOW CAUSE HEARING AND REQUEST FOR EXPEDITED HEARING; NOTE RE PROCEDURES TO BE USED IN CONNECTION WITH RECEIVER'S MOTION FOR SHOW CAUSE HEARING

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

DONALD S. KAPLAN, named in the Motion for Show Cause Hearing as a party allegedly in possession of assets of the receivership estate, files this reply regarding his motion to dismiss the Motion for Show Cause Hearing filed by Receiver Michael Quilling. In addition, if this motion is not granted, Kaplan files the following note regarding the procedures to be followed in connection with the Receiver's motion.

REPLY RE MOTION TO DISMISS

THE RECEIVER CONCEDES THAT MINIMUM CONTACTS AND THE SECURITIES ACTS DO NOT PROVIDE JURISDICTION OVER KAPLAN

There Are No Minimum Contacts Between Texas and Kaplan.

The Receiver concedes that Kaplan has no minimum contacts with the State of Texas. The Receiver has not pointed to any fact which establishes that a Texas court has personal jurisdiction over him. Likewise, the Receiver concedes that the nationwide service of process provisions of the Securities Acts do not provide a basis to haul Kaplan into this Court. Instead, the Receiver argues that minimum contacts has no place in the analysis, that traditional due process analysis is to be laid aside, and that the intersection of two statutes provides jurisdiction. As will be seen, this will not establish jurisdiction.

SECTIONS 754 AND 1692 DO NOT PROVIDE

UNLIMITED *IN PERSONAM* JURISDICTION

In his motion, Kaplan himself cited the Court to the two statutes upon which the Receiver relies: 28 USC §754 and 28 USC §1692. These 1948 statutes give a receiver appointed in one district the right to take control of property in different districts simply by filing his order of appointment in the non-forum district. The Receiver relies upon a series of cases which have misconstrued these two statutes for a result-oriented rationale which is at odds with the language of the statutes, the previous practice of receiverships, and the constitutional limitations which the liberty interest of the due process clause of the 5th Amendment is designed to protect. None of these are published cases from the Fifth Circuit; though one is an unpublished district court decision from the Northern District of Texas (the citability of which is open to some question).

FRCP Rule 4(k)(1)(D) provides that service of a summons is effective to establish personal jurisdiction of a court over a defendant when authorized by a statute of the United States. The Receiver asserts that the two statutes cited above fulfill this requirement. Analysis of the statutes shows otherwise. §754 is purely a procedural statute which in this context requires that the receiver file his Order of Appointment in each non-forum district where receivership property is located. It is within §1692 that the receiver contends the nationwide service of process provision resides. Analysis shows that this is misplaced.

The Code Headings Show that the Statutes Relate to Property, not Jurisdiction.

Title 28 of the United States Code provides in part: "§ 1692. *Process and orders*

affecting property in different districts.

"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."

By its heading within the United States Code, §1692 relates to matters related to property in different districts. Unlike statutes dealing with personal jurisdiction and service of process over individuals, it makes no reference to these matters, confining itself only to orders affecting property. And while headings alone do not determine the construction of statutes by themselves, they may provide a context by which Congress meant to be understood.

The words of §1692 say nothing about service of a summons being effective in any jurisdiction where property is located. Instead, it provides for issuance and execution of process as if the property lay in one district only. This suggests that specific property is within the receiver's reach, not ordinary defendants.

Congress Knows How to Provide for Nationwide Service of Process in Clear Language; It Did Not Authorize It under §§754 and 1692.

Congress is clearly capable of stating in clear and unambiguous language that it intends the federal courts to have the benefit of nationwide service of process. As discussed in the motion, both the 1933 Securities Act and the 1934 Securities and Exchange Act have nationwide service of process provisions. The 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."

The question must be asked why Congress did not use this clear, unambiguous language when it enacted §1692 if it wanted to give receiverships nationwide service of process powers. Fourteen years earlier it said specifically that process related to the prosecution of securities cases may be served anywhere. Why did Congress not use that same language when it enacted §1692?

Other statutes show Congress ability to state clearly what it means. In the Federal Rules of Bankruptcy Procedure it provided that nationwide service of process is permitted. Rule 7004(d) provides: "The summons and complaint and all other process except a subpoena may be served anywhere in the United States." Clear, concise use of language in the rule shows how Congress says what it means to say. Instead, §1692 mentions nothing about service of process, service of a summons and complaint, nor service of anything else.

