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' MOTION FOR
RECONSIDERATION OF FEBRUARY 25, 2008 ORDER

Erwin and Johnson, LLP ("E&J"), and Christopher R. Erwin ("Mr. Erwin") (collectively, "Defendants"), respectfully move for reconsideration of the Court's February 25, 2008 Order ("Order"), and in support respectfully show the Court as follows:

I.
SUMMARY

The Court should reconsider its Order for several reasons. First, the Court characterized Defendants' factual attack on Michael J. Quilling's ("Plaintiff") standing to assert all claims as a challenge to the merits, better left to summary judgment, and decided that it was premature to consider the lack of a particularized injury. However, the decisional framework for a factual attack on standing required Plaintiff to prove both a particularized injury and a causal link ***by a preponderance of the evidence.***[1] As

[1] That evidence would be necessarily weighed in the factual standing challenge required filing the Rule 12(b)(1) motion separately from the Rule 12(b)(6) motion. While the arguments in both motions are similar in some instances, this is only because the required elements of standing (injury to ABC, causal

Defendants point out throughout their reply, Plaintiff failed to do so. In fact, Plaintiff's standing arguments are not supported by any evidence at all, only Plaintiff's arguments, conclusions, and speculations. Plaintiff's *arguments* are not enough to show the requisite proof backing a particularized and concrete injury to ABC caused by Defendants – the necessary jurisdictional hallmarks. The Court should reconsider its ruling under the standard for a factual standing challenge and hold that Plaintiff failed to produce a preponderance of evidence on all elements of standing as to each of his claims.

Second, the Court's Order misunderstands the relationship that existed between Defendants and ABC. Specifically, the Court based its analysis of the breach of fiduciary duty, professional malpractice/negligence, and gross negligence claims on the mistaken premise that Defendants acted as ABC's attorneys. As set forth in the operative escrow account and trust agreements, E&J was retained solely to provide trustee and escrow services for ABC, an nothing else. Defendants have *never* acted as ABC's attorneys. Plaintiff has not and cannot dispute this. Simply put, there is no evidence to show that Defendants provided legal services to ABC. Accordingly, since there was no attorney-client relationship between Defendants and ABC, any reasoning based upon a non-existent relationship would be inappropriate and the Court should reconsider its rulings on these claims.

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connection) sometimes appear as substantive elements of certain claims (damages to ABC, causation). Relatedly, while Plaintiff may be able to "state a claim" under Rule 12(b)(6), this does not mean that he has met his evidentiary standard under a 12(b)(1) factual attack. A Rule 12(b)(1) motion must be considered before any other challenge because "the court must find jurisdiction before determining the validity of a claim." *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) (internal citation omitted); *see also Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 577, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) ("The requirement that jurisdiction be established as a threshold matter . . . is inflexible and without exception") (citation and internal quotation marks omitted). Plaintiff must thus meet his evidentiary standard as to each element of standing on every claim to survive a Rule 12(b)(1) motion ***before*** the plausibility of a claim according to the Rule 12(b)(6) motion may be considered.

Third, to the extent that the Court refers to state substantive law, it is the law of California – not Texas – that applies to any claims arising out of E&J's performance of its contractual trustee/escrow services. The Court applied Texas substantive law to the breach of fiduciary duty claim, California law to the claim for aiding and abetting corporate waste, and did not specify which state's law applied to the remaining claims. Defendants' motions adequately set out California law on the applicable elements for each one of Plaintiff's claims. The Court should reconsider its Order to apply California substantive law to all of Plaintiff's claims in its analyses of Defendants' Rule 12(b)(6) challenge.

