EXHIBIT B

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Paul Hastings

Paul, Hastings, Janofsky & Walker LLP
695 Town Center Drive
Seventeenth Floor
Costa Mesa, CA 92626
telephone 714-668-6200 • facsimile 714-979-1921 • www.paulhastings.com

Atlanta
Beijing
Brussels
Chicago
Hong Kong
London
Los Angeles
Milan
New York
Orange County
Palo Alto
Paris
San Diego
San Francisco
Shanghai
Stamford
Tokyo
Washington, DC

(714) 668-6242
jaygandhi@paulhastings.com

June 22, 2007

VIA E-MAIL

Bruce Kramer, Esq.
Borod & Kramer, P.C.
Brinkley Plaza
80 Monroe, Suite G-1
Memphis, TN 38103

Re: *Michael J. Quilling, as receiver for ABC Viaticals, Inc. v. Erwin & Johnson LLP, et al.*

Dear Mr. Kramer:

We are in receipt of your demand letter dated June 14, 2007, and the draft complaint you forwarded to us.

Erwin & Johnson (collectively, "E&J") is a respectable law firm comprised of honest, dedicated professionals who diligently performed their value-added services for ABC Viaticals, Inc. ("ABC") and the trust beneficiaries; E&J voluntarily provided considerable cooperation and assistance to your client and the Securities & Exchange Commission ("SEC") in this matter, and your client and the SEC have repeatedly expressed their gratitude for E&J's cooperation and assistance; and E&J has never been accused of wrongdoing by any party to date in this matter or in any matter involving its escrow and trustee services for the life settlement business.

E&J finds your client's demand for millions of dollars to be offensive. Your client's draft complaint is replete with factual errors and omissions, founded on untenable legal theories, and does not support any liability on the part of E&J, much less any provable showing of damages.

The thrust of your client's draft complaint is that E&J's "duty was to establish and insure proper funding of a segregated premium escrow account" for each of the trusts for which E&J served as a trustee. *See* Draft Compl., ¶¶ 12-13.

Your client's position rests on two purported foundations: (1) his reading of the operative trust document (*id.* at ¶ 13); and (2) his allegation that ABC misrepresented to beneficiaries that premium funds would be separately segregated in escrow accounts for each policy, and E&J knew such representations were false (*id.* at ¶ 14).

On this theory, your client purports to assert causes of action for: breach of contract, breach of fiduciary duty, aiding and abetting fiduciary duty, aiding and abetting corporate

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waste, negligence (professional malpractice), gross negligence, exemplary damages, fraudulent transfer, and constructive trust and disgorgement. Your client's draft complaint does not specify or calculate the amount of monetary damages, but generally seeks a "money judgment consistent" with each count.

Your client's claims are plagued with a number of fatal infirmities, including the following:

A. <u>Exculpatory/Immunity Clauses Shield E&J And No Claims Can Be Asserted On Behalf Of The Beneficiaries</u>

Most of your client's claims are non-starters.

With respect to several of your claims, you allege that E&J somehow wronged the "beneficiaries" and "investors." *See, e.g.*, Draft Compl., ¶¶ 27, 44, 46. Your client has no legal standing to assert claims and attendant damages belonging to any "beneficiaries" or "investors." *Scholes v. Schroeder*, 744 F. Supp. 1419 (N.D. Ill. 1990). The only claims your client could conceivably allege are those as a representative of ABC.

Additionally the operative trust agreements plainly provide that the "Trustee shall **<u>not</u>** be liable to **<u>anyone</u>** for **<u>any action</u>** taken or **<u>omitted to be taken</u>** by it hereunder, except in the case of Trustee's proven gross negligence, bad faith or willful conduct." *See* Trust Agreement, ¶ 9.03 (emphasis added).

The trust agreements are governed by California law (*id.* at ¶ 8.06), and California law enforces such exculpatory clauses, barring liability for all claims except those based on conduct arising to the level of gross negligence or reckless indifference. Cal. Probate Code § 16461; *Pearson v. Barr*, 2002 WL 1970144 (Cal. App. Aug 27, 2002) ("[G]iven the broad language employed in the trust and disbursement agreements and the provisions of Probate Code section 16461, the exculpatory clauses at issue here limited Barr's liability for breach of fiduciary duty to instances of gross negligence or reckless indifference.").

