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

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| MICHAEL J. QUILLING, RECEIVER FOR HOWE FINANCIAL TRUST, MVP NETWORK, INC. D/B/A MVP TRUST, AND TREDS FINANCIAL TRUST | § | CIVIL ACTION NO. 3:98-CV-2689-M |
| PLAINTIFF, | § | |
| V. | § | |
| JAMES W. CONWAY, AN INDIVIDUAL AND, JAMES W. CONWAY, P.S.C., A KENTUCKY PROFESSIONAL SERVICES CORPORATION | § | Consolidated with 3:99-CV-2699-M |
| DEFENDANTS. | § | |

**RECEIVER'S RESPONSE TO JAMES W. CONWAY AND JAMES W. CONWAY, P.S.C.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

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TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Michael J. Quilling, in his capacity as Receiver for Howe Financial Trust, MVP Network, Inc., d/b/a MVP Trust and Treds Financial Trust, and files this, his Response to James W. Conway and James W. Conway, P.S.C.'s ("the Defendants") Motion to Dismiss and in support would respectfully show the Court the following:

## I.

## Factual Background

This case is ancillary to an underlying case where the United States Securities and Exchange Commission ("SEC") instituted Civil Action 3:98-CV-2689-X in the United States District Court for the Northern District of Texas, Dallas Division. The Honorable Judge Joe Kendall then appointed Michael J. Quilling as the Receiver as to all named Defendants and Equity Relief Defendants. One of the Equity Relief Defendants in the SEC Action is Howe Financial Trust. Howe then enlisted the aid of the Defendants.

## II.

## Standard of Review

The Defendants have filed a Motion to Dismiss based on two grounds, pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6). A motion to dismiss cannot be granted "unless it appears to a certainty that the plaintiffs can prove no set of facts that would entitle them to relief." *Garrett v. Commonwealth Mortgage Corp. Of America*, 938 F.2d 591, 593 (5th Cir. 1991); *Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir.), *cert. denied*, 498 U.S. 908, 111 S.Ct. 279, 112 L.Ed.2d 233 (1990). In reviewing the Rule 12(b)(6) motion, the court must accept all material allegations of the complaint as true and construe them in the light most favorable to the non-moving party. *Garrett,* 938 F.2d at 593. The Court may not look beyond the pleadings in ruling on the motion. *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992). A court may grant a motion to dismiss only if it appears beyond doubt from the face of the pleadings that the plaintiff can prove no set of facts in support of

his claims that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

In determining whether the complaint states a claim upon which relief may be granted, the factual allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). The motion is to be determined from the facts of the pleadings alone. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 499-500 (5th Cir. 1982), *cert. denied,* 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983). A dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is not a preferred avenue of adjudication and is looked upon with disfavor. *Sheppard v. Texas Department of Transportation*, 158 F.R.D. 592 (E.D.Tex.1994) (Schell,J.). Such dismissals are rare. *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986). To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief. *Clark,* 794 F.2d at 970. The Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts upon which a claim is based. All that is required is "a short plain statement of the claim" giving notice of the nature of the claim and the grounds upon which it rests. *Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *Fed. R. Civ. P. 8(a)(2)*. A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982).

## III.

## Summary of The Receiver's Arguments in Response to the Issues Raised by the Defendants in their Motion to Dismiss

**A. The Receiver was Ordered by the Court to File any Ancillary Proceedings in Dallas.**

**B. This Court Does have Personal Jurisdiction over the Defendants Pursuant to Fed. R. Civ. P. 12(b)(2).**

**C. Under a Fed. R. Civ. P. 12(b)(6) Analysis, Defendants' Motion Must be Denied.**

## IV.

## Arguments

**A. The Receiver was Ordered by the Court to File any Ancillary Proceedings in Dallas.**

The Defendants complain that this action against them was filed by the Receiver in this court. *See Defendants' Brief* at pg 2. The Receiver had to file this action in this court, pursuant to the original Order of Appointment, which was issued by Judge Joe Kendall on November 13th, 1998. *See Copy of Order Appointing Temporary Receiver*, which is marked as Exhibit "1" to this Response and is incorporated, by reference, as if fully set forth. Judge Kendall ordered that, "Any actions to determine disputes relating to Receivership Assets shall be filed in this Court." Id. at pg 4. This case is ancillary to the underlying proceeding and even the Order of Reappointment, signed by this Court, directed the Receiver to file any and all ancillary proceedings in this Court. This kind of Order is a standard Order in Receivership cases and only makes sense. The Receiver is appointed by the federal court and the appointing court must know what litigation the Receiver is performing. The appointing court charges the Receiver with marshalling all the assets, including ancillary matters,

