

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 and )  
Third-Party Plaintiffs, )

v. )

MILLS, POTO CZAK & COMPANY, )

Third-Party Defendant. )

Civil Action No.  
3:07-CV-1153-P

ECF

**ERWIN & JOHNSON, LLP’S AMENDED ANSWER, COUNTERCLAIMS,  
& THIRD-PARTY COMPLAINT, SUBJECT TO DEFENDANTS’ MOTIONS  
FOR RECONSIDERATION OF FEBRUARY 20 AND 25, 2008 ORDERS**

COMES NOW, Erwin & Johnson, LLP (“E&J”) and files this Amended Answer, Counterclaims, and Third-Party Complaint, Subject to Defendants’ Motions for Reconsideration of February 20 and 25, 2008 Orders, to the lawsuit brought by Michael J. Quilling, as Receiver for ABC Viaticals, Inc., and Related Entities (“Plaintiff” or “Receiver”), and in support respectfully show the Court as follows:

**I.  
ORIGINAL ANSWER**

E&J answers as follows with respect to the enumerated paragraphs of Plaintiff’s Amended Complaint:

1. E&J admits the allegations in paragraph 1.

2. E&J admits the allegations in paragraph 2.

3. E&J admits the allegations in paragraph 3.

4. To the extent that the allegations in paragraph 4 contain the Receiver's legal conclusions, no response is necessary. To the extent that an answer is required, E&J denies the allegations in paragraph 4.

5. To the extent that the allegations in paragraph 5 contain the Receiver's legal conclusions, no response is necessary. To the extent that any answer is required, E&J denies the allegations (3) in paragraph 5; E&J admits the remainder of paragraph 5.

6. The allegations in paragraph 6 contain reference to orders of the Court, which, as written documents, speak for themselves. To the extent that any answer is required, E&J is without sufficient knowledge as to the allegations; thus, these allegations are denied.

7. The allegations in paragraph 7 contain reference to orders of the Court, which, as written documents, speak for themselves. To the extent that any answer is required, E&J denies the allegations in the first sentence of paragraph 7. E&J is without sufficient knowledge as to the allegation in the second, third, fourth, fifth, sixth, and seventh sentences; thus these allegations are denied.

8. E&J is without sufficient knowledge as to the allegations in paragraph 8; thus, these allegations are denied.

9. E&J denies the allegations in paragraph 9, including that Christopher R. Erwin has practiced law since 2002, but admits that it has an office in Irvine, California.

10. E&J admits the allegations in paragraph 10.

11. E&J denies the allegations in paragraph 11.

12. E&J is without sufficient knowledge as to the allegations in paragraph 12; thus, these allegations are denied.

13. The allegations in paragraph 13 contain reference to the Trust Agreement, which, as a written document, speaks for itself. To the extent that any answer is required, E&J denies the allegations in paragraph 13.

14. E&J denies the allegations in paragraph 14.

15. E&J denies the allegations in paragraph 15.

16. The allegations in paragraph 13 contain reference to transcribed deposition testimony, which, as a written document, speaks for itself. To the extent that any answer is required, E&J denies the allegations in paragraph 16.

17. E&J denies the allegations in paragraph 17.

18. E&J denies the allegations in paragraph 18.

19. E&J is without sufficient knowledge as to the allegations in paragraph 19; thus, these allegations are denied.

20. To the extent that the allegations in paragraph 20 contain the Receiver's legal conclusions, no response is necessary. To the extent that any answer is required, E&J denies the allegations in paragraph 20.

21. E&J incorporates its responses to paragraphs 1 through 20. To the extent that paragraph 21 contains legal conclusions, no response is required. To the extent that further answer is required, E&J is without sufficient knowledge to admit or deny the allegations in paragraph 21.

22. E&J denies the allegations in paragraph 22.

23. E&J denies the allegations in paragraph 23.

24. E&J denies the allegations in paragraph 24.

25. E&J denies the allegations in paragraph 25.

26. E&J incorporates its responses to paragraphs 1 through 25. To the extent that paragraph 26 contains legal conclusions, no response is required. To the extent that further answer is required, E&J is without sufficient knowledge to admit or deny the allegations in paragraph 26.