You should note that the escrow agreement between ABC and E&J provides a similar exculpatory provision. A copy of the escrow agreement is attached as Exhibit "A."

Moreover, both the trust agreements and the escrow agreement include broad defense and indemnity provisions against ABC, which will be vigorously enforced against your client.

B. E&J Performed, As Required By California Law, In Conformance With The Operative Escrow And Trust Agreement

Now turning to your client's claims, on behalf of ABC, for gross negligence and exemplary damages based thereon, your client has (1) failed to take into consideration the other unambiguous agreements defining the relationship between E&J and ABC; (2) misconstrued the operative trust agreements; and (3) selectively ignored that, despite serving as only a successor trustee on most trusts, E&J prudently and timely raised the premium reserve account issue.

First, E&J and ABC's business relationship was defined by three operative agreements: (1) an engagement agreement dated April 14, 2005; (2) an escrow agreement also dated April 14, 2005; and (3) a life settlement trust agreement for each trust.

A copy of the engagement agreement is attached as Exhibit "B."

The engagement agreement stated that E&J would provide only two types of services to ABC: escrow and trustee services. The engagement agreement further stated that the "mutual roles and responsibilities" of E&J and ABC would be defined and limited by the escrow and trustee agreements.

The escrow agreement, in turn, provided that E&J was to open only **four** escrow accounts for ABC:

> 3. Escrow Accounts
> a. Contemporaneously with the execution of this Agreement Escrow Agent shall open the following Escrow Accounts:
> - ABC Escrow Account
> - ABC Premium Escrow Account
> - ABC MGMT Expense Account
> - ABC Maturity Account

See Escrow Agreement, ¶ 3(a).

The escrow agreement further made it plain – e.g., through language used in the plural – that those four escrow accounts would be used for **all** of the trusts that ABC might establish for its business purposes:

> "b. The above referenced Escrow accounts shall be used in accordance with the Life Settlement **Trusts that Grantor establishes in its line of business** and the Engagement Letter."

See Escrow Agreement, ¶ 3(b) (emphasis added).

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In terms of funding, you have misconstrued the operative trust agreement. While you generally cite to Paragraph 6.01 of a sample trust agreement, your draft complaint fails to recognize that Paragraph 6.01 specifically states it was ABC, as the grantor, who had the responsibility to "deposit a sum certain," *i.e.*, properly fund the account, for the payment of premiums on the policy:

> Trustee shall establish a "Policy Premium Payment Account" into which **the Grantor will deposit a sum certain for the payment of premiums on the Policy** equal to the term of the bond or 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 of the funds of this account, Trustee shall timely pay all premiums due and owing at the Policy at the director of the Grantor or his designee."

See Trust Agreement, ¶ 6.01 (emphasis added).

Accordingly, E&J had no obligation to "establish" any additional accounts or to "insure proper funding" of premiums. Those were not in the scope of services to be provided by E&J, nor within E&J's area of expertise. Rather, those obligations were the responsibility of ABC. To the extent ABC failed to do so, ABC is liable to E&J, **not** vice versa.

This, of course, is also consistent with the SEC's position and your client's positions and actions to date.

As the SEC explained in its complaint against ABC, "each trust agreement, established to hold the policies on behalf of the beneficiaries, states that **ABC will** 'deposit a sum certain' for the payment premiums on the policy." *See* SEC Compl., ¶ 51 (emphasis added).

Likewise, as your client explained in his preliminary report, and which he must candidly admit is the simple truth, "it does not appear that ABC ever properly set aside sufficient premium reserves in escrow accounts to cover premium obligations when ABC, **and ABC alone**, had the responsibility to the pay the premiums." *See* Preliminary Report, ¶ 3 (emphasis added).

Your draft complaint also conspicuously fails to note that **your own client served as a successor trustee** under the same structure that your client now purports to contend was wrongful conduct vis-à-vis E&J and he did so without ever otherwise contending that such a structure was improper. In so doing, your client also "fully and forever relieved and discharged [E&J] of any fiduciary responsibilities relating to the Trusts," which serves as a further and independent bar to any claim of purported liability by your client now.

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A copy of the appointment of your client as a successor trustee is attached hereto as Exhibit "C."

