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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

SECURITIES AND EXCHANGE
COMMISSION

Plaintiffs

v.

SECURE INVESTMENT SERVICES, INC.,
AMERICAN FINANCIAL SERVICES, INC.,
LYNDON GROUP, INC., DONALD F.
NEUHAUS, and KIMBERLY SNOWDEN

Defendants

CASE NO.: 2:07-cv-01724 GEB CMK

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF THE KATSUREN
FAMILY TRUST FOR LIMITED
INTERVENTION AND FOR RETURN
OF FUNDS**

[Notice of Motion and Motion of the
Katsuren Family Trust for Limited
Intervention and For Return of Funds and
Declarations of Elke Katsuren and Robin
Marsh filed concurrently herewith]

[Oral Argument Requested]

Date: November 3, 2008
Time: 9:00 a.m.
Courtroom: 10

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1 Elke Katsuren, Trustee of the Katsuren Family Trust submits this Memorandum of Points
2 and Authorities in Support of Motion for Limited Intervention and for Return of Funds in the
3 amount of Two Hundred Thousand Dollars (\$200,000.00) held by Michael Quilling, the Court
4 appointed receiver in this matter (the "Receiver").

5 **SUMMARY**

6 Katsuren is a victim of an investment scheme perpetrated by Defendant Secure Investment
7 Services, Inc. ("SIS"). Katsuren's investment, however and the claims set forth in this Motion
8 are different from those of other parties that invested with Defendants. As a result, Katsuren is
9 entitled to relief and prompt return of her investment funds for at least the following reasons:
10

11 • Katsuren executed an investment purchase contract with SIS and thereafter
12 deposited the investment funds with SIS. Katsuren's investment and payment of funds, however,
13 was not final and actually paid to SIS until after the freeze order had been entered in this case. As
14 a result, Katsuren's funds were not properly part of the receivership estate at the time of the
15 freeze order and should not now be deemed a part of the Receiver's estate.

16 • According to the specific terms of the investment contract with SIS, Katsuren was
17 entitled to cancel or rescind the contract, for any reason, within 10 days of her payment of
18 investment funds to SIS. Katsuren timely exercised this right to cancel and rescind through SIS
19 and again through the SEC and the Receiver. The Receiver should be required to abide by the
20 terms of the investment contract and return Katsuren's investment funds paid to SIS.
21

22 • Unlike the majority of other investors with Defendants, Katsuren failed to receive
23 any consideration for her investment funds or for entering into the investment contract with SIS
24 and therefore is entitled to rescind the contract pursuant to Cal. Civ. Code § 1689 and seeks to do
25 so.

1 **B. Allegations Against SIS**

2 3. The SEC Complaint alleges that Defendants offered and sold securities in the form
3 of fractionalized interests in life insurance policies. [See Complaint] Investors would invest
4 certain monies which would then be tied to a portion of a specific policy. [Id.] Investors were
5 provided with life expectancy estimates on the insured, purportedly signed by a medical doctor.
6 [Id.] The investors would be listed as beneficiaries and owners with the life insurance company
7 on the policy in which they invested. [Id.] The investment was intended to cover the policy
8 premiums for their portion of the policy for the remainder of the life expectancy of the insured
9 plus the bond waiting period (typically twelve months). [Id.] Defendants were to retain funds to
10 continue to pay the policy premiums until the policy matured or the bond company paid out. [Id.]
11 When a policy matured, each investor in that policy would receive a pro rata share of the policy
12 face amount that equaled his or her original investment plus the return. [Id.]

