IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

File No.: 3:04-CV-251

Michael J. Quilling, Receiver for Frederick J. Gilliland, Plaintiff, v. Grand Street Trust, Heartland Control Trust, Future Control Trust, Marie Margarite Gueco Mercado Paquette, Rein Evans Sestanovich, L.L.P. f/k/a Dressler Rein Evans & Sestanovich, L.L.P., Melrose Escrow, Inc., and Paul J. Cohen, Defendants.	MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW *Defendants Marie Paquette, Grand Street Trust, Future Control Trust, Heartland Control Trust*

Defendants Marie Paquette, Grand Street Trust, Heartland Control Trust, and Future Control Trust, through undersigned counsel, respectfully move the Court for an order dismissing plaintiff's complaint in this action pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure, on grounds that this Court lacks personal jurisdiction over the moving defendants,[1] lacks subject matter jurisdiction over the claims asserted in the complaint, and because the complaint fails to state a claim upon which relief can be granted.

In support of this motion to dismiss, defendants respectfully submit the following memorandum of law, as well as the Affidavit of Marie Paquette. As a preliminary matter, moving defendants note that the issues presented in this memorandum have been fully and very

[1] Defendants submit with this motion the Affidavit of Marie Paquette, which concerns the relationships of the moving defendants to the State of North Carolina. Technically, this submission converts the motion, as it relates to the issue of personal jurisdiction, to a motion for partial summary judgment pursuant to Rule 56. Given that plaintiff has made no allegations in his complaint concerning any defendants' contacts to the forum jurisdiction, but rather relies solely on federal statutes that he contends take the matter out of the minimum contacts analysis, the affidavit may be unnecessary. As will be argued, it simply reinforces that there is no basis for exercising personal jurisdiction based on minimum contacts.

ably briefed in this case by defendant Rein Evans Sestanovich, LLP ("Rein Evans"). In view of the limited body of case law dealing with the dismissal issues raised by the defendants, as well as the fact that the Court's ruling on the issues presented in this brief affect all defendants equally,[2] there appears to be little purpose in recasting the same arguments, based on the same cases, in different language. Thus, for purposes of brevity, moving defendants, where possible, have attempted to summarize their arguments and incorporate the Rein Evans brief by reference.

STATEMENT OF FACTS

This case arises out of an SEC enforcement action against Frederick Gilliland that began no later than December 1998, nearly five and one-half years prior to the initiation of the lawsuit in this matter. Complaint ¶ 12. The complaint alleges that Mr. Gilliland "operated a huge international Ponzi scheme under the auspices of a number of different entities which he owned and controlled, including Sterling Management Services, Inc. and Sterling Asset Services, Ltd." *Id.* The complaint further alleges that Gilliland raised large amounts of funds from investors, and that these investor funds were funneled through offshore accounts and deposited into a Charlotte, North Carolina NationsBank account owned by MM ACMC Banque de Commerce, Inc. *Id.* On 2 October 1998, "$2.5 million of investor funds" were wired from the MM ACMC Banque de Commerce, Inc. account at NationsBank to a Wells Fargo Bank account in the name of Grand Street Trust. Compl. ¶ 13.

From the Wells Fargo account, the complaint alleges, the funds were "laundered through a series of accounts" in the names of the defendant trusts, although no detail is provided to support this allegation. *Id.* Further, the complaint claims that the trusts paid Rein Evans "at least

[2] Moving defendants do not advance here the argument contained in Section E of the Rein Evans brief (pp. 26-28) concerning to the exercise of dominion and control over the funds, because the issue, as it relates to the moving defendants, is not appropriate for resolution by motion to dismiss.