In Stenger v Leadenhall Bank & Trust Co. Ltd., (Not Reported in F.Supp.2d), 2004 WL 609795 (ND Ill,2004), the Court rejected the view that §§754 and 1692 bestowed nationwide service of process in receiverships, in part based upon its review of the ability of Congress to state its intent to bestow nationwide jurisdiction in clear terms:

> "This section [§ 1692] provides for the issuance and execution of process; however, it does not mention service of process. Contrary to Section 1692, other statutes that have been construed to permit nationwide service of process include language not found in Section 1692. See 18 U.S.C. § 1965(b) ("process may be served in any judicial district of the United States"); 28 U .S.C. § 1697 ("process, other than subpoenas, may be served at any place within the United States"); 15 U.S.C. § 78aa (process "may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found"). Section 1692 provides no similar language providing for nationwide service of process and, therefore, does not create personal jurisdiction under Rule 4(k)(1)(D). See [Stenger v] World Harvest Church, Inc., 2003 WL 22048047 at 3 (N.D.Ill. Aug.2, 2003)."

Courts Strain Ordinary Usage to Conflate "Executed" into "Service".

As the courts have done in Haile v Henderson National Bank, 657 F 2d 816 (6th Cir 1981) and in those cases which followed it, the words of §1692, "process may ... be executed", must be twisted and contorted to include service of process. Most uses of "executed" are limited to the carrying-out of orders, the performance of legally-mandated judicial commands. "Execution", as a process, means the enforcement of a judgment, or more specifically, the seizure of property and application of its value to a money judgment. The courts in Haile, et al, construed "executed" as being the performance of any duty related to process, including the service of it. However, given Congress's past clarity on

the matter, it could have used "service" if it meant to include service of summons within the meaning of the statute. It had property in mind, not summons and complaints. In the receivership context, execution permits the receiver to take exclusive control of the property, thereby carrying-out the order that he take all property into his possession, but it does not permit the court to obtain personal jurisdiction over a defendant.

In Stenger v World Harvest Church, Inc., 2003 WL 22048047 at 2 (ND Ill 2003) the Court understood that service of process is not subsumed within issuance and execution.

> "The issuance of process is the Clerk's ministerial act of issuing a summons to a plaintiff so that he or she can serve it on the defendant. The execution of process involves the act, in an *in rem* action, of attaching property. Cf. United States v. Approximately 2,538.85 of Stock Certificates, 988 F 2d 1281, 1282, 1286 (1st Cir.1993) (concerning Sup. R. Fed. P. E(4), which deals with "execution of process"; " 'Execution' of such 'process' consists of the service of the arrest warrant upon the defendant property ...."; distinguishing between "service" of a warrant on the property owner and "execution" of the process on the property itself)."

The court would not construe into the words of the statute a meaning so far removed from those commonly understood and used.

Personal Jurisdiction Renders a Receiver's Right to Sue in Non-Forum Districts Redundant.

The interplay of §754 and §1692 produces still another result at odds with the cited

cases. "§754 Receivers of property in different districts.

> "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.
>
> "He 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.
>
> "Such receiver shall, within ten days after the entry of this 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. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district."

This section gives the receiver the right to sue in the non-forum district provided he filed his Order of Appointment. This raises the question as to why Congress would give him authority to sue in non-forum districts if all he needed to do was to sue in the appointing district and serve that summons and complaint in the non-forum district. Such inconsistency is not the usual mark of Congressional enactments.

The Statutes Were on the Books for 33 Years Before This Magic Meaning Was Discovered.

There were no cases prior to 1981 which followed the view charted by Haile and

followed by other courts. In fact, §1692 appears to have been cited exactly once in the years prior to Haile, Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 459 F Supp 507 (DC Fla,1978). There, the District Court ordered the arrest of various pieces of salvaged property taken to the Southern District of Florida. After an extensive review of maritime and admiralty practice, the Court noted that its procedure was consistent with §1692 and the right of a receiver to take possession of property in other districts. It was cited for no other proposition, certainly not for the extension of personal jurisdiction over persons in other districts.

Historical hindsight constantly calls for an analysis of what happened, what did not, and why. Receivers had been around for centuries, and the statutes since 1948, yet it only in the last twenty five years that the courts have found this meaning that issuance and execution, in a statute headed as referring to property, means nationwide service of process. Surely past courts could read the same language and never came to this strained meaning.

Finally, it is worthy of note that Section 1692 has apparently not been mentioned in any context by the United States Supreme Court.