14 4. The Complaint further alleges, among other things, that Defendants did not retain
15 enough funds to pay future policy premiums, but instead spent funds on personal and business
16 expenses and relied on new investments to pay policy premiums of earlier investors, thereby
17 operating a “Ponzi” scheme. [Id.] And that Defendants resorted to using a portion of the cash
18 value of some policies and new investor funds to meet prior policy obligations. [Id., ¶¶ 17, 19]

19 5. Prior to the appointment of the Receiver, Defendants had allowed only one policy
20 to lapse, which lapse was recent enough to the commencement of this action as to allow the
21 Receiver to have the policy reinstated. [See Receiver’s Response to Docket No. 135, ¶ 4(j), filed
22 April 21, 2008] Defendant Neuhaus and his wife Linda, held partial ownership interests in
23 policies in their own name. [See Compromise and Settlement Agreement, ¶ 3, filed 10/29/2007]

24
25 ///

1 **C. Katsuren’s Investment**

2 6. Elke Katsuren, Trustee of the Katsuren Family Trust (hereinafter referred to as
3 “Katsuren”) executed a Master Purchase Agreement and Purchase Addendum with SIS on
4 August 9, 2007. [See Exhibits “1” and “2” attached to the Declaration of Elke Katsuren
5 (“Katsuren Decl.”), ¶ 6] The Purchase Agreements designated a specific insurance policy to be
6 purchased on the life of a specified individual or insured. [Id. ¶ 9] (In the interest of the privacy
7 of the insured, the insured is not being named herein). Katsuren’s fractional portion of the
8 ownership and beneficiary interest in this insurance policy was to be held in the name Elke
9 Katsuren, Trustee of the Katsuren Family Trust. [Id. ¶ 8] Pacific Life Insurance Company
10 (“Pacific Life”) is listed as the insurance company which issued the policy to be purchased. [Id. ¶
11 9] The estimated life expectancy of the insured was 36 months. [Id.]

13 7. Katsuren deposited her check in the amount of Two Hundred Thousand Dollars
14 (\$200,000.00) in the SIS bank account with Wells Fargo Bank on August 21 or 22, 2007. [Id. ¶
15 11 and 7] The check was received by Downey Savings (Katsuren’s bank or payor bank) on
16 August 23, 2007. [See Declaration of Robin Marsh (“Marsh Decl.”), ¶ 5] The check was
17 provisionally paid by Downey Savings with a provisional settlement at approximately 9:00 p.m.
18 on August 23, 2007. [Id.] The settlement for the check did not become final until midnight on
19 August 24, 2007 and was not “finally paid” until that time. [Id.]

21 8. Katsuren was unaware of any actions by the SEC against SIS until after 5:00 p.m.
22 on August 24, 2007, when she received an e-mail from Mr. John “Jack” Hradesky (“Hradesky”)
23 informing her of the SEC action and urging her to cancel her check. [Katsuren Decl., ¶ 12]
24 Katsuren attempted to stop payment on the check later that night, but was informed by her bank
25 that it was too late to stop payment. [Id. ¶ 13] Katsuren then communicated with Hradesky over

1 the weekend noticing him she wished to cancel and/or rescind her contract with SIS and get her
2 investment funds back. [*Id.* ¶ 14] Katsuren was thereafter informed by Mr. Hradesky that
3 Defendant Donald Neuhaus (“Neuhaus”) had not yet assigned Katsuren’s investment funds to an
4 insurance policy and that SIS would return the funds if possible. [*Id.*] Hradesky further told
5 Katsuren that Neuhaus had a court hearing on Monday, August 27, 2007, and was hoping to stop
6 the SEC from shutting down SIS. [*Id.*]

7
8 9. Katsuren also spoke directly with Mr. Neuhaus prior to August 27, 2007. [*Id.*, ¶
9 15] During that conversation Mr. Neuhaus told Katsuren that since her funds had not yet been
10 invested in a policy, she should be able to get those funds back. [*Id.*] Neuhaus also told Katsuren
11 that he would return her funds to her as soon as he was allowed to do so. [*Id.*]

12 10. Katsuren has never received any documents or written communications from SIS
13 after her deposit of funds on August 21, 2007. [*Id.* ¶ 11]

