

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Case No. 07-CV-10712-RGS
)	(A Motion to Shorten Response
LYDIA CAPITAL, LLC,)	Time is Filed
GLENN MANTERFIELD, and)	Contemporaneously Herewith)
EVAN ANDERSEN,)	
)	(Leave to File Exhibit 1 Under
Defendants.)	Seal Granted by Order dated
)	December 19, 2007)

**RECEIVER’S MOTION FOR APPROVAL OF COMPROMISE AND SETTLEMENT
PERTAINING TO CERTAIN INVESTMENT PROCEEDS AND BRIEF IN SUPPORT**

COMES NOW H. Thomas Moran II, Court-appointed Receiver for Lydia Capital, LLC (the “Receiver”), and respectfully submits this Motion for Approval of Compromise and Settlement Pertaining to Certain Investment Proceeds. In support thereof, the Receiver states to the Court as follows:

I. SUMMARY OF PENDING PROCEEDINGS.

On April 12, 2007, the Securities and Exchange Commission (“S.E.C.”) filed this action against Defendants Lydia Capital, LLC (“Lydia”), Evan Anderson (“Anderson”) and Glenn Manterfield (“Manterfield”). (Doc. No. 1.) On the same date the S.E.C. sought, and on April 13, 2007 secured, a temporary restraining order freezing certain of the Defendants’ assets. (Electronic Order, dated April 13, 2007.) The temporary restraining order was modified on April 17, 2007. (Electronic Order, dated April 17, 2007.) On May 3, 2007, the Court entered unopposed preliminary injunction orders, freezing certain assets of Defendants Lydia,

Manterfield, and Anderson. (Doc. Nos. 20, 21 and 22.) One of the accounts that was frozen was a Citibank (Smith Barney) account which was maintained on behalf of Lydia Capital Alternative Investment Fund LP (the "Fund").

On May 23, 2007, the S.E.C. filed an unopposed motion seeking the appointment of a receiver for Lydia as well as a brief in support of the motion. (Doc. Nos. 25 and 26.) On June 1, 2007, the Court entered its Order for Appointment of Receiver ("Order for Appointment"), granting the S.E.C.'s request and appointing Mr. Moran as Receiver for Lydia. (Doc. No. 28.) In the Order for Appointment, the Receiver was directed to take complete control, possession and custody of all assets of Lydia defined in the Order for Appointment collectively as "Receivership Assets." (Doc. No. 28, pp 1-2, II.A.) In addition, the Order for Appointment directed that the Receiver "take all steps the Receiver deems necessary to secure and protect the Receivership Assets, including all assets and property of Lydia and Lydia Capital Alternative Investment Fund LP" (Doc. No. 28, p. 2, II.D).

The Receiver has, in partial performance of his duties, secured possession of \$8,807,686.22 which was in the Fund's Citibank (Smith Barney) account (the "Total Deposits").

II. THE RECEIVER'S MOTION FOR INSTRUCTIONS FROM THE COURT REGARDING CERTAIN INVESTOR SUBSCRIPTION PROCEEDS.

On September 25, 2007, the Receiver filed his Motion for Instructions from the Court Regarding Certain Investor Subscription Proceeds (the "Receiver's Motion for Instructions"), seeking a ruling from the Court that the Total Deposits constitute Receivership Assets and an order allowing the Total Deposits to be used to pay the expenses of the Receivership Estate (Doc. No. 78). The Receiver's Motion for Instructions was served on all parties to this litigation and, in addition, a copy was mailed to each of the Investors in the Fund, including the ten individuals/entities whose deposits comprise the Total Deposits. (Doc. No. 103.) Although no

objection has been filed to the Receiver's Motion for Instructions, the Receiver has been in contact and negotiations with a representative of one of the entities whose funds comprise a portion of the Total Deposits and that representative prepared a Legal Memorandum in response to the Receiver's Motion for Instructions which was submitted to the Receiver for consideration.

A. SUMMARY OF THE RECEIVER'S MOTION FOR INSTRUCTIONS.

1. The April Investors and the April Proceeds:

As stated in the Receiver's Motion for Instructions, between March 21, 2007 and April 11, 2007, nine individuals or entities (the "April Investors") submitted subscription agreements and, in addition, wired subscription proceeds (ranging from \$150,000 to \$2,587,312.20 and totaling \$8,507,656.22 (the "April Proceeds")) to the Fund's account at Citibank (Smith Barney). The largest investment was made by one investor who invested an aggregate amount of \$4,337,633.74, pursuant to two separate subscriptions. Two of the April Investors had previously invested in the Fund, while the other seven April Investors were first time investors.