in order to assure the greatest return for the victims. Whether a case is transferred is for the appointing court to determine, but all the litigation must be initiated in the appointing court. The appointing court cannot exercise its jurisdiction if the Receiver is forced to perform piecemeal litigation.

Once this Court has reviewed the motion, the response and any other pleading, if the court determines that Dallas is not the most convenient forum for this case, then the Receiver would request that the Court transfer this action to the federal court in Louisville, Kentucky, pursuant to its discretionary powers, instead of dismissing the case. It is the Receiver's position that such a transfer is not warranted, however, the Receiver would request a transfer instead of a dismissal. The Receiver's case against the Defendants should not be dismissed simply because the Receiver was following the directives of the Court.

**B. This Court Does have Personal Jurisdiction over the Defendants Pursuant to Fed. R. Civ. P. 12(b)(2).**

The Receiver is at a loss at what the Defendants are complaining about in the first half of their brief. The Defendants cite numerous authority for the proposition that the Defendants do not have sufficient "minimum contacts" with the forum state, Texas, in order to subject them to this Court's personal jurisdiction. *Defendants' Brief at pgs. 5-7.* The cases cited by the Defendants all relate to the traditional "minimum contacts" analysis which was articulated by the U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The problem is that the Defendants are simply utilizing the wrong "minimum contacts" test. Since a Receiver has been appointed, the statute that relates to this case is 28 U.S.C. § 754. Because there is a specific federal statute, the "minimum contacts" test is not with the forum state, Texas.

Rather the test is whether the Defendants have sufficient "minimum contacts" with the United States. Under this, the proper test, the Defendants simply lose this argument.

### 1. The Proper Analysis is "minimum contacts" with the United States, not with Texas.

The Defendants simply bypass 28 U.S.C. § 754 by stating that it does not apply and even if it does, the Plaintiff ("Receiver") has not satisfied the statute's procedures. *Defendants' Brief at pgs. 3-4.*

#### a. 28 U.S.C. § 754 Applies.

This Court has jurisdiction over the SEC's Original Action, therefore, this Court has, "authority to grant the full panoply of equitable remedies so that the [victims] can obtain complete relief." *S.E.C. v. Antar*, 831 F.Supp. 380, 398 (D.N.J.1993), *citing, S.E.C. v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984), *cert. denied,* 471 U.S. 1053, 105 S.Ct. 2112, 85 L.Ed.2d 477 (1985). These remedies include disgorgement, asset freezes, **appointment of receivers**, repatriation of assets, constructive trusts, and restitution. *See Id. Antar.*

Judge Kendall, pursuant to his equitable remedies appointed a receiver and charged the receiver with the responsibility to go and gather any and all assets to protect the investors [victims]. The Defendants now wish to divest this court of any ancillary jurisdiction it has, relating to the original SEC Action and are requesting this Court to make the Receiver go through piecemeal litigation in order to protect the victims of an illegal ponzi scheme. The district court in *Antar* noted that "the securities statutes vest federal courts with jurisdiction over claims against non-violators." *Antar*, 831 F.Supp. at 398. *See also, Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288-89, 61 S.Ct. 229, 85 L.Ed. 189 (1940) (holding that a federal court had jurisdiction over a claim in a

securities fraud action seeking relief from a non-party who held funds sought by the plaintiffs); *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1338-39 (2d Cir. 1974), *cert. denied,* 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236 (1974) (noting that the Securities Exchange Act gave the district court jurisdiction to restrain non-violators from disposing of assets claimed by plaintiffs).

This Court has personal jurisdiction over the Defendants since there is a federal statute which authorizes nationwide service of process.

