UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	**Civil Action No. 3:06-CV-2136-P**
v.	)	**ECF**
ABC VIATICALS, INC., C. KEITH LAMONDA, AND JESSE W. LAMONDA, JR.,	)	
Defendants.	)	
and	)	
LAMONDA MANAGEMENT FAMILY LIMITED PARTNERSHIP, STRUCTURE LIFE SETTLEMENTS, INC. BLUE ATER TRUST, AND DESTINY TRUST,	)	
Relief Defendants.	)	

ERWIN & JOHNSON, LLP'S AND CHRISTOPHER R. ERWIN'S RESPONSE TO RECEIVER'S THIRD INTERIM APPLICATION FOR ATTORNEY'S FEES AND EXPENSES

TO THE HONORABLE JORGE A. SOLIS, UNITED STATES DISTRICT JUDGE:

Erwin & Johnson, LLP ("E&J") and Christopher R. Erwin ("Mr. Erwin") file this Response to Receiver's Third Interim Application for Attorney's Fees and Expenses.[1] In support, E&J and Mr. Erwin respectfully show the Court as follows:

[1] E&J and Mr. Erwin are defendants in *Michael J. Quilling, as Receiver for ABC Viaticals, Inc., and Relief Defendants v. Erwin & Johnson, LLP, and Christopher R. Erwin*, No. 3:07-CV-1153-P.

I. BACKGROUND

On November 17, 2006, the Court entered its Order Appointing Receiver, which appointed Michael J. Quilling as Receiver in this case ("Receivership Order"). The Receivership Order authorized Receiver to employ such attorneys as necessary and proper in connection with the claims process. Receiver employed Quilling Selander Cummiskey & Lownds, P.C ("QSCL"), of which he is a shareholder.

Receiver and QSCL (referred to collectively as "Receiver") have filed three interim fee applications since Receiver's appointment.[2] In all three applications, Receiver states that he has paid himself and QSCL 90% of their fees and 100% of their expenses. Collectively, Receiver has claimed to have expended **$1,401,855.45** in fees and **$104,218.04** in expenses in the one year and five months since his appointment. Here, for the time period from August 1, 2007, through February 29, 2008, Receiver seeks approval of his payment of $406,854.45 in fees (90% of the fees) and $28,032.82 (100% of the expenses), and requests that the court allow payment of the 10% fee holdback in the amount of $45,206.05. This results in $480,093.32 in total requested fees and expenses for seven months of work, or $68,584.76 per month since August 1, 2007.

In support of his application, Receiver attaches only billing records. Absent from the application is ***any*** affidavit testimony or other documentation or evidence from which the Court can verify that the fees and expenses are reasonable and the services necessary. In fact, the billing records reveal that the fees and expenses are far from reasonable, and the services are unnecessary and unspecified. E&J and Mr. Erwin thus move the Court to

[2] The first on May 10, 2007; the second on August 8, 2007; and the third – the subject of this response – on March 17, 2008.

deny the fee application entirely, as unsupported by any evidence, or to significantly reduce the requested fees and expenses as unreasonable and unnecessary.

II. SUMMARY

Receiver's excessive billing, in which he has billed the receivership estate $1.5 million, is rapidly depleting the receivership estate, thereby damaging the investors. All three of Receiver's fee applications reflect such unwarranted depletion. Accordingly, all three should be denied or substantially reduced. Narrowing the focus to the current fee application, though, it is apparent that it should be denied for several additional specific reasons. First, the fee application is fatally unsupported by any evidence showing that the claimed fees and expenses are reasonable and necessary. Second, it requests unreasonable fees, including excessive attorneys' fees for driving and promoting the sale of vehicles and for allegedly updating Receiver's Web sites. Third, Receiver remarkably asks for payment from the investors in this case for assisting a plaintiff in an unrelated case against Erwin & Johnson. Finally, none of the *Johnson* factors, which Receiver set out as predicate for his entire application, show that Receiver's fees are reasonable and necessary, nor support an upward increase of the reasonable fees. For these reasons, as more fully set out below, the Court should deny Receiver's fee application in its entirety or, alternatively, apply a 70% reduction to the requested fees.

III. ANALYSIS

A. Receiver Bears the Burden of Proving Reasonable Hours and Rates

A party seeking an award of attorney's fees has the burden of proving the reasonableness of the hours expended and the rate charged, and the district court must be able to determine the reasonable number of hours expended and the reasonable hourly

rate for each participating attorney. *See generally Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Riley v. City of Jackson, Miss.*, 99 F.3d 757, 760 (5th Cir. 1996) ("The fee applicant bears the burden of proving that the number of hours and the hourly rate for which compensation is requested is [sic] reasonable."); *Von Clark v. Butler*, 916 F.2d 255, 259 (5th Cir. 1990); s*ee also Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998).