$1.5 million," most of which was in turn paid out to defendants Melrose Escrow or Cohen, and some of which was kept as legal fees. *Id.* The complaint alleges that "the investors whose funds were diverted" received no consideration from these defendants, and that Marie Paquette "stole[] or otherwise wrongfully diverted" the balance "of the investor funds" for no consideration to the investors or anyone else. *Id.*

The complaint fails to identify the investors who the Receiver claims owned the "diverted" proceeds, and fails to allege or even to suggest that any of the money transferred in 1998 is still in the possession or control of any of the defendants. Furthermore, the complaint wholly fails to set forth any fact that would support the Receiver's conclusion that the investor funds he seeks to recover somehow constitute an asset of the Receivership rather than an asset owned by the investors themselves.

ARGUMENT

A. Legal Standard.

Moving defendants adopt and incorporate by reference the corresponding Section A, concerning the applicable legal standard, in Defendant Rein Evans's Memorandum in Support of Motion to Dismiss ("First Rein Evans Memorandum"[3]), filed in this action on 17 August 2004 (pages 4-7).

B. This Action Should Be Dismissed Because the Court Lacks Personal Jurisdiction Over the Moving Defendants.

As indicated both by the failure of the Receiver to allege facts in the complaint concerning minimum contacts or amenability to long-arm jurisdiction, and the affirmative

[3] This is used to distinguish the initial brief in support of motion to dismiss from the reply brief.

statements in defendant Marie Paquette's affidavit demonstrating the existence of no contacts between the moving defendants and North Carolina, personal jurisdiction over the defendants in this matter cannot be established pursuant to the minimum contacts doctrine developed in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny. To the extent a discussion of this issue is helpful, the First Rein Evans Memorandum contains an excellent summary of the Supreme Court's development of the law since *International Shoe*.[4] It appears, however, that the Receiver concedes that the defendants would not be subject to *in personam* jurisdiction under a straight *International Shoe* minimum contacts analysis, because his response brief did not address that aspect of the Rein Evans argument concerning personal jurisdiction.

Rather, it is clear that the Receiver bases his claim of personal jurisdiction entirely on his interpretation of the interplay of two federal statutes that relate to taking control of property in Receivership actions. Despite that the two statutes have coexisted for nearly a century,[5] there is scant case law concerning whether they together allow a receiver to cause one district court to exercise not merely *in rem* jurisdiction over receivership property in another district, but also to exercise *in personam* jurisdiction over a person with no ties to the forum state, based only on the existence of an unperfected claim against such person. Any careful reading of the language used in the statute indicates that Congress did not intend such a liberal interpretation of the authority granted by the statutes. The most pertinent authority from the Fourth Circuit Court of Appeals[6] strongly suggests the same conclusion: in the absence of express congressional grant of personal

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[4] See First Rein Evans Memorandum at 8-12.

[5] Both statutes, 28 U.S.C. §§ 754 and 1692, originally became effective on 3 March 1911 pursuant to the same legislation; c. 231, § 56, 36 Stat. 1102. They were codified in their present form effective 25 June 1948 pursuant to c. 646, 62 Stat. 922.

[6] See *Gilchrist v. General Electric Corp.*, 262 F.3d 295, 301 (4th Cir. 2001) (noting that although § 754 confers in rem jurisdiction over property in other districts, such in rem jurisdiction "does not give a district court personal jurisdiction over persons in such other districts absent an express congressional grant of personal jurisdiction.")

jurisdiction, only *in rem*, and not *in personam*, jurisdiction is conferred by the receivership statutes. Thus, because plaintiff has no other basis upon which to predicate his claim of personal jurisdiction, this action must be dismissed.

Plaintiff's argument in favor of personal jurisdiction is as follows. Pursuant to 28 U.S.C. § 754, a receiver is permitted to obtain *in rem* jurisdiction over receivership property consistent with his order of appointment. The statute 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.
>
> He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.
>
> Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

28 U.S.C. § 754.

Having complied with § 754,[7] the argument posits, the receiver then may avail himself of § 1692, which, he contends, provides for nationwide service of process in receivership actions:

> In proceedings in 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.