Fourth, the Court should reconsider its conclusion that the ***trusts*** are susceptible to harm independent from the harm to the investors. The trusts do not exist as independent jural entities, capable of sustaining their own harm, asserting their own claims through ABC, and obtaining their own relief. Simply put, the trusts are not severable from the investors. Should the Court's Order stand, Defendants would be exposed to the potential for double damages since ABC would be permitted to recover from Defendants for harm done to the trusts ***and*** the investors would be allowed to sue Defendants on the same claims for the same harm to their money held in these trusts. The only way to prevent Defendants from suffering double damages would be to foreclose the possibility of the investors suing Defendants. Reconsideration of the Order is necessary to clarify that any harm to the trusts is *de facto* harm to the investors, for whom Plaintiff lacks standing to bring his claims. Alternatively, if the Court maintains that Defendants are answerable to ABC for any alleged harm to the trusts, the Court should clarify that its ruling means that

any harm to the trusts does not extend to the investors, and the investors themselves cannot sue Defendants for harm to the trusts.

Fifth, Mr. Erwin cannot be individually liable under California law for actions done exclusively on behalf of E&J since California's limited liability partnership statutes restrict a partner's liability to only those situations in which the partner personally engaged in tortious conduct for which he would be personally liable. The Court's Order should be reconsidered because it holds Mr. Erwin personally liable solely for his work done on behalf of E&J, not for any independent tortious conduct.

Finally, Plaintiff's aiding and abetting claim corporate waste claim should be dismissed on further grounds. The case cited by the Court for the application of California law is a federal diversity case applying Delaware law. If, under California law, a claim for aiding and abetting corporate waste would belong to the corporation, as the Court states, the money that was allegedly wasted would necessarily have to belong to the corporation. Here, the money invested in the trusts belonged to the investors – not to ABC. Thus, it was not ABC's money to waste. ABC, therefore, has no claim for damage to the corporation. Absent a claim that ABC wasted company assets, there is no basis for claiming that Defendants aided and abetted in the waste of corporate assets. Consequently, the Court should reconsider its Order to dismiss this claim entirely.

II.
SPECIFIC GROUNDS FOR RECONSIDERATION

A. Standard for Reconsideration of Interlocutory Order

The Court retains the power to reconsider any interlocutory order at any time before the entry of judgment. *See* FED. R. CIV. P. 54(b); *see also St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336, 339 (5th Cir. 1997). A motion seeking

reconsideration of an order is generally considered a motion to alter or amend under Rule 59(e) if it seeks to change the order or judgment issued. *Vlasek v. Wal-Mart Stores, Inc.*, No. H-07-03862008, WL 167082, at *1 (S.D. Tex. Jan. 16, 2008) (citing *Standard Quimica De Venezuela v. Cent. Hispano Int'l, Inc.*, 189 F.R.D. 202, 204 (D.P.R. 1999)). "In addition, though the general rule is that motions for reconsideration will not be considered when filed more than ten days after the judgment at issue is entered, this deadline does not apply to the reconsideration of interlocutory orders." *Id.* (citing *Standard Quimica De Venezuela*, 189 F.R.D. at 205). "Motions to reconsider interlocutory orders are left to the court's discretion so long as not filed unreasonably late." *Id.* (citing *Standard Quimica De Venezuela*, 189 F.R.D. at 205; *Martinez v. Bohls Equipment Co.*, No. SA-04-CA-0120-XR, 2005 WL 1712214, *1 (W.D. Tex. July 18, 2005)).

When the motion to reconsider concerns a threshold jurisdictional ruling, reconsideration is even more important. *See, e.g., Johnston v. Multidata Systems Intern. Corp.*, No. G-06-3132007, WL 3998804, at *1 (S.D. Tex. Nov. 14, 2007) (defendants' motions to dismiss for, *inter alia*, lack of personal jurisdiction constituted a threshold issue that presented a close call for which there could be a difference of opinion). The Court serves the interests of fairness to the parties and avoids any unnecessary delay and expense by reconsidering its jurisdiction at the earliest possible time. *See id.* (granting motions to reconsider certification for interlocutory appeal of jurisdictional issue). Here, not only does the Court have the inherent power to reconsider its Order, but such reconsideration is warranted because Defendants have presented numerous arguments and evidence showing that Plaintiff lacks standing to bring this lawsuit.

