IN THE UNIFIED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for ABC VIATICALS, INC., and Related Entities,	)	
Plaintiff,	)	**Civil Action No. 3:07-CV-1153-P**
v.	)	
	)	**ECF**
ERWIN & JOHNSON, LLP, and CHRISTOPHER R. ERWIN,	)	
Defendants.	)	

MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6) AND 9(B); ALTERNATIVELY, MOTION FOR MORE DEFINITE STATEMENT BY DEFENDANTS

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6) AND 9(B); ALTERNATIVELY, MOTION FOR MORE DEFINITE STATEMENT

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

Pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), Erwin and Johnson, LLP ("E&J"), and Christopher R. Erwin ("Mr. Erwin") (collectively, "Defendants"), move to dismiss the Complaint filed by Plaintiff Michael J. Quilling, as Receiver ("Quilling") for ABC Viaticals, Inc., and other Related Entities (collectively, "ABC"), or, alternatively, move for a more definite statement under Federal Rule of Civil Procedure 12(e), and in support show:

I. INTRODUCTION AND SUMMARY

None of Quilling's claims can stand the legal scrutiny into whether they are plausible claims. They are fatally flawed exactly because of how they are pleaded: for the investors, against an individual defendant and an entity defendant without differentiation, all under the guise of doing what a corporation-in-receivership could do.

Each claim fails on at least one element. The Court should, therefore, dismiss these claims under Federal Rule of Civil Procedure 12(b)(6).

A further reason for dismissal is that Quilling's claims, as they are pleaded, all sound in fraud. At the heart of Quilling's claims is that Defendants defrauded ABC's investors. As a result, all claims are subject to the particularized pleading requirement in Federal Rule of Civil Procedure 9(b). The Court should dismiss these claims because Quilling failed to plead them with the requisite particularity. Alternatively, under Federal Rule of Civil Procedure 12(e), the Court should require Quilling to replead all non-dismissed claims to identify the specific allegedly fraudulent acts committed by Mr. Erwin individually versus E&J, if any, and identify which claims are against which defendant in which manner.[1]

II. QUILLING FAILS TO STATE CLAIMS FOR RELIEF

A. Standard for Dismissal Under Rule 12(b)(6)

A court must find plausibility in a plaintiff's complaint to deny a Rule 12(b)(6) motion. *See Bell Atlantic Corporation v. Twombly*, 127 S.Ct. 1955, 1968-69 (2007) (rejecting *Conley v. Gibson*, 355 U.S. 41 (1957)'s "no set of facts" version of the standard). To survive a 12(b)(6) motion, a plaintiff must not make mere conclusory allegations, but must instead plead specific *facts*. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). A court must look solely at the pleadings themselves. *Jackson v. Procunier*, 789 F.2d 307, 309-10 (5th Cir. 1986). Dismissal is appropriate where the plaintiff merely makes conclusory allegations or unwarranted deductions of fact. *United*

[1] The relevant factual background is recited in Defendants' motion to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1). Defendants hereby incorporate that recitation of the relevant factual background, *but not the evidence referenced therein*, into this motion as it relates to the arguments herein.

States ex rel. Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 379 (5th Cir. 2003). Likewise, dismissal is appropriate where the plaintiff makes no allegations regarding a required element of the asserted claim. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

B. Claims Asserted Against E&J and Mr. Erwin Individually

Quilling appears to improperly assert the same claims against E&J and Mr. Erwin individually without differentiation. These six claims are:

(1) Breach of contract;

(2) Breach of fiduciary duty, and aiding and abetting breach of fiduciary duty;

(3) Aiding and abetting corporate waste;

(4) Professional malpractice/negligence;

(5) Gross negligence; and

(6) Fraudulent transfer.

(Compl. at 7-13). Other "counts" –exemplary damages and constructive trust and disgorgement – do not appear to be, or are not pleaded as, claims, but as types of relief to be gained by the substantive claims asserted. The substance of Quilling's claims is governed by California law.

C. Quilling Fails to State Plausible Claims Against Either Defendant

Quilling asserts all claims on behalf of ABC's investors, makes mere conclusory allegations instead of pleading specific facts, and fails to make allegations as to each and every required element of his claims. Many of the same arguments that refute standing apply with equal force to show that Quilling has failed to sufficiently state a claim. Dismissal is, therefore, not only appropriate, but necessary for all of Quilling's claims.