B. Receiver's Fee Application is Fatally Unsupported

The application in this case is strikingly similar to Receiver's applications in *S.E.C. v. Megafund Corp.*, 2006 WL 42367 (N.D. Tex. Jan. 9, 2006) (Lindsay, J.). Judge Lindsay recognized that Receiver's fees are not presumptively reasonable, but must be proven to be so by affidavit testimony or other evidence. *See Megafund Corp.*, 2006 WL 42367, at *2 n.2 (advising Mr. Quilling that, "given the posture of the case, in carrying out its duty to exercise proper oversight and ensure that fees and expenses are 'reasonable,' the court cannot rely on Mr. Quilling's ipse dixit that the amounts sought are reasonable."). QSCL's bills alone do not show the reasonableness of the requested fees and expenses:

> With only QSCL's bills before it, the court has no way of determining that the fees and expenses incurred by QSCL and the Receiver are reasonable and necessary, or that the hourly rate charged by the Receiver and QSCL are within the normal and customary rate for services for attorneys in the Dallas legal community with similar experience, ability and competence to that of the QSCL attorneys in this case.

Id. at *2. "In short, at this point, based on the Receiver's applications, the court does not have sufficient information before it to award the Receiver the relief he seeks." *Id.* The Court thus denied Receiver's fee applications.

Receiver's fee application here is just as unsupported as was his application in *Megafund*. Receiver wholly fails to perform any lodestar calculation, choosing to refer the Court to the billing records. As was explained to Receiver in *Megafund*, the billing records alone do not constitute a lodestar analysis, because they fail to show that the hours expended were reasonable and that the rates charged were reasonable. *See id.* Overall, the amount requested here – $480,093.32 for seven months of work, or $68,584.76 per month – exceeds the range of reasonableness on its face, considering the work done in this case since that time. In fact, over the year and a half since Receiver was appointed, he has generated over $1.5 million in fees and expenses on this receivership alone.

Receiver was appointed as an officer of the Court, entrusted to preserve and maintain the property rightfully belonging to the investors. *See Crites, Inc., v. Prudential Ins. Co. of America*, 322 U.S. 408, 414 (1944) ("As a co-receiver in charge of collecting the rents and operating the farms, Simkins was also an officer or arm of the court. He was appointed to assist the court in protecting and preserving, for the benefit of all parties concerned, the properties in the court's custody pending the foreclosure proceedings."). He is not entitled to deal with the property under his control in such a way so as to benefit himself and his associates. *See id.* ("He was not free to deal with the property under his control as co-receiver in such a way as to benefit himself or his associates."). Receiver's lucrative year and a half hardly appears to be the exercise of an officer of the Court's ministerial duty to preserve the investors' property; rather, it appears to be a misuse of the property entrusted to his control. And Receiver's alleged "exceptional" efforts do not support such large fees and expenses. *See, e.g. SEC. v. Funding Resource Group*, No. 3-

98-2689-M, 2004 WL 2583636, at *1 (N. D. Tex. Nov. 12, 2004) (recommending award of $2.7 million to Michael J. Quilling and QSCL for **five years** of work, which resulted in approved claims of more than $28 million); *Matter of Lawler*, 807 F.2d 1207, 1213-14 (5th Cir. 1987) (total award of $1.4 million was reasonable fee to be awarded to attorneys for receiver and trustee for nine years of work in which over $29 million was made available for estate and in which creditors' claims of approximate $14 million would be satisfied in full, where case had begun as "no asset" case and progressed to "full payout" case directly due to efforts of attorneys). Receiver's fees in this case far exceed any bounds of reasonableness. This Court should follow Judge Lindsay's ruling and deny Receiver's fee application for the same reasons as explained in *Megafund*. *See id.*; *see also Dibler v. Metwest, Inc.*, 1997 WL 222910, at *7 (N.D. Tex. Apr. 29, 1997) (significantly reducing fees because of no supporting documentation).

C. Receiver's Fee Application Reflects Unreasonable Hours and Seeks Fees for Work Unrelated to this Case

If the Court is inclined to review Receiver's deficient fee application, the Court should significantly reduce the amount of fees and expenses requested. Receiver has the burden to demonstrate the reasonableness of the fees requested, a component of which is a showing that he exercised "billing judgment" in writing off unproductive, excessive or redundant hours. *Walker v. HUD*, 99 F.3d 761, 769 (5th Cir.1996). There is no evidence that Receiver exercised any billing judgment, as the records are replete with excessive, vague, and unrelated entries.