[7] Moving defendants do not concede that plaintiff complied with § 754. Rather, moving defendants agree with Rein Evans that the receiver ignored the unambiguous language of the statute in failing to file as required within the ten day period after his appointment, and that the statute does not provide for the reappointment of a receiver for purposes of restarting the ten day filing period. To the extent that this Court concludes personal jurisdiction can be conferred by the interplay of these statutes, the failure of plaintiff to comply with § 754 would divest the Court of personal jurisdiction, necessitating dismissal. Moving defendants incorporate by reference the discussion of this issue at pages 3-6 of the Reply in Support of Rein Evans Sestanovich, L.L.P.'s Motion to Dismiss ("Rein Evans Reply Brief").

28 U.S.C. § 1692. In fact, neither statute says anything about service of process, which is necessary to assert personal jurisdiction. F.R. Civ. P. 4. The cases relied upon by plaintiff in his response to Rein Evans's motion to dismiss all interpret the phrase "may issue and be executed in any such district" as meaning, instead, "may issue and be served in any such district." This interpretation, which admittedly constitutes the majority view in that the three circuit courts of appeal that have ruled on this during the past 93 years have used it, nevertheless ignores that Congress has chosen not to use the word "service" or "served" in the statute. This decision by Congress not to use the word "service" is no accident. That is, Congress is quite aware of how to use this legal term of art in its jurisdictional statutes, and it has not wholly ignored the receivership jurisdictional statutes over the past century.

Congress enacted Title 28 of the United States Code, entitled "Judiciary and Judicial Procedure," in 1948. (Act June 25, 1948, c.646, § 1, 62 Stat. 869.) Chapter 113 of Title 28, entitled "Process," is one of the shortest chapters in the title, consisting of six brief statutes, including 28 U.S.C. § 1692. Three of these six statutes, including two that were enacted *on the same day* as § 1692, describe proper manners of ***service***, as opposed to ***execution***, of process, on a given person or corporation.

Specifically, 28 U.S.C. § 1694 provides that, "[i]n a patent infringement action commenced in a district where the defendant is not a resident but has a regular and established place of business, ***service of process***, summons or subpoena upon such defendant may be made upon his agent or agents conducting such business." Section 1695 provides that "[p]rocess in a stockholder's action in behalf of his corporation my be ***served*** upon such corporation in any district where it is organized or licensed to do

business or is doing business." Section 1696(a) provides, in pertinent part, that "[t]he district court of the district in which a person resides or is found may order ***service*** upon him of any document issued in connection with a proceeding in a foreign or international tribunal." Subsection (b) provides that "[t]his section does not preclude ***service*** of such a document without an order of court."

Congress has provided for nationwide service of process elsewhere through the simple use of the word ***"served."*** For example, in the securities law context, 15 U.S.C. §§ 77aa and 77v both provide that "process in such cases may be ***served*** in any other district of which the defendant is an inhabitant or wherever the defendant may be found." The federal RICO statute provides for nationwide service: "All other process in any action or proceeding under this chapter may be ***served*** on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(d).

What, then, explains the absence of the word that would make the answer to this question clear? It does not appear to be Congressional inattentiveness. Upon the enactment of the Federal Rules of Civil Procedure, technical corrections were made to receivership statutes, including substituting the word "action" for "suit" in § 754 to achieve harmony with Rule 2. (See Appendix B, which includes Historical and Statutory Notes to § 754.) Congress has demonstrated concern with technical accuracy in its terminology, and all it had to do in this instance was either replace "execute" with "serve," or add "serve" to § 1692. It did not.

It is not the intention of moving defendants to engage in another lengthy discussion of the cases discussed by the parties on this issue previously. Nonetheless, it

is instructive to note that the case relied upon by Rein Evans in support of its argument that there is a failure of personal jurisdiction considered all of the circuit court of appeals authority to the contrary, and yet departed from the view of those decisions because of the use of the word ***"executed,"*** rather than ***"served,"*** in § 1692. *Stenger v. World Harvest Church, Inc.*, 2003 WL 22048047 (N.D. Ill. 2003) (unpublished decision). The decision holds, in pertinent part:

> The question under Rule 4(k)(1)(d), however, is whether § 1692 authorizes ***service*** of process on a non-resident individual or entity in an *in personam* action. The Court concludes that it does not. The statute does not mention ***service*** of process; rather it speaks only of ***issuance*** and ***execution*** of process. . . . In short, the statute does not provide for nationwide service of summons on an individual or entity sued by a receiver. Rather, by its terms it is effectively an adjunct to § 754 which provides the court that appointed the receiver with *in rem* jurisdiction over property located outside the district in which the appointment was made.

