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.	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF STANDING UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

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I. Summary Arguments

Quilling makes a number of arguments that either ignore this Court's related rulings, ignore the orders under which he is appointed, or ignore the very capacity in which he brought this suit.[1] The space permitted for Defendants' reply does not allow them to retort to each and every one of Quilling's misstatements, nor are personal attacks appropriate. Nonetheless, the primary issue may be easily decided in Defendants' favor: Quilling lacks standing to assert his claims on behalf of investors against E&J and Mr. Erwin individually.

II. This Court has Already Ruled that Quilling Lacks Standing to Assert Claims on Behalf of the Investors

1. *Quilling Ignores this Court's Denial of Standing in Similar Case*

This Court has already denied Quilling standing to assert claims on behalf of ABC's investors. (*See* September 26, 2007 Order in *Quilling v. International Fidelity & Surety, Ltd.*, 3:07-CV-00421-P (the "*IFS* Order") (Exhibit A hereto). **Amazingly, Quilling completely ignores this Court's ruling in the *IFS* Order.**[2] The *IFS* Order:

i. Bears directly on the question of Quilling's standing here;

ii. Was issued by this Court in another of Quilling's cases peripherally related to the SEC's action against ABC Viaticals, Inc.;

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[1] Quilling also makes numerous unnecessary and specious and personal attacks on Defendants, including the claim that Defendants accepted $1 million in "hush money." (Resp. at 6 n.7).

[2] By ignoring this ruling, Quilling and his counsel also violated their ethical duties as attorneys. *See* American Bar Association's Model Rules of Professional Conduct, Rule 3.3 Candor Toward The Tribunal: "(a) A lawyer shall not knowingly: (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]" It is certainly within the Court's authority to ensure that the ethical standards are followed by all attorneys appearing before it. *See Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n*, 121 F.R.D. 284, 287 (N.D. Tex. 1988) ("A lawyer owes, to the judiciary, candor, diligence and utmost respect. . . . Those litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice, will find that their conduct does not square with the practices we expect of them.").

iii. Was based on the same *Order Appointing Receiver* and *Order Clarifying and Modifying Order Appointing Receiver* which Quilling argues for a different interpretation of now; and

iv. Was transmitted to Quilling a full month before he filed his oppositions to Defendants' motions.

Quilling's failure to cite, mention, address, or distinguish the Court's ruling speaks volumes about its applicability here and his attempt to hide from its application.

2. *The Court Rejected Quilling's Argument that Standing was Expanded by his Supposed Appointment as Receiver for ABC Investor Trusts*

In *IFS*, the defendant Arie Kotler, argued, as Defendants have argued here, that Quilling purported to assert fraudulent transfer and aiding and abetting breach of fiduciary claims on behalf of ABC, but that these claims were in fact being asserted on behalf of ABC's investors. (*See* Defendant Arie Kotler's Motion to Dismiss Plaintiff's Complaint and Brief in Support, docket # 48, at 18-22). There, Quilling responded by relying, as he does here again, on the Court's *Order Appointing Receiver* and Order *Clarifying and Modifying Order Appointing Receiver*, the Uniform Fraudulent Transfer Act, a handful of his own prior receivership actions, and *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995). (*Compare* Response to Defendant Arie Kotler's Motion to Dismiss, docket # 53, at 17-18; *to* Resp. at 6-7). This Court rejected the vast majority of Quilling's arguments and purported authorities for standing and held that Quilling lacks standing to assert claims for ABC's investors. (*See IFS* Order at 11-12).