See See Twombly, 127 S.Ct. at 1968-69; *Humana Health Plan of Tex. Inc.*, 336 F.3d at 379; *Blackburn*, 42 F.3d at 931.

1. *Quilling Fails to State Plausible Claims for Breach of Fiduciary Duty or Aiding or Abetting Breach of Fiduciary Duty*

For several reasons, Quilling fails to state plausible claims for breach of fiduciary duty or aiding or abetting breach of fiduciary duty against Defendants. As an initial matter, Quilling's "aiding and abetting" claim is barred for failure to satisfy California Civil Code § 1714.10, which requires that a party asserting a cause of action against an attorney for civil conspiracy must establish a reasonable probability that the party will prevail and obtain an order from the court allowing the claim to be filed. *See* CALIF. CIV. C. § 1714.10(a). Quilling has entirely failed to comply with this requirement. As a consequence, any claim for "aiding and abetting" should be dismissed.

a. No Plausibility in Asserting this Claim Against E&J

Quilling's claims for breach of fiduciary duty and aiding and abetting same should be dismissed for additional reasons. "To establish a cause of action for breach of fiduciary duty, a plaintiff must demonstrate the existence of a fiduciary relationship, breach of that duty and damages." *Charnay v. Cobert*, 145 Cal. App. 4th Dist. 170, 182 (Cal. Ct. App. 2006).

In addition to Quilling's lack of standing to assert these claims, there is no basis for contending that E&J breached any fiduciary duty to ABC's investors. *See Stanley*, 35 Cal. App. 4th at 1086. E&J complied with all of its fiduciary duties and obligations to ABC's investors. The Court is not bound to accept Quilling's contrary legal conclusion that E&J breached a fiduciary duty. *Twombly*, 127 S.Ct. at 1965; *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a

legal conclusion couched as a factual allegation"). Perhaps most importantly, though, there were no damages. No action by E&J proximately caused damages to ABC or its investors. Indeed, all premiums were paid on time and a policy never lapsed during E&J's tenure. To the extent that Quilling alleges any such damaging actions by E&J, these allegations are purely false and should not be considered as plausible support for Quilling's claims. Thus, Quilling has failed to state a claim upon which relief can be granted for breach of fiduciary duty or aiding or abetting breach of fiduciary duty against E&J.

b. No Plausibility in Asserting this Claim Against Mr. Erwin Individually

If this claim is asserted against Mr. Erwin, it fails for even more reasons. Initially, it does not appear that these claims were asserted against Mr. Erwin individually. Quilling alleges: "Erwin & Johnson breached its fiduciary duties by virtue of the conduct described above." (Compl. at ¶ 28). Quilling does not allege that Mr. Erwin owed a fiduciary duty to ABC, that he breached it, and caused ABC damages. Quilling's pleading fails to state a plausible claim against Mr. Erwin individually. These claims should, therefore, be dismissed. *See Twombly*, 127 S.Ct. at 1968-69; *Humana Health Plan of Tex. Inc.*, 336 F.3d at 379; *Blackburn*, 42 F.3d at 931.

2. *Quilling Fails to State Plausible Claim for Aiding and Abetting Corporate Waste*

Once again, Quilling's "aiding and abetting" claim is barred for failure to satisfy California Civil Code § 1714.10. That section requires that a party asserting a cause of action against an attorney for civil conspiracy with his client must establish a reasonable probability that the party will prevail and obtain an order from the court allowing the claim to be filed. *See* CALIF. CIV. C. § 1714.10(a). Quilling has entirely failed to comply

with this requirement. As a consequence, any claim for "aiding and abetting" should be dismissed.

a. No Plausibility in Asserting this Claim Against E&J

This claim is untenable against E&J. Under California law, the "corporate waste" claim is derivative of a corporation's director's or officer's fiduciary responsibilities to the corporation's shareholders. *See, e.g., Goldstein v. Robinson*, 2005 WL 1898564, at * 2 (Cal. App. Dep't. Super. June 20, 2005). A corporation's director or officer owes a fiduciary duty to the corporation's shareholders, and such duty includes not diverting the corporation's assets for improper or unnecessary purposes. *See Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979) ("The essence of a claim of waste of corporate assets is the diversion of corporate assets for improper or unnecessary purposes."). It is, essentially, a way for a shareholder to enforce a corporate officer's fiduciary duty to the shareholder. *See id.*