27. E&J denies the allegations in paragraph 27.

28. E&J denies the allegations in paragraph 28.

29. E&J denies the allegations in paragraph 29.

30. Intentionally omitted.

31. Intentionally omitted.

32. Intentionally omitted.

33. Intentionally omitted.

34. Intentionally omitted.

35. E&J incorporates its responses to paragraphs 1 through 34. To the extent that paragraph 35 contains legal conclusions, no response is required. To the extent that further answer is required, E&J is without sufficient knowledge to admit or deny the allegations in paragraph 35.

36. E&J denies the allegations in paragraph 36.

37. E&J denies the allegations in paragraph 37.

38. E&J denies the allegations in paragraph 38.

39. E&J denies the allegations in paragraph 39.

40. E&J incorporates its responses to paragraphs 1 through 39. To the extent that paragraph 40 contains legal conclusions, no response is required. To the extent that further answer is required, E&J is without sufficient knowledge to admit or deny the allegations in paragraph 40.

41. E&J denies the allegations in paragraph 41.

42. E&J denies the allegations in paragraph 42.

43. E&J is without sufficient knowledge to admit or deny the allegations in paragraph 43.

44. E&J denies the allegations in paragraph 44.

45. E&J incorporates its responses to paragraphs 1 through 44. To the extent that paragraph 45 contains legal conclusions, no response is required. To the extent that further answer is required, E&J is without sufficient knowledge to admit or deny the allegations in paragraph 45.

46. E&J denies the allegations in paragraph 46.

47. E&J is without sufficient knowledge to admit or deny the allegations in paragraph 47.

48. E&J denies the allegations in paragraph 48.

49. E&J incorporates its responses to paragraphs 1 through 48. To the extent that paragraph 49 contains legal conclusions, no response is required. To the extent that further answer is required, E&J is without sufficient knowledge to admit or deny the allegations in paragraph 49.

50. E&J denies the allegations in paragraph 50.

51. Any allegations not specifically admitted are hereby denied, and E&J demands strict proof as to all denied allegations.

**II.**  
**AFFIRMATIVE DEFENSES**

In the alternative, and without waiving the foregoing and without accepting any burden of proof that would not otherwise be borne by E&J, E&J pleads the following affirmative defenses:

52. The Complaint, and each and every purported claim for relief alleged therein, fails to allege facts sufficient to state a claim upon which relief can be granted against E&J.

53. Plaintiff's claims are barred for lack of standing.

54. Plaintiff's claims are barred in whole or in part because Plaintiff has not sustained any cognizable injury.

55. Plaintiff is not entitled to any recovery because any allegedly false or misleading statements or omissions attributable to E&J, which E&J denies, were not material.

56. Plaintiff has a duty to take reasonable action to minimize any damage allegedly sustained as a result of the conduct alleged in the Complaint, and failed to comply with that duty, and, therefore, is barred from recovering any damages that might have been reasonably avoided.

57. Plaintiff's claims are barred because the harm allegedly suffered, if any, was caused by factors, persons or entities other than E&J, over whom E&J has no control, and for whose acts E&J is not responsible.

58. Plaintiff is not entitled to any recovery from E&J because no act or omission by it was the cause in fact or the proximate cause of any damage alleged by Plaintiff.

59. Plaintiff is barred from any recovery against E&J because his alleged damages, if any, were the result of one or more intervening or superseding causes or caused by the acts and/or failures to act of persons and/or entities other than E&J, and were not the result of any act or omission on the part of E&J.

60. Plaintiff's claims are barred in whole or in part by the doctrine of acceptance of past performance.

61. Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands.

62. Plaintiff's claims are barred in whole or in part by Plaintiff's own bad faith.

63. Plaintiff's claims are barred, in whole or in part, by the applicable statute of limitations.

64. Plaintiff's claims fail to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

65. Plaintiff's claims are barred by lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

66. Plaintiff is barred from recovery herein by the doctrine of comparative responsibility. E&J seeks a reduction of any damages that may be awarded against it, if any, by the percentage of responsibility found by the jury as to Plaintiff or any other party.

67. Plaintiff's claims are barred, in whole or in part, by the doctrines of estoppel and waiver.

68. The allegations made the basis of this case were caused by events or circumstances beyond E&J's right of control and for such events or circumstances it is not liable.

