This is Exhibit "E" to the

Affidavit of James Torchia

Sworn to this 4th day of June, 2009

John J. Keenan

A Commissioner for Taking Affidavits, etc.

John J. Keenan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNIVERSAL SETTLEMENTS INTERNATIONAL, INC.	)	
Plaintiff,	)	
v.	)	Case No. 1:07-CV-1243
NATIONAL VIATICAL, INC., JAMES TORCHIA, and MARC A. CELELLO	)	
Defendants.	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants National Viatical, Inc. and James Torchia and hereby move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment against Plaintiff Universal Settlements International, Inc. on all counts of Plaintiff's complaint.

Defendants are entitled to judgment as a matter of law because there is no genuine dispute that the Agreement By and Between Universal Settlements International, Inc. and National Viatical, Inc. was a bona fide agreement for portfolio management services, executed by a former principal of Plaintiff with apparent and actual authority to bind Plaintiff.

In support of this Motion, Defendants submit herewith its Brief in Support containing argument and citation of authorities, and the Affidavits of James Torchia, Antonio Duscio, and Marc A. Celello. Defendant Marc. A. Celello joins in this Motion for Summary Judgment and Brief in Support for the reasons stated herein.

This the ___ day of _______, 2009.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the other parties in the foregoing matter with a copy of the above and foregoing Defendants' Supplemental Brief in Opposing Plaintiff's Motion for Preliminary Injunction by the United States District Court for the Western District of Michigan's ECF System to:

David Murphy, Esq.
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This the ___ day of ______, 2009.

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Defendants.	)	

I. DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff's entire case is based on several false and misleading assertions – none of which matter. The Court has already spent considerable time and judicial resources entertaining and dispelling Plaintiff's baseless accusations that Defendants stole money from the TPI Receiver and investors. However, we were so concerned about the implications to the Receivership, we never stopped to consider whether Plaintiff had alleged a legal claim in the first place. Even if the Court construes all of the evidence – or even all of the evidence that Plaintiff hopes to find that does not exist – in favor of Plaintiff, it still has no case as a matter of law. There is no dispute that USI paid NVI $5 million in 2005. NVI contends that the $5 million was a prepaid fee for NVI to manage USI's recently purchased TPI viatical portfolio for the life of the portfolio. USI, now under new management, disputes the bona fides of this transaction and argues that USI's prior president, Tony Duscio, paid NVI a brokerage commission on the sale of the TPI portfolio from the Receiver out of funds "earmarked" for the purchase of the portfolio.[1] USI's "X-Files" conspiracy theory, even if true (though it is not), would not give USI a legal claim to recover the funds. Plaintiff has brought numerous counts in its Complaint that all boil

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[1] See Pl.'s Resp. to Defs. NVI and J. Torchia's Fir. Interrogs. # 16 ("[T]he $5 million was an amount agreed upon between Defendant Torchia and Duscio for NVI's securing the sale of the TPI portfolio to USI."). Also, in USI's response to Defendants' motion to transfer venue, USI states: "The allegations of this case arise out of Defendants' wrongful taking of $5 million of USI's money, earmarked for the purchase of a portfolio of insurance policies from the Receiver for Trade Partners, Inc. ("TPI")." (Pl.'s Resp. Br. to Defs. NVI and J. Torchia's Mot. Trans. Venue at p. 4). There is no evidence to support this allegation. Plaintiff further alleged at a recent motions hearing that "the $5 million was transferred as a fee to NVI for USI getting . . . the right to purchase [the TPI] portfolio." (Motions Hr'g Tr. 28, Jul. 21, 2008). There is also no evidence to support this allegation.

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down to the same cause of action for fraud/theft/conspiracy. All of Plaintiff's claims, no matter how dressed up, fail as a matter of law.

II. STATEMENT OF FACTS

A. Background.

This action arises from a dispute between two companies engaged in the viatical settlement industry. Viatical settlements involve cash payments to a life insurance policyholder made in consideration for the assignment of the benefits of the seller's policy. After payment to the seller and transfer of benefits to the viatical company, the company is responsible for managing and maintaining the policy, including making premium payments and other logistical necessities.

In 2003, Michael Quilling filed an action seeking the appointment of a receiver (the "Receiver") for the assets of Trade Partners, Inc. ("TPI"), a Michigan corporation engaged in the viatical settlement business. (Prelim. Inj. Hr'g Tr. 7, Feb. 28, 2008). At the time of the Receiver's appointment, TPI had approximately 834 life insurance policies for which TPI was the beneficiary. (Prelim. Inj. Hr'g Tr. 9, Feb. 28, 2008). In or about April 2003, the Receiver hired NVI, a Georgia corporation also engaged in the viatical settlement industry, to assist the Receiver in managing TPI's policies. (Prelim. Inj. Hr'g Tr. 10-11, Feb. 28, 2008; Torchia Decl. ¶ __). Co-defendant Torchia is and has at all times relevant to this action been the president and chief executive officer of NVI. (Torchia Decl. ¶ __). Co-defendant Celello is a member of the Georgia bar and acted as escrow agent for the sale of the TPI portfolio described below. (Cellelo Decl. ¶ __).

