

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

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

V.

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.

ORDER

Now before the Court is this Motion for Show Cause Hearing brought by Michael J. Quilling (“Quilling” or “Receiver”), as Receiver for ABC Viaticals, Inc. (“ABC”). Quilling filed this motion on April 5, 2007. Donald S. Kaplan (“Kaplan”) filed a response to this motion on June 14, 2007, in conjunction with a Motion to Dismiss Receiver’s Motion for Show Cause Hearing. Quilling responded on June 27, 2007, and Kaplan filed a reply on July 11, 2007. After reviewing the briefing and applicable law, the Court GRANTS Quilling’s Motion for a Show Cause Hearing and DENIES Kaplan’s Motion to Dismiss.

I. Background

On November 17, 2006, the Securities and Exchange Commission (“SEC”) filed suit alleging that ABC Viaticals, Inc. (“ABC”) and other Defendants fraudulently sold life settlement policies and made numerous misrepresentations to investors. (Mot. for Show Cause Hr’g at 2.) ABC represented to investors that their contributions would be tied to a particular insurance policy; however, according to Quilling, from the beginning, ABC commingled investor contributions in order to pay premiums and expenses on numerous policies. (*Id.* at 3.) Additionally, the commingled accounts were allegedly underfunded, so that ABC had to solicit funds from additional investors in order to cover its obligation to the initial investors. (*Id.*)

ABC purportedly paid commissions to marketing agents who recruited investors for ABC to secure additional investors. Donald S. Kaplan (“Kaplan”), individually and d/b/a Services International Corporation and Kaplan Investment Properties, LP, earned commissions functioning as one of these marketing agents. (*Id.*)

On November 17, 2006, this Court appointed Michael J. Quilling (“Quilling” or “Receiver”) as Receiver for ABC, in order to protect the interests of those who had invested with ABC. (Order Appointing Receiver (“Order”).) In accordance with that Order, Quilling has examined the business records of ABC and determined that, as ABC was insolvent and required new investments to honor obligations made to earlier investors, it was operating as a *Ponzi* scheme. (Mot. for Show Cause Hr’g at 3.) Quilling further determined that \$1,200,890.92 in commissions had been paid to either Kaplan or to the companies that he represents. (*Id.*) On March 8, 2007, Quilling sent Kaplan a copy of the Order and demanded that Kaplan return all

commissions received from ABC, as commissions received from a *Ponzi* scheme are viewed as assets that should be surrendered to the Receivership Estate. (*Id.* at 4.)

To date, Kaplan has not tendered any payment to Receiver. (*Id.*) Accordingly, Receiver has filed this Motion for Show Cause Hearing to determine why Kaplan has not complied with the ordered disgorgement.

II. Jurisdiction

A. Personal Jurisdiction

Respondent Kaplan maintains that this Court cannot assert personal jurisdiction over him, as Kaplan does not have minimum contacts with the state of Texas and was not served in the state of Texas. (Kaplan's Resp. at 8-12.) This Court agrees that the exercise of personal jurisdiction must always comport with the requirements of due process. "However, the due process analysis is different when personal jurisdiction is predicated on a federal statute that allows for nationwide service of process." *Quilling v. Stark*, No. 3:05-CV-1976-L, 2006 WL 1683442, at *2 (N.D. Tex. June 19, 2006) (not reported in F. Supp. 2d). In this instance, the Court's jurisdiction is predicated on 28 U.S.C. § 754 and 28 U.S.C. § 1692. Section 754 provides:

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.

28 U.S.C. § 754. Section 1692 works in conjunction with Section 754 by authorizing service of process in any district where section 754 filings are made.

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.

28 U.S.C. § 1692. “Together, these statutes give a receivership court both *in rem* and *in personam* jurisdiction in all districts where property of the receivership estate may be located.” *Stark*, 2006 WL 1683442, at *3; *see also Haile v. Henderson Nat. Bank*, 657 F.2d 816, 826 (6th Cir. 1981) (“The appointment court’s process extends to any judicial district where receivership property is found. As such, the minimum contacts analysis, as a limitation on state extra-territorial power, is simply inapposite.”); *Am. Freedom Train Found. v. Spurney*, 747 F.2d 1069, 1073 (2d Cir. 1984) (adopting the Sixth Circuit’s holding and language in *Haile*).