69. Plaintiff's allegations are barred by the contractual exculpatory clauses agreed upon by ABC Viaticals, Inc. and E&J. The escrow agreement entered into by E&J and ABC Viaticals, Inc. limits E&J's liability as follows:

5. **Escrow Agent's Liability.** In performing any of its duties hereunder, **the Escrow Agent shall not incur any liability for any damages, losses or expenses whatsoever, except for its gross negligence or willful misconduct,** and shall not incur any such liability with respect to any such action taken or omitted in reasonable reliance upon any instrument, including without limitation any written notice, acknowledgement or instruction expressly provided for in this Agreement, not only as to its due execution and the validity and effectiveness of its provisions, but also as to the truth and accuracy of any information contained therein, which the Escrow Agent shall reasonably believe to be genuine, to have been signed and presented by a proper person or persons, and to conform with the provisions of this Agreement.

(ABC Viaticals, Inc. Escrow Accounts Agreement at ¶ 5) (emphasis added). A similar liability limitation was reaffirmed in each life settlement trust agreement entered into by E&J and ABC Viaticals, Inc.:

9.03 **Limitation of Liability. Trustee shall not be liable to anyone for any action taken or omitted to be taken by it hereunder, except in the case of Trustee's proven gross negligence, bad faith or willful misconduct.** Except as result of Trustee's gross negligence, bad faith or willful misconduct, Trustee shall not be liable or responsible for the inadequacy or insufficiency of the Trust or the Management Expense Account to achieve their intended purpose hereunder. The Trustee shall not be personally liable to the beneficiaries of the trust or to any other parties for any losses due to the Trustee's failure to comply with applicable local law governing investments by Trustees with respect to any act or omission in: (i) determining whether any such contract is or



remains a proper investment, (ii) exercising policy options available under any such contract, or (iii) diversifying any such contract. With respect to such matters, the Trustee shall be liable only for losses caused by the Trustee's dishonesty or reckless indifference to the interests of the beneficiaries after the Trustee has actual knowledge that action should be taken to change the investment in any such contract or exercise policy options under any such contract. The Grantor does not intend that this provision shall in any way restrict the exercise of the power given to the Trustee with respect to such insurance contracts.

(Life Settlement Trust Agreement, at ¶ 9.03) (emphasis added). These clauses bar Plaintiff's claims.

70. Plaintiff's claims are barred for failure to satisfy California Civil Code § 1714.10.

71. E&J reserves the right to assert any additional affirmative defenses that are supported by information or facts obtained through discovery or other means during this case and expressly reserves the right to amend this answer to assert such additional affirmative defenses in the future.

### **III. COUNTERCLAIMS**

72. **Indemnity and Contribution.** E&J asserts a counterclaim against ABC Viaticals, Inc. for indemnity and contribution for any and all damages, attorney's fees, costs, and expenses that it has incurred and will incur in defense of this action. ABC Viaticals, Inc. *must* indemnify E&J for any fees and expenses expended in defending any remaining claims and for any damages you hope to receive:

6. **Indemnity Agreement. Grantor agrees to hold Escrow Agent harmless and agree to indemnify the Escrow Agent from and against any loss, liability, expense (including, but not limited to reasonable attorney's fees and expenses), claims or demands arising out of or in connection with the transactions contemplated hereby.** The foregoing indemnity shall survive the resignation and removal of the Escrow Agent pursuant hereto and the termination of this Agreement.

(ABC Viaticals, Inc. Escrow Accounts Agreement at ¶ 6) (emphasis added). The Escrow Account Agreement entered into by ABC Viaticals, Inc. and E&J specifically provides that ABC Viaticals, Inc. will hold harmless and indemnify E&J for any claims, expenses, or losses arising from situations including this lawsuit. On November 26, 2007, E&J tendered its written demand for indemnity to ABC Viaticals, Inc., through Michael J. Quilling, as receiver. The demand stated a deadline for acceptance of December 3, 2007, warning that failure to time accept would constitute a breach of ABC Viaticals, Inc.'s agreements, exposing ABC Viaticals, Inc. to all available legal remedies.

73. **Breach of Contract.** E&J incorporates all of the allegations in the above paragraphs and, based on those allegations, asserts an additional counterclaim against ABC Viaticals, Inc. for breach of contract. ABC Viaticals, Inc. breached its contractual duties owed to E&J while E&J served as the trustee.