> When a federal court is attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States rather than with any particular state.

*Sovereign Bank, F.S.V. v. Rochester Community Savings Bank*, 907 F.Supp. 123, 125 (E.D.Pa.1995), *quoting Busch v. Buchman, Buchman & O'Brien,* 11 F.3d 1255, 1258 (5th Cir. 1994). There is no doubt that the Defendants, residents of Kentucky (*See Conway Affidavit attached to Defendants' Motion to Dismiss)* have minimum contacts with the United States. District courts have the power to impose equitable relief even to a third party against whom no wrongdoing is alleged if it is established that the third party possesses illegally obtained profits to which he has no legitimate claim. *See S.E.C. v. Cherif*, 933 F.2d 403, 414 n. 11 (7th Cir. 1991) (noting that courts "have jurisdiction to decide the legitimacy of ownership claims made by non-parties to assets alleged to be proceeds from securities laws violations"); *See also S.E.C. v. Wencke*, 783 F.2d 829 (9th Cir. 1986), *cert. denied,* 479 U.S. 818, 107 S.Ct. 77, 93 L.Ed.2d 22 (1986); *Antar*, 831 F.Supp. At 398 (noting that "the securities statutes vest federal courts with jurisdiction over claims against non-violators").

As Judge Maloney stated in *Entek Corp. v. Southwest Pipe & Supply Co.*, 683 F.Supp. 1092 (N.D.Tex.1988), "All the corporate defendants briefed the irrelevant issue of whether they have minimum contacts with Texas. The relevant jurisdictional issue in this case is whether the corporate Defendants have minimum contacts with the United States." *Id. at 1099.* Judge Maloney further held that, "In a federal question case in which nationwide service is statutorily authorized, minimum contacts with the United States will satisfy the due process prong of the personal jurisdiction test. *Id. at 1100.* Judge Maloney hit upon the threshold issue, which the Defendants in this case are really arguing, which is a motion to transfer venue. The Defendants are really arguing that venue in Dallas, Texas is improper because the Defendants are residents of Kentucky. There can be no question that the Receiver could have filed a lawsuit in federal court in Kentucky based upon diversity, absent the directive from Judge Kendall. In *Entek*, Judge Maloney stated, "Even failing a motion to dismiss for lack of jurisdiction under the due process clause, a defendant could still move to transfer under appropriate venue statutes or under the doctrine of forum non conveniens. *Id. at 1101. See also Burger King v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174, 2184-85, 85 L.Ed.2d 528 (1985).

When venue is determined to be improper, the court may either dismiss the case or, if it is in the interest of justice, transfer it to any other district in which it could have been brought. *Taylor v. Love*, 415 F.2d 1118, 1120 (6th Cir. 1969), *cert. denied,* 397 U.S. 1023, 90 S.Ct. 1257, 25 L.Ed.2d 533 (1970). *See also, 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, Jurisdiction 2d § 3827 (West 1986).* The Supreme Court has noted that one of the circumstances which can justify a transfer, in the interest of justice, is when the statute of limitations has run and dismissal would prevent the plaintiff from refiling the case in the proper

forum. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962). Generally, a transfer is preferred over dismissal. *DeMoss v. First Artists Production Co., Ltd.*, 571 F.Supp. 409, 412 (D.C.Ohio 1983), *appeal dismissed,* 734 F.2d 14 (6th Cir. 1984). Generally, the standard for granting a transfer pursuant to 28 U.S.C. § 1404(a) is left to the discretion of the court. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988).

The Sixth Circuit Court of Appeals spoke to the personal jurisdictional issue in a case similar to the present case before this Court, in *Haile v. Henderson National Bank*, 657 F.2d 816 (6th Cir. 1981), *cert. denied,* 455 U.S. 1172, 102 S.Ct. 1450, 71 L.Ed.2d 633 (1981). The court determined that the *International Shoe* minimum contacts analysis "becomes inapposite" when Congress has provided for nationwide service of process. 657 F.2d at 826 n. 10. At issue in *Haile* was "whether the minimum contacts analysis of *International Shoe* [citation omitted] and its progeny properly applies to ancillary actions and proceedings brought by a federal receiver..." Id. at 817. In making its ruling, the court's rationale was based on the fact that an ancillary receivership action does not involve a court attempting to extend its power beyond its own territorial limitations through a state's long-arm statute. Instead, the court reasoned, a different analysis must be applied.