1. ***Excessive Hours***

a. Hours for Obtaining and Selling Vehicles are Excessive

Receiver requests an exorbitant amount of fees for handling and selling the LaMondas' vehicles. Michael J. Quilling billed $400/hour for approximately 15 hours of driving vehicles and showing them to potential buyers. He asks for $6,000 from the receivership estate for doing so. He also billed 5 hours for talking to potential buyers of the vehicles over the telephone and preparing motions for sale of vehicles, for which he asks for $2,000. Mr. Quilling's associate, Brent Rodine, whose rate is $210/hour, billed 26.2 hours for driving the vehicles and meeting with potential buyers, resulting in a charge to the receivership estate of $5,502. Additionally, Mr. Rodine's entries reflect 22.2 hours for work to obtain titles to the vehicles and drafting motions to sell the vehicles, for which $4,662 is sought from the receivership estate. These hours are excessive, do not constitute work requiring the skills of a named partner or other attorney, and appear to be redundant and duplicative.

The billing records also reflect legal assistant entries of 7.30 hours, at $135/hour for driving vehicles, resulting in $985.50 in requested fees. Altogether, Receiver seeks over $19,000 to effect the sale of the seized vehicles. Receiver offers no justification for why obtaining possession of these vehicles and marketing them for sale required a combined effort of **67.4 hours of attorney time, billed at $400 or $210 per hour**, plus additional legal assistant time. It is unreasonable for Receiver to not exercise sound billing judgment, especially as excessive actions such as this operate to deplete the receivership estate.

b. Excessive Hours for Allegedly "Updating Web Sites"

A substantial number of time entries are also claimed for work allegedly done in updating Receiver's English and Chinese language Web sites. In particular, Brent Rodine claims to have spent **64.10** hours since August 10, 2007 updating both Web sites. At $210/hour, this represents $13,440 requested from the receivership estate. Yet, the Web site used by Receiver – www.secreceiver.com – contains ***only one*** investor update issued since August 10, 2007, the beginning date of the claimed Web site "updates." Other work done on that Web site merely shows a few pages of single-line references to filings in this case and related cases, with links to PDFs of the filings. The claim that 64.10 hours was reasonably expended for such work is indefensible, and the Court should reject outright this aspect of the request for fees.

2. *Excessive and Vague Hours*

Numerous time entries are also excessive and severely deficient in their descriptions. A failure to accurately describe the work performed and show that it was performed for this particular case warrants rejection of these fees. *See LULAC v. Roscoe ISD*, 119 F.3d 1228, 1233 (5th Cir. 1997) (holding that the trial court may reduce or eliminate hours for which documentation is vague or incomplete). The Fifth Circuit has instructed that entries such as "research and review of cases" are too vague to be credited. *See id.*

The predominant number of these entries are for work allegedly done by Receiver, D. Dee Raiborn (a shareholder at QSCL, charging $310/hour), and Leslie D. Finn (a legal assistant at QSCL, charging $135/hour). Almost all of Receiver's 100+ time entries contain vague entries for responding to investors' emails or telephone calls,

describing his work as "Review and respond to email correspondence" (08/31/2007), "Review and respond to numerous case emails" (08/22/2007; 08/23/2007; 08/24/2007; 08/27/2007; 08/29/2007; 10/04/2007; 10/05/2007; 10/29, 2007; 11/16/2007; 11/19/2007), "review and respond to numerous emails" (10/30/2007), "Review and respond to various emails" (11/20/2007), or "Review and respond to case emails" (08/28/2007; 08/30/2007; 2/08/2008). These entries show no relation to any particular case, and there is no evidence linking these entries to this case or any related cases.

Just as egregious are the numerous fatally vague and excessive entries made by D. Dee Raibourn and Leslie D. Finn. A multitude of Mr. Raibourn's entries are insufficiently described as "Attention give to sale of case assets" (08/02/2007; 08/08/2007), "Attention given to valuation of portfolio" (08/02/2007; *see also* 08/03/2007; 08/06/2007; 08/08/2007), "Review and respond to general case correspondence" (08/02/2007; 08/10/2007), "Review of claims" (08/03/2007; 08/06/2007; 08/14/2007), "Attention given to portfolio valuation" (08/06/2007). These are representative samples of the entries; Mr. Raibourn's vague entries are numerous and consistently insufficient throughout the billing records. These entries range from about 1 hour to 5 hours ***each***. All of these entries should be denied as excessive and vague. *See LULAC*, 119 F.3d at 1233.