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In 2004, the Receiver determined it was in the best interest of TPI's investors and creditors to sell the policies to a third party. (Prelim. Inj. Hr'g Tr. 22-23, Feb. 28, 2008). With the assistance of NVI and Torchia, the Receiver successfully negotiated the sale of TPI's policies to USI, a Canadian viatical settlement corporation. (Torchia Decl. ¶ __; see also Prelim. Inj. Hr'g Tr. 24-25, 28, Feb. 28, 2008). The negotiations for USI were conducted by Antonio "Tony" Duscio ("Duscio"), USI's then-president. (Duscio Decl. ¶ __). Torchia and Duscio knew each other from previous business transactions between USI and NVI. (Torchia Decl. ¶ __; Duscio Decl. ¶ __). USI and the Receiver agreed to use Celello as the escrow agent for any transfer of funds from USI to the Receiver necessary to effect the purchase of TPI's policies. (Duscio Decl. ¶ __; Celello Decl. ¶ __; Prelim Inj. Hr'g Tr. 26-28, Feb. 28, 2008).

On or about January 13, 2005, USI and Celello entered into an escrow agreement, whereupon Celello agreed to act as escrow agent for a fee of $15,000. (Duscio Decl. ¶ __, Ex. __; Celello Decl. ¶ __, Ex. __). The following day, the Receiver and USI entered into a purchase and sale agreement (the "Sale Agreement"). (Duscio Decl. ¶ __, Ex. __; Celello Decl. ¶ __, Ex. __). The Sale Agreement provided that the purchase price would be placed in escrow, and as the benefits of each policy were transferred from TPI to USI, a certain percentage of the face value of the policy (26.58% to be exact) would be released from the escrow account to the Receiver. (Duscio Decl. ¶ __, Ex. __; Celello Decl. ¶ __, Ex. __). The Sale Agreement also required USI

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to deposit $5,000,000 to be transferred to the Receiver to pay premiums on each of the policies until each was transferred to USI. (Duscio Decl. ¶ __, Ex. __; Celello Decl. ¶ __, Ex. __).[2]

On January 14, 2005, USI deposited $5,000,000, which Celello promptly transferred to the Receiver for use in paying premiums on TPI's policies prior to transfer of the policies to USI. (Duscio Decl ¶ __; Celello Decl. ¶ __). On February 17, 2005, USI wired $33,500,000 to the escrow account, to be held in trust for USI's benefit. (Duscio Decl ¶ __; Celello Decl. ¶ __). These funds were to be gradually released to the Receiver as each TPI policy was transferred to the benefit of USI. (Duscio Decl ¶ __; Celello Decl. ¶ __).

This Court then held a hearing on the Receiver's motion to approve the sale. Duscio provided undisputed testimony that, as president of USI, he was authorized to negotiate and enter into the Sale Agreement. (Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 28 at 15, 32, 81-86). Torchia also testified concerning the details of NVI's management of the TPI policies and concerning his participation in the negotiations with Duscio and USI. (Pl.'s Br. Supp. Mot. Prelim. Inj. Ex. 29 at 11-12, 20, 99). Torchia testified that all of his past and present dealings were with Duscio. Pl.'s Br. Supp. Mot. Prelim. Inj. Ex. 29 at 97-99). United States Magistrate Judge Ellen S. Carmody issued a Report and Recommendation dated May 23, 2005 approving the sale. (Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 10). This sale resulted in at least $20 million more going to the TPI investors than would have if the portfolio had not been sold. (Torchia Decl. ¶ __).

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[2] The stated purpose of this deposit for premium payment, rather than for purchase price payment, reflects that USI, the Receiver, and the Court contemplated that not all of the funds deposited in escrow were for the expected purchase price.

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USI and the Receiver, without NVI's involvement, later modified the original agreement through a course of dealing that better reflected the realities of transferring the individual policies in the TPI portfolio. (Prelim Inj. Hr'g Tr. 32-34, 37-40, 101-02, Feb. 28, 2008; Duscio Decl. ¶ __). The modification reflected the reality that some policies would mature pre-transfer and thereby fund future premium and purchase obligations. (See Prelim Inj. Hr'g Tr. 32-39, 44-45, 57, 106-07, Feb. 28, 2008; Duscio Decl. ¶ __). USI and the Receiver also expected over $4 million in policy maturities during the first few years after the purchase. (Halas Aff. ¶ 16, Dec. 22, 2008).[3] Quilling and Kramer both testified that in 2007, the Receiver refunded to USI $1.8 million in overpayments by USI. (Prelim Inj. Hr'g Tr. 64, 87, 117, Feb. 28, 2008).

B. The USI/NVI Agreement.

Facing the daunting task of managing 834 new policies, USI, through Duscio, entered into negotiations with NVI for an agreement to manage the TPI policies on USI's behalf. (Duscio Decl. ¶ __; Torchia Decl. ¶ __). By this time, NVI was familiar with the details of the TPI policies and had been managing the policies for approximately two years. (Torchia Decl. ¶ __; Duscio Decl. ¶ __; Pl.'s Br. Supp. Mot. Prelim. Inj. Ex. 29 at 11-12). In late July or early August, 2005, USI and NVI entered into the "Agreement By and Between Universal Settlements International, Inc., and National Viatical, Inc." (the "USI/NVI Agreement") in which NVI agreed to manage the TPI policies for and on behalf of USI, for a one-time, upfront payment of

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3 A true and correct copy of the December 22, 2008, Affidavit of Christopher Halas, filed in support of USI's bankruptcy proceedings in Canada, is attached hereto as Exhibit 1.