2. The April Depositor and his April Deposit:

In addition to the nine April Investors who submitted subscription documents and wired subscription funds in March and April of 2007, a tenth person wired \$300,030.00 (the "April Deposit") to the Citibank (Smith Barney) account on or about April 10, 2007. Based upon the investigation performed to date by the Receiver, that person, D.H.L. (the "April Depositor") never caused subscription documents to be faxed to the Fund's Administrator, Dundee Leeds.

3. The April Proceeds Were Accepted Expressly or Impliedly:

Based upon the information made known to him through his investigation and otherwise, including information indicating that Dundee Leeds sent copies of the April Investors' subscription agreements (or a summary thereof) to Lydia via e-mail and asked Lydia to accept

the subscriptions and, as was Lydia's custom, Anderson, on behalf of Lydia, sent an e-mail response to Dundee Leeds indicating its acceptance of the April Investors' subscription agreements, the Receiver argued in his Motion for Instructions that the April Investors' subscriptions were expressly accepted by Lydia. As was demonstrated through citation to legal authorities, the Receiver argued those facts were sufficient to demonstrate the subscriptions were accepted, even though the acceptance was never communicated to the April Investors.

Alternatively, the Receiver argued that the Court should find the subscriptions were impliedly accepted, despite Lydia's failure to return a fully executed copy of the subscription agreement to the investors, because Lydia's course of dealing demonstrated that no subscriptions were ever rejected and that Lydia accepted all subscriptions by either indicating its acceptance in an e-mail or facsimile (and never returned a fully executed copy of the subscription documents to any investor).

4. Equity Compels the Conclusion the April Proceeds were Accepted:

The Receiver's final argument was that equity should compel a conclusion that the April Investors be treated the same as the other Investors in the Fund. All of the Fund's investors, including the April Investors, were the apparent victims of the alleged acts perpetrated by Anderson and Manterfield. As was argued in the Receiver's Motion for Instructions, the April Investors' subscription agreements were accepted by Lydia and their investment monies were wired to the Citibank (Smith Barney) account. The acts which usually followed Lydia's acceptance (transfer of the April Proceeds from the Citibank (Smith Barney) account to the insurance policy escrow account and transmission of a trade confirmation report) were ministerial in nature and not sufficient so as to accord the April Investors preferential treatment over the rest of the investors. Rather, the Receiver argued it would be inequitable to give the

April Investors preferential treatment over Lydia's other investors merely because the S.E.C. brought this action prior to the time the final ministerial acts were completed.

Accordingly, the Receiver requested the Court find that the April Proceeds constitute Receivership Assets and enter an order allowing the April Proceeds to be used to pay the expenses of the Receivership.

B. SUMMARY OF THE UNFILED OPPOSITION TO THE RECEIVER'S MOTION FOR INSTRUCTIONS.

Although unfiled, counsel for one of the April Investors (the "Investor") researched, prepared and presented a Legal Memorandum to the Receiver outlining the Investors' position with respect to the Receiver's arguments.¹ The Investor argued that the Fund's Subscription Document and Private Placement Memorandum (PPM) set forth several express conditions to acceptance that had not been satisfied with respect to the Investor's proposed subscription. See Cohen v. Stratosphere Corp., 115 F.3d 695, 701-02 (9th Cir. 1997) (finding that placement of subscriptions into escrow account did not constitute acceptance pursuant to terms of defendant's prospectus). Specifically, the Investor contended that these documents required Dundee Leeds to fulfill its administrative duties pertaining to the potential subscription and Lydia's written acknowledge to the Investor of acceptance into the Fund. The Investor asserted that the evidence showed that several significant subscription processing steps—including an anti-money laundering review—remained to be completed by Dundee Leeds. The Investor further argued that Lydia Capital had not impliedly accepted the Investor's proposed subscription. According to the Investor, a contemporaneous communication from one of Lydia's principals reflected Lydia's acknowledgement that the Fund could not make use of the potential subscription until Dundee Leeds concurred that the Funds should be accepted. The Investor also took the position

¹ Of the monies transmitted by the April Investors to the Citibank (Smith Barney) account, the Investor sent the largest sum.

that the explicit form of acceptance called for by the Subscription Document foreclosed any possible implied acceptance argument. See Restatement (Second) of Contracts § 58 (1981) (“An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered”); Williston on Contracts § 6:8 (4th ed. 1991) (indicating that a subscription must be accepted in accordance with the terms required by the subscription itself). Lastly, the Investor argued that its proposed subscription should not be treated, as an equitable matter, like the monies that had been accepted into the Fund because the subscription process was not, in fact, completed with respect to its subscription, and the evidence indicated that the subscription would likely never have been accepted.

