

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

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

Plaintiff,

v.

**ERWIN & JOHNSON, LLP and
CHRISTOPHER R. ERWIN,**

Defendants.

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Cause No. 3:07-CV-1153-P

ECF

**PLAINTIFF’S RESPONSE TO MOTION FOR
RECONSIDERATION OF FEBRUARY 25, 2008 ORDER**

Michael J. Quilling, as the court-appointed Receiver for ABC Viaticals, Inc. and other related entities, (“Plaintiff” or “Receiver”) submits this response to Defendants’ Motion for Reconsideration [Dkt. No. 23] and would respectfully show the Court as follows:

**I.
ARGUMENTS AND AUTHORITIES**

Defendants’ Motion for Reconsideration is based upon a factual challenge under Federal Rule of Civil Procedure 12(b)(1) to the evidence supporting jurisdiction.¹ (Mot. for Reconsideration at 6.) In its order, the Court correctly noted that it is “free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” (Order [Dkt. No. 21] at 4) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). The burden is on plaintiff “clearly to allege facts” sufficient to support his standing. *Warth v. Seldin*, 422 U.S. 490, 518 (1975); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *Ward v. Santa Fe Indep. Sch. Dist.*,

¹ Defendants do not ask the Court to reconsider its findings under Rule 12(b)(6) and Rule 9(b).

393 F.3d 599, 606 (5th Cir. 2004). These factual allegations must affirmatively appear in the pleadings or other evidence rather than argued by inference. *FW/PBS, Inc.*, 493 U.S. at 231.

To prevail on a standing challenge, Plaintiff must show three things: (1) plaintiff has suffered an injury in fact, (2) there is a causal connection between the injury and the alleged conduct, and (3) the injury is likely to be redressed by a favorable decision. *Hosein v. Gonzales*, 452 F.3d 401, 403-04 (5th Cir. 2006). Defendants' motion specifically addresses just the first two elements and omits any challenge to the third. (Mot. for Reconsideration [Dkt. No. 23] at 1.) Without question, the Receiver has offered evidence and undisputed material facts supporting both elements of standing now at issue before the Court. The Order itself goes point-by-point through the competing allegations and makes determinations based upon the evidence before it. Defendants specifically challenge four of those points, which are addressed more fully below.

A. Defendants May Be Professionally Liable For Their Actions As Trustees And Escrow Agents.

Defendants' first argument rests on the bizarre notion that attorneys somehow step outside of their professional duties when they act as trustees or escrow agents. (Mot. for Reconsideration [Dkt. No. 23] at 7.) It is undisputed that Erwin performed trust and escrow services through his law firm for ABC's benefit. In return, ABC paid handsomely for those services. (Resp. to Mot. to Dismiss, Ex. A [Dkt. No. 14-2] at 2.) Defendants, therefore, should be held to the same standard as other professionals performing the same duties. *See, e.g., Sanders v. Casa View Baptist Church*, 898 F.Supp. 1169, 1175 (N.D. Tex. 1995) ("A professional owes his client a duty to use the skill and care in the performance of his duties commensurate with the requirements of his profession.")

The Court should disregard Defendants' argument as an exercise in semantics. It is immaterial whether Defendants believed they were "attorneys" or "trustees" when their law firm

accepted fees for handling trust assets. The fact is, they were engaged to act in a professional capacity, they were paid to do so, they owed a duty of care, and they may be liable in tort if they breached that duty.

B. As Successor Trustee, The Reciever Has Standing To Sue For Damages Suffered By The ABC Trusts.

Defendants present a new constitutional challenge under Article III that was absent from their original motion to dismiss. Originally, the motion to dismiss challenged the Receiver's standing to state claims for investors under the first order appointing receiver.² (Mot. to Dismiss [Dkt. No. 8] at 9-13). This motion, however, challenges the Court's authority to enter a second order appointing receiver³ for the ABC Trusts. (Mot. for Reconsideration [Dkt. No. 23] at 10-14.) Clearly the Court cannot reconsider an issue that was never presented in the first place.

Furthermore, Defendants would have the Court believe that they still act as trustee for the ABC Trusts and only the investors can bring suit against them. Obviously, this is not the case. By order of this Court, only the Receiver has standing to sue on behalf of the ABC Trusts. *Order Clarifying and Modifying Order Appointing Receiver* [Dkt. No. 19], 3:06-CV-2136-P (N.D. Tex.). Defendants know this and freely admit that the Receiver is now the successor trustee for those trusts. (Mot. to Dismiss [Dkt. No. 8] at 7.) The Receiver's standing is, therefore, undisputed given the very cases cited in Defendants' motion. *See, e.g., Moeller v. Superior Court*, 9 P.2d 279 (Cal. App. 4th 1997) ("the trustee, rather than the trust, is the real party in interest in litigation involving trust property").⁴

² The first Order Appointing Receiver gave the Receiver authority to represent the interests of ABC Viaticals, Inc. and several other entities. *See Order Appointing Receiver* [Dkt. No. 8], 3:06-CV-2136-P (N.D. Tex.).