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$5,000,000.[4] (Duscio Decl. ¶ __; Torchia Decl. ¶ __; see also Pl.'s Br. Supp. Mot. Prelim. Inj. ¶ 46, Ex. 13). The USI/NVI Agreement was executed by Duscio on behalf of USI. (Duscio Decl. ¶ __; Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 13 at 5). Plaintiff admits that Duscio was president of USI at this time and through January 25, 2007. (Pl.'s Resp. to Defs. NVI and J. Torchia's Fir. Reqs. for Admis. # 1, 11; see also Prelim Inj. Hr'g Tr. 93-94, Feb. 27, 2008; Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 13 at 5). While the Complaint makes the bare, conclusory assertion that Duscio lacked authority to enter into the USI/NVI Agreement, it offers no evidence as to what might have limited his authority, or when, if ever, USI informed NVI of Duscio's reduced scope of authority. The president of a company has apparent authority to enter into contracts on behalf of a company as a matter of law–and in this case, USI admits that Duscio had actual authority. (See Prelim. Inj. Hr'g Tr. 79:22-80:5, 92-95, Feb. 27, 2008).

NVI performed the portfolio management services to the full satisfaction of the Receiver. (Prelim, Inj. Hr'g Tr. 17-20, Feb. 28, 2008). Mr. Jim Torchia, as president of NVI, testified in February, 2005, that he had no agreement with USI at the time to manage the portfolio for USI, but that he would like to do so. (Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 29 at 13 ("At this point, no. I would like to but probably not.")).[5] USI initially believed that it could manage the

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4 Because the USI/NVI Agreement was executed separately by mail, both Torchia and Duscio dated the Agreement with a common effective date of July 26, 2005. (Duscio Decl. ¶ __; Torchia Decl. ¶ __).

5 Accordingly, Torchia actually informed the Court months prior to the execution of the USI/NVI Agreement that NVI would like to pursue just such an opportunity. Though not an issue for summary judgment, this is a prior consistent statement pursuant to Fed. R. Evid. 804(d)(1)(B).

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portfolio, but sought the services of an accounting firm when the task became too difficult. (Duscio Decl. ¶ __; see also Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 28 at 65). The accounting firm indicated to Duscio in July, 2005, that it wanted to quit after appreciating the scope of the services required and the attendant risks and wrote to Mr. Duscio in August, 2005, that "this new block of policies changes our and your exposure if not handled properly. We feel that under these circumstances, the potential liability is unacceptable." (Duscio Decl. ¶ ___, Ex. __). USI knew the accounting firm wanted out before the actual termination and had nowhere to turn except to NVI who had already successfully managed the policies for the Receiver. (Duscio Decl. ¶ __). After this Court approved the sale and the parties were merely awaiting final approval by the District Court, USI asked NVI how much it would charge to continue managing the policies after they were transferred to USI from the Receiver. (Duscio Decl. ¶ __; Torchia Decl. ¶ __). NVI agreed to charge its usual and customary rate of $50 per policy per month – the same rate USI charged its own investors – so long as the fee was paid up front as a non-refundable flat fee for the expected approximately ten year average service life of the policies in the portfolio.[6] (Duscio Decl. ¶ __; Torchia Decl. ¶ __).

NVI had been hired by the Receiver to manage the policy portfolio for the Receiver for a fee of $25 per policy per month. (Torchia Decl. ¶ __; Prelim. Inj. Hr'g Tr. 20-21, Feb. 28, 2008). This was a discounted rate charged by NVI as a "loss leader" in order to get into the business of managing viatical policy portfolios in receivership. (Torchia Decl. ¶ __). This strategy was

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6 Ten years (120 months) multiplied by $50 multiplied by the 834 policies in the portfolio is $5,004,000.00.

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successful and NVI has subsequently been hired to manage similar receivership portfolios at its customary rate of $50 per policy per month. (Torchia Decl. ¶ __). Mr. Michael Quilling has appointed NVI, with federal court approval, in 2 separate cases in which Mr. Quilling was acting as receiver. (Torchia Decl. ¶ __; See Prelim. Inj. Hr'g Tr. 21, 95, Feb. 28, 2008). In each of these cases, all subsequent to the Trade Partners receivership, NVI's customary rate of $50 per policy per month has been approved by the federal district court. (Ex. __; see also Prelim. Inj. Hr'g Tr. 21, 95, Feb. 28, 2008). Moreover, Mr. Duscio testified in February, 2005, that USI charged its own investors $50 per policy per month to manage the portfolio. (Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 28 at 64). USI simply paid NVI what it was being paid to manage the policies. Accordingly, NVI negotiated to be paid the customary market rate and not, as USI baldly and irresponsibly alleges, an irrational trumped up rate.

This Court may also recall that the principal problem with this portfolio was that a substantial majority of the policies consisted of viators with AIDS in their thirties and forties who had an unpredictable and extended life expectancy of anywhere from eight to twelve years or longer. (Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 28 at 38-40). The fact that NVI was not willing to offer USI the same discounted rate offered to the Receiver is of no concern to this Court. [7] NVI charged its usual and customary rate, the same rate USI charged its own investors, in an arms-length transaction negotiated by the respective presidents of NVI and USI. (Duscio Decl. ¶

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[7] The adequacy of consideration shall not be inquired into by the courts. Equitable Loan & Sec. Co. v. Waring, 117 Ga. 599, 655 (1903).

