

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

Case 3:07-cv-01153 Document 14 Filed 10/25/2007 Page 1 of 18

MICHAEL J. QUILLING, Receiver for
ABC VIATICALS, INC. and Related Entities,

Plaintiff,

vs.

ERWIN & JOHNSON, LLP and
CHRISTOPHER R. ERWIN

Defendants.

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Civil Action No. 3:07-CV-1153

ECF

RESPONSE TO DEFENDANTS' MOTION TO DISMISS
FOR LACK OF STANDING

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ECF

**RESPONSE TO DEFENDANTS’ MOTION TO DISMISS
FOR LACK OF STANDING**

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

COMES NOW, Michael J. Quilling as the court-appointed Receiver in this case (“Plaintiff” or “Receiver”) and files this response to Defendants’ Motion to Dismiss for Lack of Standing [Dkt. No. 10]. In support, the Receiver would respectfully show the Court as follows:

**I.
INTRODUCTION**

Although the Defendants go to great lengths in an attempt to do so, one cannot seriously question the Receiver’s standing to pursue the claims asserted. The very orders appointing the Receiver give him standing. As the Court-appointed representative of both ABC and each of the ABC Investor Trusts, the Receiver has standing to bring any claim the entities could have brought prior to receivership. The only claims he asserts are those which belong to the entities.

II. ARGUMENTS AND ANALYSIS

A. RELEVANT PLEADING STANDARD

A motion to dismiss for lack of standing effectively alleges that the Court lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *International Transactions v. Embotelladora*, 277 F.Supp.2d 670, 676 (N.D. Tex. 2002). In ruling on the motion, this Court may rely on (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. *Murray v. TXU Corp.*, 279 F.Supp.2d 799, 801 (N.D. Tex., 2003) (Solis, J.). Since Defendants filed affidavits and other evidentiary materials in support of their motion, it is deemed a “factual” attack upon the Complaint. *Id.* at 802. The Receiver, therefore, must prove that he has standing to bring his claims by a preponderance of the evidence. *Id.* To prove that he has standing, the Receiver need only show (1) that the receivership entities have suffered a concrete and particularized injury as opposed to conjectural or hypothetical one, (2) that the injury was caused by or is fairly traceable to Defendants’ actions, and (3) that the chances of redressing the injury by a favorable decision is likely as opposed to speculative. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Generally, motions to dismiss under Rule 12(b)(1) should be granted “only if it appears **certain** that the plaintiff can prove **no set of facts** . . . that would entitle him to relief.” *Murray*, 279 F.Supp.2d at 802 (emphasis added).

B. THE RECEIVER HAS STANDING TO BRING CLAIMS FOR BOTH ABC AND THE ABC INVESTOR TRUSTS

This Court has issued two separate orders that clearly give the Receiver standing to assert claims against the Defendants on behalf of ABC and the ABC Investor Trusts, their creditors, and in some cases the investors themselves. *Order Appointing Receiver* [Dkt. No. 8] at ¶¶ 1, 14

(3:06-CV-2136); *Order Clarifying and Modifying Order Appointing Receiver* [Dkt. No. 19] (3:06-CV-2136). In federal equitable receiverships,¹ standing generally allows the Receiver to bring any action that could have been brought by the entity in receivership. *SEC v. Cook*, 2001 WL 256172 at *3 (N.D. Tex. 2001). This Court, however, has articulated expansions to that rule. For example, the Receiver also represents the interests of the receivership entities' creditors for the purpose of securing assets for distribution. *Id.* At *3 (N.D. Tex. 2001). Furthermore, both orders appointing the Receiver in this case clearly state that he may represent the investors' interests for purposes of commencing a constructive trust claim. *Order Appointing Receiver* [Dkt. No. 8] at ¶¶ 1, 14 (3:06-CV-2136). ("The Receiver is specifically authorized to pursue such actions on behalf of and for the benefit of the constructive trust beneficiaries, including without limitation any and all investors."); *Order Clarifying and Modifying Order Appointing Receiver* [Dkt. No. 19] (3:06-CV-2136).