3. *Work Entirely Unrelated to this Case*

Receiver and Brent Rodine also have several time entries for assisting an insurance company in its separate litigation against E&J. That litigation has nothing to do with the SEC's action against ABC Viaticals, Inc. or the reasons for Receiver's appointment. The billing records contain the following entries:

Date	Billing Person	Entry	Time
08/24/2007	BR	Telephone conference with counsel for insurance company suing Erwin & Johnson and conduct fact investigation regarding same	1.0
08/27/2007	BR	Numerous telephone calls with counsel for insurance company suing Erwin & Johnson	.4
08/28/2007	MJQ	Meeting with counsel for Plaintiffs suing Erwin & Johnson	1.0
08/31/2007	BR	Telephone call with counsel for insurance company suing Chris Erwin and collect additional documents requested by same	.4
09/07/2007	BR	Numerous telephone call and correspondence with counsel for insurance company in litigation with Erwin & Johnson and collect documents requested by same	.6
10/01/2007	BR	Correspondence with counsel for insurance company regarding request for documents produced to SEC by Erwin & Johnson	.2
10/03/2007	BR	Numerous correspondence with counsel for insurance company regarding their request for various receivership records	.4
10/19/2007	DDR	Review of subpoena from Amerus Life Insurance (.3); Meeting with Receiver regarding same and various case issues (.3); Telephone conference with Jay Gandhi regarding subpoena from Amerus Life (.4); Draft e-mail to same regarding same (.2); Draft e-mail to Harold Loftin regarding subpoena from Amerus Life (.2); Left voice message for same regarding same (.1)	3.20
12/27/2007	BR	Fact investigation regarding other lawsuit involving Erwin & Johnson	.4
01/28/2008	BR	Numerous telephone call with counsel involved in separate litigation against Erwin & Johnson regarding various discovery issues	.4
02/18/2008	BR	Numerous telephone conferences with counsel for third party that requested receivership records relating to Erwin & Johnson and fact investigation regarding	.5

		same	
Total Hours			**8.5 hours**

Perhaps what is most troubling is that these entries also reflect Receiver's disclosure of Mr. Erwin's confidential deposition testimony and protected documents provided to the SEC in E&J's assistance with this investigation in this case. This information was provided specifically in accordance with the statutory protections afforded by 17 U.S.C. § 200.83, 18 U.S.C. § 1905, and is exempt from mandatory disclosure under the Freedom of Information Act (5 U.S.C. § 552(b)(4)). Thus, not only has Receiver violated the statutory confidentiality of this information, for which he should be sanctioned, but he now seeks to be compensated for doing so ***by the investors.*** While the amount of improperly billed hours here is relatively small, Receiver's decision to bill for these hours at all raises serious concern about the propriety of Receiver's billing practices as a whole. Receiver's attempt to have these efforts funded by the receivership estate should be rejected.

Without evidence of billing judgment exercised by counsel, the Court may either reduce the hours by a percentage or conduct a line-by-line analysis of the bill and reduce the total hours accordingly. *Green v. Administrators of the Tulane Educ. Fund*, 284 F.3d 642, 662 (5th Cir.2002). Based on the above, E&J and Mr. Erwin request that the Receiver's fee application be denied outright. Alternatively, a 70% reduction in the claimed hours would represent a reasonable number of hours expended for work in this case.

4. *No Proof that Hourly Rates are Reasonable*

The hourly fee awarded must be supported by the record; the district court may not simply rely on its own experience in the relevant legal market to set a reasonable hourly billing rate. *See LULAC*, 119 F.3d at 1234 (citing *Cobb v. Miller*, 818 F.2d 1227, 1232 & n.7 (5th Cir. 1987) (noting that a magistrate judge should not have considered his personal experience in setting a reasonable hourly rate); *cf. Powell v. Commissioner of Internal Revenue*, 891 F.2d 1167, 1173 (5th Cir. 1990) (reversing an hourly rate set by the tax court because the court "did not explain any evidentiary basis for its determination that the hourly rate should be limited")).