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__; Torchia Decl. ¶ __). NVI never raised its rate charged to the Receiver for this portfolio and never received more than the discounted $25 rate for the policies it managed for the Receiver. (Torchia Decl. ¶ __). NVI did not receive a dime from the Receiver for any services performed after the sale was approved.

Mr. Torchia testified at length at the sale approval hearing as to the services provided by NVI for the Receiver. (Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 29 at 11-12, 40-41, 43, 50-51, 71, 77; see also Prelim. Inj. Hr'g Tr. 17-20, Feb. 28, 2008). USI simply hired NVI to continue providing the same services for it for the entire life of the portfolio at the market rate for those services. USI requested NVI's assistance in this regard only after it first determined that it could not effectively manage the portfolio on its own and after seeking to use a different firm for the same services. (Duscio Decl. ¶¶ __). NVI was in the business of managing portfolios for others. (Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 29 at 11). Mr. Torchia testified at the sale approval hearing that he would like to manage the portfolio for USI, but that he did not think he would be able to get the business. (Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 29 at 13). The fact that NVI was later able to obtain the business it admitted to wanting is no fraud. The real fraud here is that USI is trying to pin its failure to meet its financial obligations to the Receiver on NVI. The Court will recall that it was largely through NVI's efforts that the portfolio was kept alive for the Receiver to sell and was then sold for a fair price given the composition of the portfolio. (Torchia Decl. ¶ __; see also Prelim. Inj. Hr'g Tr. 17-20, Feb. 28, 2008).

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The USI/NVI Agreement details the services provided to USI by NVI and the services to be provided for the entire life of the portfolio. (Torchia Decl. ¶ __; Ex. __).[8] NVI tracked these policies for USI, filed claims for USI, obtained death certificates for USI, and managed this huge viatical portfolio for USI until USI's new management attempted to renege on the USI/NVI Agreement. (Torchia Decl. ¶ __). NVI continues to be ready, willing, and able to perform all of the services it has contracted to perform for USI for the *entire life of this portfolio and every policy in it.* (Torchia Decl. ¶ __). USI's unsupported allegation that NVI performed no services under the Management Agreement is just false. (Torchia Decl. ¶ __).[9] USI's new management cannot get out of a prepaid services contract and get their money back after performance has begun and after the non-refundable management fee has been paid. Like a signing bonus to a valuable employee or a nonrefundable retainer to a law firm, the management fee was fully earned upon execution of the contract. The fact that two uninvolved, uninformed, and undisclosed shareholders of USI now object to this contract two and a half years later cannot affect the validity of the transaction.

C. USI's new management admits to being asleep at the switch.

This lawsuit having been cooked up by new management was shown by USI's current Chief Executive Officer Jeffrey Panos' demonstration through his own testimony that he had no

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[8] USI alleges without specificity or proof that the USI/NVI Agreement was a sham concocted in February 2007. The undisputed evidence is to the contrary.

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grasp of USI's operations, either at the time of the USI/NVI Agreement or at the time of the hearing. He plainly had no knowledge about the operations of USI during the time of the execution of the USI/NVI Agreement:

> Q: Mr. Panos, you testified that your role in 2005 was primarily in sales?
> A: Yes, it was.
> Q: By that you mean raising money from investors?
> A: That is correct.
> Q: What were your other responsibilities at the company at that time?
> A: That was pretty much it.
> Q: Okay. Did you have any involvement in policy tracking?
> A: No, I did not.

(Prelim. Inj. Hr'g Tr. 79:5-14, Feb. 27, 2008). Nor did Panos have any first-hand knowledge of the policies under management for USI, at the time or since:

> Q: Do you recall in 2005 what the approximate assets under management were for USI?
> A: No, I do not.
> Q: 2006?
> A: No.
> Q: 2007?
> A: No.
> Q: Now?
> A: No.

(Prelim. Inj. Hr'g Tr. 80:16-24, Feb. 27, 2008). Counsel for USI perhaps best summed up Panos' role:

> MR. MURPHY: -- Mr. Panos is a salesperson. He's not the financial officer of the company, and there's no foundation that he would know or should know what or what is not supposed to be on the financial records of a company.

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9 In fact, NVI has produced hundreds of documents in discovery demonstrating that it was actively managing the portfolio during the relevant time frame of July, 2005 to January, 2007– long after having received its last dime from the Receiver. (Torchia Decl. ¶ __).

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(Prelim. Inj. Hr'g Tr. 92:3-6, Feb. 27, 2008). However, Panos was USI's *only* witness during the protracted preliminary injunction hearings.

Further, Panos gutted an essential element of USI's claims by admitting that USI's former President, Tony Duscio, had authority at the time of the USI/NVI Agreement to contract with third parties to manage USI's portfolio. (Prelim. Inj. Hr'g Tr. 80, 92, 95, Feb. 27, 2008). In fact, Panos had no knowledge in that area:

> Q Well, who at USI was in charge of making sure policies got tracked by someone?
> A: No one at the time.
> Q: Who was sending tracking --
> A: It was third party.
> Q: Who was hiring a third party?
> A: That would have been Angie or Tony.
> Q: You weren't involved in that process?
> A: No, I was not.