³ *See Order Clarifying and Modifying Order Appointing Receiver* [Dkt. No. 19], 3:06-CV-2136-P (N.D. Tex.).

⁴ Furthermore, since the Receiver is the only party authorized to recover damages to the ABC Trusts, the Court may disregard Defendants' concern about suffering "double damages" at the hands of ABC's investors. (Mot. for Reconsideration at 13.)

Finally, Defendants make the curious argument that ABC's investors are the real party in interest because the ABC Trusts were not "jural entities" that existed apart from the investors themselves. (Mot. for Reconsideration at 11-12) ("[a]sserting claims on behalf of the trusts is the same as asserting claims on behalf of the investors"). Defendants cannot have it both ways. They cannot first claim that they acted as a "trustee" but then state that the trusts themselves are not real. Trusts are not metaphysical—they either exist or they don't. The evidence and undisputed facts clearly show that (1) the ABC Trusts existed, (2) Defendants performed services for the trusts, (3) the Receiver is now trustee for those trusts, and (4) in his capacity, the Receiver has standing to sue third parties for all damages to trust assets. In short, Defendants arguments are without merit and there is no reason for the Court to revisit its earlier ruling.

C. The Contractual Choice Of Law Argument Is Not Ripe For Reconsideration.

Defendants' challenge to the law controlling this case is another argument that is not ripe for reconsideration. Their motion to dismiss under Rule 12(b)(1) has only a footnote stating their belief that California law governs the Trust Agreement and Escrow Agreement. (Mot. to Dismiss [Dkt. No. 8] at 14 n.9.) The Receiver responded with another footnote pointing out that those agreements only form the basis for one cause of action in this case and that Texas law arguably applies to his claims. (Response to Mot. to Dismiss [Dkt. No. 16] at 5 n. 3.) Furthermore, Defendants themselves have left open the question about "[w]hether Texas or California law should ultimately apply." *See, e.g., Motion to Dismiss*, Ex. B [Dkt. No. 9-3] at 7. Since neither party has briefed the issue with enough specificity to satisfy Local Civil Rule 7.1(d), the Court need not make a final determination at this point.

D. The Receiver Has Stated One Or More Claims Against Erwin For His Own Tortious Conduct.

The causes of action in the Complaint clearly allege that Erwin engaged in his own tortious conduct while handling money for ABC and the ABC Trusts. Those claims are based on the following claims that Defendants never disputed in their factual challenge under Rule 12(b)(1):

- (1) Erwin participated in performing professional trust and escrow services through his law firm;
- (2) Those services included handling funds that ABC collected from each of its investors;
- (3) Investor funds were commingled with funds for other ABC investors;
- (4) The commingled funds were used to compensate Keith LaMonda for running an investment scheme that made material misrepresentations to its investors;
- (5) The commingled funds were used to compensate brokers and/or agents who facilitated the sale of LaMonda's investment products;
- (6) The commingled funds were used to purchase non-existent bonds from a fraudulent company;
- (7) Such transfers caused waste and economic damages to ABC and the ABC Trusts;
- (8) Erwin also participated in managing ABC's premium escrow accounts through his law firm;
- (9) The premium escrow funds for each policy were commingled with escrow funds for other ABC policies;
- (10) After the Receiver was appointed, he discovered that the premium escrow was severely underfunded;

- (11) ABC paid for the professional services provided by Erwin and his law firm;
- (12) The Escrow Agreement itself provided for compensation to be paid to the escrow agent; and
- (13) The money that ABC paid to Erwin's law firm—and any proceeds ultimately distributed to its partners—are traceable to funds of the receivership entities and/or their investors.

These undisputed statements are sufficient to show an injury in fact for purposes of standing because they evidence a “concrete, living contest between adversaries” that is “not abstract, conjectural, or hypothetical.” *Doe v. Beaumont Independent School Dist.*, 240 F.3d 462, 466 (5th Cir.2001) (quoting *Fed. Election Com'n v. Akins*, 524 U.S. 11, 20 (1998)). The Receiver has shown the basis for his economic damages even though the extent of those damages may be determined at a later time. *See Hosein v. Gonzales*, 452 F.3d 401, 406 (5th Cir. 2006) (direct economic damages satisfies burden for purposes of standing).

These undisputed statements also illustrate the factual nexus between Erwin and the damages claimed by ABC and the ABC Trusts. Although Erwin offers legal arguments disputing his ultimate liability, the Court properly disregarded those as addressing the “merits of the case” to be determined at summary judgment. (Order [Dkt. No. 21] at 3.) The Court should, therefore, deny Defendants’ motion for reconsideration for the reasons already set out in its Order of February 25, 2008.

Respectfully submitted,

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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