B. Defendants' Factual Challenge to Standing Requires Consideration of Evidence, Resolution of Factual Disputes, and Shifts Burden to Plaintiff to Prove Three Elements of Standing by Preponderance of the Evidence

Defendants factually attacked Michael J. Quilling's ("Plaintiff") standing to assert all claims. A factual attack required that Plaintiff prove standing by a preponderance of the evidence by submitting facts through some evidentiary method. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2006 WL 2285638, at *2 (N.D. Tex. Jul 31, 2006); *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). "Federal district courts have the unique power to make factual findings which are decisive of subject matter jurisdiction." *Jackson v. Fidelity Nat. Title Ins. Co.*, No. 3:07-CV-1706-G, 2008 WL 508489, at *2 (N.D. Tex. Feb. 26, 2008) (Fish, S.J.) (recognizing that the burden is on the party invoking jurisdiction to prove it by a preponderance of the evidence in the context of standing). Once standing is factually challenged, proper proof of the elements of causal connection and particularized concrete injury is necessary, and the Court must consider whether the party invoking jurisdiction has proven each element by a preponderance of the evidence for each claim. *Id.*

In its Order, the Court mischaracterized the factual attack as a challenge to the merits. Particularly, as to the lack of any causal connection in Plaintiff's claims, the Court stated that the challenge "speaks to the merits of case"and would be more properly considered at the summary judgment stage. (Order at 3). The Court also considered any analysis of concrete and particularized injury to be premature at this time. (*Id.*). However, Defendants' arguments did not go to the merits of each claim, but rather required Plaintiff to comply with the requisite factual standing standard to prove, by a

preponderance of the evidence, a concrete and particularized injury to ABC and a causal link between the injury and Defendants' conduct – for each and every claim.

Defendants painstakingly set forth how Plaintiff failed to produce evidence of injury to ABC and a causal connection to E&J and Mr. Erwin with respect to each and every particular claim asserted. The Court should reconsider its refusal to hold Plaintiff to the preponderance of the evidence burden as to the three standing elements for each claim. Ultimately, it should become clear that Plaintiff has not – indeed, cannot – produce a preponderance of the evidence to pursue each and every claim asserted, because the injuries under each claim were not suffered by ABC and did not have a causal connection to Defendants.

C. Evidence Conclusively Shows that Defendants were not ABC Viaticals, Inc.'s Attorneys

The Court's Order is predicated, in large part, on a misunderstanding of the relationship between Defendants and ABC. At no time were Defendants acting as ABC's attorneys. Rather, E&J was engaged and acted solely as ABC's trustee and escrow agent, as this relationship was defined in the parties' written agreements. This fact has not, and cannot, be disputed.

1. *Scope of Parties' Relationship Defined by Contract*

The attorney-client relationship can only be created by contract, express or implied. *Koo v. Rubio's Restaurants, Inc.*, (2003) 109 Cal.App.4th 719, 729. There certainly was no express agreement, in that no contract between E&J and ABC stated that E&J assumed the role of ABC's legal counsel. In fact, as set forth in the operative agreements between the parties (the April 14, 2005 engagement letter, the escrow accounts agreement, and the trust agreements), it is indisputable that E&J was retained

solely to provide trustee and escrow services. The April 14, 2005 engagement letter between ABC and E&J specifically stated that E&J was retained to provide trustee and escrow services:

> This letter will confirm that, upon all signature, Erwin & Johnson, LLP (E&J) has been engaged to provide the services outlined below, subject and limited to the terms of this letter.
>
> . . . .
>
> E&J has been retained by you in connection with certain trusts and escrow that will established in ABC Viaticals' line of business. It is expressly understood that we are not retained to advise you in other matter, and any engagement by E&J in any other matter will only be in writing signed by both you and our firm.
>
> . . . .
>
> In particular, our services will include:
>
> 1. Trustee Services
>
> 2. Escrow Services
>
> As we have discussed, it is very important to the success of our relationship that our mutual roles and responsibility be outlined clearly and in detail in the trust and escrow agreements.