(Prelim. Inj. Hr'g Tr. 79:22-80:5, Feb. 27, 2008). Panos also described Duscio as the "operational guy" for USI before his ouster. (Prelim. Inj. Hr'g Tr. 128, Feb. 27, 2008). In addition, Panos acknowledged that Duscio had authority to handle the purchase of the TPI policies and that he (Panos) knew nothing about it. (Prelim. Inj. Hr'g Tr. 92:13-14, Feb. 27, 2008). Clearly, Duscio was authorized to execute the USI/NVI Agreement and Panos had little or no knowledge of what was going on. Likewise, Panos had no knowledge of any kind about the details of USI's dealings with the Receiver. (Prelim. Inj. Hr'g Tr. 100-103, Feb. 27, 2008). USI cannot now contradict the sworn testimony of its president in an attempt to oppose this motion for summary judgment.

USI has advanced the unsupported theory that the USI/NVI Agreement is a sham because the sleeping shareholders, Halas and Panos, did not know about it until they took over. There is

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no evidence of any kind supporting this theory. The mere fact that Panos did not find out about the agreement until March, 2007, should come as no surprise. Panos did not take over operations until at or around that time. Prior to early 2007, he had no responsibility over anything dealing with TPI or with hiring third-parties to manage any USI policies:

> Q: Mr. Panos, what was your role in the TPI purchase, if any?
> A: There was none.
> Q: Okay. Mr. Duscio handled all that?
> A: Yes, he did.
> Q: Okay. Were you copied on correspondence involving the purchase?
> A: None whatsoever.
> Q: Okay. Were you involved in the negotiations at all with the receiver?
> A: None whatsoever.

(Prelim. Inj. Hr'g Tr. 92:14-23, Feb. 27, 2008). When asked about his involvement in contracting with third parties to manage policies generally, Panos again pleaded ignorance:

> Q: Who was hiring a third party?
> A: That would have been Angie or Tony.
> Q: You weren't involved in that process?
> A: No, I was not.

(Prelim. Inj. Hr'g Tr. 79:22-80:5, Feb. 27, 2008). Likewise, Panos had no knowledge that Duscio had approached third parties other than NVI, such as the accounting firm of Haynes & Moore, about possibly managing the TPI policies:

> Q: Are you aware that they had been approached about managing the TPI
> portfolio for USI?
> A: No, I am not.
> Q: Okay. Mr. Duscio was dealing with all that?
> A: Yes, he was.

(Prelim. Inj. Hr'g Tr. 94:8-12, Feb. 27, 2008). Panos was not kept in the dark, nor was there any conspiracy. Panos just had no idea what was going on with the TPI policies, or with USI's

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policy portfolio generally. He was a salesman and he was happy to let Duscio do the managing. Finally, Panos has no first-hand knowledge of any purported conspiracy to defraud USI. Id.

NVI performed under the USI/NVI Agreement for over 18 months without incident. (Torchia Decl. ¶ __; Duscio Decl. ¶ __). In early 2007, the new management team at USI unleashed its plan to renege on the USI/NVI Agreement and seek to recover its fully-earned pre-payment, culminating in this lawsuit and the now failed motion for preliminary injunction. In early 2007, after discovering the existence of the USI/NVI Agreement, Quilling and Kramer engaged in a "serious analysis" of the agreement. (Prelim. Inj. Hr'g Tr. 91, Feb. 28, 2008). This included an interview with Torchia and a review of the agreement and Celello's and the Receiver's bank account records. (Prelim. Inj. Hr'g Tr. 83-87, Feb. 28, 2008). Quilling and Kramer discovered that the Receiver had too much money, not too little, and informed counsel for USI:

> But I reconstructed [the Receiver's] account, every single transaction to the penny, and I sat down with Mr. Murphy and Ms. Kress and Mr. Harr in Detroit and discussed it. And then we had another meeting in Grand Rapids with two sets of accountants and Mr. Kramer to again discuss it. And as of last June, I think it was, there was an amendment, and at that time we owed them a million eight. They didn't owe us anything . . .
>
> So there were two purposes to these two meetings that occurred in Grand Rapids and Detroit. One was to get to the bottom of Mr. Murphy's allegations and to satisfy ourselves that something was not amiss that we needed to bring to the Court and, two, to settle up once and for all where we were. And we went into that series of meetings telling Murphy, "You guys need to pay us," and we left those meetings a month later saying, "Sorry if we owe you a million eight." So as of last summer, there was no harm, no foul to anybody about this transaction, and it never came out of our account. That's what I concluded.

(Prelim. Inj. Hr'g Tr. 87-88, Feb. 28, 2008). The Receiver refunded this $1.8 million to USI, in two parts: first, by distributing approximately $900,000 in funds leftover in Celello's accounts to

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a third party escrow agent for use by USI in making future premium payments; and second, by paying directly to USI approximately $900,000 from a receivership account. (Prelim. Inj. Hr'g Tr. 98-99, Feb. 28, 2008). In any event, if the $5 million management fee had been paid to the Receiver, rather than to NVI, in 2005, the fee would have been part of a refund which the Receiver made to USI in 2007.