> First, an ancillary receivership action is not an exercise of extra-territorial jurisdiction; and second, the territorial limits of the appointment court's effective service of process are extended to any district to which its territorial jurisdiction has been expanded by the presence in that district of property belonging to the receivership estate [emphasis added].

Id. at 823. The Sixth Circuit's analysis in *Haile* was based, in large part, on the First Circuit case of *Driver v. Helms,* 74 F.R.D. 382, (D.R.I.1977), *modified on other grounds*, 577 F.2d 147 (1st Cir. 1978), *cert. denied,* 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1978). In that case, the defendants, who were nonresidents, were served under a nationwide service of process statute, 28

U.S.C. § 1391(e). Defendants argued that the court could not exercise its personal jurisdiction over them based on the due process grounds. While rejecting this argument, the court said that since Congress specifically authorized personal jurisdiction over defendants located anywhere in the United States in 28 U.S.C. § 1391(e), personal jurisdiction over the defendants was proper. A portion of the district court opinion, not reversed by the First Circuit, is especially pertinent to the question presented in the present case. In relevant part, the court stated:

> However, Congress may provide for national service of process, i.e., national exercise of personal jurisdiction by each of the district courts based on presence of the defendant in the United States, rather than in any particular state. [citations omitted]. When Congress does so provide, the district court's service is not constrained by the due process (*International Shoe, Hanson v. Denckla*) limits to which state courts are subject. [citation omitted]. Instead, the due process limitations on national service of process is found by inquiring into the fairness of such jurisdiction in the particular circumstances and facts of the case at hand, an inquiry mandated by the Fifth Amendment Due Process Clause. The Court believes that the exercise of national personal jurisdiction pursuant to § 1391(e) here is consistent with the applicable due process test. In *Mariash v. Morill*, 496 F.2d 1138 (2nd Cir. 1974) ... the Second Circuit held that Congressionally authorized national jurisdiction satisfied due process if it was based on service calculated to inform the defendant of the proceeding in order that he may take advantage of the opportunity to be heard. As Chief Judge Kaufman noted ... nationwide service of process, when authorized by Congress, is not extra-territorial at all. Therefore, the due process limitation on such process should be precisely the limitations applicable on a state's process within its territorial limits: notice calculated to inform the defendant of the pendency of the suit. [citation omitted].

74 F.R.D. at 390-91. Under this rationale, the *Haile* court concluded, "In an action where service of process is effected pursuant to a federal statute which provides for nationwide service of process, the strictures of *International Shoe* do not apply." 657 F.2d at 824. Because the statute involved in *Haile*, 28 U.S.C. § 1692, provided for nationwide service of process, the court's process extended to any district where receivership property could be found. "As such," the court stated, "the minimum contacts analysis, as a limitation on state extra-territorial power, is simply inapposite."

657 F.2d at 825-26. *See also, United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (holding that statute providing for nationwide service of process provides jurisdiction over a defendant with minimum contacts to the United States). *See also, Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309 1315 (9th Cir. 1985), *rev'd on other grounds, Holmes v. Securities Investors Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), (upholding nationwide service of process provision).

Where a federal statute provides the basis for jurisdiction, the constitutional limits of due process derive from the Fifth, rather than the 14th, Amendment. *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 945 (11th Cir. 1997). The Defendants in this case have premised their argument on the grounds that their due process rights under the 14th Amendment would be violated if this court were to exercise its personal jurisdiction over them. This again, is the wrong analysis.