This claim is implausible as against E&J for several reasons. First, because this species of claim is reserved for a corporation's shareholders, it fails on the face of Quilling's pleading because E&J was neither a director nor an officer of ABC, nor were the investors equal to shareholders. *Cf. Goldstein*, 2005 WL 1898564, at * 2; *Michelson*, 407 A.2d at 217. Second, Quilling confuses this claim: "the conduct of ABC constituted corporate waste as to both ABC and each of the Trusts." (Compl. at ¶ 37). A corporation does not waste assets; a director or officer of the corporation wastes assets to the detriment of a shareholder. *See, e.g., Goldstein*, 2005 WL 1898564, at * 2; *Michelson*, 407 A.2d at 217. Quilling also confuses the corporate waste theory by alleging that the *trusts* were harmed by the waste. (Compl. at ¶ 37). That is tantamount to alleging that a

corporation's stocks were harmed by waste, not the stockholders. Here, it is also a ruse that Quilling uses to avoid asserting that he is making this claim for the investors directly. At any rate, this claim is clearly inapplicable to E&J.

b. No Plausibility in Asserting this Claim Against Mr. Erwin Individually

Quilling's claim fails for additional reasons, even if it is asserted against Mr. Erwin individually. Given the vagueness of Quilling's pleading, it does not appear that this claim is truly asserted against Mr. Erwin individually. Quilling alleges: "Erwin & Johnson knew that the conduct of ABC constituted corporate waste as to both ABC and each of the trusts." (Compl. at ¶ 37). To the extent that it is against Mr. Erwin individually, it is apparent from the Complaint that there is no plausible basis for contending that Mr. Erwin individually aided and abetted in the diversion of ABC's assets by an officer or director of ABC to the detriment of a shareholder of ABC. Because no one involved in this case was a shareholder of ABC, Quilling has failed to assert the applicability of this claim to either defendant. Consequently, Quilling fails to state a claim upon which relief can be granted and this claim should be dismissed. *See Twombly*, 127 S.Ct. at 1968-69; *Humana Health Plan of Tex. Inc.*, 336 F.3d at 379; *Blackburn*, 42 F.3d at 931.

3. *Quilling Fails to State a Plausible Claim for Professional Negligence*

Quilling fails to state a plausible claim for professional negligence claims against Defendants. The elements of a cause of action for professional negligence are: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his [or her] profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and

(4) actual loss or damage resulting from the professional's negligence." *Budd v. Nixen*, 6 Cal.3d 195, 200 (Cal. 1971).

a. No Plausibility in Asserting this Claim Against E&J

Quilling fails to state plausible claim for professional negligence against E&J. An "attorney's liability for professional negligence does not ordinarily extend beyond the client except in limited circumstances." *Osornio v. Weingarten*, 124 Cal. App. 4th 304, 320. (Cal. Ct. App. 2004). "[W]hen a fiduciary hires an attorney for guidance in administering a trust, the fiduciary alone, in his or her capacity as fiduciary, is the attorney's client." *Borissoff v. Taylor & Faust*, 33 Cal. App. 4th 523, 529 (Cal. Ct. App. 2004). Here, this negligence claim is being brought for the investors themselves: "Those acts proximately caused injury and damage to each of the Trusts, for which amount the Receiver hereby sues." (Compl. at ¶ 42). Neither the trusts nor the investors were E&J's client. Only the client can assert a claim for professional negligence. Quilling has not alleged harm to ABC, but to the trusts, which are really the supposed vehicles for harm to ABC's investors.

Quilling provides only conclusory statements to support his claims for professional negligence. These conclusory statements do not suffice to state *facts* for professional negligence. With no attorney/client relationship between those that were allegedly harm (the investors) and the attorneys (E&J), there is no basis for professional negligence. *See Budd*, 6 Cal. 3d at 200.

b. No Plausibility in Asserting this Claim Against Mr. Erwin Individually

This claim, if it is even asserted against Mr. Erwin individually, is all the more untenable as against him. No one hired Mr. Erwin individually, certainly not the

investors. Thus, there was no attorney/client relationship that caused Mr. Erwin to owe anyone a professional duty for which he would be individually responsible. Much less is it even apparent, or plausible, in Quilling's Complaint as to how Mr. Erwin individually breached any duty, proximately causing a purported client's injuries. These elements are required for an individual attorney's professional negligence. *See Budd*, 6 Cal.3d at 200. Because they are absent here, the Court should dismiss this claim. *See Twombly*, 127 S.Ct. at 1968-69; *Humana Health Plan of Tex. Inc.*, 336 F.3d at 379; *Blackburn*, 42 F.3d at 931.