Defendants seem oblivious to the fact that this Court entered a second order appointing the Receiver to act for the ABC Investor Trusts.² (Mot. to Dismiss [Dkt. No. 8] at 9) (erroneously stating that the Receiver only has standing to assert claims on behalf of ABC). Nevertheless, Defendants readily admit that the Receiver currently serves as the "successor trustee" for those trusts. (Mot. to Dismiss [Dkt. No. 8] at 7.) As such, he clearly has standing to sue all third parties for damages to any assets of the ABC Investor Trusts. Fed. R. Civ. P. 17(a); *see also Bd. of Nat. Res. v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993) (trustees enjoy standing to sue on behalf of the trust itself).

¹Defendants erroneously claim that California law alone controls all claims in this case by virtue of E&J's Escrow Agreement. (Mot. to Dismiss [Dkt. No. 8] at 14 n.9.) Only one of the Receiver's claims, however, is based on that agreement. The rest are grounded in equity and the federal common law, which is often more expansive than the relief afforded in state court. *See, e.g., U.S. v. McConnell*, 258 B.R. 869, 872-73 n. 2 (N.D. Tex. 2001).

²Without citing any case law, Defendants simply dismiss the Receiver's standing as substitute trustee for the ABC Investor Trusts as a "ruse." (Mot. to Dismiss [Dkt. No. 8] at 16.)

1. The Receiver Does Not State Claims Directly On the Investors' Behalf

Throughout their motion, Defendants attempt to characterize every injury to ABC or the ABC Investor Trusts as a direct injury to the investors. While the investors have undoubtedly been injured by Defendants' actions, it cannot be seriously questioned that the initial injury was sustained by ABC and the ABC Investor Trusts. Stated another way, every injury results first to the entity and has only a trickle-down effect on the investors.

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While it is true that the Receiver generally does not have standing to pursue claims for injuries suffered **exclusively** by investors, it is equally true that ABC's investors do not have standing to pursue claims suffered by ABC or the ABC Investor Trusts.³ *Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995) (rejecting notion that receiver's claims should have been brought by investors).

2. The Receiver Seeks To Redress Concrete And Particularized Injuries Suffered By ABC And The ABC Investor Trusts

Without question, Defendants' acts and omissions caused concrete and particularized injury to both ABC and the ABC Investor Trusts. Defendants erroneously conclude that their actions caused no harm because "all premiums were paid on time and no policy ever lapsed during E&J's tenure." (Mot. to Dismiss [Dkt. No. 8] at 10-11, 14) What they fail to mention is that those policies were only kept in force because the Defendants helped the LaMondas misappropriate and improperly divert assets belonging to ABC and the ABC Investor Trusts. The Receiver intends to prove at trial that the amounts required to be set aside in the premium

³The investors would only have standing to bring claims for damages to their investment or trust assets if the principals of both ABC and the ABC Investor Trusts refuse to do so. In that case, the investors would only have a right to bring the equivalent of a shareholder derivative action. *See generally* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining a derivative action as "[a] suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary; esp., a suit asserted by a shareholder . . . because of the corporation's failure to take some action against the third party.").

escrow accounts were underfunded by at least \$24 million (Compl. At 7.). Misappropriating funds to keep the policies in place does not eliminate the injury, it only masks it.⁴

Defendants assisted the LaMondas in mismanaging the assets of both ABC and the ABC Investor Trusts, which drove both entities so deep into insolvency that there was no hope of escape. (Receiver's Decl., Ex. A at ¶ 2.) As ABC purchased each of its insurance policies, ownership was assigned to a particular ABC Investor Trust. (Id. at ¶ 3.) The LaMondas, with the Defendants' knowledge and assistance, failed to retain and escrow enough investor money to properly fund the premium reserves in each trust as required by the Escrow Agreement and Trust Documents. (Id.) Defendants did not even attempt to segregate the assets for each of the ABC Investor Trusts, but, instead, simply held all of the funds in a commingled account. (Id.) In that the premium reserves for each trust were underfunded and not segregated, the Defendants diverted funds from new investors to make premium payments for the benefit of earlier investors.⁵ (Id.) By continuing to misappropriate funds in this manner, Defendants helped deplete the assets of both ABC and the ABC Investor Trusts. (Id.)