(April 14, 2005 correspondence, attached hereto as Exhibit A). The engagement letter limited E&J's services to trustee and escrow services, and such limitation is further evidenced in the escrow accounts and trust agreements, which have been provided to the Court.

The escrow accounts agreement (Exhibit A to Defendants' Rule 12(b)(1) motion) specifically stated that ABC was the Grantor and E&J was the Escrow Agent. Certainly, this escrow accounts agreement cannot be construed to create an attorney-client relationship. The trust agreement (Exhibit B to Defendants' Rule 12(b)(1) motion) made E&J the Trustee on the policy listed therein. While this agreement evinces the grantor/trustee relationship between E&J and ABC, it certainly does not support any

attorney-client relationship. Plaintiff has not, and cannot, present ***any*** evidence rising to a preponderance to show that E&J acted as ABC's attorneys.

Additionally, there was no implied attorney-client agreement between Defendants and ABC. An implied attorney-client agreement must be based on evidentiary facts, such as the solicitation of legal advice, the billing for and receipt of legal services, payment of attorney's fees, or concrete representations of being the client's legal counsel. *See Beery v. State Bar*, (1987) 43 Cal.3d 802, 811-812, 239 Cal.Rptr. 121, 739 P.2d 1289; *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 79 Cal.App.4th at 126, 93 Cal.Rptr.2d 534. "Intent and conduct are critical to the formation of an attorney-client relationship." *Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton*, 109 Cal.App.4th at p. 1228, 135 Cal.Rptr.2d 695; *Hecht v. Superior Court*, 192 Cal.App.3d at 565-566, 237 Cal.Rptr. 528. Here, Plaintiff had the burden to present evidence showing the intent and conduct necessary to show the existence of an attorney-client relationship. He failed to do so because no such relationship has ever existed.

2. *Plaintiff Recognizes E&J's Role as Trustee in Breach of Fiduciary Duty Claim*

Plaintiff's pleadings do not support creating an attorney-client relationship where none existed. The Court mistakenly considered Defendants to be ABC's attorneys in its analysis of Plaintiff's breach of fiduciary duty claim despite the fact that Plaintiff's claim refers to E&J as "trustee", and not ABC's attorneys. (Complaint at 15). Moreover, the specific claim does not even mention Mr. Erwin, who assuredly had ***no*** attorney-client relationship with ABC. The Court should reconsider its ruling to clarify that this claim has nothing to do with an attorney-client relationship, as pleaded, as supported by evidence, and as construed under California law.

3. *No Evidence Shows Attorney-Client Relationship in Relation to Professional Malpractice/Negligence or Gross Negligence Claims*

Plaintiff asserts his professional malpractice/negligence and gross negligence claims against E&J (again, not Mr. Erwin) as "attorneys and in their role as trustee[.]" However, Plaintiff's ***allegations*** are unsupported by any ***evidence*** showing that E&J acted as ABC's attorneys. To prove standing, the law requires Plaintiff to demonstrate by a preponderance of the evidence that an attorney-client relationship existed. *See Jackson*, 2008 WL 508489, at *2; *Merrill Lynch, Pierce, Fenner*, 2006 WL 2285638, at *2. None of the evidence before the Court supports any such relationship. Ultimately, it would be in error to predicate standing – as to E&J and Mr. Erwin – on a phantom attorney-client relationship that simply did not exist, is conclusively refuted by the evidence, and is not otherwise imposed upon a trustee/escrow agent under California law. Thus, the Court should reconsider its rulings on the breach of fiduciary duty, professional malpractice/negligence, and gross negligence claims, and dismiss these claims as predicated on a relationship that is not supported by the evidence.

