

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, POCZAK & COMPANY,
Third- Party Defendants.

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

ECF

REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO IMPLEAD JASON SUN AS A THIRD-PARTY DEFENDANT

Defendants Christopher R. Erwin and Erwin & Johnson L.L.P. (jointly "E&J") reply to Plaintiff Michael Quilling's ("Receiver") response objecting to E&J's Motion to implead Jason Sun ("Sun") as follows:

The Receiver cites three lines out of two, multi-page agreements¹ between E&J and ABC (See App., p. 1 – p. 18), and then disingenuously claims that his only real complaint concerns E&J's alleged breach of those three lines. According to the Receiver, since E&J's claims against Jason Sun have nothing to do with those three lines, E&J's motion to implead Jason Sun as a party should be denied.

¹ There were actually multiple trust agreements, but each trust agreement is identical.

If E&J's alleged breach of those three lines is the only matter at issue in this lawsuit, then the Receiver should stipulate to that fact and E&J will immediately file a motion for summary judgment. That will not happen because the Receiver is blatantly misrepresenting what is at issue in this lawsuit and he is misrepresenting Jason Sun's connection to those issues.

The three lines that the Receiver cites provide that the "Trustee" shall establish a policy premium account into which the "Grantor" will deposit a sum certain for the payment of premiums. (See ¶ 4 page, 2 of Receiver's Response; See also App. p. 6). Significantly, the "Trustee" is Erwin & Johnson and the "Grantor" is "ABC Viaticals, Inc." ("ABC"). (See App. p. 5). It is undisputed that E&J established a premium payment account in accordance with those three lines.² The issue is whether E&J has any liability for the alleged failure of ABC to meet its obligations under the trust agreement; specifically, ABC's alleged failure to fully fund the ABC Premium Escrow Account.

The ABC Premium Escrow Account was one of four escrow accounts set up under the ABC Viaticals Inc. Escrow Accounts Agreement between ABC and E&J (the "Escrow Agreement") (See App. p. 1). The handling of the funds in those escrow accounts was governed by the Escrow Agreement.³ The Escrow Agreement, like the Trust Agreement, called for the application of California law. (See App. p. 8) Under that state's law, E&J had to comply strictly with the terms of the Escrow Agreement and had no powers other than the powers granted in the Escrow Agreement. *See Summit Financial Holdings LTD. v. Continental Lawyers Title Co.*, 41 P.3d 548, 551 (Cal. 2002). Moreover, E&J's duties ran only to the parties to the Escrow

² The Receiver contends that there should have been multiple escrow accounts, as opposed to the four called for in the escrow agreement. (App. p. 1)

³ The only property in any of the trusts by the terms of the trust agreement, were the policies themselves. (See App. p. 12) There are no allegations that any of the policies were not held in the proper trust. There are no allegations that any policy lapsed during E&J's tenure.

Agreement. *Id.* at 553-54. Therefore, the terms of the Escrow Agreement and the identity of the parties to the Escrow Agreement are of crucial importance to E&J's defense in this lawsuit.

Upon information and belief, Sun was a party to a conspiracy to forge E&J's name on purchase agreements with Taiwanese investors, or in the alternative, he knew or should have known that E&J was not a party to those agreements. These purchase agreements arguably had the effect of creating separate escrow agreements between the purchasers and E&J. These new "escrow" agreements arguably modified the terms of the Escrow Agreement, which set E&J's duties and obligations, even though E&J did not know that these documents existed. In the Receiver's discovery responses, he specifically alleges that E&J breached its fiduciary duty by failing to comply with the terms of the Escrow Agreement. (See App. p. 30)

The Receiver has alleged that representations about E&J's duties as escrow agent induced the purchases of the viatical shares and in his discovery responses, he contends that E&J acted with gross negligence in misrepresenting its credentials to investors. (See App. p. 25) Logically, the belief by Taiwanese purchasers that there was an escrow agreement that ran from those purchasers to E&J might have induced the purchasers to provide their funds to ABC. The Receiver is now seeking to recover the funds given to ABC from E&J. (See App. p. 25, 33) Funds that might never have been deposited in the ABC/E&J escrow account but for the misrepresentations made about the escrow agreement and E&J's relationship to the Taiwanese viatical purchasers by Sun and others, without E&J's knowledge.

Purchase funds from Taiwanese citizens make up a large percentage of the money that the Receiver now seeks to recover from E&J. E&J is entitled to contribution from Sun to the extent that his intentional conduct and/or negligence contributed to this loss.

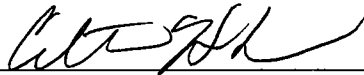
The Receiver's alternative argument regarding why leave should not be granted to bring in Sun is equally disingenuous. The Receiver claims that since he filed his action against Sun for disgorgement of fees that Sun earned, the Receiver has learned Sun now lives in Taiwan. Despite the supposed difficulty of suing an alleged Taiwanese resident, the Receiver is engaging in on-going settlement talks with Sun and has given him several extensions of his deadline to answer. (App. p. 19 – 20) There is no reason to believe that E&J will be unsuccessful in serving Sun.

A federal court should freely grant leave to amend pleadings unless there is good reason to deny the motion. *Cf. Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962) (good reason for denying leave to amend includes bad faith, dilatory motive, undue delay or undue prejudice to other parties). This Court should grant E&J's Motion because there is no evidence that granting the Motion will prejudice any other party nor is there evidence that E&J has unduly delayed in bringing the Motion. Most importantly, E&J seeks derivative relief from Sun and thus, granting this Motion will advance the purpose of Rule 14 which is to avoid duplicative lawsuits on closely-related issues and thereby preserve judicial resources, reduce the costs and expense of the litigation to the parties and avoid the risk of inconsistent verdicts. *See 6 Charles Alan Wright & Arthur R. Miller*, FED. PRAC. & PROC. §1443, at 300-11 (2d ed. 1990).

WHEREFORE, Defendants/Third-Party Plaintiffs, Erwin & Johnson, L.L.P. and Christopher R. Erwin, respectfully ask this Court to grant their Motion for Leave to File a Third-party Complaint against Sun and order the Clerk to file the Third-Party Complaint and to issue summons to Sun and give Defendants/Third-Party Plaintiffs whatever and further relief to which they may be entitled.

Respectfully submitted,

**WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP**

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 3rd day of September, 2009, to all known counsel of record as required by the FEDERAL RULES OF CIVIL PROCEDURE.



Cathlynn H. Cannon