

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

SECURITIES AND EXCHANGE
COMMISSION,

CASE NO. 07-22204-CIV-GOLD
Magistrate Judge Turnoff

Plaintiff,

v.

CHARLES O. MORGAN, JR.,
as Personal Representative of the
ESTATE OF FREDERICK J. KUNEN,

Defendant.

_____ /

**MOTION TO EXPAND RECEIVERSHIP TO INCLUDE
ASSETS OF DEFENDANT DT CAPITAL, LLC**

Scott M. Dimond, Esq., the Court-appointed Receiver of the Estate of Frederick J. Kunen (the "Receiver"), hereby moves to expand the receivership in this case to include the assets of DT Capital, LLC. By this Court's January 8, 2008 order, the above-styled action (the "Kunen Action") was consolidated with the newly filed case of *Securities and Exchange Commission v. Terry E. Provence and DT Capital LLC*, Case No. 07-23167 CIV-COOKE (the "Provence Action"). Both the Kunen Action and the Provence Action now are pending before this Court. Because both actions arise out of the same fictitious options-trading scheme employed to defraud investors, the Kunen Receiver respectfully requests that the Kunen Receivership be expanded to include the assets of the corporate defendant in the Provence Action, DT Capital, LLC ("DT Capital"). In support of his Motion, the Receiver states as follows.

BACKGROUND

On August 23, 2007, the Commission filed a Complaint against Charles O. Morgan, Jr., as Personal Representative of the Estate of Frederick J. Kunen (the “Kunen Complaint”), by which it commenced this action. The Kunen Complaint alleges that Mr. Kunen violated federal securities laws by, essentially, defrauding primarily inexperienced investors through a scheme involving a fictitious options-trading strategy promising guaranteed investment returns.

That same day, the Court entered two separate orders in connection with the Kunen Action. First, it issued its Order Appointing Receiver (the “Kunen Receiver Order”) which, *inter alia*, appointed Scott M. Dimond, Esq. as the Receiver over the Estate of Frederick J. Kunen, with “full and exclusive power, duty and authority to: administer and manage the business affairs, funds, assets, choses in action and any other property of Kunen’s Estate and Frederick J. Kunen (“Kunen”); marshal and safeguard all of the assets of Kunen’s Estate and Kunen; and take whatever actions are necessary for the protection of the investors[.]” [D.E. 10]

Second, the Court entered an Order Freezing Assets and Other Emergency Relief (the “Kunen Freeze Order”), in which it froze Mr. Kunen’s assets based on the finding that the Commission “has made a sufficient and proper showing in support of the relief granted herein by presenting a *prima facie* case of securities law violations and misappropriation of investor funds by Kunen.” [D.E. 11]

On December 6, 2007, the Commission filed a new complaint against Terry E. Provence and his affiliated entity DT Capital (the “Provence Complaint”), by which it commenced the Provence Action. The Provence Complaint alleges that Mr. Provence

played a major role in the scheme that is the subject of the Kunen Action, primarily by serving as the largest conduit to investors who invested millions of dollars in Mr. Kunen's fraudulent options-trading scheme and indeed by continuing to operate the scheme after Mr. Kunen's July 2007 death.

In conjunction with its Provence Complaint, the Commission filed a motion seeking to freeze all of the assets of Mr. Provence and DT Capital, which was entered by Judge Moore on December 14, 2007 (the "Provence Freeze Order"). [Provence Action, D.E. 14]. That order provides the same safeguards in connection with the Provence Action as have been put in place in the Kunen Action. *Id.* There is extensive evidence that the scheme underlying the Provence Action is part and parcel of the scheme underlying the Kunen Action and that the two matters – and their respective receiverships – are inextricably intertwined.

Indeed, as set forth in detail in the Provence Complaint, Mr. Kunen and Mr. Provence worked together to induce investors to participate in the same options trading scam, and then the two men shared in the proceeds of the scheme. Therefore, these matters involve identical sales pitches and marketing materials, investment contracts, trading institutions and bank accounts, trading patterns, commission structures, and techniques for creation of false profits and conversion of investor funds. For all of the foregoing reasons and to promote judicial economy and conserve resources, the Commission, on December 12, 2007, filed a motion to transfer the Provence Action to this Court, which was granted on December 17, 2007. [Provence Action, D.E. 23]. Once the Kunen Action and the Provence Action were before the same court, the Commission, on January 4, 2008, moved to consolidate them into a single action. On January 9, 2008,

this Court consolidated the two actions under the Kunen Action and closed the Provence Action [D.E. 54; Provence Action, D.E. 26].

Accordingly, as demonstrated herein, it would further serve the interests of judicial economy and protect the rights of those investors in the Kunen scheme whose assets may be held by DT Capital to expand the Kunen Receivership to include the assets held by DT Capital.

ARGUMENT

The Court has expansive discretion to manage an equity receivership, including the right to expand a receivership as the need arises. Generally, "[t]he district court has broad powers and wide discretion to determine relief in an equity receivership." *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir.1992); *see also, S.E.C. v. Kirkland*, 2006 WL 2639522 (M.D. Fla. 2006) (expanding Commission receivership).

Because the Kunen Action and the Provence Action involve such closely related allegations of misconduct – to the point that they can properly be characterized as, effectively, the identical misconduct – it would serve the interests of judicial efficiency and conserve judicial and party resources to create a single, unified receivership for both of these matters. And given the extent to which the existing Receiver already has worked to investigate the combined scheme and identify and marshal assets derived from that scheme, it would be both prudent and appropriate for this Court simply to expand the Kunen Receivership to include the assets of DT Capital.

More specifically, as part of his duties in administering the Kunen Receivership, the Receiver has reviewed all of Mr. Kunen's files and discovered numerous correspondence between Messrs. Kunen and Provence that detail acts in their conspiracy

to perpetuate the fraudulent options trading scheme. Moreover, the Receiver has collected extensive documentary and testimonial evidence from other sources, including both the promoters and the victims of the scheme, regarding the manner in which the concerted fraud was effectuated.

Further, in connection with that ongoing investigation, the Receiver has worked with a forensic accountant employed by the Commission to trace investor funds flowing in and out of the many bank accounts and trading accounts that Mr. Kunen owned or controlled. Given the factual and financial interrelationship between the Kunen and Provence Actions, any receiver appointed in connection with the Provence Action would be obligated to subpoena and review documents and testimony already collected in the Kunen Receivership.

In sum, because the Kunen and Provence Actions arise out of a single fraudulent scheme, creating two separate receiverships over those actions would increase the burden on the various parties, witnesses, and courts, extend the length of time required to conclude both cases, and unnecessarily multiply the expense of litigating the overarching matter to all concerned. Simply, this Court should exercise its broad discretion in connection with equity receiverships to expand the Kunen Receivership to encompass both matters.

The Commission and Defendant Charles O. Morgan, Jr. ("Mr. Morgan"), as Personal Representative of the Estate of Frederick J. Kunen, agree to the relief requested herein.

WHEREFORE, the Receiver respectfully requests that the Court enter an Order expanding the Kunen Receivership to encompass the assets held by DT Capital and further providing such further relief as is just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 9, 2008, I electronically filed the above and foregoing *Motion to Expand Receivership to Include Assets of Defendant DT Capital, LLC* with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Melanie Emmons Damian
MELANIE EMMONS DAMIAN

SERVICE LIST

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United States District Court, Southern District of Florida

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