D. Appointment of Plaintiff as Receiver for Trusts Violates Fundamental Constitutional Limits on a Party's Standing

The Court should reconsider its Order because it is based on the incorrect premise that standing can be conferred by order, even if it exceeds constitutional limitations. Standing has both constitutional and prudential aspects. *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 560 (5th Cir. 2001). Constitutionally, 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); *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").

Defendants argued at length why Plaintiff would not have standing to sue on behalf of the investors themselves ***or*** the investors' trusts. (Defendants' Rule 12(b)(1) motion at 10-13). The Court roundly rejected Plaintiff's argument that he could sue on behalf of the investors. Plaintiff also argued that he was appointed to sue on behalf of ABC's ***trusts***. (Response to Rule 12(b)(1) motion at 2-3). The Court apparently adopted this argument, stating throughout its Order that Plaintiff has standing to sue on behalf of the "investor trusts," "ABC or the investor trusts," and "ABC and the ABC trusts." (Order at 10-14).[2] To the extent that the Court holds that Plaintiff has standing to sue on behalf of the trusts themselves, the Court's appointment exceeds Article III's standing boundaries.

2. *Investors' Trusts are not Separate Jural Entities to Whom a Duty may be Owed by Defendants*

Prudential concerns are raised by appointing Plaintiff to asserting claims on behalf of the investors' trusts. Prudential restrictions include a requirement that a litigant generally must assert his or her own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties. *Ward v. Santa Fe Independent School District*, 393 F.3d 599, 606 (5th Cir. 2004), *citing Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Asserting claims on behalf of the trusts is the

[2] No mention is made of Plaintiff's supposed appointment to sue on behalf of the trusts in the Court's recitation of background and procedural history, only that Plaintiff was appointed as Receiver for ABC. (Order at 2).

same as asserting claims on behalf of the investors. The whole of Defendants' Rule 12(b)(1) motion is that ABC has no standing to assert claims on behalf of the investors.

a. *Any Breach of Trust is Actionable by Investors, not the Trusts*

Plaintiff claims various means by which Defendants breached the trust and escrow agreements. California law clearly contemplates that any breach of trust by a trustee is actionable by the trust's beneficiaries. *Moeller v. Superior Court*, (1997) 16 Cal.4th 1124, 1134, 69 Cal.Rptr.2d 317, 947 P.2d 279 (recognizing that, if a trustee violates any duty owed to the beneficiaries, the trustee is liable for breach of trust). Here those beneficiaries are the investors. In a trust relationship, the benefits belong to the beneficiaries and the burdens to the trustee. *Id.*; Va*n de Kamp v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 204 Cal.App.3d 819, 853, 251 Cal.Rptr. 530, 546 (1988) (advising that the beneficiary has the initial burden of proving the existence of a fiduciary duty and the trustee's failure to perform it).

On the other hand, trusts are not proper defendants, either. *Moeller*, 16 Cal.4th 1124, 1132, fn. 3, 69 Cal.Rptr.2d 317, 947 P.2d 279; ("[T]he trustee, rather than the trust, is the real party in interest in litigation involving trust property."). In fact, the trustee has the duty, in some cases, of instituting its own actions for recovery of the property of the trust. In instances in which the trustee will not do so, or has breached its trust, the beneficiaries (not the trust itself) may step in and institute suit. In fact, Section 16420 of the California Probate Code expressly allows a beneficiary or a cotrustee of a trust to "commence a proceeding" "[i]f a trustee commits a breach of trust . . ." *Wolf v. Mitchell, Silberberg & Knupp*, (1999) 76 Cal.App.4th 1030, 1036.