74. **Breach of Fiduciary Duty.** E&J incorporates all of the allegations in the above paragraphs and, based on those allegations, asserts an additional counterclaim against ABC Viaticals, Inc. for breach of fiduciary duty. ABC Viaticals, Inc. breached its fiduciary duties owed to the investors at the time when E&J served as the trustee for the investors. As the trustee, E&J was provided the right to sue for damages to those investors caused by ABC Viaticals, Inc.

75. **Gross Negligence.** E&J incorporates all of the allegations in the above paragraphs and, based on those allegations, asserts an additional counterclaim against ABC Viaticals, Inc. for gross negligence. ABC Viaticals, Inc.'s actions constituted an extreme departure from the standard of care which indicates a conscious indifference to the welfare of the investors and/or E&J. Such conduct evinces malice and constitutes

gross negligence, for which ABC Viaticals, Inc. is liable for compensatory and exemplary damages to E&J.

**IV.**  
**THIRD-PARTY COMPLAINT**

76. E&J asserts a third-party complaint against Mills, Potoczak & Company, as set out below.

77. Mills, Potoczak & Company is a corporation that is incorporated under the laws of the State of Ohio and has its principal place of business at 27600 Chagrin Boulevard, Suite 200, Cleveland, Ohio 44122. Mills, Potoczak & Company may be served by serving its registered agent for service, National Registered Agents, Inc., 1614 Sidney Baker Street, Kerrville, TX 78028.

78. In or about spring 2005, E&J was contacted by Keith LaMonda about potentially serving as a successor trustee/escrow agent for ABC. Keith LaMonda explained that he was experiencing problems with the quality and speed of the services provided by the then-trustee/escrow agent Mills, Potoczak & Company, and desired to retain the services of a new trustee/escrow agent. E&J agreed to a limited trustee/escrow relationship with ABC and entered into written agreements providing that E&J would perform specific trustee and escrow services for ABC.

79. The immediate former trustee was Mills, Potoczak & Company, who had served as trustee for ABC from approximately March 2004 to April or May 2005. William M. Potoczak conducted the trustee services for ABC.

80. In sworn deposition testimony, William M. Potoczak testified that he discovered that ABC was underfunding its premium account and, that when he brought

this problem to the attention of Mr. LaMonda, Mr. LaMonda attempted to bribe him with a payment of \$1 million to remain ABC's trustee.

81. ABC then selected E&J as successor trustee, and informed Mills, Potoczak & Company of this fact, referring to the retention of E&J as a "solution" to Mills, Potoczak & Company's knowledge and concern regarding ABC's protracted and repeated failures to adequately ensure payment of premiums. Ostensibly satisfied with this "solution," Mills, Potoczak & Company kept quiet, refusing to inform E&J of ABC's illegal actions.

82. Thereafter, Mills, Potoczak & Company notified insurance companies involved in the policies which it in trusts that it had been removed as trustee and replaced by E&J. Mills, Potoczak & Company was required to transfer to E&J all documents in relation to its trustee services provided to ABC. Over a period of months Mills, Potoczak & Company transferred documents in batches to E&J. Ultimately, E&J received only about two boxes of documents, notwithstanding the year's worth of trustee services supposedly provided by Mills, Potoczak & Company.

83. Mills, Potoczak & Company was under a duty to inform E&J of its concerns or problems that Mills, Potoczak & Company experienced with ABC Viaticals, Inc., especially those that would impact E&J's succession as trustee.

84. During the transfer of escrow proceeds, Mr. LaMonda requested that Mills, Potoczak & Company reduce the transfer by \$250,000 and place that money into the premium payment account, or if the escrow had already been transferred, then E&J would send back \$250,000 to Mills, Potoczak & Company for payment of payment of premiums. E&J was not informed by Mills, Potoczak & Company of the fact that any

such transfer was due to the results of ABC's illegal use of investors' money. In fact, during sworn deposition testimony, Mr. Potoczak admitted that no one at Mills, Potoczak & Company was even keeping track of premium payments at that time. Consequently, while knowing of ABC's repeated failures to comply with its obligations under the policies concerning payment of premiums, Mills, Potoczak & Company failed to maintain record of the payment of premiums and failed to apprise E&J, as successor trustee, of any issues concerning ABC's payment of premiums or illegal use of investors' money.