Five days after Quilling was appointed Receiver for ABC, he filed his Order of Appointment in the United States District Court for the Central District of California in compliance with 28 U.S.C. § 754. (Quilling’s Resp. at 4.) As Kaplan has already conceded that funds belonging to ABC, and thus subject to this receivership, are being held in that district by the law firm Erwin & Johnson, (Kaplan’s Br. at 7), this Court finds that it has personal jurisdiction over Kaplan under the relevant statutes.

B. Fairness

In addition to his objection to this Court exercising personal jurisdiction over him, Kaplan maintains that forcing him to travel to Texas for this hearing is an undue burden in light of a medical condition that places restrictions on his travel.¹ (Kaplan’s Br. at 13-14.)

¹ Kaplan’s primary care physician has advised him to not fly, and to limit his travel to no more than four hours by car in any given day. (Kaplan App. at 12.)

When a federal statute provides for nationwide service of process, a court's exercise of personal jurisdiction must comport with Fifth Amendment due process principles. *Republic of Panama v. BCCI Holdings*, 119 F.3d 935, 942 (11th Cir. 1997); *Peay v. Bellsouth Med. Assistance Plan*, 205 F.3d 1206, 1210 (10th Cir. 2000). While the Supreme Court's due process analysis has focused primarily on protections afforded under the Fourteenth Amendment, the Court's opinions still provide important guidance as "the language and motivating policies of the due process clauses of these two amendments are substantially similar." *Republic of Panama*, 119 F.3d at 944. However, one key difference in a Fifth Amendment due process analysis is that the liberty interests of the individual are to be weighed against the sovereignty interests of the United States rather than those of the forum state.² *Id.* at 945. Accordingly, if a defendant "makes a showing of constitutionally significant inconvenience, jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant." *Id.* at 948.

To determine whether infringement on the defendant's liberty is justified sufficiently by government interests, courts should examine the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff's vindication of his federal right, and concerns of judicial efficiency and economy. *Where . . . Congress has provided for nationwide service of process, courts should presume that nationwide personal jurisdiction is necessary to further congressional objectives.*

Peay, 205 F.3d at 1213 (emphasis added) (quotations and citations omitted).

² Thus, Kaplan's reliance on *Central Freight Lines v. APA Transport Corp.*, 322 F.3d 376 (5th Cir. 2003) is somewhat misplaced, as it focuses on state interests.

Assuming, arguendo, that Kaplan's medical condition creates a showing that traveling to Texas would be a significant inconvenience, that finding must still be weighed against the presumed necessity of the jurisdictional grants found in 28 U.S.C. § 754 and 28 U.S.C. § 1692. Congress's grant of nationwide jurisdiction over persons and property relating to receivership cases stresses the importance of having a single court responsible for accessing, protecting, and distributing the assets of a company in receivership. Additionally, with the advancements in communication technology, Kaplan's liberty interests may be protected even if proceedings are maintained in this forum. Kaplan may represent his interests in this court via the presence of his attorney, through his own deposition, and through video or telephone conferencing.

Accordingly, this Court finds that even if Kaplan's medical condition limits his ability to travel to this forum, his liberty interests may still be adequately protected while the interests of the sovereign are likewise maintained. Therefore, the Court will not decline to exercise personal jurisdiction over Kaplan on this basis.

III. Notice and Due Process

Kaplan also maintains that two additional due process concerns arise from Quilling's Motion. First, Kaplan argues that the Motion did not provide him with sufficient notice of the proceedings involving his interests. (Kaplan Br. at 23.) However, the Fifth Circuit has held that making an effort to respond to charges clearly reflects notice of the claims. *FTC v. Assail, Inc.*, 410 F.3d 256, 267-68 (5th Cir. 2005). Additionally, this District has previously held that a receivership complaint calling for disgorgement that lists an allegation of a *Ponzi* scheme, the amount of transfers, the date of transfers, the persons or entities who made the transfers, and the

persons who received the transfers is more than sufficient to give notice of a Receiver's claims.

Stark, 2006 WL 1683442, at *3. As Receiver's Motion has provided all of the above listed information, (Mot. for Show Cause Hr'g; Receiver's Ex. 1), and as Kaplan has filed numerous detailed briefs in opposition to this Motion, it is clear than Kaplan has received adequate notice of the Receiver's claims.