14 11. Katsuren spoke with Thomas Eme of the SEC on Monday, August 27, 2007. [*Id.*
15 ¶ 16] She also spoke with the Receiver sometime on August 27th or 28th. [*Id.*] She continued to
16 correspond with them through e-mail for several days thereafter, demanding a return of her
17 investment funds. [*Id.*] Ultimately, the Receiver recommended Katsuren bring a Motion seeking
18 an Order authorizing the Receiver to Release Katsuren’s funds. [*Id.*]

19
20 **II.**
ARGUMENTS AND AUTHORITIES

21
22 **A. Katsuren Is Entitled to Limited Intervention for a Return of Funds**

23 12. Intervention is governed by Federal Rule of Civil Procedure 24. Katsuren fits
24 squarely within the provision relating to intervention as of right as she claims an interest in
25 property which is the subject of this action and her ability to protect that interest may be impaired

1 by the disposition of this action. Her interests are not adequately represented by existing parties,
2 as her claims are substantially different from those of the other investors. Permissive intervention
3 is also appropriate because the question of law relating to the return of Katsuren's funds is
4 common to, and must be resolved with, the issues in connection with the main action. The
5 Receiver has yet to include Katsuren's claims on any approved claims list and has yet to accept or
6 reject her claims for a full refund in writing. The Receiver, instead, has requested that Katsuren
7 file this motion in order to seek a determination of her claim by the Court.
8

9 **B. Katsuren Timely Exercised Her Contractual Right to Rescind.**

10 **1. Contractual Right of Rescission**

11 13. The Purchase Addendum provides for a 10 day right of rescission, beginning at the
12 time SIS received the investment funds. [See Katsuren Decl., Exhibit 2, ¶ 4] Katsuren did not
13 provide any funds to SIS until August 21, 2007 at the earliest. [See Katsuren Decl. ¶ 11] On
14 August 24, 2007 Katsuren exercised her right to rescind the Purchase Agreements by noticing
15 both Mr. Hradesky and Mr. Neuhaus. [Id., ¶¶ 14-15] Thereafter but prior to the 10 day rescission
16 period, Katsuren requested the return of her funds from both the SEC and the Receiver. [Id. ¶ 16]

17 **2. Statutory Right of Rescission for Failure of Consideration**

18 14. Section 1689 of the California Civil Code provides for rescission of a contract
19 based on, among other things, failure of consideration.

20 Cal. Civ. Code § 1689(b)(4) states:

21 (b) A party to a contract may rescind the contract in the following cases:

22 (2) If the consideration for the obligation of the rescinding part fails, in whole or
23 in part, through the fault of the party as to whom he rescinds.

24 (3) If the consideration for the obligation of the rescinding party becomes entirely
25 void from any cause.

1 (4) If the consideration for the obligation of the rescinding party, before it is
2 rendered to him, fails in a material way.

3 15. Unlike other earlier investors, the policy Katsuren contracted for, on the life of
4 ALT-R, was never purchased. [See Exhibit 1 to Receiver's Interim Report dated April 30, 2008]
5 Pacific Life Insurance Company issued the life insurance policy on ALT-R [See Katsuren Decl.,
6 ¶ 9] They were one of the insurance companies who allowed the multiple owner policies to be
7 held in the name of the individual investors. [See Exhibit 3 to the Receiver's Interim Report
8 dated April 30, 2008]. Had Katsuren's policy actually been purchased, Katsuren would be
9 similarly situated to those investors who were given the option of opting out of the Receivership
10 Estate. These investors are not legally required to turn over their ownership interests to the
11 receivership. They have the option of paying the remaining premiums themselves and obtaining
12 the percentage of their ownership interest when the policy matures, which will likely far exceed
13 the pro rata distribution contemplated by the Receiver. Some have exercised this option, as
14 evidenced by the Receiver's motions to cease making payments of premiums on those policies.
15 Those investors have the choice of whether to risk paying additional premiums out of their pocket
16 in anticipation of a much larger return, or to allow themselves to become part of the Receivership
17 Estate. Because Katsuren did not receive the consideration (her ownership interest in the life
18 insurance policy) she has been denied this option.