Imposition of Personal Jurisdiction Infringes Constitutional Guaranties of Due Process.

As noted in detail in the Motion to Dismiss, the Due Process clauses of the 5th and

14th Amendments provide a bulwark protecting the liberty interest of the people, 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 (1982). Limitations upon the reach of state and federal judicial power stem not from sovereignty but from the liberty interest of the people. The federal nature of the republic demands respect for the locality of justice. Since it was the states which came together to form the more perfect union, respect must be accorded to their citizens right to be free from extraterritorial exercise of judicial power imposed not by the citizen's conduct but by vague notions of judicial economy. This is particularly so where Congress has not clearly spoken that nationwide service of process is required to solve a national problem.

Statutory construction requires that the courts interpret acts of Congress so as to avoid unconstitutionality. The corollary is that where constitutional limitations exist, courts should avoid interpretations which might infringe constitutional rights. The extension of nationwide service of process in absence of a clear congressional mandate upends established practice and seriously undermines the right that a citizen of the United States may not be called to answer a civil complaint at a place far from home without having undertaken some act toward that faraway place. The notion that "minimum contacts" may be with the United States as a whole, rather than with a particular state leads to the highly doubtful proposition that the Framers intended that the due process clause of the Fifth Amendment would protect from the exercise of civil jurisdiction only foreigners not resident in the United States. As such, the Receiver's interpretation of the application of the statutes should be rejected, and the motion to dismiss should be granted.

NOTE RE PROCEDURES TO BE UTILIZED IN MOTION FOR SHOW CAUSE

It appears that the essence of the Receiver's substantive case goes something like this. The Receiver alleges that ABC Viaticals was a Ponzi Scheme; that any transfer made by a Ponzi Scheme operator is a transfer made with actual intent to defraud, hinder or delay creditors, and thus a fraudulent transfer; and that Kaplan received $1.2-million from ABC Viaticals which is recoverable as a fraudulent transfer. There are several issues which this theory places front and center, but the most striking one is the allegation that ABC Viaticals was a Ponzi scheme. This requires the Receiver to show that newer investors' money was used to pay profits to older investors. Rosenberg v Collins, 624 F 2d 659 (5th Cir 1980); Cunningham v Brown, 265 US 1, 44 S Ct 424, 68 L Ed 873 (1924) (the case in which Mr Ponzi scheme was at issue).

This case is considerably different from most Ponzi scheme cases where there was little if any investment property purchased with the investors' money. Here, the receivership estate owns 51 life insurance policies with face value death benefits of over $200,000,000.00. Discovery will be necessary to evaluate the claim of "Ponzi scheme" when such substantial assets exist. This requires interrogatories related to the presently existing insurance policies, as well as those policies which may have matured and their proceeds paid. To whom, and how much, and what were the initial investments provides fertile ground for inquiry. If insurance proceeds were paid to investors, this negates the key factor of a Ponzi scheme.

The Receiver also takes the position that the insurance policies were underfunded, that is, that there were insufficient reserves in order to pay the expected premiums on the policies. It will be necessary to investigate whether the reserves were inadequate, and if so, whether the inadequacy was due to unexpected increase in life beyond the life expectancy, or due to error in calculation of sufficient reserves, or due to excessive fees and costs, or due to looting by the operators of ABC Viaticals. Extensive discovery is required on these issues.

The preliminary inquiries will focus on the basics of the policies and the proceeds. These will undoubtedly lead to subsequent inquiry and discovery. This seemingly makes it more efficient for the Court to have a hearing in which the propriety and parameters of this summary proceeding are discussed and orders issued, and, in view of the extensive discovery schedule, a subsequent conference is set to enable the court to set deadlines, pre-trial and trial dates. A subsequent hearing would enable the parties to more accurately predict the time required for trial.

If the Receiver has other parties in mind against whom to make similar allegations, it saves considerable judicial resources to have all of these parties brought into one proceeding, or at least parallel proceedings. If the Receiver were to succeed in his case against Kaplan, there is no collateral estoppel effect upon anyone not in privity with Kaplan. Thus, the court may be required to endure several dozen such trials.

Finally, if the Court schedules a hearing and requests that counsel be present, the

undersigned counsel requests that the hearing not be held between August 17 and September 4, 2007 due to personal and family commitments made during this time.

DATED: July 11, 2007

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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 July 11, 2007.

/s/ Richard T. Baum
RICHARD T. BAUM