Similarly, Quilling has failed to state a plausible claim for gross negligence. Gross negligence is "'the want of even scant care or an extreme departure from the ordinary standard of conduct.'" *Cooper v. Board of Medical Examiners*, 49 Cal. App. 3d 931, 941 (Cal. Ct. App. 1975). Without negligence, there can be no gross negligence.

4. *Quilling Fails to State a Plausible Claim for Fraudulent Transfer*

Quilling also fails to state a plausible claim for fraudulent transfer against Defendants. "A fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim." *Yaesu Electronics Corp. v. Tamura*, 28 Cal. App. 4th 8, 13 (Cal. Ct. App. 1994).

a. No Plausibility in Asserting this Claim Against E&J

As an initial matter, there was no conveyance, fraudulent or otherwise, by Mr. Erwin or E&J to ABC. At its heart, this claim seeks to recover funds belonging to the investors – who, it bears repeating, are not receivership entities. Quilling fails to plead

that Defendants transferred property fraudulently with the intent to hinder, delay, and defraud "creditors" of itself.

This claim certainly fails because ABC received "reasonably equivalent value" for its transfers to E&J (namely, the value of E&J's services). Thus, there is no tenable claim for fraudulent transfer. *See, e.g., Annod Corp. v. Hamilton & Samuels*, 100 Cal. App. 4th 1286, 1294 (Cal. Ct. App. 2002) ("If the debtor received reasonable equivalent value, the inquiry ends there."). Moreover, it seems as if Quilling is asserting this claim against ABC, and claiming that ABC's transfers to E&J were fraudulent. If so, Quilling still fails to apprehend that ABC had no "creditors" at the time that it rightfully and lawfully paid E&J's management fees.

b. No Plausibility in Asserting this Claim Against Mr. Erwin Individually

To the extent that this claim is actually asserted against Mr. Erwin individually, it is certainly not plausible. There are no plausible allegations that could show that Mr. Erwin individually fraudulently transferred any funds from ABC. **As explained at length, Mr. Erwin did not act in an individual capacity with respect to any involvement with ABC.** If Quilling alleges that Mr. Erwin did, no such allegations are plausible. Ultimately, because Quilling fails to state a claim upon which relief can be granted, the Court should dismiss Quilling's fraudulent transfer claim. *See Twombly*, 127 S.Ct. at 1968-69; *Humana Health Plan of Tex. Inc.*, 336 F.3d at 379; *Blackburn*, 42 F.3d at 931.

5. *Quilling Fails to State a Plausible Claim for Breach of Contract*

Quilling alleges: "Erwin & Johnson breached those contracts by failing to perform their written obligations under the Trust Agreements." (Compl. at ¶ 23). Under

California law, a claim for breach of contract requires: (1) a contract, (2) plaintiff's performance, (3) defendant's breach, and (4) damages. *See Poseidon Development, Inc. v. Woodland Lane Estates, LLC*, 152 Cal. App. 4th 1106, 1112 (Cal. Ct. App. 2007).

a. No Plausibility in Asserting this Claim Against E&J

This claim fails under Rule 12(b)(6) for some of the same reasons that Quilling lacks standing to assert this claim: it cannot, by its elements, be asserted against Defendants by ABC or even the investors.

First, there is no allegation of an express contract between E&J and the investors. Thus, the first element fails. Second, according to Quilling himself, ABC *did not perform the contracts*, but rather breached them. (Compl. at ¶ 48). Thus, the second element fails. The third element fails because any allegation of breach is fully contradicted by the contracts themselves and the evidence in the underlying SEC Action. And E&J was contractually and legally bound to abide by its trustee/escrow agreements with ABC. *See Estate of Bothwell*, 65 Cal. App. 2d 598, 683 (Cal. 1944). Defendants could not have substituted their own judgment should they have thought that it was a better course of action. *See id.* But even if they could have, there was no premium shortfall during E&J's tenure. No matter how Quilling couches it, there simply was no breach.

Finally, the fourth element also fails because ABC suffered no damages, and the investors stand to suffer no damages. An assertion of damages to ABC's **investors** is not an assertion of damages to ABC. Quilling has claimed that the investors stand to profit from the current receivership estate: "the total amount of money invested is

$115,635,072" and "those claimants expect to receive a total of $225,865,285.00 of death benefits." Thus, the fourth element fails.

b. No Plausibility in Asserting this Claim Against Mr. Erwin Individually

In addition to the above reasons, if this claim is even against Mr. Erwin individually, it is simply not plausible. Quilling alleges: "Erwin & Johnson breached those contracts by failing to perform their written obligations under the Trust Agreements." (Compl. at ¶ 23). As Quilling knows, Mr. Erwin was not a signatory party to any of these agreements in his personal capacity, so he could not have breached either of these contracts. Corporate officers are not liable for acts solely because they are officers, even where their day-to-day involvement in the corporation is pleaded. *See Financial Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 287 (5th Cir. 2006). Under any formulation of Quilling's breach of contract claim, then, it fails to be plausible. Thus, because Quilling fails to satisfy at least one element of this claim as to either defendant, this claim should be equally dismissed under Rule 12(b)(6). *See Twombly*, 127 S.Ct. at 1968-69; *Humana Health Plan of Tex. Inc.*, 336 F.3d at 379; *Blackburn*, 42 F.3d at 931.

D. Quilling's Claims Should be Dismissed Because Quilling has Failed to Plead Them with Particularity, as Required by Federal Rule of Civil Procedure 9(b)

Quilling's claims, as a whole, should be dismissed for an additional reason. His breach of contract, fraud, breach of fiduciary duty (aiding and abetting same), aiding and abetting corporate waste, malpractice/negligence, and fraudulent transfer all sound in fraud and thus must be pleaded with particularity pursuant to Federal Rule of Civil

Procedure 9(b). Quilling has failed to do so. Accordingly, these claims should be dismissed.

1. ***Standard for Pleading under Rule 9(b)***

All claims alleging fraud or sounding in fraud must be "stated with particularity." Federal courts have analogized fraud pleading to "the first paragraph of any newspaper story," requiring "the who, what, when, where, and how" of the circumstances with respect to each and every defendant alleged to have committed fraud. *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (11th Cir. 1990); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1422 (3d Cir. 1997); *Kanter v. Barella*, 2007 WL 1519894, at *2 (3d Cir. May 25, 2007). The Fifth Circuit has a "relatively strict interpretation" of Rule 9(b), under which a plaintiff must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d336, 349 (5th Cir. 2002). This requirement applies to federal and state law claims. *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997).

When a claim involves multiple defendants, a plaintiff cannot simply group the defendants together, but must make specific and separate allegations against each particular defendant. *E.g. Zuckerman v. Foxmeyer Health Corp.*, 4 F. Supp. 2d 618, 622 (N.D. Tex. 1998). The plaintiffs must identify the roles of the individual defendants, and describe their independent involvement, if any, in preparing the misleading statements. *Southland Securities Corp. v. Inspire Insurance Solutions Inc.*, 365 F.3d 353, 364 (5th Cir. 2004); *Fener v. Belo Corp.*, 425 F. Supp. 2d 788, 796 (N.D. Tex. 2006). Thus, for the alleged fraud, Quilling must distinguish between Defendants and describe the

respective role, if any, of each. *See Financial Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 287 (5th Cir. 2006); *Fener*, 425 F. Supp. 2d at 798. Corporate officers are not liable for acts solely because they are officers, even where their day-to-day involvement in the corporation is pleaded. *Financial Acquisition Partners LP*, 440 F.3d at 287; *Fener*, 425 F. Supp. at 798.

2. *All Claims Sound in Fraud and Must be Dismissed for Lack of Particularity Pleading*

All of Quilling's claims have as their fulcrum the allegation that Defendants defrauded ABC's investors by failing to properly fund the premium account. Even if the claims themselves do not necessitate proof of fraud, the manner of Quilling's pleading inextricably interweaves fraud into every claim because Quilling "incorporates" all prior allegations into each claim. *See Ingalls v. Edgewater Private Equity Fund III, L.P.*, No. H-05-1392, 2005 WL 2647962, at *5 (S.D. Tex. Oct. 17, 2005) (recognizing that when fraudulent conduct is alleged as the exclusive genesis of claims, Rule 9(b)'s particularity requirement applies). Quilling has failed to plead these claims with the particularity called for by Rule 9(b). As such, these claims should be dismissed.

"'[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th 603, 612-613 (Cal. Ct. App. 1992); *accord*

Linear Technology Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 131 (Cal. Ct. App. 2007).

Quilling has not pleaded "the who, what, when, where, and how" of the circumstances with respect to each and every defendant alleged to have committed fraud. *See DiLeo*, 901 F.2d at 627. Quilling has not pleaded with particularity how both Defendants independently concealed or suppressed a material fact that either was under a duty to disclose to ABC. Nor has Quilling pleaded with particularity that either of Defendants intentionally concealed or suppressed the fact with the intent to defraud ABC, that ABC must have been unaware of the fact, and that it would not have acted as it did if it had known of the concealed or suppressed fact. Finally, Quilling has failed to plead with particularity that, as a result of the concealment or suppression of the fact, ABC sustained damage. *See Marketing West, Inc.*, 6 Cal. App. 4th at 612-613; *see also Linear Technology Corp.*, 152 Cal. App. 4th at 131. The pleading deficiencies are even more apparent if Quilling attempts to say that Defendants defrauded the trusts themselves. Due to Quilling's failure to plead all of his fraud-based claims with particularity, all of his claims must be dismissed.

E. Alternatively, Motion for More Definite Statement Under Rule 12(e)

If the Court is inclined not to dismiss all claims for lack of standing, or to dismiss all claims for failure to state a claim under which relief could be granted, or even to dismiss all claims for failure to plead the claims with particularity, the Court should at least require Quilling to replead his claims. *See* FED. R. CIV. P. 12(e) (permitting motion for more definite statement, so that unspecific, amorphous claims may be stated so that a defendant can answer them). Rule 12(e) provides that a motion for a more definite

statement may be filed "before interposing a responsive pleading." A motion for a more definite statement "is now available only before a responsive pleading is due." 5B Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1341, at 21 (3d ed. 2004).

"When a party moves for a more definite statement under Rule 12(e), the court is granted discretion to determine whether the complaint is so vague that the moving party cannot reasonably be required to frame a responsive pleading." *Chapman v. Dallas County Cmty. Coll. Dist.*, 2006 WL 3442057, at *4 (N.D. Tex. Nov. 29, 2006) (Fish, C.J.) (citing *Mitchell v. E-Z Way Towers, Inc.*, 269 F.2d 126, 130 (5th Cir. 1959)). "Whether to grant a motion for a more definite statement is a matter within the discretion of the trial court." *Russell v. Grace Presbyterian Village*, 2005 WL 1489579, at *3 (N.D. Tex. June 22, 2005) (Solis, J.).

Defendants are entitled to a more definite statement of Quilling's claims. As Quilling's claims now stand, Defendants are unable to discern which claims are asserted against Mr. Erwin individually, and which claims are asserted against E&J, separate from claims asserted against Defendants collectively. Further, all of the claims sound in fraud and are not pleaded with the particularity required by Federal Rule of Civil Procedure 9(b). Thus, as to those claims not dismissed by the Court, if any, the Court should require Quilling to replead those claims under Rule 12(e).

III. CONCLUSION

Quilling fails to state a plausible claim for relief as to every claim asserted against Defendants. As pleaded, all of these claims are asserted for ABC's investors, and thus none of these claims is plausible because every claim fails on at least one element.

Quilling has also failed to plead all claims, which arise out of fraud, with particularity. Thus, all claims must be dismissed. Alternatively, the Court should require that all claims be repleaded.

WHEREFORE, PREMISES CONSIDERED, the Court should grant Defendants' Motion to Dismiss Plaintiff's Complaint, enter an Order dismissing the Complaint, and enter judgment for Mr. Erwin and Erwin & Johnson, LLP. To the extent that the Court does not dismiss all claims, the Court should grant Defendants' Motion for More Definite Statement and require that the remaining claims be repleaded in accordance with the Federal Rules of Civil Procedure and applicable state law.

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 24th day of September, 2007, to all known counsel of record as required by the Federal Rules of Civil Procedure.

E. Stratton Horres, Jr.