19
20 **3. The Receiver Should Honor the Terms of the Purchase Agreement**

21 16. Although the general rule in receiverships is:

22 ' [a] receiver occupies no better position than that which was occupied by the
23 person or party for whom he acts...and any defense good against the original party
24 is good against the receiver.

25 *Allen v. Ramsay*, 179 Cal. App. 2d 843, 854, 4 Cal. Rptr. 575 (1960), some Courts, including the
Ninth Circuit in *FDIC v. O'Melveny & Myers*, 61 F.3d 17(9th Cir. 1995), have ruled that some

1 equitable defenses, such as unclean hands or inequitable conduct, which might have been
2 available against the original party, cannot be imputed to the Receiver. However, the *O'Melveny*
3 court also stated:

4 Of course, it does necessarily follow that equitable defenses can never be asserted
5 against . . . a receiver; we hold only that the bank's inequitable conduct is not
6 imputed to [a receiver.]

7 17. Here, Katsuren is not requesting that the Defendants' inequitable conduct be
8 imputed to the Receiver. She is simply requesting that the Receiver be held to the terms of her
9 contract with Defendants. The Receiver should be required to honor her timely request for
10 rescission of the contract, pursuant to the specific terms of her Purchase Agreement, or in the
11 alternative, this Court should void her contract for lack of consideration and order her funds to be
12 returned to her in full. While this theory might be rejected if all the claimants were entitled to the
13 same arguments, they are not. Other claimants with this right never sought to exercise their
14 contractual right of rescission within the 10 day time period. Likewise, they received at least
15 some consideration for which they bargained, the ownership interests in the insurance policies.
16 The facts of Katsuren's claims differ from the majority of other investors and so too do the legal
17 remedies.
18

19 **E. Katsuren's Funds Were Not Properly Part of Receivership Estate and Should be**
20 **Returned**

21 **1. Funds Were Not "Paid" Until Honored by Drawee Bank.**

22 18. The first issue to address is: when are funds paid by or to an entity? Are they paid
23 when a check is written, when a check is deposited or when the funds are paid by the drawee
24 (also called the payor) bank. The Ninth Circuit has previously determined that a check is not paid
25 until honored by the drawee bank. In *In re Grafton Partners, L.P.*, 321 B.R. 527, (B.A.P. 9th Cir.
2005), the Court held that a check written on July 2, 2001, but not honored by the drawee bank

1 until July 4, 2001 (thus making the transfer 89 days before the filing of the bankruptcy), was not
2 avoidable under the “settlement payment” provisions of 11 U.S.C. § 741(8). Had the Court
3 determined that the transfer date was the date the check was written, or the date the check was
4 deposited, the transfer would have occurred outside the 90 day transfer avoidance period and the
5 underlying determination of whether or not the transfer could be avoided under 11 U.S.C. §
6 741(8) would have been moot. While the underlying arguments are inapplicable to this case, the
7 Court’s use of July 4, 2001, the date the check was honored by the drawee bank, as the transfer
8 date is determinative to our present case. Thus our first question is answered, a check is not paid
9 until “honored” by a drawee bank.
10

11 **2. Determination of “Finally Paid”**

12 19. The next issue to determine is: what is meant by “honored” and when is a check
13 actually “paid.”

14 The concept of completion of the process of "posting" as the point in time when
15 payment is made... has been rejected in California “Mere recording or posting
16 activities do not constitute payment” in California. *Id.* Rather California prefers
17 “to relate ‘payment’ to failure to revoke within the time allotted by statute,
18 clearinghouse rule or agreement” . *See Pupko v. Bank of America*, 114 Cal. App.
19 3d 495, 170 Cal. Rptr. 615 (Cal. App. Dist. 4 1981)

20 *See also* Cal. U. Com. Code § 4215(a)(3):

21 (a) An item is finally paid by a payor bank when the bank has first done any of the
22 following: ... (3) Made a provisional settlement for the time and failed to revoke
23 the settlement in the time and manner permitted by statute, clearing house rule, or
24 agreement.