Accordingly, the Investor requested that the Receiver consider his legal authorities and arguments and, based thereon, agree to return the entire amount of the April Proceeds to the April Investors. Counsel for the Investor also indicated that if a resolution of this matter was not reached with the Receiver that he had been instructed to move to intervene in this lawsuit for purposes of seeking judicial resolution of the April Investors’ claims to the April Proceeds.

III. SUMMARY OF PROPOSED SETTLEMENT AND COMPROMISE.

Following the October 24, 2007, status conference, the Receiver’s counsel and counsel for the Investor have attempted to negotiate a resolution of the issue underlying the Receiver’s Motion for Instructions that would: (1) avoid further litigation between the Receiver and the April Investors, (2) conserve the Receivership Assets and (3) allow for a timely resolution of the issue. As a result of those negotiations, the Receiver, the April Investors and the April Depositor have agreed to a compromise which would allow immediate resolution of the matter and thereby provide the Receiver with unfettered access to sufficient funds to maintain the Receivership

Assets for a significant period of time, while avoiding protracted and costly litigation with the April Investors.

A. THE APRIL INVESTORS.

Subject to Court approval of the final settlement documents contemplated by Exhibit 1 (filed under seal pursuant to Court Order dated December 19, 2007), the Receiver and the April Investors would agree that the Receiver will return to the April Investors one-half of the amount of the March and April, 2007 subscriptions, in the aggregate amount of \$4,253,828.11. In return, the April Investors would agree that the remaining \$4,253,828.11 (the "Settlement Proceeds") will be remitted to the Fund and will constitute a Receivership Asset to be used by the Receiver in accordance with the terms of the Court's Order for Appointment. As a result, the April Investors would further agree to amend their claim forms filed with the Receiver to reflect the sum of (i) their respective portions of the Settlement Proceeds, and (ii) the respective amounts invested by each in the period from the inception of the Fund to March 20, 2007. Finally, as time is of the essence in this matter, the Receiver and the April Investors have agreed that the terms of this settlement and compromise must be completed on or before December 31, 2007.²

² As noted by the Receiver in his Motion for Instructions and in his Second Report to the Court (filed October 1, 2007), the monies currently available to him are sufficient to maintain the Receivership Estate only until sometime in early January of 2008. (Doc. Nos. 78 and 84.) Thereafter, the life insurance policies which comprise the Fund's Portfolio are in danger of lapsing for non-payment of premiums. Approval of the compromise reached by the Receiver and the April Investors will give the Receiver immediate access to sufficient funds to maintain the Portfolio for a significant period of time and, in addition, allow the Receiver to avoid the financial drain that litigation with the April Investors would certainly entail. As a result of the financial condition of the Receivership Estate, the Receiver and the April Investors have agreed that the compromise and settlement must be approved by the Court and effectuated on or before December 31, 2007 in order to allow the Receiver to use the funds to maintain the policies within the Portfolio beginning in early January of 2008.

B. THE APRIL DEPOSITOR.

With respect to the April Depositor, D.H.L, the Receiver believes, for the following reasons, his April Deposit should be returned to him. First, unlike the April Investors, no subscription documents were ever submitted to the Fund's Administrator, Dundee Leeds, by the April Depositor. Second, because Dundee Leeds had no knowledge of the April Depositor, Dundee Leeds did not begin processing the April Depositor's documentation and did not perform any background checks on the investor or the source of his funds. Finally, because Dundee Leeds had no knowledge of the April Depositor, Dundee Leeds did not send Lydia notice of the investment or ask Lydia to accept the investment. Accordingly, because there appears to be insufficient facts upon which the Receiver can base an argument that the April Depositor's subscribed to the Fund, the Receiver believes the April Depositor's funds (\$300,030.00) should be returned to him.

IV. ARGUMENTS AND AUTHORTIES.**A. THE COURT'S JURISDICTION AND THE RECEIVER'S AUTHORITY.**

A Court's authority to impose and administer a receivership is derived from its inherent powers as a court of equity. S.E.C. v. Forex Asset Management, L.L.C., 242 F.3d 325, 331 (5th Cir. 2001). A federal court exercises "broad powers and wide discretion" in crafting relief in an equitable receivership proceeding. S.E.C. v. Basic Energy & Affiliated Resources, Inc., 273 F.3d 657, 668 (6th Cir. 2001). This Court's jurisdiction over the Receiver and the Receiver's authority to act on behalf of the Receivership are set forth in the Order for Appointment. (Doc. No. 28.) Pursuant to the Order for Appointment, the Receiver was directed to take complete control, possession, and custody of all Receivership Assets. Acting pursuant to this authority,

the Receiver sought the use of subscription proceeds from the April Investors to preserve the Receivership Assets, including the life insurance policies comprising the Portfolio.

