

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

CASE NO.: 07-22204-CIV-GOLD/TURNOFF

v.

CHARLES O. MORGAN, JR., AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF FREDERICK J. KUNEN,

Defendant.

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v.

TERRY E. PROVENCE and DT CAPITAL, LLC

Defendants.

**MOTION FOR ORDER AUTHORIZING:
(1) PAYMENT OF FIRST DISTRIBUTION TO HOLDERS OF ALLOWED CLAIMS
AND OF COURT-APPROVED FEES; AND (2) ESTABLISHMENT OF RESERVE**

Scott M. Dimond, Esq., the Court-appointed Receiver of the Estate of Frederick J. Kunen and DT Capital, LLC (the "Receiver"), hereby seeks approval to: (1) immediately pay a total of \$1,274,061.41 as the first distribution to holders of allowed claims; (2) pay the Receiver and his counsel the balance of Court-Approved but as-yet-undistributed fee payments in the total amount of \$132,287.63; and (3) establish a reserve in the amount of \$100,000 to permit the Receiver to continue to pursue open matters for the benefit of the Receivership. In support of this motion, the Receiver states as follows.

Procedural Posture and Claims Procedure Results

1. On June 27, 2008, the Receiver filed his Motion to Approve Claims Procedure and Plan of Distribution (the “Plan Motion,” DE 118), by which he proposed a plan to distribute Receivership assets to investors who lost money in the fraudulent options index trading scheme organized by Frederick J. Kunen with the assistance of, *inter alia*, Terry E. Provence and DT Capital, LLC during the period of December 1, 2006 to September 1, 2007. This Court approved the plan of distribution proposed in the Plan Motion by its July 7, 2008 Order Granting Receiver’s Motion to Approve Claims Procedure and Plan of Distribution (the “Order,” DE 119).

2. Pursuant to the Order, investors’ proof of claim forms were to be completed and returned to the Receiver’s office by no later than October 15, 2008. The Order required that, following his receipt of proof of claim forms, the Receiver was to review all such claims and make an initial determination regarding their validity. The Receiver did so, and on November 14, 2008 the Receiver sent a letter to all claimants apprising them of the Receiver’s initial determination. Claimants were then given until December 4, 2008 to appeal the Receiver’s determinations to the Receiver himself, who then had until December 24, 2008 to consider such investor appeals.

3. To date, the Receiver has confirmed – either in whole or in part – a total of sixty-eight (68) investor claims. The total amount of approved investor claims is \$7,412,501.66 (the “Total Approved Claim Amount”).¹

¹While the Receiver maintains spreadsheets reflecting the names, contact information, initial claims amounts, and approved claims amounts for each individual claimant, and has provided that information to the United States Securities and Exchange Commission, the Receiver is not attaching those records to this Motion in order to preserve investor privacy. Those materials will be submitted to the Court for *in camera* inspection if the Court desires to review that information.

4. As of the date of this motion, the Receiver is aware of no disputes regarding approved claims amounts, as all known claimants have accepted the approved amounts proposed by the Receiver. As such, the Receiver has seen no appeals of his determinations filed with the Court, which appeals would have been due on or before January 28, 2009.²

5. As of the filing of this Motion, the Receiver maintains a total of \$1,478,338.06 in the Receivership account at Gibraltar Bank (the “Current Account Balance”). In addition, the Court previously approved a total of \$132,287.63 in attorneys’ fees for the Receiver and his counsel to be distributed at the time a distribution to holders of allowed claims was effected (the “Total Outstanding Fees”).³ Accordingly, the Receiver currently maintains a net total of \$1,374,061.41 in the Receivership account (*i.e.*, the Current Account Balance minus the Total Outstanding Fees), which represents the money available to effect the first distribution and to establish a reserve for future Receivership activity (the “Net Receivership Balance”).

Proposed Initial Distribution and Fee Payment

6. From that Net Receivership Balance, the Receiver proposes to retain a reserve fund in the total amount of \$100,000 for the prosecution of ongoing Receivership matters (the “Reserve Amount”), as discussed in greater detail below. The Receiver therefore seeks leave of Court to effect a first distribution totaling \$1,274,061.41 (*i.e.*, the Current Receivership Balance minus the

²The Receiver still is in the process of confirming one of those 68 claims (in the amount of \$40,110) recently made by an investor who indicated that she never received the original claim package. While that claimant’s entire claim is included in this request, the Receiver would not make such distribution unless and until the claim were to be finally verified.

³More specifically, the Court approved a total of \$39,424.75 for Dimond Kaplan & Rothstein, P.A. and \$92,862.88 for Damian & Valori, LLC. *See* Court Orders Granting Second, Third, Fourth, and Fifth Interim Fee Requests, [DE 89, 121, 140, and 154].

Reserve Amount) to holders of allowed claims (the “First Distribution Amount”).

7. Accordingly, the Receiver proposes that he be permitted to send each approved claimant a check in the amount of that claimant’s *pro rata* share of the First Distribution Amount based upon the following formula: the First Distribution Amount divided by the Total Approved Claim Amount multiplied by the investor’s approved claim amount. Specifically, dividing the total First Distribution Amount (\$1,274,061.41) by the Total Approved Claim Amount (\$7,412,501.66) creates a ratio of .17188 or 17.188%. Thus, the Receiver proposes to send each approved claimant a payment equal to 17.188% of such claimant’s approved claim on or before ten (10) days from the date of an order approving the proposed plan of distribution.