25 Paragraph 6 of the Official Comments to this section clarify that “final payment” occurs at the
time of the expiration of the deadline to revoke and not at the time of the provisional settlement.

///

///

1 **3. Funds Were Provisional and Not “Finally Paid” Until Midnight on August 24,**
2 **2007**

3 20. Katsuren’s check number 1819 was provisionally paid by Downey Savings (the
4 payor bank) at approximately 9:00 p.m. on August 23, 2007. [See Marsh Decl., ¶ 5] See also
5 Cal. U. Com. Code § 4301(a). Downey Savings then had until midnight of August 24, 2007 to
6 return the item or finally pay it. See Cal. U. Com. Code §§4104(a)(10) and 4215(a)(3). Until the
7 item has been “finally paid” the credit is merely provisional and is not yet the property of the
8 payee. Settlement for the check did not become final until midnight on August 24, 2007, after
9 this Court’s Freeze Order was signed. [See Marsh Decl., ¶ 5].
10

11 21. The provisional status of the funds at the time the freeze order was issued is
12 further evidenced by Katsuren’s right to stop payment of the funds on August 24, 2007. Cal. U.
13 Com. Code § 4303(a) states in pertinent part:

14 Any ... stop-payment order received by... a payor bank comes too late ... if the
15 ... stop-payment order... is received ... and a reasonable time for the bank to act
 thereon expires or ... after the earliest of the following:

16 ...
17 (5) With respect to checks, a cutoff hour no earlier than one hour after the
18 opening of the next banking day after the banking day on which the bank received
19 the check and no later than the close of that next banking day or, if no cutoff hour
20 is fixed, the close of the next banking day after the banking day on which the bank
21 received the check. [portions omitted] (emphasis added)

22 22. Therefore, Katsuren had until at least one hour after the opening of the banking
23 day on August 24, 2007, to stop payment of her check. Other jurisdictions have determined that
24 the power to stop payment determines to whom the funds belong. *State Bank v. Stallings*, 427
25 P.2d 744 (Utah 1967) .

///

///

1 **4. Freeze Order Prohibited Receipt of Funds or Change in the Status of Funds**

2 23. The Order Appointing Temporary Receiver, signed August 24, 2007, (the “Freeze
3 Order”) ordered a freeze of all assets of the Receivership Entities. [See Order Appointing Temp.
4 Receiver] Specifically, in pertinent part, it ordered, “The Receivership Entities, their respective
5 officers, managers, trustees, escrow agents, facilitators, agents, servants, employees, attorneys,
6 and all other persons in active concert or participate with them, are hereby restrained and
7 enjoined from, directly and indirectly, transferring, setting off, receiving, changing, selling,
8 pledging, assigning, liquidating or otherwise disposing of or withdrawing any assets and property
9 owned by, controlled by, or in possession of the Receivership Entities. [Id.] This freeze shall
10 include, but not be limited to, those funds located in any bank accounts.” [Id.] Therefore, the
11 Order specifically prohibited Wells Fargo from receiving Katsuren’s funds or changing the
12 provisional credit into funds available for withdrawal.
13

14 **5. Purpose of Freeze Order is to Maintain Status Quo**

15 24. The purpose of a federal receivership is to maintain the status quo, prevent the
16 further dissipation of assets and protect future potential investors from becoming victims of the
17 receivership entities’ fraudulent activities. *Anderson v. Stephens*, 875 F.2d 76 (4th Cir. VA 1986)
18 (Receiver argued that the purpose of a freeze order was to maintain the status quo and prevent
19 additional losses to customers. *Citing CFTC v. Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978);
20 *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 678-79 (S.D.N.Y. 1979))
21

22 25. The Freeze Order signed by this Court sought to uphold the purpose of a
23 receivership by freezing the assets of the Receivership Entities and preventing the receipt of or
24 changing of any assets under the possession or control of the Receivership Entities or their
25 agents.