Id. at *2 (emphasis in original).

Although the *Stenger* judge did not mention it, the reason for the departure from the circuit authorities was a simple application of the canon of statutory construction *expressio unius est exclusio alterius* (the mention of one is the exclusion of another).[8] The use of the term ***"excecuted,"*** rather than ***"served,"*** can only be viewed as indicative of a Congressional intent ***not*** to allow for the type of extraterritorial service advocated by plaintiff here. This is especially the case in view of the fact that Congress did use the term "serve" elsewhere, both in the same small chapter of Title 28 and in other portions of the Code where it actually did provide for extraterritorial exercise of *in personam* jurisdiction.

[8] The Fourth Circuit has recognized the validity of this canon of construction in the interpretation of federal statutes. See *U.S. v. Arlington County, Va.*, 702 F.2d 485, 487 (4th Cir. 1983).

Moving defendants incorporate the remaining points regarding personal jurisdiction ably advanced by defendant Rein Evans in its principal brief and its reply, and particularly emphasize the argument concerning the due process issues of fundamental fairness and the burden imposed on Ms. Paquette in forcing her to come from Calgary, Alberta to defend herself in a place that is utterly foreign to her. Moving defendants join Rein Evans in urging this Court to dismiss the Receiver's complaint for failure of personal jurisdiction.

C. The Plaintiff Lacks Standing to Pursue the Claims He Has Alleged in His Complaint, and Thus The Court Lacks Subject Matter Jurisdiction Over This Matter.

Nothing in the complaint indicates that the claims the Receiver is attempting to state belong to either of the Sterling entities (whatever they are – the complaint is silent as to this as well) or to the Receivership in any fashion whatsoever. Rather, the complaint plainly states that the funds alleged to have been fraudulently transferred belonged to Mr. Gilliland's investors. That being the case, no injury to the receivership exists as a result of an alleged fraudulent transfer. Defendant Rein Evans, at pages 14-21 of the First Rein Evans Memorandum and at pages 8-12 of the Reply Brief, ably and conclusively demonstrates that the plaintiff Receiver's complaint in this matter is fatally deficient and unsalvageable in any form that would allow the relation back necessary to preserve even plaintiff's own liberal theory of the application of the statute of limitations.[9] The application of the principles discussed is the same for all the defendants in this matter, and thus further argument would merely belabor a well-made point.

[9] For purposes of F.R. Civ. P. 11, undersigned counsel certifies that he has read the authorities cited in the Rein Evans materials incorporated by reference in this memorandum, and concurs with the arguments and inferences drawn from them.

D. Plaintiff's Fraudulent Transfer Claim is Time-Barred.

As thoroughly discussed in the Rein Evans briefs, the Securities and Exchange Commission knew about the alleged Gilliland Ponzi scheme no later than December 1998, or nearly five and one-half years prior to the initiation of this action, when the Justice Department seized the funds in the NationsBank account. Compl. ¶ 12. Gilliland himself was indicted in December 2001.[10] Inexplicably, the SEC, despite that Gilliland had been eliminated from control of the bank accounts allegedly used for the fraudulent transfers years earlier, waited until March 2003 to move for the appointment of a receiver. The plaintiff Receiver, appointed on 22 May 2003, waited 366 days (2004 is a leap year) from his appointment to file the sparse complaint that initiated this action.