Congress has authorized nationwide personal jurisdiction, and even worldwide, service of process. Where these statutes apply, so long the defendant has "minimum contacts" with the United States as a whole, a defendant is subject to personal jurisdiction in any federal district. *Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1257 (5th Cir. 1994); *Bourassa v. Desrochers*, 938 F.2d 1056, 1058 (9th Cir. 1991); *Fed. R. Civ. P. 4(k)(1)(D).* Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing in the United States. *Busch*, 11 F.3d at 1258 (holding that defendant's minimum contacts with and residence in the U.S. satisfies due process). The Fifth Circuit upheld the holding in *Busch*, despite misgivings by the Justices in *Bellaire General Hosp.*

*v. Blue Cross Blue Shield of Michigan*, 97 F.3d 822 (5th Cir. 1996); *suggestion for Rehearing en Banc denied*, 121 F.3d 706 (5th Cir. 1997). In *Bellaire*, the Court held:

> We have previously addressed nationwide service of process provisions in federal statutes. In *Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255 (5th Cir. 1994), we analyzed the nationwide service of process provision contained in § 78aa of the 1934 Securities Exchange Act. Concluding that service of process and personal jurisdiction are conceptually related concepts, we determined that when a federal court attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States. We specified that in such a case the relevant sovereign is the United States, and held that the due process concerns of the Fifth Amendment are satisfied and traditional notions of fair play and substantial justice are not offended where a court exercises personal jurisdiction over a defendant residing within the United States.

97 F.3d at 825. The Defendants in this case may desire to have Congress repeal or change the nationwide service of process provision, however, that argument or issue is not before this Court. The Fifth Circuit has consistently enforced the provisions of 28 U.S.C. § 754. *See Carter v. Powell*, 104 F.2d 428 (5th Cir. 1939), *cert. denied*, 308 U.S. 611, 60 S.Ct. 173, 84 L.Ed. 511 (1939).

A receiver achieves jurisdiction and control of property in districts other than that of appointment by filing copies of the complaint and order of appointment in the district court where the property is located. 28 U.S.C. § 754. When there is no other basis of jurisdiction, a receiver appointed in one district must file under Sec. 754 to attain jurisdiction over property in other districts. *S.E.C. v. Equity Service Co.*, 632 F.2d 1092, 1095 (3rd Cir. 1980) (allowing a receiver to reassume jurisdiction after a later Sec. 754 filing, when there was no prejudice to other claimants). The entry of a permanent appointment order sets a new 10-day period running. *S.E.C. v. American Capital Investments, Inc.*, 98 F.3d 1133 (9th Cir. 1996), *abrogated on other grounds, Steele Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 1012 L.Ed.2d 210 (1998); *see also, S.E.C.*

*v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C.Cir. 1996) (reappointment of receiver will start the ten-day clock of § 754 ticking anew). In addition, the Defendants in the present case cannot show any prejudice from any late filing the Receiver has performed since this court reappointed him as the receiver. *See United States v. Arizona Fuels Corp.*, 739 F.2d 455, 460 (9th Cir. 1984). In this case, the Receiver has followed the necessary procedures, contained in Sec. 754, after this court reappointed Michael J. Quilling as the Receiver in this action.[1] Sec. 754 has been said to cover all types of property, including money. *See Revisers' Note to 28 U.S.C. § 754; 7 J. Moore,* Moore's Federal Practice p 66.08[1] at 1948-50 (2d ed. 1972 rev.).

Federal receivers are empowered pursuant to 28 U.S.C. § 754 to collect assets anywhere in the United States. *Select Creations, Inc. v. Paliafito America, Inc.*, 852 F.Supp. 740, 780 (E.D.Wis.1994). As such, to confirm his jurisdiction over the assets the receiver need only file, within ten days of his appointment, copies of the underlying compliant and order of appointment where such properties are located. Id. Additionally, if necessary, the Receiver may also bring a proceeding before the appointing court against any person claiming an interest in the attached property and may serve the interested party with process in any judicial district where the receiver has filed the complaint and order of appointment. Id. *citing*, 28 U.S.C. § 1692; *Haile*, 657 F.2d at 826, *quoting,* "The process authorized by § 1692 is not 'extra-territorial' but rather nationwide... The appointment court's process extends to any judicial district where receivership property is found...