1 **6. Funds Received After Freeze Order Cannot Legally Become Part of**
2 **Receivership Estate**

3 26. Several courts have determined that funds deposited after a freeze order is issued
4 cannot legally become part of the receivership assets. *See Anderson v. Stephens*, 875 F.2d 76 (4th
5 Cir. VA 1986) (Checks deposited after freeze order were to be returned to investors. Freeze order
6 was ambiguous but purpose was clearly to stop all activity in account and maintain status quo.)
7 *Citing In re Vermont Real Estate Investment Trust*, 25 B.R. 813 (1982) and *In Re Bengal Trading*
8 *Corp.*, 12 B.R. 695 (Bankr. 1981). *See also SEC v. Elliott*, 953 F.2d 1556 (11th Cir. 1992) (Citing
9 *Anderson v. Stephens*, held that checks did not become part of the account because they could not
10 legally be deposited after freeze order went into effect.)

11 27. As demonstrated above, Katsuren's funds were not "finally paid" at the time the
12 Freeze Order was issued. Thus, they were not already part of the Receivership assets and could
13 not become so after the Freeze Order was issued. Therefore, Katsuren is entitled to a full refund
14 of her funds and should not share in a pro rata distribution with other investors not similarly
15 situated.
16

17 **7. Kasturen's Funds Were Not Commingled**

18 28. Restatement of Restitution § 213(2) provides that "Where the wrongdoer has
19 effectively separated the money of one of its claimants, that claimant is entitled, and only to, his
20 own money or its product." Katsuren's funds were clearly "separated" from the funds of the
21 other investors. Her funds were never "commingled" with the funds of the other investors, in
22 fact, they were not even available to SIS prior to the Freeze Order. Likewise, because the funds
23 were not part of the account until after the Freeze Order, Katsuren can clearly trace her funds.
24 Although many trial Courts have rejected the principles of commingling and tracing on equitable
25 grounds in cases where the claimants were similarly situated, tracing is still permissible.

1 Typically, when a party can trace its assets, that party is entitled to seek a
2 constructive trust or equitable lien on its portion of those funds that remain.
3 Restatement (First) of Restitution §211(1)(1937); *Cunningham v. Brown*, 265 U.S.
4 1, 11, 44 S. Ct. 424, 426 (1924) (discussing the infamous Ponzi scheme) A
5 constructive trust may be created regardless of the intentions of the parties “where
6 equity and Justice demand.” *Rosenberg v. Collins*, 624 F.2d 659, 663 (5th Cir.
7 1980).

8 *United States v. Durham*, 86 F.3d 70 (5th Cir. 1996). This present case is a perfect example of
9 when these equitable remedies should be allowed. Katsuren’s claims are substantially different
10 from those of other investors. She is entitled to return of her funds and this Court, acting in
11 equity, should permit her to invoke the equitable remedies of tracing and a constructive trust in
12 order to return her funds.

13 **F. Katsuren’s Situation is Distinguishable from Other Cases Involving Ponzi Schemes.**

14 29. The facts of this case are not representative of a typical “Ponzi” scheme. The
15 Courts have defined a “Ponzi” scheme as follows:

16 A Ponzi scheme is an arrangement whereby an enterprise makes payments to
17 investors from the proceeds of a later investment rather than from profits of the
18 underlying business venture, as the investors expected. The fraud consists of
19 transferring proceeds received from the new investors to previous investors,
20 thereby giving other investors the impression that a legitimate profit making
21 business opportunity exists, where in fact no such opportunity exists. *See*
22 *Cunningham v. Brown*, 265 U.S. 1, 44 S. Ct. 424, (1924)

23 *In re Agricultural Research and Technology Group, Inc.*, 916 F.2d 528, 531 (9th Cir. 1990).