Defendants also assisted the LaMondas in making grossly excessive distributions to themselves, the Defendants, and others from both ABC and the ABC Investor Trusts—even though Defendants knew or should have known that both entities were severely underfunded.⁶ (Id. at ¶ 4.) However, instead of resigning as trustee or refusing to make those transfers, the Defendants continued to deplete trust assets at the LaMondas' direction and continued accepting

⁴In essence, Defendants argue that they had enough gas to get to Lubbock when they needed to get to Los Angeles. Unfortunately, when the Receiver took over, there was only enough to get to Abilene.

⁵To continue the Receiver's analogy from footnote 4, the Defendants helped the LaMondas maintain an illusion that the gas tank was full.

⁶Defendants themselves directly contributed to ABC's demise by accepting at least \$1.3 million from ABC and the ABC Investor Trusts to act as their legal counsel and trustee, even though Defendants knew or should have known they were insolvent. (Id. at ¶ 4.)

handsome retainers and fees to do so.⁷ (Id. at ¶ 5.) In so doing, they assisted the LaMondas in putting both ABC and the ABC Investor Trusts into such financial peril that the Receiver has already had to take a \$9 million loan just to prevent the insurance policies from lapsing and additional loans will be required to keep the policies in force next year. (Id.)

Defendants also assisted the ABC investment scheme by providing marketing materials in each investor package touting E&J as the oldest and largest law firm in Ladera Ranch, California. (Id. at ¶ 6.) In reality, the firm was newly established and only had two attorneys. (Id.) In so doing, the Defendants gave ABC the air of legitimacy it needed to perpetuate its scheme. (Id.)

3. The Receiver Has Standing To Bring All Claims Stated In His Complaint

(a) Fraudulent Transfer

Analogous cases demonstrate that receivers clearly have standing to recover funds from third parties under the UFTA. *Cook*, 2001 WL 256172, * 2 (noting that “a receiver represents not only the entity in receivership, but also the interests of its creditors”); *see also Lehmann*, 56 F.3d at 754 (fraudulent corporation’s right to recovery arose once the Receiver was appointed); *Warfield v. Carnie*, 2007 WL 1112591, *9 (N.D. Tex. Apr. 13, 2007); *Quilling v. Cristell*, 2006 WL 316981, * 5 (W.D.N.C. Feb. 9, 2006); *Quilling v. Grand St. Trust*, 2005 WL 1983879, * 5 (W.D.N.C. Aug. 12, 2005); *Quilling v. Gilliland*, 2002 WL 373560 (N.D. Tex. Mar. 6, 2002).

In their motion to dismiss, Defendants appear confused about the nature of a fraudulent transfer claim. They state that “[t]here was no conveyance . . . by Mr. Erwin or E&J to ABC.” (Mot. To Dismiss [Dkt. No. 8] at 19.) Through this cause of action, however, the Receiver seeks to recover all funds that ABC transferred to E&J, including whatever proceeds were shared with

⁷In what can only be described as a payment of “hush money,” Defendants also accepted a \$1 million death benefit ownership interest in a viatical policy from the LaMondas. (Id. at ¶ 4.)

or forwarded to Erwin individually.⁸ Receivership records indicate that the total amount of those transfers exceed at least \$1.3 million, but discovery may reveal that amount is even higher.

(b) Constructive Trust

The Order Appointing Receiver expressly authorizes the Receiver to state constructive trust claims against any party holding “assets or funds or proceeds” that can be traced to the receivership estate:

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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 beneficiaries, including without limitation any and all investors who may be victims of the fraudulent conduct alleged herein by the Commission. The Receiver is hereby appointed as the representative of such investors . . . for the purpose of filing actions to recover such funds wherever the Receiver may deem necessary.

Order Appointing Receiver [Dkt. No. 8] at ¶ 14 (3:06-CV-2136). Defendants, however, seem to believe that only the “constructive trust beneficiaries” themselves have standing to bring that claim. (Mot. to Dismiss [Dkt. No. 8] at 11-13.) Although Defendants cite several cases in support of that proposition, none of them hold that a company’s investors have standing to bring a constructive trust claim in place of a court-appointed receiver for the company. *See Caplin v. Marine*, 406 U.S. 416 (1972) (bankruptcy trustee lacked standing to bring breach of trust claim stated expressly on behalf of individual bond holders); *Scholes v. Schroeder*, 744 F. Supp. 1419

⁸Defendants do not and cannot deny that Erwin ultimately received proceeds of those transfers from E&J. (Mot. To Dismiss [Dkt. No. 9] at 2.)