Again, it is not the intention of the moving defendants to restate the well-stated arguments of Rein Evans as to why the doctrines of equitable tolling and adverse domination have no application to these defendants. The complaint makes no allegations suggesting any defendant participated in a scheme to prevent timely filing or were in any other manner responsible for the failure of the SEC or the Receiver to bring the action within the prescribed limitations period. Indeed, in view of plaintiff's own averment that the Government took control of the instrumentality of the fraudulent transfer in December 1998, thus removing the domination by a wrongdoer that tolls the statute of limitations, this claim became time barred more than 18 months before this action was initiated.[11] See F.D.I.C. v. Gonzalez-Gorrodona, 833 F. Supp. 1545, 1557 (S.D. Fla. 1993) ("The 'adverse domination theory' reasons that as long as a

[10] Moving defendants respectfully request that the Court take judicial notice of this fact, which is contained in the Securities and Exchange Commission's brief in support of its motion to appoint receiver, which is attached at Exhibit C.

[11] If the alleged fraudulent transfer was committed on 2 October 1998, and the domination ceased in December 1998 (assuming no misrepresentations on the part of the defendants in this matter – and none have been alleged), the four year period would begin to run from 2 October 1998, resulting in a deadline of 2 October 2002.

bank is dominated by the same wrongdoers against whom a cause of action exists, the statute of limitations is tolled.").

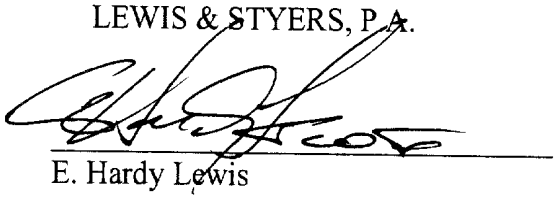
Moving defendants henceforth incorporate by reference the argument by defendant Rein Evans concerning the applicable statute of limitations, at pages 22-26 of the First Rein Evans Memorandum and at pages 12-19 of the Reply Brief.

CONCLUSION

For the reasons stated and on the authorities cited, moving defendants respectfully request that this Court enter an order dismissing plaintiff's complaint in its entirety pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure.

This the 11 day of November, 2004.

BLANCHARD, JENKINS, MILLER,
LEWIS & STYERS, P.A.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **Motion To Dismiss And Incorporated Brief In Support** in the above-entitled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof;

[ ] Transmitting a copy hereof via facsimile;

[x] Depositing a copy hereof, postage pre-paid in the United States Mail, properly addressed to:

Michael J. Quilling
Quilling, Selander, Cummiskey & Lownds, P.C.
2001 Bryan Street, Suite 1800
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Counsel for Defendant Rein Evans Sestanovich, L.L.P.

This the 11 day of November, 2004.

E. HARDY LEWIS

APPENDIX A

AFFIDAVIT OF MARIE PAQUETTE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

File No.: 3:04-CV-251

Michael J. Quilling, Receiver for Frederick J. Gilliland, Plaintiff, v. Grand Street Trust, Heartland Control Trust, Future Control Trust, Marie Margarite Gueco Mercado Paquette, Rein Evans Sestanovich, L.L.P. f/k/a Dressler Rein Evans & Sestanovich, L.L.P., Melrose Escrow, Inc., and Paul J. Cohen, Defendants.	)	AFFIDAVIT OF MARIE PAQUETTE

MARIE PAQUETTE, having been duly sworn, respectfully states as follows:

1. I have reached the age of majority, and am competent to give the testimony in this affidavit.

2. I have primary lived in Calgary, Alberta, Canada for five years. Prior to that I lived in London, England for two years and California for 16 years.

3. I have never lived in or even visited the State of North Carolina.

4. I have never conducted or transacted any business in the State of North Carolina, and have never been licensed or otherwise authorized to conduct or transact any business in North Carolina.

5. I have never owned or leased real property in the State of North Carolina.

6. To my knowledge, I had never spoken by telephone to anyone in the State of North Carolina prior to engaging counsel in this matter.

7. I am a Trustee of Defendants Grand Street Trust, Heartland Control Trusts & Future Control Trust. These three trusts are domiciled and administered in the State of California.

