

BACKGROUND FACTS

1. On November 17, 2006, the United States Securities and Exchange Commission filed a lawsuit against ABC Viaticals, Inc. and others for violating securities laws.¹ In that case, this Court appointed Plaintiff as Receiver for ABC Viaticals, Inc. and other related companies and trusts (collectively, “ABC”).

2. ABC acquired life insurance policies on third parties and sold fractional interests in them to investors. It attracted investors by promising guaranteed returns of 30% to 150% from a product it called a “bonded life settlement policy.” For each policy, ABC obtained a life expectancy report that supposedly forecast when the insured was likely to die. It also obtained a bond that supposedly guaranteed payment of the death benefit amount if the insured did not die by a certain date (e.g., the life expectancy date plus two years).

3. To make the investment appear legitimate, ABC hired an independent trustee and escrow agent to handle investor funds and payments for the policies. Defendant Erwin & Johnson, LLP (“Erwin & Johnson”) served as the trustee and escrow agent during a period of time from 2005 to 2006. Its duties were principally handled by Defendant Christopher R. Erwin (“Erwin”).

4. The Receiver believes Defendants’ most important duty was described in Erwin & Johnson’s Trust Agreement with ABC:

Trustee shall establish a “Policy Premium Payment Account” into which the Grantor will deposit a sum certain for the payment of premiums on the Policy equal to the term of the bond . . .

(Am. Compl. [Dkt. No. 41] at 5.) When the Receiver took over ABC’s accounts, he discovered that Defendants had not created separate premium escrow accounts and had not set aside the amount needed to pay premiums on each policy until the bonds matured. He also discovered that

¹ That case is styled *SEC v. ABC Viaticals, Inc., et al.*, Cause No. 3:06-CV-2136-P (N.D. Tex.).

they allowed ABC's principal officers to use investor funds for purchasers and payments not related to the underlying investment. Those are the principal breaches of duty the Receiver alleges in this case.

5. Each investor in the ABC investment scheme signed a Purchaser Agreement that addressed the rights and obligations between that investor and ABC. The Receiver does not believe—much less allege—that either Defendant was a party to those Purchaser Agreements.

6. The Receiver's Amended Complaint [Dkt. No. 41] has a detailed statement of background facts. One of the statements in that section explained the Receiver's belief that Erwin & Johnson provided investors with a copy of its malpractice insurance certificate. (*Id.* at ¶ 17.) That statement, however, is not an element for any of the Receiver's causes of action and it does not form the basis for his claims.

7. Defendants give two reasons to include Jason Sun in this lawsuit: (1) he allegedly used Erwin & Johnson's name to market life settlement policies to his clients in Taiwan in 2005 and (2) some of the Purchase Agreements signed by a group of Taiwanese investors allegedly designate Erwin & Johnson as a party to that agreement. (Defs.' Br. in Support [Dkt. No. 87] at ¶¶ 3-5.)

8. Defendants' motion presumes the Receiver is stating causes of action based on the investors' Purchaser Agreements with ABC and the representations that Jason Sun allegedly made to some Taiwanese investors. (*Id.*) As explained more fully below, that is not the case. Defendants' allegations about Jason Sun have nothing to do with the Receiver's stated causes of action or defenses that can be raised in this case.

ARGUMENTS & ANALYSIS

Federal Rule of Civil Procedure 14 governs third party practice. In relevant part, it says that:

A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it.

FED. R. CIV. P. 14(a)(1) (emphasis added). Defendants may only use third-party complaints “to resolve claims related to the claim made against them.” *Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 652 (5th Cir. 1999). The right to state third-party claims is limited to “the same core of facts which determines the plaintiff’s claim.” *U.S. v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (5th Cir. 1967); cf. *Frank’s Casting Crew & Rental Tools, Inc. v. PMR Techs.*, 292 F.3d 1363, 1372 (Fed. Cir. 2002) (motions seeking to bring “new claims against new parties . . . [are] not authorized”). District Courts have discretion to deny leave to file third-party complaints and may strike any claim filed either by right or by leave. *McDonald v. Union Carbide Corp.*, 734 F.2d 182, 184 (5th Cir. 1984).

The Court should deny Defendants’ request because their allegations about Jason Sun bear no relation to the claims and defenses in this case. None of the Receiver’s causes of action have anything to do with the investors’ Purchaser Agreements with ABC or any representations made to Jason Sun’s clients. To the contrary, only the investors themselves have standing to state claims based on their contracts or misrepresentations made to them.²

Defendants’ motion overstates the importance of a single statement from the background facts recited in the Amended Complaint. That statement expressed the Receiver’s belief that

² The Receiver’s standing to state claims for investors is very limited. Under the Order Appointing Receiver, he has standing to recover investor funds fraudulently transferred out of ABC and/or held in constructive trust for the investors’ benefit. (Order Appointing Receiver, Cause No. 06-CV-2136-P [Dkt. No. 8] at ¶ 14.)

Erwin & Johnson provided investors with a copy of its malpractice insurance certificate. (Defs.' Br. in Support [Dkt. No. 87] at ¶ 2; Am. Compl. [Dkt. No. 41] at ¶ 17.) It, however, is not at issue in this case and is not an element forming the basis for any claim or defense. This is evident just by reading the Amended Complaint. It states claims for:

1. Erwin & Johnson breaching its Trust Agreement with ABC (*Id.* at ¶ 22);
2. Defendants breaching fiduciary duties owed to ABC's trusts (*Id.* at ¶ 27);
3. Defendants aiding and abetting principal officers who wasted ABC's corporate and trust assets (*Id.* at ¶ 36);
4. Defendants breaching duties to ABC's trusts that amounted to malpractice, negligence, or gross negligence (*Id.* at ¶¶ 41, 44);
5. any of these acts that may warrant exemplary damages by rising to the level of malice, fraud, or oppression (*Id.* at ¶ 46);³ and
6. Defendants receiving money traceable to ABC that amounts to a fraudulent transfer or constructive trust (*Id.* at ¶¶ 48, 50).

Defendants do not explain how the allegations about Jason Sun relate in any way to these claims or their defenses to them. The Court, therefore, should not give Defendants leave to file a third-party claim against Mr. Sun, who is a resident of Taiwan.⁴ To do so would only result in delay and expense for all by introducing parties and issues that are not material to this lawsuit. The Court should exercise its discretion and deny the motion.

³ Exemplary damages can be based, in part, on misrepresentations of material fact. (*Id.* at ¶ 46.) Obviously a representation that Defendants had a \$2 million malpractice policy does not fall into this category because it was true.

⁴ The Receiver already filed a motion to disgorge commissions earned by Mr. Sun. (Mot. for Show Cause Hr'g, Cause No. 06-CV-2136-P [Dkt. No. 226].) Through that action, he learned that Mr. Sun no longer resides in the United States and now resides only in Taiwan.

Respectfully submitted,

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

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

- and -

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

ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

A true and correct copy of this motion shall be served on all interested parties through the Court's electronic filing system. A copy has also been sent by U.S. Mail to:

C. Keith LaMonda
Butner LSCI
P.O. Box 999
Butner, North Carolina 27509

/s/ Brent J. Rodine