(N.D. Ill. 1990) (receiver lacked standing to state claims alleging fraud upon the investors).⁹ In fact, none of those cases even address an instance where the plaintiff stated a constructive trust claim.

Without question, the Receiver has authority to bring a claim for constructive trust against third parties who ultimately receive **proceeds** of funds traceable to the receivership estate. *See, e.g., Quilling v. McDuff*, Case No. 3:06-CV-959 [Dkt. No. 39] at *5 (N.D. Tex. Dec. 13, 2006). In this case, the Receiver seeks to recover (1) all of the funds and/or assets that E&J received directly from ABC or the ABC Investor Trusts and (2) any proceeds of those funds and/or assets that E&J shared with or forwarded to Erwin individually. Although Erwin denies that he received funds “directly” from ABC, he does not and cannot deny receiving compensation from E&J that can be traced, in part, to the \$1.3 million in fees, retainers, and assets paid and given by ABC.¹⁰ (Mot. To Dismiss [Dkt. No. 9] at 2.)

(c) Professional Malpractice / Negligence / Gross Negligence

E&J admits that it acted as ABC’s legal counsel in overseeing the corporate assets placed in the ABC Investor Trusts. (Mot. to Dismiss [Dkt. No. 8] at 17.) The Receiver certainly has standing to state a professional malpractice claim on behalf of ABC, as the party in direct contractual privity with E&J under the Escrow Agreement. *See Belt v. Oppenheimer, Blend,*

⁹Amazingly, defendants also rely on a Report and Recommendation entered in *In re Wiand*, 2007 WL 963162 (M.D. Fla. Jan. 12, 2007). The Court overseeing those receivership proceedings, however, later entered an order that specifically held “the Receiver has standing to bring a UFTA claim on behalf of the Receivership Entities because the Receivership Entities were injured by the diversion of their funds.” *In re Wiand*, 2007 WL 963165, *2 (M.D. Fla. Mar. 27, 2007). The Defendants’ reliance on *Florida Dep’t of Ins. v. Chase Bank of Tex., N.A.*, 274 F.3d 924 (5th Cir. 2001), is also misplaced. Although the Fifth Circuit states that a receiver does not have standing to bring claims stated expressly on behalf of individual policyholders, it explains that the receiver does have standing to assert numerous claims on behalf of the entity, including claims for loss of trust assets, improper certification of trust assets, misrepresentation and fraud, and deepening insolvency. *Id.* at 933 (noting the receiver “has standing to assert these claims”).

¹⁰The Receiver reserves his right to seek constructive trust damages in excess of this amount if discovery reveals a higher figure.

Harrison & Tate, Inc., 192 S.W.3d 780, 783 (Tex. 2006). The Receiver also has standing to bring a professional malpractice claim on behalf of the ABC Investor Trusts for legal malpractice and/or trustee malpractice, as the party in direct contractual privity with E&J under the separate trust agreements.¹¹ *Id.*

Independent of the attorney-client relationship, both of the Defendants also owed a duty of care to ABC and the ABC Investor Trusts in handling their assets and protecting them from waste or unauthorized expenditures. The Receiver, therefore, has standing to bring a common law claim for negligence or gross negligence against both Defendants to the extent they each contributed to the injuries suffered by ABC and the ABC Investor Trusts. *See Resolution Trust Corp. v. Coopers & Lybrand*, 915 F. Supp. 584, 588-89 (S.D.N.Y. 1996).