B. THE RECEIVER BELIEVES IT IS IN THE BEST INTEREST OF THE RECEIVERSHIP FOR THE COURT TO APPROVE THE COMPROMISE AND SETTLEMENT AGREEMENT WITH THE APRIL INVESTORS.

The Receiver, in consultation with counsel, has concluded that it is in the best interest of the Lydia Receivership estate and the Lydia Investors to settle and compromise the claims relating to the April Proceeds and the April Deposit. As noted above, following the October 24, 2007, status conference, the Receiver and counsel for one of the April Investors have negotiated in principle a settlement agreement pursuant to which the April Investors would receive one-half of the investments made by them in March and April of 2007, in the aggregate amount of \$4,253,828.11. In addition, the April Depositor would be returned his entire April Deposit (\$300,030.00). (A copy of the proposed Settlement Agreement is attached hereto as Exhibit 1 (filed under seal).³)

It is the Receiver's opinion that settlement with the April Investors is in the collective best interests of all of the Lydia Investors for at least two reasons. First, settlement with the April Investors provides the Receiver with immediate and unrestrained access to over four million dollars, which sum will enable the Receiver to maintain the Receivership Assets for a portion of 2008. Second, settling the disputed claim will save both the Receivership Estate and the April Investors considerable time and money. As described above, absent a compromise resolution, it is likely that one or more of the April Investors would be seeking leave to intervene in this lawsuit for purposes of challenging the Receiver's Motion for Instructions. If the motion

³ At this time, the Receiver and the Investor have agreed in principle to the terms of settlement and compromise, subject to the Court's approval of the final settlement documents. The Investor and its counsel have expressed confidence that the remaining eight April Investors and the April Depositor will agree in principle to the same terms and conditions.

to intervene had been granted, the Receiver anticipates the litigation of this matter would be lengthy and expensive. Further, based upon the Receiver's investigation up to this point, the outcome of the litigation would be less than certain. In addition, given the amount of money at issue, it is anticipated that the losing party would likely appeal an unfavorable decision from this Court to the First Circuit Court of Appeals, thus incurring additional attorney's fees and further delaying resolution of the issue. Finally, due to the financial condition of the Receivership Estate, it is possible that while the claims to the April Proceeds were being litigated, insurance policies that comprise the Portfolio might lapse due to the Receiver's inability to fund the Receivership, including the payment of premiums.

WHEREFORE, premises considered, the Receiver respectfully requests the Court grant his Motion for Approval of Compromise and Settlement Pertaining to Certain Policy Proceeds and enter an order directing the Receiver to take all necessary steps to implement and effectuate the compromise and settlement of this matter.

Dated: December 20, 2007

Respectfully submitted,

/s/ Melvin R. McVay, Jr.

Melvin R. McVay, Jr. (admitted *pro hac vice*)

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Attorneys for H. Thomas Moran, II, Court-Appointed Receiver for Lydia Capital, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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/s/ Melvin R. McVay, Jr.

EXHIBIT 1

FILED UNDER SEAL
PURSUANT TO COURT ORDER
DATED DECEMBER 19, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SECURITIES AND EXCHANGE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Case No. 07-CV-10712-RGS
)	
LYDIA CAPITAL, LLC,)	
GLENN MANTERFIELD, and)	
EVAN ANDERSEN,)	
)	
Defendants.)	

**PROPOSED ORDER GRANTING THE RECEIVER’S
MOTION FOR APPROVAL OF COMPROMISE AND SETTLEMENT
PERTAINING TO CERTAIN INVESTMENT PROCEEDS AND BRIEF IN SUPPORT**

The Court has before it for review and consideration the Receiver’s Motion for Approval of Compromise and Settlement Pertaining to Certain Investment Proceeds, which was filed on December 20, 2007. Despite the passage of the period of time allotted in the Court’s Order shortening the response time to the motion, no objections have been filed to the Receiver’s Motion. Based on the Court’s review of the Motion and for good cause shown, the Court finds the settlement and compromise reflected in the Receiver’s Motion for Approval of Compromise and Settlement Pertaining to Certain Investment Proceeds to be in the best interests of the Receivership Estate. The Court further finds that the Motion should be and is hereby granted. Accordingly, the Receiver is authorized to enter into the settlement and compromise reflected in the Settlement Agreement (Exhibit 1 to his Motion) and is directed to take all steps necessary to implement and effectuate the compromise and settlement.

IT IS SO ORDERED this ____ day of December, 2007.

UNITED STATES DISTRICT JUDGE