The Court recognized a singular exception to the rule that the receiver may bring actions that only could have been brought by the entity in receivership. (*Id.* at 11). The Court reasoned that Quilling had standing to assert only his fraudulent transfer claim. (*Id.* at 12). Notably, the Court wholly rejected Quilling's argument that his supposedly

being appointed receiver for the investor trusts somehow broadened his standing beyond constitutional limits. Despite the ruling in the *IFS* Order, Quilling makes this argument in his response to Defendants' motion: "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." (Resp. at 2, citing the *Order Appointing Receiver* and *Order Clarifying and Modifying Order Appointing Receiver*). Quilling even goes so far as to complain that Defendants are "oblivious" to the second order and its supposed expansion of Quilling's receivership standing. (*Id.* at 3). Far from being "oblivious", Defendants have always held the correct position that the second order did not expand Quilling's standing, as this Court previously held in the *IFS* Order:

> The Court does not agree with Plaintiff. **The investor trusts were created by ABC and Keith LaMonda to hold insurance policies for investment purposes**. (Compl. ¶ 10-11.) **Both the investor trusts and ABC owed a fiduciary duty to their investors. Any breach of that duty is actionable only by the investors to whom the duty was owed. Therefore, the Court finds that only the investors have standing to assert claims based on a breach of fiduciary duty**. The Court does not find an applicable exception as with the claim for fraudulent transfer and hence Plaintiff lacks standing to assert this claim on behalf of the investors in this case.

(*Id.* at 12) (emphasis added). That Quilling continues to assert precisely the same rejected argument is nothing short of baffling. The Court should grant Defendants' motion to dismiss on this basis alone.

3. *Other Jurisdictions Reject a Receiver's Standing to Sue on Behalf of Investors*

The Court's reasoning in the *IFS* Order is in keeping with other jurisdictions' well-reasoned rejections of arguments like the ones Quilling advances now. For instance, in 2005, Judge Moreno dismissed a receiver's action because it sought relief for

defrauded investors. (*See Final Order of Dismiss and Order Denying All Pending Motions as Moot* entered in *Martinez v. Traina*, No. 05-60906-CIV-MORENO (S.D.Fl. June 22, 2005) (Exhibit B hereto). There, the court conducted a *sua sponte* examination of the receiver's complaint and determined that the receiver was suing solely on behalf of allegedly defrauded investors. (Ex. B at 1). The court found that the receiver lacked standing to do so and expressed concern that, if permitted to continue the action, Defendants would unfairly be subject to "double" actions and damages:

> **The Court is concerned with the possibility that, if also sued by the investors, the sales agents might be forced to pay double damages** since there is no indemnification clause in the settlement agreements to protect the agents in such circumstances. In summary, t**he Court lacks constitutional jurisdiction and the Receiver does not have statutory standing to bring this suit on behalf of the investors**.

(Ex. B at 1-2) (emphasis added).

In *Martinez*, the receiver moved to reconsider the dismissal, making the same arguments that Quilling makes here. (*See* Receiver's Motion for Reconsideration of Order of Dismissal) (Exhibit C hereto). Like Quilling, the receiver argued that he brought suit based on the depletion of the receivership estate as a result of the payment of millions of dollars in commissions to sales agents, and that injury was first suffered by the receivership estate. (*Id.* at 2-3). Compare that with Quilling's identical argument: "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." (Resp. at 4). The court denied the motion, reasoning that the only harm alleged was that to the investors:

> There is no cause of action available to an entity which simply wishes to ensure that money is available for judgment creditors. **The investors have the right to decide whether or not to sue the MBC sales agents. . .**

> **. It is best to simply let the investors bring any cause on their own behalf, if they wish**.