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[1] The Receiver has, within ten (10) days of the date this Court Reappointed Michael J. Quilling as the Receiver, sent the required documents, pursuant to 28 U.S.C. § 754 to the proper United States District Court in Louisville, Kentucky. *See Affidavit of Andrew Trusevich which is attached as Exhibit "2" and is incorporated into this Response, by reference, as if fully set forth.*

as such, the minimum contacts analysis, as a limitation on state extra-territorial power is simply inapposite." Id. 28 U.S.C. § 754 gives the appointing court and the receiver exclusive jurisdiction and control over all of the receivership assets in whatever district it may be situated. 28 U.S.C. § 1692 of the Judicial Code helps to effectuate the appointing court's exclusive jurisdiction by providing that when a receiver is given the responsibility for property 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.

The ancillary jurisdiction of federal courts over actions incident to a receivership established by a federal court has long been recognized. *Tcherepnin v. Branz*, 485 F.2d 1251, 1255 (7th Cir. 1973) *cert. denied,* 415 U.S. 918, 94 S.Ct. 1416 (1974), *citing White v. Ewing*, 159 U.S. 36, 15 S.Ct. 1018, 40 L.Ed. 67 (1895); *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. 573, 19 S.Ct. 500, 43 L.Ed. 814 (1899). So long as an action commenced by a court appointed receiver seeks "to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the ... court of the United States is concerned." *Tcherepnin,* 485 F.2d at 1256.

**b. A Nationwide Service of Process Statute Applies to this Case.**

The Receiver was authorized under a nationwide service of process statue to sue the Defendants in this court. The interplay between Rule 4(k)(1)(D) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1692 provide that authorization. *S.E.C. v. Vision Communications, Inc.*, 74 F.3d 287, 290 (C.A.D.C. 1996). Under Rule 4(k)(1)(D), the service of a summons may establish

personal jurisdiction "when authorized by a statute of the United States." *Fed. R. Civ. P. 4(k)(1)(D).* 28 U.S.C. § 1692 provides:

> 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 such districts.

To invoke Sec. 1692, a receiver must comply with Sec. 754. *S.E.C. v. Vision,* 74 F.3d at 290, *citing Haile,* 657 F.2d at 823; *and 7 James W. Moore, Moore's Federal Practice p 66.08[2], at 66-51 (2d ed. 1995).*

In essence, a receiver can utilize 28 U.S.C. § 754 to invoke 28 U.S.C. § 1692, which interplays with Fed. R. Civ. P. 4(k)(1)(D) which then vests a court with personal jurisdiction over a defendant. Id. at 290. The Receiver has asserted that the Defendants obtained funds from an illegal ponzi scheme and through his negligence only exacerbated the damages. The Receiver has not only a right, under the cited statutory authority, but a duty, pursuant to the Court's Order appointing him as the Receiver, to marshal and gather all of the assets, including money, and deposit the money into this Court's registry. There is no question that the Defendants are subject to the personal jurisdiction of this court. It may be more convenient for the Defendants to have their case heard in a federal court in Kentucky, however, the Defendants have not asked this court for a change of venue. In addition, this court exercising personal jurisdiction over the Defendants will not offend traditional notions of fair play and substantial justice because the jurisdiction is reasonable. It is the Receiver's position that it would be unreasonable to make the Receiver litigate and carry out his court-appointed duties in a piecemeal litigation scheme, such as that which is suggested by the Defendants.

### C. Under a Fed. R. Civ. P. 12(b)(6) Analysis, Defendants' Motion Must be Denied.

As the Receiver has previously cited, under the standard of review of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the court cannot dismiss a case unless the face of the plaintiff's pleadings show, beyond doubt, that the plaintiff cannot prove any set of facts that would entitle it to relief. *Garrett v. Commonwealth Mtg. Co.*, 43 F.3d 198, 203 (5th Cir. 1995). The motion cannot be used to resolve issues or merits of the case. The Defendants seem to be asking this Court to make the Receiver put on evidence in order to survive a 12(b)(6) motion to dismiss. This is the wrong standard.