The Court's analysis parses in an intermediate step, construing the investors' trusts as existing independent of the investors, susceptible to harm in their own right, and capable of redressing that harm by obtaining their own relief from Defendants (through ABC). To the extent any harm is caused, it is not to the trusts, but to the investors who have placed their money in the trusts. The fiction that the ***trusts*** may be harmed – apart from the ***investors*** – is simply a way to side-step the argument that Plaintiff has no standing to sue on behalf of the investors. The Court should reconsider its Order and hold that harm to the trusts is actually harm to the investors, on whose behalf Plaintiff lacks standing for the many reasons set out in Defendants' Rule 12(b)(1) motion.

b. ***The Court's Order Opens Possibility of Double Damages from Defendants***

Parsing the harm to the trusts from the harm to the investors also creates the very real problem of allowing ABC and the investors to sue Defendants for the same claims and same damages to the same trusts. Restricting Plaintiff's standing to ABC – the corporation in receivership – would alleviate this problem. That Plaintiff has been appointed as receiver ***for*** the trusts does not, in and of itself, mean that Plaintiff has standing to sue ***on behalf of*** the trusts. Rather, Plaintiff's standing is and has always been limited to that which ABC would have had, based on which Plaintiff may try to obtain funds traceable to the trusts. The question of what claims could be brought by Plaintiff (with standing tied solely to ABC) to obtain funds traceable to the trusts is certainly distinct from suing on behalf of the trusts. The Court should reconsider its Order to make this distinction.

Alternatively, if the Court concludes that ABC has standing to sue for the trusts themselves, and that the trusts suffered injuries apart from the investors, Defendants

would ask that the Court clarify that any harm to the trusts does not constitute harm to the investors for which the investors could sue Defendants. This conclusion appears reasonable from a fair reading of the Court's Order, which already separates out harm to the investors from harm to the trusts. And this would preclude the investors from suing Defendants for the same harm that Plaintiff claims was suffered by the trusts. Should the Court maintain that the trusts and investors are severable, Defendants would ask that the Court reconsider its Order on this alternative basis.

E. The Court Must Apply California Substantive Law

The Court should reconsider its application of Texas substantive law because the substance of Plaintiff'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." (Exhibit A to Defendants' Rule 12(b)(1) motion). The trust agreement states that it is also governed by California law. (Exhibit B to Defendants' Rule 12(b)(1) motion). Defendants adequately set out applicable California law on each one of Plaintiff's claims. Yet, the Court applied Texas substantive law to the breach of fiduciary duty claim, California law to the claim for aiding and abetting corporate waste, and did not specify which state's law applied to the remaining claims.[3]

When an agreed choice-of-law provision has been included in a contract, California applies an analysis under the Restatement Second of Conflict of Laws, section 187. *See Nedlloyd Lines B.V. v. Superior Court*, (1992) 3 Cal.4th 459, 464-465 (Nedlloyd, supra, 3 Cal.4th 459; *see also Washington Mutual Bank v. Superior Court*,

[3] The application of Texas substantive law in the breach of fiduciary duty analysis consists of the consideration of Texas' attorney-client law. Removal of this analysis would remove all Texas substantive law on this claim and leave only California law as to a trustee's duties.

(2001) 24 Cal.4th 906, 914-915. The Restatement analysis, and California law, reflects a strong policy favoring enforcement of contractual choice-of-law provisions. *Nedlloyd*, supra, 3 Cal.4th 459, 464-465. The parties agreed to the application of California law to their respective duties and responsibilities under the trust and escrow agreements. Their choice of law must be followed. *See id.* There is no evidentiary basis for applying Texas substantive law to any of Plaintiff's claims arising out of E&J's performance of its contractual trustee/escrow services. The Court should reconsider its Order and apply California substantive law to all of Plaintiff's claims.

F. Mr. Erwin Cannot be Individually Liable for his Actions Done Exclusively on Behalf of the Limited Liability Partnership

The Court should reconsider its ruling that Mr. Erwin's actions taken on behalf of E&J are enough to support his independent liability. Under California law, a partner is not individually liable solely for acting on behalf of a partnership unless he engages in his own tortious conduct. California's Uniform Partnership Act of 1994 (CALIF. CORP. CODE §§ 16100-16962) applies to all general partnerships, including limited liability partnerships. Section 16306(c), which states:

> Notwithstanding any other section of this chapter, and subject to subdivisions (d), (e), (f), and (h), **a partner in a registered limited liability partnership is not liable or accountable, directly or indirectly**, including by way of indemnification, contribution, assessment, or otherwise, **for debts, obligations, or liabilities of or chargeable to the partnership** or another partner in the partnership, whether arising in tort, contract, or otherwise, that are incurred, created, or assumed by the partnership while the partnership is a registered limited liability partnership, by reason of being a partner or acting in the conduct of the business or activities of the partnership.