Finally, it is notable that your client's draft complaint contends that, "as time went by," Mr. Erwin "grew increasingly concerned about the problem [of premium reserves] but did nothing to remedy it other than talk to the LaMondas" and asked for a $500,000 retainer paid directly to Chris Erwin.

As Mr. Erwin testified, during E&J's short tenure, E&J was the only trustee to identify the premium reserve issue and have ABC undertake an audit by a well-known third party. Mr. Erwin's "concern" and actions reflect diligence, and directly contradict your client's theory that E&J was somehow careless. Such an audit was, in fact, undertaken by Data Life Associates. To the extent your client contends there was somehow impermissible delay, your client fails to acknowledge, as he must, that E&J was a **successor** trustee to the majority of ABC policies, and was first obligated to sort out the prior trustee's disorganization and defects, not to mention combating insurance companies who sought to rescind various policies, etc. Correspondingly, E&J cannot be held liable under any theory for ABC not depositing funds with the prior trustee. To the extent your client contends that E&J should have immediately resigned its engagement, that would have posed a greater harm to ABC and the beneficiaries. E&J took the reasonable, prudent course under the circumstances, and your client cannot contend or prove otherwise.

A copy of the appointment of E&J as a successor trustee is attached hereto as Exhibit "D."

The $500,000 retainer paid by ABC was not paid to Mr. Erwin personally, but rather to the firm. A copy of E&J's bank statement is attached as Exhibit "E."

It was also not paid because "[a]pparently money cures all," but rather, as Mr. Erwin testified, as an advance to ensure that the policies would continue to be maintained, and to protect E&J against the additional costs that might be incurred as a result. Your client should know that all of that retainer has now been exhausted and, in fact, E&J has incurred costs far surpassing that amount as result of ABC's acts.

Your client's draft complaint also suggests that such a premium analysis can be effortlessly undertaken. For example, your client alleges "[i]n fact, the Receiver obtained such a report within two weeks of his appointment." The truth is that a proper analysis of premiums requires a consideration of a number of variables (e.g., a policy's cash value). A complex calculation and analysis is required, so that only the "cost of insurance" is incurred for each policy, *i.e.*, the least amount to maintain the policies current. Your client was able to obtain "such a report within two weeks" – if true – because E&J and Data Life had already undertaken the vast majority of the work in assembling and organizing the books and records for this purpose.

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At bottom, your client as successor-in-interest to ABC may now believe that the grantor's plan, *i.e.*, ABC's plan, was somehow unwise, but that is neither here nor there given that E&J acted at all times in conformance with the operative escrow and trust documents. As the courts have long taught, "[t]he plan of 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." *Estate of Bothwell*, 65 Cal. App. 2d 598, 683 (1944).

Accordingly, we believe your client can allege no facts, much less prove them, that E&J acted in a grossly negligent manner. *Acosta v. Glenfed Development Corp.*, 128 Cal. App. 4th 1278, 1294 (2005) (gross negligence "connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results.").

C. **E&J Cannot Be Liable To ABC For Aiding And Abetting Its Breach Of Fiduciary Duty Or Corporate Waste**

Whether Texas or California law should ultimately apply, to allege and prove a cause of action against E&J for aiding and abetting a breach of fiduciary duty (also labeled as "knowing participation" in Texas), your client must, at a minimum, establish that E&J provided substantial assistance to ABC with knowledge of the tort to be committed and with the intent to facilitate the commission of that tort. *See e.g., Howard v. Sup. Ct.*, 2 Cal. App. 4th 745, 748-749 (1992). In other words, E&J cannot be held liable for aiding and abetting ABC's breach of fiduciary duty absent: (1) actual intent and knowledge of the underlying wrong that ABC was perpetrating; and (2) substantial assistance to that wrongful end.

Here, your client's draft complaint cites two purported acts of knowledge/intent and substantial assistance: (1) E&J prepared and provided materials for inclusion in ABC's closing package "claim[ing] to be the oldest and largest law firm in Ladera Ranch, California" (*see* Draft Compl., at ¶ 12); and (2) E&J "touted the fact that the law firm had malpractice insurance in the amount of at least $2 million" (*id.* at 17).