#### 1. Professional Negligence

The Defendants first start out by setting forth three (3) elements for professional negligence under Kentucky law. *See Defendants' Brief at pg 10-11.* The Defendants then state that the Receiver has not stated that an attorney/client relationship existed between MVP or TREDS. Id. Under Kentucky law, since the relationship of attorney-client is one of fiduciary in nature, an attorney has the duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client's interest. *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978). "As it would be in negligence cases generally, the question of whether the conduct of the attorney meets the standard of care test is one for the trier of the facts to determine." Id. The Receiver has plead a short statement putting the Defendants on notice of what the Receiver is complaining. If the Receiver cannot offer sufficient admissible evidence to prove his claim, then that is to be reviewed under a Rule 56 motion. All that is required to be in a complaint is, "a short and plain statement" of the claim. *Fed. R. Civ. P. 8(a)(2).* A claim is not inadequate simply because

an element of the claim is omitted, so long as the element may be fairly inferred from the pleading as a whole. *Walker v. South Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990). Evidence pleading is not favored under the Fed. R. Civ. P. *Brownlee v. Conine,* 957 F.2d 353, 354 (7th Cir. 1992).

Here, the Receiver has plead that Conway, an attorney was acting as an escrow agent, without any written agreement setting forth his duties and never attempted to reconcile the money in verses the money out. *See Original Complaint at pg 6.* The Receiver complains that Conway never inquired or performed like a reasonable and prudent attorney/escrow agent. As cited by the Receiver, this is for the trier of fact to determine. The Defendants argue there is not an attorney/client relationship between Conway and MVP or TREDS. *Defendants' Brief at pg 11.* Under the standard of review for a 12(b)(6) motion, that is not enough of an argument to justify a dismissal. The Receiver's position is that he has plead enough facts to overcome a 12(b)(6) motion, however should the Court desire, the Receiver will plead more factual detail in an Amended Complaint. The Receiver's position is that if the Defendants' wanted more factual detail, the proper procedural tool would have been a motion for more definite statement. Because under the facts, as plead by the Receiver, even under Kentucky law, he has plead sufficient facts to submit a question of professional negligence. Despite the Defendants' argument, "An attorney may be liable for damage caused by his negligence to a person intended to be benefitted by his performance irrespective of any lack of privity..." *Seigle v. Jasper*, 867 S.W.2d 476, 483 (Ky. App. 1993), *citing, Hill v. Willmott,* 561 S.W.2d 331, 334 (Ky. App. 1978).

### 2. Negligent Misrepresentation

The Receiver is at a loss of what facts the Defendants deem necessary to prove a claim for negligent misrepresentation. *See Defendants' Brief at pgs 12-13.* The Receiver complains that Conway issued letters and affidavits which contained statements which were false, misleading or which Conway failed to properly investigate. *See Complaint at pg 8.* The Receiver, again based on the authority previously cited, does not have to plead evidence under Fed. R. Civ. P. 8. There is no heightened pleading requirement in the Fifth Circuit. Under Kentucky law, the Kentucky civil remedies section gives a purchaser oriented action for either intentional or negligent misrepresentation in the sale of securities. *City of Owensboro, Kentucky v. First U.S. Corp.*, 534 S.W.2d 789, 792 (Ky. App. 1975). Under a 12(b)(6) the Receiver has plead facts and has alleged a cause of action, which if taken as true, that Conway issued letters and affidavits which contained statements which were false, misleading or which Conway failed to properly investigate, then the Receiver has a right to submit this issue to the trier of fact. As far as who relied on what specific letter and affidavit, that is the purpose of the discovery procedures.

### 3. Aiding and Abetting Corporate Waste

The Defendants state that Kentucky law does not allow for such cause of action and the counsel for the Defendants state that he has searched the case law and could not find such a cause of action. *See Defendants' Brief at pgs 15-16.* The Receiver's position is that the Defendant did not look hard enough. "Where a person in a fiduciary relationship to another violates his duty as a fiduciary, a third person who participates in the violation may be liable to the beneficiary." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 486 (Sup. Ct. Ky. 1991). The Kentucky

Supreme Court goes on to say, in *Steelvest*, "One who knowingly aids, abets, or joins a fiduciary in the breach of his duty in order to make a profit becomes jointly liable with the fiduciary for such profits." Id. at 486. "It is recognized that a party, who, without privilege, aids or assists an agent to violate a duty to his principal is subject to tort liability to the principal." Id. The Kentucky Supreme Court also cites the U.S. Supreme Court and different federal and state circuit courts regarding the claim of "aiding and abetting." Id. at 485. The Receiver's position is that if the Kentucky Supreme Court recognizes such a cause of action, for aiding and abetting, then the Receiver has met his burden under the standard of review for a 12(b)(6) attack on the factual sufficiency of his pleadings.