(d) Aiding And Abetting Corporate Waste

Defendants correctly state that a claim for aiding and abetting corporate waste may be a “derivative” cause of action, but fail to appreciate the impact of that term. Derivative actions are generally brought by a shareholder to protect a company’s interests when its directors refuse to do so. *See generally* BLACK’S LAW DICTIONARY (8th ed. 2004) (“a suit asserted by a shareholder . . . because of the corporation's failure to take some action against the third party.”); *see also* *Mid-State Fertilizer v. Exchange Nat’l Bank*, 877 F.2d. 1333, 1335-36 (7th Cir. 1989). Although Defendants claim that corporate waste claims belong solely to the “corporation’s shareholders,” (Mot. to Dismiss [Dkt. No. 8] at 16) that is not true—the claim belongs to the entity. *See, e.g.,* *Corrections USA v. Dawe*, 504 F. Supp. 2d 924 (E.D. Cal. 2007) (“a corporation itself must bring an action for an injury to the corporation”); *In re Sagent Technology, Inc.*, 278 F. Supp. 2d

¹¹In addition, the Receiver notes that most malpractice policies cover suits against the attorneys who serve as trustee. To date, the Receiver has not yet seen the policy, only the binder which was provided by ABC to each investor with E&J’s full knowledge.

1079, 1087 (N.D. Cal. 2003) (“the right of a stockholder to prosecute a derivative suit is limited to situations where the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so”). For years, both ABC and the ABC Investor Trusts stood helpless while Defendants assisted the LaMondas in wasting their assets through numerous unauthorized transfers against their interests. But that changed when this Court appointed the Receiver to act for those entities. *Lehmann*, 56 F.3d at 754.¹² The Receiver has not refused to bring claims on behalf of ABC and the ABC Investor Trusts and has, in fact, done so through his Complaint. Without question, he now has standing as the Court-appointed representative of each entity to recover damages from the LaMondas for wasting corporate assets **and** from the Defendants for aiding and abetting them.

(e) Breach Of Contract

In large part, Defendants’ motion addresses the merits of the Receiver’s breach of contract claim rather than his standing to bring it. For example, they claim that ABC failed to perform its contractual duties and that Defendants had no duty to fund the escrow accounts. (Mot. to Dismiss [Dkt. No. 8] at ¶¶ 19-20.) Furthermore, they effectively claim that the Escrow Agreement and Trust Agreements required them to commingle the assets of all ABC Investor Trusts and misappropriate those funds at the LaMondas’ direction.¹³ (Mot. to Dismiss [Dkt. No. 8] at 20.) The Receiver submits that these are issues of fact to be determined at trial.

Defendants’ only comment relating to the Receiver’s standing is their admissions that “there is an agreement between ABC & E&J” and “E&J entered into one overall escrow

¹²As the Court noted in that case, “[t]he appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [his] evil zombies. Freed from his spell, they became entitled to the return of the monies.” *Id.* at 754.

¹³Since Defendants’ acts likely violated their fundamental common law duty to preserve and maintain trust assets, any exculpatory clause in those agreements may be invalid as against public policy. *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003); *Health Net of Cal., Inc. v. Dep’t of Health Servs.*, 113 Cal. App. 4th 224, 234 (Cal. Ct. App. 2003).

agreement and separate trust agreements for each trust.” (Mot. to Dismiss [Dkt. No. 8] at 4, 19.) They, therefore, acknowledge the very contracts that give the Receiver standing to state this claim on behalf of ABC and the ABC Investor Trusts as the parties in direct contractual privity.

(f) Breach Of Fiduciary Duty

It is basic hornbook trust law that the trustee—rather than the beneficiaries—has authority to recover losses to the trust. *Case 3:07-cv-01153 Document 14 Filed 10/25/2007 Page 15 of 18* See RESTATEMENT (SECOND) OF TRUSTS § 294, cmt. a; *California v. Altus Finance, S.A.*, 116 P.3d 1175, 1188 n.8 (Cal. 2005) (generally the trustee rather than the beneficiary may prosecute lawsuits against all parties that harm trust property). Defendants admit that the Receiver now serves as successor trustee of the ABC Investor Trusts. (Mot. to Dismiss [Dkt. No. 8] at 7.) In that capacity, he certainly has standing to sue any other party—including Erwin and E&J as previous fiduciaries—that caused injury to the trust assets. *Haskett v. Vias at Desert Falls*, 108 Cal. Rptr. 2d 888 (Cal. Ct. App. 2001) (trustee may be held personally liable for intentional or negligent acts in a manner that establishes personal fault); *Moller v. Superior Court*, 947 P.2d 279 (Cal. 1997) (successor trustee has duty to redress breach of trust by former trustee).