Your client should be aware that, among other things, E&J's materials "claiming to be the oldest and largest law firm in Ladera Ranch, Califoria" were developed long before ABC became a client. That statement was on E&J's web site and, to the extent ABC used it for any purpose, ABC did so without E&J's knowledge or consent. Further, a copy of E&J's malpractice insurance was provided only to ABC – never an investor – pursuant to ABC's specific request. As Mr. Erwin has already testified, neither E&J nor he had any dealings with beneficiaries, and was unaware of what representations were made by ABC to them.

Moreover, any claim by your client – standing in the shoes of ABC – against E&J for "aiding and abetting" a breach of ABC's own fiduciary duty would be barred by the *in pari delicto* doctrine, *i.e.*, the law will not aid a man who participates in the same wrongdoing as the defendant. And your client will find no comfort in the Seventh Circuit's *Scholes*

decision. *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir.1995) (concluding that under the circumstances in that case the receivership "cleansed" the corporation). Here, the *Scholes* decision is inapplicable because, as the SEC and your client already avowed, ABC was nothing more than the "prior incarnation" and "successor in interest" to Accelerated Benefits Corporation. In other words, ABC was the alter ego of Accelerated Benefits, which in turn was the alter ego of Keith LaMonda. *See O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1204 (11th Cir. 2003) (stating that a corporate entity that is merely the "alter ego" of the wrongdoer lacks standing to pursue claims for injuries resulting from a Ponzi scheme as the wrongdoer could not injure himself. However, the court noted that if the corporation possessed "a significant membership and a governing body" it cannot be said to be the wrongdoer's alter ego). As alleged in this case, ABC was controlled exclusively by persons engaging in the allegedly fraudulent scheme and benefiting from it; there is no allegation that ABC was a large corporation with an honest board of directors and multiple shareholders, suffering from the criminal acts of a few rogue employees in some regional office.

Furthermore, we do believe that neither California nor Texas recognize a claim "for aiding and abetting corporate waste." To the extent such a claim did exist, we believe it, too, would be unmeritorious for the same reasons as outlined above.

D. <u>There Was No Fraudulent Transfer And There Can Be No Imposition Of A Constructive Trust</u>

Your client's draft complaint asserts that ABC was an "insolvent Ponzi scheme ... [and] as a result, all transfers from ABC to [E&J] were fraudulent and made with the intent to hinder, delay, and defraud creditors as a matter of law." *See* Draft Compl., ¶ 49.

Even assuming your client overcome the *in pari delicto* defense outlined above (which it cannot), among many other things, however, there is certainly no fraudulent transfer – under the California or Texas Uniform Fraudulent Transfer Acts – when "reasonably equivalent value" is received by the transferor. *See, e.g., Annod Corp. v. Hamilton & Samuels*, 100 Cal. App. 4th 1286, 1294 (2002) ("If the debtor received reasonably equivalent value, the inquiry ends there.").

Here, ABC did receive reasonably equivalent value, and your client will fail to satisfy his burden to prove otherwise. E&J assembled and maintained impeccable books and records as part of its trustee services (despite the prior trustee's poor recordkeeping), and premiums on all policies were current. In fact, recognizing the value of E&J's services, your client remitted professional fee payments to E&J since his appointment as receiver.

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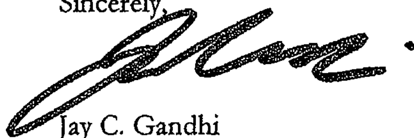
In short, not only do we disagree that your client has substantial claims, much less any claims, against E&J as described above, but you should be aware that, if any such unsubstantiated claims are asserted against E&J, E&J will assert claims – including fraud – against your client as receiver for ABC, successor trustee, and in his individual capacity, in addition to cross-claims against other parties, including all related trustees.

To date, E&J has made a professional decision not to affirmatively assert such valid claims against your client because, among other things, to protect the beneficiaries from depletion of the receivership assets. But E&J will also not countenance any bullying attempts through false accusations, and will vigorously enforce all its rights.

If you have any additional, material information or persuasive contrary authorities worthy of our consideration, please call me to discuss.

Sincerely,



Jay C. Gandhi
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

Attachments

cc: Peter M. Stone, Esq.
Michael J. Quilling, Receiver
Steve Harr, Examiner

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