8. These Trusts hold no property that is located in the State of North Carolina nor do they conduct or engage in commercial business in North Carolina. These Trusts never have been authorized to transact business in North Carolina, never had a registered agent for service of process in North Carolina, never paid any taxes to North Carolina, never maintained a mailing address in North Carolina, and never made any distribution to beneficiaries in North Carolina.

Affiant offers no further testimony at this time.

This the 2 day of November, 2004.

MARIE PAQUETTE

Sworn to and subscribed before me
this 2 day of November, 2004.

Notary Public

My commission expires: N/A

WILF K. BACKHAUS
NOTARY PUBLIC & COMMISSIONER
FOR OATHS IN & FOR THE PROVINCE
OF ALBERTA, BARRISTER & SOLICITOR

APPENDIX B

HISTORICAL AND STATUTORY NOTES

REGARDING 28 U.S.C. § 754

28 U.S.C.A. § 754

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part III. Court Officers and Employees (Refs & Annos)
Chapter 49. District Courts (Refs & Annos)

→§ 754. Receivers of property in different districts

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 922.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., § 117 (Mar. 3, 1911, c. 231, § 56, 36 Stat. 1102).

Word "action" was substituted for "suit", in view of Rule 2 of the Federal Rules of Civil Procedure.

Section 117 of Title 28, U.S.C., 1940 ed., applied to land or other property of a fixed character lying in different States within the same circuit. Words "property, real, personal or mixed, situated in different districts", were inserted to broaden the scope of this section to cover all property in different districts without respect to situs "within different states within same judicial circuit".

The revised section permits the receiver appointed by any district court to control all property of the defendant in whatever district the property is situated. The provisions of section 117 of Title 28, U.S.C., 1940 ed., for divesting the receiver's jurisdiction and control of property in other districts upon disapproval by the circuit court of appeals or a judge thereof of the circuit embracing the district of appointment was omitted as unnecessary in view of sections 1292 and 2107 of this title. Said section 1292 provides for review of the order of appointment and the directions of the reviewing court will control the receiver.

Provisions of section 117 of Title 28, U.S.C., 1940 ed., relating to process are the basis of section 1692 of this title.

APPENDIX C

SECURITIES AND EXCHANGE COMMISSION'S

BRIEF IN SUPPORT OF MOTION FOR APPOINTMENT

OF RECEIVER

FILE NO. 3:02CV128Mu

ORIGINAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. FREDERICK J. GILLILAND, Defendant, and MM ACMC BANQUE DE COMMERCE, INC., Relief Defendant.	CIVIL ACTION FILE NO. 3:02CV128-Mu

SECURITIES AND EXCHANGE COMMISSION'S BRIEF IN SUPPORT OF MOTION TO APPOINT RECEIVER

The plaintiff, Securities and Exchange Commission ("Commission" or the "Plaintiff"), files this brief in support of its motion to appoint a receiver as follows:

I. SUMMARY

Between at least mid-1997 through November 1998, Frederick Gilliland sold more than $29 million in interests in a succession of non-existent prime bank trading programs to more than 200 investors. In connection with his scheme, Gilliland misrepresented and omitted material facts concerning: (1) the existence of the trading programs; (2) the use of investor funds; (3) the promised return; and (4) the safety of the funds invested. Gilliland persuaded his investors to wire funds to at least four offshore bank accounts that he had established in the Isle of Mann, Bermuda and the Caribbean.

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GCM

Gilliland ultimately transferred these funds to several other accounts, including: approximately $20 million to an account held by MM ACMC Banque de Commerce, Inc. ("MBC"), the relief defendant, at NationsBank in Charlotte, North Carolina; $4 million to other offshore accounts; $2.5 million to an account at Wells Fargo in California; and approximately $600,000 to a bank account in New Zealand. The Department of Justice seized the funds in the NationsBank account and the court in that case, Rollar v. United States of America, Civil Action No. 3-02CV205-McK (W.D.N.C.) (the "Rollar Proceeding"), appointed a receiver to administer the return of the funds to investors. The New Zealand government also seized the funds in the New Zealand account and approximately $245,000 is believed to be available for Gilliland's investors. The Commission now seeks to appoint a receiver in this matter to pursue the remaining proceeds from Gilliland's fraudulent offerings, including the $6.5 million transferred to Wells Fargo and other unidentified accounts and the $245,000 in New Zealand.