(Order Vacating Order Granting Motion for Reconsideration and Order Denying Motion for Reconsideration, at 1-2) (Exhibit D hereto) (emphasis added). This Court has already employed similar reasoning in the *IFS* Order, and it should reassert it here by granting Defendants' motion to dismiss for lack of standing. *See id.*

III. Quilling has Failed to Prove Standing by a Preponderance of Evidence

Quilling recognizes that Defendants have asserted a factual attack on jurisdiction. (Resp. at 2). Quilling, therefore, must prove by a preponderance of admissible evidence that he has standing to bring each and every one of his claims. *See 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.). In other words, and consistent with the *IFS* Order, Quilling must prove that he is (i) asserting claims for the receivership entity, ***not*** for the investors; and (ii) he must present preponderant evidence to support each of his claims. *See id.*

Quilling's declaration and the supposed advertisement used by ABC – the only evidence presented (to the extent that it is admissible) – do nothing more than regurgitate the allegations in his response. (Resp. at 5-6). They do not identify any particular claim as being asserted on behalf of ABC instead of the investors, nor do they identify which claims are being asserted against E&J versus Mr. Erwin. Tellingly, they also fail to overcome the unambiguous written contracts between ABC and E&J, which were attached to Defendants' motion to dismiss and prove that E&J has no responsibility to "insure [sic] proper funding of a segregated premium account." (Compl. at ¶ 13). The written agreements contractually and unequivocally placed the responsibility of funding

the premium account squarely and exclusively upon ABC's shoulders. (Ex. B at 2). Quilling fails to even refer to this evidence in discussing many claims.[3] It was incumbent upon Quilling to identify and explain his evidence supporting jurisdiction over each claim by a preponderance of the evidence. He has failed to do so. Moreover, Quilling has apparently abandoned any standing argument as to his request for disgorgement, choosing not to discuss it at all.

Quilling's inclusion of the advertisement bears special mention, as he presumes that it was created with the consent or the direction of Defendants. This advertisement was not created with the consent or under the direction of Defendants. In fact, Defendants had not even seen it until the received Quilling's response. According to Mr. Erwin's attached declaration, he never provided permission or support to ABC in creating this advertisement. (Declaration of Christopher R. Erwin) (Exhibit E hereto). It appears that this advertisement was compiled by someone at ABC, with the information about E&J being simply copied from E&J's Web site, without E&J's permission. None of this evidence is sufficient to prove standing for Quilling to assert each and every claim he asserts now. "As said [by the Supreme Court] in *Michigan v. Michigan Trust Co.*, receiverships for conservation have a legitimate function but they are to be watched with jealous eyes lest their function be perverted." *Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954) (internal citation omitted).

[3] Quilling confusingly cites Defendants' own motion to dismiss as apparent support for fraudulent transfers of proceeds to Mr. Erwin. (Resp. at 7 n.2). Page 2 of Defendants' motion actually contains several statements refuting Mr. Erwin's personal receipt of any funds from ABC.

IV. Quilling's "Successor Trustee" Argument is a Red Herring

Once again, Quilling attempts to expand his standing by making new arguments well beyond the scope of his pleadings. This time, he claims that he is supposedly suing Defendants as a successor trustee (apparently, in addition to suing as receiver for ABC, as receiver for the ABC Investor Trusts, but evidently not for the investors themselves, to be sure). Yet again, Quilling loses sight of the orders appointing him and settled standing jurisprudence. The Court should reject this new argument for several reasons:

First, **Quilling did not bring this suit as successor trustee**. He brought suit **solely in his capacity as Receiver** for ABC Viaticals, Inc., and other related entities.[4] He never makes any mention anywhere of his "successor trustee" grounds. Thus, his new argument – that he can assert all of his claims as successor trustee – fails to appreciate the pleading of his own suit.

Second, Defendants have challenged ***standing***, which is not addressed by Quilling's successor trustee argument. Having standing and being a successor trustee is not the same thing. *See Kent v. Northern California Regional Office of Am. Friends Service Committee*, 497 F.2d 1325, 1329 (9th Cir. 1974) ("There is no doubt that as to the trust fund, the trustees are the real party in interest by virtue of FED. R. CIV. P. 17(a). But Rule 17(a) means only that the trustees have a real interest in the trust fund. Rule 17(a) does not give them standing; 'real party in interest' is very different from standing.") (citing 6 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1542, at 641

[4] "COMES NOW, Michael J. Quilling, **as Receiver for ABC Viaticals, Inc., and other related entities** and files this Complaint against Erwin & Johnson, LLP and Christopher R. Erwin and in support of such, would respectfully show the Court as follows …" (Compl. at 1) (emphasis added).