8. Finally, the Receiver proposes a single exception to the proposed distribution scheme. The Receiver recently has been contacted by a detective from the West Jordan Police Department in West Jordan, Utah, who indicated that one of the approved claimants may himself have been making investments in the Kunen scheme on behalf of other investors. The Receiver proposes that the monies owed to that particular claimant (in the total amount of \$20,434.68) be held in escrow by the Receiver pending further investigation into the police allegations, which might ultimately result in those funds being provided to third parties to whom they may rightfully belong.

9. The Receiver further proposes that the Total Outstanding Fees would be paid to the Receivers’ counsel immediately upon the Court’s granting this motion.

The Reserve and Future Receivership Activities

10. The purpose of the Reserve would be to fund ongoing activities of the Receivership intended to generate additional assets for the Receivership Estate. For example, the Receiver and his counsel continue to pursue collections efforts against parties with whom the Receiver has settled

claims but who later defaulted on those settlements, including: (a) pursuing execution of the judgment entered against Howard Fields in the amount of \$155,097; and (b) pursuing the return of \$52,810.00 in investor funds that Dr. Kunen fraudulently transferred to one of his three sons, Michael Kunen, who has since filed chapter 7 bankruptcy (because such debt to the Receivership Estate is nondischargeable pursuant to Section 523(a) of the Bankruptcy Code, the Receiver has filed an adversary complaint in an effort to prevent the discharge thereof and perhaps obtain some recovery for the defrauded investors).

11. The Receiver and his counsel currently are working with the Commission to determine the most cost-efficient steps to take in pursuit of additional assets for the benefit of the Receivership Estate, with the expectation that some or all of those efforts would produce, net of costs and fees, additional money for eventual distribution. The Receiver believes that the \$100,000 amount of the Reserve will be adequate to fund those efforts, with the expectation that there would be a later, final distribution to approved claimants (albeit much less than the first distribution proposed herein.)

12. The Receiver further proposes to provide the Court with a report regarding the status of any future efforts, expenses, and recoveries after three months, at which time the Receiver would recommend additional activity and/or distribution of the remaining Reserve to the allowed claimants.

13. The Receiver has discussed the relief requested herein with the Commission and is authorized to represent to this Court that the Commission does not oppose the relief sought in this motion.

14. For the Court's convenience, a proposed Order granting this motion is attached hereto as Exhibit A.

Wherefore, the Receiver respectfully requests that this Court enter an order: (a) authorizing payment of the First Distribution Amount as set forth herein; (b) authorizing immediate payment of the Total Outstanding Fees to the Receiver's counsel; (c) authorizing retention of the Reserve as set forth herein; and (d) providing all such other and further relief as this Court deems just and proper.

Respectfully submitted,

By: /s Scott M. Dimond
Scott M. Dimond, Esq.
Fla. Bar No.: 995762
Sdimond@dkrpa.com

DIMOND KAPLAN & ROTHSTEIN, P.A.
Offices at Grand Bay Plaza
2665 South Bayshore Drive, PH-2B
Coconut Grove, Florida 33133
Telephone: (305) 374-1920
Facsimile: (305) 374-1961

CERTIFICATE OF SERVICE

I Hereby Certify that on this 5th day of February, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/EF system which will send a notice of electronic filing to the following counsel or parties of records, except as otherwise noted:

Robert K. Levenson, Esq.
U.S. Securities Exchange Commission
801 Brickell Avenue, Suite 1800
Miami, Florida 33131
Telephone: (305) 982-6379
Facsimile: (305) 536-4154
CruzR@SEC.GOV

Allan Lerner, Esq.
2888 E Oakland Park Boulevard
Fort Lauderdale, Florida 33306-1814
Telephone: (954) 563-8111
Facsimile: (954) 563-8522
amlrwp@aol.com

Russell Weigel, Esq.
Russell C. Weigel, III, P.A.
5775 Blue Lagoon Drive, Suite 100
Miami, Florida 33126
Telephone: (786) 888-4567
Facsimile: (786) 787-0456
RWeigell@InvestmentAttorneys.com

By: /s Scott M. Dimond
Scott M. Dimond

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

CASE NO.: 07-22204-CIV-GOLD/TURNOFF

v.

CHARLES O. MORGAN, JR., AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF FREDERICK J. KUNEN,

Defendant.

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

v.

TERRY E. PROVENCE and DT CAPITAL, LLC

Defendants.

**ORDER GRANTING MOTION FOR ORDER AUTHORIZING:
(1) PAYMENT OF FIRST DISTRIBUTION TO HOLDERS OF ALLOWED CLAIMS
AND OF COURT-APPROVED FEES; AND (2) ESTABLISHMENT OF RESERVE**

THIS CAUSE came before the Court upon the Receiver's Motion for Order Authorizing: (1) Payment of First Distribution to Holders of Allowed Claims and of Court-Approved Fees; and (2) Establishment of Reserve (the "Motion," D.E. 155). The Court has reviewed the Motion and finds that good cause exists for the entry of this Order. Accordingly, it is

ORDERED and ADJUDGED as follows:

1. The Receiver's Motion is granted.

2. The Receiver is authorized to make payments of the “First Distribution Amount” to holders of allowed claims, as set forth and requested in the Motion.

3. The Receiver is authorized effect payment of the “Total Outstanding Fees” to the Receiver’s counsel, as set forth and requested in the Motion.

4. The Receiver is authorized to establish a “Reserve,” as set forth and requested in the Motion.

DONE AND ORDERED in Chambers, in Miami, Miami-Dade County, Florida on this ___ day of February, 2009.

ALAN S. GOLD
U.S. DISTRICT COURT JUDGE

c: All counsel of record