

NO. 13-10488

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff / Appellee

v.

C. KEITH LAMONDA,

Defendant / Appellant

v.

MICHAEL J. QUILLING,

Appellee

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Appeal from the United States District Court  
Northern District of Texas, Dallas Division  
Civil Action No. 3:06-cv-02136

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**APPELLEE MICHAEL J. QUILLING'S RESPONSE TO MOTION  
FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL**

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Michael J. Quilling, the court-appointed Receiver for ABC Viaticals, Inc.  
and other related entities, ("Receiver") files this response to the Memorandum of

Law dated September 20, 2013, that C. Keith LaMonda (“LaMonda”) filed in support of his Motion for Leave to Proceed In Forma Pauperis on Appeal.

## **I. SUMMARY**

Although the District Court has certified that his appeal is not taken in good faith, LaMonda filed a motion in the Court of Appeals to proceed in forma pauperis. The District Court denied LaMonda’s claims against the Receiver because it found there was no actual violation of the Compromise and Settlement Agreement between the parties and LaMonda was not entitled to the relief requested. LaMonda does not offer any reason to dispute those findings but merely asks to proceed in forma pauperis based upon his own belief that he is acting in “good faith” and that the Magistrate Judge’s evidentiary hearing was premature. His motion ignores the substantive reasons for the District Court’s ruling and fails to identify a substantial and non-frivolous question for review. As a result, the Court should uphold the District Court’s certification and deny LaMonda’s request to proceed in forma pauperis.

## **II. BACKGROUND FACTS**

1. On November 17, 2006, the Securities and Exchange Commission filed a lawsuit alleging that LaMonda violated securities laws and ran a fraudulent investment scheme through a company called ABC Viaticals, Inc. (“ABC”). The

U.S. District Court for the Northern District of Texas (“District Court”) appointed Michael J. Quilling as the Receiver for ABC and other related entities.

2. Since that time, the U.S. District Court for the Middle District of Florida convicted LaMonda on eight securities law violations in another scheme he ran through ABC’s predecessor. *United States v. LaMonda*, No. 6:05-CR0131-JA-UAM [Doc. 972] (M.D. Fla. Jan. 2, 2008). He is currently serving a total of 240 months in federal prison.

3. The District Court permitted LaMonda to pursue a claim against the receivership estate in the main receivership proceeding. (Order [Doc. 362] at 3-4.)<sup>1</sup> LaMonda filed a Motion to Compel that asked the Court to pay essentially 25% of the entire receivership estate to his family for alleged violations of a Compromise and Settlement Agreement between the Receiver and LaMonda. (Mot. to Compel [Doc. 344].)

4. The District Court referred that motion to the United States Magistrate Judge, who conducted an evidentiary hearing on February 20, 2013. The Magistrate Judge’s Finding, Conclusions, and Recommendation (“Recommendation”) construed LaMonda’s requests as a motion to show cause

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<sup>1</sup> Unless otherwise noted, citations to ECF docket numbers refer to documents filed in *Securities and Exchange Commission v. ABC Viaticals, Inc., et al.*, No. 3:06-cv-02136 (N.D. Tex.).

why the Receiver should not be held in contempt, and recommended that it be denied. (Recommendation [Doc. 410] at 1.)

5. LaMonda objected to the Recommendation and then filed a Motion for Remand seeking further discovery and another chance to argue the same issues. (Objections [Doc. 415]; Motion for Remand [Doc. 417].) The District Court accepted the Recommendation in part, denied it in part, and denied LaMonda's motions. (Order [Doc. 421].)

6. LaMonda filed a notice of appeal and motion to the District Court asking to proceed in forma pauperis. (Notice of Appeal [Doc. 427]; Mot. for Leave to Appeal IFP [Doc. 433].) The Magistrate Judge recommended that the motion be denied and the District Court certified that the appeal was not taken in good faith under 28 U.S.C. § 1915(a)(3). (Recommendation [Doc. 434]; Order [Doc. 436].)

### **III.** **ARGUMENTS AND ANALYSIS**

LaMonda now seeks leave from this Court to proceed in forma pauperis after the District Court certified the appeal is not in good faith. He contends the appeal is "based upon the movant's sincere, well-developed and documented belief that he is entitled to the relief sought." (LaMonda's Mem. of Law at 1-2.) However, good faith is judged by an objective standard and the District Court must determine whether there is a substantial question for review that will not be futile.