II. FACTS

A. The Prime Bank Scheme

Gilliland collected in excess of $29 million from over 200 investors throughout the United States, Canada, and the United Kingdom, telling investors that they were investing in bank debenture or high-yield trading programs, which in fact did not exist. The investment agreements that investors typically signed referred to the investment programs as a "high-yield banking transaction." Most of these programs guaranteed high rates of return ranging from 30% per month to as high as 130% per 10 days, depending on the amount of investment. Moreover, the investment agreements stated that: (1) the investor's funds would be pooled with other monies provided by Sterling Management

Services, Inc. ("Sterling Management") in order to meet the minimum amount necessary to participate in the investment; (2) the principal investment would be fully collateralized by U.S. Treasury bills; (3) there was no risk to the principal; and (4) the full principal would be returned to the investor at the termination of the agreement. Gilliland promoted these investment programs to potential investors by live presentations he conducted, written materials and by word-of-mouth. Gilliland also provided some investors with a handout that described the purported history of bank debenture programs and the exclusivity of these opportunities. According to the handout, investor funds were placed with an established "Program Management" firm working directly with a major trading bank. The hand out assured investors of a guaranteed high return on a periodic basis with "no risk of losing [their] principal investment." The firm purported to guarantee such high returns because it traded in fully negotiable unencumbered "debt obligations of the Top One Hundred (100) World Banks." All of these representations were false.

Gilliland instructed most of his investors to wire funds into one of four bank accounts that he controlled, held in the name of Sterling Assets Services, Ltd. ("Sterling Asset") or Sterling Management.[1] During 1998, Gilliland transferred approximately $4 million from these accounts to other as of yet unidentified offshore accounts. He also transferred $2.5 million to an account at Wells Fargo in California. On September 16, 1998, Gilliland transferred approximately $20 million from one of the four accounts to an account held by MBC at NationsBank in Charlotte, North Carolina. In December 1998, the Department of Justice seized the approximately $19 million remaining in the MBC

[1] Sterling Asset was an international business corporation organized by Gilliland under the laws of the Isle of Mann. It was dissolved on April 12, 2001. Sterling Management was a corporation organized by Gilliland under the laws of the Turks and Caicos Islands, an overseas territory of the United Kingdom located in the Caribbean. It was dissolved on January 14, 2002.

account. The Commission staff has not yet identified what Gilliland did with the additional funds that were transferred to the MBC account.

Gilliland also transferred approximately $600,000 of investor funds from one of the four accounts to a bank account in New Zealand in the name of Paramount Insurance Co., Ltd. The New Zealand government froze almost $10 million in this account in November 2000, because it contained proceeds from another apparent prime bank scheme that is unrelated to Gilliland's scheme. A New Zealand court appointed a receiver, called a "release auditor," to administer the return of these funds to investors. The release auditor subsequently authorized the return of substantially all funds to various investors who had filed claims. However, the Commission and the Rollar receiver believe that approximately $245,000 of the investor funds originating from Gilliland remains to be dispersed. The Commission understands that the release auditor is willing to release these funds if a receiver for Gilliland appointed by a U.S. court makes the request.[2]

B. Related Proceedings

The United States Attorney's Office for the Northern District of Florida indicted Gilliland in December 2001 on charges of conspiracy to commit wire fraud and securities fraud. The District Court for the Northern District of Florida has issued an arrest warrant for Gilliland, but it has not been executed and Gilliland is currently considered a fugitive.