Since Duscio had actual and apparent authority to enter into the USI/NVI Agreement on behalf of USI, the agreement is valid and Defendants are entitled to an order entering summary judgment as a matter of law dismissing Plaintiff's claims. Just because USI is now under new management does not mean that it is allowed to pick and choose among the contracts agreed to by prior management, and sue to undo the contracts the new management team does not want to live up to. Indeed, this appears to be the same strategy USI employed with the Receiver.

What this case is really about is two relatively inactive and uninformed shareholders who elected to become purchasers under the "shotgun" offer and buy out Tony Duscio, who had been managing USI. USI has no evidence that the $5 million payment was not a bona fide management fee and instead offers inadmissible and insupportable suspicion and innuendo. However, no matter what USI now tries to label the $5 million payment, it is not entitled to recover the payment as a matter of law. Accordingly, this Court should grant summary judgment as a matter of law as to all of Plaintiff's claims.

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III. ARGUMENT AND CITATION OF AUTHORITY

A. Fed. R. Civ. P. 56 requires the entry of judgment as a matter of law in favor of the Defendants in this case.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "The non-moving party, in answering a properly supported motion for summary judgment, must show a genuine issue necessitating trial." Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 628-629 (6th Cir. 2002). Such an issue exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. In this case, no reasonable juror could return a verdict for USI because the evidence undisputedly shows that the USI/NVI Agreement was a bona fide contract for the management of the TPI portfolio made by one who had apparent and actual authority to bind USI to such an agreement.

B. USI is not entitled to a refund of the prepaid management fee by virtue of early termination.

USI, through counsel, has agreed that if the USI/NVI Agreement is bona fide, it has no case. (See Rule 16 Hr'g Tr. 23. Jun. 12, 2008; Motions Hr'g Tr. 22-23, Jul. 21, 2008). The

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undisputed and overwhelming evidence shows that not only is the USI/NVI Agreement bona fide, but that Halas and Panos (USI's current principals) know that it is bona fide. First, Mr. Torchia and Mr. Duscio have declared under oath that the USI/NVI Agreement is bona fide and that USI paid a nonrefundable prepaid $5 million management fee to NVI so that NVI would continue to manage the TPI portfolio for the entire life of the portfolio. (Torchia Decl. ¶ __; Duscio Decl. ¶ __). Mr. Celello, a member of the bar, has declared under oath that he drafted the USI/NVI Agreement in July, 2005, to document the management agreement negotiated between the principals of NVI and USI. (Celello Decl. ¶ __). This is corroborated by the fact that USI initially believed that it could manage the portfolio, but sought the services of an accounting firm when the task became too difficult. (Duscio Decl ¶ __). The accounting firm announced its intention to quit in July, 2005, after seeing the scope of the services required and the attendant risks and wrote to Mr. Duscio that "this new block of policies changes our and your exposure if not handled properly. We feel that under these circumstances, the potential liability is unacceptable." (Duscio Decl. ¶ __; Ex. __). This is even further corroborated by Mr. Torchia's prior consistent statement during the sale approval hearing that NVI wanted to manage the policies for USI, but had not been hired to do so yet. (Pl.'s Br. Supp. Mot. Prelim. Inj., Ex. 29 at 13 ("At this point, no. I would like to but probably not."). NVI has also submitted the declarations of five former USI employees, in addition to Mr. Duscio, stating that: "Everyone at USI, including Mr. Panos and Mr. Halas, knew that NVI had been hired to fully track and manage the TPI portfolio." (Duscio Decl. ¶ __).

USI cannot now terminate the USI/NVI Agreement to obtain a refund or partial refund of the management fee just because USI is now under new management. The management fee was

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fully earned when paid. (Duscio Decl. ¶ __; Torchia Decl. ¶ __). The closest analogy to such a fee is the "general retainer" fee agreement used by many lawyers and law firms:

> The distinction between general and specific retainers is well established. A retainer is general where the services being purchased are the attorney's availability to render a service if and as needed in a specific time frame and thus is earned when paid. On the other hand, a retainer is special or specific where the funds paid are for a specific service. In that circumstance, the retainer remains the client's property if the contemplated services are not provided.

Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210, 217 (3d Cir. 1999) (internal quotations omitted). NVI insisted that the fee be pre-paid precisely because it was making itself responsible for providing an unknown amount of services for an unknown amount of time. (Torchia Decl. ¶ __). Indeed, up front/prepaid nonrefundable fees are a fact of commercial life. See e.g., Delta Minerals Corp. v. First Mississippi Corp., 1987 U.S. App. LEXIS 3103 (6th Cir. Mar. 9, 1987) (noting that a $500,000 advance license fee was nonrefundable because there was no language in the agreement which relieved First Mississippi of its obligation to pay the $500,000.00 fee in the event of termination); Mann v. Commissioner, 483 F.2d 673, 676 (8th Cir. 1973) (citing numerous cases discussing the propriety of deducting fully prepaid expenses in the year of payment); In re Public Serv. Co., 88 B.R. 518 (Bankr. D.N.H. 1988) (discussing an engagement letter providing for an up-front nonrefundable advisory fee of $500,000.00); Ecenrode v. Household Finance Corp., 422 F. Supp. 1327, 1334 (D. Del. 1976) (describing "pre-paid finance charge" as a "service charge is a sum which the consumer will not have the use of as part of the amount financed and which will not be returned in the event of early repayment of the loan"); Alabama Football, Inc. v. Greenwood, 452 F. Supp. 1191 (W.D. Pa. 1978) (holding that performance of duties under a professional football contract was held excused by frustration

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of purpose because of the failure of the World Football League, but that restitution of a $50,000 signing bonus was denied because the court found the bonus an agreed equivalent of part performance (the signing of the frustrated contract) by the player).