*Coppedge v. U.S.*, 369 U.S. 438, 445 (1962); *Parsell v. U.S.*, 218 F.2d 232, 236 (5th Cir. 1955). To proceed in forma pauperis, the appellant must be economically eligible and seek review of an issue that is not frivolous. *Jackson v. Dallas Police Dep't*, 811 F.2d 260, 261 (5th Cir. 1986); *see also Jones v. Frank*, 622 F.Supp. 1119, 1120 (W.D. Tex. 1985). Determining good faith often requires an inquiry into the merits of the appeal itself. *Baugh v. Taylor*, 117 F.3d 197, 201-02 (5th Cir. 1997); *Jones*, 622 F.Supp. at 1120.

A District Court's certification that an appeal is not in good faith carries "great weight" and may be controlling absent a showing that the decision was arbitrary or unwarranted. *Johnson v. United States*, 352 U.S. 565, 566 (1957); *Maloney v. E.I. DuPont de Nemours & Co.*, 396 F.2d 939, 940 (D.C. Cir. 1967), *cert. denied* 396 U.S. 1030; *Parsell v. U.S.*, 218 F.2d at 236. Therefore, a motion to proceed in forma pauperis to the Court of Appeals must be directed solely to the District Court's reasons for the certification and show how that decision was erroneous. *Baugh*, 117 F.3d at 202.

LaMonda's motion does not explain how the District Court erred in certifying that "the appeal presents no legal points of arguable merit and is therefore frivolous." (Order [Doc. 436].). The District Court expressly incorporated its order addressing each of LaMonda's objections to the Magistrate Judge's ruling. (*Id.*) LaMonda does not contest the District Court's analysis but

merely restates his own belief that the Magistrate Judge's Recommendation was premature because LaMonda desired more time to develop the record. (LaMonda's Mem. of Law ¶ 3.) The District Court overruled that objection because it was evident that "the magistrate judge waded through 'almost 300 pages of exhibits' supplied by LaMonda himself and made factual certifications based on this information and other items on record that support a *de novo* finding and legal conclusion that the report was not premature." (Order [Doc. 421] at 11-12.) It also noted that LaMonda did not explain how developing the record further would bolster his claims. (*Id.*) Moreover, the District Court denied LaMonda's claims for lack of substance—not just lack of evidence—by finding that the Compromise and Settlement Agreement was not breached and that LaMonda had no basis to request an accounting.<sup>2</sup> (*Id.* at 10-11.) Because LaMonda has not identified any basis for challenging the merits of that decision, the District Court correctly certified that his appeal is frivolous and not taken in good faith.

WHEREFORE, the Receiver respectfully asks that the Court deny LaMonda's Motion for Leave to Proceed In Forma Pauperis on Appeal and for

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<sup>2</sup> The only claim that truly lacked any evidence was LaMonda's attempt to recover real property in Kissimmee, Florida, that the Receiver had foreclosed. (Order [Doc. 421] at 11.) The Receiver judicially foreclosed a \$1,425,000 equitable lien in favor of the receivership estate, which was affirmed in LaMonda's appeal on the merits to the Florida Supreme Court. The District Court knew of the foreclosure and approved the subsequent sale. (*See* Am. Status Report [Doc. 294] at 4-5; Order [Doc. 303]; Jt. Status Report [Doc. 328] at 2; Mot. to Approve Closing [Doc. 322].) Therefore, it appropriately noted that "the record is devoid of evidence to dignify satisfying this request." (Order [Doc. 421] at 11.)

such other and further relief, general or special, at law or in equity, to which the Receiver may be entitled.

Respectfully submitted,

/s/ Michael J. Quilling

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**ATTORNEYS FOR RECEIVER**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 3, 2013, a true and correct copy of this document was served via the ECF system, in accordance with the Federal Rules of Civil Procedure, upon counsel of record. It was also served as follows:

C. Keith LaMonda  
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*By U.S. Mail*

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*By E-mail*

/s/ Michael J. Quilling



**Jedonna Adams**

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**United States Court of Appeals for the 5th Circuit**

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**Case Number:** 13-10488

**Document(s):** Document(s)

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RESPONSE/OPPOSITION filed by Mr. Michael J. Quilling [7473050-1] to the motion to proceed IFP in accordance with PLRA filed by Appellant Mr. C. Keith Lamonda in 13-10488 [7442925-2] Date of Service: 10/03/2013 via US mail - Appellant Lamonda; email - Attorney for Appellees: Galloway, Quilling. [13-10488] (Michael J. Quilling )

**Notice will be electronically mailed to:**

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