CALIF. CORP. CODE § 16306(c) (emphases added). Partners are only liable for their own tortious conduct. CALIF. CORP. CODE § 16306(e). "The individual partners in a registered limited liability partnership generally are not vicariously liable for partnership

obligations that do not arise from the partner's personal misconduct or guarantees. (Corp. Code, § 16306, subd. (c).)" *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro LLP*, 150 Cal.App.4th 384, 389 n.3, 58 Cal.Rptr.3d 516 (2007). In fact, absent personal tortious conduct, a partner is not even a property party to a proceeding in which damages are sought against the partnership:

> A partner in a registered limited liability partnership is not a proper party to a proceeding by or against a registered limited liability partnership in which personal liability for partnership debts, obligations, or liabilities is asserted against the partner, unless that partner is personally liable under subdivision (d) or (e).

CALIF. CORP. CODE § 16306(g). California statutory law is clear: only independent tortious conduct by a partner may subject that partner to suit.

The Court relied on Plaintiff's ***allegations*** of Mr. Erwin's conduct to allow Plaintiff to maintain this suit against him. (Order at 12). That the Court found Plaintiff's allegations sufficient to survive a Rule 12(b)(6) challenge (Order at 11-12), does not mean that Plaintiff produced the necessary evidence to prove the standing elements as to each claim against Mr. Erwin. Allegations alone cannot prove standing in response to a factual attack. *See Jackson*, 2008 WL 508489, at *2; *Merrill Lynch, Pierce, Fenner*, 2006 WL 2285638, at *2. For Plaintiff to have standing to sue Mr. Erwin personally, Plaintiff must be able to show by a ***preponderance of the evidence*** a ***particularized and concrete injury*** to ABC caused by ***Mr. Erwin's*** own tortious actions. *See Jackson*, 2008 WL 508489, at *2; *Merrill Lynch, Pierce, Fenner*, 2006 WL 2285638, at *2. Because no such evidence exists here, the Court should reconsider its Order as to Mr. Erwin and dismiss all claims against him.

G. Reconsideration of Analysis of Claim for Aiding and Abetting Corporate Waste

Finally, Plaintiff's aiding and abetting claim corporate waste claim should be dismissed on additional grounds. As an initial matter, the Court correctly recognizes the application of California law to this claim, but the cited case is a federal diversity case that applied Delaware law. *In re Sagent Tech., Inc. Derivative Litig.*, 278 F. Supp. 2d 1079, 1091 (N.D. Cal. 2003) ("Accordingly, under the provisions of § 309 of the Restatement, the law of Delaware, the state of incorporation, should apply."). The proposition for which the Court cited *In re Sagent* appears on page 1095, citing Delaware law. *Id.* at 1095 ("A cause of action for corporate waste must be asserted in a derivative action, because a cause of action for impairment or destruction of the corporation's business vests in the corporation rather than in the individual shareholders.") (citing *Kramer v. Western Pacific Indus.*, 546 A.2d 348, 353 (Del. 1988)).

Further, the genesis of a claim for corporate waste is that money or assets owned by the corporation were diverted for an improper purpose. That this claim belongs to the corporation (in our case, ABC) does not save the claim from dismissal here because the money allegedly wasted was not ABC's money. The money invested in the trusts belonged to the investors. ABC did not waste ABC's money, but misused the investors' money, for which the investors have a claim against ABC. The investors' claim would not be corporate waste, assuredly. They would likely not assert a claim that began with the presumption that their money belonged to ABC such that it ABC wasted it. Thus, the Court should reconsider its Order and dismiss this claim in its entirety.