Kaplan has also claimed that an expedited hearing—as requested by this Motion—will deny due process. (Kaplan's Req. for Interim Hr'g Setting Procedures ("Request") at 6.) His argument is built upon a number of cases that stress the need for fairness and an opportunity to be heard. (*Id.* at 6-7.) The Fifth Circuit, however, has adopted the approach taken by the Ninth Circuit with regard to due process in receivership claims.

Although this court has not confronted directly the issue of what process is due where a receiver and a nonparty both claim the same property, the Ninth Circuit has stated clearly that *in such circumstances summary proceedings satisfy due process* so long as there is adequate notice and opportunity to be heard.

Assail, Inc., 410 F.3d at 267 (emphasis added) (quotations and citations omitted). In its application of this approach, the court in *Assail, Inc.* held that a single hearing where the parties have the opportunity to be present, testify, and call and cross-examine witnesses is sufficient to satisfy due process. *Id.* Additionally, the Fifth Circuit has stated:

[T]he traditional show cause order is an effective and appropriate procedural tool. Indeed, it harmonizes procedure with the substantive principle that puts the burden on the summoned party of showing an abuse of the court's process In no way does its use extinguish the adversary proceeding which the decisions call for. Rather it is a principal means by which the enforcing court can determine whether there is anything to hear and if so to give proper scope and direction to an orderly, but expeditious, adjudication of the points in controversy.

United States v. Wyatt, 637 F.2d 293, 300 (5th Cir. 1981) (citations and internal quotations omitted). Therefore, as an expedited Show Cause hearing maintains the adversarial process, and will afford Kaplan the opportunity to be heard, it will not deny due process.

IV. Right to Jury Trial

Kaplan also argues that an expedited Show Cause hearing would be inappropriate as he is entitled to a jury trial. (Kaplan's Req. at 8-9.) At the heart of Kaplan's argument is the idea that "[a]t common law, an action for the recovery of damages from a fraudulent transfer was a legal matter, not equitable, and, as such, the right of a jury trial was preserved." (*Id.* at 8.)

Additionally, Kaplan posits that, as Receiver has not proven that the funds paid to Kaplan are subject to a constructive trust, there is no equitable remedy currently available to Quilling. (*Id.* at 9; Kaplan's Resp. at 22.) Kaplan concludes that, as any proceeding will, at best, entitle Receiver to a money judgment, the right to a jury trial is preserved as this would be considered relief at law. (Kaplan's Req. at 9.)

However, in federal receivership proceedings, district courts sit as courts of equity. *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *In re Jack Kardow Plumbing Co.*, 451 F.2d 123, 133 (5th Cir. 1971) (citing *Katchen v. Landy*, 382 U.S. 323, 335 (1966)). Additionally, under Texas law, a constructive trust is an equitable remedy used to prevent unjust enrichment. *Dyll v. Adams*, 167 F.3d 945, 948 (5th Cir. 1999) (citing *Omohundro v. Matthews*, 341 S.W.2d 401, 405 (Tex. 1960)).

Accordingly,

[t]he constructive trust arises in favor of the injured party on the date the wrongful act occurs. . . . The Court does not create a constructive trust, but instead simply recognizes and enforces it 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.

Quilling v. Trade Partners, Inc., No. 1:03-CV-236, 2007 WL 107669, at *3 (W.D. Mich. Jan. 9, 2007).

In the case that underlies this present Motion, this Court recognized that such a trust exists and appointed Receiver “to institute such actions or proceedings to impose a constructive trust, obtain possession and/or recover judgment with respect to persons or entities who received assets or funds or proceeds traceable to investor monies.” (Order at 7.) Receiver’s attempt to have Kaplan disgorge funds paid out by ABC stems from this Order, and is therefore to be seen as a claim for equitable relief and not an action at law. Accordingly, Kaplan has no right to a jury trial in this matter.

V. Further Objections


This Court finds Kaplan’s remaining objections to the hearing (i.e. that Kaplan did not violate any provision of the Order Appointing Receiver and that ABC Viaticals was not a *Ponzi* Scheme), are better suited for adjudication at the Show Cause hearing, and therefore will not be addressed here. As both parties are amenable to discovery, this Court will issue a separate scheduling order in this matter setting the necessary discovery and briefing deadlines and hearing date.

VI. Conclusion

For the foregoing reasons, the Court GRANTS Receiver's Motion for Show Cause Hearing and DENIES Kaplan's Motion to Dismiss.

It is so ordered.

Signed this 9th day of August 2007.



JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE