UNITED 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 FOR LACK OF STANDING UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) BY DEFENDANTS

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ERWIN & JOHNSON, LLP, and CHRISTOPHER R. ERWIN,	)	**ECF**
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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF STANDING UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) BY DEFENDANTS

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

Pursuant to Federal Rule of Civil Procedure 12(b)(1), 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 Related Entities (collectively, "ABC"), and in support thereof show:

I. INTRODUCTION AND SUMMARY

The law is clear that Quilling as receiver steps into the shoes of ABC, not its investors. Quilling has overstepped his appointment by bringing claims exclusively for the investors. He has no standing to do so. The Court should dismiss these claims for the following reasons.

It is axiomatic that, as an element of this Court's subject matter jurisdiction, the party invoking jurisdiction bears the burden to prove each element of standing. Three

elements constitute the constitutional minimum of standing: (i) an actual and particularized injury in fact; (ii) a causal connection between the injury and the conduct complained of defendants; and (iii) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Each element of standing is absent here.

First, Quilling, as the only named plaintiff, lacks standing because he advances claims solely and entirely on behalf of alleged injuries and damages suffered by ABC's *investors*, not ABC itself. Quilling alleges that "the representations made to the *investors* [were] known by the Defendants to be false" and "the respective *investors* suffered damages proximately caused by the conduct." The Fifth Circuit has held that a receiver does not have representational standing to proceed on behalf of investors.

Second, Quilling lacks standing because his Complaint on its surface negates the casual connection between an injury to ABC, and these Defendants' specific conduct. The gravaman of Quilling's alleged wrongdoing against Defendants is that they failed to "insure [sic] proper funding of a segregated premium escrow account." However, as the SEC unambiguously recognized, "each [written] trust agreement, established to hold the policies on behalf of the investors, states that ABC will 'deposit a sum certain' for the payment of premiums on the policy," *not* Defendants. Quilling has also previously represented to this Court that "ABC, *and ABC alone*, had the responsibility to pay premiums." Where the unambiguous and governing written instrument disproves any alleged wrongful conduct by Defendants, the casual chain of an injury to ABC is necessarily and irreconcilably torn apart.

Third, Quilling lacks standing because this action is premature, as any alleged injury rests on pure speculation and conjecture. Quilling previously represented to this Court, "[g]iven the fact the claims process has not yet begun, the exact amounts of claims is not yet known," but what is known is that "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." In other words, by Quilling's own mathematical calculation, the investors face no injury, but rather stand to earn nearly a 100% profit. The filing and maintenance of this action does not serve to redress any actual and concrete injury, but results only in unnecessary expenses. Accordingly, the Court should dismiss these claims for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1).

II. FACTUAL BACKGROUND

A. SEC Files Civil Action Against ABC, Not Defendants

On November 17, 2006 the Securities and Exchange Commission ("SEC") filed a civil complaint against ABC and its principals C. Keith LaMonda and Jesse LaMonda for alleged violations of federal securities laws (the "SEC Action").[1] ABC was a participant in the viatical and life settlement business focused on purchasing and selling fractionalized ownership interests in life insurance policies.

The SEC Action alleges that ABC and the LaMondas failed to disclose material facts to investors, misappropriated investor funds and failed to adequately calculate and reserve funds for the payment of premiums. E&J, an administrative trustee and escrow agent hired by ABC, cooperated with the SEC during its investigation and has never been accused of any wrongdoing by the SEC or any other governmental agency. To the contrary, the SEC Action clearly places the blame for any wrongful conduct squarely on

[1] *SEC v. ABC Viaticals, Inc.*, No. 3:06-CV-2136-P (N.D. Tex. Dallas Division).

the shoulders of ABC and the LaMondas. The SEC has on numerous occasions expressed its gratitude for E&J's assistance and cooperation with their investigation.

B. ABC's Written Agreements With Escrow and Trust Companies

As part of the business operating structure created by ABC, ABC retained the services of trust/escrow agents to establish and maintain four types of accounts: (i) an escrow account; (ii) a premium account (iii) a maturity account; and (iv) a management fees account. In or about spring 2005, E&J was contacted by Keith LaMonda about potentially serving as a successor trustee/escrow agent for ABC. Mr. LaMonda explained that he was experiencing problems with the quality and speed of the services provided by the then-trustee/escrow agent Mills, Potoczak & Company, and desired to retain the services of a new trustee/escrow agent.

E&J agreed to a limited trustee/escrow relationship with ABC and entered into written agreements providing that E&J would perform specific trustee and escrow services for ABC. E&J and ABC entered into one overall escrow agreement and separate trust agreements for each trust. Section 3c of the Escrow Agreement required that E&J act only on written instructions from ABC; Section 3d absolved E&J of any responsibility for any transaction executed pursuant to ABC's written instructions; and Section 5 reaffirmed that E&J was to have no liability for following ABC's instructions. (Ex. A at 1-2). With respect to the trust agreements, paragraph 9.03 stated that E&J was not liable for any inadequacy or insufficiency of any trust, and Article VII restricted E&J's powers to those specifically set out in the trust – and no others. (Ex. B at 3, 5). The trust agreement clearly provided that ABC solely controlled the allocation of the

investors' funds between accounts and ABC alone had the power to order funding of the premium escrow account:

> **6.01 Payment of Insurance Premiums.** Trustee shall establish a "Policy Premium Payment Account" into which **the Grantor [ABC] will deposit a sum certain for the payment of premiums** on the Policy equal to the term of the bond or the certificate of reinsurance if applicable or the life expectancy of the insured plus 2 years if the Policy purchased has no additional bonding or reinsurance, and from the funds of this account, Trustee shall timely pay all premiums due and owing under the Policy **at the direction of Grantor** or his designee.

(Ex. B at 2) (emphases added). Moreover, paragraph 6.02 stated that the Trustee "shall have no responsibility to fund premium payments should there be insufficient funds remaining to pay on a specific policy." (*Id.*) (emphasis added). Thus, contrary to Quilling's allegations, E&J's written contracts with ABC did ***not*** provide E&J with the right to direct ABC's activities, nor did they require that E&J "insure [sic] proper funding of a segregated premium account." (Compl. at ¶ 13).

Ultimately, then, the trust agreements contractually and unequivocally placed the responsibility of funding the premium account squarely and exclusively upon ABC's shoulders. (Ex B at 2). Also contrary to Quilling's assertions, E&J at no time participated or assisted with marketing to ABC's investors and never performed any legal work for ABC. E&J served in a purely administrative role as trustee/escrow agent.

C. E&J Pressed ABC for Accountability and Pre-Payment of Trustee/Escrow Fees

Several months after E&J was hired by ABC to provide administrative

trustee/escrow services, Keith LaMonda informed E&J that the Department of Justice indicted him in Florida arising out of his role with a separate company nearly ten years earlier. The allegations did not involve ABC and at that time were merely unproven allegations. After thoughtful analysis, E&J agreed to continue to serve as trustee/escrow agent under the condition that ABC provided an assurance that it would be able to continue to pay E&J's trustee/escrow fees for future services. As an assurance, ABC prepaid a portion of E&J's trustee/escrow agent fees in a lump sum retainer and assigned E&J an ownership interest in one life insurance policy.

After spending several months reviewing the documents and records of the prior trustee/escrow agent and having the opportunity to get fully up to speed on the engagement, E&J approached ABC about what appeared to be a deficit in the premium reserves that had been allocated by ABC. At that time and to this day, every premium has been timely paid, not a single policy has lapsed and there are sufficient funds available to fund the ongoing premium obligations for a relatively long period of time. Nevertheless, even with its limited scope of involvement, E&J (unlike the prior to trustee/escrow agents) convinced ABC to hire an independent third party to analyze and determine the proper amount of premiums for ABC to maintain in the account. ABC hired Data Life, Inc., a well-known actuarial firm, to ascertain the proper premium reserves. It bears stressing that E&J is not an insurance or actuarial firm – it was an administrative agent whose duties and responsibilities were clearly defined in the trust and escrow agreements. Even Quilling recognizes that a law firm is not qualified to perform complicated premium calculations, evidenced by the fact that he has hired outside insurance consultants to perform the very same analysis Data Life was hired to

perform. ***ABC assured E&J that, once the analysis was complete, ABC would fully fund any deficit in the premium account.*** Data Life, Inc. was approximately 90% complete with its comprehensive analysis when the SEC Action was filed and Quilling was appointed as receiver. At that point, E&J demanded that Quilling as receiver become the successor trustee to the trusts, or alternatively that E&J would file an action in California probate court to resign as trustee. Quilling agreed to become successor trustee and E&J resigned its position.

D. <u>This Court Appointed Receiver for ABC Viaticals, Inc., and Relief Defendants</u>

In the SEC Action, this Court appointed Quilling as receiver for ABC Viaticals, Inc., and "Relief Defendants,"[3] and authorized Quilling to take jurisdiction and possession over ABC's "Receivership Assets." The Order Appointing Receiver permitted receiver only to sue to obtain property <u>traceable</u> to the investors' funds and did not appoint Quilling as the investors' representative to pursue new legal claims against third parties for recovery of property not traceable to the investors' funds. Yet, Quilling has sued Defendants entirely for money which is not traceable to the investors' funds, asserting claims entirely on behalf of the investors – claims that Quilling has no standing to assert.

[3] Quilling refers to these "Relief Defendants" as "related entities." These "related entities" are not identified in the Complaint. It can be learned from the underlying case that the "related entities" are actually the "Relief Defendants": LaMonda Management Family Limited Partnership, Structured Life Settlements, Inc., Blue Water Trust, and Destiny Trust. (*See* Order Appointing Receiver at 1 (attached as Exhibit 1 to Receiver's Complaint)). This action is brought strictly and only on behalf of ABC Viaticals and these "related entities," as stated clearly in the Complaint, not for ABC's investors.

III. QUILLING LACKS JURISDICTIONAL STANDING

A. Standard for Dismissal under Rule 12(b)(1)

"A district court may decide a Rule 12(b)(1) motion to dismiss 'on any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2006 WL 2285638, at *2 (N.D. Tex. Jul 31, 2006). The Fifth Circuit distinguishes between a "facial" and "factual" attack on a complaint under Rule 12(b)(1). *Id.* at *4 (citing *Hanson v. Sonic-Frank Parra Autoplex, L.P.*, No. 3:04-CV-0108-P, 2004 U.S. Dist. LEXIS 11856, at * 1 (N.D. Tex. June 15, 2004) (Solis, J.)).[4] Here, the attack is factual. Defendants have attached evidence refuting the alleged bases for Quilling's claim to standing: namely, ABC Viaticals, Inc. Escrow Accounts Agreement (Exhibit A); Trust Agreement (Exhibit B); and the Order Appointing Receiver (Exhibit C). Thus, the Court need not accept the jurisdictional allegations in Quilling's Complaint as true, and may resolve factual disputes based on the evidence submitted by Defendants. *See id.*

B. Standing

Standing is an Article III jurisdictional requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984). Three elements are required for Article III standing: (1) the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest that is concrete and

[4] "If a defendant files a 12(b)(1) motion, the attack is presumptively facial and the Court need look only to the sufficiency of the allegations in the complaint, which are presumed to be true. If, however, the defendant supports the motion with affidavits, testimony, or other evidentiary materials, then the attack is factual and the burden shifts to the plaintiff to prove subject matter jurisdiction by a preponderance of the evidence by also submitting facts through some evidentiary method." *Id.* (citation omitted); *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U .S. 375, 377 (1991) (clarifying that the burden of establishing jurisdiction rests on receiver as the party invoking jurisdiction).

particularized, and actual or imminent rather than conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely rather than merely speculative that the injury will be redressed by a favorable decision. *Ensley v. Cody Resources, Inc.*, 171 F.3d 315, 319 (5th Cir. 1999). In the context of a receivership action, an equity receiver can only assert those claims that the corporation-in-receivership could have asserted in the manner in which it could have asserted them. *See Florida Dept. of Ins. v. Chase Bank of Texas Nat. Ass'n*, 274 F.3d 924, 929 (5th Cir. 2001); *see also Lank v. New York Stock Exch.*, 548 F.2d 61, 67 (2d Cir. 1977) (same).; *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 625 (6th Cir. 2003) ("Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action.") (citations omitted). And the court may look to the allegations as they are pleaded, not as they *might* have been pleaded were the corporation the plaintiff. *Cf. Patterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

C. Quilling Lacks Standing to Assert All Claims Against Defendants

1. *Quilling's Standing is Limited to the Standing ABC Would Have Had*

Quilling's standing is limited to the standing that ABC would have possessed. *See Florida Dep't of Ins.*, 274 F.3d at 929; *Lank*, 548 F.2d at 67; *Javitch*, 315 F.3d at 625. Thus, Quilling is limited by standing jurisprudence and this Court's appointment to assert only those claims that ABC could have asserted to obtain "proceeds traceable to investor monies."[5] Quilling has exceeded his receivership authority by (i) asserting claims ABC

[5] 14. The Receiver is hereby authorized to institute such actions or proceedings to impose a constructive trust, obtain possession and/or recover judgment with respect to persons or entities who received assets or funds or proceeds traceable to investor monies. All such actions shall be filed in this Court. The Receiver is specifically authorized to pursue such actions on behalf of and for the benefit of the constructive trust

could not have asserted – claims for the investors themselves – to (ii) obtain money *that is not traceable* to the investors' funds. [6] The fallacy in Quilling's position is perhaps most apparent in light of the fact that Defendants did not cause a concrete and particularized harm to ABC.

2. *Defendants did Not Cause a Concrete and Particularized Harm to ABC*

The heart of Quilling's Complaint is that Defendants failed to fund ABC's investors' trusts. (*See, e.g.*, Compl. at 3 at ¶ 9; 7 at ¶ 20; 8 at ¶ 32; 9 at ¶ 36; 11 at ¶ 48). Putting aside the numerous factual falsehoods in Quilling's Complaint, it is apparent that the "concrete and particularized harm" complained of is *ABC's harm to its individual investors*. Quilling does not allege harm *by Defendants to ABC the entity*. Quilling himself contends that the mismanagement of the trusts was one of the means by which *ABC breached its duties to its "investors"*:

> 31. ABC owed a fiduciary duty to each of the investors to honor their contractual obligations and to ensure the proper usage and treatment of the investors' funds.
>
> 32. ABC breached those duties by virtue of the foregoing conduct. Erwin & Johnson knew that ABC owed a fiduciary duty and further knew that ABC's conduct constituted a breach of those duties.
>
> . . . .
>
> 36. As explained above, ABC allowed investor funds to be misused and wasted the corporation's assets and those of the Trusts.

(Compl. at ¶¶ 31, 32, 36). E&J certainly did not breach ABC's duties to its investors.

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beneficiaries, including without limitation any and all investors who may be the victims of fraudulent conduct alleged herein by the Commission.

(Ex. C at 2-3 at ¶ 2; 4 at ¶ 5; 7 at ¶¶ 14, 15).

[6] Indeed, numerous problems arise if Quilling is permitted to sue a third-party to obtain non-equitable relief, including the arbitrary manner in which any new money would be allocated to the trusts, the inherently speculative nature of calculating what amount of new money, if any, accurately represents the harm, if any, to the trusts caused by a third-party's breach of a legal duty, and the preclusive effect of the Receiver's recovery (or failure) on others' claims against the third-party.

First, the unambiguous written agreements defeat Quilling's alleged wrongdoing. The Trust Agreement mandated that ABC was to fund the premium account and direct E&J was to pay premiums solely "at the direction of the Grantor . . ." (Ex. B at 2). Paragraph 6.02 further stated that E&J "shall have no responsibility to fund premium payments should there be insufficient funds remaining to pay on a specific policy." Paragraph 9.03 likewise stated that E&J was not liable for any inadequacy or insufficiency of any trust, and Article VII restricted E&J's powers to those specifically set out in the trust – no others. (Ex. B at 3, 5).

Second, Section 3c of the Escrow Agreement required that E&J take written instructions from ABC; Section 3d absolved E&J of any responsibility for any transaction executed pursuant to Grantor's written instructions; and Section 5 reaffirmed that E&J was to have no liability for following ABC's instructions. (Ex. A at 1-2). Thus, Quilling's Complaint fails to plead facts showing harm by Defendants to ABC, and any alleged losses thereby.

3. *The Investors did not Assign or Designate Quilling as Their Representative*

Quilling may argue that the Order Appointing Receiver authorized him to sue Defendants on behalf of "constructive trust beneficiaries." If Quilling argues that the "constructive trust beneficiaries" are ABC's investors, this reading would impermissibly and erroneously expand Quilling's standing beyond constitutional legal limits.

The general rule is that a receiver may only assert claims that comport with the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction. *See In re Burton Wiand Receivership Cases Pending in the Tampa Division of the Middle District of Florida*, 2007 LEXIS 27294, at **20-21 (M.D. Fl. Jan. 12, 2007) ("the Court

rejects the Receiver's assertion that the Court's order appointing him receiver authorized him to pursue any and all claims on behalf of the Receivership Entities."); *Scholes v. Schroeder*, 744 F. Supp 1419, 1421 (N.D. Ill. 1990) (stating "the appointment of a receiver is inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction"); s*ee also Caplin v. Marine Midland Grace Co.*, 406 U.S. 416 (1972) (distinguishing between claims of a corporation and claims of individual investors); *accord McGuire v. Benjamin*, 821 F. Supp. 533, 535 (N.D. Ill. 1993); *Johnson v. Miller*, 596 F. Supp. 768, 772 (D. Colo. 1984). The investors have neither assigned their claims to Quilling nor designated Quilling as their agent for suit. Indeed, nothing indicates that the investors have allowed Quilling to bring claims on their behalf. Thus, Quilling's assertion of the investors' claims fails to comport with the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction.

In *Florida Dep't of Ins*, a case similar in many respects to the present one, the Fifth Circuit, following United States Supreme Court authority, held that a liquidator lacked standing to assert claims on behalf of policyholders because the policyholder did not assign their claims to the liquidator:

> The breaches of duty under these theories were to policyholders, not Western Star. . . . The Florida Insurance Commissioner, ***as receiver for the Western Star estate, does not have standing in federal court to bring these claims on behalf of policyholders***. . . . There is no indication in the record that the policyholders have assigned their fraud claims to Western Star or the Florida receiver.

Id. at 931 (footnote omitted) (emphasis added). Here, the result should be the same. ABC's investors have not assigned any claims to Quilling, nor have they designated Quilling as their representative for their claims.[7] As such, Quilling lacks standing to

[7] The propriety or validity of the investors' potential claims against Defendants is not an issue before the

assert claims on their behalf. *See id.* Consequently, Quilling's actions on behalf of "constructive trust beneficiaries," to the extent that means ABC's investors, fails to confer standing on Quilling for the claims he asserts against Defendants. [8] Thus, all of his claims must be dismissed due to his lack of standing.

D. Quilling Lacks Standing to Assert Claims Against Mr. Erwin Individually or Against E&J

Even if Quilling could assert a claim for the investors, which Defendants wholly refute, Quilling cannot assert the particular claims he has pleaded against Mr. Erwin individually and E&J. The claims alleged must be evaluated as they are pleaded here, not as they *might* have been pleaded. *Cf. Patterson*, 644 F.2d at 523.

Although it is far from clear in Quilling's Complaint, Quilling appears to assert the same claims against Mr. Erwin individually and E&J, without differentiation. These 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

Court at this point. The issue is whether Quilling is attempting to assert their claims ***for*** them.

[8] That the Fifth Circuit has found a lack of standing in a similar situation should obviate the effect of the Seventh Circuit's conclusion that a receiver had standing to assert claims for investors. *See, e.g., Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (finding that a corporation in receivership was harmed by transfers used for an unauthorized purpose and the receiver had standing to bring claims to seek return of such funds to distribute them to the tort creditors of the receivership). Moreover, in the *Scholes*, the claims actually belonged to the receivership entities and not to the creditors thereof. *Id.* at 754-55. Thus, *Scholes* is factually inapposite to this situation. Defendants submit that *Scholes*, and decisions that have followed *Scholes*, are not binding on this Court and do not account for the differences between this case and *Scholes*. *Cf. Warfield v. Carnie*, No. 3:04-CV-633-R, 2007 WL 1112591, at *9 (N.D. Tex. Apr. 13, 2007) (Buchmeyer, S.J) ("A receiver of an alleged Ponzi scheme may sue under UFTA to recover funds paid from the entity in receivership"); *SEC v. Cook*, No. 3:00-CV-272-R, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001) (Buchmeyer, J.).

(6) Fraudulent transfer.

(Compl. at 7-13).[9] 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.[10]

1. *No Standing to Assert Breach of Fiduciary Duty or Aiding or Abetting Breach of Fiduciary Duty*

Quilling lacks standing to assert his breach of fiduciary duty or aiding or abetting breach of fiduciary duty claims against Defendants. "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. 2006); *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086 (Cal. Ct. App. 1995).

a. No Standing to Assert Claims Against E&J

Quilling has no legal right to argue that E&J breached any fiduciary duties to ABC's *investors*. To the extent E&J owed any fiduciary duty to ABC's investors, there is no basis for contending that E&J breached any such duty either. *See Charnay*, 145 Cal. App. 4th Dist. at 182. Quilling ignores the fact that any action by E&J did not proximately cause damages to ABC. *See id.* Indeed, all premiums were paid on time, and no policy ever lapsed during E&J's tenure. Thus, because neither ABC nor its

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[9] The substance of Quilling's claims is governed by California law. The escrow agreement states: "This Agreement shall be governed by the laws of the State of California, without regard to principles of conflict of laws thereof." (Ex. A at 3). The trust agreement states that it is also governed by California law. (Ex. B at 4).

[10] Quilling may attempt to rely on the language of each "Count," or claim. However, each claim does not stand alone. Quilling incorporates all prior allegations into each claim "as if fully set forth [t]herein": (Compl. at 7 at ¶ 21; 8 at ¶¶ 26 30; 9 at ¶¶ 35, 40; 10 at ¶¶ 43, 45, 47; 11 at ¶ 49). Thus, each claim is fatally infected by all prior allegations that assert harm to investors, not to ABC. This makes each and every specific claim fail for the same reason: Quilling's lack of standing.

investors could have sued E&J for breach of fiduciary duty, Quilling lacks standing to do so here. *See Florida Dep't of Ins.*, 274 F.3d at 929; *Lank*, 548 F.2d at 67; *Javitch*, 315 F.3d at 625.

b. No Standing to Assert Claims Against Mr. Erwin Individually

For the same reasons that Quilling lacks standing to sue E&J for these claims, he has no standing to sue Mr. Erwin. 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 has no standing to assert these claims against Mr. Erwin because ABC could not have done so under California law. Quilling does not allege that Mr. Erwin – separate and apart from E&J – owed some distinct fiduciary duty to ABC, that he breached it, and caused ABC damages. Because ABC could not have asserted the breach (or aiding and abetting breach) of fiduciary duty claims against Mr. Erwin individually, Quilling lacks standing to do so here. *See Florida Dep't of Ins.*, 274 F.3d at 929; *Lank*, 548 F.2d at 67; *Javitch*, 315 F.3d at 625.

2. *No Standing to Assert Aiding and Abetting Corporate Waste*

Quilling lacks standing to assert a claim for aiding and abetting corporate waste against Defendants for several reasons. Under California law, the "corporate waste" claim is derivative in nature, not direct. It derives from 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.*

a. No Standing to Assert Aiding and Abetting Corporate Waste Against E&J

Quilling lacks standing to assert this claim against E&J for two main reasons. First, ABC could not have asserted this claim against E&J because this species of claim is reserved for a corporation's shareholders. *Cf. Goldstein*, 2005 WL 1898564, at * 2; *Michelson*, 407 A.2d at 217. E&J was neither a director nor an officer of ABC, nor were the investors equal to shareholders. As a result, there is no concrete and particularized harm that would be redressed by suing E&J for aiding and abetting corporate waste because the claim could not be brought against E&J.

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.

b. No Standing to Assert Aiding and Abetting Corporate Waste Against Mr. Erwin Individually

There is no standing as to Mr. Erwin for the same reasons applicable to E&J, and because there is no concrete and particularized harm that would be redressed by suing Mr. Erwin individually. Mr. Erwin is not claimed to have personally diverted corporate assets to the detriment of any shareholders of ABC. (Compl. at ¶ 37). Consequently, because ABC could not have asserted aiding and abetting corporate waste against Mr. Erwin individually, Quilling lacks standing to do so here. *See Florida Dep't of Ins.*, 274 F.3d at 929; *Lank*, 548 F.2d at 67; *Javitch*, 315 F.3d at 625.

3. *No Standing to Assert Professional Negligence*

Quilling lacks standing to assert his professional negligence claim 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, 98 Cal. Rptr. 849, 491 P.2d 433 (Cal. Ct. App. 1971).

a. No Standing to Assert Claim Against E&J

Quilling complains about harm to the trusts, not to ABC: "Those acts proximately caused injury and damage to each of the Trusts, for which amount the Receiver hereby sues." (Compl. at ¶ 42). The trusts were not the client – ABC was the client. Quilling has not alleged harm to ABC, but to the investors. The investors were not clients, either. 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). Thus, because Quilling attempts to assert his claim exclusively on behalf of the trusts or ABC's investors – neither of which were E&J's client – Quilling lacks standing to bring this claim. *See Florida Dep't of Ins.*, 274 F.3d at 929; *Lank*, 548 F.2d at 67; *Javitch*, 315 F.3d at 625.[11]

b. No Standing to Assert Claim Against Mr. Erwin Individually

For the same reasons with respect to E&J and for additional reasons, Quilling has no standing to assert this claim against Mr. Erwin individually. As with most of Quilling's pleading, it does not appear that this claim is truly asserted against Mr. Erwin. Quilling alleges: "Erwin & Johnson breached those duties by negligently performing its obligations as trustee." (Compl. at ¶ 28). To the extent that this claim is against Mr. Erwin individually, Quilling has no standing to allege professional negligence against Mr. Erwin individually because Mr. Erwin was not retained by the investors (nor ABC) in a personal capacity. Because neither the investors nor ABC could have asserted this claim against Mr. Erwin individually, Quilling lacks standing to do so here. *See Florida Dep't of Ins.*, 274 F.3d at 929; *Lank*, 548 F.2d at 67; *Javitch*, 315 F.3d at 625.

4. *No Standing to Assert Fraudulent Transfer*

Quilling also lacks standing to assert his fraudulent transfer claim against Defendants. "A fraudulent conveyance is a transfer by the debtor of property to a third

[11] Similarly, Quilling has no standing to assert 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, 123 Cal. Rptr. 563 (Cal. 1975). Without negligence, there can be no gross negligence.

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. 1994). There was no conveyance, fraudulent or otherwise, by Mr. Erwin or E&J to ABC. This claim again follows the familiar path: it asserts harm to *ABC's investors* for ABC's own actions. Because this claim seeks to enforce the rights of the investors for ABC's wrongdoing, not the rights of ABC as against E&J, Quilling has no standing to assert this claim against Defendants. *See Florida Dep't of Ins.*, 274 F.3d at 929; *Lank*, 548 F.2d at 67; *Javitch*, 315 F.3d at 625.

5. *Quilling Lacks Standing to Assert Breach of Contract*

Quilling lacks standing to assert his breach of contract claim against Defendants. Under California law, a claim for breach of contract requires four elements: (1) a contract between the parties, (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 Standing to Assert Breach of Contract Claim Against E&J

First, while there is an agreement between ABC & E&J, there is no 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:

> ABC did not handle investor funds in a manner consistent with its representations. Instead, it made numerous undisclosed transfers of investor funds and underfunded the escrow accounts used to pay premiums on the insurance policies owned by the Trusts. In reality, ABC diverted funds from new investors to satisfy its obligations to earlier investors. ABC was, therefore, an insolvent Ponzi scheme.

(Compl. at ¶ 48). Thus, the second element fails.

The third element fails because, as discussed above, any allegation of breach is fully contradicted by the contracts themselves, such as the escrow agreement, which placed the responsibility of funding the investors' premium account fully and squarely on the shoulders of ABC, and the evidence in the underlying SEC Action. (Ex. A at 1-2). Similarly, the Trust Agreement mandated that ABC was to fund the premium account and direct E&J was to pay premiums solely "at the direction of the Grantor . . ." (Ex. B at 2). Moreover, paragraph 6.02 stated that E&J "shall have no responsibility to fund premium payments should there be insufficient funds remaining to pay on a specific policy," paragraph 9.03 stated that E&J was not liable for any inadequacy or insufficiency of any trust, and Article VII restricted E&J's powers to those specifically set out in the trust – no others. (Ex. B at 3, 5).

Quilling also cannot legitimately contend that E&J should have disregarded the written agreements. It is prohibited by California law for a trustee to overstep its trustee/escrow agent bounds. *See Estate of Bothwell*, 65 Cal. App. 2d 598, 683 (Cal. 1944) ("[t]he plan of the grantor must be followed. It may not be departed from in particulars wherein it is specific, merely because it may be considered in those particulars to be unwise. The trustee cannot substitute his own plan because he thinks it is a better one."). Thus, despite what Quilling alleges, Defendants were contractually and legally required to follow ABC's explicit instructions, and actually would have breached their contracts had they not done so. Defendants could not have substituted their own judgment should they have thought that it was a better course of action. *See id.*; *see also* (Ex. A at 2-5; Ex. B at 2). E&J is not an insurance or actuarial firm – it was an administrative provider – it was not in the position to discern the best course of action for

ABC to conduct its business. E&J did the best it could by convincing ABC to hire Data Life to assess the proper amount of premium account funding that ABC should have been providing. It cannot be stressed enough that all premiums were paid on time and a policy never lapsed during E&J's tenure. Thus, no matter how Quilling contrives it, there simply was no breach.

Finally, the fourth element required for a breach of contract claim 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. Moreover, 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. This failure reaffirms that there is no concrete and particularized harm that would be redressed by suing E&J, which is necessary element for standing. Because ABC could not have asserted the breach of contract claim against E&J, Quilling lacks standing to do so here. *See Florida Dep't of Ins.*, 274 F.3d at 929; *Lank*, 548 F.2d at 67; *Javitch*, 315 F.3d at 625.

b. No Standing to Assert Claim Against Mr. Erwin Individually

In addition to the above reasons, Quilling has no standing to assert this claim against Mr. Erwin individually (to the extent that this claim is even against Mr. Erwin). Quilling alleges: "Erwin & Johnson breached those contracts by failing to perform their written obligations under the Trust Agreements." (Compl. at ¶ 23). Mr. Erwin was not a signatory party to the Trust Agreement or the Escrow Agreement in his personal capacity, so he could not have breached them. (*See* Ex. A; Ex. B). 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). Because neither ABC, much less the investors, could have sued Mr. Erwin individually for breach of contract, Quilling lack standing to do so now, and the breach of contract claim should be summarily dismissed.

IV. CONCLUSION

Quilling lacks standing to assert his claims. Quilling is prohibited by applicable standing jurisprudence from asserting claims for ABC's investors. There is no particularized harm caused by Defendants that would be redressed by relief against these Defendants on these claims. Neither the investors nor ABC could have asserted any of the particular claims against Defendants. Quilling, therefore, lacks standing to do so here. In sum, the Court should grant Defendants' motion under Federal Rule of Civil Procedure 12(b)(1) and dismiss for lack of standing all claims against Christopher R. Erwin, individually, and Erwin & Johnson, LLP.

WHEREFORE, PREMISES CONSIDERED, the Court should grant Defendants' Motion to Dismiss Plaintiff's Complaint and enter an order dismissing the Complaint and enter judgment for Christopher R. Erwin and Erwin & Johnson, LLP.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

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.