(1971)). Quilling's successor trustee argument is, therefore, really an attempt to side-step the standing dispute.

Third, the two orders concerning Quilling's appointment certainly do not provide him with the right to bring suits ***as successor trustee***. Indeed, they strictly and solely permit him to bring suit as Receiver for ABC Viaticals, Inc., and other Relief Defendants. To now argue that he can pursue this action based on, but also aside from, those orders contravenes his own steadfast (until now) reliance on the Court's orders.

Fourth, if Quilling actually brought this suit as a successor trustee, Defendants would have had a stable of other grounds for dismissal and counterclaims to assert. For instance, it would have been incumbent on Quilling to pleading standing as a successor trustee, identify each and every trust on whose behalf he was suing, and plead how each trust was damaged individually. Quilling would also be responsible for his own actions as a trustee, essentially creating the situation where Defendants could assert counterclaims against Quilling for his responsibility for under-funding premiums during his tenure as a successor trustee.[5] The Court should not consider Quilling's sham argument.

V. Leave to Amend Should be Denied

By challenging his standing, Defendants are not engaging in a "game of skill in which one misstep by counsel may be decisive to the outcome[.]" (Resp. at 12) (quoting

[5] Quilling misrepresents Defendants' use of the term "ruse." (Resp. at 3 n.2). Quilling states that Defendants dismissed as a "ruse" Quilling's argument that he has standing as a successor trustee. (*Id.*). Quilling never made a successor trustee allegation in his Complaint, but only makes it now in response to Defendants' motion. It is thus patently illogical that Defendants would have referred to the un-made allegation as a "ruse." Defendants' actual argument was that Quilling's allegation that he was seeking relief on behalf of the trusts was a "ruse" to avoid directly alleging that he is seeking relief on behalf of the investors. (Motion at 16). And in the *IFS* opinion, this Court recognized that relief sought for the trusts is relief sought for the investors themselves.

Conley v. Gibson, 355 U.S. 41, 48 (1957)).[6] Quilling should be denied leave to amend for several reasons:

First, despite knowing this Court's ruling in the *IFS* Order Quilling failed to voluntarily amend his complaint before filing his responses to Defendants' motions. And his refusal to initially remove the allegation that Mr. Erwin received $500,000 personally, despite being confronted with incontestable evidence showing that the money went directly to E&J, further demonstrates that he cannot now be trusted to draw an amended complaint in keeping with the true state of the evidence and the Court's rulings.

Second, Defendants are aware that the Court granted Quilling leave to amend to assert the claims for which he did not lack standing in the *IFS* Order. Here, however, Defendants submit that because Quilling has failed to adduce the necessary preponderant evidence to support any of his claims here, all of his claims warrant dismissal, mooting any request to amend. Indeed, the Southern District of Florida denied the receiver's request to amend after deciding that the receiver lacked standing to assert any claims.

Third, Quilling's request suffers from numerous procedural deficiencies. *See* N.D. TEX. L. CIV. R. 5.1(c); 7.1(c); 15.1(c). To the extent that the Court is inclined to grant Quilling an opportunity to amend to assert a claim, if any, for which he has standing, Defendants request that the Court require that Quilling follow the Local Rules for creating and submitting such motion.

[6] The United States Supreme Court has already moved on from *Conley v. Gibson*'s pleading standard in *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1960 (2007). Quilling is apparently not aware of this, as he cites *Conley* as the current pleading standard here and in response to Defendants' motion to dismiss for failure to state a claim, with only passing reference to *Twombly*.

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 9th day of November, 2007, to all known counsel of record as required by the Federal Rules of Civil Procedure.

William J. Akins