The Defendants also state in a footnote, that, "The United States Supreme Court recently abolished aiding and abetting liability under federal securities law," citing a 1994 case. *See Defendants' Brief at pg 16, fn. 5.* However, what the Defendants did not state is that the case which they cited, eliminated only private parties from bring securities law violations for aiding and abetting. In fact, Congress was so concerned with the "aiding and abetting" issue that it passed Section 104 of the Private Securities Litigation Reform Act of 1995. "By its clear terms, Section 104 provides that aiding and abetting a violation of Chapter 2B, which is itself a violation, and as such is subject to injunctive actions and civil actions for money penalties by the SEC under 15 U.S.C. §§ 78u(d)(1) and 78u(d)(3)." *United States S.E.C. v. Fehn*, 97 F.3d 1276, 1283 (9th Cir. 1996), *cert. denied,* 522 U.S. 813, 118 S.Ct. 59, 139 L.Ed.2d. 22 (1997).

**4. Breach of Contract**

The Defendants next argue that the Receiver's breach of contract claim must fail and cites, *Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 936 (5th Cir. 1988) in support of this position. *See*

*Defendants' Brief at pg 16-17.* The Receiver is again at a loss because the pinpoint cite, cited by the Defendants, does not stand for the position for which it is cited. In fact, *Mahone* holds, "Even if it seems 'almost a certainty to the court that the facts alleged cannot be proved to support the legal claim,' the claim may not be dismissed so long as the complaint states a claim." *Mahone*, 836 F.2d at 927. The Defendant next argues that the Receiver fails to attach "confirming letters" to the complaint, therefore, the Defendants argue, the Receiver's breach of contract claim must be dismissed. *See Defendants' Brief at pg 17.* The Defendants are missing the mark under a 12(b)(6) standard. All the Receiver has to do is plead a breach of contract claim, which the Receiver has done. *See Complaint at pg 9.* So long as the Receiver has plead a valid cause of action, i.e.- breach of contract for which relief may be granted, the 12(b)(6) motion must be denied. The Receiver's position is that he has plead with enough specificity to overcome a 12(b)(6) attack, however, should the Court require the Receiver to replead his complaint with further specificity, then he certainly will follow the Court's directive.

## V.

## Conclusion

The Court should deny the Defendants' Motion to Dismiss on the following grounds:

(a). The Receiver was following Judge Joe Kendall's Order that any ancillary proceedings, to the underlying SEC Action, where Michael J. Quilling was first appointed as the Receiver, will be brought in this Court.

(b). In addition, the Defendants have utilized the wrong "minimum contacts" analysis. The proper test to be used is the "minimum contacts" with the United States, not Texas.

(c). The Receiver has stated valid claims and under the 12(b)(6) standard of review, the only test is whether the Receiver has plead causes of action for which relief may be

granted; and not, as the Defendants would have this Court believe, whether the Receiver can prevail at trial.

WHEREFORE PREMISES CONSIDERED, the Receiver respectfully requests this Court to Deny Defendants' Motion to Dismiss, or in the alternative to transfer this case to federal court in Louisville, Kentucky; and for any such other relief, either in law or in equity, which the Receiver may show himself justly entitled.

Respectfully submitted,

By: 

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ATTORNEY FOR RECEIVER

## CERTIFICATE OF SERVICE

The undersigned certifies that on this 6th day of March, 2000 a true and correct copy of this Response was sent, via the U.S. Postal Service, certified mail, R.R.R., to the following:

Mr. Gary D. Elliston
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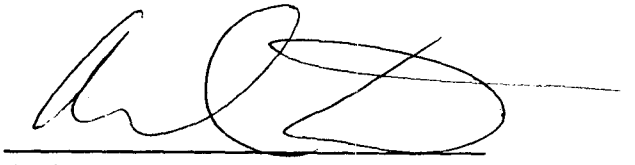

Andrew M. Trusevich