Both individuals executing the USI/NVI Agreement on behalf of their corporations aver that this fee was intended to be a non-refundable, fully earned, prepaid flat fee for the management of the TPI viatical portfolio for the entire unpredictable life of the portfolio. (Duscio Decl. ¶ __; Torchia Decl. ¶ __). USI has no evidence to contradict this testimony. Just like any other prepaid contract, Plaintiff has no legal right to terminate the contract and obtain a refund. If the USI/NVI Agreement is what it says it is, Defendants win as a matter of law. USI's counsel has already admitted as much. (See Motions Hr'g Tr. 31, May 16, 2008). The various red herrings raised by USI do not change this result.

C. The Receivership Red Herring.

Plaintiff asserts repeatedly without any support whatsoever that the $5 million management fee paid to NVI came out of the TPI investors' pockets. Nothing could be further from the truth. (Duscio Decl. ¶ __; Torchia Decl. ¶ __; Prelim. Inj. Hr'g Tr. 88-89, 117, 136-37, Feb. 28, 2008). The management contract and associated fee was an entirely separate and distinct transaction from the purchase agreement with the Receiver. Nor was the management fee paid from funds paid to the Receiver for policies – it was a separate transaction and was funded separately. (Duscio Decl. ¶ __; Torchia Decl. ¶ __; Prelim. Inj. Hr'g Tr. 86-88, 142, Feb. 28, 2008). Monies paid by USI to the Receiver were wired into Mr. Celello's escrow account set up for this purpose. (Torchia Decl. ¶ __; Celello Decl. ¶ __; Prelim. Inj. Hr'g Tr. 86-88, Feb. 28,

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2008; <u>see</u> <u>also</u> Duscio Decl. ¶ __). The $5 million management fee was wired by USI to a separate account that had nothing to do with the Receiver. (Torchia Decl. ¶ __; Celello Decl. ¶ __; Prelim. Inj. Hr'g Tr. 86-88, Feb. 28, 2008; <u>see</u> <u>also</u> Duscio Decl. ¶ __). The management fee was not paid from funds disbursed from the receivership escrow account as alleged by USI. (Duscio Decl. ¶ __; Torchia Decl. ¶ __; Prelim. Inj. Hr'g Tr. 86-88, Feb. 28, 2008). USI is still obligated to pay the full purchase price for each policy transferred to the Receiver for the benefit of TPI's investors. At the time that Mr. Duscio was bought out and replaced as president in January 2007, USI had sufficient resources to fully pay the purchase price to the Receiver. (Duscio Decl. ¶ __). USI has not and cannot produce any admissible evidence showing that the $5 million paid to NVI came from Receivership funds. Moreover, the management fee was paid for the purpose and benefit of the TPI portfolio in any event because USI had no other way to manage the portfolio.

This lawsuit is a dispute between two private companies that has nothing to do with the Receivership. This dispute may involve some of the same players and the same viatical portfolio involved in the receivership, but it does not involve receivership funds or obligations. All of USI's uproar about the Receivership has been nothing but a red herring and a distraction from the merits. There is no cognizable legal theory vaguely related to the Receivership action which would allow USI to recover the $5 million payment from USI.

D. The Brokerage Commission Red Herring.

The Declaration of Halas filed in this action further implies that if the funds were not stolen, then the management agreement is still a sham and that the $5 million was akin to a

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broker's commission paid to NVI for putting together the TPI portfolio transaction. (See Halas Decl. ¶ __). This allegation was repeated at a hearing by USI's counsel. (Motions Hr'g Tr. 28-30, Jul. 21, 2008). USI's interrogatory responses also allege: "NVI's Michael Sullivan made statements to Mr. Panos and Mr. Halas that caused Mr. Halas to believe that the $5 million was an amount agreed upon by Defendant Torchia and Duscio for NVI's securing the sale of the TPI portfolio to USI." (Pl.'s Resp. to Defs. NVI and J. Torchia's Fir. Interrogs. # 16). This is yet another red herring because if Mr. Duscio had authority to enter into the $43 million TPI portfolio transaction without a shareholders' meeting (Prelim. Inj. Hr'g Tr. 94-95, Feb. 27, 2008), then he certainly had authority to pay a $5 million commission on the deal. Defendants dispute and deny that the USI/NVI Agreement is anything but a management fee agreement, but if Plaintiff's conspiracy theory were correct about the $5 million fee being for brokerage rather than management services – Plaintiff would still not have a legally cognizable claim to recover the funds.