24 Here, a legitimate profit making business opportunity did in fact exist. According to the
25 Receiver, the Defendants have taken in approximately \$25 million from their investors since
2001. [See Complaint, ¶ 2] The death benefits of the policies purchased by SIS, either in its
name or in the names of its investors, exceed \$49 million. [See Exhibit 1 to Receiver’s Interim
Report for the Period Ended April 30, 2008] The future policy premiums through the life
expectancy and bond waiting periods of the insureds was approximately \$3.1 million dollars

1 when the SEC filed its action. [*See* Complaint, ¶ 18] Although we are not privy to the amounts
2 already paid in premiums by the Defendants, it is unlikely that it exceeded \$20 million dollars.
3 Therefore, had SIS continued to meet its obligations, its business would likely have been
4 profitable and its investors would have secured their profits thereby creating a profit for the
5 business and its investors, had SIS continued to meet its obligations.

6
7 30. One of the defining characteristics of a Ponzi scheme is the transferring of
8 proceeds received from new investors to previous investors in the form of “returns” on their
9 investments. Here, the SEC alleges that Defendants used the funds of new investors to pay policy
10 premiums and other business expenses of previously sold policies. [*See* Complaint, ¶ 17.] Using
11 funds obtained from new contracts to meet previous obligations, while not sound business
12 practice, is not tantamount to paying fraudulent “returns” on investment with the money of new
13 investors.

14 31. Additionally, the defendants were actually operating the business they portrayed to
15 investors. It has not been alleged, and indeed the Receiver has evidenced through various filings
16 with this Court, that prior to the filing of this action by the SEC, the insurance policies invested in
17 by the investors were in fact purchased. [*See* Exhibit 1 to Receiver’s Interim Report for the
18 Period Ended April 30, 2008] Ownership interests in those policies were placed in the names of
19 the individual investors, when allowed by the policies and procedures of the insurance
20 companies. [*See* Exhibit 3 to Receiver’s Interim Report for the Period Ended April 30, 2008]
21 This is dissimilar to the majority of “Ponzi” cases, where the Defendants do not actually engage
22 in the purported investment vehicle they advertise, or do so only on a very limited basis.
23

24 32. In the majority of Ponzi scheme cases, the sole intent of the Defendants was to
25 defraud their investors and abscond with as much money as possible. The investors did not

1 receive any consideration for their investments, other than fraudulent returns which were paid
2 with new investors' money. That is not the case here. Here, the investors actually received
3 fractionalized interest in the life insurance policies for which they contracted. Here, the
4 Defendants were actually operating the business they portrayed to investors. Here, the investors
5 actually stood the chance of realizing a legitimate return on their investment. It would be a waste
6 of the Court's time and resources for Intervenor to cite every Ponzi scheme case and distinguish it
7 from the facts herein. However, she respectfully requests that this Court, as it reviews the
8 decisions in other cases, keep in mind that the facts of those cases are materially different from
9 the facts herein and that the rules generally applied in alleged Ponzi scheme cases should not
10 necessarily be applied herein.

11
12 **G. Katsuren's Claims Are Substantially Different**

13
14 33. Katsuren's case is factually and legally different from that of other investors in this
15 case. Katsuren has been denied her contractual right of rescission; her Purchase Agreement failed
16 due to lack of consideration; and her funds were received after the Freeze Order was issued. To
17 treat her similarly to other investors would be inequitable. The Courts, while typically ruling that
18 claimants who stand equally should be treated equally, also recognize that not every claimant is
19 similarly situated. In those cases, the Courts recognize that the facts of the case should determine
20 the result for each individual claimant.

21 A claimant is not treated better in the eyes of the law if the controlling facts
22 surrounding his or her case lead to a different legal conclusion. To argue that all
23 claimants should be treated similarly, without presenting facts, is an empty
24 argument. One of the basic purposes of the law and the courts is to determine
25 which facts are legally relevant or irrelevant. If relevant facts differ, then the law
will treat the claimants differently. Thus, it is incorrect to say the law prefers one
claimant if that claimant's situation differs in a legally cognizable way.

SEC v. Elliott, 953 F.2d 1556, 953 F.2d 1560 (11th Cir. 1992).