Defendants’ primary argument is that they do not have any liability under the Escrow Agreement. That, however, is a question of fact to be determined at trial and does not impact the Receiver’s right to bring a claim on behalf of the ABC Investor Trusts.¹⁴

(g) Aiding And Abetting Breach Of Fiduciary Duty

The Receiver also has standing to sue Defendants for their role in aiding and abetting the LaMondas’ breach of fiduciary duties to ABC and the ABC Investor Trusts.¹⁵ Obviously, the

¹⁴As explained previously, the terms of the Escrow Agreement are not necessarily determinative in this case because Defendants were also bound by numerous fiduciary duties at common law. *White Mountain Apache Tribe*, 537 U.S. at 475.; see also RESTATEMENT (THIRD) OF TRUSTS § 72 (“A trustee has a duty **not** to comply with a provision of the trust that the trustee knows or should know is invalid because the provision is unlawful or contrary to public policy”) (emphasis added).

LaMondas had a fiduciary duty to carefully and competently manage the assets of both ABC and the ABC Investor Trusts. *In re Rajabali*, 365 B.R. 702, 708 (Bankr. S.D. Tex. 2007) (“Corporate officers owe fiduciary duties to the corporations they serve and they are without authority to act in any manner in which their interest are averse to that of the corporation.”). As the Court-appointed representative of ABC, the Receiver may sue all parties who assisted in damaging ABC’s corporate assets. [Case 3:07-cv-01153 Document 14 Filed 10/25/2007 Page 16 of 18](#) *Order Appointing Receiver* [Dkt. No. 8] (3:06-CV-2136). As the Receiver and successor trustee for the ABC Investor Trusts, he also has standing to sue all parties that assisted in damaging the assets of those trusts. *See* RESTATEMENT (SECOND) OF TRUSTS § 294, cmt. a; *Altus Finance, S.A.*, 116 P.3d at 1188 n.8 (Cal. 2005). He, therefore, has standing to state claims against the LaMondas for breaching their fiduciary duty **and** the Defendants for aiding and abetting them. *See, e.g., Quilling v. Compass Bank*, 2004 WL 2093117, *8 (N.D. Tex. Sept. 17, 2004).

C. THE RECEIVER SHOULD HAVE AN OPPORTUNITY TO AMEND HIS COMPLAINT BEFORE THE CASE IS DISMISSED

The Federal Rules of Civil Procedure “reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Conley v. Gibson*, 355 U.S. 41, 48 (1957). It is the well established policy of the Federal Rules of Civil Procedure that a plaintiff is to be given every opportunity to state a claim. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). A district court should give plaintiff the opportunity to file an amended or supplemental complaint before dismissing the case. *Czosek v. O’Mara*, 397 U.S. 25, 27 (1970).

¹⁵ Logic dictates that since the Receiver has standing to bring claims for breach of fiduciary duty, he likewise has standing to bring claims for aiding and abetting that breach or any other claim to redress injury to the trust assets.

Accordingly, if the Court concludes that the Complaint and exhibits do not comply with Rule 12(b)(1), then the Receiver should be granted leave to amend.

III.
CONCLUSION

Based upon the foregoing, the singular unalterable conclusion is that (1) the receivership entities have suffered as very real and existing injury of at least \$24 million, (2) those injuries were caused by and are traceable to, at least in part, the conduct of the Defendants and, (3) a decision in favor of the Receiver is likely as opposed to speculative. Therefore, the Receiver has standing to pursue the claims. Moreover, it is far from certain that the Receiver can prove no set of facts that would entitle him to relief. The Complaint should not be dismissed.

Respectfully submitted,

QUILLING, SELANDER, CUMMISKEY
& LOWNDS, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201-4240
(214) 871-2100 (Telephone)
(214) 871-2111 (Facsimile)

By: /s/ Michael J. Quilling
Michael J. Quilling
State Bar No. 16432300
Brent J. Rodine
State Bar No. 24048770

By: /s/ Bruce Kramer
Bruce Kramer
Tennessee Bar No. 7472
BOROD & KRAMER, PC
80 Monroe, Suite G-1
Memphis, TN 38103
(901) 524-0200 (Telephone)
(901) 523-0043 (Facsimile)

ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

A true and correct copy of this motion shall be served on all interested parties through the Court's electronic filing system.

/s/ Michael J. Quilling

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