85. Plaintiff cannot dispute that Mills, Potoczak & Company learned of the failure of ABC to adequately fund the premium account and that Mr. LaMonda attempted to bribe Mills, Potoczak & Company. Plaintiff has nonetheless refused to bring suit against Mills, Potoczak & Company, stating:

[O]ur investigation and that of the SEC revealed that Mills Potozac [sic] attempted to force ABC to escrow money and fund the policies as required. The investigation reveals that when ABC tried to bribe representatives of Mills Potozac [sic] to do disburse money inconsistent with their obligations, they resigned their position rather than follow an illegal path. Under these circumstances, the Receiver does not presently intend to spend money pursuing these former trustees.

86. Instead, Plaintiff chose to sue Mr. Erwin and E&J for alleged damages wrought by ABC's failure to properly fund premiums while Mills, Potoczak & Company was the trustee. These damages would have been minimized or averted had Mills, Potoczak & Company complied with its legal duties to properly inform E&J of ABC's mishandling of investors' monies and attempted bribe.

87. Plaintiff claims damages for at least two insurance policies that began suffering from non-payment of premiums while held in trust by Mills, Potoczak &

Company. Any such claim for damages is properly directed at Mills, Potoczak & Company, not Mr. Erwin or E&J.

**A. Breach of Fiduciary Duties**

88. Mills, Potoczak & Company breached its fiduciary duty under Ohio Revised Code § 5807.07, which states that a trustee who has been removed or who has resigned has the duties and the powers necessary to protect the trust property until all of the trust property is delivered to a successor trustee.

89. Mills, Potoczak & Company also breached its fiduciary duty under Ohio Revised Code § 5808.04, which mandates that a trustee shall administer the trust as a prudent person would and shall consider the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

90. Mills, Potoczak & Company breached these statutorily-imposed duties by failing to deliver all trust property to E&J, failing to account for payment of premiums before and during the transition process, and by failing to administer the trust as a prudent person would have once it learned of ABC's mishandling of investors' funds and especially after the attempted bribe. Ohio Revised Code §§ 5810.01, 5810.02, 51.10.04 provide numerous categories of remedies for a breach of trust by a former trustee.

**B. Fraudulent Viatical Settlement Acts**

91. Mills, Potoczak & Company also engaged in a fraudulent viatical settlement act under Ohio Revised Code § 3619.01(E)(1)(d) ("Viatical Settlements Models Act") by knowingly or with intent to defraud and for the purpose of depriving another of property or for pecuniary gain, presented, or permitted any of its employees or

agents to present false information to Mr. Erwin and E&J concerning any premiums paid on an insurance policy or certificate.

92. E&J was damaged by the actions and failure to act done by Mills, Potoczak & Company, and now pursues this third-party complaint against Mills, Potoczak & Company to recover any and all attorney's fees and expenses incurred in this litigation and any and all damages, if any, awarded to Plaintiff or any other entity or person.

**C. Negligence & Gross Negligence**

93. Based on the above allegations, Mills, Potoczak & Company was either negligence, grossly negligent, reckless, or else knowingly participated in a fraud upon E&J and Mr. Erwin perpetrated by ABC. Mills, Potoczak & Company had knowledge of the fraudulent practices of ABC concerning its failures to adequately fund the premiums account. Nevertheless, Mills, Potoczak & Company negligently, recklessly, or knowingly chose to remain silent, not inform E&J or Mr. Erwin of ABC's conduct, and thereby cause E&J and Mr. Erwin to suffer damages, including defense of this lawsuit.

**V.  
JURY DEMAND**

94. E&J demands a trial by jury on Plaintiff's claims, E&J's defenses thereto and affirmative defenses, and E&J's counterclaims and third-party complaint.

**V1.  
PRAYER**

**WHEREFORE, PREMISES CONSIDERED,** Erwin & Johnson, LLP prays that Michael J. Quilling, as Receiver for ABC Viaticals, Inc. and Related Entities takes nothing in this suit and that Erwin & Johnson, LLP recovers all of its attorney's fees,

costs, and expenses. Erwin & Johnson, LLP also prays for judgment against ABC Viaticals, Inc., and Mills, Potoczak & Company for all of its attorney's fees and expenses and any damages recovered against it. Erwin & Johnson, LLP also prays for any and all further relief to which it is entitled.

Respectfully submitted,



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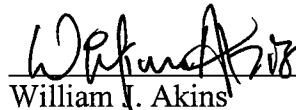
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**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served on this 28 day of May 2008, to all known counsel of record as required by the Federal Rules of Civil Procedure.

  
William J. Akins