III. CONCLUSION

The Court should reconsider its Order and hold that Plaintiff failed to produce evidence supporting standing on each of his claims, specifically evidence of a particularized injury and causal connection to Defendants' conduct. The Court should also remove any reference to attorney-client relationship, apply California substantive law to Plaintiff's claims, reconsider its conclusion that the ***trusts*** are susceptible to harm independent from the harm to the investors, and hold that Mr. Erwin cannot be individually liable under California law for actions done exclusively on behalf of E&J. The Court should also reconsider allowing Plaintiff to maintain his aiding and abetting corporate waste claim, and Plaintiff lacks standing to assert any such claim under California law because the funds in the investors' trusts did not belong to (and could not be wasted by) ABC Viaticals, Inc.

WHEREFORE, PREMISES CONSIDERED, the Court should grant Defendants' Motion for Reconsideration, Dismiss Plaintiff's Complaint in its entirety, 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 10th day of March, 2008, to all known counsel of record as required by the Federal Rules of Civil Procedure.

William J. Akins

EXHIBIT A

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April 14, 2005

C. Keith LaMonda
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Re: Life Settlement Trust and Escrow Services

Dear Keith:

This letter will confirm that, upon all signatures, Erwin & Johnson LLP (E&J) has been engaged to provide the services outlined below, subject and limited to the terms of this letter. We appreciate your retention of our firm. Although you are retaining E&J and not any particular attorney, it is anticipated that services will be performed principally by Richard B. Johnson, Esq. and Christopher R. Erwin, Esq.

E&J is committed to providing efficient and responsive service to its clients in an atmosphere of mutual trust, confidentiality and candid communication. In that spirit, this letter sets forth our agreement with you regarding our engagement and the firm's billing practices.

E&J has been retained by you in connection with certain trusts and escrows that will be established in ABC Viaticals' line of business. It is expressly understood that we are not retained to advise you in other matter, and any engagement by E&J in any other matter will only be in writing signed by both you and our firm.

We expect our fees to be competitive with other firms offering similar services. Based upon your estimate of three to seven closings per month, our flat service fee will be fifteen thousand dollars ($15,000) per month. In addition, there will be an additional one-time startup fee of ten thousand dollars ($10,000) to cover our due diligence and set-up expenses. Our monthly invoices will include itemized charges for expenses such as photocopying, facsimiles, parking, bank fees, mileage, postage, courier costs, and travel expenses.

In particular, our services will include:

1. Trustee Services
2. Escrow Services

ERWIN & JOHNSON LLP
ATTORNEYS AT LAW

As we have discussed, it is very important to the success of our relationship that our mutual roles and responsibilities be outlined clearly and in detail in the trust and escrow agreements. This will avoid any unnecessary confusion and duplication of effort. Accordingly, we will make sure that the trust and escrow agreements are clear regarding our respective duties and responsibilities.

Please contact us immediately if there should be any questions or concerns of any kind about any of our billings. Open and candid communication about billings is critical, and you should not harbor any unexpressed concern. Often we can answer billing questions (and provide a more detailed description of time spent) from our notes, memories or other material if the question is promptly raised. Unless promptly contracted by you upon receipt of one of our billings, it will be understood that our billing is acceptable.

If you agree to the terms of this engagement letter, and if our billing policies and procedures are acceptable to you, please sign and date the enclosed copy of this letter and return it to the address above. We thank you for the opportunity to do business with you and look forward to a successful long-term relationship. If you have any questions, please contact us at your convenience.

Very truly yours,

ERWIN & JOHNSON LLP

Christopher R. Erwin, Esq.

Very truly yours,

ERWIN & JOHNSON LLP

Richard B. Johnson, Esq.

AGREED AND ACCEPTED,

By: C. Keith LaMonda
ABC Viaticals, Inc.

4/15/05
Date