E. The Stolen Funds Red Herring.

There has been no evidence proffered whatsoever for Plaintiff's conclusory theory of theft. As Magistrate Judge Carmody noted: "[A]t some point you're going to have to like come up with these facts, Mr. Murphy. You tell a very compelling story, I'll give you that. But I don't -- I haven't heard any facts yet to support this theory." (Motions Hr'g Tr. 30, Jul. 21, 2008). The Declaration of Halas (one of USI's principals) alleges that the management agreement is a sham and that the $5 million was "stolen" by NVI which in turn paid a $1 million kickback to Mr. Duscio. (Halas Decl. ¶ 5, June 2, 2008; see also First Am. Compl. ¶ 51). NVI could not

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have "stolen" $5 million from USI when it was willingly paid by USI. Plaintiff has attempted to further muddy the waters by alleging that a $1 million loan made by NVI to Tony Duscio for the purpose of purchasing an office building for USI was a "kick back" or "fraudulent scheme" to drain USI's funds allocated for payment for the portfolio. An examination of the undisputed facts reveals the fallacy of such an argument.

First, the loan was a legitimate loan to Mr. Duscio and was documented by a promissory note. (Duscio Decl. ¶ __; Ex. __). Due in no small part to the hundreds of thousands of dollars Mr. Duscio has had to spend in legal fees litigating with his former partners in Canada and the escrowing of the $1 million purchase price pending the outcome of the arbitration, Mr. Duscio was unable to repay the note when due and the parties executed an amended promissory note extending the due date and increasing the principal of the loan. (Duscio Decl. ¶ __; Ex. __). In fact, Mr. Duscio has had to declare bankruptcy in Canada and NVI is his largest creditor. (Duscio Decl. ¶ __). At the time of the payment of the management fee and the negotiation of the loan, Mr. Torchia did not even know that Mr. Duscio had other partners. (Torchia Decl. ¶ __). As Mr. Duscio represented at the time that the loan proceeds were going to be used to purchase an office building to house USI,[10] NVI was justified in believing that the transaction was not only authorized by USI, but for the benefit of USI. (Torchia Decl. ¶ __; see also Duscio Decl. ¶ __). The allegation of USI's current management that NVI conspired to defraud two shareholders it did not even know existed is contrary to the undisputed facts.

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This argument amounts to a claim that the $5 million fee was not supported by adequate consideration. (First Amd. Complaint ¶ 51). It has long been black letter contract law that the adequacy of consideration will not be inquired into by courts:

> It will not do for courts to declare contracts void simply because they are apparently unwise or even foolish. The authority of the lawmaking power to interfere with the private right of contract has its limits, and certainly the courts should be extremely cautious in supervising private contracts, when the lawmaking power has not declared them to be unlawful. . . . But not all foolish contracts are fraudulent, and it is neither the duty nor within the power of the courts to relieve a person from a contract merely because it is in its terms unwise or even foolish.

Equitable Loan & Sec. Co. v. Waring, 117 Ga. 599, 655 (1903). See also GMC v. Dep't of Treasury, 466 Mich. 231, 241 (2002) ("[S]o long as the requirement of a bargained-for benefit or detriment is satisfied, the fact that the relative value or worth of the exchange is unequal is irrelevant so that anything which fulfills the requirement of consideration will support a promise . . . ."); Gillam v. Michigan Mortg. Inv. Corp., 224 Mich. 405, 409 (1923) (The fact that the contract is a foolish one for one of the parties, and a very advantageous one for the other, does not of itself establish the fact that it was unconscionable."). In other words, USI cannot recover the fee just because its new management now thinks it made a bad deal. A bona fide deal is a deal. Because USI can produce no evidence to support its theory of theft, its complaint should be dismissed as a matter of law.

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[10] Mr. Duscio offered for Halas and Panos to participate in the building purchase, but they declined. (Duscio Decl. ¶ __). The building was instead purchased separately and leased to USI at below market rates. (Duscio Decl. ¶ __).

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F. The "We Need More Discovery" Red Herring.

Defendants fully expect Plaintiff to argue that they should not be forced to respond to this motion prior to full leave-no-stone-unturned, "break the bank" and "destroy the enemy" scorched-earth discovery. This is a red herring because any evidence that Plaintiff could hope to find would not help them avoid summary judgment. Both signatories to the contract at issue in this case, that resulted in $5 million being paid up front to NVI from USI, agree that NVI has fully earned the $5 million prepaid non-refundable management fee and that these signatories had actual authority to make such an agreement. (Duscio Decl. ¶ __; Torchia Decl. ¶ __; see also Prelim. Inj. Hr'g Tr. 94-95, Feb. 27, 2008). Plaintiff's alternative theories are that (i) the $5 million was really a broker's commission on the sale of the portfolio; or (ii) the $5 million was given to NVI (or stolen by NVI with USI's president's help) without consideration. As explained above, neither of these theories would allow USI to recover the $5 million – regardless of whether USI has a valid claim against its former president, Tony Duscio, for breach of fiduciary duty, corporate waste, theft, or any other theory. Accordingly, Defendants [11] are

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[11] Defendant Marc A. Celello joins in this Motion for Summary Judgment and Brief in Support for the reasons stated herein.

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entitled to judgment as a matter of law dismissing Plaintiff's complaint now - no matter how one slices Plaintiff's various claims.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be granted.

This the ___ day of _______, 2009.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the other parties in the foregoing matter with a copy of the above and foregoing Defendants' Supplemental Brief in Opposing Plaintiff's Motion for Preliminary Injunction by the United States District Court for the Western District of Michigan's ECF System to:

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This the ___ day of ______, 2009.

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