Receiver states, in conclusory fashion and without any evidentiary support, that the hourly rates charged by Michael J. Quilling, James Moody, Chuck Baum, D. Dee Raibourn, Ken Hill, and Brent Rodine are commensurate with or lower than rates charged by others in the Northern District of Texas. (Fee App. at 5). There is no evidence that these hourly rates are reasonable in this district. Moreover, Receiver failed to even state that the hourly rates of any of the legal assistants he seeks fees for are reasonable. Further, Ken Hill does not appear in Receiver's billing records. Thus, there is nothing before the Court to show that any of the hourly rates are actually reasonable for the specific individuals who appear in the billing records. Receiver failed to carry his burden in this regard, as well. *See Hensley*, 461 U.S. at 433; *Riley*, 99 F.3d at 760 ("The fee applicant bears the burden of proving that the number of hours and the hourly rate for which compensation is requested is [sic] reasonable.").

D. *Johnson* Factors Do Not Support Upwardly Adjusting Fee Application

Receiver's fee application is based entirely on the Johnson[3] factors. If the Court does not deny Receiver's application, it certainly should not upwardly adjust the lodestar amount according to the *Johnson* factors, which are:

(1) The time and labor required,
(2) The novelty and difficulty of the questions,
(3) The skill requisite to perform the legal service properly,
(4) The preclusion of other employment by the attorney due to acceptance of the case,
(5) The customary fee,
(6) Whether the fee is fixed or contingent,
(7) Time limitations imposed by the client or the circumstances,
(8) The amount involved and the results obtained,
(9) The experience, reputation, and ability of the attorneys,
(10) The "undesirability" of the case,
(11) The nature and length of the professional relationship with the client, and
(12) Awards in similar cases.

Johnson, 488 F.2d at 717-19. None of the *Johnson* factors support updwardly adjusting the lodestar calculation.

The first factor – upon which Receiver primarily relies – is necessarily included in the lodestar and cannot be double counted. *Walker v. U.S. Dep't of Hous. and Urban Dev.*, 99 F.3d 761, 771 (5th Cir. 1996). Thus, the Court can ignore factor (a) in the fee application. Likewise, a court may not use the sixth and seventh factors, whether the fee is fixed or contingent and the time limitations imposed by the client or the circumstances to enhance a fee. *Id.* at 772. The Court can therefore bypass factors (f) and (g) in the fee application.

[3] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

Furthermore, the Supreme Court has significantly restricted the use of the novelty and difficulty of the question; the skill requisite to perform the legal services properly; the experience, reputation, and ability of the attorneys; and the amount involved and the results obtained (the second, third, eight, and ninth factors) to serve as an independent basis to enhance the lodestar. *Delaware Valley*, 478 U.S. at 565. Receiver focuses his application on these factors. But these factors are "presumed" to be fully reflected in the lodestar calculation. *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993) (noting that after lodestar has been determined District Court may adjust lodestar up or down for relevant *Johnson* factors not already included in lodestar being careful not to double count *Johnson* factors). That one acts with expertise in a complicated case does not automatically warrant a bonus. *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1257 (5th Cir. 1986). Receiver is certainly not entitled to a bonus here, where the billing records reflect excessive fees for unspecified and unnecessary work. Consequently, the Court should not upwardly adjust the reduction in Receiver's lodestar amount pursuant to Receiver's factors (b), (c), (h), and (i).

By Receiver's own admission, factors 4, 10, 11 (Receiver's factors (d), (j), and (k)), do not support upward adjustment. Finally, there is no evidence at all to support Receiver's belief that the awards in similar cases have been equal to or more than the $450,000 that Receiver requests here for seven months of work. As a result, no upward adjustment of Receiver's fee application is warranted.

E. Conclusion

For the reasons set forth herein, the Court should deny Receiver's Third Interim Fee Application. Alternatively, the Court should reduce the fee application by 70%, which represents a true reasonable fee request, and not upwardly adjust that amount. E&J and Mr. Erwin also ask the Court to reconsider, *sua sponte*, the Court's orders granting the First Interim Fee Application and the Second Interim Fee Application for much the same reasons as elucidated above. The fee applications made the subjects of those orders are likewise deficient, excessive, and unwarranted.

WHEREFORE, PREMISES CONSIDERED, Erwin & Johnson, LLP and Christopher R. Erwin request that the Court deny or, alternatively, significantly reduce Receiver's Third Interim Application to Allow and Pay (1) Receiver's Fees and Expenses and (2) Attorneys' Fees and Expenses and Brief in Support., and that the Court reconsider and deny or similarly reduce Receiver's First Interim Fee Application and Second Interim Fee Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 4th day of April 2008, to all known counsel of record as required by the Federal Rules of Civil Procedure.

William J. Akins