[2] The U.S. Attorney's office for the Northern District of Florida and the receiver in the Rollar Proceeding requested the New Zealand authorities to postpone the disbursement of funds from the Paramount account until they had an opportunity to review bank records and determine whether any of these funds came from Gilliland-controlled entities. The New Zealand authorities declined this request and dispersed funds to those investors whose claims the release auditor had traced into this account.

Prior to Gilliland's indictment, one of Gilliland's investors, George Rollar, filed suit against the United States and others in the Rollar proceeding to recover his investment from the seized funds. The United States then moved to seek the appointment of a receiver in the Rollar Proceeding for the funds seized at the MBC account at NationsBank. The court appointed a receiver, who is to: 1) notify potential claimants to the seized funds, 2) review claims submitted, 3) recommend a distribution plan to the court, and 4) disburse the funds in the MBC account based upon the court's order. The Rollar receiver currently does not have authority to pursue the return of the funds in New Zealand or the other investor funds that did not flow through the MBC account.

III. DISCUSSION

Once the Commission properly invokes the equity jurisdiction of a federal district court by a prima facie showing of securities violations, the court possesses the necessary power to fashion appropriate interim remedies. Manor Nursing Centers, 458 F.2d 1082, 1103 (2d Cir. 1973). When a prima facie showing of fraud and mismanagement is made, "the appointment of a temporary receiver is often a necessary ancillary form of relief." SEC v. First Financial Group of Texas, 645 F.2d 429, 438 (5th Cir. 1981); see also SEC v. United Financial Group, Inc., 474 F.2d 354, 358-59 (9th Cir. 1973). When funds have been commingled between various companies, and no separation of funds has been maintained, courts have treated both the individual defendant and his various companies as one entity for purposes of the receivership proceeding. See SEC v. Elliott, 953 F.2d 1560, 1564 n.1 (11th Cir. 1992).

A receiver for Gilliland's estate, and the assets of Sterling Asset, Sterling Management and any other entity controlled by Gilliland, Sterling Asset or Sterling

Management is warranted in this proceeding. Such a receiver could pursue the return of the $4 million that Gilliland transferred to other bank accounts, the $2.5 million transferred to an account at Wells Fargo in California and the $245,000 that the Commission believes remains in New Zealand.

A receiver in this matter should have authority over Gilliland's estate, the assets of Sterling Management, Sterling Asset and any other company or entity that Gilliland used in connection with his prime bank schemes. Gilliland was the sole owner of these companies, exercised control over them, and used them to perpetrate his fraud. Moreover, it appears that he commingled funds from investors between the two companies. These facts should allow the receiver to recover assets in the possession of these companies. See SEC v. Elliott, 953 F.2d at 1564 n.1; SEC v. Elmas Trading Corp., 620 F. Supp. 231 (D. Nev. 1985) (receiver may assume control of any entity which was alter ego of estate); Levin v. Garfinkle 514 F. Supp. 1160, 1164 (E.D. Pa. 1981) (concluding that receiver appointed to oversee liquidation of individual's assets also had authority to liquidate and distribute assets of corporations that were essentially alter egos of individual). Also, Sterling Management and Sterling Asset have been dissolved and are no longer recognized as valid corporations. In such cases, the property of the dissolved corporation reverts to the owners of the corporation, i.e. Gilliland. In addition, Gilliland frequently transferred large monetary sums between the corporations and other entities. A receiver that controls all of Gilliland's property will be in a position to identify all monies that Gilliland currently controls that should be returned to investors.

III. CONCLUSION

Based on the foregoing reasons, the Court should enter an order, in the form

submitted herewith, appointing a receiver over Gilliland's estate and the assets of Sterling Asset, Sterling Management and any other entity that Gilliland used in connection with his prime bank scheme.

This 3rd day of March, 2003.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, M. Graham Loomis, certify that I have served the foregoing SECURITIES AND EXCHANGE COMMISSION'S BRIEF IN SUPPORT OF MOTION TO APPOINT RECEIVER on the Defendant and Relief Defendant by US Mail, postage prepaid, addressed as follows:

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This 5th day of March, 2003.

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